FREE LAW JOURNAL

Volume 1, Number 1 (July 18, 2005)

ISSN 1712-9877

IN THIS ISSUE :

FREE WORLD PUBLISHING Inc. @ http://www.FWPublishing.net

The Free Law Journal results of a merger with the Eastern European Law Journals. It builds upon this previous success and aims at providing the freedom of publishing juridical research from everywhere and on all subjects of law. Its goal is to promote respect of the rule of law and the fair application of justice by sharing juridical research in its pages.

Academics, post-graduate students and practitioners of law are welcome to submit in the academic section their articles, notes, book reviews or comments on any legal subject, while undergraduate students are welcome to publish in our student section. The list of fields of law addressed in these pages is ever-expanding and non-restrictive, as needs and interests arise. If a field is not listed, the author simply needs to propose the article and the field believed of law applicable; we will insure to create and list it.

We accept articles in English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portugese (both Brazilian and European), Romanian, Russian, Serb (both Latin and Cyrillic), Slovenian as well as Spanish.

Articles not in English are provided with a synopsis to explain their content. Articles of exceptional quality, or requested to be, can be translated into English and/or French. All of this is the measure of freedom we provide.

The material submitted for publication remains copyrighted to the author. If the author has interest in publishing elsewhere after having published in our pages, no permission to do so will be necessary. The author remains in full control of his or her writings. Articles of superior value will be considered for incorporation in collective works for publishing. We always accept submissions. To submit, please read the submission guidelines or ask us any question at : FLJ@FWPublishing.net .

List of subject addressed (as it currently stands - subject to modifications as need arise)

Administrative Law	**Family law**	**Private International Law**
Admiralty law	**History of Law**	**Private law**
Antitrust law	**Human Rights Law**	**Procedural law**
Alternative dispute resolution	**Immigration Law**	**Property law (Public)**
Anti-Terrorism	**Intellectual Property Law**	**International Law (See International Law (Public))**
Bankruptcy	International trade law	**Refugee Law**
Business Law	Patent	**Religious law**
Canon Law	Trademark Law	***Islamic Law (Sharia)***
Civil Law	**International Humanitarian Rights Law**	Qur'an
Common Law	Laws of Armed Conflicts	Sharia
Comparative Law	Laws of war	***Jewish law (Halakha)***
Constitutional Law	War Crimes Law (Belgium)	Hebrew law (Mishpat Ivri)
Contract Law	**International Law (Public)**	Talmud
(Consuetudinary law)	Diplomatic Relations	Taqlid
Obligations	Jus Gentium	***Christian (other than Canon Law)***
Quasi-contract	Treaties Law	Twelve Tables
Corporations law	**Labor law**	**Roman Law**
Criminal Law	Law and economics	**Sacred text**
Organised Crime	**Law and literature**	**State of Emergencies Laws**
Criminal Procedure	**Medical Law**	**Space law**
Cyber Crime Law	Public Health Law	**Tax law**
Penal law	Public Law	**Technology law**
Cyber law	Malpractice	**Torts Law**
Election law	Mental health law	Quasi-delict
Environmental law	**Military law**	**Trusts and estates Law**
European Law	**National Legal Systems -** (Laws of any national legal system that is not of a precise category)	Liens
Evidence Law	Nationality and naturalisation Laws	**Water law**
	Natural law	**Zoning**
	Philosophy of Law	

Free World Publishing is a partner of the Free European Collegium, provider of web-based, e-learning education in matters related to the European Union.

All mail correspondence can be made with the editorial board at Karikas Frigyes u.11, 2/1, XIII kerulet, 1138 Budapest, Republic of Hungary, while electronic correspondence can be made through FLJ@FWPublishing.net .

Cited as (2005) 1(1) Free L. J.

ISSN 1712-9877

Free Law Journal Submission Guidelines

Important. The following is not meant to discourage from submitting; only to ensure quality. If your article conforms to your own national standard of writings, we accept all and any format as long as arguments are justified by footnotes or endnotes. Never hesitate to submit an article : if there is a need for improvement, we will inform you and we will always remain open for re-submissions.

1. Academics, Post-Graduate Students and Practitioners of law are all welcomed to publish their book reviews, comments, notes and articles.

2. All legal subjects are considered for publication, regardless of the legal tradition, national or international field of expertise. The only limit to the extend of our publishing would be content that is illegal in national legislation (i.e. enticement to hatred) or against international norms (i.e. promoting genocide).

3. Articles are welcomed in English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portugese (both Brazilian and European), Romanian, Russian, Serb (both Latin and Cyrillic), Slovenian as well as Spanish. Note that our staff is limited and therefore we use "Word Recognition Processors" to communicate in some languages. Nonetheless, this does not prevent understanding articles submitted in these language and we are not interested in measuring every word of your article : simply in publishing your writings. Therefore, we will review the general content, but leave with you the precise sense and meaning that you want to convey in your own language. If translation is desired by the author, we then submit it for translation to a translator.

4. Their is no defined system of reference (footnotes or endnotes) demanded. As long as you justify your argument through references (author and work), we accept all writings respecting your own national standards. Exceptions : For Canadians, the Canadian Legal Guide to Citation is recommended but not mandatory. For Americans, referencing is expected to be in accordance with Harvard University's The Bluebook, A Uniform System of Citation. Any breach of copyrights is the sole responsibility of the author.

5. The author retains the copyrights to his or her writings. As articles are unpaid for, ownership remains within your hands. We act as publishers and caretaker. Nothing prevents you from publishing elsewhere. You may even decide to have the article taken off this site if another publisher desires to buy the rights to your article.

6. We reserve ourselves the right to edit the content or length of the article, if at all necessary.

7. We do not discriminate in any way. Our aim is to bring under one roof perspectives from everywhere and everyone. Never hesitate to submit.

8. If you desire information or desire to submit, do not hesitate to contact us at : FLJ@FWPublishing.net.

EDITORIAL

Welcome to the first issue of the Free Law Journal, a print and electronic journal aiming at promoting respect of the rule of law and the fair application of justice everywhere through the sharing of juridical research.

While the Free Law Journal is a new publication as such, it builds upon the previous year of activities of the *Eastern European Law Journals*, and merged within the *Free Law Journal*. It builds upon those previous success and extends the previous purview of activities to all types of laws across the world. So far, we are receiving a high volume of articles in particular from Central and Eastern Europe. We continue to welcome those and encourage even more academics from the Middle East, the Maghreb and Northern, Central and Southern Africa to submit their articles. We desire to be truly international in scope and to offer comparative point of views in order to sustain the development and maintenance of the rule of law everywhere. As such, all articles are welcome and none are refused on principles : all that are accepted are so on merits.

Turning to our new publication, we hope that you will join the sharing of your research though us and that you will contribute to supporting the rule of law. This point is a major one as avery little step in the development of a coherent and respectful system of law counts everyday.

Indeed, the last century of development of legal systems everywhere has been truly amazing and developments under the United Nations' system in the last 60 years has provided much in way of comparaison of national and international perception of what law is and should be, in accordance with cultural imperative.

Sadly, as ideas and commitment by some to the rule of law develop, there are always setbacks and attacks on the respect of human rights, the rights to a fair trial and simply the administration of proper justice within a nation and at the international levels.

This, with the previous acceptance of subjugation in international law, has led Africa to be drawn into illogical boundaries, engendering many conflicts that otherwise could have been avoided through the years. The opposition of the right/left dialectic during the cold war further contributed to many acceptance of regimes deny the respect of human rights and the very denigration of justice through corruption. From Central to South America ; from East to Far Asia, from Western to Eastern Europe, no country has been without period of profound questionments of its legal system, reforms or attacks from within and without.

As we witness oday further imbalanaces on the international stage, from Bosnia to Palestine, from Iraq to Belarus, from the Congo to Kashmir, in is evident that the rule of law is often subverted by the imperative of politics and the rule of might.

Still, there are courageous jurists everywhere condemning violations of justice and demanding its fair application to all, in equality. Those jurist, supporting and aiding to develop civil society, are the hope for a better future under the guidance and fairness of the law.

We hope that you will be part of this and that you will forge ahead in sharing your reasearch and helping establish common legal norms.

With hope,

Louis-Philippe F. Rouillard
Editor-in-Chief, Free World Publishing Inc.

DEMOCRACY OF HISTORY

by

DR ANWAR FRANGI * *Maître de Conférences-Chercheur (USEK)*

TABLE OF CONTENTS

ABSTRACT

This article presents an argument for the creation of a new type of democracy, namely, Democracy of History, for addressing the issues to which modern democracy has not been able to address itself. Democracy of History rests on this primary principle, *that participation in the government is based on participation in the evolution of history in all its forms.* This article is not meant to be a thorough study of Democracy of History. It only inquires into the identification and justification of the main issues Democracy of History raises. This required, at this stage, using philosophical concepts to lay the foundations of Democracy of History, which prepares the ground for dealing with much complex and practical questions, such as *whether determining a group's historical participation is possible*, or *whether participating in their government is possible for groups based on their historical participation*, or *whether the world is in need of a new type of government based on the principles of Democracy of History*.

---

* ***LL.M.*** 1995, Harvard University Law School (Massachusetts, USA); ***LL.M***. 1992, American University Washington College of Law (Washington, D.C.); ***Doctorat en droit*** 1986, University of Poitiers Law School (France); ***D.E.A***. 1983, University of Poitiers Law School (France); ***LL.B.*** 1982, Lebanese University Law School (Lebanon). Dr. Frangi is full-time Senior Lecturer-researcher at the Holy Spirit University of Kaslik (Lebanon), and professor of international law and philosophy of law at La Sagesse University Faculty of Law (Lebanon). This article is taken in substantial part from a paper submitted to Harvard Law School on May 23, 1995.

INTRODUCTION

A. SUBJECT-MATTER OF DEMOCRACY OF HISTORY

1. THE IDEA OF GROUP

1. The inclination to be part of a group belongs by nature to all human beings. A sign of this is man's ability to form a language, and to laugh. For language and laughter are the proper human tools by which human souls associate. It might be contended that some men are not inclined to be in groups, and therefore that this inclination does not belong to the nature of man. I cannot agree. Some individuals might be prevented from being part of a group because the performance of a creative activity requires solitude, or because of political, religious, or social reasons.

2. HIERARCHY OF GROUPS

2. All animals are alike in the respect that they possess by nature a certain kind of interaction; for every animal is defined by its place in nature. Most animals, however, live individually, and their groupings are often mediated by the environment. Nevertheless, some animal groups, such as termites, ants, bees, and wasps, display intimate behavior, although their group activities reflect largely unlearned patterns of behavior. Other animal groups operate less by inherited instinct than by almost learned behavior. This is mainly true of chimpanzees, but can also be found with fish, wolves, birds, and deer.

3. The ability to transmit information proves that memory exists in some animal groups, since understanding among members of the group follows a certain standard system of communication. Memory, however, means one thing to animal groups, and another thing to human groups. Human groups have a memory because they can produce culture, and, therefore, make a history, for it is the culture of the group as a whole that is transmitted from generation to generation. This is done by means of language, the unique human sign of a group's memory, and its way of life. But, in animal groups other than human, the ability to group for avoiding certain things because of a natural instinct is only called prudence and, therefore, memory.

4. The association of many singular "intensions" received in a group's memory can produce a group's experience.[1] An indication of this is found in certain types of actions which, though committed against individuals, are remembered by those individuals to be committed less against their persons individually than against their group collectively. Genocide, for example, is a type of group crime even when it is committed against some individuals who belong to that group. It is said that the group as a whole survives the genocide when only few individuals actually survive.

5. A group's experience, then, arises from a group's memory, since certain types of things are avoided or accepted in the future based on the remembrance of certain things that occurred in the past. Still, it can arise from a group's self-consciousness, and becoming. Singular activities that make provisions for the group's future are also parts of the group's experience. Thus, experience is not only a reflection of the past, but also a participation in the becoming; for becoming is the perpetuation of groups' identity, and necessarily arises from an association of many experiences. Since participation in becoming finds its best expression in thought, experience, then, is most appreciated where it is concerned with thought.

[1] *See* ARISTOTLE, METAPHYSICS, Bk. I, I, 4 at 5 (Loeb Classical Library, Harvard University Press: 1989): "It is from memory that men acquire experience, because the numerous memories of the same thing eventually produce the effect of a single experience."

6. Thought can experience becoming at the level of imitation. This kind of becoming is primarily found among some animal social groups; for it is by an inherited instinct, thus by an imitation of nature, that these groups survive. So it is by imitation that the activities of social animals, such as bees, are transmitted from generation to generation. This kind of becoming is, however, found at the lowest level among human groups because the imitating group survives, and perpetuates its identity, by mediation of the imitated group. Also, thought can experience becoming at the level of intellectual activity, since it is the proper growth of a group, where to rise to historical self-awareness, to refute imitation, in a manner similar to the proper growth of human beings, where stepping into adulthood requires revolt against basic social ideas of dependency. Group thought can most experience becoming at the level of creative activity, for it is in creation that a group most rules over facts, and, therefore, can perpetuate for generations.

7. Thus, the democracy we want to propose deals with *groups*. But, since every group is constituted of individuals, it is, therefore, also concerned with *the individual as part of the group*, and the *individual simpliciter*. And the reason we are undertaking this study is that, since every individual is by nature inclined to be in a group, and since modern democracy considers that people rule only as individuals, a democracy that considers individuals must therefore also be one that considers groups.

8. If our democracy is concerned with groups, we must show what kind of group with which it is concerned. Understanding would be helpful for us, first, how the "rule of the people" is conceived under modern democracy, and second, what kind of group our democracy wants to investigate; for a group is part of the people; and to understand the part we must first understand its whole.

9. It is considered that democracy is the rule *by the people*, made *out of the people*,[2] since, just as a thing is governed by its *source* in the manner of an activity by its idea, so people's rule must be governed by the people. Also, in order for the people to rule, the rule of the people must be made *for the people*, since just as in order for a thing to be considered perfect it must be united to its source, as St. Thomas Aquinas states, for example, the starting and the ending point in a full circle, so the rule of the people must be made for the people. Still, for the people to rule, the rule must be made *for the common good of the people*, since just as the artist's activity is directed to the completion of the artist's idea, for an idea finds its satisfaction when it is completed, in a similar way the rule of the people is said to satisfy the people when it is completed for the common good of all people.

10. Now, the group is part of the people. And a group may participate in the government based on three precepts: (i) When a group participates in becoming, namely, in the evolution of thought; (ii) When the group's participation is made for the benefit of the wide world, and (iii) when the group's participation deals with the essence of things, and not only with their existence; for to participate in the development of the most basic principles that rule over the world at all times is most noble, yet most fruitful to all the world over.

11. From what has been said, then, our democracy is clearly concerned with groups, and primarily with historical groups, and a group is qualified as historical if it participates in the evolution of thought.

B. NATURE OF DEMOCRACY OF HISTORY

12. That this democracy is not a national or regional democracy is clear from the historical group's activity. It is because of the universal character of a group's activity that an influence can be exerted on history as a whole. Now the influence that a national or a regional group can exert on the history of

[2] *See* Alan Ider, "The American Democracy and Judicial Review", 33 ARIZ. L. REV. 1 (1991).

its region or state is related to that exerted by a group on history as a whole, as form is related to substance. Just as substance is prior to form in essence, and grounds its existence, so world history is prior to national or regional history, and grounds its existence. An idea that has participated in the evolution of world thought will certainly contribute in the evolution of national or regional history. Khalil Gibran, a Maronite Lebanese-American, has tremendously revolutionized the use of Arabic language in the Arab world. Gibran, however, was, in turn, deeply influenced by Friedreich Nietzsche, the German philosopher whose writings have more participated in the evolution of the world thought than Gibran's have, although passages from the latter's PROPHET, have been widely read, in lieu of passages from the New Testament, during marriage ceremonies in Protestant Churches in the United States, and in the wider world.

13. This democracy, then, is a *Democracy of History*, a historical science that studies historical groups, *i.e.*, groups which have participated in the evolution of thought.

14. Having defined first what this democracy is concerned with, and then what it is, namely, Democracy of History, I must now show what this democracy intends to do with that with which it is concerned.

C. OBJECT OF DEMOCRACY OF HISTORY

15. If the aim of Democracy of History is to show how a group is entitled to participate in its government based on its participation in the evolution of thought, establishing knowledge about this right, then, would justify this democracy's ultimate goal, namely, that there should be a new type of government that would answer to the common good, and thus resolve the individual-group conflict within the idea of democracy today.

16. From what has been said, then, the subject-matter of Democracy of History is evidently to consider groups, and, particularly, historical groups; that it is not by nature a national or regional science, but a historical science that studies the participation of groups in the evolution of thought ; and that its aim, to which this whole inquiry is directed, is to know how historical groups are entitled to national or regional participation, thereby answering satisfactorily to the common good.

17. I still have to show how Democracy of History uses that with which it is concerned to reach its aim, namely, how it defines its issues, and uses its principles, and subject-matter, so that it may reach its ultimate goal.

PART I: THE ISSUES RAISED BY DEMOCRACY OF HISTORY

18. To appreciate a thing is to appreciate it within its environment. Since Democracy of History is part of democracy, we must, then, appreciate the issues raised by Democracy of History within the issues raised by democracy in general.

A. THE ISSUES UNDER DEMOCRACY OF HISTORY TAKEN *INTER SE*

1. GENERAL ISSUES

19. That democracy of today encounters problems is evident from its source, aim, and means. If the people are the ultimate source of a democratic government, then Democracy of History wants to know

how, for example, it is possible that the American Constitutional Convention created the basic law in Philadelphia in 1789, for a nation that did not yet exist; and how it is possible that the Charter of the United Nations was shaped at the Congress of nations in San Francisco in 1945, for a world nation that did not yet exist. Also, granted the establishment of a government, Democracy of History wants to know why the concept of people, which has also been conceived as the ultimate aim of a democratic government, does not include the concept of group under modern democracy, and why equality and liberty, which are conceived as the elements of modern democracy,[3] apply to individuals, to the exclusion of groups. If "all should have some share in the government," as St. Thomas Aquinas states, and if "all" denotes the nature of human beings, so that every individual would be entitled to the rights given to all human being by virtue of being human, Democracy of History wants to understand, then, why the idea of 'group' should be excluded from this nature, when *all men are by nature inclined to be in groups*. The fact that in some countries, such as Lebanon, modern democracy applies to groups, all religious communities having some share in the government, does not refute the fact that it does not deal with groups. Even as all communities live together in Lebanon, which is a sign of liberty, and all have a share in the government, which is a sign of equality, the liberty and equality of the Lebanese citizen are still affected. For the Lebanese citizen would lose major civil and political rights, such as the right to vote, the right to marry, and the right to rule, if he or she would choose not to belong to a particular religious community.

20. Still, there is the problem of the means used by modern democracy. For "all" expresses the need of political services given to "all" through the right to vote. But, the right to vote is in many ways altered by many other democratic means, such as the media, or the charisma of the leader. Therefore, what is called a rational vote under modern democracy appears to be irrational under Democracy of History, indeed.

21. After pointing out, in general, the problems which modern democracy faces, I must now point out, in particular, how these problems should be approached in relation to Democracy of History.

---

[3] *See, e.g.*, HOBBES, LEVIATHAN, Part II, Chap. XXI (Bobbs-Merrill Co., IN: 1958); LOCKE, TREATISE ON CIVIL GOVERNMENT, Chap. IV ("Of Slavery"), Sec. 22, p. 16; Chap. VI ("Of Paternal Power"), Sec. 54-57, pp. 35-37; Chap. VII ("Of Political or Civil Society"), Sec. 87-94, pp. 56-62; Chap. XI ("Of the Extent of the Legislative Power"), Sec. 142, pp. 95-96 (D. Appleton-Century Co. 1937); ROUSSEAU, LE CONTRAT SOCIAL, Bk. II, Chap. IV ("Des bornes du pouvoir souverain") ["On the Limits of the Sovereign Power"], pp. 42-46; Chap. XI ("Des divers systèmes de législation") ["On the Various Systems of Legislation"], pp. 62-64, esp. 62 (Librairie Hatier: 1936):
« Si l'on cherche en quoi consiste précisément le plus grand bien de tous, qui doit être la fin de tout système de législation, on trouvera qu'il se réduit à ces deux objets principaux, la liberté et l'égalité. » [If we ask in what precisely consists the greatest good of all, which ought to be the aim of every system of legislation, we shall find that it is summed up in two main objects, liberty and equality.]

HEGEL, PHILOSOPHY OH HISTORY, Part I, 124-125 (Dover Publications Inc., N.Y.: 1956): In China, we have the reality of absolute equality... Since equality prevails in China, but without any freedom, despotism is necessarily the mode of government.

Part II at 260: In Athens a vital freedom existed, and a vital equality of manners and mental culture; and if inequality of property could not be avoided, it nevertheless did not reach an extreme.

THE DECLARATION OF INDEPENDENCE,

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness...

THE CONSTITUTION OF THE UNITED STATES, *See* Preamble; Article IV (Sec. 2); Amendments I-X, XIII (Sec. 1), XIV (Sec. 1), XV (Sec. 1), XIX. THE FEDERALIST PAPERS, *e.g.*, No. 26, 168-174, No. 84: 510-520 (New American Library, Mentor Book: 1961).

2. PARTICULAR ISSUES

22. There are two ways to approach these problems: Either to criticize previous conceptions of modern democracy, and to establish thereafter what is true about Democracy of History; or to establish what is true about Democracy of History by criticizing, all along the inquiry, the previous conceptions of modern democracy. The adoption of either approach notwithstanding, the following shows, first, how Democracy of History is dependent on, and then how it is independent from, modern democracy.

a. DEPENDENCE OF DEMOCRACY OF HISTORY ON MODERN DEMOCRACY

23. Democracy of History fulfills modern democracy. If every individual is by nature inclined to be in a group; and if modern democracy deals with individuals, and Democracy of History with groups, Democracy of History should be, where the group is an extension of the individual, an extension of modern democracy.

A reason for this is the abolition of the privileged classes from both types of democracies. Yet where modern democracy does so without denying national participation to individuals, Democracy of History does so without denying national participation to both groups and individuals. Unlike modern democracy, which attributes individual accomplishments solely to individual endeavor as such, Democracy of History attributes individual accomplishments to the *group*, to the *individual simpliciter*, and to *the individual as part of the group*, for it is within a group that the personality of the individual is shaped. Also, unlike modern democracy where political endowment is considered about individual accomplishments, Democracy of History considers this endowment about a group, including the individual, *simpliciter* and as part of the group, accomplishments in the evolution of thought.

On the other hand, Democracy of History is dependent on modern democracy in considering the "people" as the ultimate source of political power. Both democracies, however, differ in the meaning they attribute to it. Unlike modern democracy that considers "people" individually without distinction as to race, religion, language, class, gender, etc., Democracy of History considers "people" as groups, where measurement of the difference between groups is less in characteristics, than in historical participation.

Also, Democracy of History is dependent on modern democracy with respect to the aim toward which political process is directed. Like modern democracy, Democracy of History directs all its political power to the common good of the people. The common good of the people under both types of democracy is equality and liberty for all under the law. But, unlike modern democracy which gives political recognition to individual equality for all human beings by virtue of being human, and to individual inequality by virtue of accomplishments, Democracy of History gives political recognition to group equality, providing the historical opportunity for every group to make a historical difference; and to group inequality, where every group would be entitled to gradual standing into national participation, by virtue of its gradual standing into historical participation.

24. Having defined how Democracy of History fulfills, rather than contradicts democracy of today, I must now explain what is true about Democracy of History.

b. INDEPENDENCE OF DEMOCRACY OF HISTORY

25. Like Locke,[4] and Kant,[5] I consider that legislative power is the most important function of the state, to be exercised by none but the people. However, unlike Locke and Kant, who look at the "people" from the perspective of individuals, I look at it from the perspective of "groups," without the exclusion of the prerogatives of individuals. And unlike Rousseau, and Kant, who justify the government respectively as a "general will,"[6] and a "united will,"[7] of the people,[8] I justify the government as the people's thought. Whereas the former conception, under Rousseau[9] and Kant,[10] considers the government as integration or realization of its people's will, the latter conception, under Democracy of History, considers the government as people's historical participation. Accordingly, although I agree with Montesquieu,[11] and with Rousseau[12] and Kant,[13] that the separation of branches is a fundamental tenet of democracy, I disagree, however, with the fact that they are only for the protection of equality and liberty for all, because the common good of the people under Democracy of History is not concerned only with equality and liberty, but also with historical participation.

26. Also, I agree with Hobbes,[14] Locke,[15] and Rousseau,[16] in stating that a civil state must be conceived for utilitarian reasons, be it for security, moral freedom, or civil liberty reason. Yet, I disagree with them with respect to the origin of their utilitarianism. For where all consider that the civil state should be formed because what is gained, namely, security, moral freedom, or civil liberty, is greater than the state of independence men had enjoyed in the state of nature, I consider that the establishment of the civil state is a matter of moral imperative, required of groups for historical participation. It is only from this angle that I agree with Kant[17] who considers that what men should do is a matter of duty, rather than a matter of ends to be achieved. But, I disagree with all because

---

[4] TREATISE OF CIVIL GOVERNMENT, *supra* note 3, Chap. XI ("Of the Extent of the Legislative Power"), para. 134, p. 88: "The great end of men's entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; the first and fundamental positive Law of all commonwealths, is the establishing of the legislative power..."

[5] THE SCIENCE OF RIGHT, para. 46 ("The Legislative Power and the Members of the State"), 166-169 (Scribner and Welford, N.Y.: 1887).

[6] ROUSSEAU, LE CONTRAT SOCIAL, *supra* note 3, Bk. I, Chap. VI ("Du pacte social")["On the Social Compact"], 30: « Chacun de nous met en commun sa personne et toute sa puissance sous la suprême direction de la volonté générale, et nous recevons en corps chaque membre comme partie indivisible du tout. » [Each of us puts his person and all his power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole]
Bk. II, Chap. III ("Si la volonté générale peut errer") ["Whether the General Will Can Err"], 41-42; Bk. IV, Chap. I ("Que la volonté générale est indestructible") ["That the General Will Is Indestructible"], 110-112.

[7] THE SCIENCE OF RIGHT, *supra* note 5, para. 46, 166: "The legislative power viewed in its rational principle, can only belong to the united will of the people."

[8] *See* ROUSSEAU, *supra* note 3, Bk. II, Chaps. VIII-X ("Du peuple") ["On the People"], 55-62.

[9] *Id.*

[10] THE SCIENCE OF RIGHT, *supra* note 5.

[11] *See* THE FEDERALIST PAPERS, *supra* note 3, No. 47: Madison, 300-308.

[12] LE CONTRAT SOCIAL, *supra* note 3, Bk. III, Chap. IV ("De la démocratie") ["On Democracy"], 76-78.

[13] THE SCIENCE OF RIGHT, *supra* note 5, para. 49 ("Distinct Functions of the Three Powers. Autonomy of the State."), 171-173.

[14] LEVIATHAN, *supra* note 3, Part I, Chap. 14, 115: "[I]n a civil estate, where there is a power set up to constrain those that would otherwise violate their faith, [...] fear is no more reasonable."

[15] *Supra* note 3, Chap. IX ("Of the Ends of Political Society and Government"), para. 123, p. 82: "If man in the state of nature be so free...if he be absolute Lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which, it is obvious to answer, that though in the state of nature he has such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasions of others...This makes him willing to quit this condition, which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property."

[16] LE CONTRAT SOCIAL, *supra* note 3, Bk. I, Chap. VIII ("De l'état civil") ["On the Civil State"], 33-34.

[17] THE SCIENCE OF RIGHT, *supra* note 5, para. 61 ("Perpetual Peace and a Permanent Congress of Nations"), 224-225.

departing from the state of nature[18] to form civil societies is not in contradiction with the state of nature as such. For *all men by nature are inclined to be in groups*. The real difference is that under civil society the "people" manifest a historical maturation and awareness that they did not have in the "state of nature." War is created when this historical awareness is at its lowest level in people's thought, and can be eliminated only by being aware of how a group should make a historical participation.

27. Having defined what is true about Democracy of History, I must now examine the issues with which Democracy of History is concerned.

B. THE ISSUES UNDER DEMOCRACY OF HISTORY TAKEN *IN SE*

28. The reason issues must be brought up under this subject is because the other theories of democracy have neglected the approach I take, and because this democracy, if it is to be a contribution, must be in the line of precedent theories of democracy. Thus, the identification of the issues will be addressed, first; their justification, second.

1. IDENTIFICATION OF THE ISSUES UNDER DEMOCRACY OF HISTORY

29. In examining the issues that Democracy of History raises, I will consider, first, the general, and then the particular issues. Where the first type of issues relate to the principles behind Democracy of History, the second refer to their application.

30. Thus, <u>in general</u>, we must ask *(i)*

whether determining a group's historical participation is possible for Democracy of History.

If so, there follows the question whether this democracy is concerned with the group's participation in the evolution of *the highest and most dignified form* of thought, or of *all, or some* forms of its manifestation.

31. There is also the question *(ii)*

whether participating in their government is possible for historical groups based on their historical participation.

32. If this is possible, we must investigate *(iii)*

whether historical groups should be given national popular participation in proportion to their gradual standing into historical participation.

If this is granted, we must further investigate whether this national popular participation should be in proportion to historical groups' gradual standing into historical self-consciousness, or historical existence, or historical dignity, or historical experience.

33. There is also the question *(iv)*

whether historical groups should be given national political representation in proportion to their

[18] *See, e.g.*, ROUSSEAU, LE CONTRAT SOCIAL, *supra* note 3, Bk. I, Chap. VI ("Du pacte social") ["On the Social Compact"] at 29.

gradual standing into historical participation.

If so, we must investigate whether their national political representation should be measured by *the universality* of their historical participation, or the universality of the particular discipline in which they are participating. We must as well investigate whether historical groups should be given national political representation in proportion to quantitative historical participation, despite the universality of their participation or the universality of the particular disciplines in which they are participating.

34. There is also the question *(v)*

whether historical groups should be given national participation in proportion to their historical participation in the State or the Region to which they belong.

35. We must also investigate the problem *(vi)*

whether, given the fact that a group has made a historical participation, its geographical distribution in the state to which they belong, can adversely affect its entitlement to national participation.[19]

36. Again, we must investigate *(vii)*

when ending a historical group's national participation is possible, without impairing the democratic process.

37. Finally, we must ask *(viii)*

whether the wider world is in need of a new type of government, based on the principles of Democracy of History.

38. Also, in particular, we must ask *(ix)*

whether historical groups are limited in number, or every national group is, in one way or another, historical.

39. We must also ask (x)

whether civil, political, economic, social, cultural, and environmental participations are the kinds of national participations to which a historical group is entitled.

40. We must also investigate *(xi)*

whether, given the fact that a group has made a historical participation, the fact that it is settled in a section of the country, or scattered throughout the country, or both, can adversely affect its entitlement to national participation.

41. If it is only those who are settled in a section of the country must be the groups who are entitled to national participation, we must then inquire *(xii)*

whether, given the fact that a group has made a historical participation, the fact that it is settled in a section situated on the border of the country, or in the middle of the country, can adversely affect its

[19] On 'geographical distribution,' *see Definition and Classification of Minorities*, Memorandum submitted by the Secretary-General to the Sub-Commission of Prevention of Discrimination and Protection of Minorities, para. 60 (U.N. Publications, Sales No.1950.XIV).

entitlement to national participation.

42. If the former, we must then inquire *(xiii)*

whether the fact that the historical group is settled in a section contiguous to a state whose dominant group has the same distinctive characteristics, can adversely affect its entitlement to national participation.

43. But, if it is granted that only those who are scattered throughout the country must be the groups who are entitled to national participation, we must then inquire *(xiv)*

whether the fact that the historical group is scattered throughout the country, or throughout a large portion of the country, can adversely affect its entitlement to national participation.

44. And, if it is granted that it is both, we must inquire, besides the above, *(xv)*
whether the fact that the historical group is partly scattered throughout the country, or partly settled in a section of the country, can adversely affect its entitlement to national participation.

45. If geographical distribution is not sufficient in itself, then we must inquire *(xvi)*

Whether the fact that the historical group was brought <u>voluntarily</u> or <u>involuntarily</u> within the jurisdiction of the state, can adversely affect its entitlement to national participation.

46. And *(xvii)*

whether only groups who live in mono-group societies are the groups who must be qualified as historical, or only those who live in multi-group societies, or both.

47. Having defined some issues with which Democracy of History is concerned, we must now explain why they must be brought up.

2. JUSTIFICATION OF THE ISSUES UNDER "DEMOCRACY OF HISTORY"

48. Thus, we go on to justify the first issue, namely,

whether determining a group's historical participation is possible for Democracy of History.

There are three arguments for the legitimacy of this issue under Democracy of History: (1) The determination of historical participation is the basic element out of which all the other issues are composed. (2) On the basis of this determination we can address the basic issue of Democracy of History, namely, whether groups may be entitled to national participation based on their historical participation. (3) It is out of this determination that Democracy of History can, most importantly, appreciate whether or not the world is in need of a new type of government for the proper protection of the common good of the people.

This issue, therefore, is legitimate.

49. And we go on to justify the second issue, namely,

whether participating in their government is possible for groups based on their historical participation.

The aim of Democracy of History is to institute the proper government for the protection of the common good of the people. Since we showed above the problems modern democracy faces as for its source, aim, and mean, and how Democracy of History claims to resolve them by showing that national participation can be based on historical participation, it is, thus, necessary that we investigate this issue to prove that the mechanisms of Democracy of History for dealing with these problems are sufficiently efficient to complete, if not replace, those of modern democracy.

This issue, therefore, is legitimate.

50. And we go on to justify the third issue, namely,

whether historical groups should be given national popular participation in proportion to their gradual standing into historical participation.

Not all historical participations are the same. If all historical participations were the same, the idea of evolution would have been impossible as an ultimate experience to human thought. Nor are national participations the same, where national participations are based on historical participations. Thus, it is our first task to ask whether the degree of a group's national participation should be any less than that of its historical participation.

The issue, therefore, is legitimate on its face.

51. And we go on to justify the fourth issue, namely,

whether historical groups should be given national political representation in proportion to their gradual standing into historical participation.

Democracy of History argues that the establishment of a government is justified less by the people than by thought,[20] the people being a means for the evolution of thought. Thus, a group's historical participation should justify no less its popular participation to, than its political representation in the government.

The issue, therefore, is legitimate.

52. And we go on to justify the fifth issue, namely,

whether historical groups should be given national participation in proportion to their historical participation in the State or the Region to which they belong.

It might be contended that this issue is irrelevant here because it is in contradiction to the definition of the term 'historical group' given above.[21] It is true that we have limited the ascription of 'historical' to groups which engage in the participation of thought as a whole. We have reasoned that it is the world thought that puts national and regional histories into perspective, not the other way around. Thus, it is argued, bringing up the issue whether or not a group's national or regional historical participation can justify its national participation is irrelevant. I cannot agree. It is true that thought as such puts national and regional histories into perspective. Yet the latter are parts of history as a whole. Wider historical participation is often mediated by national or regional historical participation. Since individuals are shaped within a group, and groups within a society, conceiving historical participation as stemming from nothingness is absurd. No less than wider historical participation which can exert its influence on national or regional historical participation, the latter can have an influence on the

[20] *See supra* at paras. 30-40.
[21] *See Supra* at para. 15.

former. History, in fact, is an endless rotation of an ongoing process that makes it impossible to dismember the unity of thought through all its various forms of historical development.

The issue, therefore, is legitimate.

53. And we go on to justify the sixth issue, namely,

whether, given the fact that a group has made a historical participation, its geographical distribution in the state to which it belongs can adversely affect its entitlement to national participation.

It might be argued that this issue is irrelevant here, it being forced arbitrarily into inquiry. Apparently, there is no reasonable justification for bringing up a relationship between historical participation and national participation on the one hand, and geographical distribution on the other. Nevertheless, national participation is affected by geographical distribution.[22] If national participation is affected by historical participation, as *issue one* of this inquiry will have to show, exploring whether historical participation is affected by geographical distribution would be logical, then.
The issue, therefore, is legitimate.

54. And we go on to justify the seventh issue, namely,

when ending a historical group's national participation, without impairing the democratic process, is possible.

Democracy of History argues that all individuals, and all individuals belonging to a group, and all groups, must be provided with equal historical opportunity to make a historical difference in the State to which they belong. If a group is entitled to national participation based on its historical participation, we must then investigate how this national participation ends. Otherwise political endowment would lack a democratic qualification.

The issue, therefore, is legitimate.

55. And we go on to justify the eighth issue, namely,

whether the wider world is in need of a new type of government, based on the principles of Democracy of History.

Democracy of History argues that modern democracy does not effectively protect the common good of the people, as we have shown above. Not only does the problem lie in the source, means, and end of modern democracy, but also in the number of branches of the government, and the manner in which the separation of their powers is conceived. But we mentioned earlier that the aim of Democracy of History is to institute the right government for the protection of the common good of the people. Since the establishment of this government is the aim of Democracy of History, and since we have shown that all the previous issues are legitimate to our inquiry, this issue must, therefore, also be legitimate.

56. And we go on to justify the ninth issue, namely,

whether historical groups are limited in number, or every national group is, in one way or another, historical.

Democracy of History argues that the mechanisms of modern democracy, for example, the right to

[22] *See* Shaw v. Reno, 113 S.Ct. 2816 (1993).

vote, are inefficient in themselves. As an alternative, Democracy of History argues that national participation, whether popular or political, can be based on historical participation. But Democracy of History is an extension of modern democracy, where "all should have a share in the government." Where modern democracy understands "all" as to include only individuals, Democracy of History understands "all" as to include, in addition to individuals, individuals as parts of groups, and groups *simpliciter*. Thus, Democracy of History must investigate how "all" can participate in the government based on historical participation.

The issue, therefore, is legitimate.

57. And we go on to justify the tenth issue, namely,

whether civil, political, economic, social, cultural, and environmental participations are the kinds of national participations to which a historical group is entitled.

Investigating whether a historical group is entitled to national participation, compels us to investigate what kinds of national participations to which a historical group is entitled. There are at least six kinds of national participations: A civil, political, economic, social, cultural, and environmental participation. Thus, we must ask whether historical groups are entitled to civil, political, economic, social, cultural, or environmental participation.

The issue, therefore, is legitimate.

58. And we go on to justify the eleventh issue, namely,

Whether the fact that a historical group is settled in a section of the country, or scattered throughout the country, or both, can adversely affect its entitlement to national participation.

This issue is a kind of the sixth issue above. If the latter is legitimate, the former is , therefore, legitimate. The same also applies to the twelfth issue, namely,

Whether the fact that a historical group is settled in a section situated on the border of the country, or in the middle of the country, can adversely affect its entitlement to national participation;

and to the thirteenth issue, namely,

whether the fact that a historical group is settled in a section contiguous to a state whose dominant group has the same distinctive characteristics, can adversely affect its entitlement to national participation;

and to the fourteenth issue, namely,

whether the fact that a historical group is scattered throughout the country, or throughout a large portion of the country, can adversely affect its entitlement to national participation;

and to the fifteenth issue, namely,

whether the fact that a historical group is partly scattered throughout the country, or partly settled in a section of the country, can adversely affect its entitlement to national participation.

59. And we go on to justify the sixteenth issue, namely,

Whether the fact that a historical group was brought voluntarily or involuntarily within the jurisdiction of the state, can adversely affect its entitlement to national participation.

If it is found that 'geographical distribution' is not sufficient to affect a group's national participation based on its historical participation, it seems necessary then to know what would make it, besides geographical distribution, sufficient.

The issue, therefore, is legitimate.

60. And we go on to justify the seventeenth issue, namely,

whether only groups living in mono-group societies are the groups that must be qualified as historical, or only those living in multi-group societies, or both.

Democracy of History argues that in mono-group societies, minority groups may be prevented from national participation under modern democracy. Historical participation is the ultimate phenomenon of democracy, where minority groups are provided with historical equal opportunity to make their gradual standing into historical self-consciousness. However, the situation is not the same in multi-group societies where there is no clear-cut distinction between a minority and a majority. Thus, we must ask whether national participation should also be based on historical participation in mono-group societies.

The issue, therefore, is legitimate.

61. We have shown thus far the important issues with which Democracy of History is concerned, and why it considers them issues. To show the nature of historical issues is to show that they are debatable, the nature of issues being that they can be treated in different ways, similar to a marble that, before it is sculpted, can potentially be sculpted in many ways. Accordingly, the major step forward in the treatment of Democracy of History is developing its issues, which Part II will deal with.

BIBLIOGRAPHY

1. Aquinas, Saint Thomas, SUMMA THEOLOGICA.
2. Aristotle, METAPHYSICS (Loeb Classical Library, Harvard University Press: 1989); NICHOMACHEAN ETHICS (Loeb Classical Library, Harvard University Press: 1990).
3. Augustine, Saint, CITY OF GOD (Loeb Classical Library, Harvard University Press: 1968)
4. Bacon, F., OF THE PROFICIENCY AND ADVANCEMENT OF LEARNING (Oxford University Press: 1974)
5. Comte, A., COURS DE PHILOSOPHIE POSITIVE (Librairie Larousse, 5ème Edition, Paris).
6. *Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/1992/48 (1991), Annex I, 16-19.
7. *Definition and Classification of Minorities*, Memorandum Submitted by the Secretary-General to the Sub-Commission of Prevention of Discrimination and Protection of Minorities, U.N. Publications, Sales No.1950.XIV, Para. 60.
8. Duschenes, *Proposal Concerning a Definition of the Term "Minority"*, U.N. Doc. E/CN.4/Sub. 2/1985/31 (1985).
9. Frangi, A., DEMOCRACY OF HISTORY: A THEORY OF GROUP LAW (Harvard Law School, MA, U.S.A.: 1995).
10. Hegel, G.W.F., PHILOSOPHY OF HISTORY (Dover Publications Inc., NY: 1956).
11. Hobbes, Th., LEVIATHAN (Bobbs-Merrill Co., In: 1958).
12. Kant, I., THE SCIENCE OF RIGHT (Scribner And Welford, Ny: 1887); FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF ETHICS (Bobbs-Merrill Co.: 1949); CRITIQUE OF PURE REASON (Macmillan Co., Ny: 1896).
13. Locke, J., TREATISE ON CIVIL GOVERNMENT (D. Appleton-Century Co. 1937).
14. Rousseau, J.J., LE CONTRAT SOCIAL (Librairie Hatier, 1936).

MENTAL ELEMENTS AND MISTAKE OF FACT AND LAW IN ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

by

DEVRIM GÜNGÖR*

I. INTRODUCTION

Article 30 and article 32 of the Rome Statute regulate the mental element of crimes on which International Criminal Court (ICC) has jurisdiction and mistake of fact and mistake of law.

There is very close relation between these two articles. Although we mainly intend to write on mistake of fact and law in this essay, it is also necessary to see the article 30 of the Statute because of this interrelation.

As it can be seen, provisions about mistake of fact and law are applicable, if they negate the mental element required by the crime.

Article 32 says: 1. Mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 30 says: 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct.
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means, awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 30 emphasizes that, a crime, punishable under the Rome Statute, should be committed with certain state of mind. Terms used in article 30, "intent" and "knowledge", confirm the principle according to which, culpability is an essential element for the crime on which ICC has jurisdiction. Actually this principle represents very great conquest in a civil human life. In primitive societies, objective causality between act and result was sufficient for the criminal responsibility. A participation of mens rea to fact occurred in an external world is called as a subjective or mental element of crime.[1]

* Research Assistant and PhD Student at Ankara University,Turkey, Faculty of Law, Department of Criminal and Criminal Procedure Law; LLM in Criminal Law at Ankara University; LLM in International Criminal Law at University of Teramo, Italy.

[1] Francesco ANTOLISEI, Manuale di Diritto Penale, Parte Generale, 2003 Milano, p. 321.

In fact, history of criminal law is characterized by dialectic contradiction between objective criminal law and subjective criminal law.[2] On the other hand, modern criminal law is based on mixed criminal law that means for a crime, it is not enough to bring about material facts, but it is also necessary that those facts can be attributed to the perpetrator.

According to Article 32 of the Statute, "mistake of fact shall exclude criminal responsibility if it negates the mental element". A question to be addressed is whether this article repeats what is already stated in the article on mental elements of crimes. It should also be explained why States' delegations at the Preparatory Committee and the Rome Diplomatic Conference found necessary to insert this article in the Statute. Another question is under which conditions mistake of fact may affect the mental element. An additional problem relates to the impact of mistakes not on the material elements of crime (such as act, result), but on the grounds for excluding responsibility (e.g., justifications, excuses) or the aggravating circumstances for penalties.

The interpretation of these articles is extremely important to ensure their applicability. Problems in question may be better understood if some of historical positions are known.

II. MISTAKES OF FACT AND MISTAKES OF LAW IN INTERNATIONAL CRIMINAL JURISDICTIONS

Although the Charter of International Military Tribunal of Nuremberg, one of main historical milestone in the field of international criminal jurisdiction, did not contain any provisions on mistake of fact and law, the Tribunal accepted defences regarding both mistake of fact and law.[3]

Like on the matter of mistake, there was not clear provision in the IMT Charter on *mens rea* or mental element. Even though core crimes under international law, which are of concern to the international community, can hardly be committed without having intention, still it is necessary to have certain regulations to solve the problems in a proper way.

Neither the ICTY Statute (1993) nor the ICTR Statute (1994) has any general clause on defences and any other grounds for excluding criminal responsibility. However, by making generally accepted legal rules applicable, ICTY and ICTR can take consideration of both mistake of fact and mistake of law.

When the Ad Hoc Committee on the establishment of an International Criminal Court was held in 1995, delegations suggested the clear regulation on mental element. Ad Hoc Committee has made two proposals about mistake. Namely, one of them as a more general option would recognize both mistake of fact or law as a defence 'if not inconsistent with the nature of the alleged crime' and even if avoidable would be still possible to take it as a mitigation of punishment. On the other hand, the other option would accept mistake of fact only 'if it negates the mental element' and would reject mistake of law in principle.[4] After

[2] Ferrando MANTOVANI, Diritto Penale, Padova 2001, p. 39.

[3] Especially in case so- called 'Arzte-Urteil'. "This term refers to cases of physicians who were acquitted because they believed that the persons brought to them were sentenced to death and would be pardoned if they survived the medical experiments, during which they were 'at the disposal' of the physicans." Triffterer, "Article 32 Mistake of fact and mistake of law", Commentary on the Rome Statute of the International Criminal Court, Baden-Baden 1999, par. 4.

[4] ESER, "Mental Elements- Mistake of Fact and Mistake of Law", The Rome Statute of The International Criminal Court: A Commentary, Vol. I, Ed. Cassese, Gaeta, Jones, United States 2002, pp. 897-898.

discussions among the representatives of participating countries, draft provisions on these matters were included in the Draft Statute of the ICC adopted by the Preparatory Committee in March 1998, together with the Draft Final Act. When looking back from the final result in the Rome Statute's Article 32, it is noticed that the article on mistake is close to the second proposal of the Ad Hoc Committee by precluding mistake of law as far as possible and by requiring the negation of the mental element.

Mistake of fact and mistake of law were formulated in a different way in the ICC Statute. In other words, whereas "mistake of fact shall be ground for excluding criminal responsibility if it negates the mental element required by the crime", "mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding the criminal responsibility" in any case. The second one is a typical mistake of law[5] and almost all criminal doctrines refused to accept it (mistake of law) as a defence. According to the provision regarding mistake of fact, criminal responsibility and liability for punishment depend on whether the material elements of crime are committed with intent and knowledge. So if a person is not aware of material elements, which consist of conduct, result and circumstances, at the time the crime is committed, he does not have the necessary mental element. Culpability depends on the existence of such a mental element.[6]

On the other hand, mistakes about legal aspects of a crime in general do not concern the material elements for justification or excuse. That's why as expressed in paragraph 2 of Article 32 of the Statute, they shall not be a ground for excluding criminal responsibility.

Formulation of mistake of fact in the Statute shows that it should negate the mental element. We think this formulation is conformity with the jurisdictional structure of mistake of fact. Therefore, even if there were no provision about mistake of fact, it would still have been possible for the Court to take it into consideration according to the Article 30 of Statute. There are some national penal codes, which do not have any provision about mistake of fact. For example Turkey was one of these countries, which adopted the Italian Penal Code of 1889. Mistake of fact, however, has been regarded as a proper defence because of its negative effect on mental element.

III. WHAT IS MISTAKE OF FACT

In order to consider its effect in criminal jurisprudence, first mistake should be defined. Mistake in general, is intellectual state, which has a false perception of fact that belongs to the external world. There are two words used in English for mistake: "Ignorance" and "mistake".[7] Actually, these two words have different meanings; "ignorance" may be defined as lack of knowledge; whereas a "mistake" is a wrong conclusion mostly caused by insufficient of knowledge.

Mistake is distinguished from doubt, which can be defined as indecisiveness.

In order to make mental element understandable, it is better to see what mistake of fact is. As we stressed above, it is a fundamental principle of criminal law that perpetrator of a criminal act shall not be punished

[5] Ignorantia juris.
[6] Triffterer, par. 11.
[7] "Ignorantia juris" and "Ignorantia facti."

unless he has a criminal mind. An exception to this fundamental principle exists in a case where, by statute, the legislature either expressly or impliedly indicates that no such state of mind is necessary.[8]

Whenever a person, having the ability of reasoning to a conclusion, does a criminal act, he has the criminal mind. In order that one may be able to reason to a conclusion, he must have the power or capacity of reasoning, and the data upon which to base the reasoning. There must be a process and the materials will affect the result. Whenever, then, the defendant does not have the ability to reason as considered above, he does not have the criminal mind. For instance; infants under specific age and "mentally ill persons" are exempted from criminal responsibility, because they do not have the power of reasoning. One who commits a criminal act under mistake of fact has a defence, because he has wrong or insufficient data for reasoning. [9]

The defendant's criminality must be determined by his state of mind toward the situation in which he acted, and his state of mind will depend upon his impression of the facts. Therefore, he should be dealt with as if the facts were what he believed them to be. Then if, according to his belief concerning the facts, his act is criminal, he has the criminal mind as distinguished from motive, desire, or intention and should be punished. If, on the other hand, his act would be innocent provided the facts were what he believed them to be, he does not have the criminal mind, and consequently should not be punished for his act.[10]

Ignorance and mistake of fact, therefore, are important in so far as they negate the criminal mind. There is no saving power in mistake itself. The fact that defendant says, "I was mistaken" does not necessarily indicate that he is not guilty. It is only by showing the absence of the criminal mind due to his mistake that he can escape punishment for his criminal act. It follows that the mistake is no defence where there is a prosecution under a statute, in which the legislature has indicated that no criminal mind is necessary for a conviction of the crime created by the statute.[11]

IV. MUST MISTAKE BE HONEST AND REASONABLE

The term of "honest" in this connection can only mean that the defendant did it in truth believe the facts to be different from what they were. It is, therefore, a truism to say that the mistake must be honest. The term "honest belief" are sometimes used to express two different ideas: 1) that the belief must have been sincere and 2) that what was done would have been proper had the facts been as they were mistakenly supposed to be. While there is no exception to the requirement that the mistaken belief of the factual situation must be genuine, the question whether it must be based upon reasonable grounds is not so simple.[12]

If no specific intent or other special mental element is required for guilt of the offence charged, a mistake of fact will not be recognized as an excuse unless it was based upon reasonable grounds. One, for example, who kills another because of a mistaken belief that his own life is in imminent peril at the hands of the other, is not excused if there is no reasonable ground for this belief. If a specific intent or other

[8] KEEDY, "Ignorance and Mistake in the Criminal Law", HVLR, Vol. XXII, December, 1908. p. 81. See also HALL, "Ignorance and Mistake in Criminal Law", INLJ, Vol.33 Fall 1957, Number 1, pp.1-44.
[9] KEEDY, p. 81.
[10] KEEDY, p. 82.
[11] KEEDY, p. 82.
[12] PERKINS, U. Pa. L. Rev. 35 (1939-1940), p. 55.

special mental element is required for guilt of the offence charged, the possibility of excuse due to a mistake of fact not based on reasonable grounds must be studied in the light of this special requirement and the mistake itself. A mental element required for guilt of the particular offence, other than a specific intent in the true sense of the word, may be negatived by a bona fide belief resulting from an ill-grounded mistake of fact, depending upon the peculiarity of the required element. Thus an un-true statement under oath is not wilfully and corruptly false and hence not perjury if genuinely believed to be true, however great the carelessness which induced the belief.[13]

An act is reasonable in law when it is such as a man of ordinary care, skill and prudence would do under similar circumstances. Requiring that the mistake be reasonable means that if the defendant is to have a defence, he must have acted up to the standard of an average man, whether the defendant is himself such a man or not. This is the application of outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one, which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence. If the mistake, whether reasonable or unreasonable, as judged by an external standard, does negative the criminal mind, there should be no conviction. The requirement, that the mistake be reasonable in order to be a defence, at first sight appears the same as the rule that if the defendant be negligent his mistake will not avail. This similarity, however, only seems for the test of negligence in the criminal law is not whether the defendant used the care of a reasonable man but whether he used the care which appeared proper to him under the circumstances, that is "Did he do his best according to his own standard?"[14]

V. WHAT IS MISTAKE OF LAW

It is refused to accept ignorance or mistake of law as a defence. The proposition that mistake of law can never be a defence is usually overstated in most domestic law systems although where the lines lie between fact and law is sometimes hard to discern. It is, for example, surely no defence to deny knowledge of the illegality of destroying property belonging to one's landlord. But it must be a defence to introduce belief that the property destroyed was one's own and not the landlord's. Another example is that it is no defence to bigamy to claim a belief that polygamy is lawful, but there is a defence for the actor who believes that the previous marriage had terminated in divorce.

If an element of law enters into the mistake of defendant, such mistake is held to be no defence. There is, however, an exception to this general rule. When a specific criminal intent, as distinguished from the criminal mind, is a requisite element of the offence, and such intent is negated by ignorance or mistake, it is held that the defendant shall not be convicted, notwithstanding the rule. Although the writers[15] fully recognise that the courts enforce, and commentators approve, the general doctrine that mistake of law is no defence, nevertheless, it is suggested that on principle and analogy a different result may and should properly be reached in certain cases where a criminal act is committed under a misconception of the law.[16]

[13] PERKINS, p. 56.
[14] KEEDY, pp. 84.
[15] Austin, Jurisprudence, 496-501(1869); Holmes, The Common Law, 47-51(1881), J, Hall, Prolegomena to a Science of Criminal Law, 89 U. Of Pa. L. Rev. 549, 567 (1941); Kohler, Ignorance or Mistake of Law as a Defence in Criminal Cases, 40 Dick. L. Rev. 113 (1936).
[16] KEEDY, p. 89.

Under what has been termed ignorance of law may be grouped two situations. The first is when a man does an act without giving any attention to the law as such, in what may be termed unconsciousness that the law governs such a case; the second, when he considers the law but believes that it does not govern the particular case. In each instance he does an act in ignorance that the law has made the act criminal. It is the contention at this point that there is a distinction, so far as legal effect is concerned, between the two classes of cases designated by the headings "ignorance of law" and "mistake of law". This distinction is based upon the ground that ignorance of law does not negate the criminal mind, whereas mistake of law does. When a person, not insane, does an act, knowing its physical character, if the act is criminal the doer of the act has the criminal mind. Intending an act, which the law has made criminal, is the criminal mind. This is so even when the defendant has not the means or opportunity of knowing that the law exists which makes his act criminal, for example, when the act was committed so short a time after the passage of a statute that defendant could not possibly have known of it. The defendant has the criminal mind in such a case. It follows that the reason why ignorance of the criminality of the act does not excuse is that in such a case the defendant has the criminal mind. The rule of law embraced in the language of the maxim is the fundamental rule that criminality is determined by the criminal mind. [17]

VI. MENTAL ELEMENTS IN THE ROME STATUTE

Article 30 of the Rome Statute as it was indicated before, establishes requirements for the mental element valid for all crimes regulated by the Statute. Although it is the main one, Article 30 is not the only place where mental elements can be found as it is indicated by the words "unless otherwise provided".

Although strict liability in terms of founding criminal responsibility on the fulfilment of the objective elements of the crime is not explicitly excluded, the requirement of a mental element in Article 30 of the ICC Statute makes clear that the crime must also be subjectively attributable to the perpetrator, even if the crime definitions in Article 6 to 8 do not explicitly require a certain state of mind. In this respect, Article 30 in requiring the commission of a crime "with intent and knowledge" functions as a general and supplementary rule for criminal responsibility according to the Rome Statute.[18]

This is not only true for the perpetration of the crimes of Articles 6 to 8 of the ICC Statute, but applies also to the various forms of perpetration and participation of Article 25(3) of the ICC Statute. This is because Article 25(3), when it doesn't require a special state of mind at all, does not distinguish between perpetration and participation and, thus, presupposes intention and knowledge according to the general rule of Article 30 of the ICC Statute.

According to article 30, paragraph 1 of the Rome Statute, for a crime within the jurisdiction of the Court, the material elements is committed with intent and knowledge. For a person who is not aware of a certain situation or a single material element, it is not possible to build the intent required for the mental element.

A. Mental Elements: Intention

There is a definition of intention in second paragraph of Article 30 of the Rome Statute. According to this, "a person has intent where,

[17] KEEDY, p. 90.
[18] ESER, p. 902.

a) In relation to conduct, that person means to engage in the conduct;
b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events,

There is a definition of knowledge on the last paragraph of Article 30 of the Rome Statute. It says, "For the purpose of this article, knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

From the psychological-analytical point of view, the mental element is determined by the presence of cognitive and volitional components of mental elements. According to this formulation above, the relation to conduct must be truly volitional, but the relation to a consequence need not in any case be volitional, rather it suffices that the perpetrator is aware that the consequence will occur in the ordinary course of events. In relating knowledge primarily to circumstances and to consequences, though the latter only insofar as they occur in the ordinary course of events, paragraph 3 is correct in assuming that circumstances can normally only be known of but not be intended. This is not exclusively so, however, as in certain cases the perpetrator can very well wish to have a certain circumstance present, as for instance, if he intends to kill not just any human being but rather a member of an ethnical group (in terms of Article 6 of the ICC Statute); this circumstance is, thus, not only an object of knowledge but of intent as well.[19]

B. Mental Elements: Other Than Intention

The requirements of mens rea can remain below the threshold of intent. Since, for instance, according to Article 28 (1) (a) of the ICC Statute a commander is deemed responsible not only if he knew but also if he "should have known" that a subordinate was committing or about to commit a relevant crime, his responsibility may be based on mere negligence rather than full intent.[20] The same is true of a commander's responsibility for failure to exercise control properly by consciously disregarding information on the subordinates committing a crime. A conduct of "consciously disregarding information on the subordinates committing a crime" should be based on "Commander's" "failure to exercise control properly over such subordinates". Therefore, in this case 'Commander's' responsibility could be qualified as a kind of *"recklessness"* or *"conscious negligence"* or just *"unconscious negligence"* rather than full intent.

Contrary to the aforementioned lowering of mental requirements, other provisions in the Rome Statute require stronger subjective graduations than provided for in the Article 30 of the ICC Statute. With particular emphasis on the aim envisaged by the perpetrator, certain forms of complicity such as aiding and abetting or in any other way contributing to a group crime must be determined by a certain purpose such as facilitating the commission of the crime or furthering a criminal activity of the group.

