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OBJECTIVE DIALECTICAL RELATIONSHIP BEHIND FORENSIC IDENTITY

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The subject of resear

Forensic sciences support criminal law by providing general principled solutions for scientific questions that arise during the criminal procedure. In practice, the forensic expert is the person who presents this knowledge on a scientific level before the authorities. His/her task is often aimed at forensic identification, that is to individualize the link between two or more objects. However, following formal logic, the fact that forensic experts preliminarily analyze, compare and evaluate objects arisen, collected and managed under various conditions, make source conclusions contradictory. Throughout my doctoral thesis I will therefore address the theoretical question of how the theory of forensic identification can resolve the formal logical contradiction behind forensic identity? The answer to this question is of methodological importance in the field of forensics. Namely, because the relationship behind forensic identity highlights those axioms, that forensic disciplines are supposed to describe through the exploration of causal mechanisms.

The method of research

The task of forensic scientists is considerably complicated by the fact that the axioms in question are theoretical cornerstones that cannot be proved or refuted by complete induction.

The methods of research had to be adapted to the interdisciplinary nature of the topic. Accordingly, historical, comparative and exploratory research has been applied. During the processing of the Hungarian historical roots of the topic (concept of indicium) I strived for completeness and conducted original sourcing and analysis. I only used secondary sources exceptionally. I processed the Hungarian legal literature related to the field of research as fully as possible, and the analysis of logical and philosophical works concerning the narrower topic of my dissertation was also unavoidable. In the analysis of the foreign literature, I mainly used the original sources available in English. My narrower filed of research allowed for the direct use of few specific cases. The etymology of the concept of indirect evidence is closely

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related to the fixed demonstration system of thefeudal criminal procedure, which offered more possibilities to use indirect evidence as proof.
The independent disciplinary character of criminalistics is closely related to the theory of forensic identification.

The theory of forensic identification has stood the test of scientific and technological developments because it also provided methodological guidance for better understanding the concept of forensic identity. The mechanical separation of the concepts of trace and substance had a biasing effect on the development of the theory of forensic identification in Hungary. Forensic scientists are able to solve the formal logical contradiction of source conclusions with the philosophical theorems of objective dialectics. The residual problem of forensic identity should not be seen as unsolvable irrational residual problem.

Throughout the cognitive neuropsychological research in forensic identification, we must not forget the comprehensive study of the role of technologies, which are designed to perform cognitive operations in the procedural activities of forensic experts. Source conclusions expressed in numerical form can also bias the regulatory assessment of forensic evidence. Expert uncertainty should be converted into fuzzy sets that are also suitable in the field of forensics to represent natural linguistic concepts with uncertain boundaries.

In the framework of the present dissertation, I do not undertake a complete elaboration of the theory of evidence or criminalistic identification, but of filling the main theoretical gaps of forensic identification: the objective dialectical relationship behind forensic identity. For this I call for the help of the old-new notion of the concept of indicium, which gains new importance in the theory of forensic identification. I conduct the study of forensic identification through this field of dactyloscopy, because I believe that the debate surrounding the scientific basis of forensic disciplines can be best illustrated through this field.

The main results of dissertation and their applicability

Through the results of my dissertation, forensic experts will be able to understand and explain the uncertainty arising from the objective dialectical relationship behind forensic identity. The independent criminalistic discipline is built on the pillars of indirect evidences. Criminalistics began at the point where socially inherited and accumulated experiences, tools, and procedures were no longer sufficient to solve the practical problems of criminal justice. The accumulated forensic knowledge has necessarily changed into forensic science. One of the most important tasks of forensic science is to identify the "phenomena" of crime that can help in investigating, prosecuting and judging the phenomena of "crime".

The etymology of indirect evidence is closely related to the theory of indicium, which was developed in the feudal inquisitorial procedure. The theory of indicium reached its highest level of development between the 16th and 18th century, when all sources of criminal law in Europe came under the influence of the fixed demonstration system. The fixed demonstration system divided evidence into complete and incomplete evidence. Complete

evidence mechanically proved the guilt of the accused. Incomplete evidence, in contrast, was seen as indicia that were insufficient to resolve the question of guilt, nevertheless aroused suspicion against a particular person and provided a basis for the use of torture against non-nobles.

The inquisitorial procedure introduced by Carolina, was divided in two by the middle of the 17th century due to Praxis Criminalis. Under general inquisition the judge examined whether, in general terms, an offence was committed and by whom it was committed. On the contrary, special inquisition took place against known suspects. This differentiation closely relates to corpus delicti, a legal instrument used for material evidences that could prove the objective existence of a material crime with the highest probability. The aspirations of the absolutist monarchy deepened the theoretical gap between general and specialinquisition, as a result of which the legal instrument of corpus delicti became part of the indicium rules of late feudalism. In this way, the Criminal Procedure Code of Joseph I considered the determination of the corpus delicti as a core prerequisite for special inquisition, in which, depending on the nobility of the suspect, general indicia played a significant role. This privileged position has been extended to citizenship by Theresiana more widely than ever before, which has made it possible to remedy the quantitative failures of complete evidence through indicia. Hence, the empirical evidence of indicia could serv as a proper basis for making categorical judicial decisions. The rational theorems of classical criminal law have greatly contributed to the development of guarantee measures of criminal procedure, consisting of a formal and a material side. The formal side was determined by the structure of the inquisitorial procedural stages, whereas the material side was determined by the normative system of indicia. The abolition of legalized torture has transformed the inquisitorial procedure and has also led to the rapid development of legal demands on indicium-proofing. Although the awareness among judges maintained the scope of torture for a considerable time beyond its original period of validity, the doctrine in which confession was the queen of evidence has faded away. This is because contemporary detection methods could not meet the needs of the fixed demonstration system.

The development of indicium-proofing is necessarily related to the marginalization of the fixed demonstration system and the reduction of the extent of corpus delicti. As a result of the abolition of torture, the procedural structure of late feudalism offered more opportunities to use indicia as complete evidence. Thus, in the period of the josephinist penal law reforms, indicium was already the most common evidence in Hungarian court practice: any phenomenon from which a probable conclusion can be dawn related to the criminal offence. The josephinist reform movement against the inquisitorial procedure were also present in contemporary Hungarian legislative attempts. The draft Hungarian Criminal Code of 1795 was a clear attempt to introduce the legal institution of corpus delicti. This remarkable product of Hungarian feudal law, on the other hand, mechanically confused the concept of indicium with corpus delicti. Although the draft Hungarian Criminal Code of 1795 did not become law, but in many respects, it served as a model in the formulation of subsequent reform proposals. In this way, it has also made a significant contribution to today's terminological confusion, in which the concept of indicium is mechanically

confused with the concept of trace evidence. Indeed, my etymological reflection clearly confirmed that the concept of indicium is much more than trace evidence. After all, every trace evidence is an indicium, but not every indicium qualifies as trace evidence.

There is a necessary connection between the theory of evidence and the prevailing theories of criminal law. Nothing proves this more than the impact of the school of anthropology on the theory of indicium. Representatives of objective indicia have built the new scientific stage of evidence: expert evidence. They rightly declared an illusion the way in which the adherents of classical criminal law discussed the freedom of will: they describeree will as a psychological phenomenon independent of the material environment. However, they themselves made the same mistake while proclaiming the materialist and deterministic nature of their own theory. The theorems of the school of anthropology provided a way of confusing the objective nature of indicia with its evaluating methods. After all, the real task of the theory of indicium is to limit the set of uncertainties that remain with certainty as far as possible for the trier of fact. In this way, the effectiveness of expert evidence depends to a large extent on the degree of development of the theory of indicium, as well as on the extent to which the expert and the trier of fact have mastered the theory of indicium. Although expert evidence is an invaluable aid in the nomothetic understanding of the "phenomenon" of crime, the trier of fact still has to reach a final verdict in the world of idiographic legal cognition in addition to the certainty of uncertainties.

The recognition of the partial reflection of evidence has led to the doctrine of the judge's inherent authority, in which the free deliberation of evidence plays an important role. While the sources of the fixed demonstration systemregulated the issues of proof and the assessment of evidence together with legal norms, the need to distinguish legal norms and evidentiary requirements arose within the theory of the free deliberation of evidence. The detection of the partial reflections of legally relevant facts and the appropriate justification of proof have thus become the subject of an emerging field of science.

The existence of criminalistics is justified by the need of practice, the primary aim of which is to promote the day-to-day work of the judiciary. Thanks to its foundations, this discipline has often come close to embarking on the path of mere empiricism, as its theoretical questions have been significantly relegated to the background in addition to the effective service of law enforcement practice. There was therefore initially no consensus among criminalists on the boundaries of criminalistics. Drawing the terminological and disciplinary boundaries of forensic knowledge was a necessary prerequisite for its systematization. It had to be clarified which issues of criminal sciences belong to it and to what extent. In the initial development of the concept of criminalistics, it was so divided by language area and author that even its elimination was raised. However, the lack of unambiguous terminology still has an impact today, which is mainly due to the differences between the European continental and Anglo-Saxon legal systems.

The literature debate surrounding the concept of forensics is rooted primarily in the development of criminology and criminalistics. In the 19th century a number of new criminal disciplines appeared alongside normative criminal sciences, the first practitioners of which developed newer concepts to specify newer issues. The transformation of these

spontaneously created concepts into scientific concepts was thus accompanied by a degree of terminological confusion. The concept of criminalistics was used by LISZT as a collective term for the disciplines dealing with crime, which was replaced by a narrower interpretation by GORSS. The latter view served as the basis for criminalists who considered criminology as a collective name for the auxiliary sciences dealing with the phenomena of crime, of which the science of criminalistics was only a subset. The first literary occurrence of criminalistics is therefore attributed by many authors to LISZT and GROSS. The truth is that GÓRSZKI used it earlier, in his 1848 work titled "Black Book: A collection of the most interesting crimes of old and new times".

In addition to the definition of disciplinary boundaries, the systematization of forensic knowledge was also conducted heterogeneously. Early systematization attempts ignored the theoretical foundations and definitions of its own division. The recognition of the objective dialectical relationship between criminalistic tactic and technique has changed the dualistic division of criminalistics. After all, investigating authorities use procedures developed by the discipline of criminalistics within the framework defined by normative acts for the purpose of effective crime detection. The successful application of such procedures is made possible by two essential components: knowledge of the relevant technical means and their appropriate use. Criminalistic procedures are therefore the most effective with the combined knowledge of the method itself, the technical aids and the rules of their applications.

After recognizing these objective dialectical connections, it was no longer justified to maintain the term "special criminalistic tactic", as the concept of "criminalistic methodology" more specifically reflects the essence of this stock of knowledge. The triple structure of criminalistics has thus become the most common in the continental European language areas, which was supplemented from an educational point of view by a fourth, introductory part in Hungarian literature. The latter should be called criminalistic methodology, which, in contrast to method, denotes the scientific research methodology of criminalistics.

Similarly, as the European criminalistic technique, the concept of forensic science began to be used in Anglo- Saxon language areas to denote the scientific methods of crime detection. This use of the term is still dominant today and its only supplemented by civil justice. The unification of terminology, on the other hand, is greatly hampered by the fact that the concept of criminalistics began to be used in a narrower sense by Anglo-Saxon authors as a branch of forensic sciences. Anglo-Saxon criminalists have paid little attention to these systematical issues which could be remedied by the concepts of expert evidence. The Anglo-Saxon concept of forensic sciences and criminalistics is thus reasonably compatible with the concept of expert evidence, which is also common in continental European linguistic areas. The main cause of these terminological and systematic issues can be traced to the differences between the two legal systems. Whether it is criminalistics or forensic sciences, one thing is for certain: the first and foremost stage of their disciplinary cultivation is the development of the theory of forensic identification. The independent disciplinary nature of criminalistics is closely related to the development of the theory of forensic

identification. The common goal of identification has proved to be decisive in the systematization of forensic knowledge. The theory of forensic identification thus has methodological importance, as it forms a unified system in forensics with its general concepts. The theory of forensicidentification describes test methods only insofar as they are necessary to close theoretical gaps. I myself found a theoretical gap in this very specific feature: the theory of forensic identification provides methodological guidance for understanding the objective dialectical relationship that lies behind forensic identity.

Soviet criminalistics has left its mark on the theory of forensic identification in Hungary. This by no means reduces the significance of its scientific axioms, as they have retained their validity to date. Academician POPATOV, as a pioneer of Soviet criminalistics, was among the first to divide the objects of forensic identification into source and reference objects. This categorization has stood the test of scientific and technical progress because it has shown that forensic identity could be achieved through the individualization of the link between the reference objects.

The theory of forensic identification was initially relied on the tracologcial concept of trace, in which the model of fingerprint identification was decisive. Accordingly, the process of forensic identification was built on the analyzation, comparison and evaluation of characteristics to identify their unique relationships. Since the mutually matching features of the reference objects became the building blocks of the theory of forensic identification, criminalists found themselves confronted with the philosophical question of the quality of these features.

Understanding the unique relationship of the reference objects necessarily presupposes research into the nature of the source object. That is, the quantitative changes of its characteristics take place within a certain quality range. Consequently, the link between the characteristics of the reference objects is unique as long as the quantitative difference of the latter does not show a change to an extent that would lead to a qualitative transformation of the source object.

Following formal logic, the fact that forensic experts preliminarily analyze, compare and evaluate objects arisen, collected and managed under various conditions, make source conclusions contradictory. The logical roots of the theory of forensic identification are therefore to be found in philosophical dialectics. Since forensic contradictions are objective, we should not attempt to eradicate them from source conclusions (in a formal logical way), but rather solve them. The only way to solve forensic contradictions is to ensure both the moments of identity and non-identity. The theory of forensic identification therefore lies on the philosophical thesis of the identity of identity and non-identity. The forensic interpretation of Hegel's theorem states that the generality (genus proximum) of the unique source object is the logical basis which succinctly and necessarily defines what quantity of identical features of the reference objects eliminates difference and vice versa: what quantity of different features of the reference objects eliminates identity. The unique characteristics of the source object are constantly changing as a result of various circumstances, but remain relatively constant within certain quality range.

The qualitative assessment of the identical and non- identical features has become the objective dialectical basis for identification. However, the specific axioms involved were limited to macro size objects with relatively constant morphological features. By the end of the 20thcentury the concept of tracological trace proved to be too narrow to indicate the objects of forensic identification. There were also qualitative changes in forensic cognition, as a result of scientific and technical development. Forensic analyzation of micro- and submicro-scaled substances became possible, to which forensic scientists introduced the concept of substantial evidence. The mechanical separation of the concepts of morphological and substantial trace has a biasing effect on the theory of forensic identification ever since. The emphasis here is not on the fact that substantial traces represent the source object beside themselves because, even if we know the material properties of the source object, there are no reference materials that could be used to draw a conclusion about the individuality of the link between characteristics based on their quantitative and qualitative assessment. This is the objective dialectic relationship, the importance of which LOCARD has drawn to the attention of the forensic community during the discussion of the principle of mutual exchange. Forensic experts needed new methods to monitor the outputs of high sensitivity analysis methods. With the development of forensic sciences during the 20th century, macro-scaled empirical relations were supplemented with micro- and submicro-scaled probability relations. Forensic experts were able to determine more precisely than ever the uncertainties arising from the induction problem surrounding ontological axioms. The case law of the Supreme Court of the United States clearly proves this: although the Daubert trilogy drew the attention of the forensic community to the individualization fallacy of "junk sciences", traditional empirical forensic approaches have not been eliminated from the justice system. The main goal of crime detection guides forensic identification, in which the objective dialectical robustness of expert conclusion helps legal practitioners. It is important to see, that forensic objectives are not constitutive, but rather regulatory. If forensic objectives were constitutive, experts would already implicitly assume that the reference object is the source object. Error lies precisely in this assumption. Although theory-development is an essential part of crime detection, we cannot diverge from the phenomenon itself. In the "phenomena" of crime there is always a degree of uncertainty because of the identity of identity and non- identity. The latter, however, should not be seen as an unsolvable residual problem. On the contrary, we must acknowledge positional irrationality in the process of individualization, namely that the residual is not unknowable but is not yet known at the given stage of development. This includes forensic sciences, which rely on the traditional empirical or Bayesian approach as well. Although the use of more advanced tools reduces uncertainty but does not completely eliminate it. Forensic sciences have always operated with a degree of uncertainty. With the expansion of the scientific horizon, they are now able to say even more what the scope of uncertainty is. In the field of forensics, mathematical logic did not make logic out of mathematics, but made mathematics out of logic.

The probabilistic relationship alone cannot eliminate or reduce the uncertainty of its essence. This is only possible if other independent background information is also taken

into account. Some of this background information is provided by constantly updated expert databases. However, the forensic expert will only be able to make the most effective use of his/her state-of-the-art scientific method if the law practitioner shares case- relevant background information with him/her. The latter, on the other hand, necessarily requires scientific transparency of forensic methods. Otherwise, the possibility of bias arises. All this is well illustrated by the recent development of dactyloscopy, which has been surrounded by livery debate in the scientific literature.

The controversy surrounding the scientific validity of forensic disciplines has mostly put the pseudoscientific stamp on dactyloscopy, which deals with the identification of friction ridge skin. Fingerprint experts should be able to understand and explain the philosophy of fingerprint identification, the methodology used in analyses, the permanence and uniqueness of friction ridges by, at the same time, relying on empirical and scientific research data. The permanence of volar skin lies in its own structure. The rising cells of the epidermis, through the constant cell proliferation of the basal layer, form an outer layer on the surface of the skin that consistently represents the unique arrangements of the basement membrane. The permanence of friction ridges is thus ensured by the three structural elements of the skin: the attachment of epidermal cells to each other, the basal epidermal cells to the basement membrane, and the dermis to the basement membrane. The features of the basement membrane zone are consistently represented on the surface of the skin through the continuous supply of skin cells. The uniqueness of volar skin is shaped by the accidental forces impacting the basal structure, which in themselves are influenced by an infinite number of factors. Although the fetal volar pads play a huge role in shaping the surface tensions that directly influence finger pattern development and ridge count, minutiae formation occurs on a different level. The basis of second level uniqueness are created by localized stresses, resulting from growth of the tissue layers of the digit and contact with existing ridge fields. Ridge morphology (third level uniqueness) paints a three- dimensional portrait of the collective individuality of the epidermis, reflecting the heterogeneous cellularcommunity along the basement membrane. Exact duplication of these physical stresses and cellular distributions can be completely ruled out in two different areas of developing fetal tissue. Since each individual friction ridge is unique, each friction ridge arrangement must also be unique, which can only come from a single source. Although the set of information that is reproduced during the process of trace formation can prevent individualization, friction ridge arrangement is till unique. Our dermatoglyphic conceptions may easily be wrong about this to date. However, no one can deny the fact, that "something" exists, which is called the permanence and uniqueness of the volar skin for now. That, with the help of the principles of objective dialectics we have the ability to identify finger marks.

