

The concept of law: the multi-layered legal system

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The Concept of Law.
The Multi-Layered Legal System

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I. Chapter: Some Conceptual Problems of Law

Systematic monographs on the theory of law traditionally begin with the exposition of the concept of law, then each chapter unfolds the key components in the concept of law. This tradition can be called proper because of the needs of the didactic presentation, and it will be fundamentally followed here too. However, on the basis of our general social theory background (see Luhmann 1984; Pokol 1990) in the framework of which we believe all activities performed en masse and aimed at a function of social size can be grasped as a system, *subsequently the adequate exposition of the concept of law can cover nothing but the concept of the legal system*. Once the concept of the legal system has been expounded, it is possible, complying with traditional legal thought, to sum up the concept of the less precise “law”, which is actually a notionally looser repetition of the concept of the legal system.

1. The nature of social reality: the intellectual reality

The legal system is one of the functional subsystems of society just as science, politics, mass communication, health care, etc. represent such a subsystem. Therefore, first the “operating material” of society must be clarified, which represents the material of each social subsystem, separated from the material of natural reality beyond society (or to put it evolutionarily: below social reality). And after that we can near to the internal components of the legal system.

Living under the conditions of natural reality we are inclined to grasp social phenomena interwoven with and focusing on the objects of physical reality. For example, to identify a city, a people with its geographical surroundings, and in general even unconsciously to tie the reality of the observed social phenomenon to physical and biological circumstances. E.g., the museum is represented by its characteristic building, the university by the platform and the lecture hall. However, the reality of social phenomena is only built on these, and the more developed level the operation of society reaches, the more it uses the circumstances of physical and biological existence as a precondition, and unfolds the specific material of social reality. *And this represents the peculiar existence of intellectual connections, which are maintained in the communication among people, and are made lasting in norms, concepts and the symbols expressing them*.

During the short socialisation after their birth, which is getting gradually longer at higher level of social development, human beings with consciousness acquire the concepts, terms dividing natural and social reality and the operations necessary for handling these created by earlier generations. Commonly used concepts provide social reality with stable division subsequently the intellectual softness of concepts disappear and the option of different division with different

concepts does not even emerge. This is how, in spite of the intellectual structure of social reality established by means of concepts, categories, norms, the notion of social reality “with physical solidity” and its interpretation as the extension of natural reality comes into being. Especially under the circumstances of simple societies evolves the notion that social phenomena, norms are created for eternity just as the laws of natural causality. Under the conditions of modern society, however, the “created” character of social institutions and their continuous re-creation mechanisms become increasingly visible, and this makes the intellectual build-up of social reality increasingly apparent to the eye. Thus the thesis on the “objective” existence of social formations independent of communicative practice is false, also false is to deny the independence of these formations of individual notional and linguistic aspects. The degree of the existential relevance of social formations between these two extremes can be determined always on the grounds of a particular examination.

At the beginning of the 20th century this development led, especially in the German science, to separating specific social reality from natural reality, and grasping social reality as intellectual reality. This scientific development following Dilthey, Edmund Husserl, then Alfred Schütz became accepted in social theory thought.

2. The functional subsystems of society as intellectual systems

With social development social communities cannot properly solve basic functions necessary for their survival unless activities performed en masse aimed at each function are functionally separated. To mention the most important one only reference should be made to the fact that, for example, the need for a kind of community administration, protection, maintenance of order, each community demands some kind of state-political activity, or likewise occurring conflicts require an institution of administration of justice among people, or, for example, newcomers every time need to be socialised, and this calls for some kind of education, and we could enumerate the basic functions of society, which each community has to solve somehow to be able to survive.

At a rudimentary level these functions are solved either within the family, or in neighbourhood relations, or in the totality of a village without special social institutions, but the higher level a society’s development reaches, and the more overall and impersonal society the people of a village live in, the greater the role of independent functional subsystems is in implementing these functions. Thus we can see the functional separation of politics, law, science, economy, education, health care in the course of history, and highly developed societies cannot survive unless through the independent operation of these subsystems and balanced relations among them.

With this functional separation the intellectual build-up is more and more shaped by the legal subsystem, political subsystem, scientific system etc. representing independent intellectual subsystems. It must be further noted that with social development social subsystems specialised for each social basic function not only split and unfold their internal intellectual connections, but they are more and more professionalised and through that rise above the world of everyday life (see Pokol 1990). Only through lengthy socialisation, profession like specialisation does a single

person get to the stage where he or she is able to pursue activity in a professional subsystem, and the development of the entire society is ensured by its basic functions fulfilled by professionalised lawyers, politicians, entrepreneurs, writers, artists, physicians, etc. in the subsystems that have risen above everyday life's lay activities.

The keeping of a functional subsystem separately from the others (and the organisations of everyday life) is ensured by it processing the events of reality through a value dual of its own and typical only of it (see Luhmann 1984:34-35). *This specific value dual (or, in other words binary code) allows that the functional subsystem could formulate connections and things to do from the side of the social function fulfilled by the given subsystem.* For example, science processes reality in terms of the value dual: true/false, economy in that of profitable/non-profitable, democratic politics in that of "taking over government/going into opposition", law in that lawful/unlawful. The establishment of the concepts, patterns of thought, connections in each subsystem is determined by its own value dual, and by that they allow *reality being processed in a peculiar segment.* Thus the intellectual build-up of society are composed of intellectual subsystems operating in conformity with each basic function, and the concepts, patterns of thought created in each professional subsystem are shifted through mediation, in a simplified form, to everyday life as part of general education thus improving everyday thought. All this allows that more complicated societies are able to survive, contrary to the level of social organisation which is suitable only for the maintenance of a simple society, in which all functions are fulfilled by diffusely interwoven social activities and their institutions. E.g., the royal court in the Middle Ages was the institution of military, judicial, religious, economy controlling, etc. activities together, or a monastery was the common institution of religious, economic, educational, scientific, etc. activities, and this did not allow each activity being functionally differentiated. Simpler social formations and the elementary fulfilment of functions are yet possible but they are not suitable for attaining the level of complex social institutions.

So while researching modern societies *we need to deal with functionally separated intellectual systems* which unfold their own logic pursuant to their value dual, and on this basis are able to ensure the operation of society at a higher level.

3. Law as an intellectual system

Law processes reality to avoid conflicts among the members and organisations of society and to resolve them should they occur in the segment of lawful/unlawful, and as a result of that provides the members of society with normative points of reference for behaviour in relations among themselves. How one ought to behave him or herself in particular situations; what a person acting in particular situations may and may not do; and if he or she does not do that, then public authorities, in the last resort applying force against him/her, will bind consequences (sanctions) to the injury of the norm of behaviour. *Thus law in its most general formulation represents norms of behaviour supported by public force.*

In a general formulation law can be described as a norm, but it must be made clear that it is necessary to ensure that the relation among norms should be uncontradicted to avoid and

resolve conflicts in the entire society. *That is, legal norms can effectively operate as a system of norms established by means of taking each other into consideration.* The development of law reveals that, e.g., from the early, medieval phase of European development in several hundreds of years up to the 1800's the legal norms of each country became a more and more regular system separated into internal branches of law, more specifically into legal institutions supplementing each other.

The necessity of uncontradictness grows in law simultaneously with the development of society, and the complicated operation of complex societies is possible only at a high level of uncontradictness. This is what the systematic nature of legal norms can ensure. With increasingly more frequent social relations and increasingly more intense contacts among millions and millions of people and organisations, contrary to the unchanged relations in minor communities living in small villages at an earlier level of the development of society, for example, only increasingly complicated legal systems allow systematic legal norms. While in Europe in the Middle Ages, e.g., it was only judges who represented the administration of justice, who for a long time were not even trained lawyers, and it was from their decisions that the law of the given country was consolidated for centuries as common law, in later centuries conscious lawmaking separated from judicial administration of justice and rose above it, first by creating codices of common law, then by framing more and more consciously drafted new codices; simultaneously, jurisprudence appeared markedly to work out exact legal concepts. During the Enlightenment it was already the independent legislation, judicial application of law subject to statutes and jurisprudence working out legal doctrines, concepts together that represented the system of law.

Subsequently the system of legal norms as an intellectual system has been able to operate *as the common product of three layers of law* in the modern societies of the recent centuries. The *layer of the text* shaped in the processes of legislation, the *law dogmatics layer* of jurists working out the intellectual connections among concepts, categories, distinctions in legal texts, and finally the *layer of case law* of judges applying-specifying law to specific cases constitute the three layers of the legal system traditionally as it developed by the 1800's.

The proportions among these three layers of law may be different in each legal system. For example, the English legal system, which has developed mostly on the basis of judicial case law – and the parliamentary statutes that have gained ground since the second half of the 1800's, apply the case based detailed regulation technique and does not set forth abstract norms as the legal systems on the Continent – has not constructed a developed legal dogmatics layer, but it is just owing to the detailed, particular way of regulation that judicial case law is not separated dramatically from the intellectual level of the layer of the texts of statutes (see Dawson 1968). Here it is judicial precedents basically tailored to cases, on the one hand, and particular and detailed statutory provisions also tailored to cases, on the other hand, that represent law being the two halves of a single layer of law. Although it should be indicated that a certain set of law dogmatics concepts does exist even in the English legal system, but it is not so pervasive there as in the abstract law of codices on the Continent.

In the legal systems of the Continent, however, division into three layers of law appears markedly, and it can be said that the stronger the role of law dogmatics is in a legal system – and thus abstract codex law prevails in it – the more necessary it is to supplement it with

judicial case law. The clearest example for that is German law, and the legal systems including the Hungarian that developed under its influence well show the division of the legal system into three layers of law. In this solution the intellectual definition of legal norms heavily shifts from the legislator to the circles of jurisprudence, and parliamentary politicians can bind only a few definitions to the abstract codex law drafted by them when accepting the wording of statutes. However, on the other hand judges receive open norms, and they have a great freedom in shaping case law in the framework of the provisions of the abstract text. That is, in this arrangement the focal point is shifted from the parliamentary politics, and the juristic circles and the judiciary will be given a greater role in this. It is, however, undoubted that thus law is given more emphatically into the hand of professional lawyers, while in the aforesaid English solution beside lawyers parliamentary politicians also have a significant role in determining law.

If we confront English law with Continental law, then we can also see that while the English legal norms going into details represent mostly norms with the accuracy of rules for the actors in particular situations, the Continental legal systems based on abstract legal codices provide guidance for behaviour to be followed in particular situations only at the level of legal theory. *Only the supplementary layer of law of the specifying judicial case law will show what is lawful in the given situation and whose action is supported by the law with as well public force.* That is, contrary to English law with accurate rules, it is the abstract legal theory normative material and the judicial case law specifying it together that represent the alternative in Continental legal systems, and the two different solutions can be formulated as two answers given to the question of regulatory necessities in modern societies.

Alongside these traditional layers of law another layer of law has appeared in the past half century in the legal system of several countries, and its appearance has restructured to some extent even the traditional layers of law. *This is the layer of basic constitutional rights*, and it appears as an independent layer of law only where constitutional court jurisdiction evolves beside written law. In the beginning it was typical only of the United States from the beginning of the 1800's, then from the 1950's it appeared continuously in several European countries, and in the wave of democratisation in 1989 in Central-Eastern Europe the new constitutional court jurisdiction was introduced in this region too.

Constitutional rights appeared first as human rights in the ideological fight against feudalism, formulating various political, humanitarian demands, and were included in state constitutions in the 19th and 20th centuries. When constitutional court jurisdiction based on them began, and justices started to compare particular statutory provisions with them, examining their possible unconstitutionality, then it became obvious that as an abstract demand basic rights can control public decisions, but when the intention is to decide particular rights in cases with them, then each basic right stimulates to move toward different decisional directions opposing each other. *That is, at the level of cases these basic rights are often contradictory, and can be applied by restraining some of them and giving priority to others.* However, if it is other justices that decide the case, and give priority to other basic rights, then they will reach just the contrary result, and subsequently an unpredictable constitutional court jurisdiction will control law. As it is the individual justice's hierarchy of values that will determine which rights he deems prior to the others, and which to be pushed in the background.

In spite of this problem, if the layer of basic constitutional rights are directed only at legislation and lawmaking and this layer of law controls the selection of one of the alternatives only in this respect, then with several years' constitutional court decision material basic rights can be provided with more or less cleared decisional points of references, and with a consistent system of viewpoints (tests, internal measures) contradictions among them can be eliminated. Of course, only in the event that the public opinion of the underlying legal circles puts pressure on constitutional court justices to attain consistent adherence to the elaborated viewpoint system. Then basic constitutional rights and basic constitutional principles discerned in the constitution will determine lawmaking "from above", by extending the most abstract normative points of reference, and will not allow that statutory provisions are pushed into directions which are possibly accepted by the majority of the empirical public will but come into conflict with longer term civilisation requirements.

The problem is greater when the abstract and contradictory basic constitutional rights and principles begin to push out legal dogmatics activity in each branch of law working with traditional case law attitude, and in its place formulations of concepts for each branch of law deduced from the abstract basic rights/fundamental principles come into existence. This happened once in the history of law in the 1700's and the beginning of the 1800's, when the intention was to deduce evolving regulations and concepts for the branches of law from intellectual law and natural law principles. This legal argument and thought meant for "eternity" was not able to regulate the rapidly changing conditions of a complex society, subsequently by the mid of the 1800's this method was no longer applied, but in recent years the exaggerations of constitutional court jurisdiction and "constitutionalisation" have partly revived these attempts in certain circles of lawyers.

The problem is even greater when constitutional rights begin to produce their effect directly on judicial application of law, possibly the relevant statutory provisions can be struck down as unconstitutional by referring to some basic right, and decision can be reached directly on the grounds of basic rights. For some years the administration of justice in the United States shifted in this direction from the mid 1950's, but due to the problems that arose by the 1970's it was radically cut back.

Nevertheless, if constitutional rights have an impact on the legislation, then they can be accepted as a new layer of law placed above the traditional three layers of law. In most of the countries where constitutional court jurisdiction has appeared, this is typical.

The main difference between basic constitutional rights and principles and the basic principles for each branch of law abstracted from the rules of each branch of law is that the latter constitute an uncontradicted unit, actually they contain the abstract intellectual order of the particular rules of the branches of law in a consolidated form. Contrary to that, basic constitutional rights and principles are not able to constitute an uncontradicted system even if with internal tests/measures they might be as well specified by the constitutional court justices of some legal systems. E.g., the taking away of the life of the embryo allowing abortion can be never reconciled with the mother's right to have disposal over her own body, the right to develop her personality, if she intends to get rid of the unwanted pregnancy through abortion. Regarding such contradictions it will be always the constitutional court justices' values that decide, and other justices' other hierarchy of values will take decisions pertaining to this in

other directions, but it will not be possible to give a final answer in this basic rights conflict in a satisfactory manner. And not so much apparently though, in each basic rights conflict this situation will arise.

4. The concept of the legal system

From the above description it can be seen that *law is an intellectual system, which contains the norms – basic rights, basic constitutional principles, principles for each branch of law, statutory and order rules, judicial case law norms – in the relations of the members and organisations of society in the last resort supported by public force*. It is in various proportion that the legal system of each country is divided in the system of its intellectual construction into the layer of the text, the layer of legal dogmatics and the layer of judicial case law, and allows the development of the layer of basic constitutional rights above them. To ensure predictable administration of justice under the conditions of complex societies it is necessary to establish certain optimal proportions with regard to the weight of each layer of law. Thus a particular way how a legal dogmatics layer exerts its effect and through that the pushing of statutory provisions to a more abstract domain, for the sake of regularity and flexibility, seems to be a modernisation requirement. To a certain extent, even English law has been shifted in this direction in recent decades, although it does not reach the level at which Continental legal systems are built on legal dogmatics. In the same way, the abstract codex law built on legal dogmatics would not be able to provide predictable administration of justice without the specification of judicial case law; and the growth of the role of judicial case law in most Continental legal systems has indeed become apparent in the past decades (see MacCormick/Summers 1991; 1997). Finally, basic constitutional rights and principles as a new layer of law built above the traditional layers of law can work optimally only on condition that their effect is directed at the legislation, and they do not extend to reach judicial application of law. In this event, fundamentally it does not threaten the traditional layers of law and predictable legal dogmatics specifications, but ensures the incorporation of longer term civilisation requirements into the law through controlling lawmaking.

5. The concept of law

In a more precise formulation, i.e., formulating it at the level of social sciences, law can be grasped as a legal system, but following the juristic tradition the concept of law can be defined in a looser form too by gathering the conceptual elements from the above analysis. *Law is, thus, the system of norms and the legal dogmatics concepts used by them, which are at the most comprehensive level determined by the basic constitutional rights and principles and the constitutional court justices making their decisions on the grounds of them, are made under this framework by the legislators and other lawmaking bodies pursuant to the connections among legal dogmatics concepts, and are specified by high courts, especially supreme court*

justices, making their decisions on the basis of them by means of case law, and the judicial and authoritative decisions made in cases based on them may be implemented in the last resort also by public force.

II. Chapter: The Concept of the Multi-Layered Legal System

If one decides to make a comparative analysis of the various modern legal systems, one will inevitably encounter the following phenomenon; namely, that the very same component which one finds in the legal systems of different countries is of varying importance; in certain countries it plays a major role, while in others it is much less important. Such a comparative study which examines components of several different countries will reach a far more comprehensive result than research which only focuses on a single legal system. Therefore, an attempt to create an overall legal concept will be more precise if it is based on a comparative study of the various legal systems of the present, and further compared with the opposing influential legal theories of the last centuries. The result of such a comparison will show that these legal theories restrict the actually existing multi-layered legal systems. This can be easily integrated into an overall theory of law, which is the aim of this brief study.

1. Restricting legal theories and multi-layered legal concepts

If one examines the development of the legal theories of the past two-hundred years, one observes the formulation of certain opposing legal concepts which identified law with phenomena that determined the rulings of court. Montesquieu's surprising statement, which declared that the judge is the mere mouthpiece of law, appeared in numerous tendencies of legal theory in the last two-hundred years. First, it was the French "école de l'exegese" in the first half of the 19th century; later on it appeared in German legal theories by Julius Bergbohm and, some time later, by Hans Kelsen. Subsequently it made its appearance in the theories of the Soviets.

The legal concept which identified law with the text of the past decisions made by state bodies was opposed by the leading German legal concept of the 19th century, namely the pandectist jurisprudence, known under several designations, such as "Begriffsjurisprudenz" or "jurisdiction built on legal-doctrines", according to the terminology of its critics. This concept defined law as a "touched up", refined system of legal-terms. Its main representatives, Georg Puchta and Bernhard Windscheid, for instance, saw the determination of the judicial decisions through the hierarchical order of the legal terms, and when the first draft of the German BGB (civil code) was completed with the participation of Windscheid in 1884, the practicing judges of the time labeled it a "monstrosity of jurists" (Fikentscher 1975; Larenz 1979). It is impossible to deal with everyday cases, with all their tiny divergences, if legislation is based upon an abstract

system of legal terms - this was the opinion of the practicing judges.

This clarity of legal notions and the identification of law with the clear-cut system of legal terms appeared in the United States in the 1870's, almost contemporaneously with Windscheid's works, through the participation of Christopher Columbus Langdell, the dean of the Faculty of Law of Harvard University (Duxbury 1991; Grey 1996). It remained the leading tendency of the American legal practice and influenced works on legal science for the next several decades. An opposing tendency emerged which defined law as the collection of all judicial decisions. In Germany, it was supported by the members of the so-called School of Free Law, while in the United States its representatives were the exponents of the trend of "legal realism".

From time to time, although a few influential jurists appeared who endeavored to include the multiple layers of law in their legal concepts, although the authority of the ruling tendency always oppressed these random attempts. The authors of multi-layer legal concepts therefore abandoned their ideas, and they too adopted the mainstream direction. The German Carl Friedrich von Savigny can be mentioned, for instance, who, in his earlier works wrote about legal institutions and legal dogmatics which analyze them and formulate general rules. Later on, however, influenced by Georg Puchta himself, he also shifted his attention towards a legal concept built on legal terms in spite of being one of the main supporters of the idea of a school of legal history. Another example is Francois Géný who, at the end of the 19th century in France, opposed textual positivism propagated by the "école de l'exegese", and emphasized the importance of the multiple components of law. In 1921 in the United States, Benjamin Cardozo emphasized the role of the multi-layered legal components in his book "The Nature of the Juridical Process" (Cardozo 1921). Later on, however, he adopted the views of the legal realists, who emphasized the central role of the rulings of the court.

Thus, these theories define law as a "textual layer", "legal dogmatic layer", and "a layer of judge-made law", though it must be said that these theories only recognized one of the three layers as law at a time, and sometimes the coming into existence of one of these theories was in reaction to another.

Another layer of the law was emphasized by an emerging legal theory in the United States in the 1960's, which can be identified with the name of Ronald Dworkin (Dworkin 1977). This theory found the essence of law in the fundamental constitutional rights and basic constitutional principles. Dworkin's thesis was set out in his book "Taking Rights Seriously", though his legal theories are more clearly expressed if we paraphrase the title as "only basic rights should be taken seriously!". In the United States from the 1960's the extension of the judicial process based directly on the constitution led to the relegation of simple laws to the background while, in parallel, the doctrinal conceptual system of certain legal branches also lost its importance. These developments, which began in the United States, have emerged in several other countries in the past years, while in the U.S. they fell into the background (Posner 1990; Grey 1996).

The textual layer, the doctrinal layer, the layer of judge-made law and, above all, the layer of fundamental constitutional rights - these notions summarize the most influential legal theories of the last two-hundred years. How is one to create an overall theory, a multi-layered legal concept out of these opposing legal concepts?

2. The layers of the law

If one examines the development of the modern legal systems, a striking feature of its progressive tendency is that the rules of law tended to take the form of decisions of the sovereign power, and that judicial decisions had to be made according to the texts of the state power. Based on the medieval continental European jurisdictions, which already possessed collections of customary laws, the legal practice that can be always amended by the central state power was rapidly accomplished with the influence of the absolutist rulers of the 1600's (Caenegem 1980). Later on, with the sovereign power's growing democratisation and the development of parliamentarism, it was only the place of making the final decisions that shifted from the royal authority to the parliaments. With this progress, law became the collection of the decisions of the sovereign power, but it primarily became a collection of legislated texts in countries with a democratic political system. In England and in countries influenced by England's common law system, however, it was attenuated by allowing the high courts to create judge-made law.

With the adoption of a multi-party system and within the sphere of mass-media based on freedom of speech, the parliament became the culminating point of the society's political common will; so the law that appeared in legislative texts more or less depended on the will and majority opinions of society. The court decisions that depend on legislation fulfill society's self-governing nature: society itself decides when the judges apply these fixed laws in each individual case and dispute. Because law fundamentally appears in legislative texts and is a result of a democratic decision of the state power, it tends to express the empirical common will of society.