Some provisions are characterized by their requiring that the crime be committed with a certain aim as, for instance, in the case of genocidal acts, with intent to destroy a protected group or in the case of aiding and abetting for the purpose of facilitating the commission of the main crime. In these cases, general intent and knowledge of Article 30 (1) of the ICC Statute must be accompanied by a special intent (dolus

[19] ESER, p. 905.
[20] ESER, p. 899.

specialis), which a part of doctrine qualifies as an additional intent related to an objective goal[21]. This combination of a general intent (with regard to the basic act and its regular consequences and circumstances) and a specific intent (with regard to an additional aim) is clearly exemplified in the case of complicity in group crimes in which the relevant contribution must be made intentionally and in addition with the aim of furthering the criminal activity of the group.[22]

VII. RECOGNIZED MISTAKES WITH REGARD TO FACTS

With regard to the ICC Statute, mistake of fact does not exclude criminal responsibility per se but only if it negates the mental element, it refers to the preconditions of the mental element in terms of intent and knowledge (Article 30/1) without which the perpetrator cannot be held responsible.[23] Article 32/1 of the ICC Statute, combines recognizable mistakes of fact to the material elements of the crime and requires a mistake capable of nullifying intent or knowledge. This means that possible reference points of a mistake of fact can only include the nature of the conduct and its circumstances and consequences in terms of Article 30/3. The only clear category of recognizable mistakes of facts is that about factual elements of the definition in terms of descriptive elements of the crime, perceivable by means of the human senses.

It should be stressed that not every case of mistake on descriptive elements of crime entails the negation of the mental element. Mistaken identity can be given as an example. If the perpetrator intended to kill "A" but for some reasons he fails and instead he hits "B" and if he does not have legally recognised right to do it, this is only error of person and irrelevant because the material element of killing a human being, regardless of its personal identity, would in any case be fulfilled. Therefore, as long as in case of mistaken identity both the envisaged and the actual victim fall within the same definitional category of crime, the perpetrator's intent and knowledge is not affected by his mistaken the identity.

Persons assuming the existence of a situation in which, if it were as they believed, they were justified, for instance by self-defence, have on the contrary the necessary mental element. They are in the same way mistaken about one or more facts, even though these are not material elements of the crime but material prerequisites for a justification of the crime. In a situation which he reasonably believed to exist, the psychological pressure on the perpetrator is as strong as if the situation existed in reality.[24]

VIII. RECOGNIZED MISTAKES WITH REGARD TO THE LAW

How the general principle that culpability is necessary for criminal liability grew up with the rule that a mistake of law is not a general defence is a matter of history. The increasing complexity of law, the multiplication of crimes and a more exact definition of fundamental principles of criminal liability, have shared the responsibility for this development. But the process has been slow and uncertain, and in its early stages not well understood.

According to the Article 32/2 of Rome Statute, "mistake of law may be a ground for excluding criminal

[21] See the writings of authors like Triffterer (international criminal law and comparative criminal law and procedure) and Picotti (Italian penal law and comparative criminal law).
[22] ESER, p. 900.
[23] ESER, p. 937.
[24] Triffterer, par. 14.

responsibility if it negates the mental element required by such a crime." The mistake has to have been capable of negating the mental element and this can be ensured by the perpetrator's lack of knowledge of a material element of the crime.

Since mental element can only be negated by mistake to the extent that the perpetrator must be aware of material elements, accordingly normative misjudgements are capable of ensuing from a mistake of law only to the extent that the mental element is open to misjudgements. Consequently, normative ignorance or evaluative misperceptions would constitute a mistake of law negating the mental element only if the perpetrator did not even realize the everyday meaning of the material element of the crime. This, for instance, might be the case if he had no idea that certain letters on a car were to indicate the protected status pf this personnel, but not, however, if he related these letters to another organization which would have had a protected status as well.[25]

Even if the mental element is negated by a mistake of law in the way described before, this does not necessarily lead to the exclusion of criminal responsibility though; for, as according to sentence this "may" merely be the case, it seems as if the ICC Statute wants to leave some discretion to the Court to either accept or ignore the mistake. The use of "may", could perhaps simply mean that not every mistake of law is a defence, but on a case-by-case basis it could exclude the "mens rea", if the Judges come to this conclusion in a concrete case.

In completing the general rules on mistake of law dealt with above, a special regulation is provided for mistakes with regard to superior orders according to Article 33 (1) (b) and (c) of the ICC Statute. In recognizing the at times delicate situation in which a subordinate was ordered to carry out a command without having had the chance of examining the lawfulness of what he is going to do, the perpetrator, when committing the crime in obedience to superior orders or prescriptions of law, can be relieved of criminal responsibility if he did not know that the order was unlawful provided, however, that the order was not manifestly unlawful. This reasoning applies only to alleged culpability for war crimes, since orders to commit genocide or crimes against humanity are always presumed manifestly illegal.

CONCLUSION

Anybody being mistaken about a material element of crime, on which the International Criminal Court has jurisdiction, do not have "the mental element" required. According to the article 30 para 1, Crimes within the jurisdiction of the Court should be committed with intent and knowledge. This is a general rule of mental elements of the crimes. For this reason, with few exceptions, recklessness and negligence cannot render a perpetrator responsible for prohibited acts according to the Rome Statute of International Criminal Court. If there exists such a regulation independent of intent and knowledge, the mental element required for the crime in question is not lacking and it depends on whether the mistake of fact was unavoidable or not. If it was avoidable, negligence may be punishable. If it was unavoidable, it is not possible to punish the commission of crime. A mistake is unavoidable when a reasonable person under the same conditions would have made the mistake and in this situation a perpetrator cannot be held responsible for his/her act even though the crime committed is punishable for negligence.

[25] ESER, p. 941.

Mistake of law as to "whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be ground for excluding criminal responsibility. Whether it can be ground for excluding criminal responsibility depends on if it negates the mental element required by such a crime according to the Rome Statute of International Criminal Court. This can be ensured by the perpetrator's lack of knowledge of a material element of the crime. Even if the mental element is negated by a mistake of law, this does not necessarily lead to the exclusion of criminal responsibility. Even in this case Court would have a right either accept or ignore the mistake.

ПАРАДОКСИ ЈЕДНЕ СЛОБОДЕ

ДРАГАНА ЋОРИЋ*

Може ли се бити критичан,
а немати културу слободе савести, мисли и изражавања мишљења?
Слободан Бељански,» Право и илузија»

ABSTRACT

The freedom of thought (equalled with the freedom of opinion), together with the freedom of expression belong to the first generation of human rights, which are the same for all people, no matter what differences apparts them. Those rights are fundamental rights, and mean a lot of opportunities for individuals, prepared to use them properly. But if not, the indiviuals may be caught in paradoxes, that can ruin the meaning of those rigths.

The state is fully powered to protect itself, whether that means to hurt some segments of those rights. On the other side, there is a danger that it can «strech a rule» to its interests, especially if it is a non-democratic regime.It is also able to restrict the ways individuals are using those freedoms, but only when that is fully justified.

The question here is: where is the difference between verbal delict and the simple realization of fundamental right to speak your mind? Or, else, can you criticize others, without beeing free to think, to express yourself? Without it, the whole system can not exist, and the democratic culture is missing its the most important part.

ARTICLE

УВОДНЕ НАПОМЕНЕ

«Прву генерацију» људских права, која припадају свима , без обзира на евентуалне разлике у полу, националној припадности, верској опредељености и др., чине право на живот и физички интегритет,право на људско достојанство, слобода мисли и изражавања свог мишљења, равноправност пред законом и једнака заштита свих лица пред судовима. Према критеријуму субјекта заштите, наведена слобода је универзализована до крајњих граница. Сама слобода мисли је истовремено и слобода од великог значаја за човека као разумно биће(која је више везана за духовну, верску и филозофску сферу), док слободу изражавања мишљења можемо посматрати одвојено, у нешто другачијем светлу.

Наиме, ако се лицу ускраћује могућност испољавања мишљења, аутоматски се тако потире и унижава раније дата слобода да се мисли. Изражавање, посматрано кроз призму лингвистике, психологије, уметности, и на концу и права, јесте начин потврђивања индивидуе, њене личности и културне залеђине,њеног цивилизацијског развоја и услов је комуникабилности међу индивидуама. Без наведене слободе, човек, схваћен као *homo politicus*, не постоји, а без њега таквог, не постоји онда ни друштво па ни држава. Према » дефиницији», слобода изражавања укључује « слободу мишљења без утицаја других, као и тражење, примање и саопштавање

обавештења и идеја било којим средствима и без обзира на границе»[1]. Слобода изражавања не познаје границе између држава, нити сме да успоставља границе међу људима. У томе и јесте космополитски дух ове слободе. Слично конципирана и у другим документима, чини се да се слобода мишљења схвата као апсолутна а слобода изражавања као ограничена. Ту јесте и први парадокс, јер обе фигурирају као нормативни, треба - искази, док их стварност представља потпуно другачије, измењене суштине и циља.

Управо због свог значаја, слободу мисли и изражавања гарантују , као једно од највиших (и најсветијих) начела многе међународне конвенције : Универзална декларација о правима човека (чл.2, 7, 18-21)[2], Међународни пакт о економским , социјалним и културним правима(чл.2), Европска конвенција о људским правима (чл.10) [3], Повеља о људским и мањинским правима и грађанским слободама(чл.26, 29, 48).Постављена је као један од основних постулата слободне, правне и демократске државе, као могућност и(ли) обавеза сваког грађанина , да се користи њима, и других ауторитета, да их поштују.Обе поседују завидну моћ утицаја на државу али и могућност слободе од државе саме.

Даље, значајна је у том смислу и Декларација о слободи политичке дебате у медијима [4] .Право на слободу изражавања и информисања овде се квалификује као један од основних темеља демократског друштва и један од основних услова за напредак и развој сваког појединца.Слично је изражено у Декларацији о слободи изражавања и информисања из 1982. године, Декларацији о медијској политици сутрашњице[5]; Резолуцији (74) 26 о праву на одговор- положај појединца у односу на штампу , Резолуцији 1165 (1998) Парламентарне скупштине о праву на приватност и Препоруци број Р (99) 15 о мерама у вези са извештавањем медија о предизборним кампањама, као и у Препоруци број Р (97) 20 где је посебно наглашено да слобода политичке дебате не обухвата и слободу изражавања расистичких ставова или ставова који подстичу мржњу, ксенофобију, антисемитизам и све облике нетолеранције. У свим наведеним актима, наводи се да "остваривање права на слободу изражавања са собом носи обавезе и одговорности," као и да ово право "може легитимно бити ограничено ради одржавања равнотеже између остваривања овог права и поштовања других фундаменталних права, слобода и интереса заштићених другим међународним правним актима.

Посматрано са другог аспекта, слобода изражавања је право које традиционално припада одраслој особи. Путем тумачења може се посредно закључити да и деца поседују слободу мишљења и изражавања, али то ни у једном од поменутих докумената није експлицитно наведено. Чак ни Декларација о правима детета не предвиђа ово право, иако генерално постоји право детета да тражи, прима и даје информације и идеје свих врста без обзира на границе, било усмено, било писмено или штампано, у уметничкој форми или преко било ког другог средства информисања по

---

* Драгана Ћорић, Асистент, Правни факултет, Нови Сад.

[1] Универзална декларација о правима човека, чл.18. У члану 19 Интернационалног Споразума о грађанским и политичким правима се прихват информација или идеја донекле прецизира: « ....било усмено, писмено или на оба начина истовремено, у облику уметности или преко било ког другог медија, по сопственом избору».

[2] Усвојена и проглашена Резолуцијом 217А Генералне Скупштине УН од 10.12.1948.

[3] Конвенција је ступила на снагу 03.09.1953. Индикативна је повезаност наведеног члана 10 са чл.19 Универзалне декларације.

[4] Усвојена од стране Комитета министара, 12. фебруара 2004. година, на 872. заседању представника министара.Прошло је више од 50 година након отварања за потписивање земљама чланицама Савета Европе Конвенције о заштити људских права и основних слобода

[5] Усвојена на Шестој европској министарској конференцији о политици масмедија у Кракову 15. и 16. јуна 2000. године

избору детета. Зашто се наведено чини спорним, будући да деца самостално или уз помоћ одраслих могу да доносе одлуке које га се непосредно тичу? Или је демократско друштво , које захтева слободу мишљења и говора, само друштво одраслих?

О ПАРАДОКСУ СЛОБОДЕ

Но, сама прокламација ове слободе, без обзира на начелну демократичност коју носи са собом, показује се као недовољна и чак неприхватљива, посебно у друштву које се бори са изазовима транзиције и са «освајањем слобода и права у свим осталим друштвеним областима».[6]Онда су слобода мисли, а посебно изражавања, изазови којима је тешко одолети, али су често у колизији са државом самом.

Следећи правило да се не може пренети на друго лице виша права него што преносилац сам има *(nemo plus iuris ad alium transfere quam ipse habet),*тако ни држава не може дозволити појединцима веће слободе него што их она сама има. Као моћан ентитет, сноси посебну одговорност за неадекватно вођење спољне или унутрашње политике, привреде и других сегмената. Захтев је правичности, пошто је сваки чин државе заправо изражавање њеног мишљења, да исто тако и појединац одговара за своје акте, физичке или вербалне. Овај захтев има и своју репресивнију страну, приметну у ауторитарним режимима, који теже већим ограничењима људских слобода и права. У томе се назире следећи парадокс, а то је ограничење ради ограничења самог, понижење појединца ради његовог покоравања . Владарима је увек било у интересу да сазнају садржај свести својих поданика да би се благовремено осигурали од оних који сумњају у идеолошке и филозофске основе њихове владавине или снују антидржавне или антинародне завере Слобода изражавања тада постаје императив, један треба-исказ исписан малим словима.

Ипак, и тај исказ је противуречан самом себи. И сам Ц.С. Мил је у једном свом есеју навео да треба да постоји најпотпунија и најшире схваћена слобода изражавања мишљења, и да то треба прихватити као ствар етичког убеђења сваког појединца. Било која мисао, било која доктрина мора бити подобна да буде испољена у јавности, чак и ако је њена морална страна дискутабилна.[7] Или другачије речено, ако се нашем непријатељу ускрате оне слободе које ће он моћи да злоупотребљава, онда се негира сама суштина оног за чега се залажемо, и постајемо исти као они против којих се боримо.[8]

Слобода мисли егзистира као потврда и крајњи продукт једног унутрашњег, интимног процеса размишљања. То је истовремено и процес обраде многих података, до којих се долази на различите начине, њихово усвајање или одбацивање, и поновна потрага за новим информацијама. Стога ,слободу мисли посматрамо и као својеврсну, тзв. « позитивну сугестију», подстрек за даље процесе и развој самог људског бића. У питању је сугестија , а не заповест; предлог или став, који је могуће али није обавезно прихватити.Једини проблем представља немогућност контролисања самог тока мисли, јер конклузија може бити потпуно тачна иако се кренуло од апсолутно неистинитих премиса. Одређена мисао може остати заробљена у једном простору, ако се не дозволи или се контролише њено испољавање. Мисао тада губи своју полазну намеру, и постаје

[6] Извештај о стању медија после 5.октобра 2000. године

[7] Mark Cooray:*Human Rights In Australia* , доступно на сајту: http://www.ourcivilisation.com/cooray/rights/chap6.htm

[8] У том смислу је и Волтерова изјава да се не салже са оним што ће му саговорник рећи, али ће до смрти бранити његово право да каже шта жели. Ибид.

само оруђе вишег ауторитета, исказано нумерички, процентима, као сагласност или несагласност са ставовима других[9].

Зато, слобода изражавања фигурира као « вентил» слободе мисли. У питању је механизам подложан сваколиким контролама, ограничавањима. Овиме упадамо у парадокс саме суштине ових слобода[10]. Теоријска гаранција није истовремено и довољна за њихово несметано коришћење у стварном животу. Државе је зато склона ограничавању оног што се неограничено гарантује а у име виших циљева типа « заштите права и угледа других лица, очувања ауторитета и непристрасности суда, националне безбедности, јавног здравља и морала или јавне безбедности»[11]. Извесна законодавна ограничења у овом домену се свакако намећу као нужна, али остављају и широк простор за злоупотребе. Међутим, има и супротних случајева. У САД, на пример, особа , која се бави државним послом или обавља било коју другу јавну функцију, нема право да тужи друго лице због клевете. Сама позиција у друштву коју заузима је подложна оштрој критици јавности, и таква личност мора бити спремна да прихвати сваку критику упућену њеном раду или самој појави.

Слобода изражавања се тако не може свести на чисто индивидуално право да се нешто сазна или саопшти. Оно има своју колективну димензију која претпоставља постојање стабилних установа и организација чијим посредством се могу примати и одашиљати поруке од јавности и ка јавности. Посебно је значајан механизам у процесу доношења политичких одлука. У том случају делује изнутра- међу самим државним органима, али и споља - у интеракцији са (изборном) популацијом.

ДЕФАМАТОРНО ИЗРАЖАВАЊЕ ИЛИ КРИТИЦИЗАМ?

Европски суд за људска права својом праксом је утврдио да је слобода изражавања посебно подложна контроли у свим аспектима, било да се посматра као « изражавање мишљења или идеја које су фаворизовано примљене или посматране као неувредљиве или као производ индиферентности, већ и оне које вређају, шокирају(?) или узнемирују државу или било који сегмент популације».[12] Иако, дакле поставља висок степен толеранције за информације на основу који се ствара мишљење које ће неминовно, негде и некад бити саопштено, Европски суд за људска права оставља исто толико широк простор и за санкционисање сваког понашања које се може подвести под горенаведено. Слобода изражавања стога не може бити неограничена, већ може трпети и ограничења која су неадекватна у односу на слободу мишљења.

Суд је проценио да је у демократији слобода изражавања право од виталне важности. Суд је нарочиту важност приписао говору који се односи на политичка питања или друга питања која су од ширег друштвеног интереса. У овој области су рестрикције слободе изражавања проучене са нарочитом пажњом, те је простор за примену доктрине "поља слободне процене државе" унеколико сужен.[13]. Тако је ова слобода ограничена дужношћу државе да сузбија пропаганду рата

[9] Вешто постављено питање понекад може наметнути одговор, без обзира на право мишљење испитаника, посебно када се мишљење треба свести на кратак одговор, најприближнији правом ставу испитаника.

[10] Што и јесте, сходно тумачењима прадставика либералне струје, сама суштина парадокса слободе, не само слободе мишљења и изражавања, већ и сваке друге слободе.

[11] Повеља о људским и мањинским правима и грађанским слободама, чл.29, став 3

[12] Коментари и препоруке организације ARTICLE 19 на предлог црногорског закона о медијима, AHEM, 2003.

[13] Endru NIKOL, Doughty Street Chambers, London : Izveštaj Savetu Evrope o Zakonu o javnom informisanju Republike Srbije iz 1998. godine

и изазивање националне, расне или верске мржње . Ово ограничење улази у дефиницију слободе изражавања: она једноставно не обухвата право да се заговарају рат и мржња

Питање за правнике практичаре је: где се завршава слобода , а где наступа ограничење? Где је граница између јавне критике и деликта?Када се изјашњавање о било ком питању, посебно политичке природе има сматрати позивом на промене, претњом по поредак, лажи, а када једноставном реализацијом једног од основних људских и грађанских права? Или, «како се може бити критичан а не имати културу слободе свести, мисли и изражавања мишљења?»[14] Критицизам , у смислу предочавања резултата анализе одређених података сопстевним снагама, ретко када је пожељан, јер носи у себи клицу могућег разарања. Иако је то једини начин да се посебно у политичкој сфери, открије и формира коначно мишљење о идејама и ставовима политичких посленика, нерадо се прибегава овом средству, јер са собом носи горак укус неуспеха и разочарења.

Али, како другачије организовати слободну политичку расправу, која чини суштину, срж једног демократског друштва? Како «упражњавати» демократску културу и њене «плодове», без наведеног?Следећи парадокс, који покреће и многа друга питања.

Даље, као опасност се јавља и евентуална злоупотреба слободе мишљења и изражавања у извештајима новинара који прате судске поступке. Судски поступак по својој суштини захтева присуство јавности, па барем оно било ограничено. Недостатак правних механизама заштите судовања у случају пристрасног извештавања наговештај је анархичности и утирање пута презумпцији кривице, и без правоснажне пресуде. [15]
Слобода мисли и посебно изражавања носи са собом одговорност, која спрам одговарајућих околности може бити веома флексибилна. Зато, индивидуа се неретко одриче своје слободе, приклања нечему што и није њено мишљење јер се не осећа довољно спремном или не жели да сноси одгповорност за своје изјаве. Услед таквог одбрамбеног механизма, сама слобода и овде губи своју суштину, а законодавна интенција заштите виших интереса постаје још еластичнија док се индивидуа губи у маси. Њени интереси и права прелазе у други план, јер ако целина не функционише, зашто је битно да се један део тог друштва добро осећа, јер има могућност да испољи свој став било када, било какав да је ?Боље је , стога, уздржати се од изражавања свог става, него закорачити у сферу противправног и због тренутка своје воље , прихватити стигму делинквента.

Идеологизација слободе мишљења и изражавања је неминовна, као последица сукоба и посесивности државе, уперене на појединца. Држава има свако право и обавезу да одговарајућим механизмима спречи или казни злоупотребу слободе мисли и изражавања, ако нађе и најмањи траг (потенцијалне) инкриминације.Но, скептик би питао: а колико држава,(посебно један недемократски систем)може и треба да буде објективан приликом просуђивања у горњем смислу?

Иако *de iure* више не постоји, вербални деликт и дање фигурира у казненом законодавству, најчешће у виду кривичних дела увреде или клевете. Понекад постављен као « повреда представе о врлини политичког система, без физичке промене света»[16], указује на законодавчеву добру намеру

[14] Слободан Бељански: Право и илузија, Библиотека XX века, стр. 47.
[15] У исто време , законодавства неких чланица Европске Уније садрже веома строге казне, у том смислу.
[16] Ибид, стр.50.

да у корену сузбије субверзивне делатности. Али и «пут до пакла је поплочан добрим намерама», па и законодавчева несавршеност (јер је и он на концу конгломерат физичких лица, различитих политичких убеђења) долази до изражаја, јер несвесно оставља држави широк простор за одређивање «бића» могућег прекршаја или кривичног дела. Онда се не налазимо далеко од средњовековних поклича за уништавањем вештица, прогона монархомаха или заточења највећих умова у Бастиљи.

БОРБА САВРЕМЕНОГ ДРУШТВА ЗА (ИЛИ)ПРОТИВ СЛОБОДЕ МИШЉЕЊА И ГОВОРА

У савременом друштву, слобода мисли и изражавања је добила још један , веома значајан медијум за пренос информација -Интернет .Императив брзог протока вести, идеја, догађаја,истовремено је и најтеже контролисани извор. Излаз се назире у цензури садржаја постављених на сајтовима, али ни држава, чак уз помоћ транснационалних компанија није свемогућа. Цензурисање је , са друге стране, атак на слободу мисли и изражавања, који се у извесној мери може подвести под посебне околности у којима је то оправдано чинити.И опет се налазимо у зачараном кругу и, за сада последњем, парадоксу једне слободе: ефикасно и брзо контролисање садржаја *world-wide* сервиса, базирано на позитивно-правном одређењу оног што се сматра противправним, кажњивим, неморалним, неретко може довести до колизије.

Право се не може упуштати у аутентичност мишљења већ само у његову физичку неометаност, тј. физичко испољавање истог. Слобода мисли и изражавања ће бити потпуно «слободне» оног момента, када се *homo sapins* уздигне на виши ниво и престане да користи своје квалитете на погрешан начин, али и онда када држава прихвати критицизам маса, ту «белу рукавицу бачену у лице» достојанствено, како и доликује, и не прихвати изазов. До тада, демократска култура ће увек бити ускраћена за свој најзначајнији део.

МЕЖДУНАРОДНОЕ ГУМАНИТАРНОЕ ПРАВО, ПРИМЕНИМОЕ ВО ВРЕМЯ ВООРУЖЕННЫХ КОНФЛИКТОВ НЕМЕЖДУНАРОДНОГО ХАРАКТЕРА

ALEXANDR SVETLICINII*

«… междоусобные войны всегда гораздо больше вызывают у воюющих чувство ненависти и возбуждают страсти, чем война между независимыми народами». Ф.Ф.Мартенс

В современный период количество локальных войн и вооруженных конфликтов немеждународного характера возрастает, страдает от этого огромное число людей, и необходимость более детального и расширенного регулирования вооруженных конфликтов такого уровня становится одной из главных задач МГП на современном этапе.

Последние пятьдесят лет в мире наблюдается значительное изменение характера конфликтов: центр тяжести сместился от классических войн к конфликтам немеждународного характера. Этот процесс развивается на фоне технического прогресса в развитии средств ведения войны, и в этой войне гибнут уже граждане одного государства.

Внутренний вооруженный конфликт может возникнуть в форме вооруженного инцидента, вооруженной акции и других вооруженных столкновений ограниченного масштаба и стать следствием попытки разрешить национальные, этнические, религиозные и иные противоречия с помощью средств вооруженной борьбы.

Часто причина возникновения вооружённого конфликта состоит в необходимости достижения национального единства и национальной идентичности в качестве обязательного предварительного условия демократизации. Наглядным примером может послужить затянувшийся на долгие годы конфликт в Руанде. Причина конфликта проста: после получения независимости был нарушен единственный в своем роде «общественный договор», существовавший между двумя африканскими народами тутси и хуту в течение как минимум пяти веков.

МГП как особая ветвь международного права, относящаяся к ситуациям вооруженных конфликтов, различает две категории таких конфликтов: вооруженные конфликты между двумя или более государствами – международные, и вооруженные конфликты в пределах территории одного государства – немеждународные или внутренние.

Но если в настоящее время регулирование международных вооруженных конфликтов происходит сравнительно успешно (подавляющее большинство положений Женевских конвенций, около 500 статей относится именно к таким конфликтам), то в отношении внутренних вооруженных конфликтов еще имеется ряд трудностей. Связано это в первую очередь с тем, что государства не желают ограничивать свой суверенитет, несмотря на общемировую тенденцию все большей защиты прав человека. Основной атрибут государственного суверенитета заключается в праве соответствующего правительства по своему усмотрению решать внутренние проблемы. Отсюда и исходит позиция правительств, что все внутренние проблемы (в том числе и внутренние вооруженные конфликты) должны решаться без вмешательства извне.

---

* ТАТЬЯНА КУБАТА, АНДРЕЙ РУСУ, АЛЕКСАНДР СВЕТЛИЧНЫЙ

Но в то же время неограниченное насилие и смертоносное оружие причиняют во время гражданских войн и иных внутренних столкновений с применением вооруженных сил такие же страдания и разрушения, как и во время войн между государствами. Жестокость и беспощадность враждующих сторон во время гражданской войны в Испании 1936 г. а также развитие после Второй Мировой Войны концепции прав человека привели к появлению в МГП первого положения, специально предназначенного для вооруженных конфликтов немеждународного характера – общей для всех Женевских конвенций ст. 3. В 1977 был принят 2-ой Дополнительный Протокол, который развивал положения ст. 3 и расширял гуманитарную защиту для гражданского населения в вооруженных конфликтах, происходящих внутри государств. Однако, рассматривая процедуру его принятия, мы можем убедиться в том, что чрезмерная озабоченность государств по поводу возможного ограничения своего суверенитета может помешать распространению идей гуманитарного характера. Во время дипломатической конференции 1974-1977 проект 2-го Дополнительного Протокола, разработанный МККК, подвергся серьезной критике и был отвергнут как неприемлемый на данном этапе. После этого, за достаточно короткий период он был существенно изменен и урезан и предоставлял собой сокращенный и более «слабый» по содержанию текст, который и был принят на основе консенсуса. Фактически получилось, что опасения правительств насчет возможного вмешательства во внутренние дела привел к принятию слабого в смысле механизма самообеспечения и применения, а также качества регулирования документа, а в результате – к слабому уровню защиты больших групп населения во время вооруженных конфликтов немеждународного характера. И в то же время, даже те скромные факторы гуманитарного порядка, которые содержатся во 2-ом Дополнительном Протоколе не могут найти своего полного применения из-за его неподписания такими сильными мировыми державами как США,… в которых демократия и права человека признаются высшей ценностью и даже государственным достоянием.

Положения МГП, относящиеся к регулированию внутренних вооруженных конфликтов не запрещает применять силу для восстановления на территории государства режима законности и порядка, а только ограничивает методы применения такой силы. Т.е. право государства выбирать средства и методы для восстановления правопорядка не является неограниченным.

Следует определить те положения МГП, которые предназначены специально для регулирования ситуаций внутренних вооруженных конфликтов. В первую очередь то ст. 3, общая для Женевских конвенций – результат «прорыва» в отношении применения принципов конвенций во время вооруженного конфликта немеждународного характера. Она предусматривает применение принципа гуманности в отношении лиц, не принимающих участие в вооруженном конфликте и устанавливает запрет на совершение в отношении указанных лиц определенных действий – пыток, убийств, истязаний, незаконного осуждения и др. По своей сути данная статья являет собой квинтэссенцию норм обычного права, что было констатировано Международным Судом в его решении от 27.06.1986 по поводу спора между Никарагуа и США.

Другим не менее важным документом является 2-ой Дополнительный Протокол к Женевским конвенциям 1949 г., принятый в 1977 г. Генеральная Ассамблея ООН в 1868 г. приняла резолюцию 2444, в которой призвала участников международного сообщества применять основные гуманные принципы во всех вооруженных конфликтах и просила Генерального Секретаря ООН совместно с МККК изучить необходимость в принятии дополнительных международных конвенций или других соответствующих правовых документов в целях обеспечения лучшей защиты гражданских лиц и комбатантов во всех вооруженных конфликтах.

На основании этих решений Комитет Красного Креста подготовил проект двух протоколов, которые были приняты в 1977 г. под названием “Дополнительные протоколы к Женевским конвенциям” от 12 августа 1949 г.

Второй Протокол (Протокол II**)** посвящен защите жертв вооруженных конфликтов, не носящих международного характера. Этот документ развивают сжатые положения общей 3-й статьи и расширяет гуманитарную защиту населения во время вооруженных конфликтов немеждународного характера. В настоящее время Протокол № 2 ратифицирован большинством государств мира (168 государств на 31 декабря 1999 г.).

Этот документ развивает положения ст. 3, в частности, устанавливает основные гарантии для лиц, не принимающих участия в конфликте, и лиц, свобода которых ограничена в связи с участием в таком конфликте; определяет основополагающие правила осуществления уголовного преследования; содержит нормы по защите гражданского населения и гражданских объектов, медицинского и духовного персонала, а также ряд других важных положений. Однако, указанные нормы недостаточно проработаны и носят по большей части общий характер, что является следствием непростого процесса принятия данного документа.

Другим важным источником для регулирования внутренних вооруженных конфликтов является обычной право. Как мы уже отмечали, ст. 3 Женевских конвенций является квинтэссенцией норм обычного права, но она не включает в себя целый ряд принципов МГП, которые ограничивают выбор средств и методов ведения военных действий. Применение этих норм возможно на основе всеобъемлюще действующих общих принципов МГП и международного права в целом, специально отметим здесь известную «оговорку Мартенса» (указана в преамбуле Гаагской Конвенции 1907 г.). На практике же, применение данного источника МГП довольно затруднительно из-за необходимости в документальном обосновании применения данных принципов. Кроме того, не существует общей точки зрения в отношении того, какие принципы следует считать общепризнанными.

И наконец, следует отметить такой источник регулирования, как специальные соглашения между находящимися в конфликте сторонами. Ст. 3 Женевских конвенций предусматривает и призывает враждующие стороны заключать такие соглашения, посредством которых стороны могут ввести в действие все или некоторые положения Женевских конвенций. При этом под самим соглашением подразумевается выраженное согласие на применение определенных норм.

Прежде чем приступить к характеристике вооруженных конфликтов немеждународного характера следует сначала определить само понятие «вооруженный конфликт». Ни одна из существующих конвенций не дает четкого определения, поэтому мы можем обратиться к другому источнику международного права – судебной практике. Так Апелляционная Палата Международного Уголовного Трибунала по Югославии указала, что «вооруженный конфликт существует всегда, когда происходит обращение к вооруженной силе в отношениях между государствами, между государством и организованными вооруженными группировками, или же между этими группировкам.» (см. The Prosecutor v. Dusko Tadic # IT-91-1-AR72)

Далее, мы можем обратиться к определению вооруженного конфликта, который не носит международного характера. Его определение впервые дается в ст. 1 2-го Дополнительного Протокола «Основная сфера применения»: под вооруженным конфликтом немеждународного характера понимаются “вооруженные конфликты на территории какой-либо высокой договаривающей стороны между ее вооруженными силами и антиправительственными вооруженными силами или другими организованными вооруженными группами, которые, находясь под ответственным командованием, осуществляют такой контроль над частью ее территории, который позволяет им осуществлять непрерывные и согласованные военные действия и применять настоящий Протокол”. Из сферы применения Протокола безоговорочно исключены ситуации напряженности и беспорядков внутри страны - «такие как беспорядки, отдельные и спорадические акты насилия и иные акты аналогичного характера» (статья 1, пункт 2).

Исходя из современной, объективно существующей структуры МГП в той части, где его нормы регулируют вооруженные конфликты немеждународного характера, можно проводить их классификацию руководствуясь определенным набором объективных и субъективных факторов.

Так, одним из критериев может являться степень интенсивности конфликта, особенно в плане степени организованности и силы повстанцев. Здесь можно выделить гражданские войны, когда восставшая сторона отвечает ряду признаков: контроль над территорией, войска под единым командованием, гражданское правительство, соблюдение норм и обычаев войны и некоторые другие. Далее следуют вооруженные внутренние конфликты меньшей интенсивности, которые подпадают под действие 2-го Протокола или ст.3 ЖК. Далее, по нисходящей находятся ситуации внутренней напряженности, спорадические акты насилия и массовые нарушения правопорядка. В данном случае нормы МГП не применяются, но МККК может осуществить право гуманитарной инициативы, а государство не освобождается от обязанности соблюдать права человека, в частности в метах заключения участников беспорядков.

Особым случаем среди немеждународных вооруженных конфликтов являются национально-освободительные войны, подпадающие под действие 1-го Протокола, когда МГП будет применяться в полном объеме, как и в международных конфликтах. Отличительная черта этих войн – борьба народа против колониальной державы или оккупантов, национального или расового угнетения. Причем за народом, борющимся за право самоопределения, международное право предусматривает особый статус, сходный со статусом государства.

Классификацию вооруженных конфликтов немеждународного характера (ВКНХ) можно проводить и по критерию участвующих в них сторон. Так, в целях определения применения норм МГП выделяют

1. ВКНХ между правительством и повстанцами
2. ВКНХ с участием иностранного государства а) на стороне правительства б) на стороне повстанцев в) на обеих сторонах
3. ВКНХ между двумя или более вооруженными группировками внутри страны, борющимися за власть

Д. Шиндлер предлагает классифицировать вооруженные конфликты немеждународного характера следующим образом: 1) Гражданская война в классическом смысле международного права как немеждународный вооруженный конфликт высокой интенсивности, в котором за вновь созданным правительством третьи государства могут признать статус воюющей страны. 2) Немеждународный вооруженный конфликт по смыслу ст. 3, общей для Женевских конвенций, о защите жертв войны 1949 г. 3) Немеждународный вооруженный конфликт по смыслу Дополнительного протокола II к Женевским конвенциям 1949 г. При осуществлении такой классификации ученый исходит главным образом из правового регулирования, под которое будет подпадать тот или иной конфликт.

Исходя из установившейся международной практики вооруженные конфликты немеждународного характера должны обладать следующими признаками:

1)вооружённый конфликт разворачивается в пределах территории одного государства;

2)применение оружия и участие в конфликте вооруженных сил, включая полицейские подразделения;

3)коллективный характер выступлений. (Действия влекущие обстановку внутренней напряженности, внутренние беспорядки не могут считаться рассматриваемыми конфликтами);

4) определенная степень организованности повстанцев (минимум организованности) и наличие органов, ответственных за их действия (более или менее соответствовать определению «сторон»). На первый взгляд, Протокол II не применяется к вооруженным конфликтам между организованными вооруженными группами, ни одна из которых не представляет существующее правительство. Первоначальный проект МККК действительно касался, столкновения между организованными группами без участия правительственных сил, однако текст, принятый в конечном счете, похоже, не предусматривает такой ситуации, так как в нем рассматриваются исключительно конфликты, в которых вооруженные силы «одной из Высоких Договаривающихся Сторон» противопоставляются «антиправительственным вооруженным силам или организованным вооруженным группам. Не исключается возможность применения Протокола II к столкновениям между организованными вооруженными неправительственными группировками, если одна из них утверждает, что она представляет государство, и, если эти группы отвечают также другим условиям Протокола.

5) продолжительность и непрерывность конфликта. (Возникает вопрос: с какого момента можно считать конфликт продолжительным или интенсивным? Означает ли это, что принципы и нормы международного гуманитарного права не могут быть применены до тех пор, пока данный конфликт не будет отвечать этим требованиям? В этом как раз и заключается негативный и опасный аспект включения в качестве обязательного элемента данных критериев в определении этого вооруженного конфликта);

6) осуществление повстанцами контроля над частью территории государства. Контролируемая территория может быть и относительно небольшой, но постоянно и абсолютно контролируемой. Контроль над территорией является самым сложным в условиях партизанской войны. В данном случае требование именно о постоянном контроле определенной части территории может оказаться трудным, иногда невозможным. Однако, находясь внутри страны повстанцы так или иначе продолжают контролировать ту часть территории, куда они перемещаются;

7) конфликтные отношения сторон должны достичь уровня открытых и коллективных военных действий. Теоретически данные критерии должны позволить отличить разновидности вооруженной борьбы, подпадающие под действие статьи 3, от любой другой ситуации. Их сочетание является необходимым минимумом для того, чтобы то или иное вооруженное противостояние вошло в сферу действия статьи 3. В достаточной степени соответствовали вышеуказанным критериям: Гватемала 1954 г.), Алжир (1955г.), Ливан (1958г.), Куба (1958 г.), Йемен (1962г.), Доминиканская Республика (1965г.) и т. д.

8) повстанцы должны применять положения Протокола II (любое положение Протокола II действует автоматически, когда на территории одного государства имеет место вооруженный конфликт, как общепризнанные обычные нормы международного права);

9) преследование политической цели (этот критерий сам собой разумеется, ибо нет такой стороны, которая боролась бы без этой цели). Эта цель должна соответствовать интересам широких народных масс, нормам и принципам современного международного права.

Несмотря на то, что и в классической войне и в период конфликта немеждународного характера гуманитарные проблемы одни и те же, при междоусобной войне намного сложнее определить надлежащие границы для насилия и произвола.

В связи с тем, что негативные разрушительные последствия вооруженных конфликтов немеждународного характера в современных условиях во многих случаях даже превосходят

последствия международных войн, вопросы правового регулирования этих конфликтов приобретают особое международное значение. Необходимо понимать, что практически все вооруженные конфликты немеждународного характера связаны с международными событиями и лишь изредка имеют сугубо внутренний характер и последствия. Конфликт в современном мире, возникнув как внутренний, становится международным в результате, например, своего расширения. К нему подключаются другие участники, и он выходит за рамки национальных границ. Если этого не происходит, внутренний конфликт, как правило, воздействует на соседние страны, в том числе вследствие перехода границ беженцами. Так, в связи с конфликтом в Руанде в 1994 году эту страну покинули около 2 млн. человек, которые оказались в Танзании, Заире, Бурунди. Ни одна из этих стран не была в состоянии справиться с потоком беженцев и обеспечить их самым необходимым.

В иных случаях внутренний конфликт может, оставаясь по сути внутренним, приобретать международную окраску из-за участия в нем представителей других стран. Например, в конце 1996 года в резиденции японского посла в Лиме (Перу) представителями революционного движения «Тупак – Амару» были захвачены заложники - граждане разных стран. Требования террористов относились к внутренней политике Перу, однако, в конфликт оказались вовлеченными и другие государства, граждане которых стали заложниками, - прежде всего Япония.

Некоторые внутренние конфликты превращаются в международные в результате присутствия в стране конфликта иностранных войск**,** а нередко и их прямой интервенции.

Еще один вариант трансформации внутреннего конфликта в международный – «дезинтеграция страны». Пример: конфликт в Нагорном Карабахе, возникший еще в рамках СССР. После распада Советского Союза и образования самостоятельных стран – Армении и Азербайджана – конфликт в Нагорном Карабахе превратился в межгосударственный.

Квалифицировать конфликт порою сложно, так как у сторон могут быть различное, крайне противоположное мнение по этому поводу. Наглядный пример: конфликт в Российской Федерации, в котором Чечня считает себя суверенным государством, а Россия рассматривает её как свою часть. Если первое положение принять за истину, тогда настоящий конфликт стоит рассматривать как международный, разрешение которого должно основываться на автоматическом установлении между сторонами международно-правового режима неприменения силы и мирного урегулирования существующего между ними спора. Однако, несмотря на то, что Чечня была присоединена к России в 1859 году насильственно, в настоящее время она является её составной частью, так как в 19 в. каждое “цивилизованное” государство имело полное право присоединить к своей территории новые земли, на которые ранее не распространялся суверенитет другого “цивилизованного” государства.

С другой стороны необходимо чётко разграничивать понятия вооружённого конфликта немеждународного характера и национально - освободительную войну народа за самоопределение**,** регулирование которой осуществляется другими нормами Гуманитарного права (Дополнительный протоколII).

Однако, кроме права народа на самоопределении существует не менее значимый принцип территориальной целостности любого государства. В условиях увеличения числа внутренних вооружённых конфликтов в настоящее время было бы глупой неосторожностью ставить под угрозу неприкосновенность государственных границ. Тем более, что Устав ООН (п. 4 ст. 2 запрещает любые попытки расчленения государственной территории, исключение: применение международных санкций).

Например, чеченский конфликт ставит перед собой цель суверенизации на этнической основе, изначально стремиться к отделению и созданию на территории Чечни своей государственности. Кроме того, в соответствии с Декларация о принципах международного права 1970 г. принцип равноправия и самоопределения народов как правовая основа для требования Чечни об отделении от России и создании собственного государства мог бы быть использован лишь в том случае, если бы чеченский народ не имел пропорционального представительства во властных структурах российского государства. Только группы населения, не представленные в Правительстве, считаются, в подобном случае, народом, обладающим правом на свободное определение своего политического статуса. Подобной ситуации не существовало даже в советское время. Вопрос, является ли та или иная группа населения народом, обладающим правом на самоопределение, должен быть разрешён путём коллективной легитимации в рамках международных организаций типа ООН или ОБСЕ. Таким образом, предметом конфликта между Россией и Чечней является вопрос об "изменении политической общности" России, возникший в результате курса руководства "режима" Дудаева, на образование независимого государства. С этих позиций, чеченский конфликт по намерениям сторон с самого начала являлся политическим конфликтом, который нацелен на изменение важнейшего элемента политической системы России — политической общности.

Таким образом, именно проблема отграничения вооруженных конфликтов немеждународного характера от ситуаций внутренней напряженности и беспорядков вызывает наибольшую озабоченность в связи с тем, что на последние пока не удалось распространить гарантии Международного Гуманитарного Права. Это происходит по причине того, что, во-первых, эта квалификация будет иметь решающее значение для применения принципов МГП или самих ЖК и, во-вторых, государства, обеспокоенные защитой своего суверенитета от вмешательства извне, всегда будут противиться признания ситуации в качестве вооруженных конфликтов немеждународного характера.

В истории становления и развития МГП, особенно на начальных этапах доминировало т.н. «субъективное признание», когда законное правительство должно было признать повстанцев в качестве воюющей стороны. Естественно это происходило крайне редко, последний раз в 1912 г. во время англо-бурской войны. После принятия общей ст. 3 и двух дополнительных протоколов к ЖК мировое сообщество применяет «объективное признание», то есть рассматривается наличие объективных материальных факторов, позволяющих квалифицировать конфликт как вооруженный конфликт немеждународного характера.

Другим проблематичным вопросом в данной области является становление принципа мирного урегулирования конфликтов немеждународного характера, как основополагающего принципа международного права. Другим немаловажным с практической и юридической точек зрения вопросом, является участие международных организаций, таких как МККК, в осуществлении гуманитарных операций и других мер для гарантирования защиты жертв таких конфликтов.

В настоящее время возросло число участников международных отношений, поэтому зачастую поведение новых актеров (религиозные движения, ТНК, политические объединения) способны оказывать непосредственное влияние на ход событий без оглядки на национальные правительства. Можно говорить сегодня о таком явлении как «парадокс участия», суть которого заключается в следующем: чем меньше количество участников системы и степень их разнородности, тем более упорядоченной оказывается сама система и легко предсказуемыми последствия отдельных действий. Если система начинает пополняться все новыми членами, то значительно затрудняются процессы урегулирования современных конфликтов, которые сегодня приобретают тенденцию к подключению все большего числа негосударственных участников. Поэтому конфликты порождают особые трудности при урегулировании их традиционными средствами дипломатии, которые включают в

себя официальные переговоры и посреднические процедуры. В результате особенно актуальным в конце 1990-х годов становится поиск иных «нетрадиционных» средств урегулирования подобных конфликтов, которые дополняли бы традиционное межгосударственное взаимодействие (участие в урегулировании современных конфликтов церкви, частных лиц, неправительственных организаций).

Сегодня уже известны случаи посредничества Римской католической церкви в различных конфликтах. Здесь можно привести в пример участие папы Павла II в урегулировании конфликта между Чили и Аргентиной в 1978 году. Важно то, что стороны доверяют актеру, предложившему такие услуги и стремятся сохранить с ним хорошие отношения. Папа римский является высшим авторитетом для более 800 млн. католиков и это делает его посредничество обоснованным в глазах конфликтующих сторон.

Примером участия частных лиц в урегулировании современных конфликтов может быть активность лауреата Нобелевской премии по литературе Габриэля Гарсиа Маркеса в урегулировании колумбийского конфликта в 1998 году, когда он выступил в роли посредника между правительством Колумбии и Революционными вооруженными силами Колумбии (РВСК).

Особые надежды вызывает сегодня практика так называемой «мультинаправленной дипломатии» (Multi-Track Diplomacy), которая предполагает сотрудничество официальных лиц – «первого направления дипломатии» (Track-I Diplomacy) с неофициальными представителями – «вторым направлением дипломатии» (Track-II Diplomacy). «Мультинаправленная дипломатия» представляет собой не просто смешение первых двух направлений, но и «подключение к ним деловых структур, частных лиц, исследовательских и образовательных центров, религиозных деятелей, местных активистов, адвокатских и филантропических организаций, представителей СМИ, а также распределение функций между ними.

Важным также является сотрудничество неправительственных организаций с межправительственными в сфере урегулирования конфликтов, поскольку у многих межправительственных организаций, в частности, у ООН, уже накоплен определенный полезный опыт политического урегулирования конфликтов в сотрудничестве с другими международными актерами.

Именно неправительственные организации нередко являются теми участниками урегулирования, которые первыми вовлекаются в этот процесс и последними сворачивают свою деятельность. Структура их действий (в том числе и в результате многочисленности и разнообразия НПО) сегодня, пожалуй, более всего соответствует характеру урегулирования современных международных конфликтов. Однако некоторые государства, входящие в межправительственные организации, отстаивая свой суверенитет, часто отказываются признать правомочность решений этих организаций, что понижает эффективность их деятельности.

Поэтому, наилучшие результаты получаются, когда и тот и другой тип организаций действуют совместно и согласованно. В качестве примера здесь можно привести успешное взаимодействие организации ЮНИСЕФ и некоторых неправительственных организаций во время урегулирования конфликта в Судане, когда этими участниками был установлен «коридор спокойствия», использование которого помогло доставке необходимой помощи детям, относившимся к разным сторонам конфликта.

LEGAL ISSUES ARISING OUT OF *CORFU CHANNEL CASE* OF 1949

by

KAMRUL HOSSAIN*

ABSTRACT

The *Corfu Channel case* is one of the leading cases in International Law that invokes some very fundamental questions of customary international law. This article investigates those international legal issues, raised during the decision making in the International Court of Justice. The legal issues included first of all the jurisdictional competence of the ICJ. The other issues such as state responsibility, right to innocent passage, suspension of innocent passage through strait, environmental laws were investigated by through analysis in line with the *Corfu Channel case*.

INTRODUCTION

The paper mainly presents some international legal issues that arose from the *Corfu Channel Case* held in 1949 in the International Court of Justice. The issues discussed here are derived from the ICJ Reports where the Court was acting on the points agreed by the parties through an especial agreement concluded between them. I mainly tried to discuss some related legal issues in brief, along with the Court's judgement. These legal issues include international responsibility of states and innocent passage through the territorial water. Court's jurisdictions, questioned by Albania, and the state responsibility issues under environmental law were also discussed. I tend to put throw the state responsibility doctrine within the framework of the case itself. Therefore, doctrine of strict liability and the doctrine of *culpa* were discussed. It is also found from the discussion that where there is responsibility under international law there is remedy. This remedy can be a mere declaration of the Court. I raised the particular provisions relating to the innocent passage through the territorial water and through the strait, taking from the conventions held in different times on the law of the sea. Those provisions were considered in the line along with the *Corfu Channel Case*. Finally, the discussion sought whether warship does have right to innocent passage.

THE CASE

On October 22nd, 1946 a squadron of British warships including two cruisers, *Mauritious* and *Leander*, and two destroyers, *Saumarez* and *Volage* left the port of Corfu and proceeded northward through the North Corfu strait which was previously swept for mines. However, outside the Bay of Saranda, *Saumarez* struck a mine and heavily damaged. At that time *Volage* was ordered to give assistance and to take her in tow. This time while carrying out the order *Volage* itself struck a mine and was much damaged.

* Doctoral candidate, University of Helsinki, Finland

Earlier to that, in October, 1944 North Corfu Channel was swept by the British Navy. However, no mines were found in that mine sweeping operation and thus the Channel was announced as a safe route of navigation. In January and February, 1945 the Channel was again swept by the British Navy and even this time existence of any mine was absent in the Channel. As a result, the British Admiralty must have considered the Channel to be a safe route for navigation, which is shown by the fact that on May 15th 1946, it sent two British Cruisers and on October 22nd a squadron through the Channel without any special measures of precaution against danger from moored mines[1]. Nevertheless, in the later case the explosion was occurred where life of human and property were damaged.

Finally, on the 13th of November, 1946, North Corfu Channel was swept by British minesweepers and twenty-two moored mines were cut. Two of the mines were taken to Malta for an expert examination and it was found that the mines were belonging to German GY type.

United Kingdom claimed Albania to incur responsibility and pay compensation under international law for the explosion occurred in its territorial water where death and injuries of 44, and personal injuries to 42, British officers and men were held. The UK also claimed compensation for the damages of his majesty's ships.

The Issues of Contentious

When the case was in its hearing before the Court, various factual as well as legal issues were appeared. However, parties to the case did bind themselves by special agreement to some particular issues to be decided by the Court. Therefore, the first question of contentious before the Court was, whether Albania is responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters, and for the damages and loss of human life which resulted from them, and is there any duty to pay compensation.[2] Different factual issues arose from this point at the time of hearing such as when was the minefield laid down; was the explosions on the 22nd October occurred from the floating mines; was really Albanian government ignorant of the mine laying activities and so on.

The Government of the United Kingdom claimed that the minefield was laid recently, and the explosions occurred on 22 October was from the same minefield discovered on 13 November. The government of Albania, however, acknowledged that the minefield was recently laid but contended that it must have been laid after October 22nd, 1946. About the explosions of 22nd October, Albanian argument was that, it occurred from the floating mines, coming from the old minefield in vicinity, or magnetic ground mines, magnetic moored mines, or German GR mines[3]. However it was established before the Court by expert examination that the explosions were occurred neither from the floating mines nor from the magnetic moored mines or from German GR mines.

About the mine laying activities, and/or knowledge of such activities on part of Albania, it's argument was that Albania does not have any navy and it has only few launches and motor boats with which main laying activities was impossible. Albania also denied its knowledge about the existence of minefield. Interestingly on part of the United Kingdom little attempt was made by the government that Albania herself laid the mines. Rather, it called upon Albanian government to disclose the circumstances in which

[1] ICJ Report, 1949 at p. 14
[2] ICJ Report, 1949 at p. 12
[3] *Id.* at p.14

two Yugoslav war vessels, the *Mljet* and the *Meljine*, carrying contact mines of GY type, sailed southward from the port of Sibenic on or about October 18th, and preceded to the Corfu Channel.[4] The British claim was mainly based on by the bond of close military alliance between Albanian and Yugoslavia, resulting from the Treaty of friendship and mutual assistance signed by those two States on 9th July 1946. The Court, in fact, in this point considered the fact, whether it would have been possible for Albania to observe the mine laying activities by somebody else if even it did not lay the mines by itself, and found by reproducing such a situation in its water that Albania had knowledge in mine laying activities.

The Second question in the special agreement to be decided was whether the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction for the violation if involved.[5] In this point, contentious was mainly based on 'innocent passage' on part of the United Kingdom while travelling through the Corfu Channel on the mentioned dates. The Court's finding in this regard was that state can not deny innocent passage through its territorial waters unless there is really some exceptional situation. Even more, where territorial waters include strait that are used for international navigation, innocent passage of such strait can never be suspended. Therefore, since travelling through the Channel on 22nd October being innocent, and not contrary to the international law, was an innocent passage. However, in the later dates i.e., 12th and 13th November 1946, minesweeping activities of the UK, as was without prior authorization of the Albanian government as required by its regulation, was contrary to the right of innocent passage. According to the Court's judgement this declaration was the proper satisfaction as demanded.

There were also some other contentious issues as regards the jurisdiction of International Court of Justice i.e., in the first stage to bring the dispute to ICJ in the absence of special agreement between the parties and in the second sphere following the verdict of first question of the dispute as to the assessment of the sum of compensation. In both cases Court found jurisdiction in accordance with the provisions of the Statute of the International Court of Justice.

Jurisdictional Competence

After the Corfu Channel incident, the matter was noticed to the Security Council, and a long and complicated discussion continued in the Council to find out a diplomatic negotiation. However, it failed to reach a decision to settle the dispute. Therefore, the Council recommended that the two governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the statute of the Court.

On 22 May 1947, United Kingdom filed in Court an application instituting proceedings. United Kingdom invoked the Security Council resolution to take the dispute to the Court. But Albania was in an opinion that the United Kingdom was not acting in conformity with the Statute of the Court while filing a unilateral proceeding in the absence of special agreement between the two governments. Since Albania was not a party to the Statute of the ICJ, it invoked the provision of the requirement of an especial agreement. Albania did never deny the matter to be brought to the Court. Therefore, instead of filing

[4] In the formal statement Albanian government states that it it did not lay the mines, and was not in a position to do so, as Albania possessed no Navy; and that on the whole Albanian littoral, that Albanian authorities only had a few launches and motor boats. *See, id.* at p. 15

[5] ICJ Report, 1949 at p. 26

counter-memorial Albania filed a preliminary objection proceeding. On 25 March 1948, in its judgement, Court found the jurisdiction, in fact, on the basis of doctrine *forum prorogatum*. The idea of the doctrine is that the consent of a state to the jurisdiction of the ICJ is established by the act subsequent to the initiation of the proceedings of the Court. In this respect, maybe Court has relied on article 36(6) of the Statute of the International Court of Justice, where it states that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. However, this matter was not a dispute any longer, because immediately before the judgement was delivered the parties had concluded an especial agreement by which they decided to put two questions to the Court. The first question was regarding Albania's responsibility and if the answer is in the affirmative then whether there was any duty to pay compensation, and the second question was, if there was any Violation of Albanian Sovereignty due to the acts of British Navy and if so then whether Britain was in a duty to give appropriate satisfaction.

Jurisdiction of the Court was again a question when in answer to the first question, Court found Albania responsible under international law, and declared that Albania was under a duty to pay compensation. In its application the British government showed the sum of loss it suffered. Albanian question was the assessment of the sum of loss suffered by Britain was not under the special agreement, and thus Court did not have jurisdiction on this issue. Court did not accept this argument but decided to start a further proceeding regarding to fix the sum of loss. Albania did not participate in any Court's hearing devoted to the question even though it was duly notified. Finally, followed by an expert opinion Court fixed the amount to be paid to United Kingdom, which was eventually never paid by Albania.

State Responsibility Issues

The general principle of international law is that where there is an obligation there must be a responsibility for the violation of such obligation. Obligation may include both commission of an illegal act or an illegal omission. Article 1 of ILC Draft provides that every international wrongful act by a state gives rise to international responsibility. An international wrongful act exists where:

> a. Conduct consisting of an action or an omission is imputed to a State under international law; and
> b. Such conduct in itself or as a direct or indirect cause of an external event, constitute a failure to carry out an international obligation of the State.[6]

In *Corfu Channel Case*, the first and the most important question between the parties to be decided, which was concluded in the special agreement was, whether Albania could be held liable under international law for the explosions occurred in its territorial water on 22nd of October 1946 and for the damages and loss of human life which resulted from them, and was Albania in a duty to pay the compensation. It is the right of the coastal state to enjoy sovereignty over its territorial water. However, peaceful passage of ships of other states through the territorial water is also a recognised right under international law. Coastal state should enjoy its right over territorial water in such a manner that the right of other states might not be denied. Therefore, the Channel was indeed within the scope of the territorial water of Albania over which its sovereignty extends, and also the Channel was a strait that are used for international navigation. Thus, Albania was under an obligation under international law to let the channel use for international navigation by other states. Responsibility, in fact, is the necessary corollary of a right. All rights of an international

[6] Article 3 of the ILC Draft

character involve international responsibility.[7] Therefore, responsibility arises on part of both the parties subject to the acts or omission contrary to the rights inferred. Court found an obligation on part of Albania that it should have warned the British ships beforehand. Since no such warning was given, an omission under international law has constituted that made Albania responsible. The following issues relating to international responsibility should be discussed in this regard.