As the term individualization can easily be misinterpreted in practice, there has been a move away from categorical towards probabilistic conclusions in fingerprint identification, given the extent to which the forensic evidence supports one of the following two competing hypotheses: there is sufficient evidence to determine that the two fingerprints come from different sources; there is sufficient evidence to determine that the two fingerprints come from the same source.

Despite the fact that the counting of minutiae historically dates back to statistical research carried out at the beginning of the twentieth century, it continues to serve as a basis for standardizing fingerprint identification in many countries. However, there is currently no scientific basis for determining a minimum amount of matching points between two impressions to make a single source conclusion. There are many situations in practice where fingerprint experts are confident about an identification in the case of only 7 corresponding minutiae. Conversely, several cases have been documented in which the reference objects came from different sources despite the mutual existence of 12 minutiae points. Instead of counting points, it is more realistic and accurate to consider also the quality of the characteristics. After all, source conclusions rest on the trained and qualified determination of the fingerprint expert. For a long time, the science of dactyloscopy did not address the degree of certainty of identification conclusions. However, with the development of the theory and practice of probability theory, it is becoming a fundamental requirement to communicate the degree of certainty of fingerprint identification. Nevertheless, experts often do not distinguish between the identification of extremely complex borderline fingerprints with few minutiae points and high-quality crime scene fingerprints with many minutiae points. Although the fingerprint expert may be confident in both conclusions, for the sake of transparency, it is appropriate to indicate the degree of certainty in both conclusions.

Despite the proliferation of statistical models and probability theory, there is still no standardized probability model to quantify the weight of fingerprint evidence. Several probabilistic models are currently under development, of which the U.S. Department of Defense's FRStat software appears to be the most promising, which quantifies how similar the minutiae configurations are between fingerprints. It is expected that in the near future, more probabilistic models will be tested in practice and that the communication of fingerprint identification conclusions will be standardized.

In 2004, dactyloscopy witnessed one of the most highly publicized misidentifications: the MAYFIELD-case, in which cognitive bias was also named as a possible source of error. Practitioners of cognitive neuropsychology have in recent decades drawn the attention of the scientific community to a number of contextual influences that can lead to bias in forensic conclusions depending on the flexibility of the human perceptual system. However, in the course of such investigations, we must not forget the comprehensive examination of the role of cognitive technologies, which are designed to perform cognitive operations in the tasks of forensic experts. Since these cognitive structures can mislead the process of forensic identifications, we need to assess the quality and quantity of cognitive infocommunication between these cognitive actors. Forensic genetics is particularly involved in this process, which has undergone tremendous development in recent decades through FDP and MPS technology.

Exploring the nature of forensic technology and human cognition thus draws attention to a new field of research: forensic cognitive infocommunicaion. The interdisciplinary research field of forensic cognitive infocommunications (Forensic CogInfoCom) has emerged from the convergence between forensic science and cognitive infocommunications.

One of the main findings of Forensic CogInfoCom is that forensic experts and the infocommunication network surrounding them are becoming increasingly intertwined at different levels through the greater integration between these fields. As a result, new forms of cognitive competence are appearing in forensic subdisciplines, which are neither purely human or purely artificial. This necessitates serious thinking about new approaches and methodologies for the synchronization of new human-technology competences based on forensic principles. Forensic CogInfoCom investigates the link between forensic science and cognitive infocommunications. The primary goal of Forensic CogInfoCom is to provide a systematic view of how cognitive processes can co-evolve with forensic infocommunication networks so that the competences of the human expert may not only be enhanced through these networks, but may also cooperate with the competences of any artificially cognitive forensic network. This linkage and enhancement of cognitive competences is largely addressed towards developing new forensic applications in which human and/or artificial cognitive systems are enabled to work together more effectively and efficiently.

The use of forensic sciences in criminal proceedings necessarily requires the law assessment of identification conclusions. The difficulty of the latter arises from the fact that an opinion drawn up in the possession of specific expertise must be assessed by a law practitioner with general knowledge and legal training. In this way, the expert must be aware that his/her conclusion becomes the phenomenon of "crime", only after law assessment. In practice, however, it is often a problem to evaluate an expert opinion that objectively expresses probability, for which a significant amount of training is reauired. Thus, a general criticism of the Bayesian approach today is that it often relies on subjective numerical prior probabilities. Although these estimates are based on informed guesses, it is quite difficult to convert them into exact numerical form in the absence of experimental data. My doubt about the application of the Bayesian approach on its own stems not from the inaccuracy of the results, but from the fact that it may give a speculatively distorted impression of accuracy.

After all, in addition to the certainty of uncertainties, it is for the trier of fact to determine the probative value of expert evidence by comparing it with other data and evidence available in the case in question. This is how subjective elements take place in jurisprudence. Although positive law seeks to eliminate this subjectivity, criminal justice is also looking for certainty somewhere in the midst of uncertainty: the best possible solution available at a given degree; because the only one correct decision does not exist, only the one which is the most authoritative in the given conditions of the given age, both factually and legally. Based on the results of my research, which is the basis of my dissertation, I formulate the following suggestions for the practical usability of the above theses. Proposals towards the legislator: Based on the reasons explained in Chapter II.1. of the dissertation, it seems necessary to define the concept of indicium more precisely that at present.

Proposals towards law practitioners: Given that a deeper understanding of the axioms of forensic identification facilitates a proper evaluation of forensic evidence, interdisciplinary discourses (conferences, training) can facilitate a more accurate understanding of the results of identification, evaluation and proper interpretation of these underlying expert opinions.

Proposals towards forensic practitioners: The theoretical foundations of forensic identification can be compelling, and they can also contribute closely to examining, and, if necessary, rethinking the bases of individual forensic disciplines, taking into account the specific aspects of each forensic identification discipline.

The theoretical foundations of forensic identification can contribute to the use of the revealed results in recommendations, methodological letters, standards, good practice proposals prepared in each forensic identification discipline. The results of the dissertation may indicate that in addition to the dynamic technical development of different forensic fields, the elucidation of the theoretical foundations of the identification processes have received less emphasis so far, but this is unlikely to be avoided in the future. An intensified scientific discourse on the topic may help the representatives of co-sciences, philosophy, logic and natural sciences to explore further areas of forensic identification, and these findings can also be relied upon by everyday forensic practice.

The findings of the dissertation concerning dactyloscopic identification, as well as the research results that form the basis of them, can be directly used in fingerprint expert practice. In Chapter III.4.5. of the dissertation I draw attention to the dangers of cognitive bias, while in C hapter III.5. I propose possible future solutions to it.

THE LEGAL PERSONALITY OF EUROPEAN UNION

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Aim and focal points of the research

On 1 December 2009 a new chapter has begun in the history of the European integration with the entry into force of the Lisbon Treaty,[1] since it has granted legal personality to the European Union. Through this symbolic step, the Member States committed themselves to strengthen and deepen their cooperation with public law and political elements. This came together with the reform of the integration's legal system essentially resulting the removal of the so-called pillar system, which meant a rather sharp dichotomy between Union and Community law. The modified founding treaties have not only reshaped the EU's internal legal system but laid down the new fundaments for the Union's role within the international community.

The question justifiably arises, why should the redefinition of the EU's role centered at the grant of legal personality be considered that important and what were its consequences. To get an answer, it is core to analyse the *function* of this phenomenon, which can be described in the simplest way that it means a kind of *detachment*. In legal context, it implies that a legal person, which is a fictive subject of law, should be considered as being separated from other subjects and legal persons of the legal system in question, it possesses its own rights and obligations, and is able to make use of them against the abovementioned actors. Significance of legal personality stems from the fact that it is also true against subject which created the legal person in question. Considering the character of the European Union, this detachment regarding its *Member States* is a particularly sensitive and complex issue, since the latter were those entities which transferred some of the *competences* belonged to their sovereignty to the European Communities and the European Union.

Reflecting the issues mentioned above, first and foremost *aim* of the dissertation is to explore the changes regarding the European Union's relationship with its Member States and other actors stemmed from the grant of legal personality to the EU and the related modification of the competence structure with its Member States. Because of the legal personality's embeddedness within the different legal systems and to list the relevant

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[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. *OJ* C 306, 17.12. 2007, 1–271.

external actors, it is important to consider which fields of law or legal systems form a framework to contextualize this status.

Since the European Union should be considered as international organization, though a *sui generis* one, above all, *international law* is of outstanding importance, where the change in this status can be interpreted. Therefore, primarily the powers of the persons of international law, namely states and international organizations arise the question whether the Unions is able to make use of its rights independently from its Member States. From an EU law point of view, rather the internal aspects of this issue are of interest, namely how has the grant of legal personality reshaped the competence structure between the EU and its Member States. But from an international law point of view, it is relevant to explore the effects of it on other actors within this legal system and on the life of the international community.

Although the legal personality of international organizations is basically and international law category, another legal system might also get a role during the analysis on the status' effects, namely the *law of the European Union* itself. As the European Court of Justice has concluded in its famous *Van Gend & Loos* judgement[2], these group of norms forms "a new legal order of international law." It is not only theoretically presupposing the existence of legal persons within this legal system, but Union law has indeed created many, e.g. in form of agencies or Union business entities. Reflecting the point of departure mentioned above, it is necessary to examine whether the European Union itself possesses legal personality under Union law, and which rights and competences form parts of it.

The last type of fields of law are the *national legal systems* of various states. Here, the legal systems of Member States and third countries are to be distinguished. In case of 'classical' international organizations, above all the laws of their member states are those in which the rights and obligations of the organizations have already been defined. To explore the content of the Union's legal personality, it is important to analyse the practice of the Member States and the different ways of application in third countries.

Although this work aims to provide with a deep and comprehensive analysis of the European Union's legal personality in different legal systems, it does not mean that the international law, Union law and national law parts would have the same weight in course of the research. The reason for that is that the legal personality of the Union is predominantly an international law category, and this is the field of law where both the EU and its Member States are to be considered as persons but not as *entities being framework for the legal system* in question, which is true for Union and Member State law. Because of their *quasi* similar position and legal status under international law, the competence clashes outlined before can be contextualized primarily concerning the rights and obligations here. That is the reason why this work put such an emphasis on analysis

[2] Judgement of 5 February 1963, Van Gend & Loos, 26/62, EU:C:1963:1.

of these issues. In addition, the European Court of Justice has also identified the legal personality of the Union as a status *of public law character*.[3] Because of the related rights and obligations, it adumbrates above all the international and Union law analysis of the personality, since the national law status of the Union can be contextualized primarily in legal relationships *of private law character*.

Novelty of the dissertation is that it intends to explore the content of the European Union's legal personality in all three possible legal systems. Due to its character, the issue of legal personality appears in studies connected to the Union's external relations and its legal aspects, where international law segments of these status are emphasized to place the related competences into a deeper context. Works especially dealing with the legal personality of the European Union are typically shorter chapters or papers both in the foreign and Hungarian literature.

Particularly in the context of the term's usage by the Hungarian literature, it needs to be clarified why the dissertation applies the term 'legal personality' instead of 'legal subjectivity'. Within the Hungarian language literature, to describe the international law status of states and international organizations the term 'legal subject' has become more widespread, likely for the reason that this category in itself refers to a certain level of independence or detachment against other subject of that legal system. In addition, several decades ago there was no reason to sharply distinct subjects and persons of international law, but this was challenged above all by the various human rights protection mechanisms. Besides the transformation of the term usage within the international law environment, Article 47 of Treaty on the European Union[4] itself also underpins it by stating that "The European Union shall have legal personality."

In accordance with the dissertation's aim defined above, it intends to explore the content of the European Union's legal personality focusing on the related rights and competences under the various legal systems, and to examine through these, how this status fulfils its function, namely to make the Union appear as a separate, independent entity. Due to the nature of this work, this analysis is not exhaustive but embraces the most typical fields of international, Union and national law, and focuses on the related types of rights and competences, and questions of responsibility. The dissertation, besides the introduction and the conclusion, is divided into four substantial parts. Within the parts (I.), there are chapters (1.), subchapters (1.1.), and points (1.1.1.) and in some cases sub-points (α, β, γ, δ). To analyse cases separately, the work applies small Roman numbers (i., ii., iii., iv.).

After the introduction, Part II deals with the legal personality of international organizations. To insert this is justifiable for the reason that the mentioned legal systems – above all international law and national laws – considered the European Union as

[3] Judgement of 15 July 1960, Von Lachmüller and others, 43, 45 and 48/59, EU:C:1960:15.

[4] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *OJ* C 202, 7.6.2016, 1–388.

international organizations, even though all of them are recognizing its special character. This part serves as a theoretical fundament for the rest of the work, where the *international law* status of the organizations will be focused. After examining the definition and development of legal personality, the analysis will highlight how the practice on the status of the United Nations has contributed to the general recognition of the other organizations' personality, which issues have been raised connected to it, and how the International Law Commission tried to redress the lack of regulation in this field. Particularly the last element underpins the analysis of legal personality trough the related competences, since it always appeared in this context of the work of the ILC. Furthermore, that part is demonstrating the fact that the Union is not only possessing internal rules but it its own legal system, and also the typical elements of the organizations' national legal personality will be presented.

Part III is the most significant one of the dissertation analysing the legal personality of the European Union *under international law*. Attributes of the Communities' and the Union's personality lead to the present regulation in force. The scrutiny of these criteria is necessary to map whether the explicit grant of legal personality has indeed resulted a status recognized by international law. From the various international law capacities, the conclusion of international agreements gets particular attention, since the related powers can basically be considered as preconditions for the rest of rights. Keeping in mind the analysis of the functions of legal personality, that chapter is focusing on the express and implied powers, and on the mixed agreements. Besides, the EU's participation in diplomatic relations, especially the features of its privileges and immunities will be subject of examination. A separate chapter will deal with its membership and participation in other international organization as well as the complex issue of responsibility.

Since the European Union has its own legal system, subject of Part IV is whether the legal personality laid down by Article 47 TFEU is to interpreted *under Union law*, and if yes, with which content. This analysis is also justifiable for the reason that this legal system has established its own category of legal personality. Since there are no well-defined list of rights and obligations of entities possessing this status, this part is based on analogies coming from international and national law, and examining that within the existing legal framework how the legal personality of the Union itself can be contextualized. Such basic categories get attention here, like conclusion of contracts or responsibility.

The last substantial part deals with legal personality of the Union *under the national legal systems*. Distinction should be made between laws of the Member States and of third countries. In case of the former, there are relatively detailed Union law rules binding the Member States, but the latter is defined by the bilateral international agreements concluded by the Union and the states in question, which create a narrower space for the Union.

Methods and approaches of the research

The present work is a dissertation in field of *law and political sciences*, and therefore it primarily applies the methods of this discipline to reach the aim of research. Coming from the character of the topic, international and Union law elements are dominant, therefore methods of analysis in case of the various parts follow those typical for these fields of law. Therefore, besides the general criteria for works of jurisprudences, like the analysis of evolution and content of norms and their context, their *character* gets importance, whether being binding or not, primary or secondary source etc. In accordance with the mentioned features, the analysis of the related practice involves above all the interpretative work done by international judicial forums, especially the International Court of Justice and the European Court of Justice.

Besides the main track of law and political sciences, the dissertation applies methods of other social sciences, especially those of the *history and theory of international relations*. This is particularly true for chapters on the evolution of the term legal personality and on the status of international organizations, since this category firstly appeared as attribute of the sovereign states, and became feature of other entities as well in line with needs of the international community. The European integration organizations got their present form as result of an organic development as well, and became legal persons of international law in the end. The European Union in its original form was not granted legal personality, and the hesitating approach of the Member States covers fears related to competences connecting to that status. Therefore, to explore the real content of legal personality makes it necessary to review the relevant parts of integration history.

Besides legal background, judicial practice and other documents as *primary sources*, the dissertation intends to research the relevant literature as *secondary sources*. Concerning parts about the European Union, the most important goal was to become familiar with monographies and studies dealing with the present legal framework of its external relations created basically by the Treaty of Lisbon. The dissertation is primarily based on foreign language, above all English, literature, where the monographies *EU External Relations Law*[5] by Piet Eechout and *EU External Relations Law: Texts, Cases and Materials*[6] by Bart Van Vooren and Ramses A. Wessel are to be emphasized. Furthermore, Dominic McGoldrick's paper *The International Legal Personality of the European Community and the European Union*[7] is of importance, since it analyses the status in context with the main related rights. Hungarian authors deal primarily with this

[5] EECKHOUT, Piet: *EU External Relations Law*. Second Ed. Oxford University Press, Oxford, 2011.

[6] VAN VOOREN, Bart – WESSEL, Ramses A.: *EU External Relations Law: Text, Cases, Materials*. Cambridge University Press, Cambridge, 2014.

[7] MCGOLDRICK, Dominic: The International Legal Personality of the European Community and the European Union. In: DOUGAN, Michael – CURRIE, Samantha (eds.): *50 Years of the Euroepan Treaties: Looking Back and Thinking Forward*. Hart, Oxford and Portland, Oregon, 2009. 181.

issue in studies on international law aspects of Union law, but the legal personality directly appears in the works of Ildikó Bartha, indirectly, inter alia, in studies of Marcel Szabó.

Besides the methodological considerations of law and political sciences and others typical for social sciences, the dissertation applies *evolutive approach* on the one hand. This is manifested in the analysis of development of law and legal phenomenons, through the examination of the related case law, the drawing up of directions of evolution and *de lege ferenda* suggestions. This approach is particularly true for parts dealing with the practice of International Court of Justice and European Court of Justice, where emphasis is placed on the enrichment of argumentation tools carried out by these judicial bodies.