When textual positivism identifies law with legislative texts, it emphasizes an important aspect, but it also commits two fundamental mistakes. One of these concerns the following: in the complex and intricate social context, thousands and thousands of legal regulations have to be perpetually created if they are to be consistent. If this is not done properly, they may end up canceling each other's effects through contradictory content. It might be well imagined what sort of legal chaos would result on the level of judicial case-law. It is only a carefully prearranged system of legal concepts that can provide harmony amongst the many thousands of legal regulations. Furthermore, it is the unified application of these concepts in many legal rules that can maintain this intellectual systemic quality and consistency in a heightened form. Thus without a legal dogmatic layer, the layer of legal texts cannot function. Overlooking this fact is one of the errors of textual positivism.

The other source of error is the failure to take into account the openness of the legal regulations. It is very typical of code-like laws to use overall, rather general notions and regulations, which renders divergence possible in its application. This could result in several different judicial decisions in a country in similar or even identical cases, which would easily create legal chaos. Thus without a Supreme Courts' use of concretizing precedents, the imprecise legal regulations could not properly function. (For the growing role of the precedents in the contemporary legal systems see MacCormick/Summers 1997).

Textual positivism, a concept of law built on legal dogmatics and the concept of judge-made law

can be integrated into a multi-layer legal concept, if their striving for absoluteness is set aside. The textual layer of law, that can function as a consistent intellectual organization due to its prearranged doctrinal conceptual system, is connected to a democratic political common will, and among the existence of many thousands of legal provisions, it keeps the functioning of law in consistent order. The openness of the regulations that the texts of laws, that are formed from a legal-dogmatic point of view, contain, are counterbalanced by the jurisdiction of the Supreme Courts. It is a jurisdiction built on precedent, and together with the doctrinally formed texts of laws, it renders a unified law for each country.

The importance and function of the aforementioned three layers of law can be easily observed in continental European legal systems, as well as those built on the common-law system, though in different proportions. It can be stated, that the more abstract the codified law gets in a legal system, the more inevitable it becomes to concretize the doctrinal categories, and to shape the judicial processes accordingly. Furthermore, the loose regulations that the codes contain have to be concretized and updated with the current judicial precedents. In contrast, the more specific and concrete the legislative provisions, the less necessary it becomes to have a doctrinal layer or a concretizing body of judicial precedents. Accordingly, judicial precedent would instead function as a method of independent regulation, and not as a concretizing legal layer. The English legal system can be characterized as such a system, while the legislation of the United States started to shift in the last century towards that of the continental European countries' codified legal system and, compared to the English system, a stronger legal-dogmatic categorical system was established in certain fields of law (Dawson 1968). However, among the continental European countries' legal systems, a visible difference can be observed concerning the importance of each of the three legal-layers; while in the German legal system and in the other continental legal systems influenced by it, the doctrinal layer is of high importance, it is much less so in the French legal system.

There is a divergence amongst the continental legal systems with regard to the development of the layer of judicial precedent. Although its significance seems to be increasing everywhere in the course of the last few decades, it is mostly in the Scandinavian countries and Germany where it is of marked importance, while in the southern-European countries and France it is still not so highly emphasized (see Alexy/Dreier 1997; La Torre/Taruffo 1997; Peczenik/Bergholz 1997). Among the post-socialist countries, it is in Hungary and Poland that a visible development can be observed concerning the importance of the aforementioned layer of judicial precedents (Wróblevski 1991). Besides the mere textual layer of official regulations, the layers of doctrine and judicial precedent are also an essential part of the legal systems of these countries. In Hungary, the empirical statistics which analyze the rulings of the courts prove that the position taken by the Courts is based on the texts of law, as well as on the interpretations of certain doctrinal notions, together with the precedents of the Supreme Court which provide solutions for some of the legal dilemmas which were left unsolved by the former legal regulations (see Pokol, 2000a; 2000b).

The cooperation of these three layers of law is not recent; it can be observed in the legal history of the past centuries and, in some countries where a Constitutional Court was established, it was even accompanied by a layer of constitutional rights. If we do not accept Ronald Dworkin's overemphasizing attitude on this field, and we attempt to integrate fundamental rights into an extensive legal concept, as a recently established legal layer, the following connections have to

be emphasized.

As a starting point it has to be stressed that this recent legal layer may have a different impact on the three already existing layers within the legal systems of various countries. Wherever the new legal layer comes into being with the establishment of a Constitutional Court, it inevitably influences the creation of the textual layer. A judicial decision which is declared unconstitutional loses its validity - this is the sole influence of the layer of fundamental rights. Its other important influence is due to the procedure of considering the essential normative basis of the previous constitutional decisions before issuing new judicial decisions.

A third influence can be observed if the fundamental constitutional rights and their concretizing constitutional restrictions are included in each legal branch's doctrinal activity, and the doctrinal system of legal terms of the criminal law, family law, labour law, etc. is (also) altered according to the legal layer of fundamental rights. If this is accomplished, the new legal layer, besides its effect on the textual layer, will have an influence on the doctrinal layer as well.

Finally, a third influence is that of fundamental rights on certain court rulings; either through its inclusion in the analysis of judicial decisions - together with other evaluations, or through their exclusion - or relegating the relevant judicial decision itself to the background, and issuing a ruling based on fundamental constitutional rights. If the latter occurs - as it did in the United States during the period of the activist Warren Court in the 1960's and 70's, then fundamental rights push all other legal layers into the background. In most legal systems which have constitutional courts, the layer of fundamental rights only influences the layer of the legal text, and jurists also form their "de lege ferenda" suggestions that consider fundamental rights according to the legislation and not with the aim of influencing the judicial decisions.

In this restricted solution the traditional cooperation of the three legal layers remains, and the fundamental constitutional rights only slightly modify its final outcome. Aspects of righteousness, and influences that have a short-term pacifying effect on the empirical common will, improve the functioning of the legal system.

If the aforementioned ideal arrangement is established, the layer of legal texts, together with the layer of legal dogmatics and that of judicial precedents and fundamental constitutional rights together provide a unified legal system. This is the goal of the concept of a multi-layered legal system. Besides defining the ideal concept of law, it also points out the shortcomings of other legal concepts that strive for the absoluteness of one of the legal layers.

3. The implications of the concept of the multi-layered legal system

The broadening of the concept of law and the recognition of other legal layers engenders the necessity of reconsidering several legal phenomena. In the following, we shall examine a few of these.

(The definition of law) One of the first aims of the necessary reconsideration has to be to redefine what law itself means. In other words, if we include the doctrinal system as an inevitable part of the law then, accordingly, it has to be expressed within the definition of law itself.

There is another aspect in which law differs from non-legal norms. Namely, it produces an intellectual system, and after a certain stage of development this emphasizes the notions and categories that are used by legal norms from other notions of everyday-thinking. The only way to eliminate the (possible) inconsistencies that might occur among the many thousands of legal norms is to deliberately create specific legal terms, expressions and classifications, and then systematically use these when dealing with any legal norm in question. Contrary to this, other non-legal, social norms rely on notions that are used in everyday-life, and the solutions based on these notions do not constitute a unified intellectual system.

Taking all this into consideration, the definition of law can be given as the following: law is a system of norms and their terms that express regulations and prohibitions which, failing all else, is sustained by coercion of the state.

(Legal dogmatics as a barrier of legislation) The prearranged system of legal terms that the legal norms are based on also has an influence on the modifiable nature of certain legal norms. Namely, the modified norm has to fit the already existing unified intellectual system and, for instance, a new legal norm can not use a classification that would clash with the classifications used by the already existing legal norms. For example, in the criminal law of most of the modern legal systems, the intentional character is separated from negligence when judging culpability - or rather these concepts are divided into different degrees. If a new legal rule contained a new classification of guilt, regardless of the already existing ones, the numerous restrictions of the criminal code would simply collapse. To replace a legal norm with a new one is only possible if it is doctrinally verified. The emphasis of this connection sheds a different light on the ability to modify legislation and the role of legal dogmatics which ensures the law's intellectual unity.

Often it is sufficient to include well-trained lawyers in the parliamentary apparatus and legislative committees in the ministries in order to verify the consequences of certain amendments. But if a more significant amendment or a new enactment of the legislature is at stake, the consideration of the doctrinal questions should be done by a specialized legal experts in the relevant field. This is especially so in the case of codified laws.

Inasmuch as the politicians in parliaments often amend and interfere with laws which rely on a prearranged notional system, or rather establish new codes, and this does not affect the fundamentals of the legal-dogmatics, we have to hypothetically assume that there has to be a transformational-mediator sphere in existence between the legislation and the legal dogmatic sphere, that somehow connects legislators following a political logic and the legal dogmatic sphere itself. In order to verify this hypothesis, the following things have to be taken into consideration: the methods of codification, the political intentions of the parties, or rather the professional organizations of legislation. As a result, *the outlines of a legal-political sphere* can be detected which, in some form or another, is present in every modern democracy, particularly in the case of the continental European countries.

On the one hand, this legal-political sphere exists as a part of the legal subsystem that is directed towards politics, and on the other hand, some institutions can be found as part of the political subsystem that are involved with issues of legislation. Ideally, these two elements of the legal-political organization adopt parts of the “de lege ferenda”-type restrictions in a two-step transformational process, and in the course of a selected borrowing the political side gradually tables bills which were originally formed as part of a doctrinal activity, according to the logic of politics (for instance the method of aspiring to maximize the number of votes).

The part of legal-politics that is established as a part of the legal subsystem, typically consists of bodies and assemblies of the various legal professions. The conferences, programs, membership-meetings and publications of these bodies mostly emphasize proposals about amendments that react to the recent social problems, and that were previously outlined and supervised from a doctrinal point of view and already published in some of the legal periodicals. Thus, a part of the numerous “de lege ferenda”-type propositions that the legal experts of universities and the members of the high courts etc. outlined only from a juridical point of view, become the object of a certain filtering process. As a result, those propositions will come to the foreground that are the reactions on the current social problems. At the same time, non-topical propositions that concern academic-scientific issues only excite attention in scientific circles and are the subject-matter of the legal periodicals, without having any influence on the functioning legal sphere.

The other part of the legal-political sphere that is founded as part of politics, consists of the legal experts of the parties, the legal groups of the parliamentary party-factions, and of the groups of the jurists who are the members of the so-called “background-institutions” of the political parties, such as the political foundations and party-schools. Though the aspirations of the parties are mostly determined by the maximization of the votes (and due to this they try to include motions in the party’s program that are likely to enhance the number of votes), the adequacy of the programs inquires aspirations that are more or less workable. On account of the latter reason, the legal experts of the parties can only choose from propositions concerning amendments that are adaptable from a legal-dogmatic point of view. Although it becomes very important method to start looking for such motions among the lot that would fit the interest of a certain party the best, or rather to look out for those that would be against their interest the most. The jurists of the parties mostly concentrate on those “de lege ferenda”-type regulative propositions that were already emphasized on the assemblies and conferences of the associations of the lawyers, and the social consequences of which were already stressed in relation to certain propositions. Thus with a double transformation - despite the pushing of the pure legal-dogmatic point of view into the background and emphasizing the logic of politics - those regulatory models will appear in legislation, that do not violate the intellectual coherence of law. The legal experts of parliamentary committees are continually on the watch for motions concerning amendments that would violate the established legal-dogmatic system.

It is only this legal-politic sphere that mediates between law and politics, that can assure the proper operation of legislation, and the intellectual systematic character of law.

(The expansion of the circle of legal sources) The inclusion of more legal layers into the concept of law requires the expansion of the circle of legal sources. As the multi-layer legal concept can be best observed in the legal systems of the continental European countries, let us

look at their legal sources.

It is the state bodies that are in charge of the textual layer of law, and the sources of the textual layer are those forms of decision making, that contain the textual layer of law. The most characteristic of these are the forms of decision making in the case of parliamentary acts, the forms of decision making of the governmental orders, the orders of the ministers, or rather the locally prevailing forms of decision making of the local authorities.

The first outcome of these forms of decision making is a series of open legal norms, that can only be accurately interpreted according to the legal-dogmatic categories that the norms contain. The reduction of the occurring disparate possibilities and the establishing of a more unified interpretation can be achieved with the consensus of the legal profession. The employment of the accepted legal opinion in legal case-decisions, and - due to juridic decisions that refer to these - also the legal-dogmatic works that express legal consensus, all contain characteristics of legal source. This is typical of Germany, for instance, where in the case of legal dilemmas that have to be decided by the Supreme Court, the judges often refer to works of certain jurists (Alexy/Dreier 1991). It is characteristic of numerous countries that when a decision has to be made about a legal dilemma, it is the commentaries of the law that they refer to, and not directly to the law as it applies to the case. According to this - although on a comparatively small scale -, some systematizing legal-dogmatic works may also serve as a kind of a legal source in certain legal systems.

The legal textual layer's regulations - even if it is amplified with the legal-dogmatic interpretations - still remain open, and the layer of the concretizing judicial precedents that supplements it and creates a further legal source, has to be perpetually observed by lawyers, if they want to know what they should expect in their cases. These judge-made laws, that gained considerable importance in the legal systems of the continental European countries, were mostly created by the Supreme Courts of the countries in question, and the forms of decision making of these judicial forums function as a legal source.

Finally, wherever a constitutional court is in existence, its concretizing decisions concerning fundamental constitutional rights and basic principles also serve as a legal source. These constitutional decisions have to be separated from the concretizing precedents that concern basic legal decisions, because the fundamental rights that these are based on are not systematized dogmatically, they are usually more abstract and compared to certain legal restrictions their openness is greater, or the fundamental rights contradict each other in some cases, respectively. This is one of the various reasons why, based on these, in the continental countries it is the constitutional court that decides in these cases, and their influence is reduced to legislation, furthermore, they do not directly affect the judicial decisions. Naturally, there are great differences between the degree of influence that they have on a countries' legislation, and apart from most of the countries where the impact of fundamental rights and the decisions of the constitutional court (that serve as the interpretations of them) is restricted to the role of controlling legislation, in Germany they also influence certain judicial decisions. In theory the judge, based upon the constitutional court decisions and the constitutional basic rights, could simply set aside the given judicial provisions that should be applied under those circumstances and directly refer to these in a constitutional case, as it was achieved in "the rights revolution" in the United States in the 1960's (see Epp, 1998). However, this did not become customary in

Europe. In other respects, if this is not established, then it can result in the falling of the other legal layers to the background, and furthermore, in the course of the re-politicization of the law it can lead to the corrosion of the predictable judicial decisions - as it could be seen as one of the consequences of the “rights revolution” in the United States. (For the politicization of the law in the United States see Scheingold 1998).

The existence of these degrees show that the constitutional court-decisions would only be of full value as a legal source if they had direct influence on certain judicial decisions, though this only appears as an exception in the continental legal systems. In most places their impact is narrowed down to the control of legislation, therefore their function as a kind of a legal source is limited.

(Broadening the methods of statutory interpretation) Having included numerous other legal layers into the theory of law and the legal system, and the discovery of the determined relations between them, influences the ways of legal interpretation as well. Let us look at a few connections visible on this field.

The recognition of the importance of the textual layer of law brings forth the recognition of the primary importance of grammatical interpretation. It is the parliament, as the chosen representative of society’s political common will, that is in charge of the proper interpretation and usage of the textual layer of jurisdiction, therefore to take the grammatical meaning of the text seriously is identical with taking the empirical common will seriously. The several ways of interpretations that rely on the other legal layers can only advance as far as it does not contradict the clear grammatical meaning of the legal text.

The legal-dogmatic layer and the emphasis on the intellectually systematic character of law in the course of the functioning of legislation impels the employment of those ways of legal interpretation, that, beyond the grammatical meaning of the textual layer, help the judge in decision making in a given case. One of the possibilities is the interpretation based on the use of legal-logical maxims, that, starting from the text’s perceivable meaning, but not encroaching it or using judicial autocracy, manages to control the judicial procedure. The so-called “argumentum a minore ad maius” (to reach more from the less by inference), and the “argumentum a maiore ad minus” (to reach the less from more), their collective designation is “argumentum a fortiori”, or the “argumentum a contrario” (induction from opposites) etc. can control jurisdiction with the extrapolation of the text’s perceivable meaning. In order to remedy a situation when a legal gap occurs, the judicial decision that relies upon analogies shall also end up leaning on the legal-dogmatic layer, as it constructs the verdict directly from the legal principles (this process is called legal analogy), or it transfers a legal provision that was created in a similar case, so to base the current regulation on the former example (the method of statutory analogy). As to the doctrinal interpretation, it implements the embedding of the notions found in the textual layer, therefore it binds the textual and the legal-dogmatic layer together, in relation to the current case.

The interpretation based upon precedents connects the textual legal layer with the layer of judicial precedents, and it specifies the open regulations, and therefore assures the nationwide unity of jurisdiction. Thus, this is of primary importance in the concept of the multi-layer legal system.

From the multi-layer legal system’s point of view it can be qualified as dangerous, when in

relation to a current case, the verdict relies on an interpretation that is based on such constitutional court decisions that concretize fundamental constitutional rights and basic principles. The American legal practice that carried this into effect is a proper example to show how this process “re-politicizes” law, and how it instigates to push the other legal layers - besides the layer of the fundamental rights - into the background (see MacCann/Silverstein 1998; Scheingold 1998). The German legal practice is also liable to experience such a shift, and the only reason why it has not yet shown such negative signs is because - despite having accepted the fundamental rights as directly prevailing through the German constitution - in practice they are rarely included into the current judicial procedures.

In Central Europe it was in Poland where, for only a few years, the constitutional court’s legal interpretations were obligatory, that is, the judges were bound to take it into account. But the judicial opposition to the functioning of a re-politicized constitutional court led to its exclusion from the new constitution of 1997 (Poplawska 1998). The Hungarian constitutional court - even on an international scale - has a very great competence, and it has a right to eliminate laws, though the constitutional court decisions do not directly influence judicial decisions. In fact there are some lawyers and smaller groups of legal experts who - based on the American pattern achieved by “the rights revolution” - support the introduction of the constitutional court’s direct influence on judicial decisions, but this has not been put into practice yet.

Thus in order to conclude, the concept of the multi-layered legal system supports the idea of a law on a larger scale, accepting the parallel operation of several methods of legal interpretation at the same time, therefore it is against legal concepts that place a single legal layer into the center.

III Chapter: The layers of law in the history of legal theories

It is judicial casuistry, the sphere of jurisprudence/law dogmatics, the sphere of legislation and the constitutional court practice over constitutional rights created in a large number of legal systems in recent decades that can be grasped as the layers of law. Keeping this overall picture in view, the restrictions, the one-sidedness of the key tendencies in legal theory can be classified into main types, and thus the legal concepts that can grasp the total structure of law more completely will become more easily assessable. First, let us consider some examples of the *legal positivist* concepts that restrict law to the text of law; then the approach of restricting law to the *layer of law dogmatics*; after that we shall dwell on the view that identifies law with the *judicial practice*; then we shall deal with *the approach that settles law around constitutional rights*, which is a quite recent development. A good number of the approaches of the *sociological school*

of law, primarily at the beginning of the 20th century, identified law with *everyday practice*, thus we shall also touch upon this as a remarkable restriction.

1. The restriction of decisionist legal positivism

This view of the law puts one of the important aspects of modern legal systems in the centre. Law consists of decisions issued by defined bodies (high courts, public authorities), from which judges and other law enforcement officers gather judgements with regard to particular cases. This attitude towards law has two sides, and these two sides should be assessed differently. On the one hand, law in this interpretation is equal to the text of decisions that appear in formalised legal sources. From the point of view of the practising judge, at least as regards the main weight of his orientation, this side contains an important truth. The other side of decisionist school of law is the really problematic one, which considers the adjudication material appearing in these legal sources actually the product of the public authority that issues it, and thus declares the option to change it, or at least this ensues from it without being stated. Provided that this latter side, that is, the option to change is realised in practice, it immediately comes out that the thesis of judges being bound by the text of law contains restriction, and this will stay hidden as long as the text of law consists of the categories of law dogmatics activity of working out harmonised decision viewpoints, the deductions that socialise judges and the constructions allowed by those. As long as this is the situation, legal positivism means no major problem from the point of view of judges.

The first clear formulation of the decisionist view of the law can be traced back to *Hobbes* (Perelmann 1983:428), who, contrary to Locke's former concepts, set no limits to the sovereign ruler who had ended the original state of nature. *Rousseau's* concept of sovereignty vested in the community took this sovereign legislation limited by nothing further, and Montesquieu's theory of the separation of powers, in which the judge as "the mouth of law" simply declared the judgement, accomplished this basis of ideas. In France this theoretical background and the successfully drafted codices of Napoléon made "école de l'exégèse", "the exegetic school" dominating since the beginning of the 19th century, which was not willing to acknowledge anything but the text of codices as law for almost a hundred years. As one of their representatives, Bugnet stated he did not know the concept of private law, what he exclusively used was Code Napoleon (Kramer 1969:6). Bergbohm's "Jurisprudenz und Rechtsphilosophie" published in Germany in 1896 represented the first pure formulation of the decisionist school of the law, and it became so dominating as it never did in France. Due to the peculiar features of common law, theories in England had never played an important role in determining the actual development of law, subsequently, *Jeremy Bentham's* and following him *John Austin's* view of the law which based law on state commands had only theoretical importance. Austin had a greater impact on the 19th century American legal theory, which joined in legal practice in operation to a greater extent, and could thus influence the reality of American law more. It was, however, not Austin's definitive legal concept based on state commands that became important but his analytical attitude towards law that highlighted legal categories. (And it was just this that later the American realist school of legal thought took firm action against, and turned to judicial practice similarly to the free school of law that took firm steps against the German conceptual jurisprudence.) Thus it is mostly due to his definitive law concept that Austin's view may be ranked among etatist law concepts (see Ott 1983:425).

One of the most powerful formulations of decisionist legal positivism undoubtedly comes from

Hans Kelsen. In this respect the most important peculiarity of Kelsen's Pure Jurisprudence is that it breaks, without explicit refutation, with the concept of law based on *intellectual unit* accepted in German jurisprudence since Savigny and Puchta. The traditional reply to the question what gives unity to the multitudes of legal forms was that it was the hidden law dogmatics system of categories chiselled together. Whereas Kelsen believes that the essence of unity is that particular legal decisions can be traced back to earlier decisions, eventually to the constitution and a hypothetical fundamental norm behind it (Kelsen 1934:63). It is the specific feature of law that a state decision connects the casuistic facts of a case from real life to an artificial legal consequence. Law is thus a special technique that can connect anything to anything through this connection, hypothetical judgement, which must be considered law. The only precondition is that this state decision should be made during proceedings and comply with frames that has been determined by an earlier state decision for it (Kelsen 1934:24). The essence of the unity of the law is this formal scale of validity.

2. The absoluteness of legal dogmatics

In the second half of the last century pandect jurisprudence, or, as called by its critics "Begriffsjurisprudenz", "conceptual" jurisprudence, alongside decisionist legal positivism, clearly shows another possible restriction of the structure of law. Law in this view is the system of subordinated and superordinated concepts, legal theses logically deducible from one other, which bind both the law maker, should he intervene in the law, and the judge when they apply law or rather the legal conceptual system created by the layer of legal dogmatics/jurisprudence to the particular case. In this concept of law the profession of lawyers is the carrier of law but it is only *university jurists* getting in the centre of the profession who can ensure the systematic and scientific nature of concepts. "Even the concepts set up by the law-maker can get their justification only by being deductible from the concepts of the legal system, thus Begriffsjurisprudenz is in harsh conflict with legal positivism" (Jerusalem 1948:149).