Objective Responsibility

In other words it is meant as *Risk Theory*. Responsibility imputes upon the state for any kind of illegal act or omission committed whether in good faith or in bad faith. There is no scope of fault in this regard. Violation of any nature entails responsibility. States are strictly responsible for such a violation. However, state can not act by itself. It can only act by and through their agents and representatives.[8] It does not matter from whatever position, superior or subordinate, a state organ is.[9] Therefore, a causal link between state and its agent or agents has generally been established in this regard. Verzijl, President of the Franco-Mexican Claim Commission, stated:

> the doctrine of objective responsibility of the State, that is to say, a responsibility for those acts committed by its officials or its organs, and which they are bound to perform, despite the absence of *faute* on their part ... The State also bears an international responsibility for all acts committed by its officials or organs which are dialectal according to international law, regardless of whether the official organ has acted within the limits of his competency or has exceeded those limits ... However, in order to justify the admission of this objective responsibility of the State for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorised officials or organs, or that, in acting, they should have used powers or measures appropriate to their official character ... [10]

As Brownlie states, a considerable number of states support this point of view either explicitly or implicitly[11], and also majority of the cases tend towards strict responsibility. In *Youmans* Case[12], it was held that Mexican Government was responsible for the opening of fire by Mexican troops upon American citizens. In *Caire* Claim,[13] although it was argued by the Government of Mexico that the act committed by the solider was exceeding his power, Commission held Mexico responsible for shooting the French citizen dead. However, in respect of *Corfu Channel Case*, it was not clear from the judgement of ICJ whether Albania is strictly responsible for omission to give prior warning. This was indeed a matter of great complex as to whether Albania was directly involved in mine laying operation since there is no direct proof in this regard. However, the foundation of responsibility was mainly based on the circumstantial evidences. The British government although never abandoned the fact that Albania itself laid the minefield, but a very little attempt was made as such. Therefore, Court moved to find second alternative ground to base Albanian responsibility. The Court viewed; by taking into account various implied reasons, that whoever is the author of the minefield, did not do it without the knowledge of Albanian government. Court argued that on 15th of May 1946, while passing through the Channel, Albanian authority gun fired on British ships for which the British government protested and stated that a fire will be returned if it happens again in future. Since then, Court found, a jealous watch on Albanian part on its territorial water. Therefore, Court viewed that if even Albania did not by itself lay the minefield, it had knowledge on who

[7] Judge Huber on *Spanish Zone of Morocco Claims*, cited
[8] *German Settlers in Poland Case* (1923), PCIJ, Ser. B, No. 6 at p. 22, quoted in Higgins, R., *Problem and Process International Law and How We Use it* (1994) at p.149.
[9] Article 6 of the ILC Draft
[10] Brownlie, I., *Principles of Public International Law* (1990) at p. 438, cited.
[11] *Id.* at p. 438
[12] 1926, 4 RIAA 110, cited in Higgins, R., *Problem and Process* (1994) at p.149
[13] 1929, RIAA v. 516 at 529-31, cited in Brownlie, *Principles of Public International Law* (1990) at p. 437

laid the minefield. In its judgement, Court said that the Bay of Saranda and the Channel used by shipping through the Strait are, from their geographical configuration, easily watched; the entrance of the bay is dominated by heights offering excellent observation points, both over the bay and over the Strait; whilst the Channel throughout is close to the Albanian coast.[14] Furthermore, to verify whether observation is possible by the Albanian look-out post, the Court reproduced the situation by sending a motor ship under the most favourable conditions for avoiding discovery. The ship was clearly seen and heard from the St. George's Monastery.

Test of 'Culpa' Doctrine

In *Corfu Channel Case*, the Court did not even expressly state that Albania's responsibility follows the doctrine of '*Culpa*'. However, it is deemed that the doctrine of '*Culpa*' was found in the Case even though the 'unclear pronouncements by the International Court of Justice'[15]. The foundation of Albania's responsibility was that it had knowledge that minefield exists in the path of shipping, and thus it was in a duty to notify the fact. However, a failure to observe the duty constituted a breach for what Albania is internationally responsible. In fact, this was the basis for some writers[16] to find '*Culpa*' in this Case. Also it was mentioned by Lauterpacht, that if *Culpa* was not necessary, it would not have been necessary to decide whether Albania had preknowledge.[17] Need for *Culpa* was even clearly mentioned by two of the dissenting judges.[18] Higgins was in support of the opinion that Court was neutral on *Culpa*. It only simply says that a failure to warn about what it knew violated an international obligation.[19]

However, it may be argued that mere absence of the express statement by the Court does not mean that doctrine of *Culpa* might not be found. Albanian from the very beginning denied its involvement with mine laying activities, and also denied its prior knowledge of the minefield. The Court did not even find any direct evidence on the fact that Albania itself laid the minefield or the minefield was laid in connivance or knowledge of the Albanian government. However, taking all the evidences together and presumptions, the Court was in opinion that Albania Should have had knowledge and therefore, since prior warning about the danger was not given, it should be incurred responsibility. Doctrine of *Culpa* may apply where there is a lesser degree of responsibility. Albania might have been in a strong position in this regard if it would have provided due diligence following the explosions on 22nd October 1946.

When a breach is committed by a private individual, revolutionary group or the breach was the result of insurrection, state might not be incurred responsibility provided that it showed due diligence. In 1924, in *Union Bridge Co. Case*, the Court states that to show due diligence will not impute responsibility. In *Home Missionary Society Claim*, in 1920, it was stated that no government is responsible for the acts of rebels where the government itself was guilty of no breach in good faith or not negligence in suppressing the revolt. In the *US Hostage Case* the International Court of Justice noted that those attacking the US Embassy had no status as recognised agents of the State, and their conduct was not to be imputed to the state on that basis. Article 14 of the ILC Draft affirms that the conduct of an insurrectional movement is not to be considered the act of the state. Article 15 of the ILC Draft states, that the act of an insurrectional movement which becomes the new government of a state, shall be considered as an act of that state. In

[14] ICJ Report, 1949 at p.20
[15] Higgins, *Problem and Process* (1994) at p. 160
[16] Oppenheim, *Inernational Law*, Ed. H. Lauterpacht (8th ed., 1955), in 343, quoted in Higgins, *id.* at p. 160
[17] *Id.* at p. 160
[18] ICJ Report, 1949 at pp. 72, 128
[19] Higgins, *Problem and Process* (1994) at p.160

Hostage Case, since the revolutionary guards never became the new government, the provisions of ILC Draft were not found applicable. However, if the government who failed to control the rebels, had existed, responsibility might have been claimed, if it did not have taken measures necessary or pay due diligence.

In *Corfu Channel Case*, it was almost proved before the Court that Albania failed to show due diligence. The Court viewed that on November 13, 1946 Albania sent a telegram to the Secretary General of the United Nations protesting strongly against the minesweeping operation of British ships in its territorial water without even mentioning the existence of minefield in its water. To show due diligence Albania could have taken at least some measures necessary to remove the danger in its water. Unfortunately, it did not do so whereas Greece, after the explosions on 22nd of October, 1946 sent a mission to ensure the safety of its territorial water in the Channel, which constitutes frontier with Albania. In this point Court found lack of due diligence and malice on part of Albania. Therefore, Albania did not have in anyway the chance to escape international responsibility.

Reparation

The consequence of state responsibility is the liability to make reparation.[20] This principle was established in *Chorzów Factory Case*, where the Permanent Court observed reparation as the corollary of the violation of the obligations resulting from an engagement between states. Breach of duty by an illegal act or by an illegal omission entails responsibility upon the state to make reparation. Reparation can be of different kinds as recognised in the customary principles of international law. In *Chorzów factory Case*, Court provided:[21]

> Reparation must as far as possible wipe out all the consequence of the illegal act and re-establish the situation which would, in all probability, have existed it that act has not been committed.

Therefore, it was the case of restitution. However, in several cases proper satisfaction was declared as a means of reparation. In *Rainbow Worrier Case*, although New Zealand claimed restitution, public condemnation of France was regarded as appropriate satisfaction by the tribunal. Payment of monetary compensation is also a kind of reparation where physical harm or damage is occurred. In *Corfu Channel Case*, at the end of first part of special agreement, the question was at issue as to whether Albania was in a duty to pay compensation. Since a breach of duty on part of Albania to warn the British war ships about the danger existed in its territorial water was found, Court held Albania responsible under international law for not doing so. Therefore, duty to pay compensation is indeed exist. It was even superfluous to raise the question of duty to pay compensation where the first question regards international responsibility unless the parties had intention to have only a declaration as such. However, Albania questioned the jurisdiction of Court to assess the sum of compensation that had been later an issue of another proceeding.

In the second part of the special agreement where it was stated that if the activities of British Royal Navy are the violation of Albanian sovereignty then is there any duty to give satisfaction on part of Britain. In its judgement Court found ‘Operation Retail’ was the violation by the UK of Albania's sovereignty although British argued it as a ‘self-help’ measure. Therefore, the Court’s view was that the declaration of the violation is itself the appropriate satisfaction.

[20] Higgins, *id.* at p. 162
[21] PCIJ (1928), Ser. A, no. 17, p. 29, cited.

Issues Relating to Law of the Sea

The second question of Corfu Channel case has been involved relating to the issues arising out of rules of the law of the sea, especially rules regarding the innocent passage through the territorial water of a state, and the position of straits that are used as an international highway for navigation under international law. Innocent passage of a war ship was also an issue of dispute in this regard. At the time when the case was brought before the Court, these rules were mainly derived from the customary international law and the state practices. However, the different conventions on law of the sea concluded later on were highly influenced by those customs and state practices.

Right of Innocent Passage

The element, 'innocent passage' was first introduced in 1930 Hague Conference by including ships travelling through the territorial sea to or from internal waters.[22] In general terms 'passage' means go through to some destination, and to be innocent this passage should be peaceful. It is a recognised principle under international law that although Coastal State's sovereignty extends to the territorial waters, it would not impair the right of the ships of other states taking passage through the territorial waters unless the act of foreign ships is prejudicial to its interests. That means when a passage becomes prejudicial to the coastal state, it looses its character as innocent. Hague Conference in 1930 provides:

> Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to public policy or to the fiscal interests of that State.[23]

In 1982, in the convention on law of the sea passage was defined as navigation through the territorial sea for the purpose of:

> a. traversing that sea without entering internal waters or calling at such roadstead or port facility outside internal waters; or
> b. proceeding to or from internal waters or a call at such roadstead or port facility.[24]

However, the passage to be innocent shall be continuous and expeditious. In some cases passage includes stopping and anchoring, but only in so far as it is incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[25] Article 14(4) of the Territorial Sea Convention states, that a passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. This article also states that passage should be in conformity with other rules of international law.

The law of the sea conventions indicated some manners to be regarded innocence of a passage through the territorial waters such as, for fishing vessel it requires to observe the rules and regulations of the coastal state[26], for submarines to navigate on the surface and to show their flag[27] and so on. However, it was ambiguous from both the conventions on whether a passage of war ship is regarded as innocent in time of peace or even in time of war. In the *North Atlantic Coast Fisheries* arbitration in 1910, counsel for the

[22] *See*, Churchil, R.R., *The Law of the Sea* (1988) at p. 69
[23] Churchil, *id.* at p. 70, note 15
[24] Article 18, 1982 Convention on the Law of the Sea, and Art.14 1958 Convention on the Law of the Sea
[25] Article 18, 1982 Convention on the Law of the Sea
[26] Art. 14(5) 1958 Convention
[27] Art. 14(6) 1958 Convention

United States argued that warships may not pass without consent into this zone, because they threaten; merchant ship may pass or re-pass because they do not threaten.[28]

However, it is rather controversial as in the 1930 Hague Conference text provided that as a general rule, a Coastal State will not forbid the passage of foreign warships in its territorial sea and will nor require a previous authorisation of notification.[29] Still, in the 1958 Convention on Territorial Sea, the terms were limited only to 'ships of all State'[30] that indicates both warships and other ships. However, some states ratified the Convention to this effect that warships should require a prior authorisation for the passage.

In *Corfu Channel Case*, as regards the innocent passage of British war ships, the Court, in fact, referred the manner of passage as the decisive criterion. Albania contended that since the manner of passage in respect of British war ships was inconsistent with the term 'innocence', its sovereignty was violated. In support of this argument Albania stated that the passage was not an ordinary passage, but a political mission; the ships were manoeuvring and sailing in diamond combat formation with soldiers on board; the position of gun was not consistent with the innocent passage; the vessels passed with crews at action stations; the ships had received orders to observe and report upon the coastal defence[31] and so on. However, these were later evidenced by the Court that the ships were not in a combat formation, but in line, one after another, and that they were not manoeuvring until after the first explosion,[32] the position of guns were also normal.

Article 19 of the 1982 Convention on Law of the Sea provides the followings as precluded from innocent passage:

> a. threat or use of force against the sovereignty, territorial integrity and political independence of the coastal state;
> b. any exercise or practice with weapons of any kind;
> c. any act aimed at collecting information to the prejudice of the defence or security of the coastal state;
> d. any act of propaganda aimed at affecting the defence and security of the coastal state; and
> e. any fishing activities and the carrying out of research or survey activities.

In the light of those provisions, in *Corfu Channel Case*, British war ships did not make either any act of propaganda aimed at affecting the defence and security of Albania or any act of fishing and carrying out research or survey falling respectively under article 19(d) and 19(e). Therefore those can be excluded here. The passage was not even proved for the purpose of collecting information to the prejudice of the defence or security of Albania. Exercise and practice of weapons on part of British ships were also absent in *Corfu Channel case*. The rest of the provisions were issue before the Court i.e., whether the acts of British war ships constituted threat to the sovereignty, territorial integrity or political independence of Albania. She contended on the point that the British warships did not comply with the Albanian regulations requiring prior authorisation of war ships, and thus its sovereignty was violated by such a passage. The Court pointed out that as long as the passage was conducted in a fashion which presented no threat to the coastal state, it was to be regarded as innocent. The Court, in fact, considered two journeys through the Channel differently. On the day the explosions occurred on 22nd October 1946, acts of British war ships were mere passage thorough the territorial waters, thus regarded as innocent passage whereas on 12th and 13th November, acts of minesweeping operation, 'Operation Retail' in the channel by the United

[28] Churchil, *The Law of the Sea*(1988) at p. 74
[29] *Id.* at p. 75 note 24
[30] Article 14(1) of 1958 Convention on the Law of the Sea
[31] ICJ Report 1949 at p. 30
[32] ICJ Report 1949 at p. 31

Kingdom was contrary to right of innocent passage and thus Albanian sovereignty was violated by such acts.

Passage through Strait

In Corfu Channel case, the position of strait has had a great importance while the right of innocent passage was being considered. Definition of strait was not concluded in any of the convention produced by the United Nation Conferences on the Law of the Sea. However, the ordinary meaning of strait bears a narrow natural passage or arm of water connecting two larger body of water.[33] North Corfu Channel, being such a narrow natural passage connecting Egean and the Adriatic Seas, constitutes a frontier between Albania and Greece, which a part of it is wholly within the territorial waters of these States. The Channel was also important to Greece for the traffic to and from the port of Corfu. Albania did not deny the fact that North Corfu Channel is not a strait. But it contended that since such strait constitutes the territorial water of Albania, passage of British warships must have been needed prior authorisation in accordance with the local regulation of Albania.

However, it is the customary international law that passage through strait constituting territorial waters of a state can never be suspended when the strait is used as the high way of international navigation unless there exists some exceptional circumstances subject to the passage was innocent. Albania invoked that North Corfu Channel was the way of secondary importance and not even the necessary route between two parts of the high seas, and the channel was used almost exclusively for local traffic to and from the ports of Corfu and the Saranda.[34] British government submitted a statistics that since 1st April 1936 to 31st December 1937, within this one year and nine months period the total number of ships passed through the Channel were 2884, that were belonging to the flag states of Greek, Italy, Romania, Yugoslavia, France, Albania and Britain.[35] Therefore, Court was in a decision that North Corfu Channel belongs to a strait used as high way of international navigation, and thus passage can not be prohibited in time of peace even if it is a war ship, provided that such passage was innocent.

Therefore, Albanian moved towards finding a situation contrary to peace in the area at the time in question by invoking an earlier declaration made by Greece that she considered herself technically in a state of war with Albania due to the territorial claim bordering on the Channel. The Court, having regarded the situation as an exceptional circumstances pointed out that issuing regulations in respect of the passage of war ships through the strait would have been justified but prohibiting of such a passage or subjecting it to the requirement of special authorisation can not be justified.[36]

Environmental Issues

During the last few decades environment has been a matter of considerable importance under international law. Regulation of the international environment has increased dramatically in recent years. It is now established that a state owes all times a duty to protect other states against injurious acts by individuals

[33] Churchil, *The Law of the Sea* (1988) at p. 87
[34] ICJ Report, 1949 at p. 28
[35] ICJ Report, 1949 at p. 29
[36] ICJ Report, 1949 at p. 29

from within its jurisdiction.[37] This was actually in the *Trail Smelter Case*, where emission of sulphur dioxide from a smelter plant from the Canadian territory about 10 miles from the boarder caused damage since 1925 in the state of Washington. In Corfu Channel Case Court maintained that every state is in a duty to 'not allow knowingly its territory to be used for the acts contrary to the rights of other states'.[38] It was in fact the duty of Albania to keep its territorial water safe for the vessels of other states as well as for the vessels of its own. Since innocent passage through the territorial water was recognised in the customary principle of international law, the duty of Albania was to make sure that route was without danger. Even if Albania did not lay the minefield by itself or minefield was laid without its knowledge, its duty was to make a promulgation of danger as soon as it knew and thereafter to take measures necessary. But it failed to make any declaration and also did not take even any attempt to remove the danger whereas just after the explosions on 22nd of October, Greece, that have a frontier with Albania through the Channel, took measures to make sure about the safety of its water in the Channel. Therefore, Albania's responsibility should be drawn even on the ground of international environmental law.

CONCLUSION

Corfu Channel Case indeed remained as one of the very important cases in international law. International Law has been developed through the cases of different times. The *Corfu Channel case* has produced some important issues of international law. In this case it was established that responsibility of a state is not only due to the wrongful act committed by a state itself, but also for the omission of notification of the fact that by all means it should have known. In this point the case is, in fact, a very important one in the field of international responsibility of states. The other important issue was also established as regards the innocent passage of warships through territorial water, which is still to some extent ambiguous from the law of the sea convention. However, what is yet not clear is whether the innocent passage of warships can be allowed in time of war.

[37] *Trail Smelter Arbitration* (1941), the Tribunal's final decision, that was recognise as a general principle of international law, cited in Rebecca Wallace, *International Law a student introduction* (1994)
[38] ICJ Report, 1949 at p. 22

FREE WORLD PUBLISHING Inc.

HTTP://WWW.FWPUBLISHING.NET

CALL FOR ARTICLES

Free World Publishing is calling for articles by Academics, Practitioners and Post-Graduate Students to be published in its new journals :

FREE LAW JOURNAL - (ISSN 1712-9877)

WAR & PEACE JOURNAL - (ISSN 1712-9885)

WORLD HISTORY JOURNAL - (ISSN 1712-9893)

Articles are welcomed in : English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portugese, Romanian, Russian, Serb, Slovenian as well as Spanish.

FREE LAW JOURNAL : pertains all legal subjects, whether from a national, comparative or international perspective and including Canon Law, International Law, Islamic Law or social and historical perspective of laws' impacts on societies.

WAR & PEACE JOURNAL : pertains to all issues ranging from conflict prevention to nation-building; including political sciences and diplomacy, nation-building, defense policies, strategies, operations, tactics, logistics, intelligence, peacekeeping, peacemaking, leadership, psychology of combat, technological developments and counter-terrorism; and finally Military Historical studies, relating to the conduct of operations, their causes and effects, the avoidance of conflict, leadership and personalities.

WORLD HISTORY JOURNAL : pertains to the whole spectrum of human development, whether from local, regional or global perspectives, including history from all periods, paleontology, anthropology, linguistics, letters and languages, arts as well as sociological perspectives.

For details, please consult the respective page of each journal and its submissions guidelines from http://www.FWPublishing.net or contact the editor-in-chief at FWP@FWPublishing.net .

Sincerely,

Louis-Philippe F. Rouillard
Editor-in-Chief, Free World Publishing Inc.

APPEL POUR ARTICLES

Free World Publishing accepte les articles d'académiciens, praticiens et d'étudiants supérieurs à être publier dans ses nouveaux journeaux :

FREE LAW JOURNAL - (ISSN 1712-9877)

WAR & PEACE JOURNAL - (ISSN 1712-9885)

WORLD HISTORY JOURNAL - (ISSN 1712-9893)

Les articles sont bienvenus en : Français, Anglais, Allemand, Bosniaque, Bulgare, Croate, Espagnol, Finlandais, Grecque, Hongrois, Islandais, Innuktikut, Italien, Latin, Polonais, Portugais, Roumain, Russe, Serbe, Slovène et Tchèque.

FREE LAW JOURNAL : porte sur tous les sujets juridiques de perspectives nationale, comparative ou internationale, incluant les droits canonique, international, islamique, et les perspectives sociales et historiques de l'impact des lois sur les sociétés.

WAR & PEACE JOURNAL : porte sur le spectre de la prévention de conflit jusqu'à la reconstruction d'État, incluant : sciences politiques, diplomacie, politique de défense, stratégie, operation, tactiques, logistique, renseignement, maintien et imposition de la paix, art du commandement, psychologie du combat, avancées technologiques et contre-terrorisme, l'histoire militaire étudiant la conduite des opérations, l'évitement des conflits, leurs causes et effets, les commandants et personalités.

WORLD HISTORY JOURNAL : porte sur l'ensemble du spectre du développement humain, d'une perspective locale, régionale ou globale, incluant : histoire de toutes les périodes, paleontologie, anthropologie, linguistiques, lettres et langages, les arts de même que les perspectives sociologiques.

Pour les détails, consulter la page respective de chaque journal et ses critères de soumissions de http://www.FWPublishing.net ou contactez l'éditeur-chef à FWP@FWPublishing.net .

Sincèrement,

Louis-Philippe F. Rouillard
Éditeur-chef, Free World Publishing Inc.

ФОРМА УГОВОРА О ДОЖИВОТНОМ ИЗДРЖАВАЊУ

Др Биљана Петровић

Апстракт

У раду се разматра форма уговора о доживотном издржавању. Овај институт наследног права сагледава се с обзиром на улогу и значај форме уговора о доживотном издржавању који је неопходан за његову правоваљаност. Тражена форма уговора о доживотном издржавању је писмена форма. Кључне речи: уговор о доживотном издржавању, форма, писмена форма.

1. Увод

Према мишљењу неких теоретичара, могуће је извршити деобу свечаних форми уговора у три категорије: 1. уговори који се закључују пред надлежним органима; 2. нотаријални уговори; 3. уговори који се само оверавају од стране државног органа[1]. Критериј за ову поделу био је карактер учешћа органа јавне власти. Ми се придружујемо оваквом мишљењу, с тим што бисмо у њиховом излагању прво пошли од категорије која није заступљена у нашем правном систему, а у упоредном праву није уређена на јединствен начин[2].

Има правних система у којима се за закључење неких уговора тражи учешће јавних службеника - нотара или јавних бележника. Нотари или састављају уговор или врше његову оверу.

У италијанском праву, уобичајено је да се формални уговори сачине у писменој форми и да буду потписани од оба уговарача. Али, постоји могућност да уговор сачини нотар и да га потпишу и нотар и уговарачи. На пример, уговор о поклону (члан 782), уговор о јавним друштвима (члан 2296), уговор о конституисању хипотеке (члан 2832). У италијанском праву постоји нешто специфично, што је потребно разликовати од нотаријарних уговора. Ради се о *scripture privata autentica*. Наиме, уговарачи могу да траже да писмено буде потписано у присуству јавног бележника, који оверава њихове потписе. И то треба разликовати од акта сачињеног код јавног бележника[3].

Француско право такође познаје нотаријалне уговоре. Њихов број је ограничен: уговори о поклону (члан 931), уговор којим се конституише хипотека (члан 2127), имовински уговори супруга (члан 1349), уговорена суброгација права поверилаца (члан 1250), цесија патената[4].

И совјетско право познаје установу нотара. У уговорима које закључују државне установе и предузеће, кооперативне организације са појединцима и када вредност предмета уговора премашује износ од 1000 рубаља, ГК РСФСР предвиђа нотаријалну форму уговора. Она је предвиђена за уговор о пуномоћству у (члановима: 47,65,68), за уговор о куповини стамбене зграде (у члану 239), за уговор о поклону (у члану 257), за уговор о грађењу у (члану 72).

Установа јавних бележника укинута је у нашем праву Одлуком АВНОЈ-а од 17.11.1944. године, о укидању јавних бележника и јавнобележничких комора. Надлежност јавних

[1] Перовић, С.Облигационо право,Београд,1981,стр. 66

[2] Guhl T. Das schwezerische Obligationenrecht, Zurich,1956,стр. 107, т. 4.

[3] Schlezinger, наведено дело, стр. 1675.

[4] *Code civile* од 5.7.1844.

бележника прешла је у надлежност редовних судова[5]. Пре него су укинути, вршили су одређену јавнобележничку функцију, која се састојала: или у потврди да је пред њим странка потписала писмено сачињен уговор, или да је потпис већ био на писменој исправи и да га је странка признала за сопствени. Јавни бележник је морао познавати странку лично, како би извршио оверу потписа[6]. Неопходност закључивања уговора пред јавним бележником била је за: имовинске брачне уговоре, о куповини, о ренти и зајму. За брачне имовинске уговоре у смислу грађанског права, за потврде пријема мираза, било да се издаје жени или којем другом лицу, за уговор о даривању без праве предаје, за све исправе о правним пословима међу живима које лично предузимају глуви или слепи, који не знају читати.

Код нас се стало на становиште да улогу јавних бележника могу и треба да врше редовни судови, мада има мишљења, међу неким нашим теоретичарима, да нотари треба да постоје и да их треба поново увести у наш правни систем[7].

У уговоре који се закључују пред надлежним државним органом спада одређен број уговора који се налазе у различитим гранама права. Ми ћемо се, овом приликом, задржати на области облигационог (уговор о доживотном издржавању), наследног (уговор о уступању наследства), породичног (закључење брака, усвојење деце) и грађанско - процесног права (уговор о пропријацији надлежности).

I

2. УГОВОР О ДОЖИВОТНОМ ИЗДРЖАВАЊУ је, по свој природи, облигационо правни уговор који има одређених специфичности, па га многи сматрају уговором "*sui generis*"[8] - код нас и у Швајцарској као и према Мађарском грађанском законику. Негде се, као у Немачкој и Аустрији, сматра реалним теретом према законима, али му се у теорији и судској пракси признају облигационо-правна дејства. У Француској се он убраја, заједно са доживотном рентом,у групу уговора званих *alienation a fonds perdu*, али се не изједначава са доживотном рентом[9]. Сви ови различити ставови у погледу правне природе овог уговора последица су придавања важности појединим елементима уговора.

Уговор о доживотном издржавању представља такву врсту уговора у коме се један уговарач обавезује да пренесе на другог неку ствар или право, док се други обавезује да, у накнаду за то пружи, доживотно издржавање њему или неком трећем лицу. Предмет овог уговора као облигационог уговора представља садржину облигације. С обзиром на то да се овим уговором стварају обавезе за обе стране, то се његов предмет чини садржина обавеза даваоца и примаоца издржавања.

Иако је регулисан савезним законом о наслеђивању, јер није било Закона о облигационим односима у време када је донет, он није наследноправни уговор. Он представља правни посао *inter vivos* и има дејство од момента закључења, а извршење примаочеве обавезе је одгођено до његове смрти. У Предлогу Закона о облигацијама и

[5] Наведено према Перовић, С. стр. 73.
[6] Параграф 88. Закона о јавним бележницама од 11.9.1930.
[7] Мишљење проф. Марковић, С. на предавањима за студенте последипломских студија на Правном факултету у Нишу у мају месецу 1982.г.
[8] Месаровић, К. Правна обележја уговора о доживотном издржавању, Гласник адвокатске коморе Војводине, бр. 3/1963, стр. 3, Шкарица Н. О даљој проблематици код уговора о досмртном издржавању, Одвјетник, бр. 5-6/1980, стр. 152.
[9] Наведено према Суботић-Константиновић, Н. Уговор о доживотном издржавању, Београд, 1968, стр. 159

уговарачима прочита уговор и упозори их на последице. Према томе, за уговор о доживотном издржавању захтева се нарочито строга форма. Овим, строгим захтевом законодавца показује се његова намера да обезбеди примаоца издржавања од принуде, претње и заблуде од стране даваоца издржавања. "Ако се путем форме правног акта не само обезбеђује ред у правном саобраћају, него и пружа заштита онима који у њему учествују, онда је несумњиво јасно да ту заштиту путем испуњења формалних уговора за правоваљаност уговора треба пружити лицима која за живота остају без своје имовине да би добијала издржавање од њих"[11]

II

У швајцарском праву се за закључење уговора о доживотном издржавању тражи да буде у форми уговора о наслеђивању, без обзира на то да ли је то уговор којим давалац наслеђује или је то обичан уговор о доживотном издржавању (члан 512. швајцарског закона о облигацијама). Овај уговор се закључује пред нотаром и два сведока, који саставља нотар, а уговарачи потписују. При овом чину потребно је присуство свих ових субјеката[12]. Пре доношења овог акта сваки кантон је имао своје гледиште о настанку уговора. У Фрајбургу се тражила само писмена форма. У Базелу је поред писмене форме захтевано и оверавање од стране судије. У Цириху и Лугану било је потребно да буду оверени од одговарајућег надлештва[13]. Швајцарски Закон о облигацијама предвидео је писмену форму за уговор о доживотном издржавању, уз учешће државног органа, код протеста менице и купопродаје, и оптерећења непокретности.

Немачки грађански законик не говори о уговору о доживотном издржавању као посебној врсти облигационоправног уговора. О њему се говори у делу који регулише реалне терете (члан 1100 и 1112). У њима је наведена могућност да се једно земљиште може да оптерети у корист бившег власника, тако да нови власник даје одређене чинидбе које признаје из тог земљишта. И правна теорија у овој земљи није имала јединствени став о питању правне природе уговора о доживотном издржавању и о питању његове форме. Према једном мишљењу, овај уговор је врста реалног терета, а по другом реч је о облигационом уговору. Према мишљењу једног дела немачке правне теорије прихваћена је слобода форме за уговор о доживотном издржавању уз ограничење с обзиром на предмет уговора. Као потврду тога става, теоретичари наводе да Опште право (*Gemein Recht*) не прописује обавезу форме за уговор о доживотном издржавању уколико покрајински закон не предвиђа супротно[14]. У теорији постоји и супротно мишљење овом, до сада изложеном. Према томе, другом мишљењу, за закључење овог уговора захтева се строжија форма, учешће суда при закључивању. Општепризнати став је да се ова форма тражи само ако се уступа целокупно имање једног лица[15].

Поред тога, у теорији се сматра да овако закључен уговор о доживотном издржавању (уз учешће суда и нотара) омогућава примаоцу издржавања да тражи принудно извршење и ако није прво утужио даваоца издржавања.

Аустријски грађански законик не регулише уговор о доживотном издржавању. То не значи да овог уговора нема у пракси. Како се он најчешће јавља поводом преноса непокретности, у АГЗ-у је предвиђена писмена форма да би могао да се изврши пренос у земљишним књигама. Они уговори којима се не преносе непокретности регулисани су одговарајућим прописима који регулишу доживотну ренту. С обзиром на природу односа

[11] Радоман, Д. Аналогија и уговор о доживотном издржавању, Одвјетик бр. 11-12/1963, стр. 317.
[12] Clauzen, A. Der Verpfrundungsvesrtrag, т.9
[13] Суботић-Константиновић, Н. наведено дело, стр. 52
[14] Mayer, E. H. Wilhelm: Das Verbergabevertrag Koln, 1935, стр. 132.
[15] Gerber, Das Deutsch Privatrech, п. 254, наведено дело према Meyeru, стр. 17.

који уговором о доживотној ренти настаје, уговор се закључује писмено и тада форма служи као доказ његовог постојања. Он се разликује од става немачког права где је форма битан састојак уговора.

У мађарском праву, овај уговор је регулисан чланом 586, и предвиђа обавезну форму писмену. Поред тога, наглашено је да овај уговор има правно дејство и кад није поштована писмена форма ако је једна страна дуже времена пружала бесплатно издржавање[16].

III

У нашем праву ово питање је било регулисано Законом о наслеђивању из 1955.године. За овај уговор захтевана је писмена форма и овера од судије који има задатак да странама уговорницама приликом овере прочита и упозори на права и обавезе (члан 122, став 4. и 5.). Поред тога, он је био регулисан и одређеним републичким и покрајинским законима: ЗН СР Србије од 30.12.1974., Службени гласник Србије бр.52/74 (члан 11-122), ЗН САП Косово од 30.12.1974., Сл. гласник САПК бр.43/74 (члан 105-110), ЗН СА Војводине од 4.4.1975 Сл. гласник САП Војводине бр.8/75 (члан 118-123), ЗН СР Црне Горе од 16.2.1976. Сл. лист СР Црне Горе бр.4/76 (члан 117-122), ЗН СР БИХ од 19.7.1973. са Законом и изменама и допунама ЗН од 17.7.1975 Сл. лист БИХ бр.22/73 и 22/75 (члан 122-127), Закон о наслеђивању од 26.9.1973 Сл.гласник на СР Македонија бр.35/73 (члан 120-126), Закон о деловању од 4.6.1976. СР Словеније - Уредни лист СР Словеније бр.15 из 1976 (члан 117-122).

У оним нашим крајевима где је важио АГЗ, било је довољно да се закључи уговор о доживотном издржавању којим се имовина примаоца издржавања преносила на даваоца одмах при закључивању уговора. За такве уговоре важило је, према АГЗ-у, правило о доживотној ренти. Сматрало се да давање на име издржавања представља накнаду за предату вредност[17].

Закон о наслеђивању, из 1955.године, није посебно предвидео форму као битан елеменат за настанак овог уговора. Али, у тачки 5. члана 122 је наглашена важност форме, јер се у њој каже да је при овери састављеног уговора судија дужан да упозори странке на значај уговора и правне последице које из њега произилазе. Поред тога, стране уговорнице морају бити присутне, тако да га не могу закључити преко пуномоћника. У образложењу једне своје одлуке Савезни суд је истакао: "У овом случају уговорна страна М.Ђ. није се уопште појавила пред судом, већ је у њено име фунгирао при закључивању посла као њен пуномоћник С.П. и то на основу пуномоћја од 28.8.1957. године која га овлашћује да се тужени закључи у њено име уговор о доживотном издржавању. Њен отисак прста и садржина пуномоћи потврђени суод службеника народног одбора Општине В. Из садржине члана 122. ЗН види се да ти потписи под појмом уговорника имају у виду увек само странку која за себе заснива правни однос, па захтевају и присуство таквог уговора пред судом као неопходну форму за ваљаност уговора, тако да закључење таквог уговора пред судом без уговорника а преко пуномоћника, уз недостатак прочитања уговора пред уговорником нужног упозорења од стране судије, чини да уговор се има сматрати ништавим, и то утолико пре што је и сама пуномоћ сумарна а није издата пред

[16]Грађански законик Мађарске Народне Републике од 1959.г. Институт за упоредно право, серија Е, бр. 26-27, Београд 1961.
[17]Члан 1289. АГЗ, Зборник грађанских законика старе Југославије, Титоград, 1960.

судом у условима из члана 122. ЗН да би евентуално могла бити сматрана пуноважном заменом присуства уговарача при склапању уговора[18].

Присуство судије при закључивању уговора о доживотном издржавању је потврда конститутивне форме код овог типа уговора. Она је битан елеменат пуноважности, и без њеног испуњења уговор не производи дејство.

Садашњи републички и покрајински прописи указују на обавезно присуство страна уговорница. Према Закону о наслеђивању Македоније, захтева се писмено састављање и овера од судије, у присуству странака и два сведока, чија је улога иста као и пред судским телом. У једној од судских одлука заузет је следећи став: "Код закључивања уговора о доживотном издржавању не могу бити сведоцима лица која не могу бити сведоцима ни код састављања судског тестамента"[19]. Према мишљењу Врховног суда Македоније, приликом овере уговора о доживотном издржавању као сведоци могу се појавити лица која то својство заиста испуњавају, слично као и код сачињавања тестамента. Мишљење је да код овере треба да се обезбеди присуство јавности, која ће, осим службене, бити и реална.

Ако бисмо погледали овај услов, који се, иначе, тражи код уговора који треба да буде закључен пред надлежним државним органом, могли бисмо сагледати и питање да ли је потребно да уговор буде сачињен у присуству судије или је довољно да га судија овери, па да тако буде задовољен захтев писмен форме.

Према једном тумачењу, судија узима учешће у настанку уговора, јер мора у то време обема странкама да прочита уговор и објасни значај уговора, као и њихова права и обавезе. Друго тумачење истиче да је довољно да га судија приликом овере прочита странама уговорницама, упозоравајући притом, на њихову важност. Ово, друго тумачење је, према нашем мишљењу, прихватљивије, животније и практичније и више одговара начину закључивања овог уговора. Упозорење које чини судија странама уговорницама обезбеђује одговарајућу тачност у настанку уговора.

Захтеви форме који се траже код закључивања уговора о доживотном издржавању подстакнути су одређеним дејством које овај уговор изазива у личним и материјалним приликама самих страна уговорница. Осим тога, ту су и последице које њихово закључивање има на трећа лица, као и заинтересованост друштвене заједнице за ову врсту уговора. Овим се уговором омогућава збрињавање старих ,усамљених и немоћних лица, о којима би друштво морало да се брине. С друге стране, ту су и непокретности које та немоћна лица нису у прилици да обрађују, и тако се самостално издржавају, те је друштвено прихватљиво дати их онима који то могу да раде.

Кад је уговор о доживотном издржавању закључен, поставља се питање да ли се може изменити, и у коме облику се могу вршити измене . Према решењу судске праксе, све измене овог уговора морају поштовати прописане форме. "Измјене уговора о доживотном издржавању морају бити састављене у писменом облику и овјерене од суда у смислу члана 122. став 4. Закона о наслеђивању"[20].

Било је решења у нашој судској пракси да се признавала важност уговору који је сачињен другачије него што то предвиђа Закон о наслеђивању. "Уредба члана 122.

[18] Решење Савезног Врховног суда Рев. 475/59 од 17.10.1959. ЗСО, књ. 4, св. 3, одлука 393.

[19] Пресуда Врховног суда Македоније, Рев. 611/85 од 28.11.1985, Судска пракса југословенски информативни часопис, бр. 5/86, одлука 61.

[20] Одлука Врховног суда Хрватске Рев. 179/85 од 13.3.1985, Судска пракса југословенски информативни часопис, бр. 7/86 одлука 6.

Закона о наслеђивању не искључује да се и после ступања на снагу тог закона не би могао закључити уговор о доживотном издржавању другог уговорника или неку трећу особу, и у којим тај други уговорник изјављује да му за живота уступа у власништво одређени део имовине. Ако такав уговор испуњава, све остале увјете за ваљаност уговора и састављених у одговарајућем облику, иако га судац није овјерио, тада је такав уговор правно ваљан, те из тога уговора међу странкама настају учинци и обавјезе које се према уговору заснивају онако како то одговара сагласној вољи странака израженој у такову уговору.

На односе и спорове који настају из таквих уговора аналогијом се примењују и одредбе цитираног закона, па и оне о раскидању уговора"[21].

Институт доживотног издржавања може се јавити и у корист трећег лица. Има законодавстава која га не признају, а има и оних која га признају. Француско право познаје такав уговор под одређеним условима. *Code civile* предвиђа у члану 1121: "Исто се тако може уговорити у корист трећега, кад је такав услов уговора, који се закључује за самога себе, или поклоне, који сачини другоме ко је закључио такав уговор, не може више опозвати, ако је трећи изјавио, да хоће да се њиме користи". Исто тако предвиђа и члан 165: "Уговори имају дејство само међу уговарајућим странкама, оно немају штетног дејства према трећима а користе му само у случају предвиђеном у чл.1121".

Немачки грађански законик, из 1896. године, не предвиђа уговор о доживотном издржавању. Он познаје само уговор о доживотној ренти. Таква рента се најчешће плаћа унапред, а ако је новчани приход, онда три месеца унапред.

У италијанском праву, у *Codico civile*, из 1940. године, не говори се о уговору о доживотном издржавању а, самим тим, о уговору у корист трећег лица. Италијанско право познаје само земљишну ренту или просту ренту и доживотну ренту. Ако је уговорено да се таква рента не може откупити, онда се она претвара у доживотну ренту, која се може уговорити у корист трећег лица, познатија као тонтијска рента.

И у швајцарском праву је, у Грађанском законику, из 1911. године, замишљено извршавање уговора у домаћинству даваоца издржавања-*vitacienta*. Ако *vitalicient* наследи *vitalicianta*, онда се такав уговор регулише према правилима која се односе на уговор о наслеђивању. Иако се не предвиђа уговор у корист трећег лица, то не спречава могућност да се такав уговор не би могао закључити у корист треће особе.

У Законику Републике Чехословачке, из 1950. године, дата је могућност уступања пољопривредног земљишта због доживотног издржавања. У корист трећег лица било је могуће закључити уговор само ако је власник земљишта био дужан да даје издржавање трећем лицу.

Мађарски Грађански законик, из 1959. године, предвиђа да уговор о доживотном издржавању постоји једино у кући или домаћинству *vitalicijata*. Дата је могућност закључивања уговора у корист трећег лица, нарочито брачног друга. Битно је истаћи то да су и уговор о ренти и уговор о доживотном издржавању, према овом праву, сврстани у облигационе уговоре, а не у наследноправне[22].

---

[21] Врховни суд Хрватске Гж. 3064/77 од 19.10.1978, Окружни суд Шибеник од 20.12.1976. Преглед судске праксе у 1978. Прилог Наше законитости, бр. 14/79, стр. 26

[22] Подаци које смо овде навели коришћени су према: Шкарица Н., Осврт на уговоре о досмртном издржавању према мађарском, чехословачком праву у компарацији са прописима Закона о наслеђивању, Наша законитост, бр. 6/72, стр. 440-447

Слично решење предвиђа и пољско право Закона Народне Републике Пољске, из 1964. године. Њиме се даје могућност закључења уговора о доживотном издржавању између стицаоца некретнина који пружа издржавање и лица које му преноси власништво на непокретности, с тим што има обавезу да га прими у своје домаћинство. Овај Законик познаје и уговор у корист трећег лица, али то треће лице мора бити члан уже породице *vitaliciata*.

У совјетском праву, уговор о доживотном издржавању регулисан је Законом РСФСР из 1964. године. Он га предвиђа само за купопродају, под условима доживотног издржавања. Према овом законодавству, није могуће скопити уговор у корист трећег лица[23].

Према нашем ЗОО, уговор о доживотном издржавању у корист трећег лица је могуће закључити. Ако је реч о уговору о доживотном издржавању између брачних другова, да би био ваљан, мора да постоји прихват другог брачног друга. Притом је потребно да се то односи на њега као *suvitaliciata* (сауступиоца): "Кад неко уговори у своје име потраживање у корист трећег, трећи стиче сопствено и непосредно право према дужнику, ако није шта друго уговорено или не произилази из околности уговора"[24]. А, у члану 150. Закона о браку, истиче се: "Уговарач користи за трећег може је опозвати или је изменити све док трећи не изјави да прихвата оно што је уговорено у њену корист"[25].

За такве уговоре биле би потребне исте формалности које предвиђа члан 122. Закона о наслеђивању, у ставу 3. и 4. Разлог за то можемо наћи у томе што овај уговор обухвата имовину другог брачног друга стечену за време трајања брака. Јер, како рече један теоретичар: "Уговор о доживотном издржавању је солемнитатни уговор на чијој је егзистенцији интересирана и друштвено правна и социјална страна друштва, а напосле интерес брачне заједнице"[26].

3. Закључак

Захтев обавезне писмене форме код склапања уговора о доживотном издражавању подстакнут је одређеним дејством које изражава овај уговор у личним и материјалним приликама самих страна уговорница. Ради се о веома битним последицама које њихово закључивање има на трећа лица.Осим тога друштво и држава су нарочито зааинтересоване за ову врсту уговора.

Уговором о доживотном издржавању омогућава се збрињавање старих, болесних , усамљених и немоћних лица, о којима би друштво морало да брине.С друге стране постоје и непокретности које та немоћна лица нису у стању да чувају,обрађују и оплођују, тако даа је неопхпдно дати их младим и способним људима, који их не поседују, а могу да раде и приходују на њима.

Сигурност коју стичу и примаоци и даваоци издржавања су свакако гарантоване управо том строгом формом коју тражи законодавац за њихово закључивање, нарочито присуство државних органа.

---

[23]Према Шкарица Н. О даљој проблематици код уговора о досмртном уздржавању посебно у корист треће особе као брачног друга, Одвјетник, бр. 5-6/80, стр. 151.

[24]Члан 149, став. 1 ЗОО

[25]Шкарица, Закон о браку, од 30.12.1974, Гласник Србије бр. 52/74, и Закон о браку и породичним односима од 7.6.1980. сл.гласник Србије бр. 22/1980.

[26]Шкарица, Осврт на уговор о досмртном уздржавању у неким иноземним законодавствима, Наша законитост, бр. 6/82, стр. 7

FREE EUROPEAN COLLEGIUM

Adaptable specialised studies in European Law, European Strategy and International Human Rights

---

at

http://www.fwpublishing.net/FEC/index.html

FREE EUROPEAN COLLEGIUM

AT

http://www.fwpublishing.net/FEC/index.html

SOME ELEMENTS OF THE ECONOMIC CONSTITUTION OF THE EU: SOCIAL MARKET ECONOMY AND RELEVANT FUNDAMENTAL RIGHTS

by

DR. TÍMEA DRINÓCZI

With regard to the *European Communities/European Union*, the term economic constitution has not been used in a constitutional law sense. *Joerges* regards the economic constitution of the EC basically as an *economic* constitutional law, since integration is based on an open market and serves the creation of a common market. This law is economic *constitutional law*, since it indicates that the opening up of markets is followed by competition, and that the common market creates a system of competition without any distortions.[1] This, however, is not the reason why it is constitutional. The explanation of it is that now the *concept of the constitution* cannot be separated from its legal sense so common in the constitutional states of the rule of law, which means that the constitution is to be regarded as a basic law laying down the framework of social coexistence and state or central organs – on the basis of legal sovereignty – with a binding force, while being a minimum consensus at the same time. Thus the constitution does not express mere orderliness any longer. This obviously does not mean that other concepts of the economic constitution[2] would not be appropriate in other contexts; it simply indicates that these concepts do not take the constitution as a normative basic law. Therefore, the economic constitution – in the constitutional law sense – is the *aggregate of the constitutional norms pertaining to the field of economy*[3], in other words all constitutional provisions touching upon *economic policy*[4]. This is why this concept has a bearing on *principles* of constitutional rank whether written or unwritten, *objectives, competence* regulations and *fundamental rights*[5]. The economic constitution, however, is *not* a *closed system* in itself, since the rest of the provisions of the constitution are to be regarded when interpreting and applying its provisions.[6] Thus, defining the concept of the economic constitution does *not* mean *splitting* the constitution into an

*DR. TÍMEA DRINÓCZI, ASSITANT-LECTURER.

[1] Christian Joerges: The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics. 1997. http://eiop.or.at/eiop/texte/1997-019a.htm (24 11 2004) p 4. On the various views on the economic constitution see e.g. Armin von Bogdandy (Hrsg.): Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge. Springer Verlag, Berlin, G. Gutmann – W. Klein – S. Paraskewopoulos – H. Winter: Die Wirtschaftsverfassung der Bundesrepublik Deutschland. Gustav Fischer Verlag, Stuttgart-New York 1976., Basedow, J.: Von der deutschen zur europäischen Wirtschaftsverfassung. Mohr, Tübingen 1992., Böhm, F.: Wettbewerb und Monopolkampf – Eine Untersuchung zur Frage des Wirtschaftlichen Kampfsrechts und zur frage der rechtlichen Structur der geltenden Wirtschaftsordnung. Heymanns, Berlin 1933. IX., Tamás Sárközy: A gazdaság közjogi szabályai [Public Law Rules of the Economy]. In. Magyar Gazdasági Jog I. Aula 1999, Jankovics-Kónya: A gazdasági alkotmányosság története [The History of Economic Constitutionality]. Magyar Rendészet 2004/1

[2] National economy approach (Freiburg school), economic constitution in a broad sense.

[3] Luciani, M: Economia nel diritto costituzionale, Dig. Disc. Pubbl. V. 1990 p 374. Giuseppe Grisi: L'automia privata. Diritto dei contratti e disciplina costituzionale dell'economia. Dottore A. Guffrè Editore Milano 1999 p86, J. Baquero Cruz: Between competition and free movement: the economic constitutional law of the European Community. Oxford 2002 p 29.

[4] Only some parts of constitutional law may be regarded as economic constitution. Cf Zacher, H.F.: Aufgaben einer Theorie der Wirtschaftesverfassung. In. H. Coing-H. Kronstein. E-J. Mestmäcker (Hrsg) Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70. Geburtstag von Franz Böhm. C.F. Müller, Karlsruhe 1965 pp 63-109 (1965). Cited by Werner Mussler: Die Wirtschaftesverfassung der Europaische Gemeinschaft im Wandel. Von Rom nach Maastricht. Nomos Verlagsgesellschafts, Baden-Baden 1998 p 19.

[5] Fritz Gygi: Die Schweizerische Wirtschaftesverfassung. Verlag Paul Haupt Bern und Stuttgart 1978 p 102.

[6] Gygi: ibid. p 102.

economic and a political part, it only means a more stressed interpretation of its different provisions, as it is impossible to split the unified basic law consisting of legal norms into two.[7]

The conclusion reached by *Katrougalos* is closer to the constitutional law approach towards the economic constitution in so far as according to it the Communities have had an *unfinished* (economic) *constitution* from the start, as concerning the fundamental rules, they have a system with power beyond the legislative power, which on the one hand regulates economic procedures, on the other hand these rules define the legitimate national restrictions imposed on the operation of the market.[8] *Ipsen* applies the concept of the economic constitution to the *relevant* elements of *primary law* – that is to the customs union, the four freedoms and the prohibition of discrimination.[9] Under *primary law*, politics and economy shall be based on an undistorted market system. These *restrictions* of the political discretion together with the *economic freedoms* constitute the economic constitution. The guaranteed freedoms, the opening up of national economies, the regulations against discrimination and the commitment to an undistorted market may be interpreted as decisions supporting an economic constitution of a market economy.[10] In principle, the EEC Treaty may be construed as a *market-economic constitution*.[11] Apparently, the above definition of the constitution is a guiding one concerning the fundamental treaties in the special literature, too. It is justified – among others – on the one hand by the more and more separated EC/EU legal system, which is based on the fundamental freedoms, the establishment of the inner market and the detailed and unified competition rules. This legal system has grown out of the field of economy in a narrow sense, and restricts the scope of action of the state/national legal systems like basic law, and even becomes an organization with a constitution taken in a legal sense. It follows from this that there are debates about the economic neutrality of the EC treaties at community level *similar to the debate about the German economic constitution.*[12]

The core of the debate is whether guaranteeing the freedoms of the treaty and regulating the competition are operative only for the member states or *restrictions on the exercise of community competences* may also be gathered from them, and if yes, to what extent.

In order to answer the above question, the Treaty establishing a Constitution for Europe (hereinafter TCE) should be examined. Considering that after the ratification of the TCE, the European Union becomes a constitutional supranational legal personality composed of the Union's constitutional states of the rule of law[13], there is no need to thoroughly examine the former organisation in respect of the economic

[7] In spite of it Francesco Saverio Marini conveys the suggestion that it is worth separating the economic and the political constitution. Francesco Saverio Marini: Il „privato" e la costituzione. Rapporto tra proprietà ed impresa, Milano, Dottore A. Guffrè Editore 2000 p 65. Cf Gygi: ibid p 23. René Rhinow: Die Bundesverfassung 2000. Eine Einführung. Helbing & Lichtenhahn, Basel-Genf-München 2000 p 299.

[8] G. S. Katrougalos: The „Economic Constitution" of the European Union and the protection of social rights in Europe. www.iacloworldcongress.org/workshop/6 (24 11 2004) p 2.

[9] Weiler improved Ipsen's theory ten years later. Christian Joerges: The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics. 1997. http://eiop.or.at/eiop/texte/1997-019a.htm (24 11 2004) p 5.

[10] Christian Joerges and Florian Rödl: „Social Market Economy" as Europe's Social Model? European University Institute, Florance, Department of Law, EUI Working Paper Law No. 2004/8. Italy 2004 pp 5-6.

[11] This is not changed by the exceptions from the competition-oriented regulations either, the provisions of the ECSC and the Common Agricultural Policy. These are the most typical examples of integration through intervention. Mussler: ibid pp 190-191. C-179/90, Merci Convenzionali Porto di Genova 1991 ECR I-5889. Katrougalos: The „Economic Constitution" of the European Union p 19.

[12] On the summary of the debate see e.g. Mestmäcker: ibid p 3.

[13] The Union's constitutional state of the rule of law – by the commencement of the TCE – appears as a new type of the state of the rule of law, the main peculiarity of which is that all activities of the state have to be directly and indirectly traceable to the national constitution as well as to the TCE. Accordingly, further peculiarities of the Union's constitutional state of the rule of

constitution, the above claims are sufficient to be made. The sensitivity of the economic constitution manifested itself in the course of drafting the TCE. The objectives of the Union, the Charter of the Fundamental Rights of the Union**,** economic and fiscal policies and the budgetary procedure were among the most debated issues of the Intergovernmental Conference (hereinafter IGC), which commenced its work on the 4th of October 2003 – during both the Italian and the Irish presidencies.[14]

The concept of the economic constitution should be applied when outlining the *economic constitution of the Union*, pursuant to which it concerns the constitutional *principles*, the provisions pertaining to *objectives* and *competences* and the *fundamental rights*. Depending on how detailed the constitutional regulation is, the economic constitution – typically in respect of the provisions pertaining to competences – may be perceived in a narrow and in a broad sense. In the case of *succinct constitutions in the broad sense* it may include for instance provisions pertaining to the structure of proprietorship, social policy, employment policy, fiscal policy and the budget, whilst in the case of *more detailed basic laws in the narrow sense* it only includes provisions pertaining to economic policy. When construing the economic constitution, it is always incidental whether to apply the narrow or the broad sense, or how to classify the relevant provisions, it always reflects the arbitrary choice made by the analyst from among the view points. In connection with the Union, the rest of the study examines the economic constitution of the TCE in the broad sense. The aim of this study is to examine only one objective and the relevant fundamental rights.[15]

The relevant provisions of the TCE may be grouped by its articles or by its conceptual elements. On the basis of the *conceptual elements of the economic constitution*, the legal norms stating the objectives of the Union that have market economy in their heart may be perceived as provisions belonging to the *fundamental principles*.[16] The *institutional* framework[17] of the Union and the scope of the duties and powers of its important institutions and organs – the European Central Bank[18] and the Court of Auditors[19] – form a separate group. Provisions pertaining to the powers of the Union[20], economic and monetary policy[21], internal market[22], employment[23] and social policy[24], environment[25], industry[26] and common commercial policy[27] belong to the *competence-provisions*. Norms pertaining to the *financial* principles of the Union[28] and the financial provisions[29] should be placed into a separate group. Provisions pertaining to

law include the existence of the constitutional state, the special capacity (or outstanding role) of law, the recognition and enforcement of the fundamental rights, European Union membership and the ratification of the TCE.

[14] Cf e.g. the documents of the third (CIG 37/03), the seventh (CIG 75/04) and the eighth (CIG 78/04) ministerial meetings. SCADPlus: Work of the IGC 2003/2004. The Intergovernmental Conference 2003/2004: Negotiations under the Italian Presidency. 8., p 10. http://europa.eu.int (12 01 2005.) SCADPlus: Work of the IGC 2003/2004. The Intergovernmental Conference 2003/2004: Negotiations under the Irish Presidency. 4. p 5. http://europa.eu.int (12 01 2005)

[15] Describing the other elements would go well beyond the limits of this study, consequently, no thorough examination of them is conducted, only references are made.

[16] Part I, Title I

[17] Part I, Title IV, Chapter I

[18] Part III, Title VI, Chapter I, Section 1, Subsection 6

[19] Part III, Title VI, Chapter I, Section 1, Subsection 7

[20] Part I, Title III, Title V

[21] Part III, Chapter II

[22] Part III, Title III, Chapter I

[23] Part III, Chapter III, Section 1

[24] Part III, Chapter III, Section 2

[25] Part III, Chapter III, Section 3

[26] Part III, Chapter V, Section 2

[27] Part III, Title V, Chapter III

[28] Part I, Title 7

the economically relevant *fundamental rights* are set forth in Part I Title II and in Part II on the Charter of the Fundamental Rights of the Union. The analysis below, however, handles this grouping quite loosely – in order to describe the theme as comprehensively as possible.

1 Social Market Economy versus the Principle of 'Social State' at a European Level

Article III of the TCE lays down the principles of market economy and *social market economy*, which justifies the examination of this concept considering that it may also be regarded as the central element of the economic constitution.

The formation of the doctrine of social market economy is linked to the interpretation of the Basic Law of the Federal Republic of Germany (hereinafter the GG) and to its economic system, therefore it should be noted that the GG does not contain explicit provisions pertaining to market economy, it lays down the principle of the social statehood.

a) The German special legal literature made the principle of the *social statehood* of the Basic Law – in a certain respect, besides defining its content elements – similar to the principle of social market economy[30]. The principle of social statehood aims in particular at *fair liberty* and *equal opportunities*[31], it does *not only* mean that the state shall socially and fairly treat its citizens, *but* it *also* entails the expectation that citizens shall behave socially and fairly towards the state. The *principle* under which he who can help himself out of his own resources shall draw back for the benefit of others follows from the above and from the limited nature of financial resources. Enhancing social *self-regulation*, self-help and a community of solidarity is the duty of the state as well as protecting people from social endangeredness. The social state of the rule of law of the GG does not aim at a totally *provider state*, but at a state which intends to ensure responsible freedom besides the welfare of the individual, thus establishing the expansion of the sphere of freedom of the citizens – mainly that of the socially disadvantaged.[32] This resembles the principles of Hilfe zur Selbsthilfe and Subsidiarität of the *social market economy*. The social market economy is – besides this – basically an *economic and at the same time social system*. This is of high significance from the point of view of social policy, since the society, the state and the economy are interrelated. This theory contains all that is necessary for the coexistence of the people and for making the world of economy and labour more humane. Thus, the mutual dependence of economy and ecology is conceptually linked to this.[33] Social market economy as a social system should be perceived as a *complement to the democracy of the state of the rule of law*: what democracy and the state of the rule of law do for controlling power is done by regulation ensuring competition in the area of economy. Since the

[29] Part III, Title VI, Chapter II

[30] In their wording the social constitutional state of the rule of law is a progressive answer in a plural, industrially organised mass-society divided on the basis of the division of labour. Therefore it is a *middle course* between laissez faire and a totalitarian command economy. Alfred Katz: Staatsrecht Grundkurs im öffentlichen Recht, 12., überarbeitete Auflage, C.F. Müller.