On the other hand, *comparative approach* is definitive in case of key parts dealing with the European Union, where legal personality and related competences before and after the entry into force of the Lisbon Treaty will be compared. It is important for the special reason that the European Union in its present form has possessed legal personality only since 2009, but this has been realized with the succession to the European Community and its legal personality receiving its powers, which have become wider as well. Since this work intends to explore the present content of legal personality reflecting the antecedents, it seems to be reasonable to deliver a comparative analysis with the previous situation where it is necessary.

Thirdly, the elaboration of the topic is following a *complex approach*, meaning that it intends to explore the international, Union and national law content of the European Union's legal personality. It is carried out with reflection to the characteristic features of these legal systems. But as these fields of law do not work separately from each other, there is a significant interaction between them concerning the law and practice on legal personality. This is particularly true for the European Union, based on international law fundaments, having its own legal system and effecting not only its Member States' but also third countries' law. Therefore, the complex approach of the dissertation is manifested also in the reflection on interactions between the various fields of law.

Summary of the scientific results

As result of the evolution of law after the second world war, on the existence of legal personality of international organizations the present work follows the so-called *objective approach*. The advisory opinion issued by the International Court of Justice in case *Reparation for injuries suffered in the service of the United Nations*[8] has laid down the criteria for the existence of this status applicable to all international organizations. Accordingly, the permanent association or organization of states established by international agreement possesses this status, and is created to fulfil purposes in line with

[8] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, 174.

international law, has at least one organ capable to adopt decision attributable to the organization, and authorized with at least one competence to act under international law. Based on the practice of the last decades the objective character of legal personality is to be interpreted both in case of its own member states and third countries. It means that the legal personality fulfilling the criteria mentioned above is to be considered by both groups of states as *reality*. This is particularly true for the reason that legal personality of some organizations has been rather rejected, explicitly or implicitly, because of the lack of political will.

2 | The legal personality of international organizations is a *constitutive* category meaning that the entity in question possesses similar rights and competences to other legal persons of that particular legal system. Without this status, the given organization can be considered subject of law at the most implying an entity independent from its member states and other persons of international law. It is to be noted that legal subjects constitute a broader category, since natural persons own this quality too, and legal personality also fulfils this function to separate the entity from other legal persons. The existence of legal personality does not mean that an international organization might have all rights of other legal persons recognized by that legal system, and there is no closed competence list concerning these entities. But the practice of the organizations reveals cases where legal personality is of relevance. Concerning international law, these cases are above all the conclusion of international agreements, the, establishment of diplomatic relations privileges and immunities connected to it, the international claims and responsibility. The existence of *one* from this list or other capacity means the existence of the status, resulting legal personality of narrow extent. In case of national legal systems these are typically the conclude contracts, to acquire and dispose of immovable and movable property, and to institute legal proceedings.

3 | Concerning the rights connected to the legal personality, which practically form the content of it, this work follows the so-called *subjective* approach. It means that rights similar to those of the states are based on *competences* which were transferred from the member states to the organization. The present work rejects the position which accepts the existence of almost all international law competences when the criteria for international personality are present. This is the co-called *inherent powers* doctrine, whose followers though accept the limitation of competences by the member states. The subjective approach follows a counter-logic, and argues that international organizations possess rights (and obligations) allowed by their member states' intention. The primary manifestation of this intention is the agreement constituting the organization involving its purposes, functions, tasks and competences. From these, main sources of international law competences are the so-called *express powers*, which typically cover both substantive and procedural law norms. Due to the practice of the last decades the so-called *implied (external) powers* doctrine has also gained significance making possible to derive concrete competences from the purposes and functions of the organization.

4 | The express grant of legal personality and the lack of it in case of the European integration organizations was not only a symbolic act but involved concrete legal consequences. The establishment of the European Coal and Steel Community, the European Economic Community and the European Atomic Community happened just some years after the ICJ adopted its advisory opinion in case *Reparation for injuries suffered in the service of the United Nations*, which fundamentally reshaped the view on persons of international law. To grant *explicit* legal personality for those three international organizations should be considered not only a symbolic act of the commitment to the European integration but is to be contextualized with the permanent transfer of competences belonged earlier to the Member States' sovereignty to the European Communities. These and the internal and external application of the related rights are important elements of the supranational legal-institutional model. The Maastricht Treaty has also highlighted the lack of this structure by rejecting the grant of legal personality for the European Union, which could not make use of capacities under international law in cases of Common Foreign and Security Policy and Justice and Home Affairs.

5 | The Lisbon Treaty granting legal personality to the Union has transformed the status and powers of the integration organizations simpler and more transparent making its actions related to other actors of the international community more coherent. But all of this has *not* resulted *single* legal personality for them, since the European Atomic Energy Community continues to be a *sui generis* international organization possessing legal personality with the same institutions and Member States as the Union. Although single legal personality has been formally granted to the European Union, functioning and mechanisms of the rights being the content of it show differences, which is particularly true for the conclusion of international agreements in cases of Common Foreign and Security Policy and other fields of cooperation. But it is rather an Union law than an international law issue.

6 | Based on the legal personality of the European Union – earlier European Economic Community, than European Community – the European Court of Justice has widely applied the so-called *implied external powers* doctrine. Contrary to the International Court of Justice, the Luxembourg body has not established new capacities but extended the competence to conclude international agreements to fields without express founding treaty measure on it. Majority of cases are based on the doctrine laid down in the *ERTA* judgement[9], which stated that if the EU with its legal personality and own objectives were not entitled to conclude international agreements based on Treaty measure of secondary law, than the agreement might be concluded by the member states might effect those common rules or alter their scope. The other main track of the case law is based on Opinion 1/76[10], which is applicable in cases where the Treaties allow to adopt internal

[9] Judgement of 31 March 1971, Commission v Council, 22/70, EU:C:1971:32.
[10] Opinion of 26 April 1977, 1/76, EU:C:1977:63.

rules, but to reach the goal of the rules in this way is not possible. Here, the involvement of a third country is *indispensable*, which can be realized only by conclusion of an international agreement.

7 | One of the Lisbon Treaty's main novelties directly linked to the category of legal personality was the '*codification*' of the implied external powers doctrine. But the insertion of the main conclusions of the *ERTA* judgement and Opinion 1/76 cannot be considered successful for the reason that Article 3 (2) TFEU and Article 216 (1) TFEU are mixing up the cases of exclusivity and existence of external Union competences, and, due to their nature, they limitedly regive the main conclusions of these cases. Accordingly, the European Court of Justice continues to refer to its main case law when it applies these rules, but there is a tendency that subjects of its reference are more and more the post-Lisbon cases.

8 | Concerning the topic of this work, the category of the so-called *mixed agreements* are defining, since it reveals where the EU's competence system makes necessary for the Union to conclude agreements together with its Member States or other integration organizations, today the European Atomic Energy Community. Mixed agreements are a heterogeneous category. 'Classical' cases of them are the so-called 'vertical' agreements involving the Member States which are applied when neither the Union alone nor together with the Euratom they do not possess the proper power to conclude a treaty, therefore, the Member States with 'unlimited' legal personality also become contracting parties. Since this typically constitutes a confine of Union and Member State competences, in most of the previous cases connected to the implied external power doctrine, the European Court of Justice investigated whether the Union alone or together with its Member States is entitled to conclude the agreement in question. The category of vertical mixed agreements has been extended from time to time with new types like the most recent free trade agreements, which were concluded by the EU alone, but at the same time investment protection agreement were also singed as mixed agreements. The term of the so-called *horizontal* mixed agreements beard different content within the various periods of the integration. The 'inter-pillar' mixed agreements from the pre-Lisbon era have been replaced by the category of 'inter-sectoral' mixed agreements referring to international treaties with Common Foreign and Security Policy and other elements, where the highest level of institutional participation is standard. Agreements where both the EU and the Euratom are parties belong to the horizontal category as well.

9 | Contrary to all of its weaknesses, the European Union's current participation in *diplomatic relations* makes its actions more similar to those of the states, and it is not impaired by the fact that the Lisbon Treaty has defined different models and actors concerning the Common Foreign and Security Policy and other fields. It is true for the extended network of Union delegations and also for their *privileges* and *immunities*. The related capacities are not only meeting the relevant international standards but agreements concluded with third states expressly refer to the 1961 Vienna Convention on diplomatic relations, which is open only to States. This practically means the

Convention's customary law application by the EU. But the Union is not equal to states, and it is reflected by the fact that reciprocity clauses related to privileges and immunities within these agreements do not refer to mutual obligations provided by the Union, but it lays down that the Member States have to ensure the same rights. It is in a way reasonable, since the latter are contracting parties to the Vienna Convention, not the EU. Another difference is, when EU's privileges and immunities are challenged, the *functionality* of them is getting more importance both in Member States and third countries, than in case of a state.

10 | The EU's complex relationship with other international organizations also underpins that the European Union should indeed be considered as a *sui generis* international organization. But the nature and content of this relationship is defined by the fact that the overwhelming majority of the organizations having similar portfolio allow membership only for states, therefore the EU possesses this status just in a few cases. On the one hand, it raises the need of application of the principle of *loyal cooperation* laid down by Article 4 (3) TEU, which involves actions from the informal representation of the Union's interests till the conclusion of international agreements by the Member States falling under Union competence in the frame of another organization. On the other hand, the increasing role of the European integration organizations has been reflected by the international community. Considering the role of the European Economic Community, the Food and Agriculture Organization of the United Nations has inserted into its own Statute the term Regional Economic Integration Organization, which appeared in more and more multilateral agreements since the 1980s, and thereby the FAO made these organizations' accession possible. The application of this term seems to be reasonable by organizations with similar portfolio to the EU, especially in cases where high-level Union law harmonization has been reached, e.g. the International Labour Organization and the International Maritime Organization.

11 | Practice connected to the international responsibility of the European Union is restricted by the fact that only states can act as parties before many important international judicial forums. But this does not constitute such a burden like in case of membership in international organizations, since more such international courts with similar portfolio to the EU were not directly established in years after the second world war but in the course of the last decades, when the founders were more open to involve organizations as well. New and important tool in this field are the Draft Articles on the Responsibility of the International Organizations by the International Law Commission. It is built on the category 'internationally wrongful act' which might be realized by both action and omission. It is particularly important for the European Union, since the conventions establishing the courts in question and the ILC's work both reflect on the division of competences between the EU and its Member States laying down the *obligation to submit declaration* on that issue. The European Union's participation in disputes before the international judicial bodies can be considered successful, and its appearance led more times to peaceful compromises, moreover the Member States asked

for its assistance even in cases without exclusive Union competence. These positive result is primarily due to its participation in the dispute settlement mechanism of the World Trade Organization, and its present (International Tribunal for the Law of the Sea) and future (European Court of Human Rights) procedural capacity seems to be sufficient. At the current state of international law, there seems to be no need to open other judicial forums to the EU.

12 | Due to the complexity of norms adopted by the European integration organizations, these should be considered as a separate legal system with its own subjects of law and legal persons. According to Article 47 TEU, the European Union itself belongs to the latter category possessing special rights due to the nature of its status. This legal personality is shareable, which means that organs of certain functional autonomy fulfilling the Union's objectives are legal persons themselves, but the content of this status are primarily defined by the national legal systems. The powers stemming from the EU' legal personality are applied by its main institutions, which themselves were not granted this status, since they representing the EU as a whole. The rights connected to the legal personality of the Union do not constitute such a closed list like in cases of international and national law. The reason for that is that this status is above all of *public law* nature, resulting that legal persons of comparable status are missing from this legal system, therefore there are not many legal relationships involving actors with quasi similar position. Additionally, in this context, both law and jurisprudence are not focusing on the status of the EU but on the institutions and their procedural positions. In spite of this, such basic categories like conclusion of contracts and responsibility is applicable here as well. Due to the special character of legal personality and the lack of regulation, the European Court of Justice tries to substitute these issues with the adoption of basic principles from the national legal systems.

13 | Concerning the European Union's status under the national legal systems, there is a paradox situation at first sight, that in many third countries the EU is possessing legal personality due to the agreements on the Union delegations' privileges and immunities, while in the Member States it only enjoys "the most extensive legal capacity accorded to legal persons under their laws."[11] In fact, the directly applicable Article 47 TEU makes unnecessary to repeat it, although the quoted phrase also gives the Member States some space concerning the EU's formal status. According to its legal personality, the EU is entitled to have rights basically of *private law* character both in its Member States and third countries. In case of *public law* related disputes, the Union's position as defendant are usually excluded by its privileged and immunities. There is a difference concerning its position as applicant regarding the Member States and third counties. These involves mostly cases of Union institutions acted as authority, and the legal systems of the Member States allow them to act so before the national courts, while third countries reject it as a main rule.

[11] Article 335 TFEU.

14 | The legal personality of the European Union introduced by the Treaty of Lisbon effected mostly its status under international law causing significant changes in this field. The grant of this status and the re-regulation of the connected competences resulted indeed "a new stage in the process of creating an ever closer union among the peoples of Europe"[12] which has made the EU's role more efficient in its relationships with other actors of international law. Reflecting the political realities, this does not constitute a first step to a federal state, since the 'overregulation' of the Union's external relations show, that Member States pay attention to maintain their powers under international law. The background for that is that they intend to keep their legal personality with all of its content, through which they continue to remain active actors of the international community.

[12] Article 1 TEU.

THE CONSTITUTION IN PRIVATE RELATIONS

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The problem of horizontal effect of constitutional norms arises in many modern democracies. The legislative, the judiciary and the constitutional courts seek answers concerning the nature of the modern protection of fundamental rights: what does the constitution command in the judicial assessment of private relations? How are constitutional rules binding if they are binding at all in certain private relations? The doctrine of horizontal effect is primarily based on the recognition of the dangers posed to human rights by private entities. In our contemporary world individuals and private entities can violate human rights as extensively and, sometimes more frequently than the state can.

It is evident that states can always implement rules in order to protect defenseless individuals from the derogatory conduct of other private entities, as far as this does not contradict the constitution: private law brings good examples for this and the fairly new anti-discrimination legislation also belongs to this category. As the state has this regulatory power, in most of the cases it is not necessary to invoke one's fundamental rights granted by the Constitution in legal debates, but it is enough to call a statutory provision when seeking legal protection. Horizontal effect of constitutional rights is thus a "residual category", which means that the horizontal application of constitutional rights occurs only if ordinary legislation fails to protect fundamental rights. A good example could be the relation of the anti-discrimination legislation and the traditional concept of third party effect. Concerning the prohibition of arbitrary discrimination they both serve the same ends, they can, however, conflict when supplementing each other, thus the fight for competencies between the judiciary and the legislative organs becomes clear in this relation.

In order to illustrate my point, I would call for a simple example: A Roma wishes to rent my flat which I refuse to let him, however, I contract somebody else at the same time, who is not a Roma on less favorable terms than what the Roma offered to me. The situation clearly shows that I did not want the Roma to rent my flat because he is Roma. Does he have *a constitutional right* not to be discriminated by me, can he sue me for this conduct referring to the constitutional provision prohibiting discrimination? Or at least: does the constitution bind the judiciary to interpret general clauses of law in a way which favors the Roma's position? Does the constitution oblige the legislative to implement rules to punish me if I discriminate in this way? Under traditional constitutional theory

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it was easy to give a negative answer to these questions, because the constitutional task was to protect the individual against state actions. The relations of private actors belonged to the field of private law. However, now, in contemporary social states, in the privatized world where private entities are sometimes as powerful as state actors, it is a sound claim on behalf of the individuals that the state should somehow provide the same guarantee of protection against equally powerful private and public entities. But what is the best method for changing the role of the constitution, who can decide on this issue, and where are the new limits? These are the questions in the crossfire of recent debates.

Direct and indirect horizontal applicability of the constitution alone raise several questions, many of which cannot be the subject matter of this thesis. I try to focus on the principal relevant issues for my purposes, such as the justifications and implications of these doctrines and the reliability of these systems from a rule of law prospect, in order to provide an overview.

This thesis chose to exhibit six jurisdictions with different emphasis: My starting point was to examine the Hungarian controversy as an example for what young democracies have to face. In studying the Hungarian situation, I found that the broader description of the German example could help to understand the evolution of the extension of certain fundamental rights in horizontal relations, since the Hungarian constitutional system as interpreted by the constitutional court has become very close in nature to the German one. Apart from their internal similarities, these countries are both member states to the European Union (EU). Analyzing the tendencies in the EU concerning the protection of fundamental rights and in private relations is essential to understand what kind of pressure the Hungarian law and legal thinking must face. Thus, I have chosen to examine primarily the Hungarian, the German, and the EC/EU jurisdictions from the perspective of third party effect.

As to the origins of the problem, however, one has to mention the first written constitution in the United States which was undoubtedly drafted with the aim to govern the relationship of the state and its citizens. The Bill of Rights incorporates limitations on the competencies of the Congress concerning some fundamental rights of citizens, but does not contain any requirement concerning private relations. In the United States, even these days, only the Thirteenth Amendment which prohibits slavery has direct horizontal effect, while in other cases, the "state action doctrine" applies. However, in spite of the clear lack of mandate to apply the Constitution in private relations, U.S. courts tend to find state action in more and more dubious situations. The German social state answers the question of horizontal applicability differently. In the famous LüTh decision, the German Federal Constitutional Court (GFCC) declared that besides individual and collective rights, the post-war 1949 German Constitution incorporates an objective order of values as well. These objective values are present in the entire legal system, thus courts are constitutionally obliged to interpret all norms that apply to private relations in the light of the Constitution. These two examples provide us with two entirely different solutions to our question, namely the role of constitutional norms in private

relations. Similarly, we must mention as a further example for the contradictory assessment of the role of constitutional norms in private relations Ireland and Poland, where constitutional norms have direct horizontal effect.

As to the European Union, we can observe that the ECJ has developed a limited doctrine of horizontal direct effect for some legal provisions of the Treaties. Primarily only the principles of non-discrimination on grounds of sex and nationality and the fundamental freedoms have a horizontal direct effect in this jurisdiction. However, recent trends show that a lot has changed in the EU jurisdiction, namely one could find more and more cases where the ECJ declared that not only a part of the fundamental freedoms but also certain fundamental rights can have direct horizontal effect.