3. Law as judicial law

This view of the law could be considered mostly realistic with regard to the specific nature of 19th century English common law restricted to judicial precedents. On the Continent, however, also in the United States where contrary to the rigid adherence to precedents in the UK statutory law already played a greater role and some more abstract legal theory/law dogmatics mediating layer started to evolve at that time, the emphasising of sovereign judicial law-making can be appreciated as one of the restrictions of the total structure of the law.

In Germany Oscar Bülow's 1895 "Gesetz und Richteramt" (Law and the court) can be esteemed as an introduction to the view of the law of the free school of law transplanting law from law dogmatics and jurists to individual judicial decisions and judicial practice. In this concept of law it was the artificial structures of law dogmatics that became the main point of attack in terms of the operation of law, and state legislation only a secondary one. A certain binding force of the latter was acknowledged, and it was the domination of the layer of jurisprudence/law dogmatics that was primarily criticised. In their formulation the judge's sensation of the law creates law while passing individual judgements, and it can be gathered exclusively from the judicial practice of passing judgements. It was this trend that Eugen Ehrlich belonged to, who later pushing the

substratum of law a level deeper in his sociological jurisprudence found “live law” in every day practice. The positions of the concept of judicial law can be, however, still gathered quite well from Ernst Fuchs’s writings, perhaps the most bellicose figure of the free school of law. (For the analysis of the free school of law see Larenz 1979:339.) It was Fuchs among them who went the furthest in declaring judges’ freedom against the text of the law and law dogmatics categories in his essay bearing the telling title “The public harm of constructive jurisprudence” in 1909, in which he deemed that on the grounds of the principles of equity and justice judges were authorised to make judgements against the explicit provisions of law (Fuchs 1909:99).

In America K. N. Llewellyn and Jerome Frank were the key advocates of the realist school of legal thought putting judges in the centre, which had a great influence between 1930-40. This trend did nothing else but accomplished the turning away from the analytical view of the law that ensured the systematic order of law launched by O.W.Holmes at the end of the last century, and, similarly to the German free jurists, thought to have found law in individual judgement. As Llewellyn put it in summary: What judges charged with law enforcement decide in a legal case is, in my view, law itself. Jerome Frank more radically rejected lasting, predictable elements of law, and placing the judge’s image influenced by several psychical, incidental circumstances in the limelight, denied the binding force of earlier judicial precedents too. Provided that in passing judgement on the same legal case another judge will pass a judgement that will be quite different subject to what impressions happen to affect the judge. (While in Llewellyn’s view determined rules meant if not a decisive force but a certain orientation for the judge.)

4. Law as the layer of basic rights

Contrary to Hart’s concept of law restricted to rules Ronald Dworkin attempted to place *the layer of legal principles* into the law since the end of the 60’s, keeping mainly constitutional rights in view, and to interpret it as a dual structure of the layer of rules and legal principles (see Dworkin 1977a). In this thematic interpretation if there is no specific rule for deciding the case, it still does not give the judge the option of free deliberation, which comes from Hart’s approach, but the case must be decided on the grounds of legal principles as another part of the law. However, quite often this is the situation also when there is a seemingly specific rule but as a result of that an obviously inequitable result would be produced. Dworkin cites examples from legal practice when in such cases the court reaching back to a hidden legal principle revised the provision made on the level of rules. A person defined in a testimony, for example, after being held responsible for a criminal act, could not be deprived of his inheritance, therefore the court reaching back to an overall legal principle, “nobody may acquire advantage as a result of an action against the law”, deprived the inheritor of the inheritance.

A peculiar restriction can be found in Dworkin, and now this is what is important for us, when concentrating on the basic rights principles enshrined in the constitution he attributes genuine legal force to these, and on the grounds of them in the event of the provisions of simple law he exempts citizens from the obligation of obedience, provided that such provisions contradict basic rights. “The option of disobedience to the law is not a separate right...not some kind of subsequent right against the government. It is simply one of the traits of basic rights...and it cannot be denied without denying such rights themselves” (Dworkin 1977b:211). Or, in other words, “...any society that acknowledges these basic rights must reject the idea of general

obedience to the law that applies to any and every case” (216 p.). In this thematic interpretation real law is restricted to the layer of constitutional rights, which grants citizens primary subjective rights, and simple legal provisions on the level of rules are only conditionally in force, and they must be only conditionally obeyed.

5. Law as everyday practice

The layers of the professional legal system emerging from everyday customary standards enjoy freedom in numerous respects contrary to daily routine followed en masse, and are able to shape this routine again and again through the multitudes of mediating mechanisms. The too great cession, however, makes lawyers suddenly aware of the limits of this freedom. “A gap of change” can be defined as the maximum distance allowed for the cession between professional law and everyday routine. As a reaction to the creation of written law becoming marked first in the 19th century and legal concepts alien to everyday language acquiring a dominating position, from the end of the last century, some legal theory approaches, seceding from legal positivism and dogmatic positivism, made their way to everyday practice while searching for “real” law under “paper law”.

Facing the rigid legal positivism of “*école de l'exégèse*” dominating in France in the decades before and after the turn of the century, in his theory the French *Léon Duguit* fully rejected the thought of an independent legal sphere rising above everyday practice. For him “objective law” (*droit objectif*) represented the actual law, and public positive law was valid as long as it manifested this objective law. “The collective state of the mind which calls for a sanction is the creative legal source.” (Duguit 1920:206). An economic or moral rule becomes legal standard when masses of people become convinced that the given social group, or those who represent the greatest force among them, may intervene to suppress any infringement of these rules.

In the same years *Eugen Ehrlich* arrived at the thoughts similar to those of Duguits in the German language area. Going beyond judicial practice, Ehrlich eventually found “real law” also in everyday practice. As he wrote, he had consulted six hundred volumes of judicial decisions to come upon real law under the paper of the codices. “Soon, however, I was captivated by what happens in reality much more than by judicial decisions” (Ehrlich 1913:71).

Looking for “real law” under paper law in his study in 1907 the Polish *Leo Petrazsickij* came to the same conclusion. “Where are legal phenomena to be looked for?” he put the question, then he stated, “...traditional jurisprudence is simply an optical illusion. It perceives law not in its natural habitat but in a place where there is absolutely nothing of it...that is, in the world outside the perceiving person”. (Petrazsickij 1981:125). That is, he found real law in the psyche of individual persons. He called that “intuitive law” which was different in each person and it was affected by the state’s positive law only as one of the elements among other determinants equal with it.

Reference can be made here to the American *Graham Sumner* who ascertained the same relation with different phrases between “folk customs” and positive law also at the turn of the century as the one observable in Ehrlich’s “live law” or Duguit’s “*droit objectif*”.

6. The theories of a complex legal system

Balanced approaches that keep several aspects in view represent exceptions rather than the standard vis-à-vis approaches that restrict law to specific layers. *Friedrich C. von Savigny's* approach, who is perhaps the most outstanding figure in modern legal theory, belongs obviously to this group. Savigny both connects the development of law to everyday practice – by connecting it to “public spirit”, a term chosen somewhat unluckily because it sounds mystical – and highlights the casting of the rather diffuse/obscure legal standards into the categories of law dogmatics/jurisprudence. (See Larenz 1979:14-25). His complex view of the law was later narrowed by his followers as the historic school of law was restricted to “conceptual jurisprudence” but Savigny’s theoretical attitude may serve as an example.

At the turn of the century *Francois Gény* was able to break the rule of the legal positivism of the French “exegetic school” and, in the meantime, avoid going to the opposite extreme like the contemporary Duguit did, and formulated his complex legal concept preserving the freedom of the individual layers of law beyond everyday practice. In exploring the components inside law the starting point for Gény was the separation of the “given” layer and the layer “constructed” by jurist activity (Gény 1917:6). By the former he means the necessary incorporation, acknowledgement of social phenomena beyond the law into the law, and by the latter legal techniques created by lawyer’s activity. As used by Gény “legal technique” indicates what was meant by the law dogmatics categories, special legal distinctions classifying subtle/difficult social phenomena in 19th century German jurisprudence but in his interpretation these appear not as part of a general detailed law but as elements helping the judge in connecting rules and facts. Even if Gény fails to emphasise the thought of a system behind the rules, comparing Code Napoléon, the German BGB and the freshly drafted Swiss civil code, he prefers the German BGB based on a chiselled law dogmatics system as an ideal product and criticises the rather loose French and Swiss codices for the deficiencies in their system (Gény 1917b:548). Alongside the layer of legal technique under the layer of the text of the law, the thought of the independent role of legal principles appears in his work. “Under what conditions do judicial decisions go beyond the level of actions of the administration of justice with a view to get them closer to legislative actions? Is it not proper to make distinction between judgements in this respect? What should we think of “standards” that constitute guidelines rather than exact rules?” (Gény 1917b:547). Even if we may miss logical tenseness in Gény’s analyses, it is just through these manifold observations that the image of a more complex law built of several layers emerges in his writings. (For a detailed description of Gény’s theory see Fikentscher 1975 Band 1:460-497).

Similarly to Gény, and primarily under his influence, in American legal theory at the turn of the century *Benjamin N. Cardozo* produced a multi-layered concept of the law. Alongside “ratio decidendi” of precedents typical of the Anglo-Saxon law and written laws, Cardozo places the role of “general ratio decidendi” crystallised from several precedents, the legal principles made beyond rules, in the centre. Furthermore, he separates basic juridical constructions which stand behind precedents that control judges in making their decisions (Cardozo 1921:20). In his analysis law appears as the framework of particular rules, precedents, legal principles, maxims that rise above legal concepts, dogmatic categories and rules of decision that ensure orderliness. Later Cardozo withdrew from the view of the law manifested in his book in 1921 and got closer to the trend that turned Holmes radical in the direction of the realist school of legal thought, but

in the past 70 years his booklet has proved to be one of the most influential works not only in the United States but through Josef Esser's mediation from the 1950's also in the German legal theory.

Thus, in addition to restricting views of legal theory, we can find influential theories in the history of legal theory that kept the multi-layered structure of the law in view. These must be used as a basis even today when we want to explore the layers of a complex legal system extensively.

IV Chapter: The theories of legal dogmatics

The evolution of modern law resting on systematic/abstract categories is the historic achievement of the German pandect jurisprudence in the second half of the 19th century, which following the natural law systematisation in the 17th-18th century remoulded the categories of practical law to form an intellectual system. It was this that the French jurisprudence gaining ground again towards the end of the 19th century received the greatest impulses from, as earlier John Austin in England and following him the reviving American legal thought considered the German jurisprudence a model too.

In the 20th century it is the German law literature that deals with *the system of intellectual connections in law* to the greatest extent, and this is what is called "legal dogmatics" in the German law literature, while in the French and American terminology the term "legal doctrines" is preferred. It is primarily in the German law literature that the analysis of the legal dogmatics activity itself, in addition to performing legal dogmatics with regard to practical law, continues to be a key area. Thus the various theories pertaining to the nature of legal dogmatics to be looked at will be taken from this literature.

From the vast amount of material continuously accumulating only a few selected approaches are to be introduced in a short study, and even them with the technique that regarding each author no other than the momentum, original compared to others, in specifying the nature of legal dogmatics will be highlighted

1. Some current German theoretical approaches to legal dogmatics

It is *Niklas Luhman's* legal dogmatics theory the analysis of the approaches is worth beginning

with because he embeds the whole body of the legal system into the total society, and analyses legal dogmatics through comparing it to other social subsystems. At this level of abstraction, where each social subsystem (economy, science, art, etc.) appears as a peculiar form of homogenised communication of the social world, *legal dogmatics can be grasped as homogenisation that ensures the systematic nature of the law*. This homogenisation, as in each functional subsystem, re-divides social actions, connections in a homogeneous field of evaluation from a special point of view, disconnects those connected in another field of evaluation, connects freestanding ones there to process social reality from the point of view legal evaluation. This evaluation homogeneity is basically ensured in law by evaluation in terms of the pair of values of lawful/unlawful as the evaluation homogeneity of science is represented by true/false and that of the economy by profitable/non-profitable. These pairs of values (Luhman calls them the binary code of each subsystem) in themselves, however, allow nothing else but keeping each field of evaluation separately, and only further specifying mechanisms can make it possible to decide what is *lawful*, or *scientifically true*, etc., and it is only together with such mechanisms that a pair of values can tear a homogeneous sphere from real social events. In science it is logic, theories of science, rules of verification that make it possible to decide what is true or false regarding specific assertions, artistic beauty is specified by aesthetics, art reviews, and finally *the decision of what is lawful and unlawful is circumscribed by the defined rules of the law in each particular case, various theories of interpretation and the law dogmatics conceptual order ensuring that rules are free from contradictions* (Luhman 1971: 232-252; 1974: 6; 1981: 194). That is, it is the underlying binary codes (or, in other words, value duals) that ensure that each field of evaluation is kept separately, but these codes need to be supplemented with specifying programs to allow their application in various cases.

It is, however, necessary to go beyond Luhman, and it can be asserted that in the event of the functional system of the law *a systematic nature stricter* than in most of such subsystems *also prevails*. Because while in them it is mostly enough to ensure mere evaluation homogeneity; and, e.g., each scientific assertion in each field of science need not be assembled into an uncontradicted whole, it is just the juxtaposition of scientific assertions refuting/competing with each other that takes science further; in law a part of all legal assertions within the legal material in force from time to time must be also uncontradicted in a stricter sense, and any alternative regulation proposals contradicting them are clearly separated as *de lege ferenda* proposals (as “only scientific proposals”) from the law in force. *This stricter systematic nature, in addition to mere evaluation homogeneity, is ensured by legal dogmatics for the system of law*.

In his studies *Josef Esser* has defined this function of the legal dogmatics ensuring stricter systematic nature with special clarity. “Dogmatics ... in the framework of a system represents the controlling mechanism that ensures the compatibility of solutions with regulations in other fields” (Esser 1972:104). In another study Esser clearly identifies the point of the binding force of the dogmatic order too. “The issues of dogmatics are closely tied to the issues of systematisation. The principles that are to a great extent the principles of systematisation represent more or less defined legal opinions made obligatory” (Esser 1972b:15).

In the literature on legal dogmatics the point is often raised *to what extent legal dogmatics points of view bind and when is it possible to disregard them?* If we set out from the aforesaid function of legal dogmatics ensuring the intellectual connection in the law in force, then we can answer

that *the legal dogmatics order and each part of it is nothing else but the demonstration of connections*. Thus it cannot be bypassed unless coherently rearranging the relevant connections in the legal material, expressed in an abbreviated form by specific legal dogmatics distinctions, categories, and demonstrating the legal dogmatics model expressing the new, uncontradicted alternative order. That is, legal dogmatics represents “impeding” the amendment of rules by making this option subject to thinking over the given amendment giving rise to further amendments. But once the arising further effects have been checked, and they fit into the overall law dogmatics order, *then* the dogmatics allows the rule be amended in the given way. That is, if it should contradict a more overall dogmatics order too, then it may not be attained unless the more overall dogmatics order itself is restructured into a new order, in adherence to the required amendment of the rule.

Subsequently, the binding force of legal dogmatics is not absolute, its aim being definitely not getting one out of the habit of thinking, but it stimulates one to rethink things in broad terms when an amendment of a rule is insisted on it sets the order to rethink overall connections. On the other hand, it of course takes the burden off of thinking, and it makes the application of the law in cases easier, because it allows specific provisions of the rules of the law to be connected to the particular legal case that has occurred through the legal dogmatics order of steps practised in legal education.

It is thus important to point out regarding the issue of the binding force that *it is not the rules of positive law that legal dogmatics thought is bound by, not these are the “dogmas” that are compellingly given for the legal dogmatics jurist, but the set of categories behind the rules* which have shaped these rules in their coming into existence, that is, the system of categories behind the rules connecting the rules of positive law is the dogmatic order of positive law, and only *this* must be obligatorily taken into consideration. And, as it has been shown, it will bind as long as an alternative system of connections can be identified. And that, of course, would take place outside the legal material in force, in the academic sphere of *de lege ferenda* proposals from where in most of the cases they should be brought through legislation into the positive law to allow the restructuring of the dogmatic order of the positive law. It might also occur, of course, that the rules of the positive law are left unchanged in terms of their wording, but by replacing certain parts of the dogmatic order behind the rules these rules will be construed in a new order, and by that in spite of the unchanged wording different decisions can be made in the legal practice.

Spiro Simitis has formulated the function of legal dogmatics ensuring contradiction free rules as *the higher level of predictability of modern law*. “The claim for predictability manifested already in law becoming positive is made specific in the mechanisms of dogmatic reflection. Subsequently, dogmatics is nothing else but the logical continuation of this positivism.” (Simitis 1972: 131).

In each legal case the point of “orientation based on consequence” represents the other side of legal dogmatics. This point has been raised with a radical edge by Luhman who has elicited heated debates with his answers in recent years. Luhman’s initial proposition in this train of thought is that *by systematically binding legal decisions in cases into the homogenised world of lawful/unlawful, and it is just through this homogeneous aspect that the totality of the law fulfils its social function, legal dogmatics becomes more and more indifferent to the external, social*

consequences of the “legally right” decision (Luhmann 1974: 31). The “orientation based on consequence” is more typical in the field of politics, and law will maintain its separation from the logic of the political system by/as long as legal dogmatics blocking/blocks the judge’s orientation based on consequence in making his or her decision in the case. Luhman, however, is pessimistic as regards whether this role of legal dogmatics, and through that the separateness of law from politics, can survive under the circumstances of public organisation of society. Because the modern intruding state uses law more and more for the purpose of transferring the aims of politics into society, and this change by placing the effect aimed at in the foreground reinforces orientation based on consequences. This always means individualisation, subsequently a slow disintegration of classifying legal dogmatics can be observed in recent legal development. And all this, according to Luhman’s prognosis, forecasts the entirety of the law merging with politics (Luhmann 1974: 32).

This pessimistic diagnosis was disputed by several theorists (e.g. Teubner 1975), and indicated that if in terms of legal theory it was hard to define a precise recipe for the judge with regard to the proportion of “looking back on legal dogmatics” to “looking ahead to the consequences” possibly contradicting the former in certain decisions, but in practice the attitudes shape judicial decisions together. The only danger that might occur is when attention placed on legal dogmatics correctness is pushed into the background to a great extent for the sake of orientation based on the consequences.

The sphere of thought, albeit just from the contrary aspect, was formulated by *Carl-Wilhelm Canaris* pertaining to the relation between legal dogmatics correctness and equity. In this formulation legal dogmatics correctness appears as equity created at the level of overall connections beyond a particular equity with an ad hoc point of view. “The unity and internal order of the law ... belong to the most fundamental legal ethical requirements, and are eventually rooted in the idea of law itself. Thus the requirement of an uncontradicted internal order comes forthwith from the postulate of acknowledged equity that “the similar shall be judged similarly, the different in terms of the differences” (Canaris 1968: 16). Subsequently, the decision correct in terms of legal dogmatics taking legal dogmatics categories as its basis will transplant the points of equity already checked in terms of overall connections to the specific decision, and by that allow the judge to “ennoble” the particular equity tied to the specific facts of the given case at a more comprehensive level.

This connection of equity and legal dogmatics correctness rests, of course, on the premise of *formal equality*, this is something else that should be underlined in the assessment of Canaris’s thesis, while orientation based on consequences in decisions in cases places individualised material equality in the centre. The decrease in the tenseness of legal dogmatics in the 20th century in the Western countries on the Continent and, on the other hand, the increase of the proportion of the orientation based on consequences in judicial decisions are connected to the change in the basic ethical attitude that *has placed material equality in the centre versus formal equality in the past fifteen hundred years*, and has entailed the evolution of social state and its instrument: organisational law.

By all means, Canaris’s emphasis points at important connections between legal dogmatics and equity, and a more systematic analysis could presumably identify a further formation based on principles of equity in building up distinctions, categories. This can be also expressed by saying

that *legal dogmatics absorbs and emotionally neutralises these points for the judge*. Following Canaris this consequence was drawn by Niklas Luhman in one of his studies (Luhmann 1974: 176).

We may attain a more complex understanding of the nature of legal dogmatics when we look at the effect of “creating distance from the text” produced by means of legal dogmatics. Educatedness in legal dogmatics makes the material of the rules of the law pliable for the judge. The judge can discern what the exact meaning of the legal text is with a number of underlying legal dogmatics techniques by making legal dogmatics principles to relate to each other. Furthermore, as alternative relations might be elaborated in the law literature behind the rules, therefore in the event of unchanged legal text the judge might reach an alternative decision in specific cases. The dangers of discretionary legal arguments that might arise from this are fortunately eased by the system of appeal, and, of course, by the fact that in lower courts where the majority of the cases are terminated in the first and final instance, most judges implement the most widespread interpretations as a routine procedure and do not leaf through works of jurisprudence. Inquiry in alternative dogmatic models is more frequent in high courts, but their own previous decision making practice ensures the existence of the necessary continuity.

In the history of legal theory an important school was established at the end of the last century to formulate the effect of “creating distance from the text” in the form of “the theory of objective analysis”. One of its key figures, Joseph Kohler described it as follows “ Interpretation must remould the statute to allow the legal principles inherent in it come to the surface, and thus specific provisions of law appear as the outcome of these legal principles. *However, legal principles are not always given complete and undisturbed expression in statutes. Then it is up to the interpretation to eliminate unavoidable confusion from the expression of the statute and to develop the incomplete statute pursuant to legal principles* (italics mine - BP; quoted by Larenz 1979:36). It is the legal dogmatics order that becomes the actual centre of the theory of objective interpretation and, as underlined by Larenz, law, and the really obligatory layer of law among the layers of law; it is only through it that the layer of the text of the law, or the aims of the political lawmaker can exert their effect in each judicial decision in a screened form.

2. Lawmaking and legal dogmatics

As a general statement it can be established that judges in deciding individual cases are made subject to the wording of the relevant statutes and the order of steps of the legal dogmatics models behind them, in the course of which they read out the “lawful” specified pertaining to the given case. Following this track it can be asked *to what extent the final drafter of the text of the rule of the law has elbow room in the parliament or elsewhere in terms of law dogmatic models, or to what extent the final drafter is the one who from time to time simply “puts on paper” the results already evolved in the preliminary legal dogmatics activity.*

Looking at it historically, three phases can be identified in the relation between political lawmaker’s and the legal dogmatics-jurist’s activity. Prior to the evolution of codifications, in the 17th-18th centuries, on most of the Continent the legal dogmatics sphere was the regular unifier of law and one of the driving forces of the development of law. The creation of the codification at the end of the 18th century *formally* represents the appearance of the state power’s

control over the law, but in its content the jurist-legal dogmatics control remained at the level of establishing the content of codices. E.g., the “Codex Maximilianeus Bavaricus Civilis” from 1756 can be considered as a case for “a textbook with legal force” due to its purely juristic origin, which is therefore far from practical law. Similarly, the Prussian Landrecht from 1794 was the creation of exclusively three jurists, and the German BGB at the end of the 19th century was mostly, at least in its first drafts, also the product of jurists, and the Swiss civil code in 1907 was the exclusive product of a single jurist (Seiler 1989:117-1120).