[31] These can be broken down to the following elements: the duty to create bearable living conditions, social security, social fairness, social freedom and the system of public law indemnification. Katz: ibid

[32] Katz: ibid

[33] Otto Schlecht: Jólét egész Európának a piacgazdaság előretörésével [Welfare for the Whole Europe under the Sweep of the Market Economy]. OMIKK. 1998 p 93 Müller-Armack called for the implementation of the second phase of market economy, in which phase he emphasised environmental protection and the improvement of social environment as early as at the end of the fifties. Ernst Dürr: The Social Market Economy in the Federal Republic of Germany. Paper Presented at the Symposium Republic of Zimbabwe-Federal Republic of Gemany. Harare. 7th Nov. 1985. Vortrage zur Wirtschafts- und Socialgeschichte. Heft. 11. Nürnberg, 1986 p 9.

individual is basically free in a state of the rule of law, and this freedom is indivisible, the theory of social market economy is interlinked with the requirement of individual responsibility, creativity and individual initiative.[34] On the one hand, social market economy as a social system is based on the freedom of the individual, it gives freedom to the individual but entails risks as well.[35] On the other hand, it is an *organising principle* without common dogmatics, it is open, tolerant and flexible, based on parliamentary decisions and operates with acceptable compromises just as the concept of the system of the state of the rule of law.[36] Social market economy as an *economic system* is much more than a mere sum of market economy and social policy,[37] further, it is more than simple competition as well, as this concept regards morals, honesty etc.[38] as things which are to be made part of the economic life.[39]

b) *According to Joerges* and *Rödl* the model of the social market economy adopted by the TCE must have been the German social statehood. [40] In their view those devoted to the social Europe argued for a social market economy linguistically close to a social state, and thought it would be of constitutional and political significance if the Convention expressly stated the Union's intended social character by alluding to social market economy. The authors are *worried* that this *excludes alternative solutions* by virtue of its constitutional power, and *propose* that for the sake of stressing the social nature and avoiding the problems caused by the social market economy, the Convention should have applied the *term 'social European system of law'* or *'social union'*, or as an alternative solution it should have trusted in the strength of the conception of 'solidarity', which is contained in the values listed in Article I of the TCE.[41] These concepts apparently mix with each other in the legal literature. This is the reason why it is necessary to define these terms. *Market economy and its various attributes* (liberal, social, dirigist etc.)

[34] An individual, having political rights and making responsible decisions, whose scope for economic action is taken away by the central government is inconceivable in the long run, just like an individual who can make independent economic decisions but is patronized by a political party, based on the principle of democratic centralism, operating as if it were a state. Schlecht: Jólét egész Európának…[Welfare for the Whole Europe …] pp 17 and 108.

[35] Schlecht: Jólét egész Európának…[Welfare for the Whole Europe …] p 52.

[36] The system is flexible and open inasmuch as modifications and innovations are compatible with market economy and social fairness. Dürr: The Social Market Economy in the Federal Republic of Germany. p 9, Flexibility has been realised in practice since the opportunities provided by it has been taken by the consecutive governments. Katalin Falusné Szikra: A németországi szociális piacgazdaság [Market Econimy in Germany]. In. Összehasonlító gazdaságtan [Comparative Economics]. Bevezetés a gazdasági rendszerek elméletébe [Introduction into the Theory of Economic Systems]. Aula Kiadó. 1997 p 234.

[37] Schlecht: Jólét egész Európának…[Welfare for the Whole Europe …] p 93.

[38] The competition-oriented market economy should be saturated with social ethics so that it can deserve the adjective 'social'. In a pure, forlorn market economy the freedom of the individual is endangered by the excessive exploitation efforts of the economic power (cartels and monopolies). Schlecht: Jólét egész Európának…[Welfare for the Whole Europe …] pp 12 and 106.

[39] The reason for this is that the market economy established and maintained according to ordoliberal principles automatically and directly generated social impacts. See the works of Eucken and the Freiburg school.

[40] The reason for the commitment to the theory of social statehood is the idea that Europe is unable to solve the problem of democratic deficit unless it solves the social problem. Joerges-Rödl: „Social Market Economy" as Europe's Social Model? p 2. This concept of the social state has not got to the European level in the sense it is used by the Germans, as "this would have entailed the presupposition that the EU was a federal state, which was unperceivable considering the consensual commitment of the Convention (it totally refused the federal construction of the EU)". („This would have led to the conception of the European Union as a „state" something that was obviously impossible on condition of the chosen consensus commitment of the Convent"…." A potential of the European Union to become a federal state was carefully excluded by the Convention".) Joerges-Rödl: „Social Market Economy" as Europe's Social Model? pp 10-11. Katrougalos regards the activism of the European Court of Justice (ECJ) manifest in the social area as a basic contribution to the constitutional acknowledgement of the theory of the social state at the EU level, though he adds that the ECJ has not proved to be the champion of the social rights so far as it ranks the European integration above all in its case law. Katrougalos: The „Economic Constitution" of the European Union …p 24.

[41] Joerges-Rödl: „Social Market Economy" as Europe's Social Model? pp 10-12.

refer to economic policy, in other words to the conduct of the state – which adopts binding rules of conduct in the form of regulations – relating to economy. The *state and its attributes* (liberal, social or welfare) point mainly to the role of state and society. It should be noted that the concepts of social state and welfare state cannot be used as synonyms either. [42] *The state of the rule of law and its various definitions* (liberal or social) basically define the connection between state and law. The '*social union' in respect of the EU* – similarly to the relationship between the social state and the society – would have referred to the connection between the Union and its citizens. The term 'social European system of law' would entail what has been described in connection with the state of the rule of law. It is without the shadow of a doubt that both terms *should gain grounds for existence* as part of the European terminology at the European constitutional level, it is, however, indisputable that *neither has got anything to do* with economy, economic policy or the internal market, that is with the fundamental concepts which played a key role in the establishment and the later development of the EEC. The *incorporation* of the social market economy into the text of the constitution harmonises much better with these. It is unquestionable that *the conception was debated* even within the Convention, and several attempts had been needed before the term could get into the text. The term social market economy *was not contained in the first draft* despite the recommendation, made by the Working Group on 'Social Europe', based on a consensus. The inclusion of the term was demanded by several groups of various political colours. The issue *was raised* on the plenary session on the 27-28 of February 2003, and the subsequent draft did contain the term, though the text *was modified again* and the term 'highly competitive' *was included*. [43] Regarding the concept of social market economy, this inclusion was not absolutely necessary.

It is sometimes claimed in the literature that the social deficit, the elimination of which has been strived for, has fertilised the standpoint of the Convention.[44] Those devoted to the social Europe regard the now European constitutional principle of the social market economy as something that degrades and pushes their objective into the background, the reason for which is obviously the imprecise knowledge of the term and the implication of something which is not included. This may have led to the statement that the social market economy is the restriction of social objectives,[45] which is an apparently false statement in the light of the conception described above. Of course, perceiving the social market economy in a different dimension, it may be claimed that – for instance contrary to the theory of the welfare state – it does not unconditionally support everybody, that is it does not ensure the social level expected by some – however, this is not the responsibility of an economic model.[46] These dimensions and areas of study cannot be merged due to their different orientation.[47] Thus, it can be stated that taking into account the provisions of the founding treaties and the objectives of the EEC/EC, the inclusion of the *social market economy* into the TCE may be regarded as *logical*.

[42] For instance the USA and the United Kindom are welfare states but not social states as social policy has not been entrencehed in the constitution. Katrougalos: The „Economic Constitution" of the European Union … p 4. On the welfare state cf. Falusné: A németországi szociális piacgazdaság [Social Market Economy in Germany]. p 244, Alkotmánytan [Constitutional Law] (ed. István Kukorelli) Osiris 1998 p 153, László Szamuely: A jóléti állam ma [The Welfare State Today]. Budapest, 1985. Magvető Kiadó Budapest, 1985. p 7. Cited by János Sári in Alkotmánytan [Constitutional Law] Chapter 6. Péter Szigeti: A szociális jogállam követelményeinek helyzete alkotmányos berendezkedésünkben: jelen, múlt és jövő? [The Situation of the Requirements of the Social State of the Rule of Law in our Constitutional Arrangement: Present, Past and Future?] in Magyar Jog. 2001/5:258.

[43] Cf. CONV 528/03; CONV 574/1/03 REV p 1; CONV 724/1/03 REV; the draft of the 10th of June 2003, CONV 797/03. These are described by Joerges-Rödl: „Social Market Economy" as Europe's Social Model? p 10 (footnote 37)

[44] Cf. e.g. Joerges-Rödl: „Social Market Economy" as Europe's Social Model? p 4.

[45] Joerges-Rödl: „Social Market Economy" as Europe's Social Model? p 20.

[46] Falusné: A németországi szociális piacgazdaság [Social Market Economy in Germany]. pp 232 and 243.

[47] Just as they are mixed in the work of Joerges and Rödl. Joerges-Rödl: „Social Market Economy" as Europe's Social Model? p 19.

2 The Appearance of the Social Market Economy in Certain Constitutions

Besides the effort to resolve the democratic deficit and the result of the development, the constitution making process in the Central-East European countries may also have affected the incorporation of market economy into the TCE. The new East-European constitutions thematise market economy together with their own constitutional conditions, in which the development of wording moving from the West to the East and then back makes itself manifest.[48] It is not reasonable to describe in details the contents of the constitutions relevant to our theme in this study, suffice it to form four groups containing the main statements regarding the economic system.[49]

a) The first group is formed by the constitutions with the *principle of market economy* in them. The Hungarian and the *Polish* constitutions are like this. The latter, in its Article 21, lays down the principle of social market economy, which is based on the freedom of economic activities, private ownership, solidarity and the dialogue between the social partners, and is the basis of the economic system of the Republic of Poland.[50] Social market economy determines a new level of constitutional development for Poland. Article 20 introduced new concepts – 'dialogue' and 'solidarity' – besides it laid down the conditions of market economy thus the later social protective rights (e.g. the fundamental right to work in Article 24) are as consistent as the guarantee of the economic freedoms, which can be restricted only 'in the essential interest of the public'.[51] The constitution of the Republic of *Moldavia* (1994) also belongs to this group. It also attempts to comprehensively define social market economy, in the wording of Article 126 (1): The economy of the republic is a market economy with social bias, and is based on private ownership and public ownership to be found in free competition. In the second section partly economic freedoms in the form of status negativus (freedom of commerce) partly protective rights (environmental protection) and partly output-oriented duties (the support of scientific research) are listed in a catalogue-like manner. Article 9 (3) declares succinctly that market, free economic initiatives and clean competition are the fundamental factors of the economy. In the wording of the first sentence of Article 13 (3) of the *Ukrainian* constitution (1996) "The State ensures the protection of the rights of all subjects of the right of property and economic management, and the social orientation of the economy.". This context of the constitution defines social market economy.[52]

b) It also occurs that the constitution contains the principle of *market economy* together with the *principle of social state*. The *Spanish* constitution is like this, which sets forth in Article 1 (1) that *Spain* is a democratic and social state of (the rule of) law, which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order. It acknowledges the freedom to free enterprise within the framework of market economy in Article 38. Article 1 (3) of the *Romanian* constitution describes the republic as a democratic and social state. The economy of Romania is a free market economy which is

[48] The economic constitution, mainly in East-Europe is not an empty expression, it constitutes the central theme of the theory of European constitutional law elaborated at national and pan-European level.Cf. Häberle: ibid p 555.

[49] Five groups may be formed by applying the principle of the social state. According to it, the constitutions containing the *principle of the social state* belong to one group. It can be exemplified by the GG or the *French* constitution. The latter defines France as a transparent, democratic, secular and social republic in its first section. Pursuant to § 20 of the GG, the Federal Republic of Germany is a democratic and social state.

[50] Boguslaw Banaszak: Einführung in das polnische Verfassungsrecht. Wydawnictwo Uniwersytetu Wroclawskiego, Wroclaw 2003. p 318, Boguszlaw Banaszak: A vasfüggöny leomlása és a közép-európai alkotmányfejlődés – Lengyelország példáján keresztül [The collapse of the Iron Curtain and the Development of the Constitutions in Central Europe – through the Example of Poland]. Pécsi díszdoktori előadás [a lecture delivered upon the conferment of an honorary degree in Pécs]. Pécs, 04 November 2004.

[51] Article 21

[52] For more details see Häberle: ibid p 555.

based on free enterprise and competition.[53] Under Article 45 the law guarantees free access to economic activities, the freedom to enterprise and their exercise.

c) The third group comprises constitutions that contain the *principle of social state* and *non expressis verbis the principle of market economy*. In Article 1 the *Croatian* constitution declares that Croatia is a unitary, transparent, democratic and social state. In Article 49 it lays down that the basis of the economic system of the state is the freedom to enterprise and the freedom of market, thus – by systemic construction – the principle of market economy can also be gathered from this constitution. Further sections of the cited article should be taken into account in the course of the interpretation. Pursuant to these sections the state shall guarantee equal opportunities to all entrepreneurs on the market and shall prohibit the abuse of monopolistic position specified by law. Further, the state shall enhance economic development, social well-being and shall consider the economic development of all regions. The above interpretation is reinforced by Article 50, pursuant to which the freedom to enterprise and the right to property may exceptionally be restricted by law, in the interest or security of the state, and when referring to the protection of public health and the environment. In Article 2 the *Slovenian* constitution lays down that the state shall be governed by the principle of market economy and social statehood. Article 74 on free enterprise may be perceived as the realisation of market economy, since this also lays down the prohibition of unfair competition and restrictive practice.

d) The next group comprises constitutions in which the constitution making power did *not* lay down *market economy expressis verbis*, but it can be gathered from the provisions. Pursuant to Article 19 (1) of the Bulgarian constitution of 1991, the *Bulgarian* economy is based on free economic initiatives. The second section of the article practically lays down the principle of market economy, since it stipulates that the state shall guarantee equal legal conditions for pursuing economic activities to all citizens by avoiding the formation of monopolistic positions and unfair competition and by guaranteeing consumer protection. Articles 17-18 provide for the forms of ownership, the inviolability of private ownership and contain detailed provisions pertaining to state ownership. Article 41 of the *Italian* constitution provides for the freedom of private economic initiatives. The constitutional norms contain three essential factors of economic management: private initiative, the limits of social order and national planning. It is not clear yet, how these three elements may be combined in the legal regime of the economy on the basis of the political possibilities of the given era.[54] Article 8 of the *Macedonian* constitution lays down among others the freedom of market and undertakings as the fundamental principles of the constitutional order of the republic.

Incorporating (social) market economy into the constitution is apparently a generally applied practice in the course of the *new constitution making processes*, which is justified on the one hand by the *transition* from command (centralised) economy to market economy in the countries of the region, on the other hand by the ever strengthening international and constitutional *recognition of* economic *freedoms* and social rights linked to them. This is strengthened by the fact that Part II of the TCE contains the Charter of the Fundamental Rights of the Union.

[53] Article 135
[54] Grisi: ibid p 87

3 One of the Central Elements of the Economic Constitution of the EU: the Social Market Economy

Article I-3 of the TCE –unlike the GG but like other European constitutions – expressis verbis lays down the principle of market economy.[55] Consequently, it is well established to say that contrary to the Basic Law of Germany, the text of the constitution provides for a special economic system of the Union, the elements of which may also be found in the TCE. Further on it is reasonable to examine whether the elements of the market economy appearing in the TCE are in compliance with the model of market economy. The provisions of a basic law cannot be construed on their own, therefore, social market economy should be examined in a wider context.

a) The *values* set forth in Article I-2 of the TCE on the Union's values can be divided into a group of fundamental rights and into a group of sovereignties. The *group of fundamental rights* comprises the respect for human rights – in particular the rights of minorities[56] – human dignity, freedom and equality. The other group comprises people's sovereignty under the term of democracy and legal sovereignty under the term of the statehood of the rule of law. The Union laid down values which are among the fundamental provisions of the constitutions of the Member States. The sections of the TCE lay down the common values of the Member States.[57] Thus, the Member States must have societies where these values prevail.[58]

Within the provisions pertaining to the values of the Union, the ones referring to fundamental rights and the statehood of the rule of law suggest the *image of social market economy*. This image is reinforced by the objectives,[59] in which the role of the values and the principle of the statehood of the rule of law are strengthened. In Article I-3 (2) the TCE offers its citizens an area where the law prevails. *Market economy* is included in the list of objectives as the TCE also offers an internal market where competition is free and undistorted in the article cited above. This image of market economy is *made more precise* in the next

[55] Article I-3 The Union's objectives
(1) The Union's aim is to promote peace, its values and the well-being of its peoples.
(2) The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.
(3) The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
(4) In its relation with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
(5) The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.

[56] This provision was promoted by the Hungarians and the Slovaks and was objected by the Lithuanians. Cf. CIG 37/03 p 3, CIG 52/03 p 3, CIG 76/04 p 4.

[57] Pluralism, prohibition of discrimination, tolerance, justice, solidarity and equality between women and men. Cf. CIG 76/04 p 4

[58] The values of the TCE may be grouped by the criterion whether they define a new value or not. Human dignity, equality, the rights of the minorities and the values upheld in the Member State societies are among the new values. http://europa.eu.int (01 02 2005) SCADPlus: Constitution for Europe. The founding principles of the Union. p 2.

[59] Article I-3

section containing the term social market economy expressis verbis. “Promoting the well-being of its peoples” as an objective is linked to the elements of the (social) market economy, though the wording could rather satisfy the needs of those committed to a social Europe. The more detailed *economic objectives* are laid down in the first four sentences of Article I-3 (3) and in some elements of subsection (4) (free and fair trade) of the TCE.

b) Article I-3 (3) sets the objective the Union *works* for. This is sustainable development, which is to be perceived as the fundamental objective and is based on three pillars, namely *balanced economic growth* and *price stability* which are *definitions of objectives and tasks* pertaining to market economy at the same time. The third pillar of sustainable development is *social market economy, several elements of which* are laid down in the TCE: high competitiveness, full employment and social progress. Thus, in the course of implementing the model of social market economy, each legislative act – without prejudice to any interests – must set and realise these objectives. In the TCE it is also set forth in connection with social market economy that it is to be combined with a high level of protection and improvement of the quality of the *environment*. A further objective of the Union is to promote *scientific and technical advance*, combat discrimination and realise economic, social and territorial *cohesion*. The attainment of the economic objectives is *facilitated* by the fundamental freedoms, the prohibition of discrimination[60] and the positive and negative obligations of the Member States pertaining to it: the Member States shall assist the Union in carrying out its tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.[61]

It follows from the co-text of Article I-3 (3) that on the one hand, *social market economy* is a constitutional value,[62] and on the other hand it is a principle and the *basis* of the Union rather than an objective. [63] Provisions to be implemented within the framework of social market economy are to be regarded as objectives, namely high competitiveness, full employment and social progress. Obviously, these – together with the fundamental freedoms – do not establish social market economy on their own, the obligation to enforce fundamental rights and the freedoms and social rights entrenched in the Charter of Fundamental Rights have to be attached to them. With regard to the objective of *full employment* it should be noted that it may only be regarded as a guiding objective and cannot be taken as an obligation. Competition is basically a conceptual element of market economy, thus high competitiveness may also be defined as an objective, in other words it can be perceived as a precondition of full employment and social progress. *Social progress* is an indefinable legal term and it can be related to social market economy only if it relates to the area of economy or if the knowledge necessary for employment and competitiveness is attached to it. The *high level of the protection of the environment* has previously been defined as a fundamental element of social market economy.[64] Therefore, social market economy as a principle of the

[60] Article I-4 (1) The free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed by the Union, in accordance with the Constitution. (2) Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

[61] Article I-5 (2)

[62] On values see Antal Ádám: Az alkotmányi értékek fejlődési irányairól [On the Directions of the Development of Constitutional Values]. JURA 2002/1 p 7, same author: Alkotmányi értékek és alkotmánybíráskodás [Constitutional Values and Constitutional Jurisdiction]. Osiris. 1998. pp 33-39

[63] Joerges and Rödl regard social market economy as a constitutional principle. They refer to the fact that Müller-Armack has never perceived social market economy as an objective. He has spoken of model, formula of integration or style. Neither the German commentators take this term as an objective, but they refer to the ‘strategy of economic policy’ in order to attain the objective pursuant to the clause on social state. Joerges-Rödl: „Social Market Economy” as Europe’s Social Model? p 19. On a different view see http://europa.eu.int (01 02 2005) SCADPlus: Constitution for Europe. The founding principles of the Union. p 2.

[64] On the social market economy of the Union see Katrougalos: The „Economic Constitution” of the European Union … p 20.

Union means that the attainment of the objectives and the enforcement of the rights set out in the TCE presuppose the implementation of the model of social market economy, in other words a base on which these can be realised. [65]

c) With regard to the attainment of the objectives and the implementation of the tasks, the TCE lays down the *principle of sincere cooperation*,[66] pursuant to which the Union and the Member States mutually respect and assist each other in carrying out the tasks which follow from the Constitution. This provision obliges the Member States both in a positive and in a negative sense. On the one hand the Member States take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union and assist the Union in carrying out its tasks, on the other hand they refrain from any measure which could jeopardise the attainment of the Union's objectives. This *negative obligation* – in respect of our theme – entails that the Member States cannot actually deviate from the principle of social market economy which otherwise has been regarded as flexible, without jeopardising the objectives of the Union. In the case of the Member States which incorporated at least the principle of market economy or some of its elements into their new constitutions, this is also helped to be achieved by the relevant provisions of their national constitutions besides the authorisation clause.

The *positive, active obligation* includes the task of the Member States set out in Article III-178, pursuant to which, on the one hand, Member States shall conduct their economic policies in order to contribute to the achievement of the Union's objectives as defined in Article I-3 and in accordance with the broad guidelines of the economic policies formulated by the Council on recommendation from the Commission. On the other hand, Member States shall coordinate their economic policies which are declared to be a matter of common concern within the Council.[67] This article also lays down that the Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles of stable prices, sound public finances and monetary conditions and a stable balance of payments.[68] The above elements of the Union's economic constitution are parts of the *economic constitutions of the Member States*, consequently, the economic constitutions of the Member States not only include the provisions of the Member States' constitutions pertaining to the economy, but also the relevant provisions of the TCE, thus, national legislators have to take these into consideration in the course of formulating their economic policies.

4 The Other Central Element of the Economic Constitution of the Union: the Relevant Fundamental Rights[69]

a) In the *Preamble* of the Charter of Fundamental Rights the TCE lays down that it places the *individual* in the heart of its activities. This principle is to be interpreted as one of the conceptual elements of the fundamental rights, as the acknowledgement of the fundamental rights is based on the perception that it is

[65] Fundamental rights cannot be realised – according to current experience – to the appropriate extent in a different economic system. The freedom to choose occupation, the freedom to enterprise, the right to property and the free evolution of the personality as part of human dignity laid down in the Charter can only be realised to the full extent in a social market economy.
[66] Article I-5 (2)
[67] Common commercial policy, industrial policy, monetary policy and environmental policy also belong to it.
[68] Article III-177 Cf. Part I Title 7 and Part III Chapter II Section 2.
[69] See for instance Mónika Weller: Emberi jogok és európai integráció [Human Rights and European Integration]. Emberi Jogok Magyar Központja Közalapítvány 2000, in particular pp 123-130 and 172-289.

not the individual that is for the state, but it is the state that is for the individual. Although the Union is not a state, the Charter names the Union together with its institutions and the Member States as the addressees. [70] The protection of the essential content of the fundamental rights which can be regarded as the sine qua non of the protection of fundamental rights appears expressis verbis in Article II-112 (1) of the Charter of Fundamental Rights.[71] The recognition of the rights, freedoms and principles set out in the Charter together with the way of thinking which places the individual at the heart of all activities – like in the case of a state – entails the Union's *self-restraint* and *'self-obligation'* regardless of the Charter's laying down the respect for the powers of the Union.[72] Accordingly, the Charter does not establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution,[73] it only restricts the scope for action in respect of the fundamental rights. Without self-restraint the Charter would have no significance at all – beyond declaration.

The respect for fundamental rights, self-restraint and '(self)-obligation', however, could be inferred from the TCE even without this provision because of what is laid down in the *Preamble* of the Charter. A preamble of a certain document (typically a constitution) as a part thereof may be perceived as a solemn declaration which is of great significance when interpreting the document. In its Preamble, the Charter of Fundamental Rights reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations[74] common to the Member States, international treaties and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter is to be interpreted with due regard to the explanations prepared under the authority of the President of the Convention which drafted the Charter and updated under the responsibility of the President of the European Convention.

These provisions, however, are *repeated* in the purview, as pursuant to Article II-112 (3), insofar as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. Pursuant to Article II-113, no provision of the Charter can be interpreted as restricting or adversely affecting human rights and fundamental freedoms – as recognised in their respective fields of application – by Union law and international law and by international agreements to which the Union or all Member States are party[75]. Article II-112 (4) refers to the recognition of the fundamental rights resulting from the constitutional traditions common to the Member States, as these rights are to be interpreted in accordance with these traditions. Pursuant to Section (6), full account shall be taken of national laws and practices as specified in this Charter. Section (7) defines that the explanation drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States. Regarding these provisions, it can either be inferred that the repeated part of the Preamble of the Charter may be omitted – due to

[70] Pursuant to II-111 (1), the addressees of the provisions of the Charter are the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and the Member States only when they are implementing Union law.

[71] The exercise of the rights and freedoms acknowledged in this Charter can be limited only if provided for by law and by respecting the essential content of these rights. With respect to the principle of proportionality, any limitation on them may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. It will be interesting to observe how the Union will solve the conflicts between peace and security-fundamental right and economic objectives-fundamental right.

[72] Article II-111 (1)

[73] Article II-111 (2)

[74] From the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Social Charters adopted by the Union and by the Council of Europe.

[75] In particular the European Convention for the protection of Human Rights and Fundamental Freedoms.

considerations of the theory of legislation – or that the drafters of the TCE kept it in order to demonstrate the importance of the protection of fundamental rights, to establish the basis of the Union's protection of fundamental rights and to define the frame of its interpretation.[76]

b) The Charter contains – sometimes in a fairly wide range – the fundamental rights which determine the individual's economic activities and freedom, in other words all economic *freedoms* are contained which can be realised to the fullest possible extent in a social market economy. The *basis* of these fundamental rights is the right to human dignity which is recognised in Article I-1 in the Charter and shall be respected and protected.

Economic freedoms are set out in Articles II-75 – II-77. The freedom to choose an *occupation* and the right to engage in work are defined as civil rights of the Union and they have four elements: the freedom to seek employment, to engage in work, to exercise the right of settlement and to provide services.[77] Defining the right to provide services as a content element entails on the one hand that the right which originally was defined as a freedom now has acquired the nature of fundamental right, it entails on the other hand that this freedom pertains to both dependent (under a labour contract) and non-dependent work (for example under a business contract). Concerning the latter, it should be noted that it is expressed more markedly in Article 76 providing for the *freedom to conduct a business* (enterprise). Article II-75 also contains the equality element of the freedom defined, as Section (3) declares that nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union. Article II-77 provides for the *right to property*. On the one hand, this provision refers to a system of (individual) property, on the other hand it may be inferred that the Charter regards this essential economic right only as a civil right, as it highlights only the content elements with bearing on civil law,[78] though the basic law practices of the Member States take it in a much broader sense.[79] This definition of a narrow sense is substantially widened by the aforementioned rules pertaining to the interpretation of the constitution. In accordance with other European constitutions, this Article also provides for the rules pertaining to expropriation. As compared to other constitutions, it is a merit of the Charter that it ensures constitutional protection to intellectual property. Though the Charter includes the *right of collective bargaining and action* in the Title on solidarity,[80] the principle of social market economy concerning the ability and willingness to negotiate is inherent in it. The content elements of this right set out by the Charter are the right to negotiate collective agreements at the appropriate levels and to conclude collective agreements. The *freedom of concluding agreements* is laid down expressly only here, but obviously it is inherent in the freedoms to choose an occupation and to conduct a business and also in the right to property with regard to the fact that it is a requisite for market economy. A further function of the right to action is the collective defence of interests including strike action in cases of conflicts of interests.

c) The Charter also contains fundamental rights which may be defined as 'ancillary fundamental rights'. These include the right to *education* and to have access to vocational and continuing training pursuant to Article II-74 and the prohibition of 'general' *discrimination* and discrimination on the ground of

[76] This is why the claim according to which the several sources of law named by the Charter itself contravene the constitutional normativity is not appropriate. Joerges-Rödl: „Social Market Economy" as Europe's Social Model? p 22.
[77] Article II-15 (1)-(2)
[78] Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.
[79] Cf. for instance Decision 64/1993. (XII. 22.) AB of the Hungarian Constitutional Court, ABH 373. Sólyom: ibid pp 645-646, Gutmann-Klein-Paraskewopoulos-Winter: ibid p 25, Katz: ibid pp 378 et seq.
[80] Article II-88

nationality within the scope of application of the Constitution. *Equality* between women and men[81] which must be ensured in all areas also belongs to here. The Charter especially highlights employment and work, thus equality must also prevail in the course of exercising this freedom.

In respect of the equality between women and men, in this provision the Charter marks the area of pay that is a *part entitlement, connecting* to economic rights, and having a *stress on social fundamental right*. These part entitlements – except the abovementioned ones – are basically included in Title IV on solidarity. On the one hand, the *right to rest*, pursuant to Article II-91 (2), being guaranteed at constitutional level of is like that. The content elements of this fundamental right are expressly stated: the limitation of maximum working hours, daily and weekly rest periods and an annual period of paid leave.

On the other hand, the right of access to free placement services which everyone is entitled to may be mentioned.[82] With regard to its function the right of access to free *placement services* is linked to the freedom to choose an occupation and the right to engage in work, with regard to its nature it rather defines a need for service and with regard to its development it may perceived as a third generation fundamental right of a strong social fundamental right nature.

However, other content elements of economic *freedoms* can also be found in the Title on solidarity. Such component is, on the one hand, the workers' right to information and consultation at the appropriate level and in good time within the undertaking and the right to protection against unjustified dismissal.[83] *Fair and just working conditions* defined by Article II-91 (1) may be perceived as connected content elements. The right to working conditions which respect the workers' health, safety and dignity is defined in this sub-title, which should rather be regarded as a fundamental right connected to life and dignity in this wording. *Further provisions* (prohibitions and obligations) *of an ancillary nature* which limit economic freedom can also be found in this Title. Such are the *prohibition of child labour*, the *protection of young people at work*[84] and the *protection of family*.[85] In respect of the *protection of young people at work*, the focal point rests – like in the case of fair and just working conditions – on the fundamental rights to life and human dignity. In the case of the provisions under the sub-title Family and professional life, the social fundamental right nature is preponderant, for instance in the case of paid maternity and parental leave.[86]

The right to *protection from dismissal for a reason connected with maternity* is an exception, as it may qualify as a part-aspect of the protection against unjustified dismissal. Naming it separately is the embodiment of the Union's value judgement concerning the family. Pursuant to the first section of the article, which relates to this twofold nature of the protection of the *family*, the family shall enjoy legal, economic and social protection.

d) The examination of the economic fundamental rights cannot be complete without a *brief* survey of the occasionally connected *social rights*. Practically, only two articles are devoted to *'real'*[87] *social rights*[88] in

[81] Article II-83
[82] Article II-89
[83] Articles II-87 and 90
[84] Article II-92
[85] Article II-93
[86] Article II-93 (2)
[87] Putting the term real social rights in inverted commas is justified by the fact that social rights are taken in a narrow and in a broad sense in the special literature with the second generation of social, economic and cultural rights belonging to the broader sense. As a counterargument it may be raised that on the one hand they are not second generation rights, on the other hand –

the Title on solidarity of the Charter of Fundamental Rights: *social security* and *social assistance* is provided for in Article II-94 and health care in Article II-95. The entitlement to social security benefits and social services[89] are recognised and respected and the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources is guaranteed by Article II-94, in accordance with the rules laid down by Union law and national laws and practices. *Decent existence* is to be interpreted in the frame of combating social exclusion and poverty.[90] On the one hand, Article II-95 of the Charter on *health care* defines the *fundamental right* of access to preventive health care and medical treatment, to which everyone is entitled under the conditions established by national laws and practices. On the other hand, it provides for ensuring a high level of human health protection by the Union and the Member States as that must be guaranteed in the definition and implementation of all Union policies and activities.

Environmental protection defined as an essential element of social market economy is also provided for by the Charter as the *Union's* compulsory *task* – integrated into the policy concerning the high level of environmental protection and the improvement of the quality of the environment and ensured in accordance with the principle of sustainable development.[91]

* * *

Assuming the adoption of the economic constitution and of the above described conception of social market economy and the ratification of the TCE, *as a brief summary* it can be claimed that the Union's economic constitution has an impact on the economic constitutions of the Member States. This impact, however, is mutual as is justified by the cited economic provisions of the new constitutions. Due to this interrelationship and to the fact that the economic constitution of the EU cannot be regarded as neutral, the theory of the neutrality of the economic policy of the constitution cannot be held for long either. If the Union and its Member States want to stay within the frames of the (TCE and national) constitutions and intend to act as democratic states, then their task is nothing else but to maintain social market economy – preferably within the theoretical frames – in other words to make fundamental rights prevail and to utilise the flexibility of the system in the course of developing economic policy. This must go on until a more efficient conception is developed – one which offers more appropriate conditions for realising fundamental rights. The amendment of the wording of the constitutions might follow from this, which might impose new limits and meaning on the economic constitution.

due to their freedom nature – they cannot be interpreted as social rights. Likewise, neither can cultural rights be included in the group of social rights.

[88] Naturally, the classification applied in the Charter uses a method different from the above, the application of which follows a certain logic which cannot be objected. On a different analysis of the social provisions of the Charter see Katrougalos: The „Economic Constitution" of the European Union … pp 20-24. The author classifies the social rights into three groups: a) the rights of special groups of the population (II-84, II-92, II-85, II-86, II-93), b) right to engage in work and related rights (II-75, II-92, II-91) and c) right to have access to social services (II-74, II-94, II-95, II-96, II-94).

[89] Article II-94 (2) Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

[90] Article II-94 (3)

[91] Article II-97.

HUMAN RIGHTS AND TAXATION IN EUROPE: WHAT IS NEW?

by

ANDREI AFANASSIEV*

Despite the fact that general questions of Human rights are widely discussed not only in special literature, but on almost all levels of the society, the interference of Human rights and taxation is discussed far less. Amount of specific publications devoted to this topic is relatively small. More than three years passed since in August 2000 was published Philip Baker's article "Taxation and the European Convention on Human Rights" (Baker, 2000) [1] which is, in my opinion, is the leading work in Europe in this particular field of study. The article suggests a very effective method for finding an answer to the question: how wide and general provisions of the "Convention for the protection of Human Rights and Fundamental Freedoms" signed in Rome on 4th of November, 1950 (ETS No. 5) (with following amendments)[1] should be applied in actual cases, sometimes very tangled and complicated.

Nevertheless, three years is a relatively long time when tax law is concerned. The weight and importance of some principles and norms of the Convention were reconsidered. The main purpose of this article is to describe changes in the generally recognized in the Western European approach to the different questions of Human rights in the area of taxation. This article concentrates on the analysis of relatively recent cases. Each of the chapters first briefly describes situation before the year 2000, as found by Philip Baker article, and then describes recent developments.

1. General overview.

The Convention determined the list of civil and political rights and freedoms. The Contracting States took onto themselves the responsibility to maintain these rights and freedoms and set up legal mechanisms for the enforcement of these obligations. The first mechanism is the European Commission of Human Rights (ECNHR),(1954); than the European Court of Human Rights (ECTHR),(1959)[2] and, finally, the Committee of Ministers of the Council of Europe composed of the Ministers of Foreign Affairs of the Contracting States or their representatives were established.

Since 1950 twelve additional Protocols have been adopted. Protocols Nos. 1, 4, 6, 7 and 12 have imposed additional rights and liberties guaranteed by the Convention. Protocol No. 11, which came into force on 1 November 1998, implemented the "...replacing the existing European Commission and Court of Human Rights with a new permanent Court". For a transitional period the Commission has been continuing resolving cases it had previously declared admissible. Other protocols contain procedural provisions.

There are some other additional documents containing Human Rights provisions and related issues in general and dealing with taxation in particular. I tend to consider the EC treaty as the second important document after the Convention. This long and detailed documents contains plenty of rules, some of which set up Human rights already mentioned in the Convention, but broader and more precisely (for example, Article 12 concerning non-discrimination) (Helminen, 2002)[2]. Some important rules concerning Human Rights and taxation can be found in the Double tax treaties. These treaties also may be useful because they

*Doctoral student, Department of Financial Law, University of Helsinki, Finland.

[1] Hereinafter - the Convention

[2] Hereinafter these organs together are named "Court Organs"

clarify sometimes unclear and controversial articles of the Convention.[2;4] Let us take a closer look onto particular articles of the Convention.

2. Article 1 of Protocol 1. "Protection of Property"

This is a very important article for the taxation matters and, furthermore, it is the only article of the convention, that expressly deals with taxation[3]. Court practice concerning this article had no serious changes or variations during the last three years. Thus, this chapter mainly evaluates results of Philip Baker's research.

Article 1 of Protocol 1 provides:
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The second paragraph explicitly sets up a taxation as an exemption to a right for protection of property. And more, according to the ECTHR practice, the State can enjoy the "...wide margin of appreciation..." in the questions tax legislation. This principle of "wide margin" has been expressed by ECTHR in the decision on the case No. 15375/89 " Gasus Dosier and Fördertechnik GmbH vs. The Netherlands: "...case concerns the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes...In passing that laws the legislature must be allowed a wide margin of appreciation...".

As we can see, the main idea of this article is the protection of property. However, we also can see that this article justifies the "general interest" as a concept more important, than property. In other words, the literal meaning of the text is, that this article protects the "general interest" more, than property. It might be said, that the Convention simply can not defend the individual's property from State's "general interest" in the very same property. Actual meaning of this norm, expressed by ECTHR in the same decision on the case No 15375/89 "Fördertechnik GmbH v. the Netherlands", sets certain limitations on the "wide margin". " ...the second paragraph of article 1 of protocol No. 1 must be construed in the light of the principle laid down in the Article's first sentence. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued..."

Thus, we can recognize the limitations on the "wide margin" set by the Convention:
- provisions of taxation legislation should be reasonable and proportionate;
- taxation should be done for the purpose of the general (public) interest.

It necessary to give a couple more detailed explanations to one of the limitations. Considering the term "law", we should ask ourselves whether the term "law" implies only "statutes" or it also includes the 1.sub-legislative acts and 2.case law?

[3] Baker, 2000, p.301

The answer to the first question is not clear yet. It was discussed in the decision in the case No. 25449/95 "Spacek sro vs. Czech Rebublic". The applicant claimed the lack of accessibility and foreseeability of the one of book-keeping regulations, that was published only in specialized journal, but not in the Official Gazette. ECTHR held that there has been no violation of Article 1 of Protocol 1. There is no clear statement about legal force of sub-legislative acts, and the ground of this decision are complex legal conclusions, as following:
"59...It considers therefore that, even assuming that the Rules and Regulations published in the Financial Bulletin did not constitute legislative or regulatory instruments binding on citizens and legal entities in general, within the meaning of the national law then in force, Špaček SW had accepted the Financial Bulletin as an official public source of binding regulations, and had followed it for the purposes of keeping its accounts "in compliance with accounting principles", pursuant to section 25 of the Private Business Activities Act."" and: "...In addition, taking into consideration that the applicant company as a legal entity, contrary to an individual taxpayer, could and should have consulted the competent specialists, the publication of the Regulations in the Financial Bulletin was sufficient."

Thus, we can only imagine, what kind of decision might be achieved if the applicant would have been a natural person or if the case had been involving criminal charges and, consequently, possible violation of Article 7 of the Convention.

Regarding the applicability of case law, the answer is clear: yes. In the same case "Spacek sro vs. Czech Republic" the ECTHR stated: "...the Court considers that when speaking of "law", Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention, a concept which comprises statutory law as well as the case law. It implies qualitative requirements, notably those of accessibility and foreseeability."

This general principle of "wide margin" and also its general limitations lead to some specific consequent issues, that were considered as a breach of Article 1 of Protocol 1.

One of the most important questions is: does the "wide margin" include rules providing the enforcement of taxation? The general answer is "yes". ECTHR refused the number of claims concerning possible breach of Article 1 of Protocol 1 by measures of the enforcement of taxation.[4] There are only few cases where enforcement measures were considered as disproportional.[5]

The second important question is the question about retroactive validity and invalidity of tax legislation. The ECTHR encompasses only few cases rising the question: Is the retroactive force of tax legislation is the breach of Article 1 of Protocol 1? The answer is: "no". In all of these cases retroactive validity was considered as compatible with the Convention under conditions of proportionality and legality. Thus we may assume that the lack of foreseeability of tax legislation as such is not considered by ECTHR as a breach of the Convention.[6] Nevertheless, sometimes the lack of foreseeability of tax legislation may stipulate criminal charges and create a danger of breach of article 7 of the Convention in connection with retroactive validity of law, imposing criminal responsibility for tax offences. One recent and very interesting case will be discussed later, during the examination of Article 7.

[4] Baker, 2000, pp.305-306
[5] For example: Lemonie vs. France, application No. 25242/95; Hentrich vs. France, application No. 13616/88.
[6] Baker, 2000, pp.304-305

ECTHR holds on similar position on the question about retrospective invalidity of tax legislation provisions that considered as unconstitutional. Thus, invalidity should be only prospective.[7]
Analyzing the real situation from the point of view of Article 1 of Protocol 1, it is necessary to remember, that "wide margin of appreciation" may be limited not only by the Convention and decisions of the Courts, but also by the Contracting states themselves by submitting multilateral (EC Treaty) and bilateral (for example, Double Tax) treaties.

Resuming the ECTHR decisions described in this chapter we may conclude:
1. According to the paragraph 2 of Article 1 of Protocol 1, States possess very broad rights in the area of setting rules of taxation.
2. Nevertheless, these rights are limited by some general principles, mentioned in the Convention by implicit way.
3. Several controversial issues arise because of the general character and uncertainty of Convention's provisions. These issues were encompassed by ECTHR's decisions. Most known of these issues are:
- there is no norm in the Convention that forbids retroactive validity of tax legislation;
- the case law also must be recognized as a source of tax law;
- measures for enforcement of taxation are under defense of the paragraph 2 of Article 1 of Protocol 1.

3. Article 6: Right to fair trial
Court practice related to this article had no serious changes during last three years, but some very serious questions were risen regarding the application of this article. These issues may seriously affect future decisions. Let us examine it in detail.

Article 6 of the Convention provides:
"Article 6[8] – Right to a fair trial
1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3 Everyone charged with a criminal offence has the following minimum rights:
a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b to have adequate time and facilities for the preparation of his defence;
c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[7] Baker, 2000, p.305
[8] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

As we can see from the first part of the Article 6, the "Right to fair trial" covers two types of disputes concerning:
- determination of civil rights and obligations
- criminal charge.

Can the tax proceedings be considered as "determination of civil rights and obligations"? The general answer of ECTHR is clearly "no"; but the reasons for this approach are unclear at least in two dimensions. The first of these two dimensions has to do with the interpretation of terms "civil law" and "civil rights and obligations". The first case, where the position of ECNHR was set by very clear manner, was the case of "X vs. Belgium"[9], application No. 2145/64. ECBHR stated: "That the rights and obligations on which the local tax tribunal had to rule arose, however, out of one of the areas of public law, tax law, and not from civil law;...". This position was repeated many times, but during almost 30 thereafter there have not been more detailed or clarified explanations from ECNHR and ECTHR, why "civil rights and obligations" should be considered only as a close interpretation of "rights and obligations, generated from the area of civil law".

This critical approach was discussed in the important recent case "Ferrazzini v. Italy"[10] The major importance of this case is that ECTHR made an attempt to reconsider its own "well-established" case law concerning the general inapplicability of Article 6 to the general tax proceedings. In their dissenting opinion judges P. Lorenzen, C.L. Rozakis, G. Bonello, V. STRÁŽNICKÁ, C. BÎRSAN, M. FISCHBACH stated:
"...The Convention does not contain any definition of what is meant by “civil rights and obligations”. Even if the Convention institutions have ruled on this issue several times over the years and more than once revised earlier case-law, such a definition is not to be found in the case-law. The Convention institutions have ruled on the applicability of Article 6 in that respect on a case-by-case basis, although some important general elements have been identified.

3. In order to understand the present case-law and the possible need to revise it, it is in my opinion essential to recall the historical background for introducing the concept “civil” into Article 6 § 1 – a concept which is not found in the English text of the corresponding Article 14 of The International Covenant on Civil and Political Rights. Article 8 of the American Convention on Human Rights, on the contrary, expressly covers tax disputes (“rights and obligations of a civil, labour, fiscal or any other nature”).

The *travaux préparatoires* relating to Article 6 of the Convention – closely linked to those of Article 14 of the Covenant – demonstrate in my opinion the following: (1) it was the intention of the drafters to exclude disputes between individuals and governments on a more general basis mainly owing to difficulties at that time in making a precise division of powers between, on the one hand, administrative bodies exercising discretionary powers and, on the other hand, judicial bodies; (2) no specific reference was made to taxation matters, which are normally not based on a discretion but on the application of more or less precise legal rules; (3) the exclusion of the applicability of Article 6 should be followed by a more detailed study of the problems relating to “the exercise of justice in the relations between individuals and governments”; accordingly, (4) it seems not to have been the intention of the drafters that disputes in the field of administration should be excluded forever from the scope of applicability of Article 6, §1"

[9] Baker, 2000, p.307
[10] App. No. 44759/98.

There has not been any case, where an applicant has tried to ask the court to apply Article 6 to ordinary tax proceedings basing his position on the Convention's *travaux préparatoires*.

Also one may look at the position of ECNHR and ECTHR from the point of view of the Heading of the Article 6 : "The right to fair trial"[11]. Thus, if we do not recognize applicability of this article to ordinary tax proceedings, we do not recognize tax proceedings as a trial at all; and, accordingly, we leave a taxpayer in his dispute with tax authorities mainly without protection of the Convention . As was mentioned before, the main reason why ECNHR and ECTHR decided to leave the ordinary tax proceedings without protection of Article 6, was the opinion, that these proceedings are generated from the "...areas of public law...". Thus, this approach rises the danger to leave without protection of the Convention a lot of other potential disputes between citizens and state, for example, questions concerning compulsory military service for young men.

In the same Ferrazzini case another judge did not agree with general principle of inapplicability of Article 6 , but on the different ground. In his concurring opinion Judge G. Ress stated:
“I consider that the aspect of immediate enforcement, which presents similarities with the effect of penalties and can be even more severe from an economic point of view, should not be excluded *a priori* from the scope of application of Article 6. Even if tax matters, at least generally speaking, still form part of the hard core of public-authority prerogatives, there is an aspect in which the State transgresses those prerogatives and enters a sphere in which the individual should, in a democratic society, be able to challenge such a duty on the taxpayer by arguing that there has been an abuse of rights in immediate enforcement proceedings.” Thus, in Ferrazzini case six of seventeen judges refused to maintain the "inapplicability" principle.

The second of two dimensions is the interpretation of the term "tax". Let us have a closer look at the case No. 19005/91 "Schouten and Meldrum v. The Netherlands". Deciding this case ECTHR determined that the dispute, involving dispute concerning not taxes, but social security contributions, should be considered as "determination of civil rights and obligations"[12]. This decision was made despite similar legal and economic nature of taxes and social security contributions[13]. In following similar cases ECTHR has continued to maintain such practice.[14]

May tax proceedings be considered as "criminal charge"? The general answer of ECTHR is clear: yes, if the case satisfies to three so called "Engel criteria" (Formulated in the decision of the case "Engel vs. The Netherlands")[15]. The criteria are:
- classification of the proceedings in domestic law
- the nature of the offence
- the severity of the penalty which may be imposed.[16]

[11] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
[12] Baker, 2000, p. 308
[13] It would be very interesting to see possible future decision of ECTHR, where the respondent might be the country, where the social security contributions just named "social security tax", and the nature of this tax is the same as "social security contributions". How will ECTHR deal with this definitional snare?
[14] See for example Salomonsson v. Sweden *(Application no. 38978/97), Lundevall v. Sweden (Application no. 38629/97) and others.*
[15] Baker, 2000, p. 310
[16] ECTHR stated this matter in the case "Västberga taxi actiebolag and Vulic v. Sweden"(app. No. 36985/97) by this way: " The Court reiterates that the concept of “criminal charge” within the meaning of Article 6 is an autonomous one. In

For our purposes the most interesting criterion is the last one. First of all, if possible punishment involves imprisonment, it is clear that the dispute involves a criminal charge. Concerning cases where only a fine is imposed as a possible penalty, ECTHR has established a practice that a penalty of 25% of disputed sum or more should be considered as involving a criminal charge[17].

Thus, we can conclude from one of the most controversial issues that ECTHR and ECNHR recognize inapplicability of Article 6 of the Convention to tax proceedings as a general principle, but the practice set up plenty of exceptions from that general principle. In other words, a significant part of tax disputes is in fact under protection of Article 6 and additional guarantees according to the parts 2 and 3 of Article 6 have to be applied. Inside the text of this article we may find special guarantees. Let us take a closer look on these guarantees in the same order as they are mentioned in the text.

The first is the right for the determination of the result of the proceedings "within the reasonable time". There are no fixed rules of determination what is the reasonable/unreasonable time. The ECTHR s' decisions are made on case-by-case basis according to the complexity of the case and the behavior of the disputing sides. The general position is that the length of the proceedings longer than five years needs special circumstances to be justified[18] .

It is interesting to point out, that the "length of the proceedings" usually does not examined by ECTHR from the point of view of "intensity" of these proceedings, i.e. how "deeply" person is suffered during this time. Only extremely brief statements may be found sometimes in the final parts of judgments dealing with Non-pecuniary damage.

Answering to the additional question: "In which moment in time we can recognize the start of proceedings?", ECTHR pointed that that the start of the proceedings takes place when the citizen is "substantially affected" by the proceedings. In other words, when citizen is officially charged or has been questioned by authorized body under the circumstances that future charge is foreseeable.[19]

In the case Eckle v. Germany[20] ECTHR stated:
73. In criminal matters, the "reasonable time" referred to in Article 6 par. 1 (art. 6-1) begins to run as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court , such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened . "Charge", for the purposes of Article 6 par. 1 (art. 6-1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected"

This approach rises at least two significant questions. The first is: As we can see, the person can not be recognized in the eyes of Court as "substantially affected" before the moment when such a person clearly sees the possibility of the charge against him. And what about the case when a person is subject to secret investigation procedures, for example, the overhearing of telephone calls, examination of correspondence,

---

determining whether an offence qualifies as “criminal”, three criteria are to be applied: the legal classification of the offence in domestic law, the nature of the offence and the nature and degree of severity of the possible penalty"

[17] Baker, 2000, pp. 310-311
[18] Baker, 2000, pp. 312-313
[19] Baker, 2000, pp. 312-313
[20] Application No. 8130/78

etc. before the actual notification from the authorities about possible charge? One might say that "if a person does not know about these procedures, she/he cannot feel himself/herself suffered". However, the situation is possible when the person feels himself/herself suffered, but cannot recognize the source of this suffering because of the secret character of operations. The second question is: What about the case, when authorities start investigation in fact but do not fix the start of this investigation officially? An individual can not simply ignore some kinds of unofficial invitations to tax officials, when officers inform him about possible charges without any official notification, and still enjoy his rights. Anyway, I hope that the answers on these questions will be delivered in future.

The second right is the right to a court. It means that nobody should be denied the right to a court because of non-fulfilling some special preconditions. Concerning tax disputes it can be, for example, the obligation to pay taxes before appeal[21]. The right was formulated by ECTHR in the relatively recent case "Vasberga taxi aktivebolag and Vulic vs. Sweden"[22] this way:
"92. The Court reiterates that Article 6 § 1 of the Convention embodies the “right to a court” – of which the right of access is one aspect – as a constituent element of the right to a fair trial. This right is not absolute, but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. Furthermore, they will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved [refernces omitted]."

The third is the right to independent and impartial tribunal. The possible violation of this right was disputed only in small number of cases, and in all of these cases the Court could not find the breach. Considering these examples we may see that the independence of a tribunal was derived primarily from the analysis of formal characteristics of the tribunal such as the competence of this tribunal (e.g. does is possess necessary power to resolve the factual and judicial issues) without examining other relevant problems[23].

The fourth is the right to public hearing. This is relatively rarely raising issue. It was discussed by ECTHR in two very similar cases, "**SALOMONSSON v. SWEDEN,** (App. no. 38978/97)" and "**LUNDEVALL v. SWEDEN,** (Application no. 38629/97)". These cases concerned with not taxes themselves but Social Security benefits. In both of these the lack of oral hearings cases was discovered during Swedish Administrative Courts' proceedings. There was no Court practice concerning this issue established before 2002.

The fifth is the guaranty set up by paragraphs No. 3a and 3d concerning the right to use the language that an individual speaks and understands. These guarantees were discussed in the case "Cuscani v. United Kingdom". [24] The defendant was an immigrant of Italian origin and had a poor English command. But the Court decided, that the defendant is able to understand English good enough for participating in trial. Defendant was convicted and filed a claim to ECTHR. ECTHR held that it was a breach of Article 6 of the Convention. Decision on this case was delivered after Mr. Baker's publication.

[21] Baker, 2000, p. 312
[22] Application No. 36985/97
[23] Baker, 2000, p. 313
[24] Application (заявка № 32771/96).

The sixth is the right to legal aid. This right is mentioned explicitly in the text of Article 6 and widely recognized[25]. There might be one more recent case where the question about lack of legal aid could be examined (among other legal issues)[26], but the applicants lost their interest in the case, and according to the article 37, § 1 of the Convention ECTHR decided that the case should be struck out of the list.
The article 6 of the Convention determines some other rights, which are not mentioned in the text of the article explicitly, but are recognized as important principles being under coverage of "The right to fair trial".

Probably the one of the most interesting and the most controversial is the right to silence. It means the right not to incriminate oneself. This right is not explicitly mentioned in the text of article 6 of the Convention, but recognized as a general principle, being an important part of fair trial.[27] The problem concerning the right to silence is very important for tax disputes because tax authorities depend significantly on the information provided by taxpayer himself. It is obvious that if taxpayers decide to exercise their right to silence and refuse to submit their tax reports on the ground, that submitting these reports may guide criminal charge, this act will paralyze the whole tax system. Thus, the Courts should limit this right, based on arguments of principle, by recognition of the corresponding right of tax authorities, based on the arguments of policy. The Courts decided to use the same approach as was used in the question of applicability of the whole Article 6 to tax proceedings. The Courts' position is: taxpayers may use their right to silence only within the tax procedures involving the criminal charges. The moment of starting these proceedings should be determined in the same way as in the question of length of the proceedings - when the person is "substantially affected". The leading case in this particular issue is, probably, Funke v. France[28] . In this case Customs officers obliged applicant to deliver the statements of his bank accounts in other countries. ECTHR considered this obligation as a breach of Article 6. This position was upheld in relatively recent case J.B. v. Switzerland[29], as described in Baker.[30]

The next interesting question is the question of heritability and non-heritability of the tax fines. The position of the Court organs is clear: in cases when tax fines may be considered as criminal charges (according to the principles mentioned earlier concerning applicability of article 6), the principle of personal character of criminal responsibility should be applied. Thus, these tax fines are not heritable[31].

4. Article 14: Prohibition of discrimination.
Article 14 provides:
"Article 14 – Prohibition of discrimination
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

First of all, it is necessary to say that the Courts tend to interpret this article as "non-free-standing" rule. According to the same principle of closed interpretation of the text of the Convention, as in the questions of applicability of Article 6, the Courts consider this article as prohibiting discrimination in enjoyment of

[25] Baker, 2000, p. 315
[26] Case CASE OF M.C. AND OTHERS v. THE UNITED KINGDOM (Applications nos. 25283/94, 25690/94, 26701/95, 27771/95 and 28457/95)
[27] Baker, 2000, pp. 314-315
[28] Application No. 10828/84
[29] Application no. 31827/96
[30] Baker, 2000, pp. 314-315
[31] Baker, 2000, pp. 312-313

rights and freedoms, only mentioned in this convention, but not elsewhere. From this point of view, a lot of cases of discrimination in taxation matters are considered as fair because of principle of "wide margin of appreciation" mentioned earlier in connection with Article 1 of Protocol 1. In majority of cases where applicants were successful relates to different taxation of men and women in similar circumstances and the most of cases deal with obviously unreasonable and unjust discrimination, except one particularly interesting[32]. According to the law of Land Baden-Wurtenberg (Germany), the young men (males only) had been obliged to pay special duty instead of service in local fire brigade (similar to military service).

The ECNHR and the ECTHR considered that this practice as unjustified discrimination, because nowadays there is no practical possibility to serve in the fire brigade and, accordingly, such duty is just a tax imposed only on males. (Baker, p.318).

One interesting issue concerns the discrimination on the ground of residence. The general principle can be found in special literature, that non-residents are usually not in fact in the same position as residents[33]. This principle is well-known but, nevertheless, it is very hard to find explanations why this principle still exists. In most of cases disputes usually arise from different domestic rules, imposing some tax exemptions for residents and denying ones to non-residents. This idea might be recognized as an important course of surviving for small separated countries during the last centuries, but now, in XXI century when goods and persons may travel from one side of Europe to other side within few hours and after a decades of building united Europe, I believe this "principle" needs serious examination, first of all from the point of view of European Treaty.

There was only one case[34] where ECTHR discussed this practice. The applicant, resident of Finland but working in Sweden could not "contract out" of Sweden church tax while residents of Sweden in the similar circumstances could. ECTHR easily recognized such practice as a violation of Article 14.[35]

5. Article 7 and prohibition of criminal law retroactive force.

Article 7 provides:

"Article 7[36] – No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

[32] Schmidt v. Germany, app. No. 13580/88

[33] For example, (Baker, page 319): "...Non-residents would not normally be in an objectively comparable position to residents" and also (Ben J.M. Terra, Peter J. Wattel, European tax law, 2nd edition, 1997) page 29 "... there is a fundamental difference in tax treatment of residents and non-residents. This is explicitly allowed by the OECD model Income and Capital Tax Treaty. That Model, which is widely used by the EC Member States, although containing a clause prohibiting tax discrimination based on nationality of the taxpayer or of its shareholders (Art. 24), clearly does not regard residents and non-residents as in the same position for tax purposes..."

[34] Darby v. Sweeden, App. No. 11581/85

[35] Baler, 2000, p. 319

[36] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

Philip Baker paid minor attention to this article. Analyzing case of L-GR v. Sweden[37] he concluded that necessary elements of the offence may be described in the existing case law (not in the statute) and it is in conformity with the Convention.
The text of part 1 of the article 6 contains some uncertainties, one of which (what is "law" under this article?) was discussed in the chapter concerning Article 1 of Protocol 1.

Another important uncertainty arise potential questions: "What is the moment of tax offence?", "Can the retroactive validity of the criminal law concerning tax offence be justified?" and others similar issues about legal validity of law during the time and its possible interference with this Article. The answers on these questions are not obvious. Of course all civilized lawyers recognize very important principle which strictly forbids retroactive validity of criminal law. Nevertheless, the criminal responsibility for tax offences very often is a result of breach of those rules, that come not from the text of Criminal Code (or another analogous document) but from other supplemental documents - for example, different book-keeping regulations, accounting standards and so on. As we remember from the discussion above on Article 1 of Protocol 1, the Courts tend to consider retroactive validity of tax legislation itself compatible with the provisions of the Convention.[38] What will happen, if the criminal responsibility is a result of breaching some rule containing in the sub-legislative act with a retroactive force? There are no cases yet, where such circumstances were dealt with.