In Hungary, the doctrinal debate on the issue of horizontal applicability of the constitution is fairly heated, especially a propos the present codification process of the new Civil Code, but also with regard to the drafting process of the new Constitution.

Some authors argue that direct horizontal applicability is desirable to develop to gain the full protection of constitutional rights as the Constitution itself suggests, some others contest in favor of the autonomy of the civil law, and the impossibility of any kind of third-party effect of the Constitution. There are also worshippers of the indirect horizontal effect, stating that the German model, Drittwirkung, would possibly suit the Hungarian system. Legal practitioners often find arbitrary solutions in individual cases due to the lack of adequate guidelines.

Along with examining the Hungarian controversy on the issue and the constraints coming from the side of the European Union, I will discuss the field of non-discrimination with special regard. Non-discrimination was the dynamo of the development of the doctrine of third party effect and presently the controversy concerning the effect of the constitutional provision of non-discrimination in private relation is at its peak. Non-discrimination laws have been born implementing EU directives, and referring to the constitutional provisions which prohibit discrimination, as a source of the legislative duty. The question is how these tendencies relate to the traditional concept of horizontal applicability. My suggestion is that anti-discrimination legislation creates the requirement of direct application of the constitution in certain private matters.

I demonstrate further that the indirect horizontal effect operates as an inherent feature of the Hungarian constitutional system. No matter of review guarantees or explicit declarations: judges have to interpret legal provisions in the light of the constitutional regulations and thus understand law together with its constitutional constraints.

My aims were descriptive and analytical. Regarding its chronological order the thesis first wishes to analyze the conception of the "horizontal effect of the Constitution", namely how the Constitution applies in private relations through judicial activity and how the problem relates to the traditional concept of public private divide, the classic role of constitutional and private law. Thereafter in the second chapter the thesis examines the three main concepts of how the constitution may apply in horizontal relations,

namely gives an overview on the jurisdiction of the US, with special regard to the so called "state action doctrine", describes the German "Drittwirkung" model and shows that certain countries such as Ireland and Poland openly accepted that the Constitution applies in private relations as well. After having overviewed the main points of these systems the thesis concludes to demonstrating the advantages and disadvantages of these conceptions with special regard to the German model as German jurisdiction often serves an example for Hungarian legal solutions.

After the first two chapter's general overview of the practice of courts and the constitutional courts and the criticism of scholars developed on the issue, the third part of the thesis deals with the problem of horizontal effect in a Hungarian context with special regard to a specific constitutional right, namely the right not to be discriminated in certain private relations. I examine first the Hungarian constitutional environment, the concrete constitutional provisions that might be the basis of the acknowledgement of horizontal application of the Constitution. The thesis draws special attention to the opinion of the Constitutional Court, ordinary courts and scholars. This chapter describes the legislation promoting the prohibition of certain forms of discrimination as well, and demonstrates how this new tendency influences the idea of the third party effect in constitutional law. I argue that the laws on equal treatment exist at first sight independently from the horizontal application of fundamental rights, although, in fact, they create the requirement of the direct application of constitutional rights in certain private relations; thus implicates the necessity to reconsider the third party effect doctrine in its light.

This chapter last but not least suggests that in order to implement either the indirect or the direct form of horizontal effect, judges must interpret constitutional provisions. This requires certain interpretative skills that could be achieved with the knowledge of dogmatic concepts of interpretation of the Constitution and fundamental rights developed by the Constitutional Court. This Is the so called necessity-proportionality test used for assessing constitutional rights.

The last part of the thesis sheds light to the interrelated nature of the jurisdiction of the European Union and Hungary as member state to the Union. The thesis describes how the jurisprudence of the Union developed regarding the protection of fundamental freedoms and fundamental rights as well, and demonstrates with cases of the European Court of Justice that the jurisprudence develops into the direction that leads to the acceptation of the applicability of certain fundamental rights in certain private relations. This tendency shows that it will be a part of the jurisdiction of the member states as well to apply fundamental rights to the assessment of certain private conflicts as well when it comes to the sphere of EU competencies. This requirement might encourage judges to apply constitutional norms of the internal legal system in other private relations as well on the pattern of EU law. This could have an effect on the openness of ordinary judges to constitutional problems and the constitutional environment of legal provisions in general.

As a conclusion the thesis points out that having in mind the system of separation of powers and the Hungarian legal environment and related legal culture it is of high importance to accommodate judges to pay more attention to the constitutional interpretation of legal norms when applying them. This process could be promoted by the codification of this interpretative obligation in the Civil Code and in the Constitution as well. As these codification procedures are presently open the thesis gives de lege ferenda suggestions regarding the text of the Civil Code and the Constitution.

CORNERSTONES OF EUROPEAN PRIVATE INTERNATIONAL LAW AND INTERNATIONAL FAMILY LAW

CZIEGLER, Dezső Tamás

The subject and aim of the research, the research methods applied

The subject of the research

The dissertation deals with an actual and dynamic developing area, namely with the private international law (further on: „*PIL*") and conflict of laws rules on family law issues of the European Union (further on: „*EU*"). Regulations adopted on these fields determine which law to choose in legal relationships containing relevant international element(s). Since most of the provisions have direct effect, they are binding in Hungary, i.e. before the Hungarian courts too. The work concentrates on the rules on private law and family law. Consequently, we won't pay attention to the collision of other rules like public law or administrative law. Since the European backgrund of the topic may also be of importance, as an introduction the work analyzes the European institutional rules[1] the legislative procedures and the related provisions of the Lisbon Treaty[2]. Secondly, the main part of the dissertation overviews the legislation of the EU on PIL. Beside the adopted laws, the work constues the judgements of the European Court of Justice (further on: „*ECJ*") too. Thirdly, it tries to give an outline about the overruled laws of the member states related to EU PIL. Since the European legislation is mainly based on the „common core" or „better law" approaches, it is an interesting question whether the EU provisions adopted are corresponding with the former national rules, or the European legislator creates new and independent, formerly unknown legal rules.
Last but not least, the dissertation discusses those national rules which will stay in effect in the future too and have relevance concerning the decision of cases. Please note that

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[1] See CZIEGLER, D. T.-HORVÁTHY B.: Az EU tagállamok bel- és igazságügyi együttműködése a Lisszaboni Szerződést követően. In: *Prudentia Iuris Gentium Potestate – Ünnepi tanulmányok Lamm Vanda tiszteletére.* MTA Jogtudományi Intézete, Budapest, 2010. 61-103.; FAZEKAS, J.: Bel-és igazságügyi együttműködés az Európai Unióban. *Európai Tükör - Különszám*, Vol. 14 (2009) No. 3 87-112.

[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. HL C 306., 2007.12.17, 1. For further analyses see CRAIG, P.: *The Lisbon Treaty – Law, Politics, and Treaty Reform.* Oxford University Press, Oxford,2011.; HORVÁTH, Z.-ÓDOR, B.: *Az Európai Unió szerződéses reformja Az Unió Lisszabon után.* HVGORAC, Budapest, 2008.; GRILLER, S.-ZILLER, J. (eds.): *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?* Springer, Wien, 2008., DOUGAN, M: The Treaty of Lisbon 2007: Winning Minds, Not Hearts. *Common Market Law Review,* Vol. 45 (2008) 617-703.

present summary is a very brief and short version about the problems discussed in the work.

Purposes of the work

There were several conditions that led the author to choose a broad research topic like PIL of EU.

Firstly, when he started to deal with private international law, we were before a conflict of laws boom: the provisions brought by EU were fragmented and not satisfactoty. There was an ongoing reform that hold out the creation of conflict of laws rules on obligations (i.e. on the law applicable to torts, on the law applicable to contracts). After the regulations were adopted and the reform was realised, orientation among the rules became extremely difficult. Secondly, there was an essential need to have a book that discusses EU PIL as part of European Law. In the Hungarian and international literature there are several other options the authors chose while discussing these topic:

- they expose only one regulation's provisions[3]or
- they imply the rules into books dealing with national PIL[4] or
- they discuss PIL provisions in books written mainly about substantive law problems[5]

All of these methods may be very useful and they all may have practical benefits. However, we were planning to create a work, which analyses the rules as part of EU law. The benefits of this approach are easy to be seen: this way, the relationship of different European rules and their effect to international and domestic provisions can be more accurately discussed. Beyond, if we have a look at the neighbouring areas e.g. at Private International Procedural Law, we can state that the procedural lawyers have published by far more comprehensive works on their field than private international lawyers. This statement is true in connection with the international[6] and the Hungarian jurisprudence[7] as well.

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[3] DICKINSON, A.: *The Rome II Regulation.* Oxford University Press, Oxford, 2009., *Rome I Regulation* (Ed. FERRARI, F.-LEIBLE, S.). Sellier, Munich, 2009.

[4] BURIÁN, L.-CZIEGLER, D. T.-KECSKÉS, L.-VÖRÖS, I.: *Európai és magyar nemzetközi kollíziós magánjog.* KRIM Bt., Budapest, 2010.

[5] *Internationales Vertragsrecht – Das internationale Privatrecht der Schuldverträge* (Hrsg. REITHMANN, C.-MARTINY, D.). Verlag Dr. Otto Schmidt, Köln, 2010. 1245-1316.

[6] KROPHOLLER, J.: *Europäisches Zivilprozessrecht – Kommentar. Internationale Zuständigkeit, Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen.* Recht und Wirtschaft, Heidelberg, 2011.

[7] *Az Európai Unió polgári eljárásjoga* (eds. WOPERA, Zs.). CompLex, Budapest, 2007.; BRÁVÁCZ, O.-né-SZŐCS, T.: Jogviták határok nélkül: Joghatóság, külföldi határozatok elismerése és végrehajtása polgári ügyekben. HVG - ORAC, Budapest, 2003.; KENGYEL, M.-HARSÁGI, V.: *Európai polgári eljárásjog.* Osiris, Budapest, 2006. NAGY, CS. I.: Az Európai Unió nemzetközi magánjoga. HVG ORAC, Budapest, 2006.;

In summary, the creation of the dissertation had two main aims: to give a practical useful tool for those who want to navigate among the EU provisions, and to provide an earlier not existed handout on EU PIL for the jurisprudence.

Research methods

Since the job was complex, the author has used several methods. Concerning European law analysing the primary sources of EU law, especially the Treaty on the Functioning of the European Union (further on: „*TFEU*")[8] was of great importance. In connection with the regulations the text of secondary sources and the articles published on them were in the center of the research. Lastly, the interpretation of non-codified rules could be found in the judgements of the European Court of Justice and in judgements of member states' courts. The author tried to use as much of the international literature as he could. Most of these sources are available in Hungary, e.g. in the Library of the Hungarian Parliament. Beside these, he was the scholar of Max Planck Institute for Comparative and Private International Law (*Max-Planck-Institut für ausländisches und internationales Privatrecht)* in Hamburg for six months. During this period he has finished the last parts of the dissertation.

The structure and most important statements of the dissertation

Four chapters as the pillars of the work

The dissertation is set to four bigger chapters and the chapters are divided into several sections. The main chapters are as follows:

- Chapter I.: The background of EU PIL
- Chapter II.: The adopted laws on PIL
- Chapter III.: Self-hiding PIL provisions in the EU law
- Chapter IV.: Summary, final observations and afterword

Content of the chapters

The first chapter is called „The background of PIL regulations of the EU" This chapter overviews the main laws and the history of their adoption. The chapter also analyses the provisions of Section 81 of TFEU on the co-operation of member states in the field of private law.

Polgári eljárásjogi szabályok az Európai Unió jogában – Kommentár a polgári ügyekben való igazságügyi együttműködés keretében elfogadott közösségi normákhoz (eds. WOPERA, Zs.-WALLACHER, L.). CompLex Kiadó, Budapest, 2006.

[8] Consolidated version of the Treaty on the Functioning of the European Union. 2010.3.30. HL C 83. 47.

The second chapter is called „Certain laws and proposals" This chapter discusses the provisions of the adopted laws and proposals one after the other. Such laws are often called rome regulations in the legal literature after the 1980 Rome Convention on the rules applicable to contracts[9]. Latter regulations/proposals are the following:

- Rome I regulation[10] on the law applicable to contracts,
- Rome II regulation[11] on the law applicable to torts (or to be more specific: to non- contractual oblogations)
- Rome III. regulation[12] on the law applicable to divorce (i.e. to the dissolution of marriage and legal separation),

[9] 1980 Rome Convention on the law applicable to contractual obligations. See BURIÁN, L.: A Római Egyezmény alkalmazásának elméleti és gyakorlati kérdései, valamint az Egyezmény várható reformja. *Közjegyzők Közlönye, Vol. 1 (2008) No 3 3-19.; SZABÓ, S.: A közösségi jog beékelődése* nemzetközi szerződési jogunkba. *Külgazdaság*, Vol. 50 (2006) No 9-10 107-119.; LANDO, O.: The EEC Convention on the Law Applicable to Contractual Obligations. *Common Market Law Review*, Vol. 24 (1987) No 2 159-214.; PLENDER, R.: *The European Contracts Convention.* Sweet and Maxwell, London, 1991.; WILLIAMS, P. R.: The EEC Convention on the Law Applicable to Contractual Obligations. *International and Comparative Law Quarterly*, Vol. 35 (1986) No 1. 1-31.

[10] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Róma I.). HL L 177., 2008. 07. 04., 6. See LEIBLE, S.-LEHMANN, M.: Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I"). *RIW - Recht der Internationalen Wirtschaft*, Vol. 54 (2008) No. 8 528-543.; *Rome I Regulation... i. m.*; WAGNER, R.: Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung) – Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung. *IPrax – Praxis des internationalen Privat- und Verfahrensrechts*, Vol. 28 (2008) No. 5 377-386.

[11] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). HL L 199., 2007.07.31.,40. See DICKINSON, A.: *The Rome II... i. m.*; HEISS, H.-LOACKER, L. D.: Die Vergemeinschaftung des Kollisionsrechts der ausservertaglichen Schuldverhältnisse durch Rom II. *Juristische Blätter*, Vol. 129 (2007) No. 10 613-646.; LEIBLE, S.-LEHMANN, M.: Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II"). *RIW – Recht der Internationalen Wirtschaft*, Vol. 53., (2007) No. 10., 721- 735.; SYMEONIDES, S. C.: Rome II and Tort Conflicts: A Missed Opportunity. *American Journal of Comparative Law*, Vol. 56 (2008) No. 1 173-218.; WAGNER, GERHARD: Die neue Rom-II-Verordnung. *IPrax – Praxis des internationalen Privat- und Verfahrensrechts,* Vol. 28., (2008) No. 1., 1-17.

[12]Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. HL L 343. 2010.12.29., 10. See FIORINI, A.: Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far? *International Journal of Law, Policy and the Family*, Vol. 22 (2008) No 2 182-186.; GÄRTNER, V.: European Choice of Law Rules in Divorce (Rome III): An Examination of the Possible Connecting Factors in Divorce Matters Against the Background of Private International Law Developments. *Journal of Private International Law*, Vol. 2 (2006) No. 1 99-135.; KOHLER, Ch.: Zur Gestaltung des europäischen Kollisionsrecht für Ehesachen: Der steinige Weg zur einheitlichen Vorschriften über das anwendbare Recht für Scheidung und Trennung. *FamRZ – Zeitschrift für das gesamte Familienrecht*, Vol. 55 (2008) No. 18. 1673-1680.; WAGNER, R.: Vereinheitlichung des IPR in Ehesachen in Europa. *FamRZ – Zeitschrift für das gesamte Familienrecht*, Vol. 50 (2003) No. 12 805.

- Rome IV. proposal[13] on the law applicale to succession (the proposal mainly deals with procedural law issues),
- Rome VI. regulation[14] and the Hague Protocol[15] on the law applicable to maintenance obligations (beside PIL, this regulation deals with procedural law issues too)[16].

The third chaper called „Self-hiding PIL rules in EU law" focuses on the fragmented and hardly to be found PIL rules of EU law. Such rules can be divided into two main subgroups. Some of them were attached to substantive law provisions, like what happened in the case of consumer law directives. Some others can be found in the practice of ECJ. This chapter discusses the related rules of consumer law, the connection between the inner market and PIL, the recent achievements on the registration of foreign names, the PIL rules of EU corporate law. The fourth, last chapter called „Summary Conclusions" summarizes the author's views on the future of European PIL. The chapter discusses the present nature of the rules and makes suggestions for future legislation.

[13] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. COM (2009) 154 final. See DÖRNER, H.-HERTEl, Ch.-LAGARDE, P. Rieking, W.: Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht. *IPRax – Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 25 (2005) No. 1 1-8.; JUNGHARDT, A.: Die Vereinheitlichung des Erb- und Testamentsrechts im Rahmen einer Europäischen Verordnung – Rom IV-VO. S. Roderer Verlag, Regensburg, 2009.; MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW: Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. Available at: http://www.mpipriv.de/shared/data/pdf/mpi_comments_succession_proposal.pdf (2010. június 1.) Nyomtatott formájára ld. *Rabels Zeitschrift*, Vol. 74 (2010) No. 3;

[14] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. HL L 7., 2009.1.10., 1- 79.

[15] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Elérhető: http://www.hcch.net/index_en.php?act=conventions.text&cid=133 (2010. május. 31.)

[16] ANDRAE, M.: Zum Verhältnis der Haager Unterhaltskonvention 2007 und des Haager Protokolls zur geplanten EU-Unterhalsverordnung. *FPR* - Familie *Partnerschaft und Recht*, Vol. 14 (2008). No. 5 196-202.; BONOMI, A.: Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations Explanatory Report: In. http://www.hcch.net/index_en.php?act=publications.details&pid=4898&dtid=3 (31.05. 2011.); JANZEN, U.: Die neuen Haager Übereinkünfte zum Unterhaltsrecht und die Arbeiten an einer EG- Unterhaltsverordnung. *Familie Partnerschaft und Recht*, Vol. 14. (2008). No. 5 218-221.

Summary of the results

Observations De lege lata

In the following, we will briefly summarize the main relevant statements of the dissertation. Please note, that these statements are by far more more accurately discussed in the work.