The actual strengthening of the role of political lawmaking can be observed first in the 20th century, and where the system of political organisations opposed to each other and continuously struggling for government power, that is, parliamentary, multi-party politics, prevails, pure juristic-law dogmatics activity loses its exclusive role in determining the field of law. The politician lawmaker is actually also in need of the products of preliminary doctrinal-legal dogmatics activity, because he/she must reach into a systematically interweaving web in creating statutes on criminal law, civil law, labour law, etc. when any part of them concerned has been harmonised with some degree of indirectness with the rules of the given area of law.

In the age of modern political legislation the lawmaker is in need of the preliminary results of legal dogmatics, while legal dogmatists are in need of political lawmakers for shifting their models into positive law. Let us look at this relation from two aspects. First, we attempt to give a brief summary of the outline of the structural connections between legislation and legal dogmatics activity, then our intention is to expose a few connections of the abstract outline through some specific examples.

To understand the relation between the political legislation and doctrinal-legal dogmatics activity it is necessary to note in advance that here the different logic and evaluation considerations of two different functional subsystems are addressed; and while the logic of politics, in a parliamentary, multi-party system being now considered, is organised around the pair of values of “taking over the government”/“going into opposition”, and this is what determines each political decision, law is organised around the pair of values “lawful/unlawful”, which is cast into more specific form by the legal dogmatics order behind the law in force in each area of the law. These two different types of logic must be neared to the point where the logic of politics does not dominate lawmaking, but on the other hand, purely doctrinal-legal dogmatics activity alone cannot determine the products created. To fulfil this task stable Western parliamentary democracies have developed *a mediator law politics sphere* which may be joined both by jurists/politicians from the side of political parties and law professors active in politics from the purely legal sphere. At the conferences, in the periodicals, etc. of lawyers’ associations each competing legal dogmatics model is selected bearing its social consequences in mind and exposing them to the public opinion beyond professional circles. Similarly, each party attempts to select from the *de lege ferenda* proposals received with greater consensus through their own lawyer-experts, and attempts to find the models that suit their party program more properly, and include them in their lawmaking program. Through this two-sided approach a part of the doctrinal-legal dogmatics products become part of the overall political debates, and the parliamentary party politicians of the legislature from time to time will clash over these, while the jurists of legal dogmatics consulting systematic, dry monographs and case law reports in university rooms or preparing high court proceedings work on elaborating *de lege ferenda* proposals. The picture outlined above is, of course, ideal; considering itself a sovereign

legislator, politics actually attempts to create statutory provisions itself, overriding legal dogmatics proposals. When this kind of lawmaking is exercised to a too great extent, the internal uncontradicted state of the law will break up, and the system of the law will become chaotic. And this becoming a political problem will force politics to correct itself. Legislation thus cannot override the legal dogmatics order behind the relevant rules for a long time unpunished.

Let us look at an example from the literature on the theory of criminal law, which properly shows the connection between legal policy alternatives and legal dogmatics models. This example takes a new tendency as its basis, which is described in German law literature as turning towards “*victim orientated legal dogmatics*”.

In recent literature on the theory of criminal law three legal dogmatics alternatives can be identified, which have shaped and are shaping criminal law regulations in the past decades. The greatest consensus has been attained regarding general prevention implemented with criminal law means and the re-socialisation of perpetrators to attain that goal. As an alternative to the spectacular failure of the measures taken to improve criminals and the criminal law system achieving just the contrary effect, i.e., persons under the circumstances of imprisonment becoming criminals, a turning toward two recent models can be observed. Accepting the impossibility to achieve re-socialisation as reality one of them places retaliation in the centre of the criminal law institution system.

The core of this latter alternative is that it turns the attention from general prevention desiring to hinder a person from “becoming a future victim”, and focuses on the victim of the particular case, the possibly broadest redress of the victim’s injury and the active participation of the particular victim in the criminal procedure (Seelmann: 1990:160-165). With this revolution, however, the criminal legal dogmatics of rules in force requires reshaping in several respects. One of the most important effects of this revolution is that the conciliation of the perpetrator with the victim and the redress of the caused injury in some way becomes more appreciated in criminal procedure, and allows either the termination of the procedure or the suspension of the punishment imposed on probation. On the other hand, the prosecutor’s sphere of authority becomes less appreciated beside the victim’s and the lawyer’s power to shape the lawsuit. A further change is the shift to victim orientated legal dogmatics that the redemption of the caused damage as an independent sanction becomes institutionalised, as it was introduced from the beginning of the 80’s in the UK and the US (Seelmann 1990:162). The fact that criminal law has become “civil rights dominated” is represented on the side of the victim also by the fact that the victim’s possible responsibility for and behaviour’s contribution to the crime coming about becomes important too. A further impact of this kind of legal dogmatics alternative is that the victim’s active participation in the criminal procedure becomes both possible and necessary. In addition to the prosecution, broad right to have a say is given to the victim and the victim’s lawyer. (E.g., in the United States this dogmatic change is important in economic crimes). In the literature dealing with this issue the question is raised that such an intense confrontation of victim and perpetrator during the criminal proceedings will deplete the presumption of innocence, which allows that the person of the perpetrator is determined only after the final judicial decision (Seelmann: 1990: 167).

The relation between legal policy and legal dogmatics is thus well shown by these three dogmatics alternatives in criminal law. The working out of each alternative requires a detailed

survey of the entire criminal law including both its substantive and procedural areas and the elaboration of solution models necessitated by each alternative only a jurist of criminal legal dogmatics with conceptual comprehension is able to accomplish. *Law politics choice* and shift to a model that is an alternative to the one in force can be conceived only after the completion of this legal dogmatics work. Otherwise, the mass of contradictory impacts would soon make criminal jurisdiction chaotic.

3. Logic and evaluation in legal dogmatics

Legal dogmatics was given the clearest elaboration in the German legal thought in the second half of the last century, also the picture of legal dogmatics work widespread among today's jurists goes back to this. And this *has made the classifying-logical features of legal dogmatics exclusive*, connected to which the picture of "subsuming" application of law based on rules built up on such logically clear concepts developed. We have seen this legal dogmatics picture both in Luhman's and Josef Esser's works, and this picture appeared not only at the level of theoretical reflections but, in the period of the pandect jurisprudence at the end of the last century, as reality it shaped the operating legal material to a great extent. The codifications edited entirely by jurists were acknowledged in the era as the model of a unified system of sub- and superordinated concepts, clear deductions, which, however, for that very reason were of little help in solving real social problems. (When the first draft of the German BGB prepared by Windscheid, the great pandect jurist was made public in the 1880's, operating lawyers and judges were horrified to notice its distance from practical life; see Larenz 1979). As it is publicly known it was as a reaction to this that the sharp distance from "concept jurisdiction" in the legal thought on the Continent was established and a shift toward the free school of law and sociological school of legal thought took place. After that, however, shifts to remedy the problems of purely classifying legal dogmatics were made even without any loud rejection. One of the directions of such shifts is exemplified by *Karl Larenz's legal theory*, who attempted to push conceptual legal dogmatics, as a version of dogmatics from the end of the 19th century, toward evaluating legal dogmatics. In his attempt he was assisted by the separation of category triplet "concept", "type" and "general clause". Let us briefly look at his exposition.

Provided that the lawmaker intends to establish the facts of the case, to which the rule binds legal consequences, with conceptual accuracy, then he needs to gather all the conceptual traits contrary to the formulation based on type. "A concept is established by its definition so that it can be applied to a particular process or the facts of the case "in the event and only in the event" that all the conceptual traits of the definition are present in it. This is not the case regarding type. The presence of the traits, or some of them, given in the description of type is not indispensable; they may be present in the particular case to various extent. Often they can be divided into grades and to a certain extent one trait can be replaced with another one" (Larenz 1979: 200). Regarding type it is not specific conceptual traits that are important but if the *entire* case occurred is in conformity with the type established as the facts of the case under the rule of law. Subsequently, the particular case cannot be subsumed under such a rule of law, the judge must evaluate the case's compliance with the type. On the other hand, the citing enumeration of the

traits of the type and the overall picture gained from that must be neared to the particular case so that it should decide whether the case is in conformity or not.

Contrary to the conceptual establishment of the facts of the case, Larenz gives a better mark to a looser establishment based on types because in the event that the elements of the facts of the case are defined with conceptual accuracy, cases in everyday life most of the time do not fit conceptual traits, a good number of them are missing, and numerous further traits go beyond the conceptual description of the rule of law. It is eventually only a “seeming accuracy” that is attained, under which the judge is compelled to “feign” the case in life being subsumable under the rigid facts of the case. On the other hand, Larenz indicates that through the facts of the case established in types after numerous specifications, which is possible only in the course of the mass of judicial cases emerging, it is quite often possible to attain the establishment of facts at the level of concepts. Thus type based establishment of the facts can be considered a preliminary grade of establishing facts with conceptual accuracy.

With getting away from concept “loosening” goes even further when the rule of law no longer sets forth types but indicates them simply with general clauses. Such are, e.g., “proper due date”, “good reason” or “due proportion”, required between service and consideration, kind of establishment of facts under statutory facts of the case. The lawmaker sets forth only an abstract consideration of value, which disregards all conceptual traits, and only some proper specification of judicial casuistry can provide them with normative content afterwards, and the “sense of justice” of general awareness of justice offers some points of reference for their application (Larenz 1979: 203).

After analysing the above triplet Larenz attempts to add types based law dogmatics that allows evaluation to the merely conceptual law dogmatics from the last century. By taking this direction of development he could resolve the alienation of law dogmatics from life in a way that he managed, for the same reasons, to avoid the step taken by the free school of law and the sociological school of law that reject the entire system of intellectual connections of law.

It is in another way how Josef Esser seeks to reconcile evaluations required by the conceptual version of legal dogmatics with practical law. He accepts the assessment of classifying legal dogmatics evolved toward the end of the last century, *nevertheless he places evaluations in legal topics* (Esser 1956: 310). Esser formulates legal topics revived at the beginning of the 50's by Theodor Viehweg as “primary normative establishment of elements” evolved in the judicial practice, as judicial maxims that develop pursuant to the basic principles of the entirety of law referring to each other on the ground of the juristic socialisation, on the one hand, and equity in particular cases, on the other hand. Legal dogmatics interpreted in the original conceptual-classifying sense is given a role after this in Esser's formulation as the factor that subsequently selects, conceptually specifies primary standards, and through that fits them to the system of the entire law (Esser 1956: 313- 315). That is, contrary to Larenz's extended evaluating legal dogmatics, here evaluations slide to the field of legal topics and law dogmatics remains the area of conceptual systematisation. In other words, the logic of the field narrows down for the jurist and only the judge is given the option of evaluation.

Furthermore, the triplet applied by Larenz, concept, type, general clause, provides good points of

reference for exploring the possibilities of the dogmatics of basic constitutional rights. In this field it is almost inconceivable that terms are conceptually specified, and even fact finding is possible only to a small extent. Basically it is in the emptiness of the general clause that basic rights become part of the constitution, and it is on the grounds of this that the constitutional court is given the power to repeal over simple statutes worked out with conceptual or at least type based accuracy. General clauses can always be filled only with internal specifying maxims in the constitutional court practice with regard to certain groups of the emerging cases, but the edges, outline of these must always remain disputable when deciding whether later cases can be subsumed under them. *Therefore the basic rights dogmatics cannot reach even the accuracy that Larenz's evaluating dogmatics sets for types, and, on the other hand, this kind of specification always gives greater ground for the constitutional court justices' evaluation.* Logic here (drawing compelling consequences from the provisions of the constitution) can be observed only to a low extent, and it is mostly the consensus of the basic rights lawyers that provide the frame for the more liberal evaluation of the constitutional court judicial decisions from time to time. The measures, maxims of basic rights dogmatics turning general clauses more specifically legal yet ensure some predictability for basic rights jurisdiction. However, basic rights that resist even this kind of specification (e.g., the inviolability of human dignity, "one's right to express him or herself in every respect", etc.) are already beyond law, and no juristic consensus is conceivable regarding their normative direction in particular cases.

V Chapter: The validity of the law

1. Multi-layered law and the validity of the law

The force of the law arises in law education with regard to the separation of force/validity. According to this the *force* of the law indicates the period that elapses between the formal promulgation and the termination by a later law, while *validity* refers to the pre-question whether the rules applying to the procedure have been complied with when creating and promulgating the law. Once the creation and promulgation of a law has taken place in the proper form, then this law is valid; looking at it from another aspect, a law is in force until it is made null and void by another law, or the end of the term it has predetermined for its own force.

This approach to validity is, however, implicitly based on a preliminary concept of the law, which became dominant in Hungary especially in the second half of the 20th century, primarily in the field of public administration law. *According to this concept law is equal to the text of the decision made in proper form by a relevant administrative agency.* The given rule can be made void only in the event that the text of such decision has been drafted in proper form. This concept of the law, of course, has not been fully accepted in the past decades neither in public administration law, nor in civil law, as the actual meaning of new rules is construed every time by the judicial practice through law dogmatics screening, and the rules themselves are constructed in a way that the actual normative guidelines of particular parts of the text come out only in the light

of a hidden law dogmatics system. Thus the legal validity inspired by public administration has not given an answer to this either, and it can be considered not more than “the validity of the text”, and its acceptance can be explained in the field of public administration law by the fact that in this field, during the past century of its existence, the law dogmatic order and the judicial practice of frequent further development observable in traditional areas of the law (private law, criminal law) have evolved only rudimentarily. The fact that law enforcement officers are bound by the text, which entails detailed provisions down to the level of the most specific facts, is a phenomenon that actually exists in the field of public administration law, thus this restricted concept of the law misses reality less.

In the traditional fields of the law, however, this concept of the law represents the rejection of reality because the text of codices in itself does not determine the law that is valid for the particular case. The strength of the law being bound to the text in these fields is, of course, greater in our legal system even today as it can be observed in the German/Austrian region of Continental law into which Hungarian legal development was embedded in the past centuries. In this jurisdiction the product of the political legislator, the text of the law is controlled all the more by law dogmatic models and high court practice than it was possible in the past decades in our legal system, and these three layers of the law together constitute the premises of the valid “lawful” for the particular case in this more overall region. If we have widened our concept of the law to go beyond the text of rules and set out from a multi-layered concept of the law, then the aforesaid concept of legal validity inspired by public administration must be widened as well. Because it is only inside one layer of the law, the layer of the text, that this interprets the conditions of “lawful every time” thematically towards legal decision in a case, and this is not enough for determining the overall conditions of the relevant “lawful”.

The Continental legal systems consist of the totality of the texts of the rules in force, the law dogmatic order behind them and the standards of the high court practice which further develop them. In the past decades in numerous countries the layer of constitutional rights was placed over this traditional layer of the law, and the product of the former three layers of the law became the actual part of the legal system only after having been screened by the layer of basic rights. Putting it meticulously, since this change it can be also said that force is shifted to some extent, in a part of the cases, and after the mere statutory promulgation it is the successful upholding of the constitutional court review that grants indisputable validity to a new legal provision.

Intellectually the legal system in Continental law is divided into several layers, and none of the layers of the law in itself constitutes the “lawful” for the judge to be declared in each situation. Nor does it help if I make all the aforesaid layers of the law the subject of the examination, although this is a precondition of going further in this direction. The only thing I have reached is that now I can describe what the relation between political law-making, judicial casuistry and the layer of basic rights over these is like regarding their general connections, in the legal system of a given country, differentiated also in terms of each branch of the law. *The notion of valid law goes beyond this, and formulates the lawful arising in specific situations from the projection of these layers of the law on each other* The valid law in a situation is fixed, drawn up ideally, by the text of the politician law-maker, the shape of which is formed by choosing from preliminary law dogmatic models, and in its judicial enforcement the legislator’s text of the law is either specified through reaching back to these law dogmatic models or drafted in view of the relevant constitutional rights. Briefly, it may be rephrased that *valid law is the legal system specified as the*

result of each layer of the multi-layered legal system being projected on each other.

2. Different theories of the validity of the law

The concept of the validity of the law and valid law have resulted naturally from the concept of multi-layered law. In the literature on legal theory, however, there are numerous different formulations of the validity of the law, and by contrasting them the sense of the validity of the law as used here will more clearly unfold.

1 The notion of the validity of the law described above is based on the internal connections of the legal system, and this notion of *“internal” validity must be separated from the notion of the external, or “sociological validity” of the law.* The sociological schools of legal thought that flourished in the years following the turn of the century, perceiving that laws and decrees created by government agencies “remained on paper” and left society’s actual practice untouched, bound actual realisation and observance to the concept of valid law (contrary to the law that remained on paper). *In this sense the notion of valid law contrasted with “paper law” indicates the actually observed law.* This is what Eugen Ehrlich used the term “live law” for, and this meant “true law” versus mere paper law created by the state (Ehrlich 1913). Or, “objective law” was opposed to “positive law” in a similar sense in Duguit’s works.

Max Weber also applied the validity of the law in this sense, for him, however, in terms of the concept of the law this did not mean restricting the notion of the law to the actually observed regularities in everyday practice. *Calling it the sociological or factual validity of the law, Weber separated this aspect from the intellectual validity of the law, which, for him, represented validity in the internal intellectual connections of the law.* Comparing this distinction to what has been said above, it can be seen that it has been Weber’s notion of intellectual validity and not factual validity that we have moved along.

2 It is another formulation of the above train of thoughts when *the validity of the law is bound to judicial practice.* The concepts of the American realist school of law or the influential German free school of law at the beginning of the 20th century used the notion of the validity of the law in this sense. Within the paper law in force (i.e., the law created by public authorities) valid law shall be nothing else but the law sanctioned and transplanted into case law by judicial practice. *Here factual and intellectual validity is present in a fused form* - contrary to the pure factuality of Ehrlich’s “live law”, or, on the other hand, Weber’s duality - and thus it can be also considered to be the result of a restricted concept of the law.

3 The *validity of the law in terms of its ethical content* has been formulated from various aspects. The key trend formulates the validity of the law from the legal concept of natural law. The law created by the state becomes valid on condition that it complies with the requirements of natural law formulated in various forms, whereas rules in its part that contradicts this are not made valid by the fact that they have been created and promulgated by the state.

In the recent decades, with the incorporation of human rights into the constitution and the development of regular basic rights jurisdiction, this ethical validity of the law has been bound to constitutional rights by an effective trend originally based on the American Ronald Dworkin’s concept of the law, and existing in the field of German law on a wider basis (see Dworkin 1977,

and Alexy 1985 for the German concept of the law). This development concerns the validity of the law the most radically because while the impact of the other layers of the law beyond the layer of the text of the law on this layer is usually not formulated with textual authorisation in a particular legal system, the basic rights review has this kind of character too. In the strongest form of the basic rights review, after declaring something anti-constitutional, the constitutional court may as well abolish a given part of the layer of the text of the law, erasing it from the law in force. But even the lower grades of this formally define the direction of specifying the text of the given rule as the actually valid law. As it can be seen in German law, for example, in the event of turning “the interpretation of rules in compliance with the constitution” a legal principle, through which the text of a law is not abolished but the constitutional court prohibits that courts attribute a defined sense to a rule because it has found that sense anti-constitutional.

The ethical validity mediated by the basic rights review is more exact than the earlier natural law validity to the extent that in particular cases, in specific constitutional court proceedings, the definition of the other layers of the law is yet subject to, albeit an abstract but constitutionally defined, text. This may, however, slide back to a rather diffuse level mediated by the philosophical/intellectual discourse every time if the constitutional court begins to review the layers of the law pursuant to some quite empty formulas of constitutional rights (“the right to equal human dignity”, e.g.). There are signs of this in German and quite recently in Hungarian basic rights jurisdiction. The basic rights review, which the validity of the law and, in the event of abolition, the force of a rule is subject to, can become unpredictable again as earlier in the event of mere natural law formulation, but with the increased effect that now on its basis an agency, the constitutional court, may as well actually abolish the text of the law and other rules.

Dworkin’s radical formulation also points out that in the legal system that acknowledges the basic rights review of simple law *citizens shall be given the right of disobedience against the law*. The legal material opposed to basic rights is, in this concept, not a valid law, thus citizens may reject obedience to it. With this Dworkin outdoes most of the theoreticians of “civil disobedience” because they do not deny the validity of the law and do not argue with the lawfulness of the punishment imposed on the disobedient citizen. It is just the undertaking of the punishment that gives the disobedient citizen the moral basis suitable for rousing the widest masses and making them realise that the concerned rule is morally objectionable, and that they should start claiming en masse that such rule be changed.

4 Finally *the dogmatic validity of the law* should be highlighted by analysing the notion of the more complex validity as we have attempted to determine it. In this concept, as elaborated especially by the German “conceptual jurisdiction”, the validity of the layer of the text of the law is always subject to what extent it is in line with hidden law dogmatic categories, legal principles. Provided that it is different, then judges must interpret the text in the direction that the text adheres to the hidden law dogmatic order. The text in this concept is easy to shape and subordinated, as it is, of course, such also in other directions in the event of ethical validity or validity in terms of judicial practice, and it is the law dogmatic order that becomes the source of the validity of the law.

As a criticism of this concept, in addition to that it utterly denies the impact of the other layers of the law on the validity of the law, it can be also said that it exaggerates the unity of the hidden law dogmatic order. In the 20th century owing to the activity of a growing number of university

jurists optional law dogmatic models are constantly worked out in large numbers and politician legislators are able to add something original to and decide in an original way on “making the law” just because the law politicians of each party look for the previously worked out law dogmatic models that suit the program of the given party more properly. The text of the law is thus based on the selection of a determined law dogmatic model, alongside numerous further models, and therefore opposing the textual meaning of the law on the grounds of presuming a unified law dogmatic order also means that the judge denies the existence of the other law dogmatic model deliberately chosen by the legislator. The law dogmatic validity in itself must be considered also restricting compared to the validity produced as a result of projecting all the layers of the law on each other.

3. The possibilities to question the validity of the law

After the above legal theory argumentation, useful conclusions can be drawn from the concept of multi-layered law for the pragmatic side of the lawyer’s practice. In recent years, especially when the value of the subject of the action has been high, or other reasons have urged the parties’ lawyers, the questioning of the constitutionality of the provision of the law to be applied has appeared, alongside traditional ways of winning lawsuits, in order to win in the lawsuit. But if we consider the entire structure of the law, then numerous other ways to question the validity of the law arise. For some of them the conditions of proceedings in our law in force might not be available, others are possible in theory but have not become usual in domestic legal practice, nevertheless they may be logically systematised and briefly described in the following. A part of them may be incorporated into the law in force in the future, or, simply due to changes in litigation practices, they may spread in the domestic legal practice.