Concerning the question about determining the precise moment of tax offence and possible "ongoing" character of tax offences, we should take a closer look on the very recent (decision delivered 21.04.2003) and interesting case "Veeber v. Estonia (No. 2)" [39]. During relatively long period of time (about two years, 1993-1995) the applicants have made some fictitious documents concerning calculating of taxes. Domestic prosecutors considered them as "...having intentionally, continuously and on a large scale concealed objects of taxation and submitted distorted data on the companies' expenditures." During this time period Estionia's legislation concerning criminal responsibility was changed dramatically. In the beginning of the period one important necessary condition for criminal responsibility has existed: the tax offence may guide to the criminal responsibility only if charged person was previously Administratively punished for (other) tax offence. In January 1995 this condition was dismissed. Domestic courts held that the applicant have done "continuous" ongoing crime and convicted him according to the 1995 Law. ECTHR stated: "...The question to be determined is whether the extension of the law to acts committed prior to that date infringed the guarantee set forth in Article 7 of the Convention.

32. In this connection the Court recalls that it is not its task to rule on the applicant's criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the national law (references omitted) .... 37. In these circumstances the Court finds that the domestic courts applied retrospectively the 1995 law to behaviour which previously did not constitute a criminal offence. 38. It follows there has been a violation of Article 7 § 1 of the Convention."

[37] Application No. 27032/95, case decided by the ECNHR.
[38] See, for example, ABCD v. United Kingdom (app. No. 8531/79, resolved by Commission), Building Societies v. United Kingdom (app. Nos. 21319/93, 21449/93, 21675/93, resolved by Court), Voggenberger Transport GMBH v. Austria (app. No. 21294/93, Commission), Nap holdings UK Ltd v. United Kingdom (app. No. 27721/95, Commission), mentioned by Baker. In all of these cases was not found violation of Article 1/1 by retrospective validity of tax legislation. Nevertheless, we should remember, that they are relatively earlier cases.
[39] Application no. 31827/96

Thus, we can draw a conclusion that ECTHR considers repeating tax offences as separate acts[40], not as ongoing crime and retroactive validity of law, imposing criminal responsibility for tax offences is incompatible with Article 7.

6. Additional articles

Some articles of the Convention produced relatively small amount of cases. There were only few cases, where applicants challenged tax issues based on this articles and succeeded.
Article 4 provides as follows:
"Article 4[1] – Prohibition of slavery and forced labour

2 No one shall be required to perform forced or compulsory labour.
3 For the purpose of this article the term “forced or compulsory labour” shall not include:
. . .
d any work or service which forms part of normal civic obligations."[41]

Only two cases were raised under this article[42]. In these cases applicants claimed that necessity to calculate and withhold tax without any compensation is the forced labor, as it recognized by Article 4. Both of these cases were resolved by the Commission, and in both of cases applications were rejected on the ground of paragraph 3b. The Commission considered this work as the "part of civic obligations".(Baker, 2000, p. 323)

There are some questions still exist after examining the decisions of the Court organs on these cases. Why were not carefully examined the quantitative characteristics of this work? It is obvious, that necessity to calculate and withhold tax certainly implies the necessity for the obliged person to spent his/her/its money for this work, which is absolutely useless for the person. Sometimes the amount of work may be enormous, and that may guide interference with this article and the Article 1 of Protocol 1. The most possible answer is that these decisions were guided by the arguments of practice rather that the arguments of principle.

We may also find some minor controversies inside the provisions of the Article 4. Part 3b may easily undermine the whole article, because there is no formal limitations for "normal civic obligations" and the imagination of the officials may invent some very unpleasant forms of forced labor.

Probably, the text of the article 4 should be clarified and extended.

Article 5 of the Convention "Right to Liberty and Security" contains detailed conditions under which the detention of a person might be recognized as lawful. This article has been examined in small number of cases involving criminal investigations concerning tax evasion.
Article 8 provides as follows:
"Article 8 – Right to respect for private and family life.

[40] See more about definition of "Continuing offence in *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 33, ECHR 2001-II.
[41] The quotation is the part of the Article, that may be important for discussing issues.
[42] For example, "Four companies v. Austria, app. No. 7427/76 and Borghini v. Italy, app. No. 21568/93.

1 Everyone has the right to respect for his private and family life, his home and his correspondence.
2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The composition of this article is similar to article 1 of Protocol 1: The Right is declared in the first part of the article and possible limitations of this right mentioned in the second part. Analyzing Courts' practice we can see the Court Organs' approach, similar to the approach of the Article 1 of Protocol 1: States' organs may interfere the right, mainly during investigation and information-seeking activities of special bodies, but these interferences need adequate judicial safeguards. The most important of the cases raised under this article is the case "Funke, Miaihe and Cremeux v. France" (apps. No. 10828/84; 12661/87 and 11471/85). All of these applications have dealt with the search of premises of applicants by the officers of French Custom and seizure of documents. The Court found the Violation of Article 8 because of the lack of judicial safeguards preventing abuse of the rights to search and seizure by State Bodies.(Baker,2000, p. 319)

Article 9 provides as follows:
"Article 9 – Freedom of thought, conscience and religion
1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

On the first thought, there is no link between this freedom and the taxation at all. The Court organs have the same opinion: there have not been successful for applicants cases defended under this article. The main idea of Courts' organs can be expressed as "The freedom of religion does not mean the freedom from taxation". (Baker, 2000, p. 321). In the decision on the case of "Sivananda de Yoga Vedanta" v. France (App. No. 30260/96) the ECNHR told: "...Commission cannot read in Article 9... a right under which all of the activities of an association having a religious or cultural character would be totally exempt from tax ..." and "...no way implies that churches or their members should be granted a different status from that of other taxpayers."

We should also pay some attention to the Article 4 of the Protocol 7 (Article 4/7):
"**Article 4 – Right not to be tried or punished twice**
1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."[43]

Recently ECTHR considered few cases concerning this article, but not involving taxation matters. In these cases[44] applicants were punished first by Administrative fine and then by fines under the Criminal code

[43] The quotation is the part 1 of the Article, that may be important for discussing issues.
[44] CASE OF FRANZ FISCHER v. AUSTRIA, (*Application no. 37950/97*), CASE OF FRANZ FISCHER v. AUSTRIA, (*Application no. 37950/97*), CASE OF W.F. v. AUSTRIA, *(Application no. 38275/97)*

for negligent driving guided to the road accidents. ECTHR found violations of the Article 4/7 in of all of these cases and stated:
" . The Court observes that the wording of Article 4 of Protocol No. 7 does not refer to “the same offence” but rather to trial and punishment “again” for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (see paragraph 14 above). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements."

These decisions may have considerable impact on not uncommon in Europe practices, when person is first punished for tax offences in accordance with Administrative legislation and then, second time, under Criminal law provisions.

7. Conclusion.

The European Convention on Human Rights is one of the most important achievements of European society. Having general character as almost every important legal document, it lives only in its real implementations. The Court organs take onto themselves a very hard task to introduce the provisions of the Convention into our real life. Dealing with this great task, they have resolved plenty of serious legal problems.

Nevertheless, some of legal problems still need to be resolved. The most important and interesting problems related to specific the Convention Provisions have been discussed below. However, a couple of problems of general character is difficult to associate with some specified Articles of the Convention.

First, few words need to be said on the conception of "General interest", that is widely used in the text of the Convention as well as in the Court Organ's decisions. This "General interest" conception usually used by States for justifying theirs negative impact or impairment of individuals' rights. Inside plenty of Court organs' decisions important presumption can be found: the general (public) interest is expressed by the State (only) through its legislating and regulating activity and there is unnecessary to examine, does in fact such state's activity constitute real "General interest". Usually the main disputing point is merely forms and quantitative characteristics of this negative impact.

This presumption has not been challenged yet by applicants. There are relatively small amount of cases, where the Courts have determined themselves whether the State's activity is done in accordance with the "General interest". For example, in the case of "S. A. Dangeville v. France"[45] applicant's company

[45] Application no. 36677/97

challenged the practice, that French internal law was applied for the calculating of VAT instead of European Community Directive. After detailed explanations ECTHR stated:
"...1. In the light of the foregoing, the Court finds that the interference with the applicant company's right to the peaceful enjoyment of its possessions was not required in the general interest...."

Thus, we may draw a conclusion that the interest of European Community is recognized by the ECTHR as "General interest" being more important than the interest of a Contracting State. This conclusion is not surprising for those specialists who well know the practice of European Court of Justice, but can be lightly confusing from the point of view of pure theory of law, because European Community is not mentioned in the text of the convention as a "carrier" of "General interest" while Contracting State does. Here we may see a good example how ECTHR interpreted fifty-years old Convention in accordance with the real needs of present days.

The second legal problem needed additional discussion is a concept of "law". Court organs stated many times that the term "Law" has exactly the same meaning in all the articles of the convention. This approach, being reasonable in theory, in practice may create a lot of difficulties. The main problem existing within this approach is the absence of legal definition, what is "law". Each country has own legal system and own system of legal reasoning. For example, in Finland *travaux preparatoires* may be used in the courts with relatively high degree of importance for legal reasoning, and in neighboring Russia *travaux preparatoires* are not recognized as a source of law at all. These huge differences between Contracting States' legal system guide consequent differences in legal practices. And then, when these legal practices disputed in ECTHR in accordance with equal for all of Member States concept of law, it may lead to conflicts and misunderstandings. Nowadays, as was mentioned before, ECTHR tend to determine the "law" as "Statutes plus case law". The main problem within such approach is that in some European countries case law is recognized as a source of law with a low degree of importance, especially in Eastern Europe.

The applicability of this approach to criminal charges may guide to serious violation of Human Rights[46]. I can easily imagine that, for example, in one of the former Soviet Union's republics an absolute adequate provision of the Criminal Code will be "adjusted" by the case law in accordance with some political desire resulting in an absolute incompatibility with basic Rights and Freedoms.

Courts organs' practice have great achievements as well as problems need to be resolved. On the current stage of European integration these problems do not constitute serious danger, because they are "compensated" by the extremely high level of general legal culture in the "old" European countries. But some of these flaws I tend to consider as potentially dangerous. Even within the few following years they may have a serious negative impact on situation with Human Rights, mainly in those countries where general legal culture is not at the very high level. My concerns are based primarily on the assumption that in countries of former "Socialistic camp" the adherents of the principle "Rights of the State more important than Human Rights" are still powerful.

[46] More about the question about criminal responsibility set up by case law see above, in the case L-GR v. Sweden", (app. No. 27032/95). It is interesting to note, that the most of the relatively old Court organs' decisions, that nowadays look controversial and unconvincible, delivered by Commission, not by Court. Sometime the Court and the Commission directly contradict each other, for example, Funke v. France, discussed above.

Bibliography
1. Philip Baker. Taxation and the European Convention on Human Rights. IBFD "European Taxation". Augues 2000, page 298, (Baker, 2000).
2. Marjaana Helminen. Finnish International Taxation, Helsinki, WSOY, 2002, page 3, 15 (Helminen,2002)
3. Ben J.M. Terra, Peter J. Wattel, European tax law, 2nd edition, 1997
4. T. Viherkenttä. Tax Incentives in Developing Countries and International Taxation. Kluwer, Finnish Lawyer's Publishing Company, 1991

CONSIDERATII ASUPRA ACORDULUI GENERAL PENTRU TARIFE SI COMERT IN EVOLUTIA COMERTULUI INTERNATIONAL. ACTUALITATEA PRINCIPIILOR SI OBIECTIVELOR STABILITE IN CADRUL SAU

ANAMARIA BUCUREANU[1]

ABSTRACT

L'article met en évidence la signification de l'Accord général sur les tarifs et le commerce (mieux connu selon son abréviation anglaise - GATT) pour le développement du commerce international. Même si le caractère de notre démarche reste celui d'histoire du commerce international, nous désirions dépasser ce caractère par les conclusions établies et illustrer aussi l'actualité des buts du GATT pour le commerce mondial contemporain.

Traité multilatéral, organisme international et véritable instance du commerce international, voilà la nature juridique du GATT. Son activité s'est concentrée au sens de la libéralisation des échanges et de l'égalité des partenaires. La réduction générale et progressive des droits de douane, l'interdiction des restrictions quantitatives, le règlement des obstacles non tarifaires se sont comptés parmi ses principaux objectifs. La réalité a forcé le GATT à élaborer également des exceptions à ses règles, en admettant par exemple des zones de libre échange et les unions douanières, les clauses de sauvegarde et des dérogations.

L'actualité de ses principes est pleinement démontrée par les buts poursuivis par l'OMC. Les différences inhérentes entre ces deux entités sont déterminées par le nouvel contexte politique international, l'extension des compétences et la protection de l'environnement, ainsi que l'assurance d'un cadre institutionnel consolidé.

ARTICLE

Perioada care a urmat celui de-al Doilea Război Mondial s-a caracterizat, sub aspect economic, prin dezvoltarea accentuată a comerţului internaţional, prin adâncirea colaborării şi interdependenţei între state în vaste domenii şi prin apariţia unor noi organizaţii economice internaţionale. Aceste organizaţii vor juca un rol din ce în ce mai energic în evoluţia economiei mondiale postbelice

Segmentul relaţiilor economice internaţionale în cadrul căruia ne încadrăm analiza este reprezentat de comerţul internaţional, ca „*totalitate a schimburilor de bunuri şi servicii dintre două sau mai multe state*"[2]. Dacă în derularea sa, acesta cuprinde toate statele lumii, el devine un comerţ mondial. Înlăturarea obstacolelor de diverse tipuri în desfăşurarea comerţului mondial, cu scopul intensificării acestui fenomen global a reprezentat principalul deziderat pentru comerţul postbelic.

[1] Ingineur d'etudes à la Faculté de droit de Craiova, Roumanie.

[2] Comerţ internaţional. Tehnici şi proceduri vol. I; I. Stoian, E. Dragne, M. Stoian, Ed. Caraiman, 1997, pag. 5;

Organismul internațional cu un specific aparte care a fost promotorul acestui deziderat până la apariția în 1994 a Organizației Mondiale a Comerțului și care formează obiectul acestui studiu, a fost Acordul General pentru Tarife și Comerț, bine cunoscut după abrevierea denumirii sale engleze – GATT[3].

Deși caracterul demersului este de istorie a comerțului internațional, dorim să depășim prin concluziile pe care le vom formula acest caracter și să evidențiem nu doar semnificația pe care GATT a avut-o pentru comerțul global, dar și cât de actuale au rămas scopurile activităților sale.

1. CONTEXTUL ISTORIC ȘI POLITIC AL NEGOCIERII, SEMNĂRII ȘI RATIFICĂRII GATT

GATT a luat naștere într-un mod oarecum paradoxal[4] și pe parcursul întregii sale funcționări se va remarca prin originalitatea și statutul său specific. Un relativ eșec al diplomației economice a dat naștere unui tratat și unei organizații internaționale cu totul particulare ca statut, structură și funcționare. Conceput ca o soluție provizorie, GATT și-a dovedit aproape o jumătate de secol viabilitatea într-unul din cele mai controversate sectoare ale economiei mondiale.

Din dorința de a intensifica schimburile comerciale internaționale, în contextul general al reconstrucției economiei mondiale, în anii imediat următori celui de-al Doilea Război Mondial, țările dezvoltate au inițiat negocieri, cu scopul creării unei Organizații Internaționale de Comerț și a unei Carte cu principii și norme de bază pentru ordonarea și eficiența acestui domeniu.

Negocierile s-au desfășurat prin eforturile ONU și ale Consiliului Economic și Social cu precădere, care a convocat în 1946 Conferința de la Londra, iar în 1947 Conferințele de la Geneva și Havana. Cu prilejul celei din urmă conferințe, s-a elaborat Carta de la Havana, document care s-a dorit a fi actul fundamental pentru Organizația Internațională a Comerțului. Din considerente politice, Carta nu a fost ratificată de numărul necesar de membri, iar organizația preconizată nu a putut lua ființă.

În schimb, negocieri desfășurate în paralel cu elaborarea Cartei și care au privit reduceri de taxe vamale, s-au concretizat prin semnarea Acordului General pentru Tarife și Comerț[5].

GATT a reprezentat înainte de toate „*un acord comercial multilateral*[6]" prin care au fost stabilite principii și reguli în scopul ordonării și sistematizării comerțului internațional și prin intermediul căruia au fost exprimate obiectivele fundamentale ale politicii comerciale internaționale, valabile și astăzi. Totodată, acest acord de voință între statele dezvoltate ale lumii, generator de drepturi și obligații concrete pentru

[3] O monografie in acest sens - Acordul General pentru Tarife și Comerț (GATT) – Structură, principii și funcționare în „Principii și forme juridice ale cooperării economice internaționale, A. Năstase, București, 1979;

[4] Negocierile in urma carora a fost semnat tratatul vizau constituirea unei organizatii mondiale a comertului. Acesta fusese scopul initial care datorita unor ratiuni politice nu s–a concretizat. In paralel, s-au desfasurat negocieri care au condus la elaborarea si semnarea tratatului analizat, tratat care trepat s–a institutionalizat si s–a dovedit un foarte util inlocuitor al unei veritabile organizatii internationale a comertului.

[5] Acest acord a intrat în vigoare la 1 ianuarie 1948. Tarile fondatoare au fost Australia, Belgia, Birmania, Brazilia, Canada, Cehoslovacia, Chile, China, Cuba, Franta, India, Liban, Luxemburg, Norvegia, Noua Zeelanda, Olanda, Pakistan, Regatul Unit al Marii Britanii si al Irlandei de Nord, Siria, Sri Lanka, SUA, Uniunea Sud Africana si Zimbabwe.

[6] Comerț internațional și politici comerciale internaționale, vol. I, N. Sută, Ed. Independența Economică, 1999, pag. 248 și următoarele;

membrii săi, a declanşat, în mod generalizat, eforturile pentru reducerea şi eliminarea barierelor comerciale internaționale, tarifare sau de altă natură.

GATT prezintă semnificații multiple. În primul rând, se desemnează tratatul multilateral internațional intrat în vigoare la 1 ianuarie 1948, un tratat de referință, fundamental pentru istoria comerțului internațional. Timp de aproape 50 de ani, acesta a fost considerat baza sistemului multilateral de comerț.[7]

În al doilea rând, GATT desemnează o organizație internațională, care deşi nu a fost o organizație în sensul strict al dreptului internațional public[8], prin structura şi funcționarea sa a substituit cu succes o organizație mondială a comerțului.

În al treilea rând, GATT s-a constituit într-o veritabilă instanță a comerțului internațional, soluționând, în acord cu spiritul şi litera sa, controversele de comerț internațional dintre statele membre.

Tratat multilateral, organism internațional şi forum de apreciere şi tranşare a litigiilor de comerț internațional, iată în mod succint natura juridică a GATT.

2. PRINCIPIILE ŞI REGULILE CUPRINSE ÎN GATT

2.1. ***Egalitatea între parteneri***, un prim principiu, presupune nediscriminarea şi concurența loială în relațiile comerciale internaționale, reciprocitatea şi avantajul mutual al statelor implicate[9]. Scopul l-a reprezentat facilitarea unei veritabile concurențe internaționale, fixarea regulilor comune şi împiedicarea creării de subgrupuri conflictuale, care ar fi putut dăuna liberului joc al concurenței şi degenera în conflicte politice grave.

Egalitatea între parteneri s-a materializat în:

2.1.1. *Clauza națiunii celei mai favorizate* [10]

Vechi mecanism în relațiile comerciale internaționale, clauza, preluată de GATT, a avut o evoluție semnificativă în plan internațional. În forma sa clasică, rezultând de regulă din tratate bilaterale, clauza în discuție poate fi enunțată astfel: statul A şi statul B încheie un acord prin care stabilesc că dacă statul A sau statul B acordă avantaje unui stat C, aceste avantaje se aplică şi partenerului în mod automat şi fără negocieri.

[7] Libertatea comertului, concurenta loiala, egalitatea juridica a partilor, libertatea conventiilor, buna credinta a partilor si sanctionarea relei-credinte reprezinta principiile comertului international din zilele noastre. (A se vedea in acest sens Dumitru Mazilu, Dreptul comertului international, Partea generala, ed. Lumina Lex, 1999, pp 84-108). Totodata, acestea au fost regulile fundamentale promovate de GATT.

[8] Avem in vedere in primul rand organe clar, permanent stabilite prin structura si competente. Drept Internațional Contemporan, A. Bolintineanu, A. Năstase, B. Aurescu, Ed. All Beck, Bucureşti, 2000, pag. 283-289.

[9] Dumitru Mazilu, op. cit., pp 98-104;

[10] Adrian Nastase, Clauza natiunii celei mai favorizate in cadrul relatiilor economice internationale contemporane, Studii si Cercetari juridice, nr. 1/1981;

Clauza a evoluat în ultimele decenii, evoluție ce poate fi surprinsă din mai multe puncte de vedere. În primul rând, cadrul bilateral a fost depășit, avantajele rezultând din clauză fiind acordate multilateral, adică tuturor statelor membre GATT. În al doilea rând, clauza a cunoscut o semnificativă extindere privind mai ales drepturile vamale, transferurile de fonduri internaționale asupra plăților, modurile de percepere, ansamblul reglementărilor şi formalităților aferente importurilor şi exporturilor, fiscalitatea, etc. In al treilea rând, clauza a tins spre o instituționalizare, părțile contractante şi Secretariatul GATT, trebuind să supravegheze aplicarea acesteia. Au fost cunoscute şi derogări de la conținutul clauzei, deşi în general ea a fost respectată[11].

2.1.2. Clauza tratamentului național constă în acordarea unui tratament egal produselor provenite din exterior şi celor din interior. Cu alte cuvinte prin această clauză s-a urmărit descurajarea tendinței de favorizare a produselor naționale, raportat la cele străine, asigurându-se astfel egalitatea între parteneri[12].

2.1.3. Reglementarea anumitor practici la export.

1.Una dintre cele mai frecvente şi contestate practici este dumping-ul. "*Acesta presupune introducerea de produse aparținând unui stat pe piața altui stat, la un preț mult inferior valorilor normale*"[13]. A priori, o asemenea practică nu este condamnată. Ea devine condamnabilă în următoarele condiții: cauzarea unui prejudiciu important sau amenințarea cu un prejudiciu important, existența unei legături de cauzalitate între prejudiciu şi importul de produse şi proba prejudiciului suferit, probă care revine țării ce se pretinde păgubită[14]. În acest sens sunt efectuate anchete. Legile şi drepturile anti-dumping permise trebuie să fie proporționale cu marja de dumping constatată, iar scopul lor trebuie să conducă la o restabilire a echilibrului şi nu să sancționeze. "*În general, avantajele obținute din practicarea dumpingului sunt adesea denunțate, însă practica în cauză priveşte cu precădere relațiile bilaterale dintre statele implicate, iar nu ansamblul raporturilor GATT*".[15]

2. Subvențiile la export, forme de protecție a veniturilor, suportate de către contribuabili pentru susținerea prețurilor, au ca efect direct sau indirect creşterea exporturilor sau reducerea importurilor. Începând cu 1958, GATT a impus interdicția subvenționării produselor exportate, cu excepția produselor de bază[16]. Părțile lezate pot recurge la drepturi compensatorii care trebuie să aibă ca finalitate neutralizarea avantajului generat prin subvenții. Interzicerea subvențiilor se înscrie în logica GATT a liberalizării schimburilor şi creşterii lor, precum şi evitării unei concurențe sălbatice.

[11] De exemplu, în 1965 s-a încheiat un acord având ca obiect automobile între SUA şi Canada, fără ca avantajele rezultate din acest acord să fie extinse la alte state membre.

[12] Afacerea taxelor braziliene din 1953 a adus în atenție lupta pentru impunerea şi ridicarea la valoare de principiu a acestei clauze. La 30 noiembrie 1955, GATT a formulat o cerere către Brazilia în urma presiunii Franței, în care a solicitat schimbarea legislației sale fiscale pentru a respecta principiul egalității.

[13] Stefan Scurtu, Dreptul comertului international, Ed. Ins, Craiova, 1996, pp 84 ;

[14] Observam asadar asemanari evidente cu raspunderea delictuala din dreptul privat intern.

[15] Jean Claude Fritz, Relations économiques internationales, Note de cours, Dijon, 2002, pp 41;

[16] Produsele agricole, materiile prime.

2.2 ***Liberalizarea schimburilor****,* principiul fundamental al relațiilor comerciale internaționale a presupus eforturi susținute în sensul reducerii sau suprimării obstacolelor în calea schimburilor internaționale. Principalele obstacole s-au referit la drepturile vamale, restricțiile cantitative şi alte obstacole tarifare.

2.2.1. Scăderea generală şi progresivă a drepturilor vamale. GATT a catalogat drepturile de vamă ca reprezentând un serios obstacol pentru comerțul internațional. Pe de altă parte însă, chestiunea drepturilor vamale aduce în atenție suveranitatea statală[17]. În aceste condiții şi pentru a concilia cele două deziderate, libertatea comercială şi suveranitatea etatică, GATT nu a condamnat drepturile de vamă, ci doar a cerut diminuarea lor, aceste drepturi reprezentând un obstacol legal şi legitim contra celorlalte state. Scăderea drepturilor de vamă s-a făcut prin negociere[18]. Pentru început, între anii 1947-1960, negocierile erau bilaterale, pentru fiecare produs în parte, în jurul unui principal furnizor. Treptat, de la negocierea bilaterală s-a trecut la cea multilaterală, sub forma rundelor de negocieri, reunind membrii şi ne-membrii GATT.

Prima rundă de negocieri s-a numit Kennedy Round (1963-1967)[19], tehnica abordată fiind reducerea lineară a drepturilor vamale, iar rezultatele au constat într-o scădere importantă a drepturilor vamale. La sfârşitul rundei de negocieri, drepturile de vamă au fost diminuate cu: 36% pentru CEE, 43% pentru SUA şi 25-42% pentru restul statelor participante. Media a fost de 35-40% iar reducerea a variat, nefiind omogenă[20].

A doua rundă s-a desfăşurat la Tokio în anii 70 şi a regrupat 97 de state din care 28 nu erau membre GATT[21]. S-a negociat folosindu-se formule de analizare şi aplicare cât mai generale posibil, principiile de la care s-a plecat fiind avantajele mutuale, angajamentele mutuale şi reciprocitatea globală. La finalul rundei de negocieri, drepturile vamale au scăzut cu 25% pentru CEE, cu 30-35% pentru SUA şi cu 50% pentru Japonia.[22]

A treia rundă s-a desfăşurat în Uruguay între anii 1986-1994. Ca un rezultat global, în 45 de ani de existență a GATT, această organizație a reuşit o scădere impresionantă a drepturilor de vamă, spre anii 90, drepturile de vamă nemaireprezentând decât 10% din cifra de început.

2.2.2. Interzicerea restricțiilor cantitative.

GATT a depus eforturi pentru eliminarea generală a restricțiilor cantitative la import şi export. S-a promovat principiul conform căruia protejarea industriilor naționale nu se poate realiza decât prin drepturi de vamă. Excepțiile de la acest principiu au fost determinate de necesitatea de a proteja agricultura sau de a garanta echilibrul balanței de plăți.

[17] Drepturile vamale sunt considerate expresia puterii suverane a statului.
[18] Negocierea multilaterala, organizata, a reprezentat esenta activitatii si filosofiei economice a GATT. Acestea s–au organizat periodic intre membrii, iar uneori si nemembrii GATT, fiind cunoscute sub denumirea de *runde de negocieri comerciale multilaterale.*
[19] Aceasta s–a desfasurat la Geneva, din initiativa CEE si UA, fiind denumita dupa numele presedintelui american J.F.Kennedy.
[20] Basic Documentation for the Tariff Study, GATT, Geneve, 1971, pp 78;
[21] GATT, Les négociations commerciales multilatérales du Tokyo Round, Rapport du Directeur général du GATT, Genève, 1979;
[22] GATT, Les négociations commerciales multilatérales du Tokyo Round, Rapport additionnel, pp 39;

2.2.3. Reglementarea altor obstacole netarifare priveşte orice posibil obstacol în calea comerţului internaţional, mai puţin drepturile de vamă şi restricţiile cantitative. Acestea pot fi: participarea statului la comerţ, formalităţi vamale şi administrative la import, norme tehnice sau sanitare, limitări specifice (licenţe de import, controale ale schimburilor etc.) şi alte taxe la import, cu precădere supratаxele.

3. Excepţiile cuprinse în GATT.

3.1. Excepţiile clasice figurează în textul GATT încă de la originile sale. Integrările regionale sunt considerate excepţii de plin drept. Uniunile vamale şi de liber schimb sunt chiar încurajate de GATT întrucât contribuie la dezvoltarea schimburilor, deşi ele reprezintă o atingere adusă principiului egalităţii între parteneri. Aceste uniuni confirmă însă principiul liberalizării schimburilor.

O primă problemă referitoare la integrarea regională priveşte distincţia între uniunile vamale şi zonele de liber schimb. Constituirea unei uniuni vamale[23] presupune formarea unui singur teritoriu vamal, eliminarea drepturilor vamale şi a altor obstacole comerciale între statele membre, cu consecinţa firească a liberalizării schimburilor. Uniunea vamală presupune aşadar, un aspect intern, constând în liberalizarea schimburilor şi unul extern, reprezentat de un tarif vamal comun.

Zonele de liber schimb[24], spre deosebire de uniunile vamale, nu prezintă decât aspectul intern, referitor la liberalizarea schimburilor. Integrarea într-o asemenea structură presupune depăşirea unor obstacole interne şi externe grupate în patru categorii:
-esenţializarea schimburilor comerciale pentru a evita uniunile cu caracter parţial;
-stabilirea unui program într-un termen rezonabil pentru a asigura integrarea;
-obligaţia de a nu deturna curentele de schimburi comerciale; crearea de curente de schimburi dinamice;
-obligaţia de a nu întări obstacolele comerciale faţă de statele terţe.

Procedura de aderare constă într-o succesiune de notificări şi consultări cu statele membre.

3.2. Sistemele de excepţii: clauzele de salvgardare şi derogările.

În sistemul GATT, excepţiile şi derogările sunt la fel de importante ca şi regulile şi principiile create de Acordul General.

3.2.1. O excepţie cu o semnificaţie deosebită se referă la *protejarea securităţii statelor*[25], aprecierea situaţiei concrete revenind în întregime statelor implicate. Această libertate absolută de interpretare, consecinţă a respectării suveranităţii etatice, a fost criticată ea putând conduce la subiectivism şi arbitrariu.

3.2.2. O altă excepţie se referă la *posibilitatea adoptării de statele membre, a unor noi măsuri de comerţ internaţional, distincte de prevederile GATT*[26]. Dispoziţiile GATT puteau rămâne neaplicate cu rezerva

[23] Bianca Predescu, Drept comunitar, Edituta Universitaria, Craiova, 2000, pp 34 si urm.;
[24] Bianca Predescu, op. cit., pp 40i urm.;
[25] GATT , Tratatul de baza, art. 21;
[26] GATT , Tratatul de baza, art. 22;

însă a nediscriminării şi neintroducerii arbitrariului în relaţiile comerciale internaţionale. Domeniile în care s-a manifestat această excepţie au fost:

-măsuri necesare pentru protejarea moralităţii publice [27];
-măsuri necesare protejării sănătăţii şi vieţii persoanelor şi animalelor şi conservării mediului vegetal[28];
-măsuri referitoare la exportul şi importul de aur şi argint, până în 1971 aurul fiind mijloc de plată;
-o semiexcepţie referitoare la aplicarea legilor care nu sunt incompatibile cu GATT;
-măsuri referitoare la articolele fabricate în închisori;
-măsuri referitoare la protejarea obiectelor având o valoare artistică, istorică sau arheologică;
-măsuri referitoare la protejarea rezervelor naturale epuizabile,etc.;

3.2.3. Excepţia generală „Escape Clause"[29] permitea unui stat să se opună importurilor care riscă să genereze dezorganizarea pieţei interne.

3.2.4. Derogarea de ordin general[30] care permitea ca în circumstanţe excepţionale, altele decât cele prezente în acord, statele membre să dispună, cu o majoritate dublă, ridicarea obligaţiilor unui alt stat membru GATT.

3.2.5. Regimurile particulare au fost create pentru a facilita dezvoltarea GATT şi acestea au privit anumite tipuri de produse şi categorii de parteneri.

3.2.5.1. Regimurile particulare privind produsele se refereau la produsele de bază şi cu precădere la cele agricole. În acest sens au fost permise subvenţii, mecanisme de susţinere a preţurilor, restricţii la import etc. Produsele agricole au fost considerate ca prezentând şi valenţe culturale, strâns legate de mediul naţional de proveniență.

3.2.5.2. Regimurile particulare privind partenerii s-au referit la statele în curs de dezvoltare şi la fostele state comuniste.

Comerţul internaţional trebuia să genereze bunăstare pentru toate statele, inclusiv pentru cele în curs de dezvoltare, cu o situaţie economică extrem de dificilă. Angrenarea acestora în schimburile internaţionale se impunea în ultimă instanţă şi din dorinţa de a asigura un echilibru general. Dincolo de acest deziderat, situaţia creata prin implicarea în comerţul internaţional a statelor în curs de dezvoltare, a relevat conflictul între liberalismul GATT şi tendinţele firești de suveranitate, intervenţionism şi protecţionism ale acestor state. Pentru a soluţiona contradicţia, GATT a introdus *excepţia inegalităţii între parteneri*[31] pentru a combate inferioritatea şi dependenţa ţărilor în curs de dezvoltare. S-a procedat în sensul inegalităţilor compensatorii, ţinându-se cont de inegalitatea reală pentru a evolua spre egalitatea între parteneri, ca

[27] Noţiune cu un conţinut cultural diferit de la o civilizaţie la alta şi cu o puternică amprentă a sistemului de valori regional.
[28] In acest sens o serie întreagă de probleme referitoare la protejarea mediului au devenit incidente;
[29] GATT , Tratatul de baza, art. 20;
[30] GATT , Tratatul de baza, art. 25;
[31] Au fost acordate facilitate, reduceri, exceptii de la aplicarea unor principii statelor dezavantajate economic, tocmai pentru a compensa acest decalaj.

principiu. A doua excepție în acest sens a constituit-o *lipsa reciprocității*[32] prin admiterea existenței de privilegii şi preferințe pentru țările în curs de dezvoltare. S-au conturat astfel premisele unei concurențe „mai" reale, oferindu-se avantaje juridice celor ce erau dezavantajați economic. Dezvoltarea comerțului internațional şi necesitatea unui climat politic de siguranță au necesitat implicarea, prin eforturile GATT şi a țărilor comuniste în schimburile comerciale. Problemele ivite au fost multiple, principalele fiind reprezentate de diferențele economice şi politice între statele comuniste şi cele capitaliste, de raporturile între sectorul public şi cel privat. Negocierile privind aderarea s-au făcut țară cu țară, iar în acest sens GATT a ales o sacrificare temporară a principiile sale în beneficiul dezvoltării comerțului internațional.

Aşadar, dincolo de principii, au fost create numeroase excepții, soluționarea noilor probleme apărute impunând derogarea de la regulile fundamentale.

4. Actualitatea obiectivelor GATT

Cu prilejul ultimei Conferințe ministeriale de la Marrakesh (Maroc) din 1994[33], a fost semnat acordul privind Organizația Mondială a Comerțului(OMC)[34]. Alături de Fondul Monetar International şi Banca Mondială, OMC constituie al treilea pilon al relațiilor economice internaționale, înlocuind în fapt GATT.

Esența GATT au reprezentat-o obiectivele sale, obiective pe care acesta a înțeles să le realizeze prin negocieri comerciale multilaterale. Prin intermediul dialogului generalizat, al deschiderii față de noii membri, față de problemele şi specificul țărilor în curs de dezvoltare şi al celor socialiste, cunoscând deopotrivă perioade de recrudescență a protecționismului şi a obstacolelor politice, GATT s-a dovedit un succes în aplicarea sa. Tratatul s-a materializat într-un instrument realist şi pragmatic în liberalizarea comerțului mondial.

[32] Lipsa reciprocitatii poate fi vazuta ca o consecinta a inegalitatii dintre parteneri.
[33] Aceasta a finalizat negocierile Rundei Uruguay (1986-1994).
[34] World Trade Organization (WTO), international organization established in 1995 as a result of the final round of the General Agreement on Tariffs and Trade (GATT) negotiations, called the Uruguay Round. The WTO is responsible for monitoring national trading policies, handling trade disputes, and enforcing the GATT agreements, which are designed to reduce tariffs and other barriers to international trade and to eliminate discriminatory treatment in international commerce. In an effort to promote international agreements, WTO negotiations are conducted in closed sessions; many outsiders have strongly criticized such meetings as antidemocratic. Unlike GATT, the WTO is a permanent body but not a specialized agency of the United Nations; it has far greater power to mediate trade disputes between member countries and assess penalties. In the Uruguay Round, agreement was reached to reduce tariffs on manufactured goods by one third. Under the WTO, subsidies and quotas are to be reduced on imported farm products, automobiles, and textiles, which were not covered by GATT; there is also freer trade in banking and other services and greater worldwide protection of intellectual property. Negotiations to eliminate subsidies and protections for agricultural products, however, have proved to be a stumbling block. The WTO is headquartered in Geneva and also holds international ministerial conferences; it has 147 members. (The Columbia Electronic Encyclopedia, 6th ed. Copyright © 2005, Columbia University Press).

Printre scopurile principale ale OMC[35] se numără asigurarea reducerii tarifelor şi altor bariere în calea comerţului, eliminarea discriminării în relaţiile economice internaţionale şi o cât mai raţională şi eficientă utilizare a resurselor globale şi forţei de muncă. În acest sens OMC nu face decât să continue eforturile GATT în direcţiile stabilite de acesta. Deosebirile inerente între cele două entităţi sunt determinate de noul context politic internaţional (căderea regimurilor politice comuniste, o modificare de statut a ţărilor în curs de dezvoltare şi mai ales globalizarea), de extinderea competenţelor OMC, de necesitatea protejării sporite a mediului şi asigurării unui cadru instituţional consolidat.

Tipul de economie promovat de OMC este cel concurenţial de piaţă. Însă aşa cum GATT stabilise tratamente diferenţiate pentru anumite categorii de parteneri, OMC trebuie sa ia in calcul situatia particulara acordă statelor foste comuniste aflate în tranziţie şi celor în curs de dezvoltare, prin flexibilităţi speciale[36]. Asemenea GATT, OMC se constituie şi într-un for de reglementare a diferendelor şi declară ca finalitate a activităţilor sale o bunăstare mondială de care, cel puţin teoretic, toate statele vor beneficia.
Succesoarea GATT se vede confruntată însă cu marea provocare a globalizării şi a reacţiilor declanşate de aceasta, ultima Conferinţă a OMC[37] fiind o dovadă elocventă în acest sens. Contradicţiile între statele Uniunii Europene şi SUA privind subvenţiile din agricultură, de pildă, creşterea polarizării sociale, soluţionarea exploatării forţei de muncă ieftine (a copiilor cu predilecţie), tendinţele protecţioniste reprezintă unele dintre cele mai delicate probleme cu care este confruntată OMC. Negocierile susţinute, interesul real al statelor în dezvoltarea comerţului internaţional şi o atenţie sporită acordată regiunilor cu situaţii economice dificile, ar putea constitui mijloace de ameliorare cel puţin a contradicţiilor existente.

[35] Aşa cum acestea au fost fixate prin Acordul de la Marrakesh.
[36] Pays développés; Pays en transition; Pays en développement, La situation économique et sociale dans le monde 1997. Tendances et politiques économiques, United Nations, Ne* York, 1997.
[37] Ea s–a desfăşurat la Seattle (29 noiembrie-3 decembrie 1999) s i a fost catalogata drept un esec.

THE EXTREME NECESSITY IN THE CRIMINAL LAW OF SERBIA AND MONTENEGRO

by

DRAGAN JOVAŠEVIĆ PHD

INTRODUCTORY REMARKS

Extreme necessity represents general basis for exclusion of the existence of a criminal act[1] in all modern codes from the oldest times. Therefore, an act committed in the condition of extreme necessity is not a criminal act. Extreme necessity, according to provision article 10. in Basic Criminal Code (OKZ)[2], former Criminal Code of the Federal Republic of Yugoslavia exists when perpetrator committed an act in order to eliminate imminent obvious danger which could not be eliminated in some other way and if caused damage is not bigger than threatening damage. There is a similar provision in the Criminal code of the Republic of Montenegro from December 2003. (article 11. KZ RCG)[3].

In contrast to necessary defence which has been known in criminal law for a long time, extreme necessity has been introduced to criminal legislature as a separate institute recently, and it is of no such wide applicability in criminal law practice. The reason for this some authors find in the fact that, in this case, danger for someone's legal property comes from something else and not from a man, and in the fact that this case is about conflict or collision of two laws, and not of law and injustice[4].

From the legal definition it results that cumulative existence of certain conditions or assumptions is necessary in each particular case for the existence of extreme necessity. There are two basic elements which are necessary for the existence of such institute. They are: 1) a state of danger and 2) eliminating danger. Only in case that all conditions provided by law, which exist on the side of danger and on the side of eliminating danger, exist, can we say that an act was committed in extreme necessity.

CONDITIONS FOR THE EXISTENCE OF DANGER

Danger is the first element of extreme necessity in criminal law in Serbia and Montenegro . It actually represents harm by which security of a property is endangered and which threatens to damage or destroy it. It is actually every harm by which any legal property or legal interest of a person is endangered[5]. Every possibility of violation or endangering someone's legal property is considered as danger.

---

*Dragan Jovašević PhD, associate professor, Faculty of law in Nis, Serbia and Montenegro.

[1] Dragan Jovašević, Leksikon krivičnog prava, Službeni list SRJ, Beograd, 2002. p.389

[2] Dragan Jovašević, Komentar Krivičnog zakona SR Jugoslavije sa sudskom praksom, Službeni glasnik, Beograd, 2002. ,p. 27-31

[3] Službeni list Republike Crne Gore, Podgorica, No. 70/2003

[4] Vojislav Đurđić, Dragan Jovašević, Praktikum za krivično pravo, Knjiga prva ,Opšti deo, Službeni glasnik, Beograd, 2003.p.32-41

[5] Bora Čejović, Krivično pravo,Krivično pravo u sudskoj praksi, Knjiga prva ,Opšti deo, Beograd, 1985. p.86

Danger marks such situation in which, according to objectively existing circumstances, could be justifiably assumed or predicted that violation of some legal property, disregarding the subject (physical or legal person) to which it belongs, is imminent. Therefore, danger is the state where some legal property is endangered and, according to circumstances of the particular case, there is imminent possibility of its violation.

There are several kinds of this danger and it is almost impossible to determine in advance in which way and manner they could be manifested in everyday life situations. Whether there is real danger of endangering some legal property of a perpetrator or some other person is being judged according to objective criteria of "reality of danger" in each specific case. Therefore, danger is the state where violation of endangered property is imminent and unavoidable. Danger and possibility of endangering or violation some legal property objectively exists, and it is a real category which results from everyday life and the environment, and it is stated in the prognosis about possible further development of the situation which is based on given circumstances of that situation[6].

Certain conditions for the existence of danger, cumulatively provided by law, have to be fulfilled so that the institute of extreme necessity in each particular case could exist. These conditions are:

1) Danger could be caused by man, animal, forces of nature (fire, water, earthquake) or objects. Therefore, sources of danger could be very different. Human action, in the sense of creating danger as an element of extreme necessity, should be differentiated from action in the sense of attack with the institute of necessary defence. Here, human action was not aimed at provoking danger for some legal property of other person, even more, there was no intention or aim in the conscience of a perpetrator. These are cases of various incautious or careless handling with inflammable, poisonous or explosive materials, driving power or vehicle, or during construction work, where danger for someone's legal property is caused[7] .

Dangerous animals like dog, bull, ram, horse, wild animals can also cause danger for one's legal property. Forces of nature and natural disasters can also, suddenly and in great scope endanger properties of one person, or, more often, more people and sometimes even society in general. A person that is in the state of extreme necessity undertakes his duty which is aimed at eliminating or preventing this danger, by imminent action on the source of the danger. In case when an object is the source of danger, in the sense of institute of extreme necessity, it could be any device, machine or equipment which, during its use or exploitation, causes danger. Such object, when affected by certain external cause or damage, becomes extremely dangerous for people who use it.

2) Any legal property or legal interest of any legal subject can be threatened by danger. In contrast to previous decisions, when extreme necessity was excused only in case of attack on life and physical attack, present law provisions this kind of defence expand to all legal properties. Criminal code of Kingdom of Yugoslavia from 1929.[8], in article 25. explicitly provides the properties which could be defended in case of extreme necessity: life, body, freedom, honour, estate, as well as any other property. Criminal legislature in effect does not limit legal properties which could be protected in this way, but according to their nature and character, they are only the most significant properties, most often life and physical integrity[9].

[6] Miloš Babić, Krajnja nužda u krivičnom pravu, Banja Luka, 1987.p.82
[7] Milić Tomanović, Nužna odbrana i krajnja nužda, Službeni list SRJ; Beograd, 1985.p.162
[8] Mihajlo Čubinski, Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije, Beograd, 1934. p. 94-95
[9] Ljubiša Jovanović, Dragan Jovašević, Krivično pravo, Opšti deo, Nomos, Beograd, 2002. p. 114

But, not every kind of danger for these legal properties is relevant according to the institute of extreme necessity. It has to be the danger which has a character of social danger, and it has to be such danger which imminently endangers some legally protected property. This danger can be aimed against legal property of that person who eliminates such danger by his action, or against legal property of some other physical or legal person. In this second case, there is necessary help.

3) Danger has to be simultaneous. This means that danger is imminent, or already in progress, and only up to the point when danger is still in progress. Future, as well as finished danger, does not give the right for action in extreme necessity. It would be unacceptable if perpetrator, during the flood or fire, waited for some legal property to be destroyed, and then took measures for eliminating danger. Because in that case, these measures would obviously be late. According to this, depending on the kind, character, source and level of danger, perpetrator has the right to undertake some measures in order to eliminate danger which has already taken place and which will obviously soon endanger some of his legal property.

But, in the theory of criminal law[10], such opinions could be found, according to which extreme necessity is allowed, if it is obvious that in several days there would be a hurricane or that the flood would break levees and destroy a settlement, because it is considered that there is imminent danger of that. In conditions when very complicated technical and technological systems and procedures are used, such situations, according to which it is obvious that there would be some great harm, can also take place.

4) Danger has to be real. It should really exist in the real world-it should already be in progress or it should be imminent. Danger is real not only when there is a realised possibility of violation or endangering, when violation or endangering are already in effect, but also when it is imminent. This means that it is objectively and with certainty assumed that the danger for one's legal property is imminent.

Imaginary, illusory danger does not give the right for action in extreme necessity. In that case there is so called putative necessary defence. Namely, those are the situations when there is wrong or incomplete conscious or knowledge about the circumstances which really existed and which would possibly justify the action of perpetrator in extreme necessity. Then the perpetrator can only quote that he made a mistake about the existence of danger, which represents a factual basis for mitigating the sentence, but there is no extreme necessity. Therefore, not every danger is relevant according to the point of view of the institute of extreme necessity. It has to be danger of certain level and certain gravity. It results that not any, especially not an insignificant violation of legal property, can represent basis for the existence of this institute[11] .

5) Danger must not be blameable. Danger is not blameable if it occurred by accident and if a person in danger is not to be blamed for it. If a person deliberately, or out of negligence, provokes danger for legal property, that person cannot quote action in the state of extreme necessity, in case when eliminating such danger he violates someone else's legal property. This means that in case of blameable provoking danger there is no extreme necessity, so that the person should be responsible for the criminal act committed during eliminating danger. S. Zuglia[12] considers that the fact that the endangered person anticipated or could anticipate that he could save himself or his legal property only by violation of someone else's legal property, is obviously not enough for blaming it.

[10] Miloš Babić, Krajnja nužda u krivičnom pravu, Banja Luka, 1987.p.95
[11] Dragan Jovašević, Tarik Hašimbegović, Osnovi isključenja krivičnog dela, Institut za kriminološka i sociološka istražianja, Beograd, 2001. p. 125
[12] Srećko Zuglia, Stanje nužde, Veliki Bečkerek, 1920.p.45

Danger which is not blameable should be considered differently from blameable danger which was provoked deliberately or out of negligence. Danger which was provoked without guilt does not exclude the right for action in extreme necessity.

For example, a person who provoked fire by throwing away a cigarette end on the place where someone had previously spilled inflammable liquid, which this person didn't know, and couldn't know according to real circumstances, has the right to eliminate this danger by violation of legal property of some other person, especially if such act is of less significance then the property which is being saved. It is obvious that blameable danger excludes the existence of extreme necessity[13]. All the more so, if a person provokes danger in order to use it as means for committing some previously planned criminal act. This means that the guilt should also include "blameworthiness" in some action.

CONDITIONS FOR ELIMINATING DANGER

The second element which is necessary for existence of the institute of extreme necessity, according to provision article 10. Basic Criminal Code (with application in Republic of Serbia) and article 11. Criminal code of the Republic of Monenegro, is eliminating danger. It is any action aimed at protection and preserving legal property which is endangered. By eliminating this danger someone else's legal property is violated (provided that it is not the legal property of that person who provoked danger , because in that case, there is necessary defence, if all the conditions provided by law are fulfilled). This violation has to be of character of some criminal act provided by law. Eliminating danger should also fulfil certain conditions provided by law, in order to be criminal-legally relevant.

1) Extreme necessity exists if danger could not be eliminated in some other way (e.g. by escaping or calling for help), but only by violating legal property of some other person. This condition is not otherwise necessary in case of necessary defence, where the attacker's property is being violated, while in case of extreme necessity the property of someone else, who is most often innocent, is being violated. When judging whether this condition[14] is fulfilled or not, all the circumstances of a particular case have to be taken into consideration, and according to them judge whether it was possible to eliminate given danger in some other way, under given circumstances.

According to the character of danger, time and circumstances under which it occurred, it is being judged whether this danger could have been eliminated in some other way. Eliminating danger has to be out of extreme necessity, it has to be the only way, extreme solution to avoid violation of endangered property. But, there are some opinions in theory, according to which this judgement has to be made according to objective possibilities, where means, manner, time and other circumstances which were at disposal of the perpetrator during the danger, as well as the choice of means and manner of eliminating danger, should be taken into consideration.

This means that, in case of danger, perpetrator, in first place, has to rescue himself from danger by escaping it, but if it is necessary that one's legal property is violated by this action, it has to be spared in the greatest possible way. It means that in certain case, the means manners and actions for eliminating danger which in the smallest way violate one's legal property, have to be used. Namely, court has to be assured (which is a factual question) that, according to all circumstances under which the act was

[13] Dragan Jovašević, Komentar Krivičnog zakona SR Jugoslavije sa sudskom praksom, Službeni glasnik, Beograd, 2002.p. 31
[14] grupa autora, Komentar Krivičnog zakona SR Jugoslavije, Savremena administracija, Beograd, 1995.p.60

committed, danger could not have been eliminated in some other way. On the other hand, if it is consolidated that caused danger could have been eliminated in some other way, and perpetrator thought that there was no other way, then it is the case of putative, imaginable extreme necessity.

2) Eliminating danger has to be simultaneous with the existence of danger. This means that, in first place, real danger, so danger which has already occurred or is imminent, should be eliminated. Eliminating danger should last only while there is danger. When danger ceases, there is no more eliminating danger in the sense of this general institute of criminal law.

3) When eliminating danger, a person has to be in special psychical relation to his act and resulting consequences. Such psychical relation, in first place, has to be reflected in the aim of committed action and in the motives for committing such action. This aim, in this case, is protection of one's legal property which is endangered by occurred danger. On the other hand, if a perpetrator violated one's legal property for some other reasons and motives which are not related to eliminating danger, then there is no extreme necessity and such act is punishable.

4) Violation must not be of greater extent than the danger which was threatening. Extreme necessity can exist only if saved property is of higher value than the violated one (sacrificed). Therefore, this institute cannot exist if violated property is of greater significance than the one which was saved from danger. This means that legal property by which violation danger is being eliminated has to be of less or at least of the same value or significance as the property which is being saved[15]. Namely, in cases of extreme necessity, in contrast to cases of necessary defence, proportion or equivalence between endangered and violated property is important. it is completely understandable because, in cases of extreme necessity, there is conflict between two rights. Complete and complex judgement of particular situation, where hierarchy of properties which are protected and compared is important, is necessary for fulfilment of this condition.

It is considered that violation of material goods like: life, physical integrity, freedom, honour is fundamentally greater than violation of material goods such as estate. Moreover, easier compensable violations of properties of the same kind are less harmful. However, there is a question whether the institute of extreme necessity can exists in case when there are two properties of the same value (e.g. two lives-violator and perpetrator).

According to objective theory, society in this case has no reason to prefer one legal property to another, and because of that it is completely indifferent and disinterested about the question of whose property will actually be violated and whose will be saved. In case of conflict of two interests or two properties of the same value, society has no excuse, but also no reason to give advantage to one of them, but still, criminal law provides that there is extreme necessity in case when, during the elimination of danger, caused harm is equal to threatening harm, considering psychical condition of the person, especially in case of danger for some more significant legal property (e.g. life, body)[16].

Comprehension, according to which extreme necessity also exists in case of conflict between two properties of the same value, was introduced in criminal law of Serbia and Montenegro, by amendment of Criminal code dating from 1959. Up to then, extreme necessity had only been related to violation of properties of less value than the property which was saved by eliminating danger. Therefore, the existence

[15] Ljubiša Jovanović, Dragan Jovašević, Krivično pravo, Opšti deo, Nomos, Beograd, 2002.p. 114

[16] Nikola Srzentić, Aleksandar Stajić, Ljubiša Lazarević, Krivično pravo, Opšti deo, Savremena administracija, Beograd, 1993.p.143

of proportion between property which is endangered by occurred danger and property which is violated during elimination of such danger, is very important for the existence of extreme necessity.

VIOLATION OF EXTREME NECESSITY

If a perpetrator, during eliminating danger for his own or someone else's legal property, oversteps the limit of extreme necessity which was set under condition that caused harm is not greater than threatening harm, there is violation or excess of extreme necessity. Therefore, violation of extreme necessity exists when a person eliminates danger from a legal property and during that action violates someone's property which is of higher value or greater significance than the property being protected.

An act committed in violation of extreme necessity is a criminal act and a person who committed it is responsible according to general principles of criminal law. Most often violation of extreme necessity happens in situations when a person who eliminates danger is not in a position to estimate values of both legal properties and the level of excusable action when eliminating danger and causing harm to one's legal property.

But, not only is in practice very difficult do determine whether a criminal act is punishable, whether it was committed out of extreme necessity and whether extreme necessity is violated, but the criminal-legal theory has no definite attitude about where the limits of extreme necessity are. Some authors say that violation of extreme necessity cannot represent the basis which has influence on mitigation or exemption of sentence. Namely, an act committed out of extreme necessity, is committed towards properties of innocent, disinterested people, and not against the property of the attacker. This is the case of collision of two laws, so in this case, a perpetrator of such act should not be in favour when being punished, if such act was committed in violation of extreme necessity.

Other theories say that violation of extreme necessity is especially significant in situations when a perpetrator is under psychical pressure due to danger for his protected property. In such psychical condition a perpetrator undertakes the action of eliminating danger, so in case of overstepping the limits of extreme necessity, the sentence for a perpetrator can be mitigated. In fact, the problem of overstepping the limit of extreme necessity is about the question whether caused harm is greater than threatening harm and whether eliminating danger could have been done by less harm of one's legal property than the harm which was really done. Therefore, an act committed in violation of extreme necessity is a criminal act for which the perpetrator is responsible, but, facultatively, there is a possibility of mitigating sentence.

But, there are cases where violation of extreme necessity results from specific psychical condition of the perpetrator which was caused by occurred danger. This psychical condition can be of such intensity that it causes the condition of temporary mental derangement. Such derangement can be of such intensity that it can exempt criminal responsibility to some extent.

When violation of extreme necessity happened under special extenuating circumstances, court is authorised to mitigate the sentence or to exempt the perpetrator from sentence (article 10. paragraph 3. related to article 44. Basic Criminal Code and article 11. paragraph 3. related to article 45. Criminal code of the Republic of Montenegro).

Whether conditions for the existence of extreme necessity are fulfilled, whether there is violation of extreme necessity and whether all that is done under extenuating circumstances (of objective and subjective nature) is a factual question which is being solved by board of judges in each particular case. violation of extreme necessity is also a situation where a perpetrator himself caused danger, but out of negligence, so, while eliminating such danger, violates some legal property. In that case also, mitigating sentences (facultative) are provided by law.

DUTY TO EXPOSE TO DANGER

Extreme necessity is a general institute of criminal law. It could by used by all people, under condition that all conditions, cumulatively provided by law, are fulfilled. This institute is applicable in case of any criminal act aimed against any property. But, there is an exception to this general rule. Namely, there is no extreme necessity (which in other words means that there is a criminal act for which the perpetrator is responsible), if a person was obliged to expose to danger. Therefore, duty (obligation) to expose to danger excludes the applicability of the institute of extreme necessity. If such person commits an act in order to eliminate danger for some of his legal property (and this means his life and body as well), this person shall be criminally responsible and punished for the committed act, though all conditions of extreme necessity provided by law exist.

By provision article 10. paragraph 4. Basic Criminal Code and article 11. paragraph 4. Criminal code of the Republic of Montenegro applicability of institute of extreme necessity for perpetrators who were in duty to expose to danger is excluded, and it is necessary for the court to judge whether such duty to expose to danger existed for those people, taking into consideration all circumstances in specific situation. A person who is in duty to expose to danger cannot refuse carrying out such duty, according to the institute of extreme necessity.

In Serbia and Montenegro there is a great number of people in organs, organizations and facilities who cannot use this institution: military service, police, firemen, people who handle inflammable, poisonous, radioactive and explosive materials, prison guards and others. Those are people who are obliged to undertake actions and act according to specific rules, with necessary and high caution, because, by accepting such professions, they also accepted a risk for being in such dangerous situations themselves.

Therefore, these people are obliged to sacrifice their own properties, even the most important ones, if they are in danger while performing their jobs or taking care of confidential affairs and assignments. So, there is a collision between their right to live (which is, as a natural law, absolute and inviolable) and duty for exposing to danger and endangering life in certain situations.

In theory[17], an idea according to which duty to expose to danger does not exist always and in each case, but only then when, according to all circumstances of subjective and objective character, in certain case can be concluded that such person is really obliged to expose to danger, is accepted. This means that duty to expose to danger is not of absolute nature, as it could be concluded at first sight. In other words, possibility of quoting extreme necessity for these people is not completely excluded, so there are examples when firemen are not obliged to jump into fire at any price in order to extinguish fire, especially when such chances are small, and danger, which they are exposed to very large.

[17] Bora Čejović, Krivično pravo, Opšti deo, Službeni list , Beograd, 2002.p.179-181

THE SYSTEM OF PROPERTY CRIMINAL SANCTIONS IN CRIMINAL LAW OF SERBIA AND MONTENEGRO

by

DRAGAN JOVAŠEVIĆ PHD

INTRODUCTORY REMARKS

All modern criminal laws provide various means and measures for suppression and prevention criminality in general and specially a crime against property, which is nowadays prevailing in a structure of modern criminality. Criminal sanctions are pointed out according to their nature, character, performance and significance. Taking into consideration a specific character of crimes against property and their perpetrators, the specific kinds of sanctions, which repressive but extremely preventive influence, are provided :

1) property punishments : a fine and the confiscation of property,
2) a measure of security : confiscating an object .