EU private international law sets up for itself

If we have a look at the connection between EU PIL and the member states rules on conflict of laws issues, we can set out that European law has a special effect to domestic laws. Normally, in most of the cases, the European Commission chooses between the „better law" and „common core" techniques while codifying new provisions. Both techniques are based on the comparative examination of national provisions.

As the dissertation states, the method used in several legislation processes is a third techniques: EU creates a new law which never and nowhere existed before. In our opinion, the rules of the internal market have a stong effect on our common PIL: the rules of internal market overwrite the national thinking on PIL. The situation remained the same after the adoption of Lisbon Treaty too: formally PIL is not connected to the inner market, but the thinking it represents remains related to it. Consequently, European PIL started to move on like an independent creature: it has its own thinking, own values and own purposes.

Nationality as a connecting factor loses relevance

According to the above mentioned, nationality as a connecting factor is getting less relevant. In several instances nationality as a connecting factor set out by the member states was overwritten by EU's other methods, especially by the choice of law of the parties' habitual residence. This is espesially true in the new regulations/proposals on family law and the law of succession. Nationality is getting unimportant in most of these cases: the emphasis is on habitual residence. The legislator is trying to create a new, plural and colorful Europe.

Rights of third coutry nationals are increasing

In connection with third country nationals, two main tendencies can be shown.
Firstly, the rules of EU law are applicable to third country nationals too, if they have habitual residence in a member state. This means, that the rights granted for EU nationals have to be granted to third country nationals too in several instances.

Secondly, as a special attitude, the EU centralism is also present in Europe. A German court assessed its jurisdiction in a divorce case, in which the children and the wife were living in Sri Lanka and the man was working in Germany. The case had only one

European tie: the man was working in Germany. The decision was intensely critisized in the legal literature[17].

Rigths of third coutry nationals are increasing

Even if we wouldn't expect it, EU centralism has a subversive effect on the fortress of Europe: the laws are applicable to third country nationals too. If we give rights to the citizens of the member states, we have to allow the emergence of these rights for third country nationals too.

Interference to the „intimate life" of the member states

As mentioned before, with some exceptions the European Union has not adopted substantive law provisions on family law and succession law issues. The reason of the lack of such rules is that the EU has no competence on these areas. However, conflict of laws regulations have an effect to substantive law too. A perfect example is the case of maintenance obligations. The concept „maintenance" has divergent definitions in the member states' laws; e.g. in several countries there is no obligation to maintain the brother or sister, while in others it is obligatory. The decision brought in a member state on a maintenance obligation has to be enforced in all other member states, i.e. the substantive rules of a country will have an effect to another countries legal system.
The unification of the substantive law background of member states would be an ideal but maybe utopistic solution to this problem.

Divergent aims: Europeanisation and global values versus aspects of the member states

It is very important to mention, that some values of national laws may be changed by the European legislation based on different, common European values. An example may be the case of divorce: in Malta, divorce is not allowed. On the other hand, the courts of Malta have to recognise and enforce decisions on divorces brought in another country. If Malta joined the application of Rome III. regulation, in certain cases the Maltese courts would have to apply foreign laws on divorce. Most of these laws allow divorce.
In our opinion the changing of values is not problematic. The more important question is, that these new values should be based on a clear list of purposes, that is currently missing.

[17] See JAYME, E.: Die kulturelle Dimension des Rechts – ihre Bedeutung für das Internationale Privatrecht und die Rechtsvergleichung. *RabelsZ – Rabels Zeitschrift*, (2003) No. 2. 225-226. JAYME, E.-KOHLER, Ch: Europäisches Kollisionsrecht 2006: Eurozentrismus ohne Kodifikationsidee? *IPrax - Praxis des internationalen Privat- und Verfahrensrechts*, Vol. 26 (2006) No. 6 538

Observations - De lege ferenda

Constructing the general part of European PIL

At present, the judgements of ECJ are very important sources on EU PIL. In our opinion finding the answers for some questions in these judgements may be too difficult for practical lawyers. Beyond, there may be inconvenience among the legal sources. To have clear guidelines for future legislation processes and for the legal practice, it would be very important to create the general part of European PIL[18]. There are two methods that could be applied to create this system:

EU adopts a regulation which clears the general questions of EU PIL, or EU adopts a kind of „European PIL Code" in the form of a regulation. The regulation on the general part of PIL could be called Rome 0 regulation. In our esteem, the probably better choice would be to create a unified PIL code, that could imply the regulations on procedural questions too. The dissertation accurately examines the areas, where unification would be very important.

Coping with fragmentation

Currently, in Europe there are three layers of sources on PIL:

- national PIL (the „classic" PIL rules)
- international treaties,
- EU rules.

The connection among these layers are complicated. In certain instances international treaties have supremacy over EU law, but in other cases EU law has to be applied against the treaties. In some cases national law has to be applied beside European law. If we would like to have a well structured legal area, it is obvious we should imply the European rules in one regulation. As mentioned before, the impementation of the procedural rules on jurisdiction and recognition and enforcement of judgements (Brussels I. regulation, Brussels IIa, etc.) would also be useful. With this method one of the three layers, the European layer would be unified.

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[18] HEINZE, Ch.: Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts, in: *Die richtige Ordnung – Festschrift für Jan Kropholler zum 70. Geburtstag* (Ed. Baetge, D.-von Hein, J.-von Hinden, M.). Mohr Siebeck, Tübingen, 2008. 105-127.; KREUZER, K.: Was gehört in den allgemeinen Teil eines europäischen Kollisionsrechts? In: *Kollisionsrecht in der Europäischen Union – Neue Fragen des Internationalen Privat- und Zivilverfahrensrechtes* (Hrsg. Jud, Brigitta - Rechberger, Walter H - Reichelt, Gerte). Jan Sramek Verlag, Wien, 2008. 1-61.; LEIBLE: Rom I und Rom II… *op. cit.* 49. and op. cit. 154. lj.; Max Planck: Comments on Succession…op. cit 5. SONNENBERGER, H. J.: Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR. In: *Die richtige Ordnung...* op. cit. 227-246.

Managing the territorial fragmentation

a) The territorial fragmentation is also a serious problem that can cause the the unnecessary difficulty of chosing the applicable rules. First of all, we would suggest to imply correct notifications in the preambles of regulations. At the moment, if a regulation is adopted by EU and a state (e.g. UK) joins this regulation later than the adoption, the opt-in is not signed in the regulation. Beyond, we would suggest to deal somehow with the opt-out of Denmark, UK and Ireland. Of course, the windup of opt-out rights may be a utopistic idea, but EU should try to abolish such rights.

b) Another serious problem is caused by the allowing anchanced co-operation on certain areas. This method may also be able to cause a new kind of fragmentation. We have seen in the case of Rome III. that allowing this method could cause another, even more serious fragmentation. If the newly joining member states will also not be signed in the regulation, the territorial applicability will not be easily reviewed

c) Codification on the remained rules: Last but not least, the remaining rules of PIL should be codified, at a EU level. The dissertation discusses the relevance and methods of this issue deeply.

CHANGES OF THE MARITIME CARRIER'S LIABLILITY INT HISTORICAL ASPECTS

KOVÁCS, Viktória*

The Aim of the Research, Hypotheses

In this thesis, we wish to present the process of legal development of the maritime carrier's liability comprising several centuries. This dissertation works up the changes of regulations concerning one kind of maritime carriage of goods, the line shipping, with other words the carriage of goods with a bill of lading. It covers the changes of regulation of international maritime carrier's liability, as well as the main points and directions of them. In the course of their analysis, their economic and social background and the technical-technological changes of transportation and carriage have also been studied.

The economic importance of maritime carriage of goods in international and domestic relations

Nowadays, 80% of international trade are realized by sea[1] Based on that, it can be stated that this sector of carriage makes up the back- bone of exchange of goods and of global trade. In the second half of the 20th century, the quantity of goods carried by sea kept on grow- ing, parallel with the growth of the value of global production of GDP and of trade, the tendency of which was shaken considerably in 2009 only when the crisis of world economy broke out[2].

The proportional number regarding Hungary reflect a similar volume as for export and import, as well, and a gradual increase can be expected in the future.

It will be strengthened probably in the following term because Hungary tries to become a more grave participant in international maritime carriage by virtue of the planned port in Trieste, Italy and of the expected establishment of an own commercial fleet.

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[1] The economic importance of carriage of goods: http://www.geopolitika.hu/hu/2018/10/02/geodebates-vitaindito-szarazfoldi- vs-tengeri-kereskedelem/ (date of download: 25 March 2019)

[2] The economic importance of carriage of goods: http://www.geopolitika.hu/hu/2018/10/02/geodebates-vitaindito-szarazfoldi- vs-tengeri-kereskedelem/ (date of download: 25 March 2019)

Based on the foregoing reasons, the participants of trade of of carriage of goods (e.g. logisticians, forwarders) have to know and apply the legal background of this issue. Moreover, the mentioned economic developments may open new perspectives for Hungarian maritime carriers and they can offer new opportunities for domestic development of law, as well.

With regard to that, the de lege ferenda proposals in the concluding part of the thesis concern the improvement and transformation of the regulation system of carriage of goods. They outline the draft of a uniform regulation structure taking both the peculiarities of the transportation sectors and the interests of carriers and shippers into consideration.

Regulation and research of maritime carriage law in Hungary

The entering of the new Civil Code into force strengthened the topicality of the issue. The answer should be looked for namely to the question how much the liability system for damages in the new Civil Code concerns the previous regulation of carrier's liability and how much the new rules correspond to the tendencies of international development of laws, respectively to what extent they can be applied. It is a key moment that the *new Civil Code* changed basically the liability structure. It broke the uniform liability system for damages of the "old" Civil Code: it put the regulation of delictual and contractual liability for damages on different bases. The principle of generally expectable conduct (1:4. § of Civil Code) is the measure of liability for damages caused out of contract, and an objective based general clause consisting of three elements specifies the basis of liability for damages, respectively the exemption in the case of damages caused by breach of contract.

The other essential change concerned a *special* formation involved traditionally in a separate regulation, namely the *carrier's liability*. The "old" Civil Code regulated the carrier's liability – because of the legal and material features of transport of goods – with special rules. According to that, if the consigned goods injured in the period from shipping to delivery, the carrier held an intensified liability. It listed the factors itemized that exempted the carrier from liability. But the rules specifying these particular carrier's liability structure *were left out from the Civil Code. By virtue of that, it brought the carrier's liability under the scope of the universal con- tractual general clause of liability for damages.* Because of the radical change, the Civil Code *misses § 506 of the "old" Civil Code*[3], as well, that stated definitely that the provisions of Civil Code cannot be

[3] Section (1) of § 506 of the "old" Civil Code: "If the consignment is to be forwarded across the borders, the provisions of this Chapter can only be applied if any international treaty or convention, respectively regulation does not provide otherwise." Section (2) "This Chapter is authoritative to contracts of carriage of shipping, respectively air cargo companies only if any law or international treaty, convention or regulation does not provide differently."

applied to maritime (and air) carriages, except if any sectorial source of law or regulation, thus a general conditions of contract issued by a carrier, for example a bill of lading makes it possible.

The „new" Civil Code includes just *one provision* regarding carrier's liability: this one concerns the liability of multimodal carriers.[4] It makes the approach of this issue from international point of view justified that the relevant international conventions, thus the Brussels Rules, the Hague-Visby Rules, the Hamburg Rules and all conventions in force regulating international road, rail and air trans- portation represent segregated the regulation system being in force at the moment. It causes a considerable practical problem that these sources of law do not fit into each other without deficiencies, there are actually fully unregulated issues, as well (e.g. liability of terminal operators). It can also be stated that even the private law between ports, that is of maritime carriage of goods is not uniform.

It is remedied to a certain extent that companies performing maritime and multimodal carriage of goods secure it in the bill of lading how they solve the problems deriving from deficiencies of regulation (from viewpoint of liability law). But differences in the structure and regulation of sectorial sources of law make it yet professionally justified to harmonize the regulations connected to and completing each other. There are even duties as for the domestic legal system because of deficiencies of the Civil Code regarding legal relations of carriage and for the reason of termination of the special structure of carrier's liability.

The modifications of rules of Civil Code concerning liability for damages can be compared to the changes in the regulation of maritime carrier's liability. Essentially the Civil Code replants namely the liability model of the Convention on Contracts for the International Sale of Goods (CISG)[5] into the general rule of contractual liability for damages. Regarding its content yet, this model is not far at all from the (less applied) general rule of liability for damages in the Hamburg Rules. From the viewpoint of Hungary, it is justified to analyse and to appraise this issue even because the most recent Rotterdam Rules[6] approved in 2009 may bring some changes in many respect. If it enters into force, then as a compulsory mean of regulation, whereas in the contrary case, then by virtue of inclusion of its certain provisions in the conditions of bill of ladings also in such issues of maritime carriage law, *the application of which will be inevitable also in Hungary*. On the basis of Article 5 of the Decree Rome I, it is a basic interest of Hungary, as well, to have an applicable domestic regulation also in respect of maritime carriage of goods. Regarding international contracts of carriage, *the laws chosen* by the contracting

[4] Section (2) of § 6:268 of the "new" Civil Code: "If the carrier forwards the consignment by using several transportation methods, the rules of the concerned branch of transport shall be applied to its activity regarding the single transportation methods. If it cannot be stated where the damage occurred, the provisions of this Chapter shall be applied to the carrier's liability."

[5] Convention on Contracts for the International Sale of Goods – CISG.

[6] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

parties shall be applied in the first place, but for lack of choice of laws, just this source of law may lead to the Hungarian laws as applicable laws. But in case there are no rules in the Hungarian legal system regulating the concerned issue with regard to the features of carriage of goods, then we renounce once and for all that the Hungarian rules may come into consideration at all as applicable laws.

The lack of interest of the Hungarian jurisprudence makes it difficult to prepare for these processes. In this issue, two PhD dissertations[7] was at our disposal in Hungarian language during the research work. Four monographs[8] were prepared in this issue each of that presents and analyses a particular part of the scientific sphere of carriage of goods directly. Each of them was published at the beginning and in the middle of the 20th century. Two further monographs[9] in Hungarian were at our disposal dealing tangentially with formation, development and sense of establishments of maritime commercial and carriage law when discussed development of certain legal establishments of commercial law. In the course of the research, beyond the foregoing, five textbooks in Hungarian, six scientific articles in Hungarian and one thesis were at our disposal that worked up issues of general carriage law and maritime carriage law directly. Beside them, we worked up several scientific works in Hungarian, however these only just affect the concerned issue.

The first scientific assumption grounding our dissertation was that as a result of the legal unification process on the sphere of maritime carriage law comprising nearly one century, *two families of regulation* of the liability of maritime carriage law were materialized. One of them is the group of the Harter Act, the Brussels Rules, the Protocols and the Rotterdam Rules, the structure of liability for damages of which is basically identical with each other. The other „family" is the Hamburg Rules and their „satellite" regulations, the Multimodal UN Convention and the UN Convention on Liability of Terminals that go back to the (previous) Warsaw Convention and are influenced by the Vienna Convention on Sales of Goods, as well.

There are considerable differences between the practical applicability of the two different models of carrier's liability. The liability model of the Brussels and the Rotterdam Rules is characterized by a *practical approach*. The solutions of their regulation are based on *the centuries-old traditions of maritime private law and the contractual practice of bills of lading*. On the other hand, the system of liability for damages of the Hamburg Rules and their "satellite" regulations are less practical because

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[7] KRESKAY, Ferenc: The carrier's liability on the basis of the Brussels Rules. 1996.; Szalay Gyula: Opportunities and barriers of systematization of the law of physical distribution. 1994.

[8] BACZONYI-ISÉPI-UHLARYK: Carriage law. Közgazdasági és Jogi Könyvkiadó, Budapest, 1974. Benyovits Lajos: Maritime private law. Grill Károly Könyvkiadó vállalata. Budapest, 1912. Istvánffy László: International and Hungarian rules regarding air transportation. Királyi Magyar Egyetemi Nyomda. Budapest, 1944.
NÁNÁSSY, Béla. The Hungarian rail carriage law. Szikra Irodalmi és Lapkiadóvállalat, Nyomdai Rt., Budapest, 1947.

[9] FÖLDI, András: Commercial establishments of law in Roman law. Akadémiai Kiadó, Budapest, 1997.
SIKLÓS, Iván: Some questions of custody liability in Roman law. Budapest, 2009.

application of the abstract formula may be thesource of several practical problems in the light of different legal families and national laws. The two directions of development appear sharply separated in the "old" and the "new" Civil Code. The system of liability for damages of the "old" Civil Code is based on the same principles as the traditional maritime carrier's liability that is the "first family of regulation". The carrier is liable for indemnity for any damage occurred in the consignment if it happened during the period of the pos- session the carrier. The exemption is possible on the basis of exempting factors listed itemized. The system of contractual liability for damages of the "new" Civil Code is close to the structure of the "second family of regulation". Its substance is that the basis of liability is specified in an abstract general clause that disregards the itemized enumeration of exempting factors. In our opinion, the real way of international harmonization of laws is the application of the Rotterdam Rules in some kind. We summarize its method and opportunities in the summary, of which the success of the so-called soft law seems to be lifelike for the most part.

Taking the Hungarian law into consideration, the new Civil Code makes an adequate background also regarding carrier's liability by having formed an objective liability system in respect of contractual liability for damages, but its direct application is not life- like. We have outlined the possibility of a uniform regulation under the level of law, including all sectors of transport in the de lege ferenda proposal that would fix the most important elements of liability, too. It would be close basically to the liability system of the first family of regulation that appears in other international codices of carriage law – CMR, COTIF-CIM – as well, so it could be applicable also within multimodal systems.

Structural construction of the Dissertation and Research Methods applied in the Dissertation

In the course of preparation of the Dissertation, we have applied research methods being characteristic to jurisprudence in general.

The primary method is the historical description and analyses of the economic and social changes causing development of laws. This scientific sphere has its roots going back to the Roman law that is worked up first of all on international level, but some segments of it also on Hungarian professional level. *We could rely on foreign research, theses, databases and protocols almost exclusively for having thorough knowledge of the issue from historical viewpoint.* Beyond the historical and analysing description and assessment of the international sources of law, it is an important research method to compare them and to draw the conclusions. Because of the international feature of the issue, this phase of the research was carried out also by virtue of working up of foreign bibliography in the first place, but some domestic sources were at our disposal, as well.