Taking thus the entire structure of the law into consideration, the questioning of the validity of the law arises on the level of the layer of the text of the law, with regard to the dogmatic layer of the law, the judicial practice and the constitutional rules and basic rights. Furthermore, the connection of the law to the sphere of morality produces a possibility to question it, also either the spreading of the rule or the lack of it in everyday practice may flash possibilities for abolition for the relevant lawyer and his or her client. Taking account of all this there are 11 different possibilities available to question the law on the basis of the concept of multi-layered law for a good lawyer. Let us consider these briefly.

3.1. Questioning the layer of the text of the legal norm

There are three key options for questioning but the third can be divided into further possibilities, thus five forms of questioning can be listed in total.

1. Questioning on the grounds of the sphere of authority. If the lawyer has got to the point that in the event of the rule to be applied a guaranteed failure of the lawsuit can be expected, then the first possible way of prevention is that he asks whether it has been issued by an agency, body, person authorised to do so? That it should have been issued in a law but it has been issued in a government decree, e.g., or, it would have required a ministerial decree, because rights and

obligations binding citizens and legal persons have resulted from the rule, yet it has been issued in a ministerial order or ministerial circular. (This kind of questioning of the law is possible in our law in force in the Constitutional Court.)

2. Questioning based on the infringement of the procedure of making rules. Especially in the event of legal sources of higher level, the way of making the law is defined by constitution, law or other rule. In the event of legislation, for example, the act on law-making and legal sources sets forth obligatory procedural elements, and similarly the standing orders of the parliament contain such elements. (Obligatory harmonisation with the interest representation bodies of the area to be regulated, e.g.) Also, it can be imagined that the government's statutes contain such law-making elements with regard to creating the government decree. Thus the questioning of the rules to be applied arises on the ground that some obligatory procedure of harmonization has not been complied with, or, that the law was accepted, contrary to the standing orders, after a parliamentary committee had voted against it, or, that the legislature had no quorum as verified by documents, yet the law then debated was accepted, etc. Under this pretext, in certain cases, in domestic law in force the questioning of the validity of the rule becomes possible, and this has happened several times in the constitutional court so far. Where there is a public administration court, there this may take place to a greater extent, and in the event of rules of lower level it may represent a way that leads to the success of the lawsuit.

3. The possibilities for questioning on the grounds of coming into conflict with a rule of higher level than statutory law. In general, rules of lower level may not come into conflict with rules of higher level, and up to the level of statutes there are mechanisms for eliminating this. The level above statutes is, however, more uncertain, and more possibilities can be explored for questioning. Three major cases should be described here.

a. The rule to be applied **comes into conflict with a constitutional regulation**, thus on the grounds of this it may be questioned. If the constitution enumerates something item by item, for example, and a statute defines a further case in addition to the ones listed, then the point of its unconstitutionality may be raised, but it falls under the same category when the rule to be applied can be opposed to an accurate constitutional regulation which contradicts it. In domestic law this is possible through the constitutional court.

b. The rule to be applied **comes into conflict with a constitutional right**. This questioning is wider than the one above because basic rights are abstract norms that indicate guidelines only, and thus they may be referred to in the event of numerous provisions of law for declaring rules anti-constitutional. The style of jurisdiction of constitutional court justices, their activist interpretation of the constitution or one that adheres to the text of the constitution much more, however, allows questioning on these grounds in each country to a different extent. It should be noted that the Hungarian constitutional court practice in the past years has permitted this kind of questioning on a large scale.

c. In the event of an EU member state **reference to domestic rules coming into conflict with EU law** is the next possibility for questioning. Hungary is not an UE member sate yet, but in a few years it will most probably become one, thus this way is significant not only in terms of legal theory. The "statutes" of the European Union, the decrees of the Council, and partly the guidelines of the Committee, represent law directly in force in EU Member States, and since the

1960's the European Court has transformed the relation between the Union's legal material and the Member States' legal material that the member state courts are obliged to ignore any internal law and any other internal rule that contradict a EU legal provision. What is more, a lawyer active in a member state may be obliged within the sphere of lawyer's responsibility to pay damages subsequently, when he or she has failed to call the court's attention to a relevant European provision and the party represented by him or her loses the action. In the event of conflict, the operative knowledge of the huge EU legal material and the questioning of the validity of the domestic rule to be applied in a particular case make a great opportunity for domestic lawyers. It should be also noted that while in the former case lawyers may only call the court's attention to the infringement of the constitutional provision or the constitutional right by the provision to be applied, and may request the suspension of the procedure and that the given provision should be contested in the constitutional court, in the third event the lawyer may immediately propose that the internal rule be ignored.

3.2. Questioning on the level of law dogmatics

Here two possibilities for questioning the validity of the law may be highlighted.

1. **The interpretation embedded in law dogmatic notions used until now** of the legal provision to be applied may be questioned and **embedding in an alternative system of concepts** may be suggested for the interpretation, which may result in a fundamentally contrary judgement. Totally different legal specifications become possible in numerous fields of public administration if we interpret the Hungarian constitutional regulation, for example, on the level of central public authorities on the grounds of the American branches of power, or, on the other hand, if we interpret the separation of powers doctrine only as the separation of the spheres of authority. The Hungarian constitution has been interpreted since the turn in 1989 publicly by strong opinion groups in accordance with the American separation of the branches of power, in our view incorrectly, and the constitutional dogmatic reinterpretation of this in the public opinion would radically transform the possible regulations of our public law statutes with a basically unchanged text of the constitution. Well, as this example possibly shows quite different judgements can be made in each branch of the law from the reinterpretation of the dogmatic order behind the text of rules. Presumably, only with the involvement of jurists in the special field of the law does their complicatedness allow the questioning of law dogmatics and the placing of elements into another law dogmatics urged in order to win the action, but in the form of regular expert assignments, at least in the event of lawsuits of key importance, this involvement of jurists may become a more extensive practice in the future.

2. The embeddedness of the legal regulation into hidden law dogmatics can be also questioned when the team of lawyers interested in the litigation attempts to **ignore the entire embeddedness into legal concepts**, and tries to replace the legal concept frames used until now with the arguments of interest searching jurisdiction. Or, the other way round, if it is just this that constitutes the hidden conceptual frame in a specific field of the law, then jurists ignore it and attempt to base the sense of the legal paragraph to be applied on classical legal concept arguments.

3.3. Questioning the sociological validity of the legal norm

In this respect again three options may be fulfilled. In the first two cases, the invalidity may be asserted with reference to the derogation of the legal provision to be applied by practice, in the third case just to the contrary the reason for invalidity can be that a recently introduced rule is not obeyed in practice, i.e., is “not live yet”.

1. **“Derogation I”** should refer to the case when we base the questioning of the validity of the given legal provision on the fact that a great, increasingly greater, part of society has not obeyed to it for a long time, what is more just the contrary behaviour is typical in the given situation. This is the case of the traditional “destroying the law” in common law derogation, and although there is no legal provision in force regarding this, law enforcement agencies in the Continental legal system actually do take it into consideration.

2. **“Derogation II”** should refer to the questioning when we base it not so much on the actual decrease of obedience – a fairly good number of people still obey to the given standard – but on the fact that in the event of disobedience almost always no sanctioning is applied, thus what has occurred is the derogation of the legal sanctioning. After a longer period of time this will, of course, entirely eliminate obedience to the standard, provided that some interest beyond the law does not support the standard to live on, but with this distinction the derogation of legal sanctioning allows that reference is made to legal invalidity.

3. **Questioning the validity of the legal standard not living yet**, or, at least requesting that it should be applied with lighter consequences is an accepted argument in sanctioning the infringement of numerous new legal obligations, so it may be considered a living practice even today. “Not knowing the law does not exempt one of due consequences” but in the first phase of the new legal standards becoming living, that is, obeyed practice, remarkable reductions are applied when imposing sanctions in the event they have been infringed, therefore this may be ranked among the arguments of questioning validity in terms of sociology.

3.4 Questioning law ethically

Finally, **the reference to the rule coming into conflict with ethical standards** arises as an ultimate solution for the questioning of the rule to be applied. A long time ago, in the period of the rule of natural law doctrines this was one of the most important references to invalidity (after World War II, for example, this was the basis for making people who had obeyed the law of Germany responsible subsequently), but since the time of constitutional principles and basic rights reinforced constitutional court jurisdiction this separate ethical questioning has been forced into the background. It can be also said that this “has been absorbed” into various types of questioning through the ethically coloured basic rights. In spite of that, reference beyond these to purely “ethical depravity” in the event of a rule to be applied is not excluded. An example for that has been given by the German constitutional court when decision had to be made in the 1950’s in the case of deprivation of heritage as a result of an openly anti-Semitic law made in the epoch before the war, and without any reference to constitutional rights it declared the rule in question invalid because it was “in conflict to a great extent with apparently ethical standards”.

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In summary, it can be thus seen that through more thorough survey, albeit not during the legal work of an average lawsuit, but in actions of major importance, and based on the co-operation of a larger team of jurists, numerous legal theory possibilities for questioning the validity of the legal provision to be applied, and subsequently for winning the action, can be identified. One of the central thoughts of Rudolf von Jhering, the great German jurist in the last century was “the fight for the law”. Because although the law is given but lawyers and other jurists can do a lot for shaping the law in a given direction, fighting for the making of a new law, for example, as well as interpreting the legal texts in force in new directions, or establishing their enforcement in this direction. Even if jurists bound to the routine of the independent lawyer’s practice may have a minor role in this, larger lawyer’s offices may become the vanguards of the movement of “the fight for the law” through internal distribution of work and undertaking more complex cases.

VI Chapter: Statutory interpretation in Hungary

With several years of research work the research team evolved under the name ‘the Bielefeld Circle’ has performed a comparative study to explore how statutes are interpreted and then, in a similar way, how high court decisions work as precedents. (See MacCormick/Summers 1991 on summarising the findings of the first research and MacCormick/Summers 1997 on findings of the second). Using the results of these two researches, last year I examined the issues of interpreting law and judicial precedent in Hungary on the grounds of a total of two thousand high court decisions which were issued in the official monthly publication entitled Decisions of Courts.

The surveys made during the recent decade have revealed that there are eleven ways of interpreting law available under modern legal systems for judges using which setting out from the text of law they make decisions with regard to the cases disclosed to them (Summers/Taruffo 1991: 464-465). These bases for interpretation are taken into consideration, as a matter of fact, with different weight in various countries; also there are countries where certain ways of interpretation are absolutely unknown, and others where almost all of them are used to some extent. These ways of interpretation are as follows: 1. Interpreting the legal text in view of the meaning of the words in everyday language; 2. Interpreting the legal text in view of the special/technical meaning of the words, provided that a given word, phrase has such a meaning either in addition to its everyday meaning, or has no other than such a meaning; 3. Contextual interpretation means the kind of interpretation of the legal text where the words of each provision are construed in compliance with the meaning attributed to them when fitted in the entirety of the law or a complete body of related laws; 4. Interpreting the legal text on the basis of law logistics maxims; 5. Interpreting the legal text through analogy; 6. Interpreting the legal text on the grounds of precedents set at the time of previously enforcing the given law; 7. A doctrinal/law

dogmatics interpretation; 8. Interpreting the legal text in the light of implied ethical values of law or certain branches of law; 10. Interpreting the legal text in the light of the aims of the given rule of law; 11. And, finally, interpreting the legal text on the grounds of the will of the legislator.

Which ways of interpreting law are used by high courts in Hungary? The intention of this study is to give, at least on an experimental level, an answer to this question based on approx. 600 leading cases published in the Decisions of Courts. (It is the official publication of the decisions of the higher courts in Hungary.) In selecting leading cases, a more or less equal number of cases from both criminal law and civil law have been included in the examination, taking the different features of law interpretation in the two fields into consideration, thus avoiding in both fields cases of appeal evolved due to law interpretation debates regarding rules of court, and only legal cases that contain substantive law debates have been covered by the examination. Also, in order to explore the changes in the statutory interpretation during the past decades, with regard to the practice prevailing in 1977, the 1988 issues and concerning the 1990's, the 1998 and the first half of 1999 issues of the Decisions of Courts have been examined. Thus, it has been possible to explore the differences between the 70's, 80's and 90's every time on the basis of a hundred criminal law and civil law judgements. Furthermore, it should be noted that the leading cases issued in the Decisions of Courts constitute decisions of the Supreme Court as the court of second instance or, due to protests on legal grounds (and recently requests for revision) as the court of third instance; and they contain, as part of the description of the cases, a description of the law interpretation of the judgements made by the court of lower instance. Subsequently, in addition to the Supreme Court, the county courts' practice of interpreting law has been also revealed in them.

1. Grammatical, word by word interpretation

This kind of interpretation appears to be of key importance in the practice of the Hungarian high courts with regard to criminal and civil law judgements with the difference that in the latter grammatical interpretation is often combined with legal dogmatics interpretation actually appearing embedded in that. Whether the action is to be considered to be in the phase of either preparation, or attempt, or completion; whether it is an aggravated case pursuant to one type of the criminal code facts, or rather the technicality of a case that got stuck in the phase of attempt pursuant to another type of facts; whether one of the perpetrators is an accomplice or rather an accessory; whether the intention in committing the action is to be deemed contingent or rather it may be inferred from the facts that direct intention is involved, etc.; -- these questions constantly permeate grammatical interpretation in criminal cases. On the contrary, in civil law cases the grammatical interpretation of events of life is less embedded into a law dogmatics interpretation framework. (Although, as we shall see, it means a rising tendency here as well.)

It is another difference in grammatical interpretation between the two fields of law that while adherence to the general meaning of words in everyday language is prevalent in criminal cases, the meaning of words in civil cases are more liberally handled. Thus the extended or restricting interpretation is more frequent in civil cases, whilst in criminal cases the generally accepted meaning of words constitute the point of reference for establishing the facts of the case the judgements are based on. In spite of that, it occurs several times also in criminal cases that by attributing an extended or restricting meaning to the text of the law a judgement is made which is quite contrary to the judgement that would have been made if the generally accepted meaning of the words had been applied.

Let us consider some examples for the grammatical/word by word interpretation. In the criminal proceedings published in the 1998/8 D.C. (=Decisions of Courts), two perpetrators were brought to trial because of thirteen counts of crime committed against property, and although they committed a major part of these together, the Supreme Court proceeding in error deemed that the statement of ‘conspiracy to commit unlawful acts’ had been incorrect because the circumstances showed that such crimes were every time planned by the perpetrators ‘casually getting together’. Pursuant to Clause 6 § 137 of the Criminal Code, however, ‘conspiracy to commit unlawful acts’ is established when two or more persons commit crimes in an organised form or they agree to do that’, but the restricting grammatical interpretation did not allow to ascertain that. In accordance with the everyday/word by word interpretation of the words, however, a judgement just contrary to the above would have been reached. A restricting interpretation can be found in the criminal case published in the 1998/263 D.C. as well. The three defendants, having become angry with the editor of the journal of their town, because of an article written previously by that journalist about them, arranged a sham bomb attempt, fabricating an object that looked like a bomb which they placed in front of the door of the cathedral of the town. They wanted to see how the town journal would distort the events of the sham attempt. Once the area surrounding the church had been closed, traffic in the centre of the town was at a complete standstill for long hours, and the court of first instance, rejecting the prosecutor’s motion to ascertain the crime of threatening with a danger to the public, did not find the three perpetrators guilty. It interpreted the crime of threatening with danger to the public in a restricted way (Criminal Code Clause. (1) § 270/A) and because of the innocent, toy like character of the bomb that looked real, forbearing from establishing the commitment of a crime, deemed that by said action only the petty offence technicality of breach of the peace had been accomplished. (The court of second instance, rejecting the prosecutor’s appeal, upheld this interpretation.)

The righteousness of the extension of the grammatical interpretation was discussed in the civil proceedings published in the 1999/13. D.C. with regard to the extent of liability of the external member of a deposit partnership. Pursuant to Clause (1) § 100 of Act VI of 1988 on Business Corporations ‘The external member shall be liable the same way as the internal member is if its name is stated in the firm name’. In the present case, the firm name of the deposit partnership was made of the initials of the family name of both the external and the internal member. The court of first and second instance interpreted the text of the law with an extended meaning and found that the application of the initials was sufficient for ascertaining the external member’s liability and compelled the external member to pay eight and half million HUF payable under the lawsuit. Whereas, the council of the Supreme Court proceeding in error rejected the extended interpretation.

A restricted interpretation determined the outcome of the inheritance lawsuit published in the 1999/69 issue of the Court Rulings. The elderly testator entered an agreement with the plaintiff to oblige the plaintiff to support, take care of and have the testator buried after his death and in return the testator made him the inheritor of any and all of his moveable property and real assets. After some month he died and it came out during the probate that the person thus called the inheritor was unable to either read or write and because pursuant to clause (3) § 624 of the Civil Code an illiterate person shall make a will in no other than the form of an official document, and pursuant to § 656 the technicality of the last will shall be applied with regard to the agreement of inheritance, therefore no matter that the testator himself was able to write and read, because of

the illiteracy of the beneficiary of the agreement of inheritance the last will was deemed null and void by the court of first instance in the lawsuit thus instituted. The council of the Supreme Court proceeding error, however, interpreted the rules of the technicality of the last will in a restricting way with regard to the agreement of inheritance and found that it was sufficient that the party to the agreement of inheritance to make a will had the ability to write and read, and by that it declared the debated agreement of inheritance valid.

To draw a conclusion it should be noted that in administrative court proceedings in the grammatical interpretation the restricting and the extended interpretation seems to prevail to a lower extent, and the decisions of the administrative judges of the Supreme Court strictly adhere to the generally accepted meaning of words in their decisions. As one of the authoritative writers on the subject puts it, the Supreme Court's judges set aside judgements made at county level if through restricting or extended interpretation they depart from the generally accepted meaning of words (Dudás 1997:603). Thus, the kind of interpretation that adheres to the text as applied by domestic courts is the strongest in the field of administrative law.

2. Interpretation by legal dogmatics

This kind of interpretation means that to the open texture of the rule is added by the court a more precise ruling which was derived from the legal categories used in the text of the rule. The legal dogmatics is a set of doctrines, definitions, and categories which contain systemic connections of meaning which build up the legal institutions and aim at the elimination of the contradictories from these. As it has been shown, this kind of interpretation is more frequent in criminal proceedings but when looking at its proportion during the course of its progress, it can be said that compared to the 1970's the frequency of this kind of interpretation has increased in both fields. In criminal sentences with regard to the decisions made in 1977 a legal dogmatics interpretation was discerned in one out of every five such decisions, whereas in the sentences of 1988 this kind of interpretation was present only in every other such sentence, and the sentences made in 1998/99 showed the same proportion. In civil judgements in 1977 a legal dogmatics interpretation was present in one out of every ten such judgements, whereas in 1988 in one out of every five of them; and this proportion remained the same in the judgements made in 1998/99. Thus the role of legal dogmatics interpretation has increased in both fields but even at this higher level of frequency there is a difference between criminal sentences and civil judgements similar to the difference that was present between them back in the 70's.

Here are some examples from both fields of law for legal dogmatics interpretation. In the criminal action published in the 1999/148. D. C. the perpetrators who had robbed banks and post offices in succession were accused of committing of several counts of robbery, and with regard to one of the crimes committed when in a post office they had made the post office assistant woman lie on the floor but because of a customer who entered unexpectedly they had to flee thus interrupting the perpetration, it was debated between the court of first and second instance whether it could be ascertained in that case that the perpetrators had voluntarily ceased from committing the crime. The court of first instance took the position that robbery consisted of two phases: application of force and misappropriation, subsequently after the first phase (the application of force) it was no longer possible to ascertain that the perpetrators had voluntarily ceased from committing the crime. Whereas the court of second instance deemed it was possible to ascertain that even in such a case: 'In terms of dogmatics it is a false reasoning that says that

“because of the character of robbery having two phases it is conceptually impossible to enforce voluntary ceasing from committing crime”. The composite nature of robbery does not make it impossible in advance to ascertain ceasing from attempt.’ It was also related to the complications implied by the two phases of robbery that formed the basis of a legal debate in the Court Rulings 1999/152 case. The two perpetrators walking in through the open door to an elderly woman’s place were able to take her moveable properties without any force but could eventually leave with the movable properties and jewellery only by pushing a neighbour, who came to help the elderly lady, to the ground. They took the objects from the owner without any force and it was an element absolutely necessary for establishing the facts of robbery but the court stated that: ‘the person who suffered the force and the owner of the objects shall not be the same person’.

A legal dogmatics debate in civil action can be found also in another case published in the 1998/18 . D. C. The opposing parties had entered into an agreement that the plaintiff and its late spouse would purchase the real estate owned by the defendant for a purchase price of 1.650.000 HUF. In order to secure that a down payment was made in the amount of 300.000 HUF on the day of signing the agreement, then after a few days 200.000 HUF was also paid. The purchase failed because of the death of one of the purchasers since the other purchasers also desisted in view of that fact, and in the lawsuit to claim the down payment back the court deemed that only the 300.000 HUF given simultaneously with signing the agreement constituted down payment, and the 200.000 HUF given later was only an advance payment in view of the full purchase price. Similarly to the previous action, in the case published under 1998/333. D. C. the dogmatic issues related to down payment constituted the subject of the law interpretation that lead to the judgement. There was an intention to sell a landed property through inviting bids the basic price of which was 20 million HUF and participation in the bidding was subject to paying two million HUF bidding security which would have been included in the purchase price. On the day of the bidding no applicants presented themselves, subsequently it was unsuccessful, and on the grounds of the decree of the body of representatives of the local government that wanted to sell the land thereafter within 30 days without inviting further bids, the purchase agreement could have been entered with any applicant. The plaintiff appeared within that time period and paid the two million HUF which was registered by the employee of the local government/defendant as ‘down payment’. Finally, because of the local government/defendant the entering into the agreement failed, but the plaintiff, who hoped to be purchaser, claimed the double of the two million HUF back in vain, because pursuant to the rules of down payment, the court found that ‘It comes from the nature of down payment that it presumes the existence of a valid agreement...but entering an agreement had not even been discussed at that time, negotiations between the parties began only after that’. In spite of the false ‘down payment’ entry as registered by the employee of the local government, the court in compliance with the dogmatic interpretation of down payment deemed that the two million HUF paid was simply bidding security and thus no more than that amount, and not the double of it, was to be paid back to the plaintiff.

3. Interpretation that refers to judicial practice or precedent

The ways of interpretation that refers to judicial practice (‘permanently pursued judging practice’, ‘consistent judging practice’, etc.) and to precedents have to be considered jointly because reference to precedent is often made by citing the Supreme Court’s one or more decision(s) in cases published in the Decisions of Courts as reinforcement to the reference made to judicial practice. Also it often happens that without citing a precedent, reference is made to judicial

practice, or reference is made to a D.C.-decision without referring to judicial practice. The judicial practice and the precedent are rulings which circumscribe the facts more precise than the rules of the legislative acts themselves and these rules must be used by the court through the relevant precedent and the judicial practice. Considering frequency reference to judicial practice is ahead of reference to precedent, and in terms of reasoning weight judicial practice is ahead of precedent. In one of the D.C.-decisions the point of the debate between the court of first and second instance was just whether the decision made by the Supreme Court cited by the court of first instance really reflected the relevant judicial practice as it was stated by the court of first instance or it was contrary to it? The court of second instance found that the judicial practice evolved was just contrary to the cited Supreme Court's decision in case, and stated that the decisions made by the judging councils of the Supreme Court were not binding on the courts of lower instance, therefore it would rather abide by the judicial practice (see 1998/232 D.C.).