In all contemporary atates , in the structure of criminality, a crime against property is prevailing according to number of committed acts, their perpetrators, consequences, scope and the intensity of social danger, recidivism and other features as well. For suppression criminality of all kinds and the aspects of performance, included a crime against property, various social (primarily state) agencies at all social leveles have applied different measures, means and procedures. All of them could be divided into preventive and repressive ones. Criminal sanctions are special ones according to their significance, nature, contents, characteristics and effect.

Due to their character, at the same time they are repressive and forced ie it means to take away or to limit certain liberties and rights to the perpetrator of criminal acts. They are applied against his will on the basis of court' s decision in accordance with certain conditions and according to the procedure which is determined by law. The aim of all those measures is defined in many ways. Firs of all, their aim is to protect a society (ie its social values) from all forms of criminality (from all and aspects of injuring and endangering). Furthermore,a perpetrator is thwarted, generally or at least for a certain period of time, to commit criminal act again (the same or different one). Also, those sanctions have an educational influence on people in order not to violate regulations and commit criminal acts legal appliance of predicted repressive measures under the pretext of criminal sanction.

When we speak about suppression and prevention of crime against property (it has got a high position in a structure of modern criminality in general) , we have to point out its basic characteristics, because efficient and top-quality fight against the perpetrators of those acts, depends on them. As far as crimes against property are in question, a property of another person (physical and legal) is the object of attack. That property can be movable or immovable but it can be expressed as property rights and property interests. When these acts are in question, the most frequent are confiscating, adapting and obtaining – the

*Dragan Jovašević PhD, associate professor, Faculty of law in Nis, Serbia and Montenegro.

aim is to provide for oneself or some other person a property profit or to make a damage.

For certain acts, the law has determined a special psycho element which is shown under pretext of greed. It represents[1] a motice which comprises of rootless and egoistic rush to obtain property profit at any rate. Such a greed appears as unique personal and psycho feature shaped as a purpose (in a sense of conscious and willing act directed towards a goal, which idea effects like internal driving force of every human activity). Finally, as the result of taken act, when a crime against property is in question , there is causing property damage, property rights or interests of passive subjekct (physical or legal person) on one hand and the same or bigger amount of obtained illegal property for perpetrator or some other person on the other hand.

Prescribing, pronouncing and carrying out all criminal sanctions have got prior aim ie to protect social welfare and values from all forms of injuring and endangering. In order to fulfil that task, criminal judical organs[2] apply appropriate forms and measures of criminal sanctions. Fighting crimes against property, tat social activity is primarily the appliance of specific criminal law measures and means which should be an answer to demands and needs of modern state (society), ie to be an adequate, efficient and legal answer to all items of such a criminal act. In a system of criminal law measures for fot proper reaction on form and aspects of crimes against property, the following measures are distinguished by their importance, contens, character, performance and nature :

1) a fine as only kind of property punishment in criminal law of Serbia and Montenegro system prescribes in article 39. The Basic Criminal Code, former The Criminal Code of FR Yugoslavia[3] and in article 39-40. The Criminal Code of Republic of Montenegro[4] from 2003.),

2) a confiscation of property as property punishment only in criminal law in Republic of Serbia (precribed in article 39a. The Basic Criminal Code),

3) security measure of confiscation an object which are used or predicted for committing criminal act, ie which are originated by committing a criminal act (prescribed in article 69. The Basic Criminal Code and in article 75. The Criminal Code of Republic of Montenegro).

THE CONCEPT AND CHARACTERISTICS OF A FINE

A fine is the only property punishment in criminal law of Serbia and Montenegro and it has an early origin referring to the system of composition – it means that the perpetrator was obliged to pay a certain sum of money to damaged person or to his family as "compensation for a committed act" and in that way blood feud was practically avoided. Nowdays,a fine represents an independent criminal sanction ie paying a certain sum of money in the benefit of state. A fine is the most frequently pronounced criminal sanction.

[1] Bogdan Zlataric, Mirjan Damaška, Rečnik krivičnog prava i postupka, Zagreb, 1966. p.138 ; Dragan Jovaševic, Leksikon krivičnog prava, Beograd, 2002. p. 212

[2] Dragan Jovaševic, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002. p. 12 ; Zoran Stojanović, Politika suzbijanja kriminaliteta, Novi Sad, 1991. p. 79-81

[3] Ljubiša Jovanović, Dragan Jovašević, Krivično pravo, Opšti deo, Beograd, 2003. p.264-266

[4] Official gazette of Republic of Montenegro, No. 70/2003

In FR Yugoslavia , thepercentage of pronounced fines was 45 % of total number of pronounced criminal sanctions[5].

The situation is similar in other countries too, today. This punishment is specially conveient for misdemeanours but it is also applied when offences of moderate level of intensity are in question[6] . Mostly, it is pronounced for involutary, primarily and situational acts and in some countries, it is so widely spread that it has completely put aside a punishment of arrest[7] when misdemeanours and offences of moderate level of intensity are in question.

Except for a criminal code, a fine is extremely important sanction which is pronounced to perpetrators of other forms of offences – economy crimes and violations neverheless who the prepetrator is – physical person , juristic person, responsible person in juristic person or an entrepreneur. A fine can be pronounced as a main or accesory punishment to the prepetrator of criminal act who is responsible for committed crime.Furthermore, it can be pronounced together with the punishment of errestment, under conditions prescribed by criminal code. A fine means the obligation of sentenced person to pay a certain sum of money to the benefit of state (ie its budget of Republic Serbia or budget of Republic of Montenegro). When a fine sentence has come into effect, there is obligatory relation between the perpetrator of criminal act and the state – the state is a creditor and the perpetrator is a debtor.

As a main punishment , a fine can be pronounced when it is alternatively predicted together with the prison punishment by criminal code, that is when the court has justified the pronouncing of this punishment by appliance the regulations about meting out and mitigating a prescribed prison punishment. As accessory , a fine can be pronounced in many cases :

1) when it is predicted by code together with a prison punishment for certain criminal act,

2) when it is not predicted by code at all for a certain criminal act but when that criminal act was committed with profit as a motive and

3) when a fine is predicted by code alternatively with a prison punishment for certain criminal act and it that case, the court pronounced both prescribed punishments.

In the same way, a fine can be pronounced to perpetrator of plurality of criminal offences.

In general part of criminal law,a general minimum and a general maximum of a fine are determined, ie certain limits for court to mete out this kind of punishment. General law minimum of this punishment in Republic of Serbia is 1.000 dinars or in Republic of Montenegro is 200 EUR, while there are two general maximums. That is, a general maximum of a fine in Republic of Serbia is 200.000 dinars or in Republic of Montenegro is 20.000 EUR, but if criminal act is committed with a profit as a motive, then the court is authorized to pronounce a fine in Republic of Serbia up to 800.000 dinars or in Republic of Montenegro up to 100.000 EUR to such a perpetrator of criminal act. A both republic codes and auxiliary and

[5] Đorđe Đorđević, Odmeravanje novčane kazne , Jugoslovenska revija za kriminologiju i krivično pravo, Beograd, No. 3/1998. p. 102
[6] Zoran Stojanović, Krivično pravo, Opšti deo, Beograd, 2000. p.265
[7] W. Hassemer, Einfuhrung in die Grundlagen des Straftrechts, 2. Auflage, Munchen,1990. p. 298

additional codes as well, do not predict special minimum or special maximum of a fine for certain criminal act either once.

When meting out a fine, a court is obliged (considering the purpose of punishment in accordance with the regulation of article 41, The Basic Criminal Code or article 42, The Criminal code of the Republic of Montenegro) to take into account all extenuating and empeding circumstances and specially to consider the property condition of the perpetrator of criminal act. That is, the court should estimate his total property power – real estate, both incomes and outcomes (obligations)[8] .

Our practice has noted some cases of cumulative pronouncing a fine together with suspended sentence (as special kind of admonitory criminal sanctions). When a suspended prison sentence is pronounced to the defendant and at the same time, a fine as accessory punishment is pronounced, there is no possibility to condition the defendant to pay an accessory to pay an accessory sentence.

Considering the pronouncing a fine it is necessary to point out the regulation of article 50, The Basic Criminal Code and article 51, The Criminal Code of Montenegro . That is, according to these codes , a fine includes the time which the perpetrator spent in a custody and any other deprivation of freedom concerning the criminal act as well. Such a solution is justified by reasons of legal equity. In the same way, a pronounced fine includes a prison or a fine which the defendant served ie paid for committed economy crime or violation under condition that a criminal act (the sentence is pronounced for) includes by its characteristics and by characteristics of economy crime and violation even military-disciplinary violation in certain cases. Under such calculations, a day in custody, a day of deprivation of freedom, a day in prison and a fine of 200 dinars in Republic of Serbia and a fine of 40 EUR in Republic of Montenegro are equalized.

When the court is assured that it is justified and of legal equity to pronounce a fine to a defendant who is responsible for committed criminal act, the court will estimate a fine as a precise sum of money (fixed amount). At the same time, the court is obliged to determine the time of payment. This period of time cannot be shorter than 15 days nor longer than three mounths in both criminal codes in Serbia and Montenegro. As special solution is prescribed in article 40. The Criminal Code of Republic of Montenegro. This is a daily of fine. In this case, the court is saying a fine amount from 10 EUR to 1.000 EUR . The prepetrator is need to pay this amount in period from10 to 360 days.

The court will determine the period of time for payment in accordance with the property possibilities of offender. Taking into consideration these circumstances, the court can allow payment on installments and in that case, the court must determine the number of installments, the amount of installments and the time of payment which cannot be longer than two years in Republic of Serbia or one year in Republic of Montenegro. All periods of time, the court has determined for paying a pronounced fine, have been calculated from the moment when the sentence has gone into effect (unless an appeal is submitted) ie from the moment when an effective sentence has been handed to the defended[9] .

If defendant does not pay a fine during limited period of time, then a forced payment is present.In the case that it is not even then possible to collect total or partial sum of money, the pronounced fine has beenchanged for the prison punishment and 200 dinars in Republic of Serbia and 40 EUR in Republic of

[8] Ljubiša Jovanović, Krivično pravo, Opšti deo, Beograd, 1995,p.362
[9] Komentar Krivičnog zakona SR Jugoslavije, Beograd, 1995, p. 200-201

Montenegro of unpaid fine is calculated as a one day in prison. Bud, in this case, the prison punishment cannot be longer than six months .

We are going to point out one specific situation which is present at meting out a sentence for plurality of offences. That is, in such a situation,it is possible that the court in a cumulative way pronounces both prison punishment (as regular kind of sentence) and a fine simultaneously. In a case that the defended cannot voluntarily pay meted amount of a fime (total amount or partial one), and it is not possible to realize forced payment, the unpaid part a fine can be changed by prison punishment. It means that the defended has to serve two prison punishments in succesion, but they are still different by their nature and characteristics[10] .

Taking into consideration the case when a fine for economy crime is pronounced and included into a fine which is pronounced to the defended under condition of objective and subjective identy, it is essential to point out the appropriate solutions which are present in our court practice[11] . If a sentence is pronounced , a prison punishment and a fine for criminal act and a fine for a violation, to a efended who is accused for both criminal acts and a violation, then the pronounced fine sentence for a violation should be included into pronounced fine for a criminal act nevertheless the fact that this sentence is pronounced as accesory one. However, if that punishment is bigger than a pronounced fine for a criminal act, then the part of appropriate punishment should be included into a fine and the rest insto prison punishment.

When the court has sentenced the defended guilty and pronounced a fine for committed criminal act, and a fine for a violation is not included into that sentence (whose characteristics are included into committed act that he is pronounced guilty for and sentenced a fine), it does not represent an essential violation of criminal law because a separate resolution about calculating in punishment can be made.

Considering the ways of prescribing and estimating a fine , certain contemporary criminal laws have various systems: 1) the system of fixed amounts in criminal laws : Italia, Switzerland, Bosnia and Hercegovina[12] , 2) the system of days-a fine or the system of daily fine[13] in criminal laws : Germany, Slovenia, 3) the system of average salaries in criminal laws : Russian federation, Croatia[14] and 4) the system of proportional estimation of a fine in criminal laws : Italia[15].

As the system of fixed amounts is accepted both in Serbia and Montenegro and in majority of criminal laws, we are going to point out its characteristics. The system or the method of fixed amounts is a classical way of prescribing and estimating a fine in a majority of modern criminal laws nowdays and which has been well-known applied for a long period of time (even in old Roman law and in Hammurabi code) According to this system, a fine has been prescribed in a detrermined and fixed amount or a general minimum and a general maximum are determined in a fixed way in the regulations of general part of

[10] Bora Čejović, Krivično pravo u sudskoj praksi, Prva knjiga, Opšti deo, Beograd, 1985, p.273-274
[11] Vojislav Đurđić, Dragan Jovašević, Praktikum za krivično pravo, Knjiga prva, Opšti deo, Beograd, 2003, p. 257-261
[12] Codico penale, Note richiami e indisi a curadi , Sofo Borghase, Giudici del Tribunale di Milano, Milano, 1952 ; Shweizerisches Strafgesetzbuch Stand Am 1. April 1996., Bern, 1997 ; Zbirka Krivičnih (kaznenih) propisa Federacije Bosne i Hercegovine, Sarajevo, 1998
[13] A. Schonke, A. Schroder, Strafgesetzbuch, Kommentar, Munchen, 1976 ; Kazenski zakonik Republike Slovenie, z uvodnimi komentari Boštjana Penka in Klaudija Stroliga, Ljubljana, 1999
[14] J.I. Skuratov, V.M. Lebedov, Kommentarii k Ugolovnomu kodeksu v Rossijskoj federacii, Moskva, 1996; P. Veić, Novo hrvatsko kazneno pravo, Zagreb, 1999
[15] Diritto penale, Parte generale e speciale, Simone, Napoli, 2004.

criminal code. Besides this way of prescribing a fine, it is also pronounced as a fixed and determined sum of money and the defendant has to pay that sum during limited and sentenced period of time. Using this way of prescribing a fine, the property state od perpetrator of criminal act is of great importance.

The advantage of this system is in its simplicity, preciseness and legal equity because a fine , which the perpetrator has to pay, is determined as fixed amount and there is no need for futher calculation, determination and leveling mainly connected with some certain securities (inflation) elements. This system is very convenient for the appliance of court practice and it is fully in accordance with the principle of legality of criminal act and punishment. But besides many advantages which have made this system the most frequent one, there are some disadvantages which are apecially visible when the way of calculating fines is in question, specially under conditions of increased or extremely high inflation, when pronounced fixed amounts of money have become lower and even symbolic ones.

Performing all criminal and other penal sanctions are under jurisdiction of republics – federal units. So, performing a fine in Republic of Serbia is determined by regulations of articles 176-181. in The Code of Performing Criminal Sanctions[16]. According to these regulations the decision, which determines the performing a fine, has been carried out officialy by the court of origin jurisdiction and in accordance with The Code of Executive Proceedings. A fine has been collected by list and selling of movable property of defendant and when it is not enough, then real estate in on sale (under condition that defendant voluntarily does not meet his duties included into sentence and in a limited period of time). In a case that a fine cannot be collected in that way, the court in charge has been informed and then, the court has certain activities in order to replace a fine with a prison punishment – it was the issue of previous text.

When the costs of criminal proceedings and a fine have been collecting simultaneously, then the collection of criminal proceedings coast has got priority. In a case that because of collected fine the property of defendant is reduced to such extent that it is not possible to realize the property-law demand of a damaged person (demand for a compensation), then the demand has to be collected from a fine but mostly up the determined fine. The defendant has to pay the costs of forced fine collection. It is necessary to point out the fact that in accordance with the regulations of republic code about carrying out criminal sanctions, there is identical way of carrying out a fine which is pronounced for economy crime and economy offence.

Performing a fine in Republic of Montenegro is defined according to the regulations of articles 72-76. of The Code of Performing Criminal sanctions[17] in almost the same way as it is performing the same punishment defined in Republic of Serbia. The same way is applied when pronounced fines are in question : to juristic person, to entrepreneur, to resposible one in a legal person or physical one for committed economy crime or economy offence. In that way, the problem of carrying out criminal sanctions is defined in unique way in Serbia and Montenegro in accordance with unique regulations and procedure which guarantee legality, equality of all in front of law and legal equilty at full length.

[16] Dragan Jovašević, Komentar Zakona o izvršenju krivičnih sankcija Republike Srbije sa pratećim propisima i sudskom praksom i Zakon o izvršenju krivičnih sankcija Republike Crne Gore, Beograd, 2000, p. 134-140

[17] Službeni list Republike Crne Gore No. 25/94 i 29/94

THE CONFISCATION OF PROPERTY AS CRIMINAL PUNISHMENT

The confiscation of property is specific property punishment in criminal law of Republic of Serbia , who prescribed only The Basic Criminal Code (former The Criminal Code of the FR Yugoslavia) in article 39a, after law change from May 2003[18]. It is a secondary property sanction which forfeiture , mean the permanent depriation of all property of perpetrator by order of a criminal court. This measure eneable confiscation : 1) proceeds of crime derived from offences or property the value of which correspodens to that of such proceeds and 2) property, equipment and other instrumentalities used in or destined for use in offences.

This sanction to pass to perpetrator under following condition in criminal law of Republic of Serbia : 1) perpetrator of organized crime and 2) if to passed prison punishment over four years.

This sanction also provided many modern criminal codes : in article 44, of Criminal code of Russian federation, article 29, of Criminal code of Republic of Albania and article 23, of Criminal code of Repuiblic Ukraine. But this sanction provided also international criminal acts as : in article 77, of Roma Statute of Criminal court from July, 1998. and in article 12, United Nations Convention against transnational organized crime from December 2000. with two added Protocols.

THE CONCEPT AND CHARACTERISTICS OF SECURITY MEASURE OF CONFISCATING AN OBJECT

However, the punishments are not the only forms of criminal sanctions. They are prescribed in special part of criminal laws for the majority of criminal acts and mostly, they are pronounced for the perpetrators of criminal acts in court practice ; besides, the security measures are present as a very efficient mean for suppressing crime. They can be pronounced to all perpetrators of criminal acts (under age and adults, criminally reliable or non-reliable person) if it is estimated by court as necessary in order to eliminate the state and conditions which can be of influence on the perpetrator not to committ criminal acts in future (article 60, The Basic Criminal Code and article 66, The Criminal Code of the Republic of Montenegro).

For preventing a crime against property, the criminal law in Serbia and Montenegro has determined one specific measure of property and real character in the system of security measures. It is a security measure of confiscating an object prescribed by article 69, of The Basic Criminal Code and article 75, The Criminal Code of the Republic of Montenegro. It is represents a real measure whose prescribing, pronouncing and performing is connected with danger, a danger because of owing an object by the perpetrator of criminal act or because characteristics of some objects are dangerous[19] .

The law prescribes two conditions for pronouncing this measure :

1) The confiscated objects are used or intended for committing criminal acts **(istrumenta sceleris**) or they are products of committed criminal acts (**producta sceleris).**

[18] Službeni glasnik Republike Srbije , No, 59/2003

[19] Ljubiša Jovanović, Dragan Jovašević, Krivično pravo, Opšti deo, Beograd, 2002,p.243-245

2) A security measure is pronounced together with punishment, suspended sentence, court reprimand, released or compulsory psychiatric treatmant and guarding in a health institution or compulsory non-committed psychiatric treatment (if it is pronounced to incompetent persons) or together with educational measure (if it is pronounced to junior of legal age). Therefore, a security measure is of supplementary character.

Under these conditions, it is possible to conclude that by appliance of this security measure, those objects, which are directly connected with the committed criminal act, are confiscated. These are objects which are intended or used for committing criminal acts (means, tools) or arised by committing criminal acts[20].

The objects which are used or intended for committing a criminal act are, by rule, those which can be used as a mean or tool for committing a criminal act (most frequently they are arms, tools for overcoming obstacles, the object adapted for certain aim, but they can be such objects that they do not have some dangerous characteristics under condition that they served for committing some criminal acts or that there is a danger that they can be used in a process of committing a criminal act). They can be the objects which production and distribution is forbidden or resticted or under special regime because of their dangerous characteristics (poisons, explosive, narcotics, psychotropic substances).

For appliance a security measure of confiscating the objects of special significance is legal understanding adopted at joined session of The Federal Court, The Supreme Military Court, republic and province supreme courts which was held on 28. December 1976. and it is a follows : " The objects (automobile, furniture, various appliances etc) which are bought by foreign currency obtained by committing a criminal act of roreign currency trade or by trading other securites whose circulation is forbidden according to article 234, of Criminal Code ; such object cannot be confiscated by appliance a security measure of confiscating the objects because they are not the objects which originated or used for committin a criminal act"[21].

When a security measure is applied practically only movable property is confiscated. It means that immovable objects such as buildings, parts of buildings and ground cannot be confiscated even if the perpetrator used them for committing a criminal act. That' s why it is possible to confiscate means of transportation like vehicles, ships, aircrafts nevertheless the fact that ships and crafts are defined as real estate in a civil law.

It is necessary to make a difference among the used and intended objects and the objects which were originated by committing a criminal act from the object which werw obtained as a reward for committed criminal act of which the perpetrator or other person obtained by selling stolen goods or in some other way against the law. Those objects, although they are in a circumstantial way in a connection with a committed criminal act, cannot be confiscated by appliance of this security measure but on the basis on article 84-87, of Basic Criminal Code and article 112-114, The Criminal code of the Republic of Montenegro by appliance a special criminal-law measure sui generis – by confiscating property benefits obtained against the law.These two criminal-law measures are pronounced separately under condition that legal presumption are fulfilled for each and they can be pronounced in a cumulative way as well.

[20] Dragan Jovašević, Leksikon krivičnog prava, Beograd, 2002,p. 357-358

[21] Pravno shvatanje usvojeno na opštoj sednici Saveznog suda, Vrhovnog vojnog suda o republičkih i pokrajinskih vrhovnih sudova koja je održana 28. decembra 1976. godine

By appliance a security measure (article 69, The Basic Criminal Code and aerticle 75, The Criminal Code of the Republic of Montenegro) , the objects which are in the possession of perpetrator of criminal act can be confiscated. It is quite understandable because a criminal sanction should effect the perpetrator himself as he committed a criminal act. Besides, there are law prescribed cases when it is possible, by appliance a security measure, to confiscate the objects even when they are not in his possession. Such an opportunity is preciselu defined by regulation of article 62, paragraph 2, of The Basic Criminal Code and article 75, paragraph 2 of The Criminal Code of the Republic of Montenegro it is a matter of general security or morality reasons but even in that case, the third person's right on compensation from the perpetrator of a criminal act has not been touched. In this case, the appliance of a security measure has got extremely preventive character because it prevents committing criminal acts in future : but, in criminal-law theory, there is a reasonable question of judification of such a confiscation the object as the form of criminal sanction when the person did not participate in committing a criminal act at all or who obtained the object in question in some other legal way (but not by committing a criminal act).

Generally speaking, the pronouncing a security measure of confiscating the objects is of facultative character. It means that such a form of criminal sanction is pronounced by court' opinion when legally prescribed conditions are fulfiled to a concrete case, taking into consideration the aim of prescribing and pronouncing criminal sanctions at all. The court , by rule, on the basis of all subjective and objective circumstances in a connection with committed criminal act and its perpetrator, has decided to pronounce a security measure from article 69, The Basic Criminal Code and article 75, The Criminal Code of the Republic of Montenegro. Besides this legal possibility, it is specially prescribed that the court must pronounce a security measure in a concrete case, if, of course, legally prescribed conditions are fulfiled. It that case, the court cannot decide independently but must pronounce it.

In that sense, the decision of Federal Court (the regulations of special part of criminal law, by which it is prescribed that the objects will be confiscated for certain criminal acts) represents the realization of the regulations of general part of criminal code, so they cannot be independently applied[22]. The court can pronounce a security measure of confiscation the objects in two ways : by decision of criminal matter (sentence or decision) or by special decision. As a rule, the court decides to apply a security measure in a decision by which the court meritoriosly deals with a criminal matter. In that sense it is the principle of court practice in Serbia and Montenegro. The security measure of confiscation the objects is one of criminal sanctions but when it is missed by a sentence after the time of absolute expiry for a criminal act the defended was pronounced guilty, the court cannot pronounce it even by additional decision according to regulation of article 500, paragraph 3, of The Code of Criminal Proceedings.

Therefore, a special decision about pronouncing a security measure of confiscating the objects, the court can decide only in outstanding circumstances and only in two cases : 1) when it is missed by the sentence the defended was pronounced guilty and 2) when the procedure is ended in front of some other body or it is dismissed. When the procedure, by which the defended is pronounced guilty, is effectively ended, the decision about confiscating the objects according to article 69, The Basic Criminal Code or article 75, The Criminal Code of the Republic of Montenegro can be pronounced by a council from article 23, paragraph 6, of The Code of Criminal Proceedings, even additionally when such a decision was missed.

The pronounced security measure of confiscating the objects is accordance with the regulation of article 212, of The Law of permorming Criminal Sanctions is in the charge of court which has pronounced that

[22] Presuda Saveznog suda Kž. 12/78 od 31. maj 1978. godine

measure in the first degree. Depending on nature of confiscated objects, the court can decide weather to sell the confiscated objects according to regulations of The Law of Executive Procedure or to hand to state organs, the museum of criminalistic or other scientific or humanitarian institutions or to destroy them. In any case , financial means obtained by selling the confiscated objects are input into the budget of state in accordance with outstanding legal regulation.

FINAL REMARKS

To suppress various forms and aspects of crime generally,the society has got many different means, measures and procedures at its disposal. The criminal – law measures are among them and there are many forms in criminal law of Serbia and Montenegro. They are criminal sanctions but also other criminal- law measures sui generis. For preventing and suppressing a crime against property, among many social measures , a fine is distinguished ones by their significance, nature, contents , character and effect.

Althought the issue here is primarily of forced retributional measures which are applied on perpetrator of criminal offence because of committed act and against his will, it is not disputable that they have got preventive character (both from aspect of social and specially prevention and form the aspect of general or common prevention). Considering that the property rights and benefits ie property has been confiscated from the perpetrator of criminal act by appllying these measures, (mostly movable property because of nature and character of pronounced measure) the society, by these sanctions, resist the perpetrators of crimes against the property in most efficient and most rational way. By applying these measures, there is an attempt to drive away impulses, wishes and intentions of the perpetrator that, by committing criminal acts, he can enlarge his property or prevent its reduction.

So, these criminal-law measures affect on the perpetrator of criminal act in destimulating way and on people as well and clearly shows the determination of society that nobody can make profit of committing criminal acts, ie acting against the law. However, there is a frequent concept that preventing and suppressing all crimes and crimes against property, too cannot be efficiently conduct only by applying criminal sanctions. That is ,in that fight against the perpetrators of criminal acts (besides repressive measures we cannot deal with present level of social development) it is necessary to apply greatly various measures and means of general and special prevention at all levels ; these measures should be applied by not only judical organs and not only state organs but by all social factors and an individual in a society as well.

Only, by unique, planned, systematic and continous activity of all those subjects in the country and aurrounding area, it is possible to accomplish a success in preventing and suppressing crime in general.

PLURALITY OF OPINION VERSUS CONCENTRATION OF OWNERSHIP : RECENT DEVELOPMENTS IN TURKISH MEDIA LAW

by

DR. SAIM UYE*

INTRODUCTION

Pluralism in media is an important aspect and necessity of democratic pluralism, which is considered to be the basic principle of contemporary social orders. This stems esentially from the recognition of the need to make information objectively and impartially available to the public for maintaining the proper functioning of democratic procedure. The important role the media have, on one hand, for informed participation of people in public affairs, and on the other, for free representation and exchange of different views and opinions, makes media a cornerstone in the process of free formation of public opinion[1].

This argumentation is clearly figured out when European (Council of Europe and European Union) documents are examined[2]. *Cavallin*, referring to the Council of Europe documents to find a definition of pluralism in relation to media, explains that "the notion of pluralism is understood to mean the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through the media.[3]" In the Green Paper proposed by the European Commission in 1992, pluralism is defined as "a legal concept whose purpose is to limit in certain cases the scope of the principle of freedom of expression with a view to guaranteeing diversity of information for the public[4]."

Pluralism, in this sense, is used to have two different but related meanings, one being "internal" and the other "external". Regulation of media is closely connected with the goal of protecting both kinds of pluralism. Internal pluralism deals with ensuring diversity within the activity of a media operator; that is, the content of communication in a single service is concerned. The rules in respect of internal pluralism are simply about the obligations of operators to have different viewpoints offered in their programmes. As for the external pluralism, the stress is not directly on the editorial content, but on the existence of various organizations, which are structurally independent from each other. Having a number of different operators, it is believed, will help safeguarding diversity and plurality. The rules addressing external

* **PhD, Ankara University Faculty of Law, Turkey.**

1 James Curran, "Mass Media and Democracy: A Reappraisal" , James Curran, Michael Gurevitch (eds), *Mass Media and Society*, London, 1991, pp. 102-105.

2 See *Media Diversity in Europe*, Report prepared by AP-MD (Advisory Panel on Media Diversity) for CDMM (Council of Europe Steering Committee on Mass Media), Strasbourg, 2002, p. 6.

3 Jens Cavallin, "European Policies and Regulations on Media Concentration", International Journal of Communications Law and Policy, February 1998, http://www.ijclp.org/1_1998/ijclp_webdoc_3_1_1998.html

4 *Pluralism and Media Concentration in the Internal Market: An Assesment of the Need for Community Action*, COM (92) 480 final, 23 Dec 1992, p. 18.

pluralism, thus, governs the extent to which the allowed ownership of media companies by the same person or capital group shall be[5].

The same documents state that the "definition of pluralism views media concentration as being in opposition to pluralism"[6], because, "[C]ontrol of a collection of media by a single person ... has the potential effect of making the spreading of ideas dependant on acceptance by a single person and of restricting alternative means ... Concentration of control of media access in the hands of a few is by definition a threat to the diversity of information.[7]" This is why the restrictive regulation of media ownership is regarded to be a legal instrument as a measure against concentration[8].

Barendt and *Hitchens* show us two main concerns regarding the regulation of media ownership. The first is related with avoiding unfair competition. There is no difference between media companies and others with regard to this issue, because general competition rules are mainly concerned with securing economic objectives. But the second concern, arising from the diversity and plurality questions, goes further than simply economic objectives and justifies the specific rules that restrict media ownership in order to maintain that ownership concentration in media does not limit diversity of information and opinion[9].

Media ownership rules, specifying certain limits for multi-ownership in one sector or for cross-ownership in different sectors, serve for external pluralism by way of constructing a system that is supposed to proactively prevent the concentration of power. In this essay development of the rules of this kind are addressed. The examination of different national experiences assist us to determine common trends of development and so to reach an adequate perspective of the Turkish state of affairs with a comparative view. Following a short review of the deregulatory pattern of change in three examples of national regulation -UK, Germany and Italy- and a brief account of the failure of regulation at European level, the evolution of Turkish media law in this regard will be considered below. The word 'media' here has the meaning of 'audiovisual media', i.e. the conventional broadcasters of television and radio, which are the most widely used means of communication and the most important source of information -compared with others such as press and internet- for the people in Turkey.

1. NATIONAL TRENDS TWORDS DEREGULATION

1.1. United Kingdom

In United Kingdom, prior to 1990, the commercial broadcasting system was based on regional monopolies in terms of both dissemination and revenue. Broadcasting Act of 1990, by putting an end to the old monopoly structure and opening the broadcasting market to competition, liberalised the system[10]. The multi-ownership provisions of the 1990 Act made possible for a company to own two broadcasting

[5] David Goldberg, Tony Prosser, Stefaan Verhulst, "Regulating the Changing Media", David Goldberg, Tony Prosser, Stefaan Verhulst (eds), *Regulating the Changing Media, A Comparative Study*, Oxford, 1998, p. 19; Cavallin, Ibid; *Pluralism and Media Concentration in the Internal Market*, supra note 4, p. 18.
[6] Cavallin, Ibid.
[7] *Pluralism and Media Concentration in the Internal Market*, supra note 4, p. 20.
[8] *Media Diversity in Europe*, supra note 2, p. 9.
[9] Eric Barendt, Lesley Hitchens, *Media Law, Cases and Materials*, Longman Law Series, London, 2000, p. 242; see also *Media Diversity in Europe*, supra note 2, p. 8.
[10] Wolfgang Hoffmann-Riem, *Regulating Media*, New York/London, 1996, pp. 79, 99.

licenses (Channel 3) and at the same time to hold interests up to % 20 in other companies. According to the cross-ownership rules, newspaper owners were capable to own, though to a limited extent, shares in broadcasting companies[11]. It was argued that the Act was, in some ways, in favour of already existing cross-ownership interests of media giants such as Murdoch[12].

The 1996 Broadcasting Act, replacing the 1990 Act, brought relaxations regarding media ownership. The new multi-ownership rules introduced a new way of measuring the market power of companies. The aim was to limit the audience share of broadcasters to % 15, instead of restricting simply the number of licenses to be hold. On the other hand, cross-ownership provisions permitted national newspapers having less than % 20 market share to own a broadcaster[13].

The Communications Act of 2003[14] represents the final step of deregulation in British broadcasting. The Act radically relaxed the ownership rules which were in effect since 1996. The rule, for example, that imposed a limit of % 15 on broadcaster's audience share has been removed. The rules preventing joint ownership of licenses has been revoked[15].

1.2. Germany

In Germany, major matters of broadcasting are regulated in the interstate treaties *(Rundfunkstaatsvertrag)* which have been prepared to harmonize the legislation of different federal states. These treaties faced changes several times, recently in 2005.

Under the multi-ownership rules of 1991 Interstate Broadcasting Treaty the companies were permitted to operate maximum two nationwide television stations and two radio stations. There was also a limit of %50 for the share to be hold by an owner in a broadcaster. The cross-ownership rules were from the outset rare and weak in the country, e.g. cross-ownership between press and broadcasting at national level was not prohibited[16].

The rules have been liberalised in 1996. The Treaty which entered into force on 1 January 1997 did not impose a limit on the number of channels, but it brought a treshold with regard to the annual audience share[17]. According to this rule, companies were allowed to broadcast nationwide in the country an

[11] Barendt, Hitchens, op.cit., p. 248; Hofmann-Riem, op.cit, pp. 104-105.

[12] T. Gibbons, "Aspiring to Pluralism: The Constraints of Public Broadcasting Values on the De-regulation of British Media Ownership", Cardozo Arts and Entertainment Law Journal 16, 1998, p. 489 (also extracted at Barendt, Hitchens, op.cit., p. 250); see Alison Harcourt, Stefaan Verhulst, "Support for Regulation and Transparency of Media Ownership and Concentration – Russia, Study of European Approaches to Media Ownership", http://www.medialaw.ru/e_pages/laws/ero_union/e-conc.htm

[13] Barendt, Hitchens, op.cit., pp. 252-256; *Media Diversity in Europe*, supra note 2, p.11; Stefaan Verhulst, "The United Kingdom", Goldberg, Prosser, Verhulst (eds), op.cit, p. 126; David Levy, *Europe's Digital Revolution*, Routledge, London / New York, 1999, p. 35; Harcourt, Verhulst, Ibid.

[14] http://www.communicationsbill.gov.uk

[15] David Ward, *A Mapping Study of Media Concentration and Ownership in Ten European Countries*, Netherlands Media Authority, Hilversum, 2004, p. 215; for a summary of important changes see http://www.freshfieldsbruckhausderinger.com/practice/corporate/publications/pdfs/6193.pdf

[16] Hoffmann-Riem, op.cit, p. 135; Levy, op.cit., p. 114; Harcourt, Verhulst, supra note 12. The consolidation in German media owes its growth to this absence of prohibition, see Hoffmann-Riem, op.cit., p. 136.

[17] Wolfgang Kleinwächter, "Germany" in Goldberg, Prosser, Verhulst (eds), op.cit., p. 54; *Media Diversity in Europe*, supra note 2, p. 11.

unlimited number of channels provided that the totality of the channels of a company should not achieve an audience share more than % 30[18]. The following interstate treaties, namely 2002 Treaty and recent one which is in effect since 01 April 2005[19], keep this provision. The treshold is % 25 for a company which is proved to be the holder of a dominant position in other media-relevant markets[20].

1.3. Italy

In Italy, the role of the Constitutional Court in liberalisation of broadcasting system seems remarkable. The private services that started to operate in the country have been legalised, at the regional level first, after a Constitutional Court decision of 1976 which abolished the existing public monopoly. The spontaneous and illegally created new national networks were legimitated again by a decision of Constitutional Court in 1984. But there were no regulation regarding the ownership matters until 1990. This has led to a huge degree of concentration in the market[21].

1990 Broadcasting Law which contained rules restraining private ownersip for the first time, has been criticised of being a legal confirmation of already existing concentration level[22]. The Law faced several modificitions in following years. Consequently, the rules limited the number of licences to be held by an operator for national television to %20 of national capacity (this corresponded to two channels). In addition to this, the revenues to be collected by a broadcaster from its radio or television sector was limited to %30 of total market resources[23]. According to the cross-ownership rules, on the other hand, the broadcasters having activities also in newspaper or magazine sectors were restricted to obtain maximum %20 of total resources of both sectors[24].

In December 2003 the Italian parliament passed a new law called "Gasparri Law"[25], which, by allowing anyone to own more than two national channels and widening the way for cross-ownership between broadcasters and newspapers, legitimized factual situation. The new limit regarding the maximum obtainable revenue is determined as %20 of the market, but the market is redefined so broadly ("integrated communication system") that this may be seen as an indirect relaxation of previous cross-ownership rules[26]. After a period of controversy between the President who has once refused to sign the new Law and the ruling party which defended it, the Gasparri Law has been finally re-adopted by Italian Senate on 29 April 2004 and entered into force on 6 May 2004[27].

[18] This limit was determined over the real audience shares already achieved by companies in practice, Kleinwächter, Ibid, p. 55. Levy considers this as "the most significant liberalising move in Europe", Levy, op.cit., pp. 114, 115.
[19] http://www.zdf-werbung.de/downloads/downloadfiles/RStV.pdf
[20] Ward, op.cit., p. 91.
[21] Giuseppe Dallera, Maria Vagliasindi, Pietro Vagliasindi, "Italy", in Goldberg, Prosser, Verhulst (eds), op.cit., p. 75; Harcourt, Verhulst, supra note 12.
[22] Dallera, Vagliasindi, Vagliasindi, Ibid, p. 76.
[23] Dallera, Vagliasindi, Vagliasindi, Ibid, pp. 76, 85, 87; Ward, op.cit, p. 108; *Media Diversity in Europe*, supra note 2, p. 12.
[24] Ward, op.cit., p. 109; Dallera, Vagliasindi, Vagliasindi, Ibid, p. 87. These legal limits regarding licences and revenues have been exceeded by operators in reality, Ward, Ibid.
[25] http://www.comunicazioni.it/en/index.php?IdNews=18
[26] Ward, op.cit., p. 110; see http://www.osce.org/documents/pdf_documents/2005/06/14949-1.pdf
[27] Ward, Ibid; see http://www.rsf.org/article.php3?id_article=8695

2. ATTEMPTS FOR REGULATION AT EUROPEAN LEVEL

Connected with the introduction of new technologies, growing internationalisation of media activities carried the concentration problem to international level. But international or so called supranational law seems to be far from being able to constitute a corresponding regulatory framework.

Neither of the two basic European legal sources regarding broadcasting, namely the *Television Without Frontiers Directive* adopted by the European Community in 1989 and the *European Convention on Transfortier Television* put into effect by the members of Council of Europe in 1993, include provisions dealing with the problems caused by ownership concentration. In fact, these were from the outset coherent texts prepared with a common view of maintaining a European single media market[28]. The *Convention* has been amended in 2002 and realigned with the *Directive* which was revised in 1997[29].

The first institutional calls for Europe-wide regulation of media ownership came from the European Parliament in 1984. In several resolutions released in following years European Parliament stressed the danger of concentration and declared the necessity of legislative intervention in favour of pluralism in media structure. Consequently the European Commission attempted to prepare a special directive dealing with the issue. But the long consultation period in 1990's witnessed so wide controversies and disputes that it could not result in adoptation of any directive[30].

The failure to have a regulatory instrument at European level leads to leaving the media ownership and concentration matters to the national legislators[31].

3. DEVELOPMENTS IN TURKISH LAW

3.1. Evolution in General

In Turkey, broadcasting services were under direct state control at the beginning. An important step for the system was the establishment of Turkish Radio and Television Corporation (TRT) in 1964, in accordance with the Constitution of 1961 which stipulated that broadcasting activities should be carried out by an independent and autonomous body. TRT was kept as a constitutional public institution having the monopoly of broadcasting for a long time. In neither 1961 nor the new 1982 Constitution that replaced the old one there was a permission for free private broadcasting.

The lack of legality, however, could not prevent the activities of private companies in both radio and television sectors. The first so called 'pirate' television channel started broadcasting in 1990 and the others followed it. The illegal and quick emergence of the stations forced the Parliament to make an

[28] Levy, op.cit., pp. 41-47; Cavallin, supra note 3; Alison Harcourt, "The European Commission and Regulation of Media Industry", http://www.medialaw.ru/laws/other_laws/european/e-eh.htm

[29] Stefaan Verhulst, David Goldberg, "The European Institutions", Goldberg, Prosser, Verhulst (eds), op.cit., pp. 157-158; Revised text of European Convention on Transfortier Television and its Explanatory Report is available at http://www.coe.int/T/E/Human_Rights/media/2_Transfortier_Television

[30] Levy, op.cit., pp. 50-59; Verhulst, Goldberg, op.cit., p. 167; *Media Diversity in Europe*, supra note 2, p. 10; Harcourt, Ibid.

[31] *Media Diversity in Europe*, Ibid. For a recent call for a common action against concentration see *Transnational Media Concentration in Europe*, Report prepared by AP-MD (Advisory Panel on Media Diversity) for CDMM (Council of Europe Steering Committee on Mass Media), Strasbourg, 2004.

amendment to the Constitution in 1993, by which the monopoly of TRT was eliminated and private broadcasting was legalized.

Until 1994 there was no special legislation dealing with the structure and activity of private broadcasting. In that year the *Law on the Establishment of Radio and Television Enterprises and Their Broadcasts* (Law No. 3984 of 20 April 1994) was passed by the Parliament. In 2002 some provisions of this Law have been amended (Law No. 4756 of 21 May 2002).

3.2. Legal Framework of Broadcasting

3.2.1. The Constitution

Article 26 of the Constitution which guarantees the right to express and disseminate opinion in general, governs also freedom of broadcasting. The first paragraph of this Article stipulates that,

> Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema and similar means to a system of licensing.

Article 133/I of the Constitution reads as,

> Radio and television stations shall be established and administered freely in conformity with rules to be governed by law.

3.2.2. Legislation

The *Law on the Establishment of Radio and Television Enterprises and Their Broadcasts* (Law no. 3984 of 20 April 1994 amended by the Law no. 4756 of 21 May 2002) –hereinafter to be referred as Broadcasting Law– represents the Law that is required to regulate the broadcasting system in the above mentioned Article 133/I of the Constitution. It comprises the basic rules which cover, among other things such as licensing procedure, broadcasting standards, content of programmes, right of reply, advertisements etc., the regulation of the structure.

3.2.3. Radio and Television Supreme Council

As a requirement of the Broadcasting Law, the Radio and Television Supreme Council (RTUK) has been established. This is an autonomous public body whose duty is to determine and publish secondary rules in order to regulate and monitor the broadcasting system in compliance with the primary legislation. RTUK has the power to impose administrative sanctions varying in a range from a simple warning to the revocation of the license[32].

[32] http://www.rtuk.gov.tr

3.2.4. Convention on Transfortier Television

The *European Convention on Transfortier Television* is also an important legal source of broadcasting in Turkey, since Turkey is a party to the *Convention.* According to the Article 90 of the Constitution, the *Convention* as an international agreement which has been duly put into effect bears the same force as a law and moreover it is not subject to any judicial review of constitutionality.

Some provisions of the Broadcasting Law refers directly to the *Convention*. For example the Law requires RTUK, "to verify the compliance of broadcasts with international treaties to which Turkey is a party" (Art. 8/h), to "bear in mind the principles of the *European Convention on Transfortier Television*" while determining the obligations and standards to be observed by broadcasters (Art. 8/f) and to draft the rules regarding its own activities in conformity with the *Convention* in question (Art. 8/p).

3.3. Development of Ownership Rules

Until the entry into force of the Broadcasting Law in 1994, there was no specific regulation dealing with the restriction of ownership in the broadcasting sector. This unregulated period has naturally led to a free economic development and a rapid concentration in the sector.

The Article 29 of 1994 Broadcasting Law was the first in this manner to specify the establishment and ownership rules of private radio and television enterprises. The multi-ownership rules introduced a share limit of % 20 for a person to hold in a broadcasting company. The same limit was to apply to the totality of shares, if any, in different broadcasting companies. The cross-ownership rules, on the other hand, required the newspaper owners who have interests in broadcasting media, not to have more than %20 in totality of both sectors.

In 2001 a draft law has been prepared as a government proposal and it has been approved by the Parliament. This draft was amending the Brodcasting Law entirely and the amendments were clearly to the benefit of the existing big media companies which were looking forward to more relaxation of market development. The new rules, for example, eliminated the ban on those who owned more than % 10 of a television station to enter into business relations with the public bodies.

With this draft, the old rules of ownership restriction based directly on ratio of shares has been abolished and a new way of calculation considering additionally the audience share has been introduced. According to the sub-paragraph (d) of the new Article 29, "if a television or a radio enterprise's avarage annual viewing or listening ratio exceeds 20 percent, then capital share of a real or legal person or a capital group in that enterprise shall not exceed 50 percent". This would allow anybody to have %100 of any broadcasting company having %20 audience share or less.

The President, by using his constitutional power, sent the draft law back to the Parliament for a re-examination. The President declared, among other things, that the new ownership rules were not capable of satisfying the necessity of combating concentration and favouring pluralism. In 2002 the Parliament

passed the same draft again. The re-adopted draft could not be sent back legally for the second time and it became law on 21 May 2002[33].

But the President then brought some articles of the new law to the Constitutional Court. Among them were the rules on ownership. As a consequence of this, the enforcement of the above mentioned sub-paragraph (d) of Article 29 has been suspended by the Constitutional Court on 12 June 2002 and after the review of the Court it has been finally anulled on 21 September 2004[34].

From the annulment of this provision on, however, no new rule relating to the same issue has been enacted by the Parliament. This caused a legal gap regarding the restriction of broadcasting ownership and reminds the unregulated period before 1994. If the Parliament will act against the current situation that allows a new wave of concentration or leave the market to its own forces –at the time of writing– remains to be seen.

3.4. Foreign Ownership

According to the first version of the Broadcasting Law, the share of foreign capital in a radio or television broadcaster should not be over %20. This ratio has been increased to %25 in 2002. But the rule that prevented foreigners from holding shares in more than one private radio or television broadcaster has been kept.

Earlier in 2005 the government attempted to abolish these limits. If the draft text became law, foreign investors would have the opportunity to own %100 shares of 6 national television channels (of total 24). But the draft law has been sent back by the President and the Parliament did not insist on adopting it again. The %25 rule applies at present but the government seems to have an intention to increase this limit to %49 before the end of this year[35].

CONCLUSION

Four turning points remarking the pattern followed by Turkish media law may be put forward as follows:

1. Amendment made to the Constitution in 1993.
2. Entry into force of the Broadcasting Law in 1994.
3. Amendment made to the Broadcasting Law in 2002.
4. Constitutional Court's 2004 decision.

The 1993 amendment made to the Turkish Constitution resembles the enactment of 1990 Act in UK and the release of two (1976, 1984) judgments of Italian Constitutional Court for that the consequences of all were the removal of (public or private) monopoly and opening up the market legally to free competition. The Italian and Turkish cases have more similarities that firstly both were the initial legal ratification of illegally emerged private broadcasting, and secondly, both represented the beginning of a period of legal

[33] Official Gazette, 21.05.2002, 24761.
[34] Constitutional Court, E. 2002/100, K. 2004/109, 21.09.2004.
[35] See Journal of Turkish Weekly, 12 April 2005 at: http://www.turkishweekly.net/news.php?id?=7932.

but unregulated private ownership of broadcasting. This period in which concentration process made easily its way in Italy and Turkey, may also be compared to the situation in Germany where the lack of prohibition encouraged the increase of cross-ownership relations across the nation. Accordingly, the adoptation of ownership rules and the amendments made to them in the countries reviewed here, although differing in content, seem to share a common approach of accepting the degree of concentration already achieved in reality as it is and letting it remain intact.

The *Convention on Transfortier Television*, to which Turkey is a party, does not impose any rule on ownership matters, as stressed above. Neither does the *Television Without Frontiers Directive* of EU, which must be taken into consideration in the procedure of membership negotiations[36]. This confirmes the survivance of national legislator's competence in this area just like other nations concerned.

The development twords more liberalization and deregulation is the common feature of Turkish media law with those of UK, Germany and Italy. If the present absence of specific restrictive ownership regulation, which occured after the 2004 decision of the Constitutional Court, continues to exist and if the government, while being silent about concentration concerns, succeds in paving way for more foreign participation, it may not be false in the near future to show Turkey as one of the most liberalised media markets in Europe.

The mentioned direction of legal change, that is *de jure* approval of *de facto* emerged situation, must lead us to think about the plurality questions again and to pay more attention to the sociological assertion that views the development of media ownership rules as an illustration of law's inclination to follow the road drawn by economic reality. Turkish experience may be seen in this context as another verification of *Hoffmann-Riem*'s note stating the area of media concentration as "a consummate example of the law's limited ability to control when economic factors point in the opposite direction"[37]. This may be further detailed and considered as a contribution to the critical legal studies which critically analyze the relation between law and economy.

[36] See Commission of the European Communities, *2004 Regular Report on Turkey's Progress Towards Accession* {COM (2004) 656 final}, Brussels, 2004, pp. 129-130.
[37] Hoffmann-Riem, op.cit., p. 309.

BARRISTERS AND SOLICITORS SHALL REMAIN SEPARATE LEGAL PROFESSIONS

by

VIKTORS URVAČOVS

Abstract

This Article examines the issue whether barristers and solicitors should remain as separate legal professions in United Kingdom. Barristers spend most of their time in "paper –work", such as drafting of pleadings, complex settlements. Solicitors deal with the preparatory stages of litigation, they can appear in most courts and tribunals. These two professions are very different, though have something in common. The Article will help to understand the nature of differences between these two professions, mention Royal Commission's report on this issue, and use comparison as well experience of other countries to prove the statement.

INTRODUCTION

A distinctive feature of English legal system is the division of the legal profession into two separate branches – solicitors and barristers.[1] In other parts of the world all practitioners are described as "lawyers" – this word has no particular application in United Kingdom. The field which in other countries has been occupied by people having legal education, in United Kingdom is occupied by representatives of two separate legal professions. I will develop the following points: historically these two professions have evolved as separate ones, report of Royal Commission supports the status quo, practitioners perform similar tasks and face similar problems, though these professions differ heavily. I will look at this issue from Latvian perspective, mention personal experience and examine statutes of UK concerning particular issue. In conclusion I will mention that this is a unique system, which had shown its indispensability, proved the effectiveness of its applicability in practice, and still has huge capacities for the development.

The division of legal professions dates back to about 1340, the time at which professional advocacy evolved.[2] The separation of the historical profession has an historical foundation. The separation of pleaders and attorneys was a natural separation of different skills between quick-witted and learned court-room lawyers and managerial, clearky lawyers.[3] This suggestion was made by Coke in the seventeenth century.[4] The same distinction between specialists and generally practitioners was reproduced mush later by barristers and solicitors.[5] The nature of functions which they perform has also emerged from the past: barristers are still primary advocates, though spend most of their time in "paper-work", such as drafting of pleadings, complex settlements and opinions in specialized matters such as taxation and company law.[6] Solicitors deal with the preparatory stages of litigation such as the preparation of evidence, interviewing witnesses, issuing writs. They have right of appearance in most courts and tribunals. Solicitors deal with large number of non-litigation matters such as the drafting of wills, supervision of trusts and settlements,

[1] R. Walker, *The English Legal System* (Butterworths, 1985) at 248.
[2] J. H. Baker," An Introduction to English Legal History (2nd edition)" in R. Walker (ed.), *The English Legal System* (Butterworths, 1985) at 248.
[3] J. H. Baker, *An Introduction to English Legal History* (3rd edition) (Butterworths, 1990) at 179.
[4] *Ibid*.
[5] *Ibid*.
[6] Note 1. *Supra* at 249.

the administration of estates.[7] The duties of solicitors towards their clients are governed both by statute and their code of professional conduct. In the case of barristers the obligations are governed solely by the dictates of professional etiquette. The rules of conduct may change from time to time and may be altered by the Inns of Court on behalf of their members or by the Senate of the Inns of Court and the Bar.[8]

Even from the introductory sentences it is clear that here I am speaking about representatives of two different professions which has its own traditions and areas of practice inside one field. These professions have evolved as separate ones. The advocates with audience in the common law courts were the serjeants and barristers. While the preparatory work was carried out by officer of the court, known as attorneys. In such a way developed two classes of legal practitioners: serjeants and barristers on the one hand and attorneys, solicitors at present time, who are officers of the court, on the other. Since the UK has its distinctive legal system, the possibility of having two types of legal practitioners should be regarded as a common trait of such system. The whole legal system of the UK has shown that it can proceed very well, since the barristers and solicitors are indispensable part of this system there is no need to change the status quo.

With regard to a controversial issue of fusion Royal Commission, which was set up in 1976 to inquire into the law and practice relating to the provision of legal services in England, Wales and Northern Ireland stated:" a two-branch profession is more likely than a fused one to ensure the high quality of advocacy which is indispensable, so long as our system remains in its present form, to secure the proper quality of justice"[9] Who else than a Royal commission can adjudicate on the appropriateness of having two separate legal professions. Since the small cases can be handled by the barrister or solicitor separately, large cases will demand far greater input. The outcome of such case in situation where it is handled by either barrister or solicitor will be unpredictable.

In some areas barristers and solicitors are performing similar tasks. For example, barristers are mainly engaged in "paper-work", while solicitors are dealing with preparatory stages of litigation such as the preparation of evidence, issuing writs. The nature of these actions is similar. Nevertheless, they are performed to achieve different goals. Since only solicitors have a right of audience in most courts and tribunals and are instructed by their clients directly, it may appear that barristers, who have access only to magistrates, are put in unfair position. It may seem that while comparing to the structure of ECJ a solicitor is similar to Advocate General of ECJ and solicitors are similar to legal secretaries – representatives of lover level of hierarchy of ECJ. Maybe fusion may level their status? In practice this is not true. The distinction between these two professions is very strong. The right of access to the court does not always guarantee a solicitor higher salary or higher amount of clients. Barristers are drafting complex settlements and opinions on specialized maters such as taxation and company law. [10] Types of cases that barristers and solicitors are dealing with are completely different.

Barristers and solicitors face similar types of problems. Since the representatives of both professions are bar members they are subject to the decision of the respective bar associations with regard to the fees charged. The comments about fees are based on the duty of "advocates (solicitors and barristers)" not to

[7] Note 1. *Supra* at 250.
[8] Note 1. *Supra* at 273.
[9] Report of the Royal Commission on Legal Services (Cmdh. 7648). Paras 17.45-17.46 in R. Walker (ed.) *The English Legal System* (Butterworths, 1985) at 250.
[10] Note 1. *Supra* at 249.

exploit the monopoly for providing legal services by excessive demands for fees"[11] Barristers and solicitors could be regarded as deeply specialized professionals in respective fields. Each willing that ones talent and skills will be valued at substantially high level. This is the main similarity. Regarding the work, which they perform, neither of them could personify an outstanding tax lawyer, collector of evidence and representative of a party in a High court at once. Of course there could be exceptions. Most solicitors, especially those in large practices, are experts in particular areas of law.[12] Many barristers on the other hand might have a quite wide range of work including criminal, family matters and a variety of common law areas like tort and contract cases.[13]

Other problem is of educational nature. Many trainee lawyers did not know which way to choose: to be a barrister or to be a solicitor. They face this question before even knowing at which sphere he or she is best at. The anomaly is enhanced by the fact that there are practicing barristers – conveyancing counsel, for example – who barely even go into court, and solicitors – magistrate's court advocates, for example – who rarely go anywhere else.[14] But these things, nevertheless, could not challenge the stability of the system as whole. As in many spheres of life there is always some aspect, which can be improved.

In my opinion the system that is applied in UK regarding the division of responsibilities of advocate between barristers and solicitors shall be examined in European countries.

As for Latvia, the possibility of having two types of legal practitioners would increase the quality of services provided and will balance the workload between practicing lawyers. Number of lawyers in Latvia is not clear. A person can only find out the number of the number of advocates in Latvia because they have a bar association. Inconveniences are caused also by the fact that according to the decision of Constitutional Court in case 2003-04-01[15], basically everybody can present a party in court, provided that he has basic legal knowledge and skills. Such people are unaccountable and the damages, which a client suffers as a result of the actions of such a representative, could not be compensated.

Contrary in UK there are bar associations of both barrister and solicitors. Each and every person who practices law is accountable and could be subject to sanctions from ones bar association. The issue of accountability of law practitioners is one of the most important while comparing the situation in law sphere in Latvia and UK.

I have faced the problem of overload of practicing lawyers. At the same time people have to prepare for court cases and compose memoranda. This is very hard to manage at the same time. Each direction requires a lot of input. The quality of work suffers a lot. If the English perspective would have been implemented in Latvia it would be better for the people and for the functioning of the whole legal system.

There is no necessity to fuse these two professions. According to Access to Justice Act (chapter 12) Lord Chancellor will in future be able to authorize bodies other than the Law society to approve their members carrying out litigation. This will increase competition and will have a positive impact on the administration of justice throughout the country.[16]

---

[11] G. Moss"*Insolvency barristers' fees in the 21st century*", (1998), 11(7). (Insolvency Intelligence), 53-54

[12] G. Slapper. and D. Kelly (eds.), *The English Legal System* (fourth edition) (Cavendish publishing limited, 1999) at 418.

[13] *Ibid*.

[14] Sir Stephen Sedley, "The future of advocacy" in G. Slapper and D. Kelly (eds.), *The Sourcebook on the English Legal system* (Cavendish Publishing, 2001) at 466.

[15] http://www.satv.tiesa.gov.lv/LV/Spriedumi/04-01(03).htm.

[16] Note 12. *Supra* at 419.

CONCLUSION

The division of legal practice between two separate legal professions is a historical heritage, which up to present time is still operating brilliantly. The reports of various state commissions have proved the point that the current system operates very well. It is clear that barrister and solicitor are two completely different legal professions and could not be substituted one for another or even fused. Jurisprudence is one of the most important spheres of human activities; hence it must receive sufficient attention from the side of professionals of this sphere. The specialization is one of the most important fords in this field. Other countries, such as Latvia, shall exercise the practice of UK carefully, so that there will be lots of adequate, professional legal advises all over the world.