In the course of interpretation of international sources of law, we relied on texts in English language first of all, but when a certain source of law was available also in Hungarian based on an official translation (Brussels Rules, CISG), we relied on the

Hungarian text. In certain cases it was justified a joint analyses and comparison of the English and Hungarian texts because of the anomalies of translation presented in the dissertation. Moreover, it was necessary to analyse also the official translation of the general clause of contractual liability for damages of the „new" Civil Code into English in order to reveal parallels and divergences between certain international regulations (e.g. CISG) and the "new" Civil Code.

Structural elements of the dissertation

The first part wishes to offer a survey on development of the whole maritime private law: it provides a very detailed historical summary of the formation and development of the modern maritime carriage law and of its establishments in four separate chapters. It is important to work up the legal development thoroughly and in details because of two factors. Partly because a summarizing publication in Hungarian language was not performed in this issue in the recent decades, this process is unknown for the „profession", too. It is important also because review of the extremely large bibliography in English language can hardly be expected from those who work in the practice, but even from lawyers who are interested for the issue tangentially.

We put the emphasis of the historical summary on international legal development because the domestic scientific results did not play a direct role in forming the maritime carrier's liability structures being in force. It is examined based on that, by virtue of what antecedent (Harter Act) the modern maritime carriage law was evolved and why the development and unification of the concerned laws became justified on the turning point of the 18th and 19th century. Changes in world politics and economy from the 1970s are also presented that started the legal development and harmonization activ- ities of UNCITRAL. The conventions of maritime carriage law created as the result of the unification process: the Hamburg Rules, the MTO and the OTT Conventions are also presented. The closing chapter of the first part reveals the changes of markets going together with the globalization on the turning point of the 20th and 21st century and the provisions of the Rotterdam Rules following them. Working up and systematization of maritime carriage law from historical viewpoint, as well as an analysing presentation of the legislative attempts aiming to develop the establishments of maritime carriage law and to unify maritime private law are considered as one of the important results of the dissertation.

In the second part of the dissertation, the determinant sources of maritime private law are summarized from the viewpoint of liability law. We applied the normative and comparative method for that first of all in the sense that we compared the rules of the conventions following each other.

The third part of the dissertation includes three separate chapters. In the first place, we look for the answer to the question what are the legal and material peculiarities that make the service of carriage special and distinguish it, and by virtue of that, also the carrier's liability compared to the localized services being relatively well transparent and

computable. (These factors are based on the results of previous research at the department and its legal predecessors that are linked to the name of Endre Papp, Éva Csizmadia és Gyula Szalay.) Presentation of the connecting between the particular circumstances of carriage and the elements of liability are also emphasized in the dissertation. By means of that, the liability rules of the single sources of law can be classified. Based on them, it can also be analyzed from that viewpoint which family of regulation is the one from the various liability structures that meets the practical requirements for the most part.

In the fourth part, we compared the changes of the previous and the contemporary Hungarian regulation of carriage law aiming whether any fitting into the tendencies of international legal development can be revealed. The Act Nr. 20 of the year 1840 on Carriers et, the Trade law, as well as the structure and the concrete regulation of the previous and the „new" Civil Code are reviewed and compared to the rules of international mainland and maritime carriage law.

In the summary of the dissertation, the reasons are presented that justify professionally the unification of the regulation of various transportation sectors. The legislative methods are also presented that may promote realization of a uniform regulation. Finally our – de lege ferenda – proposals for the changes are drawn up that may realize again the consonance between the carrier's liability systems in the Hungarian and the international structures.

Summing up Scientific Results of the Dissertation, Applicabilities

Working up and systematization of maritime carriage law from historical viewpoint

The unified systematization of international maritime carriage law can be considered as a result of our research, as well as presentation of the single establishments of maritime private law and their changes from historical viewpoint, with special respect to the legal issue of liability.

It was the aim of the dissertation namely to provide essential descriptive analyses also for those who do not want to become immersed in the details of maritime carriage law, but to shed light on the solutions of regulation following the economic and social changes also for dispensers of justice, as well as for participants of trade and of transportation of goods in a surveying and complex way. By virtue of this aim, the dissertation may even contribute to the education of carriage law and trade law.

Revelation and systematization *of the material constituents* of maritime carrier's liability can be assessed as a result. Revelation of the connection between these factors and the elements of liability shall also be emphasised, the assessment of liability structures from practical viewpoint became namely possible by means of that. It is also considered as an essential result of the dissertation. It is also stated in the dissertation that two living legal systems regulate the maritime carrier's liability for the time being. They form two different groups according to the regulation of the issue of liability.

Based on the regulated establishments of law, it can also be stated that a gradual rapprochement can be noticed between maritime carriage law and the regulation of other transportation sectors. But the laws of maritime carriage of goods, with special respect to their aspects of liability, will always differ from those of the other transportation sectors, the cause of which are in the material characteristics of the whole transportation sector. The families of liability are analyzed according to the three regulation elements of liability: the formation of liability, the numerical extent of indemnity and the rules of process of enforcing claims.

Two groups of regulation

As it has been presented in the dissertation, one kind of maritime carrier's liability is the traditional variant, the model of liability for damages of the Brussels Convention and of the Rotterdam Rules, and the other one is the liability structure of the Hamburg Rules and their „satellite" rules, wishing to succeed the previous ones.

The carrier's liability on the basis of regulations of the Rules and of the Codex is an objective liability based on receptum situation. It is however not unconditional: a carrier breaking contract can be exempted by virtue of proving any of the causes of exemption listed according to the configuration of liability. It is a further feature of the regulation that the phase of locatio and of conductio are separated sharply that is reflected in the dual structure of the maritime carrier's liability. The objective liability is completed by a liability of negligence based on the "normal carefulness".

The other group of regulation is the Hamburg Rules and their „satellite" rules. The construction of receptum liability is a constant element of their configuration of liability. A fundamental change came about however at two points: they treat the phases of locatio and conductio consistently from both technical and liability point of view; and they apply the same formula to both that is included in one single general clause. The limits of indemnity and the rules of procedure of asser- tion of claims have also been presented, these were shown together. The content and quantity of the regulation grow and develop linearly in these subjects, there are no essential changes among them.

Both models of carrier's liability in the liability system of the "old", respectively the "new" Civil Code. Comparing the national and international regulations, it can be stated that the system of maritime carrier's liability based on the "classic", itemized causes of exemption (Convention, Hague-Visby Rules, Codex) is reflected by the general clause of special carrier's liability for damages in the "old" Civil Code and its antecedents, and the model based on one single general clause (Convention) is reflected by the general clause of contractual liability for damages in the actu- al Civil Code. Considering the regulations of traditional system of liability, there is no theoretical difference between the liability systems of the carrier's liability in the "old" Civil Code and of the regulations of classic maritime carriage law. Both have an objective structure, and they state the increased liability of carrier in the case of damage to the goods and of delay. They state the factors itemized, in a casuistic list, in the case of a successful proof of which the carrier can be

exempted. Moreover – as it has been presented – fundamentally the same factors appear in the regulation of maritime carriage law based on Anglo-Saxon grounds and in the list of exculpatio of the continen- tal rules. (The regulations regarding „locatio" are basically dissimilar nevertheless.)

The liability model materialized in the Convention is closely related to the CISG however, the regulations of liability law of which are the basis of the model of contractual liability for damages of the Civil Code, as well. The latter have an objective basis, too, considering liability, the liability for damages follows by objective occurrence of damage, and the burden of proof is on the party breaking contract. The condi- tions of exemption are stated in a general rule however, contrary to the itemized "list" of exemptions of the Convention.

In our view, the outlined general clause of the Civil Code can determine just the frameworks with regard to the subject of carrier's liability. The rules of contractual liability for damages are excellently suitable to regulate the liability for indemnity connecting to relative- ly well computable and localized services. Their starting point is namely that the parties fix themselves the rights and obligation to- ward each other in the contract concluded prior to the occurrence of damage, and they can freely consider the risks, as well. Therefore the conduct of causing damage means after all the breach of a contractu- al obligation accepted willingly and consciously. But the legal relation of carriage is more complicated than this. It has much more risks than the easily transparent contracts of sales, undertakings or mandates. It has been presented beforehand that because of this, several material reasons make it necessary to regulate the subject of liability concretely, simply and concentrating on practice.

The causes of that are first of all the inevitable influences deriving in the first place from shifting and from the technologies of forwarding goods, but the multiparticipant nature of carriage realized through forwarding chains, the large-scale character of the service and some other factors presented in this dissertation offer reasons together to a more simple mechanism of the division of risks between the parties. The limited possibility of recognition and predictability of dangers during carriage and the provability of real cause of damages are an important factor because of the receptum position between the parties and because of the difficult computability of external influences going hand in hand unavoidably with carriage.

The general clause of the Civil Code has no respect for these peculiarities of carriage because the clause needs and abstract legal consideration that is not favourable among circumstances of large- scale carriage at all. It has been presented at the same time that the circumstances in the "old" Civil Code regarding exemption are yet integrated to a certain degree by the general clause of the Civil Code, too: the "circumstance out of the scope of control" includes the "unavoidable cause out of the scope of the carrier's activity" and the "internal feature of the shipment" that do not belong to the scope of control of the carrier, but for example the "deficiency of the wrapping unnoticeable from outside" does not belong to the scope of control of the carrier, either. It has also been presented

that the majority of circumstances resulting exemption not only on the basis of the "old" Civil Code, but also on the basis of the maritime versions can be made suitable fully for the concerned factors of exemption, to there are no irreconcilable theoretical differences between both constructions. But details hide substance. The dissertation reveals the links between the model of liability for damages („alternative" liability model) of the Civil Code, the CISG, the Hamburg Rules and the Warsaw Convention, as well.

The so-called "alternative" liability model was codified first in the Warsaw Convention (1924). The text of the formula is presented and analyzed in the dissertation. Its substance is that – in accord with the concerned sources of law – the causes exempting the carrier are presented in one single clause that is based on an abstract, theoretical idea. The Hamburg Rules put the liability formation of the Warsaw Convention into the maritime carriage law by virtue of the general clause also presented in the dissertation. The CISG had a role in the background regarding the break with the traditional regulation. The aim of UNCITRAL was namely by creating rules based on similar idea to establish a uniform system of liability for damages both in the mechanism of trade and of carriage of goods of the international commerce.

The new Civil Code – as it is presented in the dissertation – puts essentially the liability model of the CISG into the general rule of contractual liability for damages. Therefore connections can be revealed on several points between the general clauses of liability for damages of the mentioned sources of law. It is also presented and analyzed in the dissertation that the liability models of all the four sources of law have an objective base: they set out from the objective fact of breach of contract, and the party breaking contract is exempted only if he proves successfully the exempting cause consisting of several elements that are connected to each other. The burden of proof are put on the party breaking contract by the sources of law equally.

Based on that, the purpose of the liability construction named„alternative" by us is identical in the concerned sources of law: to create a balance between services and recompenses, that is to distribute risks proportionally. Considering their logic of regulation and wording however, they are not identical fully with each other, actually they differ from each other on several points. These are presented in the dissertation.

Directions of the international development of laws

For the time being, there is no unified regulation as for maritime carriage law, and especially there are no rules of a complex regulation in force that would include all legal issues of door-to-door carriage transactions based on one contract of carriage and concerning at least two economic subsectors, with special regard to the carrier's liability. This regulation is imperfect also because the rules of single subsectors – for reason of failure of attempts to codification – cover just partly the common problems of the different ways of transportation and carriage. This results in several difficulties and uncertainties in the practice both regarding the carrier's liability and concerning

calculation of the concrete amount of indemnity. These examples and their analysis have been presented in the dissertation.

It is obvious therefore and also according to the regulation tendencies that there is still a demand for a global harmonization of laws. For lack of unified rules, parties concerned in carriage have to determine the conditions of that, the duties of several parties involved in the legal relation, the points of view of division of risks and the conditions of liability individually before concluding every single transaction of carriage. It takes the edge of the consequences of hiatus considerably that so far the unified bills of lading issued by the line conferences have more or less remedied the gaps of regulation and filled them up with contents which the UN and the organizations of representation of interests of maritime trade wished to balance by virtue of general rules to have entered into force. The FIATA Combined Bill of Lad- ing represents a similar means, too. They provide more or less a solution to establish liability and also for the problem of amounts of indemnity to be calculated on the basis of the average value of goods. So practice compensates somewhat the present periodicity and defi- ciency of the regulation (moreover this – namely the periodicity of regulation – gives the economic justification for existence of for- warders, as well).

The future direction of development of laws is yet question- able that may follow three different courses. They represent three different levels of regulation, so they need different kind of compromises. The possible solutions are as follows:

1) Entering of the Rotterdam Rules (Codex) having already been created into force as a global source of law.
2) Creation of "model rules".
3) Establishing general conditions of contract.

These directions of legal development, as well as their chances to be realized are discussed in details in the dissertation. Of the three possible methods of regulation, in our view, this one, i. e. creation of "model rules" has the biggest chance to be realize in medium term. It is a flexible means of regulation that is elaborated and accepted by a global international organization (e.g. UNCITRAL) in optimal case. It does not need a wide-ranging compromise on the part of the countries, it includes namely no commitments done by the single countries.

The aim of the model rules is to regulate a particular sphere of trade law, for example the private law of international carriage of goods. It can be a realistic option because it is accepted by an international organization as a proposal to the text of a regulation that can be applied by the single states as a guidance when they create their national rules. By virtue of that, the practical harmonization of legal systems can also be achieved. Its advantage is that it is not compulsory. This means that the text of model rules can be formed by every single country according to its own national requirements, but it remains the same on the basis of rules. It should be specially underlined that the content of model

rules are elaborated on the basis of the most applicable legal practices as a result of discussions of experts. Thereby regulations will be formulated which are well-tried in the practice and can be applied certainly.

According to that, creation of model rules definitely seems to be an expedient solution in the sphere of maritime carriage law, since – as it has been presented – they do not assign hardly alterable commitments to the countries and they can be built in any legal system with changes and supplements at will. Their application can be effi- cient because they can be changed easier depending on the changes of tendencies of world market and of monetary politics. Thereby – similarly as the convention – they can serve preventive guiding regulatory purposes, with special respect to the quick development of the technology of carriage of goods (e.g. UNCITRAL Model Law on Electronic Transferable Records [2017].

This would mean an especially useful solution for developing economies. They would implement generally valid rules already well-tried in the practice into their own legal system in a way that they form those rules according their own needs in the meantime. It shall be underlined especially that – in spite of their several advantage of application – the practical importance of these means of regulation is not yet self-evident. They can meet the requirements if – following their implementation into the national legal systems – companies and conferences also implement their regulations directly into concrete contracts.

The foregoing and the implementation into national laws are helped by so-called legislative guides being close to the model rules. They provide information for interpretation of the model rules and they highlight their social and economic backgrounds. They mediate thereby some alternative solutions, too, which shall be deliberated when national laws are formulated.

There are two model rules currently in the sphere of international carriage law. The first one was accepted by UNCITRAL in 1982: „The measures regarding units of account and the measures as for adaptation to limitation of liability in the conventions on international carriage of goods and liability".

The other one is the „UNCITRAL Model Law on Electronic Transferable Records" [2017]. This source of law regulates issuance of the „Transferable electronic records" and their application in commercial practice.

Regulation of private law of contracts of carriage and of forwarding "under Civil Code": de lege ferenda

One of the most important innovations of the „new" Civil Code is – as it was presented as appraised and analyzed in this dissertation – that it terminated the uniform system of liability for damages according to the previous Civil Code: it separated the regulations of delictual and contractual liability for damages. The principle of generally expectable conduct (1:4.§ of Civil Code) means the standard for liability for damages caused out of contracts, but in the case of damages caused by a breach of contract, the base of liability

for damages and the exemption are determined by an objective-based general clause consisting of three elements.

Thus the contractual liability for damages, considering its formation, is objective, the burden of proof is on the party breaking the contract, and the terms of exemption are fixed by the referred general rule consisting of several elements. As for maritime carriage law, the same logic is noticeable in the first regulation aiming harmonization of the laws, i.e. in the Convention (and in its „satellite" rules) that (would) have „shifted" the Hungarian carrier's liability from the traditional system still being dominant in international relations to an „alternative" liability structure inspired by the CISG.

It could – as it has been presented – not at all, or it could fill its function effectively just with considerable difficulties and by vir- tue of plenty of time, energy and expenditures. As is has been pre- sented, the causes of that are mainly the material characteristics and the legal features of carriage of goods, and the circumstances of carriage in large scale make it inexpedient to apply it. This new liability system canhardly stand the test of practice day by day.

The situation is very similar also in the case of the Civil Code: although the general clause (6:142.§ of Civil Code) establishes an objective structured liability, too, but its rules are not appropriate „sterilely" to regulate directly the conditions of damages caused by breach of a contract of carriage. We deem unavoidable the solutions of particular structure of carrier's liability being applied internationally in general as lex specialis become part of Hungarian private law. Because of the foregoing, it is justified to reconsider the present regulatory system of contracts of carriage basically and to put it into a new, uniform structure. There are – similarly as internationally – three possible solutions for that: A new rule to be passed: on the level of an act, but at least of governmental decree. It would be an adequate solution to regulate the conditions relating to the large-scale and specific services of carriage in complexity, practically and flexibly. Creating model rules by contribution of the public administration. Further application of unified general conditions of contracts in practice, as well as fitting these conditions to the most up-to- date tendencies of trade. In order to solve entirely the problems of present regulation for contracts of carriage, the solution could be to create an act or at least a governmental decree to regulate the concerned services. It could fully unify the domestic law of carriage of goods. Moreover, it could offer a useful regulation easily applicable also in the case of an inter- national multimodal legal dispute regarding carriage of goods – if the laws of Hungary are applicable by virtue of choice of laws by the parties or on the basis of the private law rules of international conflicts of laws.