Looking at how frequently references are made to judicial practice and precedents in terms of temporal dimension, it can be pointed out that while references were already frequent in criminal cases in judgements made in 1977, they were almost totally missing from civil judgements; but in 1998 they became frequent also in civil judgements, and this frequency turned out to be absolutely equal with the frequency of references made in criminal sentences in 1998/99. D.C. One out of every five criminal sentences in 1977 included references to judicial practice and one out of every twenty included references to precedents; in 1988 this changed to the extent that references to precedents reached the proportion of references made to judicial practice, that is, one out of every five referred also to precedents, and this remained as such in 1998/99 as well. Whereas, no references to precedents were found in civil judgements in 1977, and only one reference to judicial practice was identified at that point of time, in 1988 one out of every ten judgements included references to judicial practice and one out of every twenty judgements included references to precedents; regarding judgements made in 1998/99 one out of every five included references to judicial practice and one out of every ten included references to precedents. That is, today, even if references to precedents are still less frequent in civil proceedings than in criminal actions, the interpretation based on references to judicial practice is as frequent here as there. In summary, the conclusion can be drawn that the changes, not using the valuing term 'development', in the last twenty years have gradually raised the Supreme Court's decisions in cases and the judicial practice that has evolved around it up to a stage where they can act beside the text of law as the medium of law. The calculation made in future judicial decisions will have to include high court judgments and judicial practice both in criminal and civil proceedings. The same refers, as a matter of fact, to the compilation of syllabuses for law education: teaching law becomes less and less possible without incorporating judicial practice into it because the text of law proves to be less and less sufficient in itself to attain its purpose.

Just to avoid misunderstandings, it has to be noted that with regard to the above numbers and the tendency that is getting outlined from them, the Supreme Court's decisions of principle and guidelines as well as collegiate positions have not been discussed yet. For they do not constitute decisions in cases, precedents but can be considered detailed enacting clauses of criminal and civil statutory law that have every aspect of an abstract legal norm. (The resolutions on the unity of the law which, having replaced guidelines and decisions of principle last year, set forth general guidelines for the judicial practice with respect to specific cases have not been examined yet due to the short time that has elapsed since they were introduced.)

Notwithstanding, separately from the numerical data that refer to the judicial practice and decisions in cases, it could be interesting to look at the frequency of that kind of interpretation which refers to the normative decisions of the Supreme Court and the changes thereof. In criminal cases in 1977 in one out of every eight decisions reference was made to collegiate positions, in one out of every five to criminal decisions of principle or guidelines; in 1988 the frequency of references made to collegiate positions did not change; the kind of interpretation that referred to criminal decisions of principle or guidelines became fifty percent less (in one out of every ten criminal sentences reference was made to them); in the judgements made in 1998/99. D.C. it is in just a few cases that interpretation based on references to collegiate position can be identified, and slightly more references to guidelines or criminal decisions of principle are found. Whereas, in civil proceedings this decrease of significance did not take place, and in one out of every five judgements examined reference to collegiate position can be found in 1998/99. D.C. just as in judgements made in 1977. It is true that in this field references to civil decisions of principle have always been very limited.

4. Interpretation that refers to constitutional basic rights or constitutional court's decisions

This kind of law interpretation, as a matter of fact, had not been applied prior to the social/political changes in 1989; looking at the end of the 1990's, however, this interpretation basis seems to appear in judgements.

When considering the core of the thing, the most important statement in this respect to be put right from the outset into focus is that *interpretation that refers to constitutional basic rights and especially constitutional court judgements has an absolutely minimum role in the interpretation of law*. Contrary to the central role that the Constitutional Court in Hungary, with the widest power in the world, plays in determining legislation and repealing law, in the procedures of *law enforcement* it almost does not appear. One of the reasons of it is that at the beginning of the operation of the Constitutional Court the Court itself declared the exclusive role of the Supreme Court in law enforcement law interpretation and in the establishment of unified legal practice (see Constitutional Court Resolution 57/1881: Hungarian Gazette p.2456 issue 1991/123). And that is absolutely supported by the Supreme Court's conscious practice, by avoiding that Constitutional Court decisions are involved in the law interpretation issues that occur. Several cases can be identified among the judgements examined where one of the judging councils of the Supreme Court made decisions with respect to issues which had been covered by long, detailed Constitutional Court resolutions (e.g. regarding established rights or data protection cases) but the judgements made no references whatsoever to these.

A more complete view can be gained if internal distinctions are made between the cases of law interpretation performed on the grounds of constitutional rights and thus the Supreme Court's and the high courts' attitude to these are defined more precisely. It has occurred several times that the opposing parties have referred to constitutional court decisions but the court did not react to that, and the judgement made did not contain any, either negative or positive, position that referred to them. Another distinction should be made with respect to the fact that sometimes the court refers to constitutional basic rights in its law interpretation but does not refer to the relevant constitutional court decision(s). A further distinction should be made between criminal and civil cases. In criminal proceedings the court also refers to constitutional basic rights, while in civil

actions the judges do not, only the parties refer to them in some cases.

When turning to the numerical data now, it can be seen that in the criminal sentences examined in 1998 references to constitutional court judgements were made in three cases, and there were further two cases when the court referred to constitutional basic rights without citing any decision made by the constitutional court. In 1999 in criminal sentences references were made to no more than two constitutional court decisions, and one of them was made by a county court, and the case did not reach the level of the Supreme Court. Examining the civil judgements in 1998, in four cases the parties referred to constitutional court decisions but there were only two cases when the court reacted to that and included the reasons of the constitutional judges in the law interpretation. In civil judgements in 1999 there have been no such references at all, and although two proceedings have been initiated with regard to established rights, and the judging council of the Supreme Court has also interpreted the question of established rights, they have not referred to the relevant Constitutional Court decisions at all. (See Constitutional Court Resolutions 43/1995 and 16/1996 on the interpretation of established rights).

The few cases when exceptionally the Supreme Court judges still refer to the constitutional basic rights, allow one to draw conclusions with regard to their approach to basic rights. It can be said that, contrary to the constitutional judges and the ombudsmen who is also given a part in this field in our country, the Supreme Court judges tie the extent of each constitutional right and the limits of violating them to the empirical social concepts and the general public opinion; also they interpret them on a more restricted basis. An example for that can be taken from the judgement published in the 1998/223. D.C. As set forth in the justification, the plaintiff considered it the violation of his human dignity that at a camping site the assistant personnel of the camping site had wanted to hold his identity card as deposit as long as he would stay at the camping site and would want to give it back to him after he would have paid for the tent site on the last day. The case reached the Supreme Court's revision council and it took the position that the violation of human dignity could not be ascertained unless such action could be considered a violation in accordance with a generally accepted opinion in society. In the present case the generally accepted social approach does not consider the holding of the identity card a violation of human dignity, and it can be considered a normal practice in camping sites. Whereas, the Constitutional Court, at least the majority of the judges of the first nine years term, tended to make a decision contrary to the most widely accepted social opinion ascertaining the violation of human dignity, and presumably it was not at all alien to their nature to observe the violation of human dignity in the said case. What is more, many times it was decisions based on constitutional basic rights that the Constitutional Court attempted to initiate the restructuring of social opinion with. The same way in the decision 1998/412. D.C. a tie to the empirical social public opinion can be identified in view of suitability for violation against human dignity and impairing honesty: 'It is the general approach evolved in society, the general ethical and public opinion that should be taken into consideration when it has to be decided whether in the given case stating or spreading the fact is suitable for impairing honesty.'

The judges of the supreme judicial body interpret the violation of human dignity on a more restricted basis than the Constitutional Court judges regarding the fact that they deem that it can be violated only in the interrelationship of persons: 'human dignity is the expression of the demand that a person, an individual shall be treated in compliance with the minimum requirements that evolved in society' (1998/412. D.C.). Whereas, the Constitutional Court used

this formula many times also in cases when they alleged to have discovered other kind of limitations of liberty. For example, they deemed that the violation of human dignity was realised when an adopted child, subsequent to having attained his majority, wanted to find his blood parents but he was prevented by the relevant clause of the family act (see Constitutional Court resolution 57/1991).

5. Interpretation that refers to the legislator's will or intention

Concerning the 300 civil judgements, in seven cases reference was made to the minister's reasons for the relevant enforced clause of the law with the aim of interpreting the law; in two cases reference was made to the 'apparent intention of the legislator' but without any other references to underlying points. Whereas, in the judgement of the examined 300 criminal actions reference to the minister's justification was found only in one case. (It has to be added that in addition to the above cases, having examined 15 further cases from the Decisions of Courts of 1981, in five cases references to the minister's justifications was found in the interpretation of the relevant clause of the law, and it can be made understandable by the fact that in enforcing the new Criminal Code made in 1978 for some years the minister's reasons played a major role in judges' decisions as a point of reference for the interpretation of law. The examination of the criminal sentences in 1988, however, showed the prime rule, that is, no interpretation based on the minister's justification was found.)

Thus in Hungarian high court judgements interpretation that refers to the legislator's will is insignificant even on the level of reference to the minister's reasons, to say nothing of judges who would intend to know the legislator's will from legislation documents. (Cf. the Swedish legal interpretation practice that is taking this direction: Peczenik/Bergholz 1991). What is more, looking at the tendency, it also shows total disappearance. Considering the judgements made in the 300 examined civil proceedings, it can be pointed out that in the D.C.-decisions in 1977 four such references were found, there were three in judgements in 1988; there were still two such judgements in 1998, but in the judgements made in the first half of 1999 no such references have been found. In the sentences made in the 300 criminal actions reference to the minister's justification was present in one case in 1977. (As noted, the cases in 1981 can be rated as an exception due to practising the new code.)

6. Summary

As it can be seen from the above, four kinds of law interpretation are absolutely not present in high court practice. In none of the 600 D.C.-cases were law interpretation performed by using law logistics formulas found. The appearance of legal literature based interpretation is an absolutely new phenomenon in our country, and only one interpretation that included a reference made to the Criminal Code and another that included a reference to the Civil Code were found in the last two years (in 1998/270. D.C. reference is made to the commentary of the Criminal Code, in 1999/117. D.C. to the Civil Code in the interpretation of law). More liberal interpretation based on legal literature, for example, reference to a specific monograph or a legal study was not found at all in the 600 cases.

No interpretation that refer either to the basic principles of a branch of law which create greater departure from the text of the law, or to the general principles of law can be found either. As it

has become apparent, high courts handle the possible way of interpreting law in the light of constitutional basic rights also with care. If, therefore, the term, the ‘activism’ of the court can be applied for depicting greater departure from the text of the law, which has been stated so far in Hungary as criticism with regard to the judgements made by the Constitutional Court during the first term, then high court law interpretation cannot be described as ‘activist’ even in the slightest degree.

Looking at a different aspect of the subject, the text positivist style of the 70’s cannot be identified when examining the end of the 80’s either, especially not at the end of the 90’s. As it has been shown in the above analyses, with regard to the various ways of interpreting law, in addition to the grammatical/word by word interpretation, in several cases significant enhancement has been ascertained. Accordingly, the role of legal dogmatics interpretation has significantly grown both in civil and criminal proceedings; similarly, interpretation that refer to judicial practice and precedents has been applied to a much greater extent compared to the judgements made in the 70’s.

The fact that interpretation performed on the basis of law interpretation has gained ground is also indicated by the growing length of the sentences and judgements published in Court Rulings. While the majority of the D.C.-judgements in 1977 were not longer than just a half page or one page, the majority of the judgements in 1998/999 took two or three pages. My calculations reveal that the majority of the D.C.-judgements consist of 1.200-1.500 words; and for the sake of comparison, it has to be noted that the notoriously laconic French high court judgements consist of 200 words, in average; in Germany they consist of 2.000 words and in the United States 8.000 words (see MacCormick/Summers 1991 and Kötz 1973; 1988). It makes it clear that the increased length of judgements and the more extensive description of judicial law interpretation and justification in Hungary cannot be considered too detailed yet. No doubt, if our judges described all of their primary considerations and the reasons for their decisions on the relevant subject in their judgements, then these would become even lengthier. Being aware of the law theory tendencies that foster this kind of practice, this can be prognosticated in Hungary for the future as well (Wróblewski 1991; Alexy/Dreier 1991).

VII Chapter: The layer of precedent law in Hungary

Analysing the primary ways of interpreting law, in law enforcement procedures in Hungary it can be discerned that from the 1970’s up to the present day significant changes have taken place with regard to basing judicial decisions on previous judgements and judicial practice. In civil proceedings in those day hardly any references were made to former high court decisions in cases or judicial practice, there was a relatively low number of references made in criminal actions but during recent decades the number of such references have further increased to a great extent in criminal sentences; also they have appeared to a great extent in judgements made with regard to civil cases. (In the analysis judgements based on the Supreme Court’s decisions of principle,

guidelines and collegiate positions have been handled separately, and have been considered to be judgements that are not part of the judicial precedents because they have all the features of the abstract norms, and they were created through mechanisms outside decisions in cases. Thus separated, the changes in the frequency of references made to these have been already described.)

This increase of weight offers grounds for looking more closely at the presence of judicial precedents in Hungarian law and the characteristic features of its operation. In order to do that, the high court decisions in cases of civil and criminal substantive law published in the Decisions of Courts have been considered, and the following statements are based on their analysis. The periodical Decisions of Courts has been looked through from 1991 to the summer of 1999, and a total of 145 criminal substantive law and 94 civil law judgements have been found in which reference to earlier judgements or judicial practice or both provided the basis for the decision in shaping the legal position for the judgement.

1. The weight of the judicial law

The changes in the field of references to former high court precedents and judicial practice noted from the 70's have generally showed both the difference in this respect between criminal and civil judgements and that this difference still exists, although to a lower extent, even at a higher degree of frequency of judgements based on precedents. The proportion of judgements based on precedents and judicial practice is of great moment in both fields of law, that is, law is 'carried' to a lower and lower extent only by the text of laws and other statutory instruments but the material of Decisions of Courts contribute more and more to it as well. The differences of this moment and its narrowing can be better seen if we look at the development of the frequency of references in absolute numbers from 1991 in an annual breakdown: in 1991 in 3 cases in civil actions, in 16 cases in criminal actions references to previous relevant judicial precedents or judicial practice were found; in 1992 this number was 8 regarding civil actions and 21 regarding criminal actions; in 1993 these were 5 and 8; in 1994 10 and 16 such references were made; in 1995 these numbers were 12 and 15; in 1996 10 and 20; in 1997 16 and 17; in 1998 21 and 17 references were made but it has to be noted that 21 references to precedents in civil proceedings were made during the course of 104 civil actions; while in the background of 17 references to criminal precedents only 62 criminal court rulings could be analysed because only that many were published in that year. That is, the frequency of referring to precedents in criminal actions is still ahead of such frequency in civil actions. Finally, in the first half of 1999 references to judicial law can be found in 9 civil actions and 10 criminal cases.

2. The binding nature of judicial precedent and judicial practice

Former high court precedents, as set forth under constitutional law, shall have formal binding force only in UK and US legal systems. Here the legal source principle of 'stare decisis' formally stipulates the judicial decisions in cases as one of the sources of law. In Continental legal systems the binding force of precedents is not set forth at such level but, as it has been shown in the first part of this study, this binding force, although not formally stipulated, to various extent does exist (see Marshall 1997).

One of the questions that has to be discussed with regard to Hungarian legal system concerns the relation between specific decisions in cases and judicial practice from the aspect of binding force.

To what extent a relevant high court decision and to what extent a specific judicial practice being referred to has in itself binding force? As it has been revealed by the comparative study of European Continental countries, contrary to UK and US legal systems, here a relevant high court precedent typically does not have binding force in itself unless a wider judicial practice has evolved from the position of several precedents that point at a similar direction. This phenomenon can be observed also in our country, and it can be stated about most of the references made to judicial law found from 1991 up to now that they primarily bring up one judicial practice as reason for the legal position adhered to in the judgement, and one or more court judgements are described as examples for this judicial practice. (In two out of the 240 cases reference was made to a Supreme Court decision which were not published in Decisions of Courts). The prime rule that is observed in Continental legal systems can be ascertained in Hungary as well. Also, quite often it occurs that it is simply claimed that the given legal position is based on a judicial practice but no reference is made to any decision of court. Sometimes it gives rise to suspicion in the analyser, for example regarding the decision 1998/467. D.C. where in the case of a fatal traffic accident five references were made by the court to judicial practice to base various legal positions on it but no specific decision in case was described for checking it out. The actually existing nature of judicial practice can be also questioned for the analyser by the fact that the court bases its legal position on the 'consistent practice of the Supreme Court' but it is not able to bring up any decision in case published in the Decisions of Courts as it happened in the case of 1998/277. D.C. where the asserted 'consistent practice' was proved only by a decision in case made four years before and not published.

Although less frequently than sheer reference is made to judicial practice but a good many times it also occurs that only a specific D.C. is referred to as the basis of the legal position of the judgement and it is not stated that it constitutes judicial practice. For example, in the case 1997/391. D.C. the subject of debate was whether the venture agreement entered into between a 'bungler', a party that had no trade licence is null and void, or whether charging general turnover tax as part of the venture fee was lawful. The defendant/'bungler' had performed the work with slight insufficiency and once it had been corrected, it was possible to state that the work was completed. The plaintiff contested the 'bungler's right to charge general turnover tax. The Supreme Court proceeding in error referred to the fact that the new Act V of 1990 on private enterprises entered into force on 15 April 1990, and in the case 1994/186. D.C. in order to establish judicial practice the Supreme Court stated that if legal rules did not forbid the performance of an activity, then the venture agreement was not be made null and void by the fact itself that the entrepreneur did not have a trade licence with respect to the given work. And than the general turnover tax could be charged for this activity, the court based its decision on this single D.C.

Quite often it also occurs that the court does not assert a practice that is as widespread as judicial practice as the basis of one of its legal positions but it bring s up 'several Supreme Court decisions' in general which uniformly share this position concerning the given question and refers to one or two specific D.C. to base it on them. For example, in the case 1998/79. D.C. the court gives reasons for its position with this solution: 'As the Supreme Court has referred to it in several of its decisions in cases ... the party who has invited bids shall not be liable to enter into an agreement'.

In one case a legal debate can be found that exactly concerned the relation between the sheer

decision in cases and judicial practice in terms of binding force. That was the case 1998/232. D.C. when the court of first instance formed its legal position based on the Supreme Court's relevant decision in case and asserted that there was a judicial practice that adhered to this decision. Whereas, the court of second instance asserted that this Supreme Court decision in case was just contrary to widespread judicial practice: `...the Supreme Court decision in case referred to by the court of first instance actually played no role in court practice, anyway, decisions in cases do not have binding force on lower courts`. This justification was made as a result of the revision procedure where the Supreme Court's judges referred, in agreement, to the position of the court of second instance and eventually that was what they approved of. Consequently, as it can be deduced from the above, the judges of the prime judicial forum also acknowledge *the binding force of high court precedents entwined into, adding to judicial practice* as it has been seen with the judges of the court of second instance. On the level of setting forth in constitutional law, as a matter of fact, precedents entwined into, adding to judicial practice are not binding, therefore the justification quoted above express only the position actually held by the judiciary. And that takes us to the issue of the binding force of Hungarian judicial law.

3. The degrees of the binding force of judicial law

Looking at the entire scale, the binding force of judicial precedents in various countries can be described under four degrees. The force shall be the strongest when in the event of it being violated the judgement shall be definitely set aside due to that; it shall be milder than that when through explicit reasoning it is possible to depart from former relevant precedents if that reasoning convinces the forum of judges who make the decision in the second instance; the binding force shall be even milder when the precedent serves no more than an underlying reason which appears beside further legal grounds (e.g. statutory order, constitutional basic right; prevailing opinion in law literature; etc.); finally, this binding force shall be the mildest when one or more decisions in cases are described as pure illustrations to base the legal position on them (Summers/Eng 1997).

In Hungarian legal practice, at least in criminal and civil cases, all four degrees can be observed. In plenty of cases judgements can be found which have, in the event of violating relevant precedents or judicial practice that has become widespread on the basis thereof, established infringement of the law or other statutory instruments; and having set such judgements aside instructed, because of that, the lower courts that had made such decisions to start new proceedings. This can be observed, for example, in the case 1999/211. D.C. where a civil action concerned claiming a present back, and the basis for claiming it back was endangering sustenance, and it was debated whether the plaintiff's circumstances of life underlay endangering sustenance? Clause (1) § 582 of the Civil Code allows this, and the court of second instance deeming that the plaintiff's circumstances of life underlay this title to claim back made a decision in favour of the plaintiff. The Supreme Court's judges proceeding in error, however, argued that previously `the Supreme Court had defined its position based on several decisions in cases that the examination of endangering sustenance might not be restricted to clarifying financial cover for cost of life, also that in terms of sustenance, in addition to the donor's income and financial status, it had to be examined to what extent the donor was in need because of his age and health condition and whether this condition was of a temporary nature or could be considered a condition that had become permanent.` Having examined that it eventually changed

the final judgement. What concerns us now in this respect is whether the judges of the supreme forum based this decision on `the law infringing nature of the final judgement because of incorrect enforcement of substantive legal rules`. That is, the decision by the judge that did not comply with several Supreme Court decisions in cases was qualified not only as `violating precedent` but `infringing statute`. This example is not a unique phenomenon, in plenty of cases in the revision procedure this degree of force can be ascertained with regard to judicial precedent both in civil and criminal actions. To give an example for criminal actions, reference can be made to the case 1999/100. D.C. where, in addition to other crimes, the court of second instance ascertained the offence of abusing official document because during the course of a house search, ordered due to another crime, a passport issued under the name another person was found at the defendant's place. Through that the defendant held official document of another person which he had concealed, that was the reason the court gave for its legal position. The Supreme Court's judges proceeding in error, however, referring to permanent judicial practice and citing a specific court ruling indicated that holding the official document of another person in itself could not be considered concealment unless the defendant had given a negative answer regarding this fact to the owner's or the authorities question. Due to lack of compliance with this judicial practice the Supreme Court decided in the revision procedure that `the rules of criminal substantive law have been violated` and in view of that it set this part of the judgement aside.