Bibliography

1) Baker J. H., *An Introduction to English Legal History* (third edition) (Butterworths, 1990
2) Slapper G. and Kelly D (eds.), *The English Legal System* (fourth edition) (Cavendish publishing limited, 1999)
3) Slapper G. and Kelly D. (eds.), *The sourcebook on the English Legal system* (Cavendish Publishing, 2001)
4) Moss G.,"*Insolvency barristers' fees in the 21st century*", (1998), 11(7) (Insolvency Intelligence)
5) Walker R., *The English Legal System* (Butterworths, 1985)
6) http://www.satv.tiesa.gov.lv/LV/Spriedumi/04-01 (03).htm

"BIS DE EADEM RE NE SIT ACTIO" PRINCIPLE IN THE FORMULARY SYSTEM OF ROMAN LAW OF PROCEDURE

by

Dr. GOKCE TURKOGLU-OZDEMIR*

INTRODUCTION

As it is known, Roman law of procedure, is developed in two main terms. The first one is called *Ordo iudiciorum privatorum* and the second one is called *Cognitio extra ordinem*. *Ordo iudiciorum privatorum* is also divided into two parts; *legis actiones* and *formula* proceedings. *Legis actiones* proceeding is used in the primitive times of Roman law. Because of this reason some of the regulations and institutions are not known during this proceeding. Roman law of procedure makes a progress mainly during the *formula* proceeding. But it can be definitely said that, the regulations made in the *Cognitio extra ordinem* mainly effected the current procedural law. In this article, we will will explain briefly how *bis de eadem re ne sit actio* principle is used in formulary procedure. Putting forward how this principle makes a progress during a long period of time will be useful to understand the principle better in current law systems.

"BIS DE EADEM RE NE SIT ACTIO" PRINCIPLE

"*Bis de eadem re ne sit actio*" or "*ne bis in idem*" principle, is put forward briefly, to prevent bringing an action more than once on the same contentious issue in Roman law of procedure[1]. This universal principle is valid in both *Ordo iudiciorum privatorum* and *Cognitio extra ordinem* procedures of Roman law, forbidding to maintain once again the same action with reference to same issue. Although it is known even in the initial times of Roman law that there can not be more than one definite judgement about a contentious subject[2], *bis de eadem re ne sit actio* principle, which confirms this reality, shows its effects mostly in formulary system[3].

The decision given by the judge or judges[4] is called definite judgement. In Roman law definite judgement (*res iudicata*) is accepted as expressing the fact (*res iudicata pro veritate accipitur*)[5]. Therefore, it is

* Asst. Prof. Dr. Dokuz Eylul Unv. Fac. of Law- Izmir TURKEY

[1] Wenger, L.; Institutes of the Roman Law of Civil Procedure, Transl. by H. O. Fisk, p. 189; *Bis de eadem re ne sit actio* principle is also in use, in modern law systems. In modern law systems, to apply the principle, the action must be ended and definite judgement must be given. But in formulary procedure of Roman law, completing the *litis contestatio* phase, is sufficient. According to this, in formulary system, even though the definite judgement could not be given for some reasons, *bis de eadem re ne sit actio* principle is applied.

[2] Gai. 4, 108; *Alia causa fuit olim legis actionum. nam qua de re actum semel erat, de ea postea ipso iure agi non poterat nec omnino ita, ut nunci usus erat illis temporibus exceptionum*; The rule was formerly different when the ancient method to procedure was employed, for when proceedings concerning a matter had once been instituted, no legal action could be taken with reference to it, nor was the employment of exceptions in those times customary, as it is now.

[3] Thomas, J. A. C.; Textbook of Roman Law, Amsterdam, 1976, p. 318; Provera, G.; La Pluris Petitio nel Processo Romano, I, La Procedura Formulare, Turin, 1958, p. 23.

[4] Zulueta, de F.; The Institutes of Gaius, Part II, Oxford, 1953, p. 225 sq; The number of the judges who prosecute the action, can change according to the type of the action. As a rule, the issue which is defined by joinder of issue phase, goes for trial to a single private citizen who is chosen from an list and empowered by the parties and *praetor*. Sometimes an *arbiter* who is a special *iudex* hears an action in which more is left to his discretion than in a *strictum iudicium*. Several *iudices* who are called

assumed that the content of the judgement is true. A contentious subject should not be discussed more than one time, because different decisions given about one contentious issue can harm public conscience and it is against the procedural economy[6].

Res iudicata, bars a later claim because the issue definitely comes to a conclusion before the court[7] and it shows that the claim is extinguished and the fact is revealed[8]. By the extinction of the action, a new situation is formed and both parties of the action must respect this new situation. If the plaintiff, loses the action because of not obeying some formal provisions while bringing the action, but then wishes to bring a new action after correcting these discords, *praetor*[9] does not grant him the right to bring the second action. This means that *praetor* refuses the plaintiff's claims. Besides *praetor* can grant an action to the plaintiff but in the same time he also grants an *exceptio rei iudicata* in favour of the defendant which makes the plaintiff's action senseless[10].

Bis de eadem re ne sit actio principle and definite judgement are directly related with the cultiminating effect of the joinder of issue (*litis contestatio*)[11]. As it is known, especially in formulary system, the *litis contestatio* phase carries an important role. It extinguishes the claim sued on and replaces it by a right to have the question as formulated, decided by the judge (*iudex*). During the prosecution of an action, when joinder of issue phase is completed, it is accepted that contentious issue between the parties comes to an end and this contentious issue can not be brought before a court subsequently[12]. The aim of *bis de eadem re ne sit actio* principle is, in a way gained by completing the joinder of issue phase in formulary procedure, because this produces the same results with *res iudicata* in some conditions.

Joinder of issue phase can be accepted as an agreement made by the parties of the action. But it is not done under the control of *praetor*. By conclusion of joinder of issue phase, the subject of the action becomes this agreement. In formulary system of Roman procedural law, after completing joinder of issue phase of an action, the possibility of bringing another action[13] or forming a new joinder of issue with reference to the same contentious issue, ends[14].

---

recuperatores hear different actions. They are common in the court of *preator peregrinus* but they are sometimes employed by *praetor urbanus*.

[5] Stephenson, A.; A History of Roman Law with a Commentary on the Institutes of Gaius and Justinian, Colorado, 1992, p. 200 sq.; Tahiroglu, B./ Erdogmus, B.; Roma Hukuku Meseleleri, Istanbul, 2001- Some Matters in Roman Law, p.195, (Matters).

[6] Thomas, p. 319; Roby, H. J.; Roman Private Law in the Times of Cicero and of the Antonines, Cambridge, 1902, p. 259; Tahiroglu/ Erdogmus, (Matters), p.194.

[7] D. 3, 3, 40, 2.

[8] Muirhead, J.; Historical Introduction to the Private Law of Roman, 3. Ed., Rev. and Ed. by Henry Goudy, London, 1912, p. 90; Umur, Z.; Roma Hukuku Lugatı, Istanbul, 1985- Roman Law Dictionary, p. 181-2, (Dictionary); The judge, while giving the judgement, takes into consideration *res in iudicium* (D. 1, 5, 25; D. 42, 1, 1).

[9] Schulz, F.; Classical Roman Law, Oxford, 1951, p. 13; The jurisdictional magistrate within the limits of the Rome and boths parties are Roman citizens, is called *praetor urbanus*; if one or both are non- Romans the jurisdictional magistrate is called *praetor peregrinus*.

[10] Tahiroglu, B. / Erdogmus, B.; Roma Usul Hukuku, Istanbul 1994- Roman Procedural Law, p. 28, (Procedure).

[11] Schulz, p. 14; The term *litis contestatio* is used to designate the end of the proceeding *in iure* and even this proceeding as a whole.

[12] Wenger, p.104; Frezza, P.; Le Garanzie delle Obbligazioni, Le Garanzie Personali, V. I, Padova 1963, p. 311, The changes which occurred on the subject of the action after joinder of issue phase, are no longer taken into consideration. They can only be subject of another action. "D. 5, 1, 23, Paul. 7 ad Plaut.; *Non potest videri in iudicium venisse id quod post iudicium acceptum accidisset : ideoque alia interpellatione opus est*". "*Obligatio operarum* which are not requested from the plaintiff before the end of *litis contestio* phase, can not be gauged in this action.

[13] "Gai. 3, 180; *Tollitur adhuc obligatio litis contestatione, si modo legitimo iudicio fuerit actum nam tunc obligatio quidem principalis dissolvitur, incipit autem teneri reus litis contestatione*; An obligation is also extinguished by a joinder of issue, provided the action brought is authorized by law, for then the original obligation is dissolved, and the defendant begins to held

In *Ordo iudiciorum privatorum* procedure, the actions are carried out in two stages. The first stage is constituted before a magistrate (*praetor*) and the second stage is constituted before the *iudex*. The plaintiff and the defendant explain the contentious issue by exposing their claims and defences before *praetor*. This is called the proceeding *in iure*. At the close of the proceeding *in iure*, the second stage of the civil procedure begins. This stage is named as proceeding *apud iudicem*[15]. If *praetor* believes that there is a real enmity between the parties, he grants an action, if not, he refuses to grant an action. But the decision of granting an action or refusing to grant an action given by *praetor* is completely different from the decision given by the judge at the end of an action. This means that, the decision of *praetor* does not regarded as a *res iudicata* like the decision of the judge given at the end of an action as condemning or discharging the plaintiff, nor it does not produce the effects of joinder of issue phase. In other words, the plaintiff can ask for an action about this contentious issue from another *praetor*.

At this point, we must find out whether *praetor* turns definite judgement to account by himself, spontaneously or definite judgement can only be taken into consideration intervention by an exception[16]. Bringing an action subsequently before the court with reference to the same contentious issue of the first action is prohibited whether by *ius civile*, *ipso iure* or by praetorian law, *ope exceptionis*[17]. Under the older procedure of *legis actiones*, definite judgement is taken into consideration in all cases at civil law, *ipso iure*, that is spontaneously by *iudex*. But under the classical formulary procedure, a different method is operated: Definite judgement is taken into consideration *ope exceptionem* when the action is a real action (*actio in rem*)[18] or if it is a personal action (*actio in personam*)[19] when the proceedings are by *iudicium imperio continens*[20] or when the *formula* is *in factum concepta*[21]. During the actions in the form of *iudicia legitima*, *iudex* takes definite judgement into consideration spontaneously.

---

liable by the joinder of issue. But if judgement is rendered against him, the obligation produced by the joinder of issue is disposed of, and he becomes liable under the judgement. This is the reason why it was stated by the ancient authorities that a debtor is compelled to make payment before issue has been joined; for after this has been done, he will be liable if judgement should be rendered against him, and if he is condemned, he will be compelled to satisfy the judgement"; Betti, p. 601 sq.

[14] Marrone, M.; "L'Efficacia Pregiudiziale delle Sentenza nel Processo Civile Romano", Annali Palermo, V. 24 1955, p. 304 sq.; Wenger, p. 179; *Litis contestatio* phase, has a special feature like renewing the obligation. That is why, an obligation which has ended by renewing in joinder of issue phase, can not be a subject of action.

[15] Schulz, s. 14; Zulueta, p. 226; At this stage, the judge, whom is charged to give up a claim, examines the plaintiff's claim and then pronounces the judgement about either the dismission of the plaintiff or condemnation of the defendant. Proceeding *apud iudicem* is oral and informal. But parties have a right to be heard, but if one party does nor appear , the judgement goes against him.

[16] Pugliese, G.: "L'Actio e la Litis Contestatio nella Storia del Processo Romano" Studi in Onore di Enrico Tullio Liebman, V. 1, 1979, p. 411 sq. (Actio)

[17] Marrone, p. 317; Provera, p. 24.

[18] Gai. 4, 3; A real action is one in which we either claim some corporeal property to be ours, or that we are entitled to some particular right in the property, for instance, the right of use and enjoyment; or the right to walk and drive through the land of another; or to conduct water from his land; or to raise the height of a building, or to have the view unobstructed; or when a negative action is brought by the adverse party.; Zulueta, p. 228; The distinction *in rem* and *in personam* is a physical distinction.

[19] Gai. 4, 2; A personal action is one which we bring against anyone who is liable to us under a contract, or on account of a crime, that is what we claim is that he is bound to give something, to do something or to perform some service.

[20] Gai. 4, 103; Actions are either founded upon law or are derived from the authority of a magistrate.

[21] Gai. 4, 45; We say that the *formula*s in which a question of right is involved, are founded in law; as for instance, when we assert that any property belongs to us by quiritarian right, or that the adverse party is obliged to pay us something, or make good a loss to us as a thief, for these formulas and others are those in which the claim is based on the Civil Law. Gai. 4, 46; We say that other *formula*s are based upon questions of fact, that is, where a claim of this kind is not made with reference to them; but where a fact is stated in the beginning of a *formula*, words are added by which authority is given to the judge to condemn or discharge the defendant. This kind of a *formula* is employed by a patron against his freedman, when the latter brings him court contrary to the Edict of the *praetor* for then it is in the following terms: Let so-and so be judges. If it is established that such-and such a patron, was brought into court by such-and such freedman, contrary to the Edict of such-and such *praetor* –judges,

In formulary system of Roman procedural law, the actions which are called *iudicia legitima* –actions founded upon law[22], expire directly, even if no decision is given after eighteen months have elapsed from the conclusion of the *litis contestatio*[23]. Besides, the actions which are called *iudicia imperio continentia* – actions derived from the authority of a magistrate[24] expire directly, even if no decision is given when the service period of the *magistra* who has accepted the action's *formula* is over[25]. Thus, if in the first action, the joinder of issue phase is concluded, it is impossible to maintain an action subsequently with reference to same contentious issue. Such an obligation, is considered as an *obligatio naturalis*[26], because no action is granted for this kind of obligation (D. 1, 5, 25)[27].

According to Gaius 4, 107; if however a personal action is based on a statement that has been brought by the *formula* relating to the claims under the civil law, an action can not subsequently be maintained with reference to the same matter by operation of law and for this reason an exception will be superfluous. If however, a real action or a equitable personal action based upon fact, should be brought, proceedings may nevertheless subsequently instituted, by operation of law, and based on this account an exception on the ground that the question has already been decided, or that issue has been joined, will be necessary[28].

Praetor turns definite judgement to account by himself spontaneously, that is *ipso iure* if the action fulfil these conditions; First of all, the action must be an action founded upon law. Secondly, it must be a personal action. And lastly, the *formula* of this action must be in form of *in ius concepta*.

---

condemn the said freedman to pay to the said patron the sum of ten thousand sesterces. If the case should not be proved, discharge him. The other *formula*s mentioned in the Edith with reference to the summoning on the parties into court, refer to matters of fact; as for instance, against a person who, having been summoned into court, neither appeared nor appointed anyone to defend him; and also against one who rescued by force a party who was summoned to appear and in conclusion innumerable other *formula*s of this description are set forth in the register of the *praetor*. Gai. 4, 47; In some instances, however the *praetor* permits *formula*s having reference to either law or fact to be employed; for example in actions deposit and loan for use. The following *formula* is one of law."Let So-and So be the judge. Whereas Aulus Agerius deposited a silver table with Numerius Negidius, for which this action is brought, whatever Numerius Negidius is obliged to pay to, or do for Aulus Agerius in good faith, on this account, do you judge, condemn Numerius Negidius to pay to, or do for Aulus Agerius, unless he makes restitution; and if the case should not be proved, let him be discharged. The following *formula*s one of fact. Let so-and so be the judge. If it appears that Aulus Agerius deposited a silver table with Numerius Negidius and through the fraud of the said Numerius Negidius, the said table has not been restored to the said Aulus Agerius, do you judge condemn Numerius Negidius to pay to Aulus Agerius a sum money equal to the value of the property and if the case is not proved, let him be discharged. Similar formulas are employed in an action of loan for use. Zulueta**,** p. 195.

[22] Gai. 4, 104; Actions founded upon law (*iudicia legitima*), are those which are brought in the City of Rome or within the first mile-stone from that city, between Roman citizens before a single judge. Those brought under the *Lex Iulia Iudiciaria* expire after the lapse of a year and six months, unless they have been previously decided; and this is the reason why it is commonly stated that under the *Lex Iulia* a case dies after a year and six months have elapsed. Umur, (Dictionary), p. 95;

[23] Pugliese, G.; Il Processo Civile Romano, Il Processo Formularae, V. II, Milan, 1963, p. 275 (Processo); These arrangements are settled by *Lex Iulia Iudiciaria*.

[24] Gai. 4, 105; Actions derived from the authority of a magistrate (*iudicia imperia continentia*) are those brought before several judges, or before a single judge, if either latter or one of the litigants is an alien. These actions belong to the same class as those which are brought beyond the first mile-stone from the City of Rome; whether the parties litigant are Roman citienzs or aliens. Cases of this kind are said to be derived from the authority of a magistrate, for this reason that the proceedings are only valid as long as he who directed them to be instituted retains his office. Umur, (Dictionary), p. 96;

[25] Zulueta, p. 277; This distinction is not the same as that between a civil and a praetorian action. Hence, a praetorian action would be *iudicia legitima* if it fulfils the conditions, and a civil action would be *iudicia imperio continentia* if it fulfils the conditions.

[26] Longo, G.; Ricerche sull'"Obligatio Naturalis", Milan, 1962, p. 19 sp.; For *obligatio naturalis*, no action is laid, but they can be made effective in other ways. There are some kinds of this obligation and each kind shows its effects to the different extent.

[27] Pugliese, p. 413 (Actio); Tahiroglu/Erdogmus, (Matters), p. 196.

[28] "Gai. 4, 107; *Si vero legitimo iudicio in personam actum sit ea formula, quae iuris civilis habet intentionem, postea ipso iure de eadem re agi non potest, et ob id exceptio supervacua est; si vero vel in rem vel in factum actum fuerit, ipso iure nihilo minus postea agi potest, et ob id exceptio necessaria est rei iudicatae vel in iudicium deductae*".

If the plaintiff invokes an action with the same reference to the same contentious issue before the court once again because he was cast in the first action or the first action has expired despite that no decision is given, *praetor* rejects this demand (*denegatio actionis*). *Praetor,* gives this decision spontaneously[29].

In personal actions which derived from the authority of a magistrate and have *formula*s with *in factum concepta* and also in real actions, *praetor* does not turn definite judgement to account by himself spontaneously. *Bis de eadem re ne sit actio* principle, can be taken into account during the action by an exception called *exceptio rei iudicatae vel in iudicium deductae –exceptio* about definite judgement or concluded joinder of issue[30]. To use this *exceptio,* only the conclusion of joinder of issue of the action is sufficient[31]. The obligation which is the subject of the action is accepted to be removed by the conclusion of joinder of issue of the first action[32].

In the formulary system of Roman procedural law, to apply *bis de eadem re ne sit actio* principle, the first action and the subsequent action must be the same. This is called *eadem res*[33]. According to Roman law *eadem res* can only exist, if the subject of the demand (*idem corpus*), the legal characteristics of the demand (*idem ius*), the legal causes of the demand (*eadem causa petendi*) and the parties of the demand (*eadem condicio personarum*) are same in the first and the subsequent actions[34]. Sameness of the parties forms the subjective similarity; Sameness of the subject forms the objective similarity. Objective and subjective similarities must be together at the same time so that *eadem res* exists and exception of definite

[29] Arangio-Ruiz, V.: Storia del Diritto Romano, 7. Ed. con Note Aggiunte, Naples, 1957, p. 163; Betti, E.; Istitutizione di Diritto Romano, V. I, Parte Generale, Padova, 1960, p. 601 sq.; Tahiroglu/ Erdogmus, (Procedure), p. 28; Wenger, p. 177-8.

[30] "Gai, 3, 181; *Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim, quia inutiliter intendo. Dari mihi oportere, quia litis contestatione dari oportere desiit, aliter atque si imperio continenti iudicio egerim; tunc enim nihilo minus obligatio durat, et ideo ipse iure postea agere possum, sed debeo per exceptionem rei iudicatae vel in iudicium deductae summoveri. quae autem legitima sint iudicia et quae imperio continentia sequenti commentario referemus*; Hence if I bring a legally authorized action for the collection of a debt, I can not afterwards, under strict rule of law, sue a second time, as the statement that the defendant is required to pay me something will be without effect; for the reason that by joinder of issue, he ceases to be obliged to make payment. The case is different if in the first place I brought an action derived from the authority of a magistrate, for then the obligation will still continue to exist and therefore, by the strict rule of law, I can bring another action; but I can be barred by an exception grounded on a previous judgement, or on a former joinder of issue. We shall explain in a subsequent Commentary what actions are authorized by law and what are derived from the authority of a magistrate.
Wenger, p. 179; Buckland, W. W.; A Text-Book of Roman law from Augustus to Justinian, Cambridge, 1932, p. 697; *Excepti rei iudicatae*, not only merely bars the same action between the same parties, but also enforces the principle, as between parties bound by the judgement.

[31] Roby, p. 262; Tahiroglu/ Erdogmus, (Procedure), p. 28;.

[32] Tahiroglu/ Erdogmus, (Matters), p. 195; Wenger, p. 120; D. 44, 2, 12, Paul. 70 ad ed.: *Cum quaeritur, haecexceptio noceat nec ne, Inspiciendum est, an idem corpus sit*; D. 44, 2, 3, Ulp. 75 ad ed.: *Iulianus libro tertio digestorum respondit exceptionem rei iudicatae obstare, quotiens eadem quaestio inter easdem personas revocatur.* The plaintiff can be barred by the exception when he brings the same contentious issue before the court, suing the same person. These texts show that, when *eadem res* exists, *bis de eadem re ne sit actio* principle is applied and in such a situation, the second action can be hindered by an *exceptio rei iudicatae.* But, of course the type of action must be kept in mind. Some other Roman law texts mentioning this topic can be given as example; D. 44, 2, 14 pr., Paul. 70 ad ed.: *et an eadem causa petendi et eadem condicio Personarum: quae nisi omnia concurrunt, alia res est. Idem corpus in hac ecte optione non utique omni pristina qualitate vel quantitate servata, nulla diectione deminutioneve facta, sed pinguius pro communi utilitate accipitur.*
D. 44, 2, 27, Ner. 7 membr.: *Cum de hoc, an eadem res est, quaeritur, haec spectanda sunt personae, id ipsum de quo agitur, causa proxima actionis. Nec iam interest, qua ratione, quis eam causam actionis competere sibi existimasset, perinde ac si quis, posteaquam contra eum iudicatum esset, nova instrumenta causae repperisset.*

[33] Berger, A.; Encyclopedic Dictionary of Roman Law, Philadelphia, 1968, p. 132; *Eadem res* means the same object. This expression is used to explain *bis de eadem re ne sit actio* principle. It rests on the notion that an issue once decided must not be raised again.

[34] D. 44, 2, 27; D. 44, 2, 12-13.

judgement is put forward. Otherwise, *res iudicata alii non nocet* principle which means that judgement of the court must not harm people who are not the party of the action, is put into practice[35].

Sameness of the parties (Subjective similarity);

As a rule, the judgement given at the end of the action, binds and shows its effects only on the parties of the action (*res iudicata ius facit inter partes*). For example, only the plaintiff can not bring an action of replevin (*rei vindicatio*) once again, if he is identified as not owing the land. Of course, the sentence of the court also binds the successors of the plaintiff and defendant[36]. In fact, sameness of the parties is considered as a legal position than an actual position. For this reason, the exception of definite judgement can be brought forward to the successors of the plaintiff and defendant, but it does not affect predecessors[37]. But a person who brings an action as a trustee, does not encourter any legal obstacles if he brings the same action again, but this time as a plaintiff[38].

Sameness of the subject (Objective similarity); The contentious issue must not be the subject of another action. That is, every *intentio* section of an action's *formula* must be different from each other. Otherwise, *bis de eadem re ne sit actio* principle is violated because, the subsequent action can not be brought before the court with reference to same contentious issue[39]. When two or more actions have different *formula*s[40] but they head for the same aim, they may be considered as same actions[41], if they fulfil other necessary conditions.

In real actions, the reason of the action has great importance. In this kind of actions, the plaintiff does not have to prove how he obtained the right[42]. If the plaintiff brings an action, claiming that he ownes the subject of the action becuse it is transferred to him by *tradito* and he loses the action of replein (*rei vindicatio*), because he can not prove his claims, then it becomes impossible for him to bring another action of replein, this time claiming that he ownes the contentious issue by acquisition of quiritary ownership over a corporeal thing (*usucapio*)[43]. The defendant has the right to bring forward the exception of definite judgment in this second action[44]. But in the progressive period of Roman law, this proceeding is changed. It is still accepted that real actions bar all future real actions on possible reasons of the claim.

[35] Colquhoun, P., Summary of the Roman Civil Law, London, 1849, p. 595; Marzo, di S.; Roma Hukuku, 6. Ed., Transl. by Z. Umur, Istanbul, 1961, p. 127, 132, 147; Tahiroglu/Erdogmus, (Matters), p. 196.
[36] D. 44, 2, 4; D. 44, 2, 28.
[37] Buckland, p. 699; Sameness of the parties means juristic identity.
[38] D. 44, 2, 4, 9 ; Tahiroglu/ Erdogmus, (Matters), p. 196.
[39] Tahiroglu/ Erdoğmuş, (Matters), p. 197; Wenger, p. 190.
[40] Buckland, p. 697; For instance an action *in factum* on a deposit contract bars an action *in ius* on the same facts. This rule is also valid for different contracts.
[41] D. 44, 2, 3.
[42] Pugliese, (Processo), p. 287; As an example, in an action of replein, it is sufficient for the plaintiff to prove that he ownes the contentious thing.
[43] Buckland, p. 241 sq.; *Usucapio* can be defined shortly as acquisition of *dominium* by possession for a certain time.
[44] Provera, p. 68; This solution which is used in real actions is considered to belong to the Roman classical law period. In classical law period, if the reason of the action is shown in the *intentio* phase of the real action's *formula*, the plaintiff, after being cast in this real action, does not have the right to bring the same real action. And this result does not change, even if he bases on a different reason, in second action. There can be found some texts in Roman law sources, which defend the opposite opinion. But they are claimed as *interpolated.* Buckland, p. 696; In real actions the bar is only praetorian. We can say that in these actions in the *legis actio* procedure, no bar exists, because *lex Aebutia* does not allow the *formula* in real actions. But this conclusion is not generally accepted by Roman jurists. As in *legis actio* procedure, joinder of issue is at its beginging and the baring effect can not bear any relation to novatory effect. This is due to the *bis de eadem re ne sit actio* principle.

But an exception is accepted to this rule and that is if the claim is expressly limited to a specific basis and if the reason of the action is clearly shown in the *formula* of the action[45].

However in personal actions, a different obligation arises from each relation. For example, the plaintiff brings an action claiming an amount of money, basing on a sale contract and he loses this action, then he can demand the same amount of money, by bringing a new action basing on a loan agreement this time, without encourtering any legal obstacles[46]. So the system of *ipso iure* destruction is used only where the notion of *novatio* is possible that is in personal actions with *formulae in ius*[47].

One of the simplest example that can be given to explain the scope of *bis de eadem re ne sit actio* principle is like this; "the plaintiff, brings an action against the defendant. After conclusion of joinder of issue phase of the *formula*, it becomes impossible for the plaintiff, to bring the same action once again on the same contentious issue either by *ipso iure*, or by an *exceptio rei iudicata vel in iudicium deductae*[48] which is brought forward by the defendant. But the scope of *bis de eadem re ne sit actio* principle should not to be considered too narrow as in the example given above. Otherwise it would be impossible for this principle to reach its aim. The concept of "same action", must be considered on a large scale. In some cases, *bis de eadem re ne sit actio* principle becomes meaningless, allowing to bring another action, serving the same purpose with the first action. For this reason, if more than one action exist targetting the same purpose or if more than one plaintiff can bring an action against one defendant, *bis de eadem re ne sit actio* principle should be applied[49].

Bis de eadem re ne sit actio principle is not applied to a plaintiff in cases where he brings an action of replein against a defendant, against whom, he brought forward an *interdictum*[50] or a *condictio*[51] about the same contentious issue. That is because, *interdictum* is about possession and *rei vindicatio* is about ownership[52]. In these cases it can not be accepted that the same demand is claimed. But, *bis de eadem re ne sit actio* principle is accepted in cases where *actio redhibitoria*[53] and *actio quanti minoris*[54] are brought

[45] D. 44, 2, 11, 2, 14; D. 44, 2, 14, 2.

[46] Burdese, A.; Manuale di Dirirtto Privato Romano, Turin 1964, p.115 sq; In Roman law of procedure, no general action exists. This means that, every right must be protected by a different action. As, it is possible that more than one personal right can exist on the disputed thing, bringing different actions before the court about different personal rights, is not considered in the extent of the *bis de eadem re ne sit actio* principle. Because, diffferent personal rights arising from different legal relations, become subject to different actions. For instance, after an action related with the sale contract of a disputed thing, an action reletad with loan for use agreement of the same disputed thing can be brought before the court without any legal obstacle.

[47] Buckland, s. 695-6.

[48] Gai. 4, 106; Where an action is brought under the authority of a magistrate, whether it is real or personal, or whether it is based upon a formula of fact or a statement of law, it is not by operation of law a bar to subsequent proceedings having reference to the same matter and therefore it is necessary to plead an exception on the ground that a decision has already been rendered, or that issue has been joined in the case.

[49] Goudsmit, J. E.; The Pandects; The Treatise on the Roman Law and upon its Connections with Modern Legislation, Transl. by R. D. Tracy Gould, London, 1873, p. 135; Pugliese, p. 426.

[50] Schulz, p. 444- 445; Umur, Z.; Roma Esya Hukuku, Istanbul, 1985- Roman Law of Property, p. 404 (Property); Karadeniz-Celebican, O.; Roma Esya Hukuku, Ankara, 2000- Roman Law of Property, p. 116 sq.; Means to be of use to protect possession are called interdicts (*interdictum*). Interdicts are divided into two groups as, interdicts protecting the continuous of the possession and interdicts to be use of obtaining the lost possession again.

[51] Provera, p. 24; Tahiroglu / Erdogmus, (Matters), p. 197, D. 44, 2, 31.

[52] Arangio- Ruiz, p. 163; (D. 44, 2, 14, 3; D. 41, 2, 12, 1).

[53] Umur, (Dictionary), p. 12; The salesman is responsible for the physical faults only in horse and slave sales in Roman classical law period and in all kinds of goods sales in Justinian period. *Actio redhibitoria* is an action granted to the purchaser by *aedilis curulis*, to bring against the salesman to compensate the damages caused by the physical fault in the thing. This action is an action in the form of *arbitraria* and it can be brought before the court in six months. According to this action, salesman is held responsible for the faults that he is not aware of.

on the same contentious issue. The plaintiff brings an *actio redhibitoria* about a fault on the good he bought, but then he is cast in the action. It will be against *bis de eadem re ne sit actio* principle, if he wants to bring an *actio quanti minoris* this time, against the same defendant about the same fault on the same good. Because, the subject of the first action (*actio redhibitoria*) and the second action (*actio quanti minoris*) are the same[55]. But, *bis de eadem re ne sit actio* principle is not applied to cases where, after being cast in an *actio rei persecutoriae* the plaintiff brings an *actio poenales* against the same defendant about the same subject. Even though in Roman law, like the rest of the criminal actions and compensation actions, *actio rei persecutoriae* and *actio poenales* aim the same purpose, they are not accepted as "same actions". Because the characteristics of both these actions are different. If the plaintiff, after being cast in the *actio furti*, brings a *condictio furtiva* against the same defendant about the same subject, or the contrary, he does not encounter any legal obstacles. In the same way, the plaintiff's bringing a *actio furti* after *rei vindicatio* which he has lost, is not against *bis de eadem re ne sit actio* principle[56].

When all these explanations are taken into considerations, it would be hard to say that *eadem res* can only be determined when the *litis contestatio* phase of the action is completed. However, it would be more accurate to say *eadem res* is determined by also considering the definite judgement given by the court[57]. As we said before, joinder of issue phase of the action plays an important role especially in Roman classical law period. But surely, this does not mean that the judgements given by courts are ineffective. In fact, definite judgement is so effective that existence of second judgement about one subject, not only harm the interests of the parties of the action but also the public benefit. This perspective in late Roman law forms the basis of the concept of definite judgement of current times[58].

In formulary procedure, appeal is not known. The decision given by the judge at the end of the action is definite and considered as the fact. But even the best judges can make mistakes. If a judge, makes a mistake on the basis of formulary procedure, the judgement is considered as not existing. For example, if the plaintiff or the defendant does not have the capability of being a side in an action, because he is mentally ill or because of some other reasons, or the judgement is given without listening one side, it is accepted that no judgement exists[59]. In such cases, the plaintiff can bring an action once again without encountering any legal obstacles, because there is no definite judgement about this contentious issue. If the first action ends in favour of the plaintiff, the defendant can claim that no judgement exists in an execution action which has brought by the plaintiff. But in Roman law and especially in formulary

[54] Berger, p. 67; *Actio quanti minoris*, is an action brought before the court for reduction of the payment. This action is also called as *actio aestimatoria*. The salesman is responsible for the physical faults only in horse and slave sales in Roman classical law period and in all kinds of goods in Justinian period. *Actio quanti minoris* is an action granted to the purchaser by *aedilis curulis*, to bring against the salesman for reduction of the payment because of the damages caused by the physical faults in the thing. This action can be brought before the court in one year and salesman is held responsible for the faults that he is not aware of.

[55] Provera, p. 25; D. 44, 2, 25, 1.

[56] Sohm, R.; The Institutes: A Textbook of the History and System of Roman Private Law, Transl. by J. C. Ledlie, 3. Ed., New Jersey, 1970, p. 445; In actions related closely to public order like *status* actions, the judgement given by the court, binds everybody (D. 1, 5, 25).

[57] Provera, p. 25.

[58] Pugliese, (Action), p. 427; Tahiroglu/ Erdogmus, (Procedure), p. 18 sq.; In formulary procedure, like *legis actiones* procedure, slaves do not have a capability of being side in actions. But some changes are occurred in the *status* of *filius familias*. They can be put in the position of defendant for the legal relation that they have taken in part. Women have a limited capability of being a side in actions about their own matters. In formulary procedure, foreigners gained the capability of being side in actions. Also in this procedure, it is necessary for people who do not have the capability of being side in actions to be represented, in actions related with them.

[59] Wenger, p. 211; (D. 49, 1, 19; C. 1, 21, 3; C. 2, 10, 3; C. 7, 52, 2).

system, serious sanctions are put into practice to the one, who claims that the definite judgement does not exist and turned out to be in the wrong[60].

CONCLUSION

In this article it is emphasized that some important principles and institutions of procedural law of current law systems are based on the Roman procedural law. *Bis de eadem re ne sit actio* is one of the important principles used in both *Ordo iudiciorum privatorum* and *Cognitio extra ordinem* procedures and also it plays a considerable role in the current law systems. This principle proves that there can only be one definite judgement on a controversial issue. Otherwise, justice can not be found in a community and nobody relies on judgements given by courts. This would cause social chaos and people would choose to protect their rights by themselves. But in an equitable community, the decisions given by the court is considered as trusty and people know that the decision would not be changed in another time. Also, this confidence to the judgement, prevents people to bring the dispute more than once to the court and provides reliance to the State. Hence, a plaintiff would not be disturbed by summoning to the court frequently. So it can be said that by accepting *bis de eadem re ne sit actio* pirinciple and other relevant regulations and arrengements, Roman law tries to constitute an equitable comunity.

BIBLIOGRAPHY

Arangio-Ruiz, V.; Storia del Diritto Romano, 7. Ed. con Note Aggiunte, Naples, 1957.
Berger, A.; Encyclopedic Dictionary of Roman Law, Philadelphia, 1968.
Betti, E.; Istituzioni di Diritto Romano, V. I, Parte Generale Padova, 1960.
Buckland, W. W.; A Text-Book of Roman Law from Augustus to Justinian, Cambridge, 1932.
Burdese, A.; Manuale di Diritto Privato Romano, Turin, 1964.
Colquhoun, P.; Summary of the Roman Civil Law, London, 1849.
Di Marzo, S.; Roma Hukuku, 6.Ed, Transl. by Z. Umur, Istanbul, 1961- Roman Law.
De Zulueta**,** F.; The Institutes of Gaius, Part II, Oxford, 1953.
Frezza, P.; Le Garanzie delle Obbligazioni, Le Garanzie Personali, V. I, Padova, 1963.
Goudsmit, J. E.; The Pandects; A Treatise on the Roman Law and upon its Connections with Modern Legislation, Transl. by, R. D. Tracy Gould, London, 1873.
Hunter, W. A.; Introduction to Roman Law, New Ed. by A. F. Murison London, 1921.
Karadeniz-Celebican, O.; Roma Esya Hukuku, Ankara, 2000- Law of Property.
Longo, G.; Richerche Sull' "Obligatio Naturalis", Milan, 1962.
Marrone, M.; "L'Efficacia Pregiudiziale della Sentenza nel Processo Civile, Annali Palermo, V. 24 1955.
Muirhead, J.; Historical Introduction to the Private Law of Roman, 3. Ed., Rev. and Ed. By H. Goudy, London, 1916.
Provera, G.; La Pluris Petitio nel Processo Romano I, La Procedura Formulare, Turin, 1958.
Pugliese, G.; "L'Actio e la Litis Contestatio nella Storia del Processo Romano", Studi in Onore di Enrico Tullio Liebman, V. 1, 1979.
Pugliese, G.; Il Processo Civile Romano, Il Processo Formularae, V. II, Milan, 1963.
Roby, H. J.; Roman Private Law in the Times of Cicero and of Antonines, V. I, Cambridge, 1902.
Schulz, F.; Classical Roman Law, Oxford, 1951.
Sohm, R.; The Institutes: A Textbook of the History and System of Roman Private Law, Transl. by J. C. Ledlie, 3. Ed., New Jersey, 1970.
Stephenson, A.; A History of Roman Law with a Commentary on the Institutes of Gaius and Justinian, Colorado, 1992.
Tahiroglu, B./ Erdogmus, B.; Roma Hukuku Meseleleri, 2. Ed., Istanbul, 2001- Some Matters in Roman Law.
Tahiroglu, B./ Erdogmus, B.; Roma Usul Hukuku, Istanbul, 1994- Roman Procedural Law.
Thomas, J. A. C.; Textbook of Roman Law, Amsterdam, 1976.
Umur, Z.; Roma Hukuku Lugatı, Istanbul, 1985- Roman Law Dictionary.
Umur, Z.; Roma Esya Hukuku, Istanbul, 1985- Roman Law of Property.
Wenger, L.; Institutes of the Roman Law of Civil Procedure, Transl. by H. O. Fisk, New York, 1949.

[60] Hunter, W. A.; Introduction to Roman Law, New Ed. by A. F. Murison, London, 1921, p. 1011.

WANTED: BOARD MEMBERS FOR THE FOLLOWING PUBLICATIONS

Free World Publishing is currently expanding its activities and is looking for members of the Selection Boards to ensure academic quality for the selection of articles. Free World Publishing aims at bringing together an international team for three separate boards, according to its new publications. The Boards would pertain to the : Free Law Journal, the War and Peace Journal, as well as the World History Journal.

Membership of the Board is a non-paying title. Selection for the Board is honorific and a manner by which to expand both one's knowledge and contacts, as well as building one's reputation in academia. For these reasons, we aim at selecting people of the highest caliber.

Members of the Board will be called upon to read selected submitted articles for valuation of its potential for suitable publication and give a vote whether or not this article can be published.

Members of the Board will also be considered first for juridical translation and edition services from Free World Publishing. These will be separate and paying employment on precise and defined contracts related to precise work.

PREREQUISITES ARE AS FOLLOW :

Free Law Journal The Member of the Board must :
1) Be proficient in English - knowledge of other languages such as French, Bosnian, Bulgarian,
Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portugese (either Brazilian and European), Romanian, Russian, Serb (either Latin and Cyrillic), Slovenian and Spanish are definite advantages;

2) Hold, at a minimum, a recognized law degree;

3) Hold, at a minimum, a Master's Degree in Law (LL.M.) or the equivalent. By definition and comparison, a Doctor's Degree of Law (LL.D. or Ph.D. in Law) are recognized as combining the acquired knowledge of an LL.M. as well as definitive recognition of one's juridical skills.
The equivalence of this degree requirement can be work experience. For example, a practitioner
of law having worked for two years at the European Court of Human Rights, the International Court of Justice or the International Criminal Court would be dispensed of this requirement on the basis of work experience.To apply, please send your resume and a list of your publications, at: FLJ@FWPublishing.net.

War and Peace Journal The Member of the Board must :
1) Be proficient in English - knowledge of other languages such as French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portugese (either Brazilian and European), Romanian, Russian, Serb (either Latin and Cyrillic), Slovenian and Spanish are definite advantages;

2) Hold, at a minimum, a recognized arts degree; this includes all the range of arts and humanities and social sciences degrees.

3) Hold, at a minimum, a Master's Degree or the equivalent; the Master's Degree must be in Arts, Peace Studies, Strategic Studies, Military Studies, International Relations, Political Sciences, Diplomacy or related fields of studies. By definition and comparison, a Doctor's Degree (Ph.D.) is recognized as combining the acquired knowledge of an LL.M. as well as definitive recognition of one's skills. The equivalence of this degree requirement can be work experience. For example, a practitioner having worked for two years on a mission such as UNPROFOR, SFOR, KFOR, EUFOR, UNMBIH, Pearson Peacekeeping Center or other such establishments related to peace studies and peacekeeping would be dispensed of this requirement on the basis of work experience. To apply, please send your resume, including a list of your publications, at: WPJ@FWPublishing.net.

World History Journal The Member of the Board must :
1) Be proficient in English - knowledge of other languages such as French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portugese (either Brazilian and

European), Romanian, Russian, Serb (either Latin and Cyrillic), Slovenian and Spanish are definite advantages;

2) Hold, at a minimum, a recognized arts degree; this includes all the range of arts and humanities and social sciences degrees.

3) Hold, at a minimum, a Master's Degree or the equivalent; the Master's Degree must be in Arts, History, War Studies, Sociology, Anthropology, Paleontology, Linguistics, Literature or related fields of studies. By definition and comparison, a Doctor's Degree (Ph.D.) is recognized as combining the acquired knowledge of an LL.M. as well as definitive recognition of one's skills. The equivalence of this degree requirement can be work experience. For example, a practitioner having worked for two years as an historian in the Musée du Louvre or other such establishments related to history, or a field archaeologist having worked on extended projects abroad would be dispensed of this requirement on the basis of work experience. To apply, please send your resume, including a list of your publications, at: WHJ@FWPublishing.net.

THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL

by

LOUIS-PHILIPPE F. ROUILLARD*

INTRODUCTION

The current travails of the American and Coalition forces in Afghanistan and Iraq have been much debated recently as to their legitimacy. In the same manner, the capture and detention of persons dubbed "enemy combatant", a term applying only to American citizens as determined by the American Supreme Court[1], has been decried for their illegality. As time takes us away from the trauma of September 11, 2001 and gives us time for pause, the questions relating to the causes and processes of two international conflict waged simultaneously by American and Coalition forces will be further explored and deemed for their worth in light of new elements. Whether good or bad, conclusions will be drawn and history will judge.

Nonetheless, even through bad causes and bad processes some good may result. With regards to the Iraq war, and regardless of the current morass in which the occupation forces are bugged down, the capture of Saddam Hussein has had the effect of liberating a nation of peoples. As for the legal world, it has provided yet another case for an international tribunal.

The *Coalition Provisional Authority* has issued on December 10, 2003, its *Statute of the Iraqi Special Tribunal*. An analysis of its content is therefore necessary to insure that while punishment is hopefully afforded to the guilty, the preservation of the fundamental guarantees of human rights are preserved in their clearest and purest form. Such an analysis is necessary to insure that the basic judicial guarantees are granted to even such a man as Saddam Hussein, but also to determine the evolution of *ad hoc* tribunals, to denote whether the international community has yet learn from its past mistakes.

Therefore, this essay will analyse the Statute in the light of those of three preceding tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY), that of the Rwanda (ICTR), and the Special Court for Sierra Leone.

Legitimacy of the *ad hoc* tribunals

Before attempting to denote the progress or regression made by the *Statute of the Iraqi Special Tribunal*, one needs to address a very pointed question about the legitimacy of international and national *ad hoc* tribunals to preside over crimes against humanity, war crimes, the crime of genocide, the crime of aggression, as well as gross and severe human rights violations.

One of the charges brought against such tribunals is that they are illegitimate and ought not to be recognised. Charges of illegitimacy against such tribunals are not new. The *Peace Treaty of Versailles*

* Editor-in-Chief, Free World Publishing.

[1] *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1867) and *Ex Parte Quirin*, 317 U.S. (1942). The 'illegal combatant' status is an American juridical term designating a particular category of U.S. citizens. It dates from the American Civil War and was further taken again during the early days of the Second World War. Both reflect a highly politicize categorisation of what constitute an American national captured and indicted for treasonous activities. This does not apply to other nationals.

established a special tribunal to indict Kaiser William II through its Article 227. Immediately, it was denounced by many international jurists as victor's justice. Yet, these charges are difficult to substantiate in view of Article 228 of the *Peace Treaty*, in which the German Government recognised the authority of such tribunal and in view of Article 229 which statutes upon the legitimacy of multinational tribunal for multinational crimes[2]. Of course, since the former Emperor was never extradited from the Netherlands, the question remained academic for lack of a trial. Nonetheless, recognition of the principles of international morality and the sanctity of treaties inferred a notion that such breaches of international peace and security could be prosecuted. And even the fact that Germany signed the *Versailles Treaty* somewhat under the gun does not take away the fact that recognition was willed by the victors and acquiesced to by the vanquished.

The same charges of a victors' justice were made against the *International Military Tribunal* of Nuremberg at the end of the Second World War. The legitimacy of the *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*[3], was decried as *ex-post facto* law. Yet, warnings of such measures had been clearly, publicly and officially been given to the German authorities in a minimum of four instances since 1942, when word of atrocities began to filter out of the European continent and into the British and American press.

The first of such instance was the *Resolution on German War Crimes by Representatives of Nine Occupied Countries*[4] signed on January 12, 1942 in London. In this resolution, reference to the accepted principles of international law contained in the 1907 *Hague Conventions* are stated as the legal basis of indictment being sought, judgement being passed and sentence being carried out.
President Roosevelt released a statement on August 21, 1942 in which he restated these notions that acts of violence against civilian populations are "at variance with the accepted ideas concerning acts of war

[2] *Peace Treaty of Versailles*, 28 June 1919, [hereafter *Versailles Treaty*] at Article 227 : "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence (…)"; at Article 228: "The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies."; and Article 229: "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel."

[3] *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, 3 *Official Gazette Control Council for Germany* 50-55 (1946), http://www1.umn.edu/humanrts/instree/ccno10.htm, [hereafter *Control Council Law No. 10*] at Article II: "1. Each of the following acts is recognized as a crime: a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
b) War Crimes. Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated (…)"

[4] *Resolution on German War Crimes by Representatives of Nine Occupied Countries*, London, January 12, 1942, at http://www.ibiblio.org/pha/policy/1942/420112a.html.

and political offences as these are understood by civilised nations"[5]. This further restated the President's own public declaration, pre-dating the United States entrance in the war on October 25, 1941 in which he warns of fearful retribution[6]. It is again once more taken publicly with the President's declaration that it is "the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals"[7].

This is finally confirmed as a joint understanding of the major Allies in the *Statement on Atrocities* contained in the *Joint Four-Nation Declaration* of the *Moscow Conference* held in October 1943[8].

As such, the resulting *Charter of the International Military Tribunal* can hardly be said not to have been settled upon the firm foundation of treaty law, as understood in the concepts of the *Hague Conventions* of 1907, themselves resting upon the *St-Petersburg Declaration* of 1868. Nor could the intentions of prosecution of the crimes deemed to be unknown to the German government. The authority of the court being further recognised in the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* by the United Nations in whose name the four signatories act, there can little doubt of its legitimacy[9].

In the same manner, the *Charter of the International Military Tribunal for the Far East* was a direct result of the *Cairo Declaration*[10] of December 1, 1943 and of the *Postdam Proclamation* of July 26, 1943[11]. This was recognised fully by the Japanese acceptance of the *Postdam Proclamation* in their surrender of

[5] *President Franklin D. Roosevelt's Statement on Punishment of War Crimes*, Washington, White House News Releases, August 21, 1942, at http://www.ibiblio.org/pha/policy/1942/420821a.html.

[6] *Franklin D. Roosevelt on the Execution of Hostages by the Nazis*, *Department of State Bulletin*, October 25, 1941 at http://www.ibiblio.org/pha/policy/1941/411025a.html.

[7] *President Franklin D. Roosevelt's Statement on Punishment of War Crimes*, Washington, White House News Release, October 7, 1942, at http://www.ibiblio.org/pha/policy/1942/421007a.html.

[8] *Statement on Atrocities of the Joint Four-Nation Declaration*, Moscow Conference, October 1943, at http://www.ibiblio.org/pha/policy/1943/431000a.html, which states: "speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows: At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy. Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done."

[9] *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* [hereafter the *London Agreement*], August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280,

[10] *Cairo Conference*, November 1943 at http://www.ibiblio.org/pha/policy/1943/431201a.html.

[11] *The Postdam Proclamation, A Statement of Terms of Unconditional Surrender of Japan*, July 26, 1945, at paragraph 10: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion and of thought as well as respect for the fundamental human rights shall be established."

August 10, 1945[12]. Again, the legitimacy of the Allies to establish tribunals and to pass judgement upon war criminals cannot be denied on account of a lack of recognition.

In the interval between the end of the Second World War and the 1990's, there have been no real examples of *ad hoc* tribunals being formed in this manner under international jurisdiction. While many trials of former war criminals have taken place, all were done under national jurisdiction, even if deemed in accordance with international law. Cynics might say that this is because it took Europe another 45 years to get on with yet another war in which mass persecutions and the new terminology of ethnic cleansing needed to be created. Neither the Asian situations in Vietnam and Cambodia nor the juntas of South America could create the kind of support for international tribunals that the Balkan conflicts of Slovenia, Croatia and Bosnia created.

To prosecute persons indicted of war crimes, including grave breaches of the *Geneva Conventions of 1949* as well as violations of the laws and customs of war, crimes against humanity and genocide, the *International Criminal Tribunal for the Former Yougoslavia* (ICTY) was created by the Security Council through its *Resolution 827* adopted May 25, 1993[13]. Despite the claims of some nationalists and of some of the accused, such as the former President of the Serbian Republic and of the Yugoslav Federation, Slobodan Milosevic, the tribunal not only has recognition through the Security Council, but also has wide recognition amongst nations. Furthermore, it is based upon the two precedents of the *International Military Tribunals* of Nuremberg and Tokyo. Even if the relevance of the IMTs could still be opposed, the simple fact is that the international order created by the *Charter of the United Nations* recognises only its Security Council has the body with the authority vested to determine any threat to international peace and security and to maintain and restore international peace and security. It has the sole authority of deciding what measures shall be taken to maintain or restore them[14]. As such, the application of today's international body of law in undeniable and therefore the establishment and prosecution through an international tribunal is perfectly legitimate. The same can be said of the *International Criminal Tribunal for Rwanda* (ICTR)[15], and of the *Special Court for Sierra Leone* (SCSL)[16].

---

[12] *Offer of Surrender of the Japanese Government*, (1945) XIII (320) *Department of State Bulletin*, August 12, 1945 reproduced at http://www.ibiblio.org/pha/policy/1945/450729a.html#2 : "The Japanese Government is ready to accept the terms enumerated in the joint declaration which was issued at Potsdam on July 26th, 1945, by the heads of the Governments of the United States, Great Britain, and China, and later subscribed to by the Soviet Government, with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler." Furthermore, the principles of the IMTs have been recognised in *Affirmation of the Principles of International Law recognised by the Charter of the Nüremberg Tribunal*, Resolution 95 (I) of the United Nations General Assembly, 11 December 1946.

[13] *Statute of the International Criminal Tribuna for the Former Yugoslavial*, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993), as amended by S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th Meeting, U.N. Doc. S/RES/1166, 13 May 1998; S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg, U.N. Doc. S/RES/1329 (2000)of 30 November 2000,; S.C. Res. 1411, U.N. SCOR, 57th Sess., 4535th mtg., U.N. Doc. S/RES/1411 (2002), of 17 May 2002; S.C. Res. 1431,57th Sess., 4601st mtg, U.N.Doc. S/RES/1431 of 14 August 2002; and S.C. Res. 1481, 58th Sess., 4759th mtg, U.N. Doc. S/RES/1481 of 19 May 2003. All these resolutions deal with the recognition of the tribunal as it stands and establishes criteria for the election of permanent judges and the composition of the Chamber as well as officers of the court.

[14] *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, at Article 39.

[15] *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994* , [hereafter the *Statute of the International Tribunal for Rwanda*], adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

The interesting differences are that Yugoslavia's and Rwanda's tribunals have been created as the results of armed conflicts through the sole mechanism of the United Nations' Security Council while the Special Court for Sierra Leone was made through the means of the Security Council, but upon the instigations of Sierra Leone's government. This not only gives international legitimacy to the court, but it provides it with the national legitimacy it needs to face its own population and help the process of reconciliation.

This creates a precedent well supported by the international community, as requested in the *Lomé Peace Agreement* in its Articles XXXIII and XXXIV[17]. As a result the *Iraqi Special Tribunal* can be deemed as having solid grounds to claim its legitimacy since it is also rooted in both national and international law like the Sierra Leone Special Court.

Indeed, the *Coalition Provisional Authority* established through the Security Council's Resolution 1511 (2003) clearly recognises the sovereignty of Iraq as belonging to the State of Iraq and this provisional authority is constituted of the *Governing Council of Iraq* as the legitimate interim administrators of Iraq and therefore responsible for the exercise of all responsibilities, authorities and obligations under applicable international law[18]. This was in line with the mandate the Security Council provided the United Nations with in resolution 1483[19].

The *Coalition Provisional Authority*, or at the very least its *Governing Council*, did not waste time. On December 10, 2003, it issued the *Statute of the Iraqi Special Tribunal*[20]. It must be stated that the speed by which this document came about clearly indicates the insistence of the Iraqi members of the *Coalition Provisional Authority* to try former members of the Ba'ath regime in Iraq. Indeed, at the time prior to the capture of Saddam Hussein on December 13, 2003, there existed a definite question about who would have the privilege of trying former regime perpetrators and where such a trial would take place. While the United States have appeared non-committal, if somewhat bent upon doing this in America, the Iraqis have been very vocal in wanting to try those accused in Iraq. By producing a document permitting the trial to take place with the guarantees of justice, the *Governing Council* was in fact seizing the ground first to have the moral claim of trying under its terms. As the political manoeuvre of an occupied country's

[16] S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 of 14 August 2000 which rests upon the terms of the Truth and Reconciliation Commission in relation to human rights violations as contained in article XXVI of the *Lomé Peace Agreement*, Lomé, U.N. Doc. S/1999/777 of 7 July 1999, as well as upon a statement of the Special Representative of the Secretary-General next to his signature of the treaty that amnesties given to former belligerents did not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian laws.

[17] *Lomé Peace Agreement*, *ibid*., whereas Article XXXIII request international involvement and Article XXXIV names the UN as the AOU (now the African Union), ECOWAS, the Commonwealth of Nations and the Government of the Togolese Republic as guarantors of the implementation of this agreement.

[18] *Coalition Provisional Authority*, S.C. Res. 1511, 57th Sess., 4844 mtg., U.N. Doc S/RES/1511 of 16 October 2003.

[19] S.C. Res. 1483, 57th Sess., 4761st mtg., U.N. Doc. S/RES/1483 of 22 May 2003, at par. 9 recognising the legitimacy of an interim administration until a representative government can be established. S.C. 1483 affirms in its preamble the need for accountability for crimes and atrocities committed by the previous Iraqi regime and request the denial of safe haven to those members of the previous regime who are alleged to be responsible for crimes and atrocities and requests support actions to bring them to justice. It also points to promoting human rights at par. 8(g), while encouraging legal reforms at par. 8(i). This is further recognised by S.C. Res. 1500, 57th Sess., 4808th mtg., U.N. Doc. S/RES/1500 of 14 August 2003 which grants recognition of the *Governing Council*.

[20] *Coalition Provisional Authority*, *The Statute of the Iraqi Special Tribunal*, December 10, 2003, at http://www.cpa-iraq.org/human_rights/Statute.htm.

political body, this was brilliantly done. However, it does raise two questions as to its legitimacy: its roots in international law and the avoidance of the *International Criminal Court*[21].

The *Iraqi Special Tribunal* has been created by the Iraqi's own *Governing Council*, through the approval of the Coalition Provisional Authority Administrator's *Order 48 – Delegation of Authority Regarding an Iraqi Special Tribunal*[22]. This order bases the legitimacy of its delegation upon Security Council Resolutions 1483 (2003), 1500 (2003) and 1511 (2003). As such, it therefore recognises its authority under the mandate of the United Nations and under Iraqi law. Indeed, Section 2(1) of Order 48 takes pains to hold the *Governing Council* accountable for describing the elements that will apply to the crimes listed in the *Statute* and does promulgate in Section 2(2) the need for the tribunal to meet at least the international standards of justice.

Nonetheless, final authority for the Statute firmly rests in the *Coalition Provisional Authority* as the Administrator reserves himself the right to alter the statute or any elements of crimes or rules of procedure developed for the tribunal in Section 1(6), while the prevalence of the promulgations of the *CPA* is affirmed in Section 2(3) over any conflict of promulgations by the *Governing Council* and the *CPA* or judgements by the Tribunal. It is clear that the Coalition desires to firmly keep the situation within the confines of its authority. Hence the political manoeuvre in producing a *Statute* so fast and with clear indications of where the *Governing Council* wants to hold trials. Regardless of this intra-Coalition tug for jurisdiction, the legitimacy of the Tribunal is not in doubt.

Still, some will wonder about the choice of venue for such a trial, since the *International Criminal Court* was created in 2002, and therefore is available to conduct such trials. Indeed, the jurisdiction of the court extends well into all the crimes aimed in the *Statute of the Iraqi Special Tribunal*. However, it has two problems against it being applied. The first is the geopolitical nature of the *International Criminal Court*, as the United States continues to refuse to see it as having jurisdiction over its nationals. Using the ICC while leading the *Coalition Provisional Authority* would be most impolitic.

But, in legal terms it is Article 11 of the *Rome Statute* that bars it from being utilised. That is because Article 11 edicts a jurisdiction *rationae temporis* that limits it to crimes occurring solely after its coming into force. As the entry in force of the *Rome Statute* is July 1, 2002, and the crimes falling under the *Statute of the Iraqi Special Tribunal* have been giving a temporal jurisdiction applicable from July 17, 1968, there can be no question of using the *International Criminal Court*[23].

A final limitation is of course that while the United States has signed, but not ratified, the *Rome Statute*, Iraq has done neither, rendering it inapplicable to its citizens and thereby forcing the creation of an *ad hoc* venue for the trials[24].

---

[21] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), *entered into force* July 1, 2002, [hereafter *Rome Statute*].

[22] *Coalition Provisional Authority Order Number 48 - Delegation of Authority Regarding an Iraqi Special Tribunal*, CPA/ORD/ 9 Dec 2003/48, [hereafter *Order 48*] at http://www.cpa-iraq.org/regulations/#Orders, signed by the Administrator appointed by the Coalition, L. Paul Bremmer III.

[23] *Rome Statute*, *supra*, note 21 at Article 11 as opposed to the *Statute of the Iraqi Special Tribunal*, *supra*, note 20, at Article 1(b), which limits the crimes to "Iraqi nationals or residents accused of the crimes listed in articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003 in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq<s war against the Islamic Republic of Iran and the State of Kuwait."