It could have a great importance, taking the growing tendency of the international multimodal carriage of goods in Hungary into consideration. If the laws regarding international carriage of goods remain namely segmented, with special respect to the legal issue of liability, it can become then necessary concerning a legal dispute to turn back to the establishment of Hungary's domestic legal system. It is therefore justified to develop a complex regulation that takes the tendencies of unified international regulations and

their lessons into consideration. This act or governmental decree – under the Civil Code – should regulate the relations of storing and warehousing and of the connecting terminal services, the multimodal and the international multimodal carriage of goods, every sector of carriage, the additional logistic services, as well as the legal relations of forwarding. Of course, the legal aspects of liability of the foregoing issues would form the centre of the new regulation. This law may also regulate some important issues concerning the relations of carriage of goods which are not linked directly to their regulations, such as contracts of distribution.

The background and the proper basis of a complex system of rules concerning the relations of carriage of goods would be the Civil Code as a „basis law" that applies some (just some!) points to establish the basic relations of carriage law. The most important elements of liability law to be regulated would be as follows. The centre of the law to be created could be the systematization of carrier's liability, with special regard to the formation of liability. An entirely new system should be formed: it seems reasonable therefore to take the solutions and tendencies of the conventions of international carriage law created in the recent decades into consid- eration. They should be mixed with the solutions of the Hungarian antecedents (traditional carrier's liability for damages) and of course with those elements of the modern regulations of contractual liability for damages that can be brought in line with the material peculiarities of carriage (e.g. extreme outward perils) and with its legal features (e.g. receptum situation), namely with the regulation of formation of liability from objective points of view.

It would result a formation of liability with objective structures on traditional bases that includes the conditions exempting carriers into a casuistic list. From the point of view of the theory of liability, it fit to the construction of objective liability of the Civil Code because it would mean essentially a more concrete („particular") presence of the abstract exemption causes being rooted in the relations of carriage. Thus considering the exemption causes, it would be expedient to turn back to the traditional carriage law and to abandon the „sterile" application of the general clause being abstract and hardly individualized, i.e. too general. The carrier's liability should be taken traceable to exemption causes reflecting practical approach, being simple and tried in the practice. The most up-to-date tendencies of commercial law show namely – by virtue of the Codex – that international regulation also turns back to this introduced and well function- ing model, for it is practical and therefore easily applicable under the conditions of large-scale carriage even without assessing-analyzing and examining efforts from legal points of view. (Regulation of „mainland" variants [CMR, COTIF-CIM] never departed from this concept.)

Legal regulation of indemnity limitation is also indispensable. The limit should be fitted to the international measure evolved in this business line and not be specified in an abstract, too general manner („Under the title of indemnity, damages occurred regarding the services shall be compensated."). In the international regulations – also from the point of view of the extent of liability – damage to the goods, delay in delivery and fault

of locatio in maritime carriage law, as well as the maximal measure of indemnity concerning those ones constitute separate groups. Distinction between those groups of damages should also be considered in respect of the extent of indem- nity. It is also expedient to regulate the detailed rules of procedures and time limits as regards to enforcing claims deriving necessarily from performance of carriage services in a large-scale and monotonous system of carriage of goods having a specific nature. It can be so a guarantee to ensure unification of laws on a higher level not only in legal relations of carriage, but also in so-called background legal relations (e.g. sales, outsources).

These elements of regulation concern liability, but the rules under Civil Code have to regulate necessarily also additional determinant establishments of traditional rules of carriage law. So the following would be regulated – according to the chro- nology of carriage – at the preparatory phase of carriage: general and specific rules as regards to providing vehicle in every branch of carriage, issues of wrapping, loading and securing from considerations of traffic safety, and also in respect of cooperation of the parties, the rules of examination of shipment and deadlines of carriage, as well as the role and content of the consignment note (and of its duplicate, respectively copy) in the fulfilment of carriage of goods. According to the most recent regulation tendencies, the electronic version of consignment note, moreover conclusion and fulfilment of contracts on electronic way as regard to all logistic activities should also be regulated.

The rules of fulfilment of carriage would be also included in the new regulation, with special respect to the issue of obstacles of carriage and of subsequent arrangements authorizing a unilateral amendment of the contract of carriage. The circumstances of delivery to the consignee should also be regulated: notification, unloading, guidelines of examining the vehicle of transport and the consignment, and based on that, rules of taking records of damages. The issue of obstacles to delivery should be regulated by separate provisions.

This law could include general provisions regarding carriage of perilous goods. The classic carriage law establishment of asserting claims deriving from legal relations of carriage, i.e. the reservation could also be regulated, and as for the issue of assertion of claims, the alternative mechanisms solving debates and having become widely used in practice, for example the bases of arrangement of legal disputes by virtue of an arbitration court could also be regulated. (The actual rules of the Civil Code just affects some of these establishments.)

A complex regulation with logistic approach and including all elements of carriage of goods would be thus needed. It should contain concrete and practical rules regarding domestic and international unimodal, as well as multimodal and international multimodal carriage of goods, regarding hub activities between the single legs (e.g. storing, warehousing) and also regarding legal issues of mari- time carriage of goods. Further cases of combined carriage of goods (e.g. RO-RO, RO-LA) should also be regulated. As for legal relations of maritime carriage of goods, the most important documents of line shipping should also be regulated: the bill of lading, the delivery order,

the dock receipt and the mate's receipt, and concerning charter party applied in the course of tramping, unified rules meeting the tendencies of international practice should be created.

This new law, similarly as the Codex, may include, beyond arrangement of carrier's liability and of classic establishments of carriage law connecting to carriage of goods, also substantial issues linked to those ones. For example issues of electronic commerce and electronic following of goods or basic regulation of distribution contracts. This solution could have another positive consequences: the present governmental decrees would become unnecessary that the Civil Code made almost entirely “empty”.

LABOUR LAW APPROACH OF COMPENSATION, WITH SPECIAL ATTENTION TO THE DAMAGE TO EMPLOYEES' HEALTH

BORS, Szilvia*

In my dissertation my goal is to provide the narrowest legal interpretation of compensation applicable in the case of the violation of employees' physical integrity, health and personal rights[1]. My starting point is that respecting human dignity is such a principle which is only ensured by minimum requirements. Social expectations and needs work and prevail via legal norms. One of the legally formed requirements is employers' duty of care. In its frames employers have to ensure the occupational safety and health requirements for employees in consideration of the nature of the work. In the case of the violation of life, physical integrity and health connected to it, there is also a legal norm to be applied as a legal consequence: it is called the compensation. However, sanctions applied for employers only reach their aim, fulfil their function if they meet the social expectation laid against them. Employers have the duty of care within which they are obliged to make rational steps towards avoiding the predictable violation of employees' life, physical integrity, health and personal rights[2]. Lord REED remind us of that this aim appears "when the parliament accepts legislation establishing labour law… this is not only done to provide advantages to certain employees but because they decided that prevailing these rights is in the public interest"[3]. This also reflects that because of the economic dependence and organizational risk distribution it is the employee who needs more protection due to its subordination against the employer.

Hence, in my dissertation I aim at providing comprehensive research of the basic questions, theoretical bases and practical forms of protection against the violation of life, physical integrity and personal rights by employers. Having regard to the above mentioned and that as far as I am concerned, non-pecuniary loss' most serious consequences are the violation the right to life, physical integrity and health. However,

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[1] Three levels of interpretation: (1) a „largissimo sensu", that is, understanding the subject or phenomenon formed by humans; (2) „sensu largo", that is, the interpretation of written or spoken language's manifestation; (3) „sensu stricto", that is, revealing the text's meaning. WRÓBLEWSKI, Jerzy: Legal reasoning in legal interpretation. In: Logique et Analyse. Peeters Publishers, Vol. 1696/45., p. 4.

[2] KISS, György: Az új Ptk. és a munkajogi szabályozás, különös tekintettel az egyéni munkaszerződésekre. In: PLOETZ, Manfred – TÓTH, Hilda (eds.) A munkajog és a polgári jog kodifikációs és funkcionális összefüggései. Novotni Kiadó, Miskolc, 2001. p. 233.

[3] COLLINS, Hugh – EWING, Keith – MCCOLGAN, Aileen: Labour Law. Cambridge University Press, Cambridge, 2019. XXIV.

due to its lengths, in my dissertation I do not deal with violated employees' right to material compensation and the need towards compensation by deceased employees' family. Timeliness of my dissertation has also been strengthened by the world pandemic emerging in 2019, since COVID-19 has changed the content of the obligation to ensure the occupational safety and health requirements regardless of whether employees return to their place of work, or carry out their tasks in another place but their previous place of employment. The obligation to provide occupational safety and health requirements is such an employer obligation which, following the second-generation fundamental right of the employee[4] has been formed as its opposite.[5] It means ensuring such circumstances which fulfilment provides a guarantee to fully preserve employees' health and safety during the whole period of work. According to WHO, the phrase 'health' means employees physical, spiritual; and social state of well-being, as well as their mental and emotional health. Safety means a state free from harm or threat, where physical and psychological aspects also have to be considered. It depends on two separate activities: risk measurement and risk analysis. The aim is that work tasks are carried out safely, this is part of the operational process both on the level of the individual and the organization[6] Providing occupational safety and health requirements means to ensure safe environment, safe tools and safe procedures at workplaces[7] .

Every workplace has its own dangers, even those which are not always so obvious. However, seemingly harmless working conditions and circumstances may also lead to serious disadvantages. According to the justification of Act XCIII/1993 on Occupational Safety and Health, healthy working does not cause occupational disease, in case of safe working the physical and psychological effect does not cause accidents.[8] Access to safe and healthy work environment shall not influenced by employers' inappropriate management. [9] Life, physical integrity and personal rights are almost important social and individual values, they are the manifestation of human existence.[10] Society's expectation is that the community shall imply every possible measure that is necessary to ensure the smooth operation of people. Individuals are values, they are the keepers of the possibility of personal fulfilment. Ultimately, with the allocation of responsibility, the

[4] Article 3 of the European Social Charter contains the right to safe and healthy work

[5] Paragraph (1) of article 31 of the European Social Charter (2016/C 202/02)

[6] HOLLNAGEL, E., WOODS, D. & LEVESON, N.: Resilience Engineering concepts, Burlington, Ashgate, 2006. p. 2. https://erikhollnagel.com/onewebmedia/Prologue.pdf (date of download: 10. 12. 2021.)

[7] The expression of work conditions has to be interpreted based on article 156 of 2012/C 326/01 of the consolidated version of the Treaty of the European Union and the Treaty on the Functioning of the European Union (furthermore referred to as TFEU) according to the explanation of the Charter of Fundamental Rights of the European Union.

[8] BOLTON, Sharon C.: Dignity at Work: Why it Matters. https://strathprints.strath.ac.uk/13309/6/strathprints013309.pdf (date of download:10.12. 2021.)

[9] 1073/B/2006. decision of the Constituional Court

[10] BDT 2021. 4386.

justification of interest (besides ethical, moral and social disapproval) is assisted by lawmakers with the prospect of applying sanctions. Compensation for damage is the sanction of the infringement of personality rights (iniuria)[11] . Its highlighted function is compensation. Its aim is the increased respect towards personal rights and human dignity[12]. The protection of life, physical integrity and health can be derived from employers' obligation to provide occupational safety and health requirements and social rights of employees. The sanction of non-pecuniary loss consists of legal provisions of law and amount, as well as significant guidelines of jurisprudence.

Based on the above, I am going to discuss the following four hypotheses in my dissertation:

H1) Functions of compensation emerging in labour law are not identical and are not as serious compared to their function in civil law

H2) The legal system of conditions of labour law compensation is the lack of casual relationship with labour relation, the illicit behaviour of the employer, the violation of personal rights and circumstances excluding the reason for exemption

H3) The application of the legal institution of labour compensation reaches its compensatory and preventive function if and when the degree of sanction equals the social value judgement.

H4) The amount of the legal institutions also affects the legal basis of compensation.

In order to confirm or reject the hypotheses, I researched the below contents: (1) the fundamental law approach of human dignity and the right to life, physical integrity and personal rights, the social right of occupational health and safety is the obligation of employers to provide safe and healthy work environment both in the European Union and in Hungary, (2) the formation of the legal institution of compensation, legal basis and amount analysis of compensation applicable in labour law based on legislation and judicial practice, the processing of questionnaire connected to compensation and statistical data of court proceedings. In my dissertation I would like to present that the above hypotheses justify the necessity to apply compensation of due legal basis and degree.

Methods of collection

The aim of my dissertation is to present the legal institution of compensation being present in labour law and being justified by employees in case of the violation of life, physical integrity and health between 15th March 2014 and 15th September 2021 with the comparison of civil law compensation and the system of labour law liability. Based

[11] SMIED, Orsolya: A nem vagyoni kártérítés joggyakorlatának elemzése a magyar jogszabályok és a BGB alapján figyelemmel a jogintézmény fejlődésére. Jogi Fórum. 2001. p. 5

[12] ARANY, Tóth Mariann: A munkavállalók emberi méltóságának védelme. Miskolci Jogi Szemle. 2011/1. p. 41.

on these in my dissertation I will be able to demonstrate the legal system of conditions of employees' need towards compensation and the totality of factors influencing the degree of sanctions, which will clearly show the place of labour law compensation in the liability system. The results of the research are also compared with legal practice in my dissertation, which will reflect the real emergence of the legal institution. In order to obtain the targeted results of my dissertation, I endeavoured to the comparative overview of civil law and labour law, following the changes of non-pecuniary loss, their reasons and the legal institution's changing importance. I believe that before presenting the detailed rules, it is necessary to present the framework itself (right to and sources of non-pecuniary loss) as well as the change of law enforcement practice. After presenting the wider rules of the right of non-pecuniary loss I am going to narrow my research to labour law regulations. In its frames I am going to deal with employees whose rights have been violated, to be more precise, regarding the area of life, physical integrity and personal rights.

The subject and aim of the research strictly determine those methods which can be applied in my dissertation. The variety of research methods makes it possible that different methods help one another and the researcher in the process of learning. The subject of the research, as well as its research area and environment determine which set of methods help achieve the research area and environment determine which set of methods help achieve the researcher and the science the most optimal result[13]. According to STOKES, we differentiate between two basic research methods: the quantitative and the qualitative one[14] . I applied the method of quantitative research in my dissertation. Iván FALUS also differentiates between two big research groups, naming the exploratory methods (document analysation, observation, oral questioning, written questioning, method of sociometry, measurement of knowledge and psychological research procedures) and processing methods (statistical methods, quality analysis and procedures of meta pedagogy). From these I used the method of document analysis.

The objective side of the method of law and political sciences means the recognized legalities, while its subjective side means the investigation of the phenomenon based on legality, as well as their transformation[15]. The methods' three levels are the basic method, the general method and the specific research method. Methodological clarity is based on the basic and general method, the complexity of the methodology is based on the relationship between general and specific, the whole and part. Basic methods are the materialistic dialectic and the functional method. General methods are the historical-genetic, the systems theory and the comparative method. Specific research methods are

[13] BABBIE, Earl: A társadalomtudományi kutatás gyakorlata. Balassi Kiadó, Budapest, 2003. p. 127

[14] BONCZ, Imre: Kutatásmódszertani alapismeretek. Pécs, 2015. https://www.etk.pte.hu/protected/OktatasiAnyagok/%21Palyazati/sport/Kutatasmodszertan_e.pdf (date of download: 30. 11.2018.)

[15] SZILÁGYI, Péter: Jogi alaptan. ELTE Eötvös Kiadó, Budapest, 2014.

the followings: polemic-critical, concept analyser-logical, dogmatic, sociological, statistical and psychological. Based on the above, in my dissertation I aim at investigating with which aim, what harms, how, to what degree are sanctioned when the need for compensation is being justified with regards to the event that harmed employees' human right, constitutional right, fundamental right (protection of life, physical integrity, health) and occurred in connection with the employment relationship[16] . How and to what extent (with regards to legal basis or amount) certain (employee, employer) factual elements influence this. My research also covers the topic of the presentation of the historical development of non-pecuniary loss, at the moment called compensation, in a way that I would like to investigate what kind of aim it has in different periods, what the function of the legal institution is, so what the legal institution means in certain periods: private law penal measure, consolation prize, sentimental compensation, lump sum, prevention, compensation. What kind of harms are evaluated in the legal institution, having regard to that disappointment, annoyance, spiritual pain, grief can be evaluated these days. As the liability of the perpetrator stands in criminal law in the case of the thin skull rule, does it also reflect in the field of labour law? If employers are responsible for the invisible and intangible employee physical ability, can it be established in the case of mental, spiritual sensitiveness as well? If not, what is the reason? Can the irretrievable be restored? I would also like to examine court practice, analysing connections in a way that how employers' liability is established, whether liability is influenced by other variables, whether the given geographical environment or the employers' competitiveness and employee qualification has any significant role. Afterwards I would like to find the answer to how the degree of compensation is determined, what role does subjectivity, individual sensitivity and discretion play. Whether the degree of the ruled amount is affected by the growing acknowledgement of fundamental rights, is the decision on the degree influenced, can it be influenced by the employers' performance, economic importance, the number of employees or technical level. Whether can such objective corner points be determined from which practice does not deviate, which are independent from the political, social and economic environment. Based on the above-mentioned aims, one of the research strategies that I would like to apply is the qualitative research method, more precisely, research without intervention[17]

The usage of the materialistic dialectic method makes me able to determine and analyse the major changes with regards to the historical improvement of compensation. In frames of the general method I would like to discover – if possible – general legalities with the methodology of comparison relying on dogmatic or even psychological methods, therefore, logically analysing and systemizing the relationship of norm texts and concepts

[16] Szigeti, Péter: Társadalomkutatás – Mi végre? UNIVERSITAS-GYŐR Nonprofit Kft., Győr, 2011. p. 87.

[17] Hornyacsek, Júlia: A tudományos kutatás elmélete és módszertana. University of Public Service, Faculty of Military Sciences and Officer Training, Budapest, 2014. pp. 45-49.

being their core element, not ignoring the determination of significant facts and their social relationship that are important with regards to the legal institution.