Even if at the level of the constitution, where only the legally binding force of the law and the resolution on the unity of the law on the courts are set forth, judicial precedent and judicial practice which is shaped from decisions in cases do not constitute law; in the actual jurisdiction they are explicitly defined in the judgements of the Supreme Court. This is true only in some, perhaps most, of the cases because quite often references to precedents appear in Decisions of Courts with no more than underlying or illustrative force. *That is, because in Hungarian law the degree of the legally binding force of `one precedent`, `several Supreme Court decisions`, `judicial practice` is not formally defined, in several cases these have only underlying or illustrative role while in other cases the infringement of these appear as the infringement of the legal rules.*

Binding force is frequently made uncertain by the fact that among the judging councils of the Supreme Court law interpretation decisions appear that apparently draw to different directions. A good example for that is given by two court rulings that point at directly opposite directions: 1998/211. D.C. and 1998/570. D.C. made in 1998 concerning the offence of defamation. The former one puts it down in its heading set in bold type that `The judging practice evolved concerning the offence of defamation that states that complaints, critical comments and reports submitted to public and social organisations in order to protect general interest or lawful private interest imply no danger to society even if their content is, partly or fully, untruthful, is false`. And subsequently, opposing the `incorrect judicial practice`, it made its decision. After that, in the case 1998/570. D.C. again the offence of defamation in the form of reporting was asserted but the judges of the Supreme Court proceeding in error, without mentioning the precedent made just a few months before, referring to court judgements made several years before decided in accordance with the `incorrect judicial practice`. And it was possible to identify this phenomenon several times while analysing hundreds of decisions of courts.

In this respect, the option of formal revision of judicial precedent is to be also described here. An institutionalised instrument of this is the procedure concerning the unity of the law introduced at

the end of 1997, which is initiated when `in order to further develop legal practice or guarantee unified judging practice a resolution on the unity of the law is required concerning an issue of principle; or when some council of the Supreme Court intends to depart regarding an issue of law from the resolution of another judging council of the Supreme Court` (clause (1) § 29 Act LXVI of 1997). Firstly, it is apparent that this new institution that has existed for not more than just one and a half year takes the decisions made by the judging councils of the Supreme Court out of the DC's, the decisions in cases published in the Decisions of Courts, and make them formally binding on other judging councils of the Supreme Court. This binding force means that one shall not depart from it unless under special proceedings, proposing to institute a procedure on the unity of the law and on the grounds of an approving decision thereof.

A new legal institution which by force replaces another institution that has been applied for several decades, in the present case the normative material of the decisions in cases, guidelines and collegiate positions of the Supreme Court, can be realised with difficulties and minute step by minute step. In view of that, it can be understood that no more than 24 resolutions on the unity of the law have been made in the field of civil, criminal, administrative and labour law during the course of this one and a half year. (For example, in 1998 one labour, two civil, three administrative and six criminal resolutions on the unity of the law have been made; and up to the Autumn of 1999 three civil, three administrative and five criminal resolutions have been made.) It means that, for example, in addition to the approx. 150 criminal and criminal proceedings court rulings in 1998 there were only six resolutions on the unity of the law of this kind, or approx. 200 civil court rulings were covered by two such resolutions on the unity of the law.

The analysis of several hundreds of the aforesaid decisions of courts has revealed that there are indeed definitely more decisions in cases and judicial practices that point at different directions than issues which are resolved on the level of resolutions on the unity of the law. For example, in the case 1998/211. D.C. referred to above, there was an intention to correct the `false judicial practice` without proposing to institute a procedure concerning the unity of the law, and as it was seen, another judging council of the Supreme Court without even mentioning it disregarded that in the case 1998/570. D.C. The institution is nevertheless suitable for the formal revision of the judicial precedent and time will probably set it in greater motion.

4. Judicial precedent being closely linked to the text of the law

It has been clearly shown in the above, that the weight of judicial precedent has significantly increased in Hungarian law and it means, firstly, that in judgements the frequency of basing decisions on high court judgements has been growing; secondly, that the binding force of former precedents has been enhanced which is manifested by the fact that the judges of the supreme forum in many cases apply sanctions against violating, ignoring, precedents the same way as against infringement of the legal rules. This increase of weight raises the question what the relationship is between the layer of judicial precedent that recently has become significantly noticeable and the layer of the texts of law and, in general, statutory instruments. *To what extent precedents constitute specifying/interpreting precedents and to what extent they possibly constitute ruling out of provisions set forth in texts of the law?* It is worth openly addressing this point because the two theories of judicial law that have been effective so far, the German 'Freirechtslehre' at the beginning of the 20th century and the `legal realism` that dominated in the 1930's in the United States, both promoted judicial law and supported the intention to push laws

and the legislator in the background (see Fikentscher 1975). By integrating the one sided emphases of various legal concepts into a multi-layered legal concept, and apparently being aware of the processes of legal development in the last century, it is now possible to define judicial law as one of the layers of law as a kind of law that can be fitted in with no problems (see Pokol 1989; 1998a) but judicial law is indeed able to develop into both directions and only empirical examination can explore which version is realised in each country.

To answer this question the starting point can be found in the entirety of our high courts' law interpretation practice. As it has been shown in the first half of this study on the grounds of 600 examined high court decisions, Hungarian judicial law interpretation can be characterised as being *accurate in the reproduction of the text of the law*, and slight departure from the text of the law is performed only by including law dogmatics concepts into the interpretation but the basic rights or general law principle interpretation that has a more loosening effect is not typical of judges in Hungary. It cannot be doubted, however, that judges have moved from the definitely text positivist law interpretation of the 1970's towards more liberal law interpretation in recent years, as it has been shown by our aforesaid examination. But that has basically not questioned at all the close link to the text of the law present in the law interpretation of the courts of the country.

This approach also defines the types of judicial precedents in Hungarian law. The examination of further 250 high court decisions made prior to preparing this study, which definitely referred to precedents and judicial practice in developing their legal position, has revealed that judicial precedent in Hungary does not consist of regulating precedents which would push the relevant statutory orders aside, instead *they are interpreting/specifying precedents of relevant clauses of the law*. The occurring decision making dilemmas which emerge in the midst of the colourful swirling of specific cases while enforcing given clauses of the law, and regarding which this or that kind of decision can be made under the framework of statutory order, are resolved by precedents by offering a normative decision that point at one of the directions. Judges who day in, day out face decision making dilemmas left open by the relevant clause of the law, are able to resolve them uniformly throughout the country by using the specifying/interpreting precedents. *Precedents, therefore, do not take away the legislator's decision making competence but narrow individual judges' freedom of consideration*. Under the text-layer of the law the layer of specifying/interpreting judicial precedents with their exactness due to closeness to cases provide the judges with obligatory points of references for making decisions.

In summary it can be said that Hungarian judicial law, at least during the course of its development so far, has harmoniously fitted in the text of the law and has not constituted the spreading of judges' free law finding'. It does not mean, however, that in the future no changes can take place towards pushing statutory law aside because the self organisation of the judiciary, the disappearance of the licences of the judicial government policy that represent the majority of parliament in appointing leading judges took place just a few years ago. Therefore, while support is to be given to the development of judicial precedent as a tool that makes statutory law specific, it is to be guaranteed that possible departing tendencies can be noticed and necessary counter measures can be taken by the legislator.

VIII. Chapter: Constitutionalization of the law

Complicated relations in modern society cannot be regulated by law unless they are separated into several intrinsic layers. If we drop the textual approach to law, then we can have an unbiased view of the system of concept categories of each branch of law under the layer of the text appearing on the surface which constitutes the dogmatic layer of law; in addition to these, judicial case law - high court precedents, judicial practices making the open usage of acts and orders more accurate – represents the third layer of law. The relations of these three layers of law, their proportions to each other are different in each legal system, but to a certain extent all three have been present in modern legal systems of this last century. The appearance of constitutional jurisdiction, which subsequent to 19th century beginnings in America has spread in several European countries since the end of the 1940's and become a routine procedure after the changes in 1989 in Central and Eastern European countries, is a new product of development. Compared to dogmatically chiselled traditional administration of justice made more accurate by judicial case law, this new layer of law, which originally appeared in the form of human rights as the collection of ideological/political requirements outside legal systems in operation, is characterised by highly different features. One such difference is that the normative content of constitutional rights and freedoms and fundamental principles is more abstract than the rules of traditional fields of law. The other difference is due to the fact that relations between particular rights are mostly irreconcilably strained, and a certain right can be enforced only at the expense of another right or principle. These features did not cause any problems while people had to fight with them as ideal requirements, setting human rights against actual conditions, for the transformation of prevalent conditions. Judicial decisions based on them as constitutional rights and freedoms used for being applied in cases, however, often lead to legal uncertainty.

1. Three dimensions of constitutionalization

This particular problem of the layer of constitutional rights and freedoms has not been serious for predictable administration of justice even while its effect has been exerted on the legislator and other lawmakers. This has represented the prime rule during the recent half century in the countries where the institution of constitutional court has appeared. Constitutional rights and freedoms and fundamental principles have guided the alternative choice of the legislator and pushed the content of provisions of law in drafting acts and orders in the direction where the abstract instructions of fundamental rights and principles appear in them more properly. At this point, it is at most the question of democracy that is raised by the too wide power of judicial review exercised by the constitutional court. For the expression of the empirical will of the people in parliament formulated by the voting of millions is forced to the background on the grounds of the decision of a few constitutional court justices. In spite of the problem of democracy fundamental rights, which include overall aspects of justness, can reduce the

amplitudes of the empirical will of the people based on short term and rather emotional moods of the masses. Making a somewhat aristocratic remark, it can be said that ‘the radically subversive’ element built into mass democracy can be tamed by the constitutional court justices, who deliberate and make decisions in adherence to the standards of upper classes. Problems actually arise if this decision-making forum gets permanently and globally in conflict with legislature based on the empirical will of the people and the authoritative political elite.

It constitutes a new dimension when constitutional rights and freedoms go beyond determining the legislation and begin to exert directly determining pressure towards the micro-processes of law and judicial decisions in cases as well. In addition to these two dimensions, constitutionalization may touch jurisprudence and dogmatic activity: by connecting internal issues of various branches of law and dogmatic constructions of law to constitutional rights and fundamental principles; and by describing the dogmatic system of various branches of law more or less as being deduced from fundamental rights. Subsequently, a specific branch of law will appear as ‘a constitutional branch of law’ – ‘constitutional criminal law’, ‘constitutional taxation law’, ‘constitutional labour law’, etc. – and once this has been accepted by the lawyers in the given branch, then, in addition to law politics criticism alongside lawmaking, ‘the constitutional rights of the branch of law’ will be considered as the basis of interpretation of the rules of that branch by legislators as well. The constitutionalized jurisprudence of various branches of law may thus move in two, different directions: towards legislation they may appear as a new law politics assessment system, now condemning current legal conditions for lagging behind constitutionalized fundamental rights, and towards law enforcement as the supporters of judicial law enforcement with a new viewpoint driving law interpretation towards the constitutional rights under branches of law.

Out of the three dimensions of constitutionalization, only with respect to the constitutionalization of judicial proceedings is my intention in this study to examine the operation of the layer of fundamental rights, and to expound the problems that arise in this field. After that, in the final part of the study I shall describe the phenomenon of ‘political fighting through litigation’, which arise from these developments. By breaking elements up into three dimensions it is possible to assess the effect exerted by the layer of constitutional rights and freedoms on each layer of the legal system more accurately than by describing the constitutionalization of the entire legal system without any differentiation made. Thus, for example, at the comparative law conference arranged in 1998 in Bristol the papers prepared on this subject focused on ‘the constitutionalization of the legal order’ in summary, while they commented the current state of constitutional court’s judicial review of *the legislation* in various countries (see Koch 1998; Poplawska 1998). The subtle treatment of the subject allows that the effects of constitutionalization can be assessed in each dimension separately, and that the negative or positive assessment of one dimension should not influence the assessment made in the other dimension.

2. Two aspects of the constitutionalization of judicial proceedings

If the layer of fundamental rights go beyond the judicial review of legislation and begin to influence judicial decisions in cases, then the influence can be examined from two different

aspects. Firstly, regarding that *the judge can decide the case by taking into consideration, in addition to the relevant legal rules, constitutional rights and freedoms*. That is, in this event, constitutional rights and freedoms exert their effect on the judicial decision not only through drafting laws to be enforced by the judge but in addition to/instead of that they directly appear in the formation of decisions. Secondly, regarding that it exerts an effect towards the constitutionalization of the legal order when participation in the litigation is disconnected from the state of being personally concerned and more comprehensive groups, associations can enter the judicial proceedings for whom it is not the specific subject of the litigation that counts but the possibility to fight for a definite outcome of the litigation using it as means of shaping an overall issue. Let us look at these two aspects of constitutionalization, possibly called the substantive law and procedural law side of this process respectively, and the questions related them in more detail.

2.1 The substantive law aspect of constitutionalization

While in most of the countries where the institution of constitutional jurisdiction has been established, it has been confined to the judicial review of legislation, subsequently constitutional rights and freedoms and fundamental principles have not been granted a direct role in the micro-processes of law; in Germany and the United States since the mid 1950's attempts have been made in this direction. In Germany this problem area has been called 'the horizontal' effect of fundamental rights or, looking at it from another aspect, 'the tertiary direction effect' (Drittwirkung); in the United States since the 1960's when the theoretical treatment of the issues concerning new legal developments commenced, studies on the subject have been prepared under the headword: 'the constitutionalization' of solving problems in the administration of justice and society. The problems arising here are grasped in different width by the two thematic interpretations, and the wider, American thematic interpretation has corresponded to the actual situation that the constitutionalization of law enforcement has been performed on a wider scale and touching the operation of law more profoundly in the U.S. than in Germany.

In Germany the Constitution declares fundamental rights to be directly enforceable rights, and since the 1950's during the course of making judicial decisions the question has arisen what role constitutional rights and freedoms that seem relevant in the given case may have alongside applicable legal provisions (Alexy 1985). Logically, in this respect, three positions are possible. The first can be that the judge shall not take fundamental rights into consideration because the legislator has already been controlled and determined either by them or the constitutional court decisions interpreting them. In this direction the role of fundamental rights is somewhat stronger when the judge needs to take into consideration the guiding of the relevant fundamental rights and constitutional court decisions basically in formulating his decisions tied to the relevant provisions of law, but also in his interpretation work because of the openness of the provisions of law, and needs to implement his deliberation in view of these. Finally, fundamental rights will attain the strongest position in the forming of the judge's decision when the judge can (and shall) both refer to fundamental rights in the interpretation and *strike the applicable provisions of law down and base his decision entirely on constitutional provisions*.

These three positions emerged in German law literature from the beginning of the 1950's in the analysis of the possible effects exerted by constitutional rights and freedoms towards direct judicial decision; and the problem was called 'the horizontal effect' of fundamental rights in view

of the fact that fundamental rights had originally protected the individual 'in vertical direction' against the state and the overall community. And now their effect in the interrelations, i.e. in the horizontal relations, between citizens was put into focus. The German Federal Constitutional Court thoroughly considered its decision made on the issue, and after the Federal Labour Court had ignored the provisions of labour law in a labour lawsuit and decided the case directly on the grounds of the Constitution, and a huge debate evolved in the literature on the consequences of this revolution in law enforcement, the Constitutional Court took the position that fundamental rights might exert only indirect effect on judicial decision, and judicial decision might be based on them only to the extent of analysing the openness of the provisions of law, but laws should not be ignored. If a judge deems that a particular provision of law is in conflict with one of the constitutional rights and freedoms, then he can suspend his proceedings, and may appeal to the Constitutional Court requesting the examination of that particular provision of law. He himself, however, shall not ignore it.

Germans have been left alone with even this middle-of-the-road position of theirs because Austrians and Italians, who have had constitutional jurisdiction since as early as the 1950's, having examined the matter have decided that they do not approve of the horizontal role of fundamental rights even to such an extent. Also, in Germany, in spite of the declarative recognition, the inclusion of constitutional rights and freedoms into judicial decisions has remained moderate even in such an indirect function.

Constitutionalization has been performed on a much wider scale in the United States, and it has exerted a much broader effect on both the operations of the legal order and political life. Subsequently, since the 1970's a new tendency has begun to replace the old one, first by stopping further constitutionalization, then by a resolute reversal from the beginning of the 1990's (see Epp 1998).

In the United States the constitutionalization of judicial proceedings was greatly connected to the different dominance of political forces on member state and federal level and the opposition of the two levels for that very reason, which eventually resulted in the Civil War in the 1860's. The federal government, the federal legislature and the separate federal court system established on it traditionally constituted the depositories of the central formation of will in the United States just becoming uniform against member state laws and member state authorities; and the continuous extension of federal competencies during the recent one hundred years has been accomplished by the more and more broadening interpretation of the Constitution by the federal courts, and by the Federal Supreme Court, in the first place. One aspect of this has been (in addition to the widening legislative power of the federal Congress to the account of member state legislatures) *the inclusion of constitutional provisions pertaining to federal issues into judicial law enforcement, and through that the striking down of member state laws (and member state courts ordered to enforce them)*. To make this understandable it might be worth referring to the legal case from the beginning of the 1980's when a college in the U.S. entered a two-year contract with a PE teacher, but gave him notice after a year. The PE teacher intended to argue with the lawfulness of the notice not in compliance with labour rules, which would have fallen under the jurisdiction of the member state court, but by interpreting the loss of his salary as loss of property and basing his claim on the provision of the Constitution that sets forth that "no person shall be deprived of property without due process of law". This basis of litigation transferred the case into the competence of the federal court, and if the judges were inclined to interpret property in such

terms, then a considerable part of labour cases would be executed as an action of infringement of a constitutional right and redress thereof. This case, however, happened to be allocated to Richard Posner, Chief Justice of the Chicago Federal Court of Appeal, who being an opponent of constitutionalization rejected the claim, and indicated to the PE teacher that in a member state court judgment would be made pursuant to labour rules probably in his favour (see Cohen 1985:1117-1118). *What counts here is that litigation is doubled by creating the option of constitutionalized litigation, and the plaintiff has the option of either prosecuting a constitutional lawsuit or trying to solve his or her problem pursuant to simple laws.*

This tendency reached its peak by the mid 1970's and in federal courts a parallel 'constitutionalized' administration of justice evolved in addition to traditional techniques of litigation. The opposition evolving among lawyers and in courts made public opinion and politics aware of the emerging problems, and especially the law politicians of the Republican political side began to claim, more and more dramatically, the necessity of turning this process back. President Reagan put the issue in his election program at the beginning of the 1980's asserting that in the event that he was elected President, he would attempt to appoint federal justices who are against 'the constitutionalization' of judicial decisions. After he had been elected, his administration of justice managed to break through in the 1980's and once the federal judiciary had been replaced, constitutionalization ceased to be pursued in judicial proceedings to such a great extent. Eventually, through filling vacancies with the nine justices coming in turn in the federal supreme judicial forum by the beginning of the 1990's, it was possible to turn the majority of justices towards stopping constitutionalization. Against the line of 'constitutionalization' that began in 1953 with Chief Justice Earl Warren, and continued with Hugo Black, then with William J. Brennan, William O. Douglas, Abe Fortas, the camp for reversing the process was represented by Felix Frankfurter, John M. Harlan, William H. Rehnquist, Sandra Day'O Cooner, Antonin Scalia, who fought a hopeless struggle with them in the beginning, and who have constituted the majority of the supreme judicial forum in America in recent years. Among law scholars Ronald Dworkins has to be considered the arch supporter of the constitutionalization trend, while it was Alexander M. Bickel who began to fight to cut it back in the 1960's, then since the 1970's Robert Bork and since the 1980's Antonin Scalia have written important works to carry on with the issue. (Eventually Scalia was appointed the associate justice of the Federal Supreme Court in the middle of the 1980's, but Robert Bork's nomination failed because of the political and media strength of the opponents who acted uniformly.)

Compared to the German 'horizontal effect', the constitutionalization of law enforcement in the United States was thus accomplished with a more penetrating force for a while. Constitutional rights and freedoms and supreme court decisions interpreting them in the U.S. are made part of law interpretation just like in Germany, but through the independent course of constitutional litigation it is also possible to strike down laws the way referred to above. A broad interpretation of constitutional rights and freedoms, and the deduction of numerous normative points of reference from constitutional fundamental principles, are instrumental in completely striking down simple laws and the constructions of the legal dogmatic behind them; and judicial decisions in cases can be made on the grounds of constitutional rights and the points of reference applied in the literature of rights that elaborate on them, instead of provisions of law made more accurate by legal dogmatics (with regard to family law in the U.S. see Schneider 1988:79-121). In terms of legal techniques it might not be out of the question that a new kind of predictability will evolve after a longer period, although because of the multitudes of necessary changes it is unforeseeable

in what way this could happen, if it is possible at all; nevertheless, after a twenty years period of this trend the mainstream of American law has shifted towards reversing it.

2.2 The procedural law aspect of constitutionalization

In the United States, alongside the substantive law aspect of constitutionalization, from the 1960's developments on the procedural side began to shift traditional administration of justice to the domain of constitutional law/public law for a while. The core of this was that individual litigation was replaced by mass action, which extremely enhanced the importance of judicial proceedings in view of conducting the struggles of wider groups of society. *And the execution of mass action pursuant to constitutional rights and freedoms actually created the alternative for groups of society of either organising themselves into parties and attempting to attain their goals in the legislation through modifying laws, or fighting for them through judicial proceedings thus changed.*

Traditional litigation was shifted into this direction along two, intertwined tracks of development from the beginning of the 1960's. One of them represented the evolution of 'public interest litigation' or 'public law litigation', and the other that of 'class action'.

(Public law litigation) Entering a traditional, civil action, or joining an ongoing action is possible only by a person whose interest protected by law is directly affected by the case in such action. The outcome of a massive court action often affects the status of other people in similar situation, especially when judicial precedent law plays a powerful role in the legal system of the given country. In this event, in any subsequent litigation this decision will be taken into consideration as precedent on behalf of the persons in similar situation; subsequently, for the persons who are in a situation similar to the individual litigant the outcome of the action is important. It apparently goes back to the fact that in the United States attempts have been made by outside parties to join judicial proceedings since the end of the last century. The first form of this effort was the 'amicus curiae brief' (see Kristlov 1963). This consisted of the description of a lawyer's position written by some respectable lawyer or law professor in order 'to help' to decide the given case. These letters expounded arguments, regulations applied in other countries which urged the judges who decided the case to proceed into a given direction. This activity is usually pursued by respectable lawyers, government officials, experts of large companies prior to superior court decisions of general importance, when the outcome of the case is meaningful for them. One version of the amicus curiae brief is the so-called *Brandeis-brief*, which expounds legal arguments and changes in social facts for the judges who decide cases, and attempts to attain secession from previous relevant precedents. Louis Brandeis, who later became the member of the supreme judicial forum, wrote his example setting letter in an important case in 1908, which, after a two page traditional legal argument, outlined in a 110 page study social changes calling for new decisions to be made by judges against old precedents. In the midst of the euphoria of transforming law into 'sociological jurisprudence' that drew upon social sciences this kind of letter set a pattern for 'social engineer' lawyers for long decades.

This antecedent makes the evolution of public law litigation from the 1960's understandable. At that time a modification was made in the rules of court, which allowed that anyone whose interest should be affected by the outcome of an ongoing action might join such action, provided that the party in the action in similar situation should not be able to defend the given interest. The judge

was obliged to permit the joining of the action; and another clause allowed that the interested party might join the action, even if the claimed interest was properly defended, when an overall fact or legal issue was concerned in the action. The judge, however, had the right of deliberation whether to permit the joining of the action (Vreeland 1990:279-310). Since this modification in the rules of court intervention has taken place in multitudes of lawsuits, and now judicial decision may be influenced not only from outside with an *amicus curiae* brief, or in the form of a Brandeis-brief by overall interest groups, associations but also by the parties involved in the lawsuit.