[24] This can be ascertained at http://www.iccnow.org/countryinfo/worldsigsandratifications.html.

All this speaks not only of the legitimacy of the *Iraqi Special Tribunal* as an *ad hoc* court of justice, but also of the reason why it has been enacted as it currently stands. While modifications may be foreseen, the *personae*, *temporis* and *loci rationae* are certain to remain. The determination that remains to be done is therefore the content of the *Statute of the Iraqi Special Tribunal*.

Jurisdiction and Crimes

Since 1991, the *Iraqi Special Tribunal* is the fifth of the kind to be created. And there seem indeed to be lessons that have been drawn from the experiences of the preceding ones. Indeed, the progression in clarity and reach of the Statute seems to improve, although not everything has progressed toward securing the full measure of justice due to the victims in accordance with International Humanitarian Law and the International Bill of Human Rights[25].

The first attempt at creating such a court with the 1993 *Statute of the International Criminal Tribunal for the Former Yugoslavia* had fallen somewhat short of all the crimes that had been put to the feet of the accused. Indeed, this *Tribunal* was solely concerned with Serious Violations of International Humanitarian Law[26].

As such, it divided its competence over the notions of grave breaches of the *Geneva Conventions of 1949*[27], violations of the laws or customs of war, genocide and crimes against humanity. But even the formulation of these divisions seemed somewhat out of place. Instead of addressing the violations of humanitarian international law as a holistic legal regime, this *Statute* divided and compartmentalised what is inter-related. For example, its Article 2 joined as a cross-section the grave violations referred to in Articles 50 of the *First Geneva Convention*, 51 of the *Second Geneva Convention*, 130 of the *Third Geneva Convention* and 147 of the *Fourth Geneva Convention*. However, instead of speaking to the terms of the Geneva Conventions, it merged these documents to read "a prisoner of war or a civilian" when referring to grave breaches. As a result, it excluded some of the protected persons referred to in Article 4 of the *Fourth Geneva Convention*[28]. This oversight may seem benign, but it clearly excludes medical and

[25] Recognized as being the *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) , *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976. , *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

[26] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra*, note 13, at Article 1.

[27] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* , 75 U.N.T.S. 31, entered into force Oct. 21, 1950 [hereafter the *First Geneva Convention*], *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85, entered into force Oct. 21, 1950 [hereafter the *Second Geneva Convention*], *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 [hereafter the *Third Geneva Convention*], and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 [hereafter the *Fourth Geneva Convention*].

[28] *Fourth Geneva Convention*, *ibid*., Article 2: "Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the

religious personnel from the application of the *Statute* when Article 4(A) and (C) of the *Third Geneva Convention* is interpreted in the light of its Article 33[29], since it does not associate the status of prisoners of war to these persons. Nor are they considered civilians, although they are protected persons in the sense of the *Fourth Geneva Convention*. In wars like those of the Balkans, resting on cultural and religious differences, this oversight allows for many victims to fall out of the scope of obtaining justice. But this is even more telling when referring to irregulars.

Indeed, Article 4(2) of the *Third Geneva Convention* addresses the issue of militias and volunteer corps on the basis of the four conditions to be recognised for having combatant status. In ethnic conflicts such as those of the Balkan wars, a very high proportion of belligerents were in that category. But recognition as belonging to this category has always been very difficult and is left to the discretion of the Occupying Power. As a result, if they were not part of regularly constituted forces, many of the former belligerents who were victim of grave violations can not see justice done on their behalf since they did not acquire the status of prisoner of war, nor were they civilian since they were captured engaging in hostile actions, making them illegal combatants. They do remain protected persons in the sense of Article 4 of the *Fourth Geneva Convention*, but they are not civilians. As it has been noted by reputed author, the problem is that under the *Geneva Conventions*' regime, International Humanitarian Law does not recognise a category for quasi-combatants. Nor does it recognise the right of civilians to participate in hostilities. But direct participation does make one lose his civilian status and therefore results in him being a combatant, albeit an illegal one, and lawfully a target during the length of its engagement in hostile actions[30]. However, he does not re-acquire his civilian status after taking part in such hostilities if captured. He becomes an illegal combatant, subject to the protections of the *Fourth Geneva Convention*, but not entitled to the privileges of a prisoner of war. As a result, Article 2 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* had and still possesses a deep flaw whereby only grave breaches against prisoners of war and civilians can be prosecuted.

Article 3 of the *International Criminal Tribunal for the Former Yugoslavia* further had a problem in separating the violations of the laws and customs of war into a unique article. As a result, it repeated the wanton destruction of property not justified by military necessity and limited itself to stating five principles of the laws and customs of war.

Article 4 goes on with the crime of genocide, which repeats *verbatim* the wording of the *Convention on the Prevention and Punishment of the Crime of Genocide*[31].

The last crimes punishable under this *Statute* are crimes against humanity. These are listed as they first appeared when stipulated the first time in the *Control Council Law No. 10* for the promulgation of the *Charter of the International Military Tribunal* of Nuremberg[32]. The only difference concerns the fact that the persecutions on political, racial and religious grounds of the *International Military Tribunal* referred

Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention."

[29] *Third Geneva Convention*, *supra*, note 27 at Article 4(A) and (C) and at Article 33.

[30] Sassóli, Marco and Bouvier, Antoine A., *How does Law Protect in War?*, Geneva, International Committee of the Red Cross, 1999 at 208.

[31] *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, [hereafter *Convention on Genocide*] at Articles 2 and 3.

[32] *Control Council Law No. 10*, supra, note 3 and *London Agreement*, *supra*, note 9.

to persecution whether or not in violation of the domestic laws of the country where perpetrated, whilst no such statement is made in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

The *Statute of the International Tribunal for Rwanda* followed suit in many respects. Its Article 2 concerning the crimes of genocide takes also the integral version of the *Convention on the Prevention and Punishment of the Crime of Genocide*. So does its Article 3 in relation with the *Control Council Law No. 10*.

Where it differs is in the violations of the laws and customs of war. This is because the Rwanda situation happened in the midst of a non-international armed conflict. But, not only did Article 3 common to the *Geneva Conventions*' regime apply to Rwanda, but also the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, which it had ratified on 19 November 1984[33].

The drafters therefore choose to combine the fundamental guarantees of Article 3 of the *Geneva Conventions* with the notions of *Protocol II*. As a result, Article 4 of the *Statute of the International Criminal Tribunal for Rwanda* combined the four prohibitions of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, the taking of hostages, outrages upon personal dignity, in particular, humiliating and degrading treatment, and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples contained in Article 3 common to the four *Geneva Conventions*[34], with the additional prohibitions of collective punishments, acts of terrorism, enforced prostitution and any form of indecent assault, pillage, and the threats to commit any of the foregoing acts contained in Article 4(2) of *Protocol II*[35]. Interestingly, it did not concern itself with including slavery and the slave trade in all forms as violations, despite it being in Article 4(2) and the situation in some cases might be associated to this. Still, the wording of the Statutes allows for violations which "…shall include, but shall not be limited to…" these violations. Therefore, one can assume that such violations can also be prosecuted.

In both cases, the *International Criminal Tribunals* tried to create statutes tailored to the conditions of the conflicts for which they were created. The fact that they were created and that they did indeed prosecute and convict is an accomplishment worth celebrating. The lessons of the Yugoslav tribunal certainly did show in the drafting of the Rwanda statute, but as the legal regime applicable differs, it is difficult to see true progress.

The *Statute of the Special Court for Sierra Leone*[36] brought a new perspective to *ad hoc* tribunals. As in the case of Rwanda, the Sierra Leone conflict was essentially non-international, despite obvious meddling by other nations. As such, it was again Article 3 common to the *Geneva Conventions* and *Protocol II* which applied.

---

[33] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [*hereafter *Protocol II]*, 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978. For ratification information, see http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=53.1.92&Count=30&Expand=53.1#53.1

[34] *Geneva Conventions*, *supra*, note 27 at Article 3.

[35] *Protocol II*, *supra*, note 35 at Article 4(2).

[36] *Statute of the Special Court for Sierra Leone*, at http://www.sc-sl.org.scsl-statute.html

Its Article 2 takes once more the notion of the crimes against humanity in full, but adds to the crime of rape by declaring sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as such crimes. As such, it incorporates the enlargement made in Article 7(1)(g) of the *Rome Statute*, although omitting the last part of the sentence, where it stipulates "…of comparable gravity…"[37]

Further adapting to the times and moving toward simplicity Article 3 of the *Statute* deals with the violations to the laws and customs of war applicable to non-international armed conflicts by simply restating verbatim the notions of Article 4(2) of *Protocol II*.

However, the *Sierra Leone Special Court* does not limit itself. Article 4 includes other serious violations of international humanitarian law, namely: intentional attacks upon civilians, intentional attacks upon UN personnel, materiel, installations, units or vehicles involved in humanitarian assistance or peacekeeping missions as long as they are entitled to the protection given to civilians and civilian objects under international law, and the conscription or enlisting of children under the age of 15 or using them to participate in hostilities.

This article is truly interesting as while the principle of the respect of civilians has been part of the laws of armed conflicts since the *Declaration of St-Petersburg* of 1868, the notion of the crimes against the United Nations and its associated personnel have been set very shortly prior to the establishment of the Special Court in the *Convention on the Safety of United Nations and Associated Personnel*[38]. The fact that it is made a serious violation due to its grave nature, as expressed in its text makes for an interesting, and yet to be seen effective, addition to the corpus of the laws of armed conflicts. The last notion is that of child combatants and is a direct incorporation of Article 4(3)(c) of *Protocol II*, but was used here for the first time while it was of definite interest in the Rwanda cases.

But where the *Special Court for Sierra Leone* truly innovates is in its joint approach from international to national legislation. While resting on all previous International Humanitarian Laws as well as on the *Convention on Genocide* for indictments and prosecution, it also incorporates within its statute two categories of crimes under national law. Its Article 5 thereby incorporates as crimes under Sierra Leonean laws offences against the abuses of girls and offices regarding wanton destruction of property. The most interesting aspect of this incorporation is that no one can ever accuse the current government of trying to prosecute under *ex-post facto* law as the first category of offences comes from the *Prevention of Cruelty to Children Act* of 1926 (Cap.31), while the second comes from the *Malicious Damage Act* of 1861[39].

These laws still being in force at the time of the commission of the offences, they fully apply to perpetrators. Furthermore, this incorporation of national laws within the structure of an essentially

[37] *Rome Statute*, *supra*, note 23, at Article 7(1)(g).

[38], G.A. res. 49/59, 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49, entered into force January 15, 1999, these are enumerated at Article 9: "Crimes against United Nations and associated personnel: 1. The intentional commission of:
(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.
2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature."

[39] *Statute for the Special Court for Sierra Leone*, *supra*, note 36 at Article 5.

international law-based instrument demonstrate the juridical sense and the seriousness of the Government of Sierra Leone in trying and convicting those guilty of such crimes.

Parallel to the crisis in Sierra Leone, another type of violence took place in East Timor in 1999. From August 1999, the UN Commission on Human Rights was seized with the on-going violence and informed of alleged systematic and gross abuses. Following the intervention of an Australian-led Coalition to re-establish a secure environment, steps were taken to make accountable Indonesian military and paramilitary perpetrators of crimes against humanity.

As such, Indonesia established a *Special Panel on Serious Crimes*[40] on the basis of national law number 26 of year 2000[41]. This law is supposed to permit the *Ad Hoc Human Rights Court* to try broad and systematic attacks against the civilian population as crimes against humanity[42]. Still its very form, including genocide within the concept of crimes against humanity and speaking of such deeds as "explosions and invasions" confuses the usual categorisation of crimes. Indeed, explosion as such is not a crime under international law. Even explosions are not crimes *prima facie*; their obvious intent to attack systematically the civilian population must be demonstrated. But, even more damaging, is the inclusion of invasion within that concept of crimes against humanity. This confuses crimes against humanity with the notion of crimes of aggression, as understood in the *Rome Statute*.

As such, this *Ad Hoc Human Rights Court* has been deemed an instrument for paying lip service to international pressures on Indonesia while assuring the perpetrators to be sent home free. But, this may not be the case as of yet. The UN Press Release of May 10, 2004 announced that the United Nations Mission in Timor-Leste (UNMITE) communicated that General Wiranto and seven other senior officers of the Indonesian military (TNI) and officials of the former government have been indicted by the Special Panel for Serious Crimes[43]. General Wiranto was charged with command responsibility for murder, deportation and persecution[44]. As the warrant is issued and prosecution demanded, the efficiency of the Indonesian tribunal will be offered as a test case. And its efficiency will be compared to that of the legislations given to the *Iraqi Special Tribunal*.

The Statute of the Iraqi Special Tribunal

The cumulative lessons from the previous tribunals instituted to indict and prosecute the crime of genocide, crimes against humanity, war crimes and violation of national Iraqi law have not been lost on the drafters of the *Statute of the Iraqi Special Tribunal*. Indeed, the structure of its *Statute* once more demonstrate the juridical ability of its drafters and the search for clarity and expediency, while adapting to the new applicable models of international law.

[40] Information on the court is sketchy, but glimpsed of its schedule can be seen at http://www.jsmp.minihub.org/trials.htm.
[41] Katjasungkana, Nug, "The Justice Process in Indonesia Regarding the Prosecution of the Serious Crimes Cases of Human Rights Violation in East Timor in 1999", in Justice and Accountability in East Timor: Internationals and Other Options, Dili, 16 October 2001 at page 9, available at http://www.etan.org/lh/misc/justconf3.html.
[42] *Ibid*., these adapted Article 7 of the *Rome Statute*.
[43] *Daily Press Breifing by the Office of the Spokesman for the Secretary-General*, 10 May 2004 at http://www.un.org/News/breifing/docs/2004/db051004.doc.htm.
[44] Special Panel for Serious Crimes, Motion to Request a Warrant Application Hearing Pursuant to Sections 27.2 and 19(A) of UNTAET Regulation 2000/30, as Amended by Regulation 2001/25, District Court of Dili, 28 January 2004 at http://www.etan.org/et2004/january/25-31/28deputy.htm

First of all, the temporality of the statute addresses from the start the notion that the crimes aimed at are all those that are alleged to have taken place since the illegal *putsch* of the Ba'ath party against the ruling government of July 17, 1968 up to and including the official end of the latest Iraq War on May 1, 2003. As a result, there is a wide variety of conflicts and crimes that need to be addressed in particular geographic locations and at precise time. In order to avoid limiting the powers of the *Tribunal*, the Statute states clearly that its jurisdiction applies to any Iraqi national or resident accused of the crimes listed, whether it occurred in the territory of Iraq or elsewhere. As such, it does not limit the persons or the geographic area of its jurisdiction.

The drafters of this *Statute* have also decided to change its structure compared to the prior tribunals. Instead of plunging itself immediately into the crimes to be under its jurisdiction, it instead presents the composition and organisation of the tribunal. This seems obviously to be done in order to alleviate critics of a 'kangaroo court' by showing from the start and in plain view who and what shall the tribunal shall be composed of. This is of paramount importance as many of the persons representing the current *Governing Council* of Iraq are expatriates who returned to Iraq after the Coalition's invasion. As such, they are deemed to have a strong bias against the former regime and therefore need to avoid any sort of accusation that would attack its legitimacy.

It is in this aim that Article 5(e) of the *Statute of the Iraqi Special Tribunal* incorporates not only the notion of national law for the selection of judges, but also the possibility for disqualifying a judge at Article 5(f)(1). This is also applicable to investigative judges under Article 7(m)(1).

There is also a Presidency of the Tribunal, established at Article 6, which further tries to increase the legitimacy by the appointment of non-Iraqi advisors to the Tribunals whose function will be to advise the Tribunal on international law and to monitor the due process of law standards.

It is only after the credentials of the *Tribunal* are established that the *Statute* moves to the crimes submitted to its jurisdiction. And again, this is an exercise in simplicity and clarity. As such, Article 10 states them clearly: the crime of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws listed in Article 14.

It is interesting that this article does not keep in full with the *Statute of Rome*. Its Article 5(1) refers to four serious crimes, the first three being the same as in the *Iraqi Statute*, but the fourth is the crime of aggression.

Where Article 1 of the *Iraqi Statute* refers to the conflicts with the Islamic Republic of Iran and the State of Kuwait, one would expect in Article 10 that this is indeed a serious crime and that it should hold the Iraqi leadership accountable for this. Quite to the contrary, there is no mention of this being a crime at all. This is certainly the major failing of this statute, and one cannot discard the very real possibility that the avoidance of this inclusion is not unrelated to political consideration and historical facts. No mention of this crime means that no testimonies on the matter are to be accepted by the tribunal and therefore the avoidance of the subject of some countries' support for Iraq's wars.

Despite this failing, the adaptation of the statute to circumstances in interesting. One must take into consideration that the crimes mentioned have different time and space applicable to them. For example, crimes committed during the Iran-Iraq war of 1980-1988 fall under the international armed conflict regime of International Humanitarian Law. But crimes committed against Kurds during the interwar

period do not. They either fall under non-international armed conflicts, if the existence of such a conflict is proven in court and which means that only Article 3 common to the *Geneva Conventions* applies with the applicable customs of the laws of war, or there is no international *juris corpus* applicable other than the crimes against humanity. As such, the Statute does an excellent of keeping with simplicity in order to obtain clarity.

On the crime of genocide, it takes in full by referring to it and mentioning Iraq's ratification, the notions of Articles 2 and 3 of the *Convention on Genocide* and incorporating it *verbatim* within Article 11.

As for crimes against humanity, the *Iraqi Statute* does keep to the very wording of the *Rome Statute* on the vast majority of its defined acts. However, it does differ with respect to imprisonment or other severe deprivation of liberty in violation of fundamental norms of international law, whereas the Rome Statute uses "…rules…" of international law. As it stands, this was a solid demonstration of the juridical thoughts of the drafters as norms are more likely to be applicable than rules, which should be define by reference to specific treaties and not solely by custom as norms can be.

The crimes against humanity also do differ in the fact that they do not encompass enforced sterilisation, as the *Rome Statute* does in reference to sexual crimes. This omission is particularly troubling as it is known that some branches of Islam do practice the ablation of the clitoris on women. It happens sometimes that the process is not successful or that it is not a precise surgical operation. As a result, death, serious debilitating injuries or sterilisation occur. This is evidently a very delicate issue. Nonetheless, the whole rationale to justify the invasion of Iraq has been based upon the principles of democracy and humanity. The very deliberate omission of those two words does not augur well for the future of Iraq, nor of the region. As with the avoidance of the crime of aggression, the religious and political implications leave a very sour taste in the whole work of the establishment of the tribunal, despite its very commendable juridical approach. To which approach one must applaud the inclusion of the crime of force disappearance, in keeping with both the *Rome Statute* and the *Declaration on the Protection of All Persons from Enforced Disappearances*[45].

Further in keeping with the Article 7(2) of the *Rome Statute*, Article 12(b) of the *Iraqi Statute* states almost identically the definitions of these crimes, if only with the omission of the crime of apartheid, which is clearly irrelevant and the vulgarisation of the term *inter alia*, where it concerns extermination. However, it does completely omit to define the crime of forced pregnancy. Again, one must see it this omission a clear statement of the keeping of religious and political gains by factions of the Iraqi *Governing Council* favouring some segment of the Iraqi society. This is regrettable as the definition provided for in the *Rome Statute* does not alter the meaning of national laws.

Another area of interest in the *Iraqi Statute* is where it concerns war crimes at Article 13. Indeed, as seen in the international tribunals before, there is a difference of applicability between international armed conflicts and non-international ones. But, in order to avoid having to divide and diminish the reach of war crimes dispositions, the *Iraqi Statute* follows the Article 8 of the *Rome Statute*, while rightly making unlawful confinement a separate offence from unlawful deportation or transfer.

But, more important than the enumeration of what constitutes war crimes, the *Iraqi Statute* takes the whole of the definitions contained at Article 8(2)(b) of the *Rome Statute* in its overall written form.

[45] *Declaration on the Protection of All Persons from Enforced Disappearances*, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992).

However, there is one important omission in these which concerns international armed conflicts. This intentional omission is the employment of weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. This can be construed as a clear desire to leave out the very delicate issue of the employment of some weapons, such as bomblets, napalm, gas bombs and nuclear bombs, which many officials of the Coalition would certainly not want to have to speak about in a trial.

And the question of sexual sterilisation is again left out, as it is also when reference to sexual crimes is made in relation to serious violations of the laws and customs of war.

As for the rest, the whole of Article 3 common to the *Geneva Conventions*, as written in the *Rome Statute*, is brought forward in the *Iraqi Statute*, while the serious violations of the laws and customs of war are *verbatim*, save for the sexual crimes definition shown above.

CONCLUSION

As a result of the evolution of the LOAC, it is evident that the experiences of the tribunals for Yugoslavia and for Rwanda affected the kind of conflict of the end of the 1990s and the more recent ones of the third millennium. The development of the *Rome Statute of the International Criminal Court* has also clearly influenced the development of national instruments, such as the *Statute of the Special Court for Sierra Leone* and that of the *Statute of the Iraqi Special Tribunal*. Therefore, a definitive progress has been made towards legitimizing the rule of international humanitarian law in both non-international and international armed conflicts, as well as the particular rules of that pertains to the *jus in bello*.

Nonetheless, and despite clear efforts of providing for transparency of procedures and meeting of the minimal humanitarian standards, there remains a very entrenched political influence that is pervasive throughout the redaction of such statutes. Not until the United States recognizes the *International Criminal Court* will we see a fully harmonized and applicable system of indictment and prosecution of crimes against humanity, war crimes, crimes of genocide and, as important, the crime of aggression. Until such time, there will be a selectivity applied to the prosecution of particular crimes while avoiding some of the more delicate issues, such as disappearance, sexual crimes and the crime of aggression.

A silver lining does exist in the fact that all crimes committed after July 1, 2002 can be submitted to the jurisdiction of the court. Furthermore, the joint use of this tribunal with the *Convention of the Safety of United Nations and Associated Personnel* renders the U.N. peacekeepers less prone to attacks – or least able to obtain justice for sustaining injuries during their missions. As such, the *Iraqi Statute* demonstrates that the work done to draft the *Rome Statute* made good juridical sense, since it has taken most of its provisions for its own work. It now remains to be seen how far this will permit justice being truly served.

AZ EURÓPAI UNIÓ ÉS FEKETE-AFRIKA
AZ AFRIKÁBA IRÁNYULÓ SEGÉLYEK TÖRTÉNETE EURÓPA ÉS AFRIKA KÖZÖS POLITIKÁJÁNAK KONTEXTUSÁBAN

by

SZÉKELY RITA

GONDOLATOK GLOBALIZÁLT VILÁGUNKRÓL

"A technika, a tudomány, a gazdasági élet és a modern hadviselés fejlődése öröknek és áthatolhatatlannak vélt sáncokat tört át és a valamikor hatalmasnak vélt bolygónkat kicsivé zsugorította. Egyenetlen és ellentmondásos azonban a népek és országok közeledésének útja a világgazdaságban, s a világ valósága ezeknek az ellentmondásoknak a fő forrása." -fogalmazta meg Simai Mihály a globális problémáról 1977-ben olyan tökéllyel, hogy ez a meglátás még napjainkban, majdnem 30 évvel később is megcáfolhatatlannak tűnik.[1] Az ember ma már órák alatt is képes a hatalmas óceánokkal elválasztott kontinensek közötti távolságot megtenni, a mobilkommunikáció segítségével - távolságtól függetlenül - másodpercek töredéke alatt hallhatjuk egymás hangját, centiméteres felbontásban vizsgálhatjuk képernyőről a Hold felszínének kőzeteit, és a szupermarketek polcai között órákon át kilométereket bolyonghatunk ha a bőség zavarában még választani sem vagyunk képesek. Ez a mi világunk.

De ezzel egy időben, Európától csak néhányszáz kilométerrel délre, emberek milliói élnek, akik több ezer éves technikával készítik kézműves termékeiket, naponta imádkoznak néhány csepp esőért, hogy legyen az adott évben termés, és a modern technikát csak a taposóbombák kegyetlensége ismertette meg velük. Ez viszont egy teljesen más világ.

Önmagában a technikai különbségek nem indokolják a két világ közti hatalmas szakadékot.

Olyan tényezők játszanak itt döntő szerepet, melyeket az ember, mint fizikai lény a legmodernebb technika és a legjobb szándéka ellenére sem tud irányítani, bár befolyásolni módjában állhat.

Említhetem itt például a természet okozta különböző katasztrófákat, példaképpen: az évekig tartó szárazság, a dezertifikáció jelensége, az ivóvíz hiánya, ezzel szemben mégis jelen van a víz pusztító ereje, amit többek között a dél-ázsiai szökőárnál is láthattunk, a talaj vékony humuszrétege miatti csekély termőképesség és még sorolhatnám. De ide tartozik még a demográfiai forradalom is, mint a világélelmezési probléma egyik fő forrása. A világméretű élelmiszerhiány nem egyszerűen mennyiségi probléma. Nem csak annak kérdése, hogy megtermelődik-e annyi élelmiszer a Földön, amennyire az emberiség táplálásához szükség volna. Az összes megtermelt és elfogyasztásra kerülő élelmiszer talán ma sem kevesebb valamennyiünk összes táplálékszükségleténél. Csakhogy míg sok helyen az átlag fölött, az alapvetően szükségesnél jóval többet fogyasztanak, addig máshol szűkölködnek. Napjainkban a föld lakosságának több mint 70%-a nem kielégítően, hiányosan táplált, és ebből több tíz millióra tehető azok száma akik az éhhalál szélén tengődnek.
Ezek és az ezekhez hasonló számos egyéb globális probléma nem csak az egyes államokat, hanem a nemzetközi élet szereplőit egyaránt foglalkoztatja. Akár az ENSZ, akár az EU politikáját vesszük alapul, mindenhol egyre inkább előtérbe kerülnek a leginkább a harmadik világban jelentkező aggályok.

HOL IS VAN TULAJDONKÉPPEN A HARMADIK VILÁG?

Ahhoz, hogy a harmadik világgal érdemben foglalkozhassunk, először a fogalmát kell megpróbálnunk definiálni. Már maga a kifejezés is problematikus. Milyen kritériumnak kell megfelelni: ideológiai, szegénységi, földrajzi, gazdasági? Természetesen egy kritériumhoz való kötés ehhez kevés. De valahogy mégis el kell választani egymástól az „első" és a „harmadik" világot. 1990-ben O'neill és Vincent a következőként fogalmazta meg: „nem-európai, nem-kommunista, és szegény." [ii] A '90-es évek azonban nem csak a kommunizmust döntötték meg, hanem ezt az egyszerű ideológiát, mint definíciót is. Egy másik általánosan elfogadott meghatározás a Világbanknak köszönhető. A „World Development Report 1997" egy kritériumrendszert állított fel. Eszerint a fejlettségi szintnek négy alapkategóriáját különböztethetjük meg:

- alacsony jövedelmű (765 USD és kevesebb);
- közepesen alacsony jövedelmű (766-3020 USD);
- közepesen magas jövedelmű (3036-9385 USD);
- magas jövedelmű (9386 USD és magasabb) országok.

A kutatás alapján az első két csoportba összesen 128 ország tartozik, a harmadikba 30, míg az utolsóba a maradék 52. A beszámoló szerint az első két csoportba tartozó országok tartoznak a fejlődő világ országai közé. Azonban, ha e szerint soroljuk be az országokat, akkor a megszokott földrajzi kategorizálás nem állja meg a helyét. Íme egy példa: az első csoportból 7, és a második csoportból 16 ország Közép- és Kelet- Európa országaiból került ki. Ezen országok bár gazdaságilag a fejlődő világhoz tartoznak, illetve tartoztak, földrajzilag azonban mégsem tekinthetők annak. Amit biztosan állíthatunk: a harmadik világ országait nem tekinthetnénk azoknak, ha nem szorulnának folyamatos humanitárius segélynyújtásra.

A HUMANITÁRIUS JOG HIVATÁSÁRÓL

1864-ben, Henry Dunant kezdeményezésére egy világméretű mozgalom indult útjára, mely legfőbb céljaként a természeti és a háborús katasztrófák áldozatainak megsegítését tűzte zászlajára. Az esemény jelentőségét növeli, hogy ezzel egyidejűleg az egyre jelentősebbé váló nemzetközi jogalkotás is kezdetét vette. Többek között e mozgalom segítette világra a genfi egyezményeket, melyek a sebesült és a beteg katonák, a hadifoglyok és az ellenségeskedések által sújtott polgári lakosság védelmét hivatott szolgálni. Az egyezmények nevét ma már jól ismerik szerte a világon, hiszen a legtöbb állam által aláírt és megerősített nemzetközi megállapodások közé tartoznak.

Jean Pictet szerint a humanitárius jog voltaképpen nem más, mint „a nemzetközi jognak ama tekintélyes része, amely a humanitás érzelméből táplálkozik, és amely a személyiség védelmére irányul."[iii]

A nemzetközi jognak ez az ága ma a háború jogának emberi jogi összetevőjeként határozható meg. A Vöröskeresztet létrehozó 1864. évi genfi egyezmény volt a humanitárius jog első írásba foglalt megnyilvánulása. A megállapodás elsődleges célja az orvosi személyzet és a kórházi létesítmények védelme volt, korszakos jelentőségű kitétele pedig arról is rendelkezett, hogy a sérült, beteg katonákat össze kell gyűjteni, és ápolni kell, mégpedig nemzeti hovatartozásra való tekintet nélkül. Az említett okirat előzménye volt az 1899. évi hágai egyezménynek, mely a tengeri hadviselésre vonatkozóan írt elő humanitárius szabályokat. Ezeket a szerződéseket időről időre felülvizsgálják, korszerűsítik, s napjainkra már hatalmas jogszabálytömeget alkotnak, amelyek a fegyveres konfliktusok által előidézett jogi vagy politikai helyzetek szinte mindegyikét igyekeznek rendezni. E szabályok nagy részét ma a négy 1949. évi

genfi egyezmény és két kiegészítő jegyzőkönyvük kodifikálják. Kiemelkedő jelentőségű rendelkezések ezek, melyek tulajdonképp a modern nemzetközi emberi jogi okmányok alapelveit fektetik le, megkísérelve legalább egy alapszintű védelem biztosítását béke és háború idejére egyaránt.

AZ EURÓPAI UNIÓ ÉS A HARMADIK VILÁG KAPCSOLATA

Az EU és a harmadik világ kapcsolata az EU történetének legelejéig nyúlik vissza. Úgy is mondhatjuk, hogy az EU történelmével egyidős. Ez a kapcsolat azonban, a Római Szerződés életbelépése óta mind tartalmilag, mind formailag gyökeresen megváltozott. Az Unió folyamatos bővülése, a technika megállíthatatlan fejlődési sebessége, Közép- és Kelet-Európa kommunista ideológiájának megdöntése, a nemzetközi kereskedelem újjászületése a WTO létrejöttével, mind olyan tényezők voltak, melyek az EU és a harmadik világ közös politikáját átformálták. A fejlődő világgal kialakított külkapcsolat leginkább egy politikai fércmunkához hasonlítható. A legnagyobb jelentőséggel bíró egyezmények a Loméi Konvenciók voltak, melyeket az ACP (Afrikai, Karib térségi és Csendes-óceáni) országokkal kötöttek. Annak ellenére, hogy tulajdonképpen ezek az egyezmények voltak egyedül kidolgozottak és strukturáltak, nem hagyhatjuk említés nélkül a többi fejlődő országgal kialakított külkapcsolatot sem. Hasonló az együttműködés a Latin-Amerikai országokkal (Mercosur), az Észak-Afrikai Maghreb (Tunézia, Algéria, Marokkó, Líbia...), és Mashreq államokkal (Egyiptom, Szíria, Libanon...), a legtöbb Ázsiai országgal, ide tartozik például az ASEAN társulás (Association of South-East Asian Nations), és megemlíthetjük a Dél-Amerikai államokból álló Andesi Paktumot is.

A fejlődő országokkal kialakított széleskörű kereskedelempolitikai és segélyezési kapcsolatrendszert eltérő tartalmuk alapján három csoportba sorolhatjuk:

- a társulás jogalapján létrejött, a gazdasági és kereskedelmi együttműködés minden területére kiterjedő és a fejlődést pénzügyi segélynyújtással is elősegítő szerződéses viszonyon alapuló kapcsolatok,
- preferenciális elbánás: az idesorolt országokkal az EU vagy kereskedelmi és együttműködési egyezményeket köt, vagy egyoldalúan dönt kedvezmények biztosításáról és segélyek nyújtásáról,
- együttműködési megállapodáson alapuló, de preferenciális elbánást nem biztosító kapcsolatok.

A kereskedelempolitikai kedvezmények révén nyújtott közvetett segítség mellett, közvetlen támogatásokkal is hozzájárul a szegény országok gazdasági fejlődésének elősegítéséhez. Az EU ezirányú tevékenységét a Római Szerződés 130u-130y cikkelyei szabályozzák „Együttműködés a fejlesztés területén" címszó alatt. Eszerint a Közösség elősegíti: "- a fejlődő országok, s különösen a legkedvezőtlenebb helyzetű fejlődő országok tartós gazdasági és szociális fejlődését;

- a fejlődő országok harmonikus és fokozatos bekapcsolódását a világgazdaságba;
- - a szegénység elleni harcot a fejlődő országokban."
-

"A Közösségnek ezen a téren folytatott politikája hozzájárul a fejlesztés, a demokrácia megszilárdítása és a jogállamiság általános célkitűzéséhez, valamint az emberi jogok és az alapvető szabadságjogok tiszteletben tartásának célkitűzéséhez." [4]

Ezenkívül nem hagyják figyelmen kívül az Egyesült Nemzetek és más illetékes nemzetközi szervezetek keretein belül elfogadott célokat és kötelezettségeket sem. [130 u § (3)]

Ezek a cikkek azt is kihangsúlyozzák, hogy az Unió tevékenysége segíti és kiegészíti, de nem helyettesíti a tagországok által kialakított támogatási politikákat. Az Unió illetve tagországainak szerepvállalása igen jelentős a fejlődő országok segélyezésében: a világban a fejlődő országoknak nyújtott összes segély 45-50 %-a származik a Közösségből illetve tagországaiból.

A SEGÉLYEK FAJTÁI

Az EU harmadik világba irányuló segélyei között 6 típust különböztethetünk meg, melyből az 5. - a beruházási segélyek - további 6 részre oszlik, így összesen 11 kategóriába sorolhatók. Ezek a segélyek a következők:

1./ Program segélyek
2./ Élelmezési segélyek
3./ Humanitárius segélyek
4./ Nem-kormányzati szervek felé irányuló segélyek
5./ Beruházási segélyek

- természeti kincseket termelő szektor (mezőgazdaság, erdészet, halászat…)
- egyéb termelő szektor (ipar, bányászat, kereskedelem, turizmus…)
- gazdasági infrastruktúra és szolgáltatások (közlekedés és kommunikáció, energia…)
- szociális infrastruktúra és szolgáltatások (oktatás, egészségügy, vízügy…)
- kormányzat és civil társadalom
- multi-szektoriális projektek (környezetvédelem, vidékfejlesztés…)

6./ egyéb segélyek

A segélyek mértékének ingadozásával kapcsolatban a vizsgált 1986 és 1998 közötti időszakon belül a következőket figyelhettük meg: Az első négy eszközre eső támogatás a segélyek összeségéhez képest a 12 év alatt 12%-al csökkent, míg a beruházási segélyekre szánt összeg 10%-al nőtt, így ez ’98 végén elérte az egész támogatás 64%-át. A humanitárius tevékenységek anyagi támogatása szinte megkétszereződött, ami leginkább az ECHO és más non-profit szervezetek létrejöttének köszönhető. Ezzel ellentétben az élelmezési segélyek 21%-ról 8%-ra csökkentek. Tehát az egyes szektorokra szánt összeg az adott helyzet függvényében állandóan változik.

A Program segélyek kategória a kedvezményezett országok központi költségvetésén keresztül az infrastrukturális fejlesztéseket támogatja. Ide tartozik a mezőgazdasági termékekre vonatkozó Stabex, és a bányászatot elősegítő Sysmin mechanizmus is, melynek kedvezményezettjei az ACP országok voltak… Ezekről részletesebben a későbbiekben lesz szó. Ezen segélyek 89%-a az előbb említett államokba irányult, a támogatás mértékét tekintve pedig a gazdasági infrastruktúra, az élelmezési segélyek és a szociális infrastruktúra és szolgáltatások után a negyedik helyre került.

Az élelmezési segélyek, az együttműködési egyezmények első eszközeként, 1967-ben kerültek bevezetésre. Olyan segélyfajta ez, mely feltétel nélkül ellát minden rászoruló területet. Három formáját különböztetjük meg: élelembiztonsági projekt, sürgősségi élelemsegély, és strukturális élelmezési segély. Ezek végrehajtásáról megállapodás szerint gondoskodhat a befogadó ország, egy non-profit szervezet, vagy maga a Bizottság is. Eredetileg a Közös Mezőgazdasági Politika keretén belül működött, majd a későbbiek során lassan átkerült a Közösségi Fejlesztési Politika hatáskörébe. Az élelmezési segélyek ez a

bő évtized alatt (1986-'98) a 9.1 millió Euro-s össztámogatásával a második helyre került. Ezt a tekintélyes helyét mára már elvesztette, mivel az átcsoportosítások miatt a segélyek mindössze 7%-át áldozzák ez a címszó alatt hasonló célokra.

A humanitárius támogatások a különféle akciók legszélesebb területét ölelik fel, kezdve a természeti katasztrófák és háborúk áldozatai számára nyújtott segélyektől, a felvilágosító előadásokon keresztül egészen a rövid távú rekonstrukciós munkálatokig. Az EK tevékenységének határozott célja a szükséghelyzetben lévő áldozatok életének megmentése valamint ezek szenvedéseinek csökkentése.

A segélyek 10,4%-át utalták ennek a szektornak. 1992-ben a Bizottság létrehozta a Humanitárius Segélyek Hivatalát, az ECHO-t (European Commission Humanitarian Aid Office), mely 1993-ban az EU által utalt humanitárius segélyek 55%-át átvállalta. 1998-ban már 60 országban látott el a humanitárius szolgálatokat. 1986 és 1998 között a segélyek nagy része Kelet- és Közép Európa országaiba irányult, ezen belül is leginkább a volt Jugoszlávia területére, és a sorrendben csak ezután következtek az ACP országok. Az újjáépítési munkálatokra fordított összeg 1994-re megduplázódott, míg 1995-re már háromszorosa lett. Ez az összeg azóta jelentősen nem változott.

A nem-kormányzati szervek felé irányuló segélyeknek két fajtáját különböztetjük meg. Az egyiknél különleges szolgáltatásnyújtásra szerződtetik a non-profit szervezeteket, míg a másiknál a szervezetek projektjeire nyújt finanszírozási segélyeket. Az utóbbi esetben egy adott tervre maximum 500.000. Euro-t vagy a teljes kivitelezési összeg 50%-át fordíthatják, melynek időbeli hatályát 5 évben maximalizálták. A 70-es években és a 80-as évek elején a legnagyobb összeg az afrikai országokba irányult, a 80-as évek végére inkább a dél-amerikai országoknak jutott. Közép- Kelet Európába pedig leginkább a Phare programon keresztül áramlott.

Az előbbi négy és a beruházási segély kategóriája között nem lehet éles határvonalat húzni, mivel ezek átnyúlnak egymásba és egymást feltételezik. De mivel 5 különálló szektorral foglalkozik és önálló költségvetéssel is rendelkezik, részletesebben szólunk róla:

Az első helyen a természeti erőforrásokat termelő szektor szerepel. Itt a vidékfejlesztés és a mezőgazdaság egy támogatás alá esik. Az erdőgazdaság csak a 90-es évektől lett igazán jelentős ágazat, s ez leginkább az esőerdők folyamatos pusztítása miatt erősödő nemzetközi aggodalomnak köszönhető. Kiemelkedő jelentősége van még a halászatnak is. A privát szektor versenyképességének támogatásától kezdve egészen a kutatómunkák finanszírozásáig a segélyek széles választéka áll a rendelkezésre.

Az egyéb termelő szektor kategória igen széles működési kört fog át. Ide tartozik többek között az ipar, a bányászat, a kereskedelempolitika, a turizmus is. A legtöbb támogatást az ACP országok kapták, elsősorban Mauritánia és Nigéria voltak a szerencsés kedvezményezettek.

A gazdasági infrastruktúra és szolgáltatások a közlekedést, a szállítmányozást, a kommunikációt, a bankügyleteket karolta fel a több, kevésbé jelentős tevékenység mellett és ezzel az Unió segélypolitikájának legtámogatottabb eszköze lett. Összesen több mint 8 milliárd Euro-t fordítottak erre a célra. A segélyek jelentős része (83%-a) három főbb területre koncentrálódott: az ACP országokba (45%), Közép- és Kelet Európába (23%) és a Független Államok Közösségébe (15%).

A szociális infrastruktúra és szolgáltatásokon belül a támogatások 60%-át az oktatásügyre és az egészségügyre fordították. Utóbbi években kiemelkedő szerepet kapott az AIDS elleni küzdelem is.

AZ AFRIKAI ÁLLAMOK RÉSZESEDÉSE A SEGÉLYEKBŐL

Az afrikai kontinens 1986 és 1998 között összesen 30 milliárd Euro segélyt kapott, s ez az összes segély 43.5%-a. Ennek az összegnek több mint a három negyedét az úgyszintén 1957-ben létrehozott Európai Fejlesztési Alap nyújtotta.

Az ACP országoknak utalt legtöbb segély (78%) a Szaharán túli Afrikába ment, és csak a maradék 22%-ot kapták meg a Csendes-óceáni és Karib térségi államok.

A program segély eszközének két legfontosabb összetevője a Stabex és a Sysmin szinte teljes egészében az afrikai országokba irányult. A befogadó országok között Elefántcsontpart, Kamerun és Etiópia szerepel az első 3 helyen.

Az élelmezési segélyek rendkívül fontosak az afrikai országok számára. Magasan az első számú kedvezményezett Etiópia volt (640 millió Euro), őt Szudán és Mozambik követte.

A humanitárius szolgálat csak a Ruanda-Burundi krízis után kapott igazán fontos szerepet az utóbbi években.

A beruházási segélyeket, melyek az összes ACP-be irányuló segély 58%-át teszi ki, elsősorban a szállítmányozás és kommunikáció szektorra fordították, és ezeket követte az ipar, a bányászat és a szociális infrastruktúra.

Meg kell még említeni azt is, hogy a Dél Afrikai Köztársaság egészen 1997-ig nem volt tagja a Loméi Konvenciónak, így segélyeket csak közvetlenül a költségvetésből kaphatott. Létrejött az Apartheid Áldozatait Segítő Speciális Program, és ezt 1995-ben bővítette ki az Európai Program az Újjáépítésért és Fejlesztésért. Ezen intézményeken keresztül Dél-Afrika összesen 950 millió Euro-t kapott, melyet leginkább az oktatásügyre, a kormányzásra és a civil társadalomra fordított.

EURÓPA ÉS AFRIKA KÖZÖS POLITIKÁJA

Az Unió a harmadik világgal kialakított külpolitikáján belül az ACP országokkal való kapcsolatát vizsgáljuk meg részletesebben.

Ha az Európa és Afrika közötti kapcsolat nem is teljesen a humanitárius segélynyújtáson alapul, a különféle kedvezmények mögött mindenképpen felfedezhetjük nyomait.

A Közösség és a Szaharán túli Afrika közötti kapcsolatok 1957-re nyúlnak vissza, amikor a Római Szerződés egyes tagállamok tengeren túli területének társult státuszt adott. A Szerződés IV. részében található 131-136. cikkelyek foglalkoznak az EK-tagországok egykori gyarmataival kialakítható társulás lehetőségével.

„A társulás célja ezen országok és területek gazdasági és szociális fejlődésének előmozdítása, valamint az, hogy közöttük és a Közösség között szoros gazdasági kapcsolatok jöjjenek létre."

„Az e Szerződés preambulumában lefektetett elveknek megfelelően a társulással elsősorban ezen országok és területek lakóinak érdekeit kell szolgálnia és elő kell mozdítani jólétüket, hogy az általuk kívánt gazdasági, társadalmi és kulturális fejlődési irányba segítse őket." [5]

Az aláíró 6 ország közül Franciaországnak és Belgiumnak ekkor még jelentős gyarmatbirodalma volt még az Afrikai kontinensen és a tengeren túli térségekben. A társulás jogcímét eredetileg elsősorban a francia gyarmatokkal kialakítandó szorosabb kapcsolatok érdekében hozták létre, de később, az EK bővülései következtében az egykori brit, spanyol és portugál területek is bekerültek ebbe a viszonyrendszerbe. A segélyelosztás végett a Szerződés létrehozta az Európai Beruházási Bank által finanszírozott Európai Fejlesztési Alapot, valamint az EGK és a társult országok közötti szabad kereskedelmi teret.

YAOUNDÉTŐL COTONOUIG

Az 1960-as évek elején a gyarmatok nagy része elnyerte függetlenségét; újfajta intézkedésekre és kapcsolatrendszerre volt szükség. Ennek eredményeként jött létre az első Yaoundei Egyezmény 1963-ban, melynek aláírása egyben azt is jelentette, hogy nemzetközileg elismertté vált a résztvevő országok szuverenitása. A Konvenció preferenciális kereskedelmi kapcsolatrendszert alakított ki a Hatok és a tizennyolc – elsősorban frankofón – afrikai ország között. Utóbbiak Társult Afrikai Államok és Madagaszkár (EAMA) néven is ismertek. Az első Yaoundei Egyezmény aláírása az iparosodott és a fejlődő világ első intézményes együttműködésének kezdetét jelezte, és bár 1969-ben – a megállapodás értelmében – hatályát vesztette, szellemiségét tovább vitte a második Yaoundei Egyezmény, melyet elődjéhez hasonlóan öt évre írtak alá. Ez idő alatt került sor az Európai Közösség első bővítésére. Az Egyesült Királyság európai tagsága és a Brit Nemzetközösséget érintő problémák szükségessé tették, hogy a Közösség átszervezze nemzetközi kapcsolatait. Ennek eredményeként született meg a Loméi Konvenció, mely az átszervezés ellenére a Yaoundei Egyezmény lényegi elemeit tartalmazta – majd adta mindezt tovább a Cotonou-i Megállapodásnak.

A Yaoundei Egyezmény elsősorban a kereskedelmi kedvezményeket említi. Eszerint az EAMA-országokból vámmentesen jöhettek be azok a mezőgazdasági és ipari termékek, melyek az európai termelők árucikkeivel nem voltak közvetlen versenyben. Ilyen volt többek között a kávé, a kakaó, a banán vagy az ananász. A kedvezmények deklarálása fontos lépés volt ugyan, de az EK és a Yaoundei országok közötti kereskedelem viszont csaknem jelentéktelen volt; a Közösség Közép- Amerikával például kétszer ilyen élénk külkereskedelmi kapcsolatot tartott fenn. A Yaoundei országok Európával történő összekapcsolása ráadásul a fejlődő világnak csupán elenyésző részét hozta a korábbinál kedvezőbb helyzetbe, hiszen az egyezmény aláíróin kívül számos ország várt még hasonló segítségre. Az Európai Közösség fent említett, 1973-as bővítése során a tagállamok száma hatról kilencre emelkedett. Míg Dániának és Írországnak nem voltak gyarmati kötődései, a britek még mindig szoros kapcsolatot tartottak fenn a Nemzetközösség fejlődő országaival; elsősorban a Karib-tengeri és a Csendes-óceáni államokkal. Még 1973-ban megkezdődtek a tárgyalások az ACP-országokkal, majd 1975. februárjában – kompromisszumos megoldásként – létrejött a Loméi Konvenció, mely immáron negyvenhat fejlődő ország európai kapcsolatait igyekezett kiépíteni.

A Konvenció főbb irányvonalai voltak az EK és az ACP-országok közötti kereskedelem fellendítése, mezőgazdasági és ipari fejlesztés, a legfejletlenebb államok részére különleges segélynyújtás, a területi együttműködés támogatása, legfontosabb eleme pedig egy export-stabilizációs program, a STABEX volt. Utóbbi stratégiájának lényege, hogy ha az ACP-országokból származó különleges árucikkek

kereskedelme bármi okból visszaesik, a program segítségével a Közösség ellensúlyozhatja a keletkezett gazdasági kárt.

Az 1980-ban újabb tíz ország írta alá a második Loméi Konvenciót, melynek öt évét elsősorban a STABEX pénzügyi válsága jellemezte, a Közösség ugyanis nem tudta hatékonyan finanszírozni a program működését, az ötödik év végére azonban megtalálta a megoldást a problémára. Ez volt a SYSMIN létrehozása, mely a STABEX-hez hasonló elvek alapján az ásványkincsek exportját volt hivatott megkönnyíteni. A Közösség folyamatos bővítésének köszönhetően 1986-ra már Görögország, Spanyolország és Portugália is a Közösségben tudhatta magát, a harmadik Loméi Konvenció aláírásakor tehát már tizenkét európai ország kötött szerződést a hatvanhat ACP-állammal. Ezzel a fejlődő országok fele már az aláírók közé tartozott, a lakosságra vetítve azonban ez mindössze tizenöt százalékot jelentett. A harmadik Konvenció célja elsősorban a gazdasági, kulturális és szociális fejlődés előmozdítása volt.

Az 1990-ben kötött IV. Loméi Egyezmény már tíz évre szóló megállapodást tartalmazott. Ebben az időszakban dőlt össze Közép- és Kelet-Európában a kommunizmus, ennek következményeként ezen országok fejlődésének támogatása elsőbbségi kérdéssé vált, a loméi államok pedig háttérbe szorultak. A megállapodásnak – mely immár hetven fejlődő országgal köttetett – négy fő iránya volt: politikai, kereskedelmi, szektoriális és pénzügyi.

2000-ben a loméi konvenciók története lezárult, s a Cotonoui Partnerségi Megállapodás aláírásával új fejezet vette kezdetét. Az Európai Unió hetvenhét ACP-országgal kötött ekkor megállapodást, melynek időbeli hatályát 20 évben állapították meg, de 5 évente felülvizsgálják azt. A Cotonoui Partnerségi Megállapodás két alappilléren, a fejlesztési segélyeken és a kereskedelmi együttműködésen nyugszik. Az előbbi célja a fejlődést elősegítő programok létrehozása három kiemelt területen: gazdasági és szociális fejlődés valamint területi integráció. A szegénység leküzdése mellett, új elemként egyre fontosabb szerepet kap az emberi jogokért, a demokratikus elvekért és a jogállamiság megteremtéséért folyó küzdelem is. Az együttműködési stratégia a konfliktus-megelőzést és a békefenntartást is magában foglalja. A kereskedelemben szintén jelentős változásokat idézett elő a Megállapodás, többek között a dokumentum rendelkezései alapján 2002. szeptemberétől megszűnt a STABEX és a SYSMIN, amelynek a helyébe a Regionális Gazdasági Társulási Egyezmény (APER) lépett, valamint 2008 január 1-től eltörli majd az egyoldalú preferenciális vámkedvezményeket is.

AZ ECHO

A kilencvenes évek elején olyan természeti és ember okozta kataszrófák követték egymást, hogy azt már nem lehetett tovább figyelmen kívül hagyni. Banglades, Jugoszlávia, Kelet-Európa, Ruanda vagy akár Albánia nem kerülhették el a figyelő európai szemek tekintetét. Azonban a legtöbb esetben, az Unió jóformán tehetetlennek bizonyult az akkori intézményi struktúrájával. (Tulajdonképpen) külső és belső indítékok hatására hozták létre 1992-ben a Humanitárius Segélyek Hivatalát, az ECHO-t (European Community Humanitarian Aid Office). Ezt megelőzően Európának nem volt szervezetten humanitárius tevékenységet folytató intézménye, inkább bőkezű bankárként volt jelen, mintsem társként. Az ECHO megalapítása ezt a nézőpontot volt hivatott megváltoztatni. Gondosan kiépített adminisztrációnak köszönhetően, azóta is évről évre bővül a tevékenységi köre.

Az EU Tanács EC 1257/96-os számú rendeletében leírtak szerint az ECHO-nak következők a célkitűzései:

- az emberi életek megmentése és védelme, természeti és ember okozta katasztrófák idején és azokat követően;
- hosszantartó krízishelyzetek - mint például polgárháború - idején a szükséges segély és támogatás biztosítása;
- a segélyek szállításának finanszírozása és gondoskodás arról, hogy azok ténylegesen a rászorulók kezébe kerüljenek;
- Segélynyújtás menekülteknek és üldözötteknek, valamint hazatérésükkor a beilleszkedésben való segítség;
- Rövid-távú rehabilitációs és rekonstrukciós műveletek lebonyolítása az áldozatok legalább alapszintű önellátó képességének érdekében;
- Katasztrófákra való felkészülés, különös tekintettel a korai figyelmeztető rendszerek kiépítésére, valamint a magas kockázatú területeken azok megelőzését biztosítani és finanszírozni.

Az ehhez kapcsolódó működési körök olyan tevékenységeket is felölelnek, mint például a humanitárius tevékenységek figyelemmel kísérése, a segélyekhez szükséges megvalósíthatósági tanulmányok készítése, a taposóaknákkal teleszórt területek megtisztítása, szakemberek kiképzése és még sok egyéb feladat ellátása.

Az ECHO a Romano Prodi vezette Bizottság átszervezési munkálatai következtében elvesztette szeparált jellegét és korábban Poul Nielson, majd az őt követő: António Cavaco, a Fejlődés és Humanitárius Segélynyújtás tárca vezetőjének felelőssége alatt áll.

Az intézmény egy mindössze 114 tagból álló adminisztrációs magból áll, akik mellett még hetvenen a terepeken dolgoznak. A csapat munkarejét három földrajzilag elkülönített működési részlegre és további három irányítási és stratégiai részlegre osztották. Az első az ACP országokkal foglalkozik, a második a Közép-Kelet Európai államokkal és a Független Államok Közösségével, míg a harmadik földrajzi egység feladata Ázsia, Közép-Amerika, Közel-Kelet és a mediterrán országokról való gondoskodás. Az első stratégiai egység tartja a kapcsolatot a nemzetközi szervezetekkel, az EU intézményekkel, statisztikát készít stb. A második az emberi erőforrásokról és a kiképzésekről gondoskodik, valamint szerződéses kapcsolatot tart a non-profit szervezetekkel. S végül az utolsó egység feladata a felülvizsgálat és a pénzügyi irányítás.

A Loméi Konvenciókkal ellentétben az ECHO nem követel sem politikai, sem pedig gazdasági feltételeket. A segélyeket politikai meggyőződésre, vallási- és nemzeti hovatartozásra való tekintet nélkül, rászorultsági alapon osztják szét. Ha az ECHO nyújtotta segélyeket és a tagállamok által külön adományozott segélyeket összeadjuk, az Európai Unióra a világ első számú donorjaként tekinthetünk.
Működésének egyik leglényegesebb eleme a partnerszervezetekkel való együttműködés. 1999-ben már több mint 180 szervezet segítette a munkáját. 1998 és 2000 között a humanitárius segélyekre szánt összeg kétharmada non-profit szervezetek segítségével jutott el rendeltetési helyére. Egyes polgárháborús helyzetekben politikai okok miatt a civil lakosság elérhetetlen marad az ENSZ képviseleteinek, és csak nem-kormányzati szervek kapnak engedélyt az elzárt területek megközelítéséhez. Kiemelkedően erős az együttműködés a Világélelmezési Programmal, az ENSZ Menekültügyi Bizottságával, a Nemzetközi Vöröskereszttel és az Unicef-fel.

Azért, hogy egy átfogó képet alkothassunk az ECHO segélyeinek jelentőségéről, érdemes megemlíteni, hogy 2002-ben majdnem 560 millió Euro-t fordított az 1366 különféle beruházására. A legnagyobb

összeget az ACP országoknak és a volt Jugoszlávia utódállamainak utalták. Az előbbi a költségvetés 39%-át , míg az utóbbi ennek a 20%-át kapta. Az Ázsiai országok összesen 26%-ot tudhattak magukénak. A váratlanul fellépő szükséghelyzetben a terepmunka megkezdéséhez szükséges maximális idő 5 napról 24-48 órára csökkent. Ezzel az ECHO lett a világ leggyorsabban reagáló humanitárius szervezete. Ma már évente körülbelül 500 millió Euro-s éves költségvetéséből, több mint 60 országban, legalább 200 non-profit szervezeten keresztül több mint 18 millió ember számára nyújt különféle segítségeket.

A '90-es évek és az ezredforduló új világrendet alakított ki, minek következményeként a nemzetközi kapcsolatok fejlesztésénél egyre nagyobb szerephez jut a humanitás szelleme. Előtérbe került a szegénység elleni küzdelem, a fenntartható gazdasági és környezeti fejlődés, az emberi jogok biztosítása, valamint a harmadik világ felzárkóztatása és integrálása a világgazdaságba.

Minden évben, minden hónapban vagy szinte minden nap újabb és újabb humanitárius krízishelyzetek állnak elő a világ különböző csücskeiben. A legeldugottabb apró falvaktól kezdve egészen a milliós nagyvárosokig, a legváratlanabb pillanatban történhetnek olyan események, melyek az adott népcsoport életét és életkörülményeit akár évtizedekre is gyökeresen megváltoztathatják. Beszélhetünk akár fegyveres konfliktusokról, akár természeti katasztrófák okozta válságokról is. Az eredmény szempontjából ennek nincs jelentősége. Emberek milliói tengetik életüket víz, élelem, orvosi ellátás vagy otthon nélkül.

Ugyanakkor szerencsére egyre többen fognak össze annak érdekében, hogy az emberi életeket és a kulturális értékeket megmentsék, megőrizve ezzel Afrika és a világ sokszínűségét és vele együtt egy erkölcsi értékrendet is.

[i] :Dr. Herczeg Géza : A humanitárius nemzetközi jog fejlődése és mai problémái 5.oldal;
[2] :Martin Holland : The European Union and the third world 23.oldal;
[3] :Dr Herczegh Géza: A humanitárius nemzetközi jog fejlődése és mai problémái 79.oldal;
[4]: Az Európai Közösség Alapító Szerződése, Róma, 1957. március 25.; 130 u § (1), (2);
[5] :Az Európai Közösség Alapító Szerződése, Róma, 1957. március 25.; 131§;

Bibliográfia

Dr. Herczeg Géza: A humanitárius nemzetközi jog fejlődése és mai problémái Közgazdasági és jogi könyvkiadó 1981

William Brown: The European Union and Africa /The restructuring of North-South relations/ I.B.Tauris Publishers, London 2002

Martin Holland: The European Union and the third world, Palgrave, New York 2002

Aidan Cox, Jenny Chapman: The European Community external cooperation programmes /Policies, management and distribution/, European Commission, London 2000

Analyse synthétique des accords qui lient la Communauté Européenne aux pays tiers, Commission Européenne, 2001

European solidarity with the victims of humanitarian crises, European Commission, 2002

Africa and the European Union, European Commission, 2003

www.europa.eu.int

Az Európai Közösség Alapító Szerződése, Róma, 1957. március 25.;