In my research the independent variable (the reason) is the harm of life, physical integrity and health, the dependent variable (cause) is the non-pecuniary loss, while the control variable – among others may be – on the side of the employer: economic importance, level of technology, attitude of leadership, on the side of employees: qualification, age, marital status, geographical environment, which, as a rule of thumb cannot (shall not) influence the degree of compensation with which a given harm can be fulfilled. According to my point of view, among the qualitative research methods, the research applying the method of intervention does not lead to relevant results in this research area as nonverbal tools do not play a role in the determination and occurrence of harm and compensation, in the relationship between them, or in the control factors either, hence, interview, deep interview and professional interview are omitted here. As far as I am concerned the polemic-critical and concept analysing logical method do not bring me closer to achieve my above-mentioned goal either, as not the inner inconsistency, the logical inconsistency is the way towards answering the above asked questions. Besides the above, during the preparation of my dissertation one of the forms of empirical research, the descriptive method, has played a significant role, as researches of descriptive nature „can be very useful in the case of practical oriented researches, as they are able to provide a comprehensive picture regarding certain problematic areas, hence facilitating the foundation of necessary reforms"[18] I also applied the qualitative method of empirical research which also includes field study, so that the researcher is integrated in the subject of the research as a so called observer, is integrated into the participants of the legal case and to the given social environment in which it all happens, also, the researcher „has to thoroughly study all those documents which play a role in the process."[19] I also used the research method of quantitative study including more sampling techniques, too.

In the case of quantitative data it is important that they are reliable. They are considered as reliable if „the repeated procedure brings the same results"[20]. In my dissertation I would like to provide a comprehensive picture of those major changes that happened in the last couple of years and affect the institution of compensation. Therefore, at the beginning of the dissertation I am going to provide a labour law dogmatic overview of the protection of life, physical integrity and health, followed by their regulation. I am also going to provide an international outlook with regards to certain European states.

The dissertation also contains general considerations established by ILO, the European Court of Justice and the European Court of Human Rights, and provides a domestic historical overview. This is followed by the analysis of the system of legal

[18] JAKAB, András – MENYHÁRD, Attila: A jog tudománya. HVG-ORAC, Budapest, 2015. p. 119.
[19] JAKAB – MENYHÁRD op.cit.: (2015) p. 121
[20] JAKAB – MENYHÁRD op.cit.: (2015) p. 122.

conditions for labour law and the factors of amounts. Finally, I highlight the problems that occur during law enforcement. Summary is closed with my final thought which include conclusions and evaluations coming from the practice.

Therefore, my primary research method is the analysis of legislation's texts – Fundamental Law of Hungary, the Civil Code, and the Labour Code – of which I primarily have special literature in Hungarian. The centre of the research is the modification of the sources of law. Accordingly, during the processing there is more highlight on the temporal method of comparison of law than the territorial one, which – according to what has been already mentioned – I apply at the identification of the models. Besides field study – which necessity with regards to my dissertation has already been mentioned above – I would also like to apply the other typical form of "non-intrusive qualitative, discursive methods", namely, the content analysis, since "the operation of the legal system mostly depends on literacy"[21]. In my dissertation I aim at the comparison of the Civil Code's and the Labour Code's regulations as well as the old and the new regulations, therefore, the focus of the research of the compensation wished to justified by the employees is on the changes of functions. After finishing an empirical-like study we can only give an adequate answer to a central question if the researcher gathers relevant information and knowledge through as many examples as possible – in our case, with court decisions.[22] Based on all this, besides the processing of cases connected to compensation in the labour law area of the database of the Curia of Hungary, my dissertation also contains their caseload statistical data, as well as the statistical analysis of answers given to the questionnaire of social expectation with regards to compensation, completed by randomly chosen individuals.

Among the qualitative nature research methods, I would like to determine circumstances affecting the amount of compensation, the forint value of the deal with the help of written document analysis that is, inner analysis of court decisions. Based on the quantitative research method with using the electronic database I narrowed the judicial case law to labour law and civil law decisions, more precisely to decisions made by the highest court and more significant courts of second instance in the topic of the violation of life, physical integrity, health and personal rights that is, my aim is the collection, analysis of the chosen decisions based on the stratified sampling, followed by their general determination in the light of the factors.

[21] JAKAB – MENYHÁRD op.cit.: (2015) p. 128.

[22] MÁTYUS, András: A sérelemdíj funkció-analízise. In: Debreceni Jogi Műhely 2020. (XVII.) 3-4. Debreceni Egyetem Állam- és Jogtudományi Kar, Debrecen DOI 10.24169/DJM/2020/3-4/9. p. 114.

Brief summary of the scientific results

In reality, right to life, physical integrity and health coming from human dignity protects the health of humans as legal subjects throughout its different dimensions. Nowadays the right to health also means bodily-physical, mental-spiritual and social health as well. The compensation of the non-pecuniary loss occurred with the violation of the above-named personal rights greatly divides the labour law regulation of European states these days. States have various legal regulations and ruling practices due to the different social thinking and concepts. As for Hungarian lawmakers, the codification of the legal institution of compensation has become absolutely necessary. Jurisprudence permanently helps in that it makes the formation of the greatest degree of legal certainty possible. [23] Employees are entitled to request more sanctions in the case of accident or occupational disease. For the violation of personal rights, they can only ask for compensation. As far as I am concerned, the below guiding principle can be set with regards to the institution of compensation. The liability system of compensation is relatively separated from liability for damages. On the one hand, this partial separation can be viewed as its provisions are situated in the beginning of the factual law's normative part, at the part of the rules for personal rights, on the other hand, in its certain elements there is a referral to the provisions of employers' objective liability for damage: in the area of the person obliged to pay compensation, the legal system of conditions of the liability and the degree as well. Violation of interests not protected by law has to be differentiated from the violation of personal rights.[24]

Hypotheses presented at the beginning of the dissertation can be justified according to the followings:

H1) hypothesis, according to which the functions of compensation in labour law are not identical and do not have the same weight as the functions in civil law, can be justified according to the followings. Functions of compensation in civil law: compensation, private law penalty (repressive) function, next to which special prevention appears as a supplement. The emphasis is on compensation. As far as I am concerned, in labour law not 3 but 4 functions emerge and the emphasis also shifts. The most significant function of damages is compensation. Though advantages provided by compensation cannot be sensed in every single case (for instance in case the victim is in an unconsciousstate), so a special function, the humane function also emerges. Having regard to that the employer, based on its objective responsibility, is obliged to compensate the violation of personal rights due to its illegal behaviour, so the private law penalty function (retortion, repressive function) does not become significant in every single case. Employers are obliged to pay compensation regardless of their imputability and culpability. However, preventive

[23] AARNIO, Aulis: Jurisdiktion und Demokratie. Abhandlungen und Aufsatze Rechtstheorie. Vol. 30. Issue 2. 1999. p. 142.

[24] PARLAGI, Mátyás: A sérelemdíj iránti kereset elutasítása és a hátrány kutatása. Jogtudományi Közlöny. 2018/9. p. 378.

function has a more highlighted role than in the function of compensation applied in civil law, also, general prevention also emerges next to special prevention. The reason is that sanction not only affects parties to the proceedings but also to all other employees of the employer, also representative bodies also emerge on the side of employees which represent more employees.

According to hypothesis H2) the legal set of conditions of the compensation in labour law is the employment itself, the illegal behaviour of the employer, the violation of personal rights, the casual relation between them and the lack of circumstances excluding the grounds for exemption. As a result of the analysis, we can state that the precondition of legal set of conditions of the compensation in labour law is (1) employment, which means that the violation of personal rights happens during the course of the employment (2) and in connection with it according to paragraph (1) of 166. § of the Labour Code. Labour law positive legal basis conditions of compensation: (3) the behaviour of those who the employer has responsibility of (4) illegality of the behaviour, (5) violation of personal rights and (6) casual relation between these. The violated employee determines the employer's behaviour of illegal violation of personal rights. The idea is also valid in labour law disputes, according to which the violation of personal rights de facto does not necessarily form the basis of being entitled to compensation[25]. With regards to establishing the legal basis there is no need to prove further disadvantage besides the fact of violation. This means that the violated person has to name the violated personal right, besides he has to assert his claim against the employer as well as prove the above-named circumstances. The labour law negative conditions of compensation are defined by points a) and b) of paragraph (2) of 166. § of the Labour Code. Negative legal basis conditions are: (7) circumstances outside its area of responsibility, (8) which could not be foreseen and (9) was not expected that the circumstance causing the non-material damage could be avoided or averted by the employer, also, (10) the exclusive and unavoidable behaviour of the victim.

According to hypothesis H3, factors affecting the degree of labour law compensation in labour law – besides what is established in civil law – are predictability, contribution of employees and partial exemption by court. Based on the above, this hypothesis can be justified in a way that factors affecting the degree of labour law compensation in labour law – besides what is established in civil law – are predictability, contribution of employees and partial exemption by court. Predictability, expressed in paragraph (1) of 167. § of Labour Code is evaluated individually, at the point when the consequences of the violation of personal rights appear, as a factor of decreasing responsibility. Based on the casual chain those non-material violations can be evaluated at the employer's expense which cannot be predicted with regards to the given employer in advance but can be seen in connection with the illegal behaviour in general. Based on paragraph (2) of 167. § of the Labour Code, no liability shall apply to the portion of the damage resulting from the

[25] Csitei, Béla: Személyiségi jogok az egészségügyben. Polgári Jog Lap - Polgári Jog 2017/9. – Study p. 9.

employee's wrongful conduct, however, it influences the degree of compensation. Wrongful conduct of employees can be evaluated here, therefore, the innocent behaviour (recklessness, imprudence, clumsiness, not choosing the best possible method) not. With regards to evaluating whether the given act was wrongful or not, no. 5 of the MK provides assistance. According to their standpoint, intentionality can be determined if the violated employee foresees the harmful consequences of his act (failure) and he wants them (direct intention) or accepts them (conditional intent - dolus eventualis). Negligence can be determined when the victim foresees the possible consequences of his act or failure, however, he carelessly believes that they will not occur (reckless negligence) or does not recognise the possible consequences of his act or failure because he misses the attention and care expected of him (negligence). In the case of negligence there is no culpable victim behaviour. Besides the wrongful act, the failure of the victim's duty to mitigate loss also has to be evaluated with regards to the contribution of the victim. In the frame of negligence the legislation does not demand nor culpability neither imputability, however, it has to be accomplished by the victim. With regards to the obligation of damage prevention, damage control and mitigation, labour law only acknowledges compensation as a contributing factor. One of the acceptable reasons could be that the victims find themselves in a situation where their personal rights are violated due to the illegal behaviour of someone else, furthermore, due to the economic powers and risksharing lawmakers wish to determine milder obligations with regards to the victim than in civil law relations. In my research the fourth hypothesis is connected to the relationship between the legal basis and degree of compensation.

According to hypothesis 4), the amount of the legal institution has effect on the legal basis of compensation. Based on the above, the following answer can be given to the hypothesis. In labour law, the main function of damage is compensation, in case of unconscious victim is being human-based. Repressive function (private law punishment, retortion) in itself cannot be a factor, therefore, this function is provided by criminal law. Preventive function (special, general) cannot emerge without compensation, since this function in itself has a role in administrative law. In those cases where the degree of compensation applied as a result of the violation of personal rights is trivial, a small amount, and the violated plaintiff's claim is justified to such a degree, the function of compensation cannot meet the social expectations and the requirements established by the legal institution. Having regard to that in case all legal factors are established the claim – considering the degree of legal consequences – is rejected that is, the amount affects the legal basis. Based on all the above, the following guiding principle can be given with regards to the compensation of employees in labour law. The liability system of compensation is separated from the responsibility for damage in a relative way. This partial separation can be viewed in a way that on the one hand, the provisions take place at the beginning of the subjective law's normative part at the rules of personal rights, on the other hand, there is a referral back to the provisions of employers' objective responsibility of damage in the part of liability for damages, system of legal conditions of

liability, as well as its degree. The harm of interest not protected by law has to be differentiated from the violation of personal rights.[26]As far as I am concerned, the Labour Code should contain a unified opinion in at least the most important questions (failure to prove disadvantage, inapplicability of the principle of full compensation, incomprehensibility of residuum). After establishing the comprehensive theoretical and practical bases these principles, regulations need to be processed and formulated in legislations as well, which can then be applied in courts as part of their legal development role and not only as part of their legal interpreter and law enforcement role.

In comparison with civil law, in the case of compensation applied in labour law the emphasis is on compensation every single time. I personally believe that with regards to its hierarchical and permanent nature, the objective responsibility of the employer and the obligation of ensuring safe working environment, the special and general preventive function also have a highlighted role besides the function of compensation. If the element of culpability also emerges in the illegal behaviour of the employer, then the repressive and the retaliatory (private law punishment) function also reaches its aim. However, the superiority ensured by the compensation connected to personal validation cannot always be perceived by the conscious of the victim. Taking this into account, I believe that humane function should also be given a role here. If the accident, the occupational disease is to such a degree that the employee is temporarily or permanently in an unconscious state, it cannot result neither in the exemption of the employer (excluding responsibility) nor in the limitation (decreasing) of its responsibility. The precondition of compensation's legal basis adhering to employees in labour relations is a casual relation between the probable labour relation by the employee and the violation of personal rights, its positive conditions are the illegal behaviour of the employer and the wellknown, probable and proven non-material violation of personal rights, as well as the existence of casual relation between them. In case of the absence of any condition victims are not entitled to have compensation.

The connection between the illegal behaviour and the violation of personal rights causing non-material harm is established by law. The negative conditions of compensation are the lack of exemptions proven by the employer. If the causes of the accident or the occupational disease cannot be discovered, then the employer cannot be exempted. Among factors decreasing responsibility, besides examining all circumstances of the given case, the clause of predictability appears individually, without further conditions; the wrongful conduct of the employee and the imputable failure of his duty to mitigate loss; as well as the partial exemption by court appears. With regards to the clause of predictability we must note that based on court practice the peculiarities of the victim's subject (based on the doctrine of thin-skull) cannot result in circumstances limiting liability. Contribution of employees can only be taken into account if the victim

[26] PARLAGI, Mátyás: A sérelemdíj iránti kereset elutasítása és a hátrány kutatása. Jogtudományi Közlöny. 2018/9. p. 378.

is guilty or blameworthy. Based on court practice judicial fairness can only be practiced if employees are liable in the illegal behaviour. Equity may result in decrease over the degree of the function of compensation, within the frames of preventive function.

The legislation does not state the degree of responsibility with taking the exhaustive listed factors into account. The court allocates the degree of compensation based on the available and obtained evidences, in their discretion and judicial common sense, in its free consideration.[27] It also needs to be examined whether the victim marked its claim for compensation in the petition in a trivial amount, also, whether the non-material harm connected to the given violation of personal right is trivial. In these cases, in spite of the existence of the legal bases of the legal institution of compensation, the action is rejected due to the amount. In such cases victims cannot ask for compensation but they have the grounds to ask for the application of other sanctions due to the violation of personal rights.[28]

As far as I am concerned, with lying down the main principles formed in my dissertation compensation may become decisive both with regards to its legal basis and amount after fulfilling the expectations of legal certainty. We also have to take it into account that the variety of personal rights and the personal circumstances' difference do not make the exact, concrete, unalterable determination of degree possible in advance,[29] that is why basic principles and appointed standards play a significant role.[30] With regards to applying compensation[31] – I believe – not just equity but moderation also needs to be taken into account.[32] Based on all these, the legal institution is going to be legal and predictable[33] together with the evaluation of legal practice[34], and all the dimensions of

[27] BURNS, Kylie: Before the High Court Liability for Workplace Psychiatric Injury and Vicarious Trauma: Kozarov v Victoria BURNS, Kylie: Before the High Court Liability for Workplace Psychiatric Injury and Vicarious Trauma: Kozarov v Victoria. Sydney Law Review, Vol. 43. Issue 4 2021. p. 583

[28] HORVÁTHY, István: Kikérem magamnak! A személyiségi jogok megsértéséért járó sérelemdíj. Adó szaklap. 2015/12-13. p. 142.

[29] OSZTOTVITS, András (eds.): A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja. I. kötet. Opten Informatikai Kft., Budapest, 2014. p. 343.

[30] FERENCZ, Jácint: Jogalkotás a munkaviszonyok szolgálatában. A munkajogi szabályozás gazdasági és társadalmi kihívásai. UNIVERSITAS-GYŐR Nonprofit Kft., Győr, 2018. p. 130.

[31] A modern polgári jogok személyiségi jogi „értékmérője". BARCZÓ, Tímea: A sérelemdíjról a jogtudós alkotmánybíró, bíró és polihisztor szemüvegén át. In: LANDI, Balázs – KOLTAY, András – MENYHÁRD, Attila (eds.) Lábady Tamás emlékkönyv. Wolters Kluwer, Budapest, 2019. p. 146.

[32] KRAJECZ, Laura: A munkavállalók személyiségi jogainak védelme, különös tekintettel a sérelemdíjra. Munkajog. 2019/4. p. 63.

[33] ASZALÓS, Dániel: A közigazgatási szerv önálló felróhatósága? A felróhatóság értelmezése a Kaposvári Törvényszék 8.P.21.562/2015/9. számú és a Pécsi Ítélőtábla Pf.VI.20.050/2016/5. számú ítélete tükrében. Polgári Jog Lap - Polgári Jog. 2017/6. p. 10

[34] GÖRÖG, Márta: Gondolatok a személyiségi jogsérelem csekély volta esetén érvényesítendő sérelemdíj iránti igényről. In: JAKAB, Éva – POZSONYI, Norbert (eds.) Ünnepi kötet Dr. Molnár Imre egyetemi tanár 80. születésnapjára. Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Szeged, 2014. p. 167.

human characteristics protected[35], resting on firm bases but at the same time being flexible enough.[36]

[35]LÁBADY, Tamás: A nem vagyoni kártérítés metamorfózisa sérelemdíjjá: a bírói gyakorlat kezdeti dilemmái. Polgári Jog. 2016/3. p. 5. 36

[36] VARGA, Dóra: A sérelemdíj fogalmi alapkérdései a munkajogban. In: SISKA, Katalin – TALABOS, Dávidné – LUKÁCS, Nikolett (eds.) Tudományos Diákest Tanulmánykötet V. Debreceni Egyetem Állam- és Jogtudományi Kar, Debrecen, 2018. p. 141.