In such event, however, the action will be essentially transformed, and *the emphasis is shifted from an individual's interest to win the action to the enforcement of an overall social group's long term interest*. Subsequently, the lawsuit is executed for the sake of winning a permanently better legal position with the participation of the unions of the relevant social group. This change in character will make the courtroom similar rather to the plenary session of a legislative body, with huge media publicity, and not the place where neutral lawyer's argumentation takes place. Litigation appears to be an alternative for political interest groups to attempting to fight for the modification of law as a lobby or a political party in parliament (see Chayes 1982). Choosing the option of political fighting through public law litigation is especially advantageous for ethnic groups or minorities because they can enforce their will with more difficulty in the majority legislature. A cutting back attempted in 1984 was justified by a preparatory subcommittee of Congress by stating that "The members of a particular race or sex can easily set up a group, given the inclination of the federal judges to acknowledge the litigation right of social groups defined in terms of sociology. Abstract rights and freedoms constitute a basis for such groups, which makes rights litigation similar rather to legislation than traditional lawsuit between class litigants" (quoted by Feinberg 1984:272). The golden age of public law litigation was in the 1960's but even in the period between 1986 and 1989 171 such cases can be found when examining actions executed in federal courts, in spite of the fact that by then the staff of federal judiciary had been mostly replaced, and justices considered the possibilities for joining lawsuits stricter when granting permission; and, consequently, the transformation of lawsuits into public law litigation was to a certain extent forced back.

When analysing the American impact in this respect on Western European countries, it can be seen that the appearance of public law litigation has taken place only partially. Because here it usually falls within the public prosecutor's competence to join a lawsuit if the interest of the litigant is not properly represented and bears an overall social significance (for a comparative analysis of this see: Feldman 1992). In spite of this, certain developments have already begun with a view to attaining that the law of the European Union shall be enforced through judicial proceedings against reluctant domestic laws by applying to the European Court of Justice regarding specific cases if the relevant social group has not been able to enforce it because of the resistance of domestic legislature (see Feldman 1992). In the form of a germ it is the same as what has resulted in 'the constitutionalization' of law enforcement in the fight between federal and member state political forces in the United States during the recent 40 years. In Europe quite often it is through the extension of the jurisdiction of the European Court of Justice based on the broadening interpretation of the Union's Treaty that member state legislatures are more strongly subject to the Union. Currently, however, on the level of the Union there is no fundamental rights charter (the European Court of Human Rights applies the European Human Rights Treaty regarding both the Union and each member state of the European Commission) and therefore 'the

pushing forward' of the formation of will in Brussels has not been able to proceed by applying fundamental rights in a wider sense. Thus, although the status of the relation between the European Union and its members states is similar in every respect to the situation in the U.S. at the end of the 19th and the beginning of the 20th century, and there this situation led to the (federal) constitutionalization of law enforcement, this cannot generate similar phenomena among the member states of the European Union. But if a fundamental rights charter with proper legal force were after all established in the European Union, and attempts are being made to attain this goal by some political groups, then the creation of the United States of Europe would be supposedly accelerated through that channel as well.

With regard to public law litigation reference should be made also to the phenomenon of *strategic litigation*. This phenomenon evolves due to the existence of precedent law in the countries where precedent law plays a larger than usual role, and because of that in the United States public law litigation assumes the nature of strategic litigation. The point is that strong interest groups are interested not only in winning a particular case, they litigate not primarily to win a particular action but for the sake of enforcing a decision in a leading case in favour of them. One of the consequences of this is that if prospects in the particular lawsuit are unfavourable, then interest groups attempt in any way to come to an agreement with the opposing party, possibly by accepting worse conditions than the ones that they could after all obtain in the action, just to avoid that a sentence is made, so that no legal 'trace' of the given case should remain. On the contrary, if conditions for winning are good, then under no circumstances are they willing to come to an agreement because the prime aim is to attain precedent in the given case (see Tushnet/Schneider/Kovner 1988:975).

(Class action) This form has evolved primarily in mass claims for damages when due to a large company's responsibility for particular products or because of an environment polluting event crowds of several thousand or ten thousand people become affected. In this event those affected, forming a litigation group, enter the action as a quasi interest group so that the judge attain the payment of damages by fighting. But the spreading of 'class action' has transferred this form of litigation to numerous other fields, and measures of public administration agencies, school authorities, etc. are often attacked in this form. And through this spreading, class action often gets fused with public law litigation (see Elhauge 1991:72-77). In this event, a single judicial decision decides the case of ten thousands of people; what is more there are tendencies that on condition that anyone shall prove that he or she shall 'rank among the class', that is, shall be in a situation identical with the situation the parties involved in the action were in, a judicial certification may be issued to such person regarding the judgment of his or her claim without the need of such person formally taking part in the action because it is apparent that the judge – as any lawmaker – decides the case of huge social masses, and not the case of a particular individual.

3. Attempts made at constitutionalizing law enforcement in Hungary

Right from the outset it should be noted that in Hungarian judicial law enforcement no major shifts have taken place in the direction of constitutionalization; nevertheless, recently there have been attempts that indicate the appearance of concepts with an impact in this direction. In the

description of the state of affairs in Hungary the analysis of these attempts is again worth splitting into two parts, and after exploring the substantive law dimension of constitutionalization the realm of procedural law needs to be looked at separately.

3.1 The substantive law aspect of constitutionalization.

The first point that should be made in the analysis of the state of affairs in Hungary is that the Constitutional Court created in 1989 by the change of regime was vested with an enormous power to review legislation, and the tribunal itself further augmented this power, but did not push forward to review judicial proceedings and decisions. (In adherence to the model evolved in Western Europe, in Hungary the Constitutional Court is operated as a separately organised body and it is not the Supreme Judicial Court that undertakes this task.) Nor did the provisions of the Constitution allow this pushing forward, but – because in another respect it did not cause any problem for the judges of the Constitutional Court when extending their competence – it was much more important that feeling the tension generated by their expansive action against the legislature the judges of the Constitutional Court decided themselves in 1991, in the initial period of their operation, that they did not intend to compete with the law interpretation activity of the Supreme Court covering the entire judicial system (see the Constitutional Court Resolution of 57/1991).

A new attempt to create the path for the Constitutional Court's judicial review of the resolutions made by the Supreme Court on the unity of law seems to have changed this position. (The resolutions on the unity of law made by the supreme judicial forum are binding pursuant to the Constitution on lower courts when later they deal with cases similar to these.) The problem here is that this would make the direct effect of constitutional rights and freedoms and fundamental principles on judicial law interpretation formally recognised. So far the judges of the Constitutional Court have been able to intervene only in the drafting of laws pertaining to judges, and thus constitutional rights and freedoms and fundamental principles have exerted their formative effect only in this domain. By this step a fundamental breakthrough would take place, and abstract rights and freedoms would be directly asserted in the realm of judicial proceedings and decisions as well.

There is further cause for concern that should the path for constitutional court's direct judicial review of the resolutions on the unity of law be opened, then the halt prior to the decision made by the other, supreme judicial forum, also constituting judicial precedent law, will become simply unjustified. The path once opened for the constitutional law review of judicial law interpretation would be constrained to run through the entire high court case-law material. And if that happens, then for lawyers it will become a primary task to search for help in the field of constitutional rights and freedoms and fundamental principles in addition to the provisions of law unfavourable for their clients. These are abstract and flexible enough to make any case that seems to be losing defensible. And courts, either at lower or medium level, shall not reject to transfer the action to the domain of the Constitution as it is done today with reference made to the Constitutional Court Resolution 57/1991. (See the judicial decision 223. in 1998, for example.)

In summary, if the resolution on the unity of law were made subject to constitutional court's

judicial review, then within a short time we would get through the necessary steps to the constitutionalization of law enforcement in the realm of substantive law, even if this would not be supported by the majority of constitutional court judges at all. And whether it would stay on “medium” level, as it was the case with the horizontal effect of fundamental rights in Germany described above, or would be transferred to the level of direct constitutional law litigation as happened in the federal jurisdiction in the U.S., cannot be predicted. This latter case has once occurred in Hungarian administration of justice when a local judicial court striking down the relevant provisions of legal rules decided an abortion case on the grounds of the Constitution. It was approvingly welcome by minor jurist circles but overall public opinion formed among lawyers and the judiciary reacted negatively to this case.

It should be noted that in Central-Eastern Europe it is Poland where attempts have been made to constitutionalize law enforcement, and until 1997 the constitutional court there had the power of obligatory law interpretation vis-à-vis judicial courts. Law interpretation pursuant to abstract rights and freedoms always draws ideological/political aspects more intensively, and finally this led to open clash between the supreme judicial forum and the constitutional court judges. As a result of the clash the new Polish Constitution in 1997 voided the obligatory law interpretation power of constitutional court judges and their option to intervene in law enforcement. (See Poplawska 1998:132-133).

3.2 The procedural law aspect of constitutionalization.

As it has been described in the analysis of the constitutionalization of American judicial proceedings, in this domain legal actions are made subject to public law and constitutionalized by overall social groups who join the action alongside private persons directly interested in and affected by the action. *This shifts the emphasis from winning a particular action in the short run to indirect, long-term effects.* That brings along both permanent legal effects (e.g., obtaining a high court precedent which may create legal basis for later claims for a wide range of people affected by the given issue) and the involvement of a broader, political public opinion in the procedure of the action.

Looking at the activity of jurists, judges and lawmakers in Hungary, it can be immediately ascertained in summary that, contrary to the extensive presence of public law litigation and class actions intertwined with political implications in the U.S., these are not frequent in our country. The aforesaid abortion case, which has been the only example, even in terms of substantive law, of any attempt made at constitutionalization, appeared in the media and was considered by political public opinion as a place for clashing with advocates of contrary social views; and it involved the anti-abortion association and the data protection ombudsman, who referred to the protection of a constitutional right, as well as the law politicians of the small group of activist lawyers who were fighting for an overall constitutionalization of the judicial proceedings. Furthermore, in some of the criminal procedures with ethnic implications it can be observed that the representatives of human rights activist organisations with noticeable media support, the Roma Parliament, the National Ethnic Minorities Legal Aid Office, e.g., take firm action to defend perpetrators of Gypsy origin, and approach the problems of the criminal procedure in the light of constitutional law instead of the criminal law and the rules of criminal code. This phenomenon, however, has not yet evolved in wider areas in domestic jurisdiction.

Dissolving this summary statement and separating relevant legal frameworks, it can be said about the institutional and practical background concerned in the issue that *on the level of legal frameworks nothing would thwart the shifting of judicial proceedings towards public law.*

In civil actions in Hungary, pursuant to the European prime rule, public prosecutors also have an extensive right to enter an action and intervene in an action, although this right has been narrowed by the statutory modifications made after the changes in 1989; also, the Constitutional Court Resolution 1/1994 deemed that a part of public prosecutors' power to enter an action was anti-constitutional. But even today public prosecutors apply to take legal proceedings quite freely when the obligee is unable to defend its rights (see clause (1) §.9 of the Civil Procedure (CP)). Also, numerous special rules of law empower public prosecutors to bring a lawsuit or take firm action in civil lawsuits already initiated (see pp. 36-47 of the explanation of CP). In addition to public prosecutors, social organisations are also authorised by law in certain areas to bring an action or intervene in a lawsuit. Thus, Clause (2), §.109 of Act LIII of 1995 shall empower citizens' environment protection organisations to take an action in general provided that they shall notice any activity that endanger the environment anywhere. Likewise, consumer protection social organisations shall be authorised under §.39 Act CLV of 1997 to do so in the event of any infringement of customers' rights (see pp. 40-41 of the explanation of the CP).

Also, wide legal frameworks for civil actions to attain the function of public law/political actions are created under §.54-57 of the CP, which regulate intervention in a lawsuit. It can be said that they allow intervention into an action on a much wider scale than the above outlined American solutions because there interested parties may intervene on condition that the interest in the action is not properly represented. The Hungarian regulation, on the contrary, does not make the rule subject to this restriction, and "anyone who is legally interested in what the outcome of the action in progress between other persons will be, may, prior to the trial preceding the passing of a judgment by a court of first instance has been adjourned, intervene in order to facilitate the winning of such action by the party with identical interest" (CP Clause (1) §. 54.). And, the points what the legal interest shall be and how directly one shall be concerned is left by the vague phrasing to be determined by the prevailing judicial practice. In the United States in the 1960-70's, e.g., when general political opinion greatly supported the implementation of social changes through law, judges were willing to approve any citizen's compliance with the condition of being legally concerned asserting that as a taxpayer any citizen should be concerned in some way in any legal case with broader impact (see Chayes 1982). In the judicial practice in Hungary the interest by which one is entitled to intervene is interpreted in a restrictive sense; and this regulation has remained problem free primarily because Hungarian civil organisations have not entered in their repertoire the attainment of their goals through lawsuits.

Furthermore, for assigning public law function to civil actions the institution of 'joinder' set forth under Hungarian regulation, provided for under §. 51 of the CP, is also at hand. It is in every respect basically identical with the American institution of class action, and a possible change in the strategy of domestic civil organisations can make it a suitable means of pushing actions into the direction of public law as it happened in the United States in the 1960-70's. Clause (c) of the aforesaid Section, e.g., allows the option of applying the institution of joinder, i.e., joint action, in a broad sense provided that "the claims in the action arise from similar content and legal base".

The joining of criminal actions by wider social groups, possibly associations, is allowed by the

fact that §.57 of the Criminal Code secures participation in the action for “other interested parties”. This innocent power under procedural law will, of course, exert a genuine overall effect when other interested parties who appear in criminal proceedings, or, possibly the association (or the representatives thereof) of a wider circle of the interested parties, base their claims on constitutional rights and freedoms instead of the procedural law and criminal substantive law, and thus change the function of the lawsuit. The same applies, as a matter of course, to joining civil actions. Such actions assume public law function also by their substantive law basis being shifted towards constitutional rights and fundamental principles and constitutional court decisions made on them alongside the procedural aspect of mass action. The joint effect exerted by the two domains will actually transform the traditional judicial proceedings.

Thus, in Hungary legal frameworks are available in the domain of procedural law for the constitutionalization of law enforcement; and, in addition to the confining effect exerted by the European law culture, it has been actually the lack of a strategy in this respect of domestic civil organisations that has fortunately safeguarded domestic law enforcement from being shifted towards constitutionalization. It seems, however, that the intense responsiveness of dominant groups in the sphere of intellectuals and the media to the intellectual influence of American intelligent circles, makes this kind of shift more probable in our country than it has been possible in the Western European countries in the recent decades.

IX. Chapter: Political fighting through litigation

In European legal systems continuous political fighting and the competition between various decision alternatives, which have evolved after the attainment of political democratisation (thus, in the Western parts of the Continent since the second half of the 19th century, and in the Eastern parts, in their recreated form, since the political changes in 1989), are organised in parliament and around it. Political decisions becoming state decisions, thus laws, government decrees, etc., constitute the main path for attained results, agreed compromises of political fighting to become law. The different logic of law and politics will be at this point *transformed by an intermediary law politics sphere*, which nears them to one another through a series of transformations. This way the different logic of the two subsystems, the righteous/unrighteous approach in law, the assessment duality of either taking over the government or going into opposition as the logic of politics, will remain more or less intact, and politics will, after all, be able to transfer the majority priorities of the empirical will of the people into the law, the content of acts.

The intermediary law politics sphere between the distinct subsystems of law and politics rests partly on the side of the legal subsystem: in the form of lawyer associations and other professional organisations, which are no longer forums for elaborating models of legal dogmatic but forums for choosing between them – by paying attention primarily to social consequences and not simply to technical aspects of how to avoid contradictions in terms of legal dogmatics

when choosing between various regulatory models *de lege ferenda*. On the other hand, law politics institutions evolve also on the side of the political system as the divisions of the law politicians of each political party: law work teams of parliamentary party factions, law departments and events of party colleges, e.g., can be referred to in this respect. This dual structure of law politics transforms the regulatory models that arise from within the law in two phases, and turns those supported by the majority in parliament into statutory orders. The organisation of law politics can be identified everywhere where a multiparty system and a parliamentary legislature is in the centre of the political system and the legal order. In Western European countries and after the political changes in 1989 in Central-Eastern European countries this law politics model represents the main path for the connection between law and politics.

It is possible to observe another model for connecting law and politics, which *attempts to transfer political aims to the realm of the law through court proceedings*; this model began to develop in the United States in the 1960's and became a dominant phenomenon for one and a half decade, but since the 1970's it has been forced back. Owing to American intellectual/political impacts, however, this model has appeared, since then, to a certain extent, in some Western European countries, in spite of the fact of having been forced back in its mother country; and, especially in the new Central European democracies certain jurists show responsiveness to it.

1. The evolution of political fighting through litigation

Wherever political democracy and alternative political efforts and interests may be openly asserted, on the sites of law determination opposing political forces will most probably appear as well. Thus, wherever within the legal system high court precedents play a major part in the determination of law, each political group will, understandably, push forward to influence them, because such precedents will determine the possibilities of taking action for thousands of concerned parties later on as law. How such pushing forward towards judicial decision takes place is determined by plenty of structural circumstances. To understand them it is worth comparing the two countries applying common law, the UK and the U.S. where judicial precedent law traditionally plays an important part, because in these two countries, in spite of having a common starting point, political fighting through judicial litigation has developed in strikingly different ways.

In the United Kingdom lawyers and especially barristers, authoritative in determining law, and the judiciary evolving from them have remained internally homogeneous in terms of politics, from first to last, essentially by being rested on the interests of the upper classes interested in the maintenance of the status quo. In most of the cases only political parties have been able to attain political changes in the existing institutions and prevailing solutions. It has contributed to this situation that -after the university training of lawyers the mechanisms of the professional career of barristers/judges select those promoted on the grounds of their commitment to the existing institutions. Barristers shall enter the circle of the Queen's Counsellors subject to the proposal of the Lord Chancellor, and the appointed shall enter high courts from there, but always from the row of judges one grade lower, thus the judges who accede to the position of Law Lords go through several screenings during a period of long years. This course of the professional career prevents lawyers with activist lawyer's attitude from playing a part of any importance in the determination of the English Law. On the contrary, from 1900 in the United States the focal point

of tertiary level lawyer's training was more and more shifted to universities, and by the 1960-70's owing to the opening of the universities to the widest layers of society lawyers were recruited from the entire scale of society. Since then American jurists have consisted of black activists who studied Marxism and Leninism, just as well as bellicose feminists, activist lawyers of homosexual/lesbian groups, etc., and combative conservative activist lawyers organised as a reaction against them. And this internal distribution of political camps have taken roots in university departments with staffs of department professors working pursuant to different concepts of law; and, in like manner, renowned feminist activists, black civil rights activists and combative conservative judges opposing them have been appointed to the judiciary, subject to whether the conservative Republicans or the liberal Democrats have given the President of the United States and the legal administration.

These two opposing forms of professional organisation of lawyers have given different chances for political fighting through litigation to evolve; and, while in the UK this has blocked its way, and therefore political forces attempt to attain the changes important for them through parliamentary laws instead; in the United States the internal groups of lawyers having become politically heterogeneous and their spreading to most of jurist professor's and judicial positions have provided proper precondition for its evolution.

The lawyers split into political camps would, however, not have been able to establish the institution of political fighting through litigation themselves. And indeed another development, "the rights revolution", commenced after Earl Warren's accession to the Chief Justiceship of the Supreme Court in the U.S. in 1953 contributed to its establishment as well. There are records from earlier of chief justices deciding cases pursuant to constitutional rights and freedoms instead of the provisions of laws, but after the appointment of Justice Warren, step by step, a majority evolved who deemed it possible to reshape the society of the United States through litigation for social changes based on fundamental rights. Numerous political efforts had been unsuccessful in getting through the legislation of either Congress or member states because they were supported only by minor groups of society, and the majority of society opposed them. It was in this situation when Warren became Chief Justice, and once Felix Frankfurter who opposed activist jurisdiction had left the forum of justices in 1962, "the rights revolution", the trend of social changes through litigation based on constitutional rights and freedoms, could begin to develop unimpeded.

It was of course also of prime importance that in the 1960's the Democrats gave the Presidents of the United States, first J.F. Kennedy, later assassinated, then Lyndon Johnson, who in their practice of appointing federal court judges promoted with the greatest enthusiasm law professors, activist jurists considered to be the advocates of the rights revolution. Federal court judges so appointed were more and more ready to approve litigation based on fundamental rights pursuant to the supporting precedents of the Supreme Court, and thus struck down laws passed by Congress and member state courts. Lawyers, citizens, following suit, became more and more "rights conscious", and under the stimulus of support by federal courts based their lawsuits more and more on fundamental rights, avoiding legal actions based on simple provisions of laws.

This development was overwhelmingly supported by the majority of competent dailies and the media, and all this gradually built up a favourable atmosphere for rights service throughout the universities and in intelligent circles. (A typically recurring favourite scene of the films made in the 1960's and 70's showed a simple black workingwoman (a cleaning lady or a secretary, etc.)

engaged in a lawsuit, who looking up at the figure over the entrance of the court and reading the words of the Constitution suddenly realised that she had rights and expressing it with simple words in the courtroom put verbose lawyers to shame.) Based on favourable media support and climate of opinion, in the beginning black civil rights movements, then, in the 1970's, feminist movements, and finally, in the 1980's, homosexual/lesbian movements built up their institutions. These three rights movements, which, mostly in association, have been able to dominate numerous American universities and cultural institutions since the 1980's, have set an example for various efforts how to engage in political fighting through litigation. The movements of immigrants, environmentalists, the homeless, protectors of animals, etc. have all attempted to attain their political aims by applying the litigation strategy thus worked out.

Alongside the formulating of political will based on legislature, parties and parliamentary lobbies, all this generated a "secondary political system" in the United States from the 1960's, which based on constitutional rights and freedoms led through judicial litigation. This tendency of development, however, began to break more and more since the middle of the 1970's, and during the term of the Republican presidents (Reagan, Bush) in the 1980's was very much forced back, but political fighting through litigation continues to maintain considerable positions.

2. The legal frameworks of political fighting through litigation

Lawyers split up into camps within the profession can use judicial action for political fighting only in the event that some rules of substantive law and the code of procedure are redrafted, or reinterpreted, so that instead of/alongside an individual party engaged in a legal action overall social groups may appear in the action and litigate in line with abstract and thus politically easily flexible fundamental rights, instead of simple provisions of laws. Now that the aspect of fundamental rights has been discussed, let us examine the rules of procedural law, which help this process.

One of them is the broadening of the legal term "standing", the right to initiate an action or intervene in an action, which gives power both to the party who is directly and personally involved in the case and parties who are just loosely concerned. This broadening was made in the beginning of the 1960's in the United States, and, as it has been referred to above, there were judges who were willing to approve any litigant party's compliance with the condition of being legally concerned by asserting that as a taxpayer any citizen should be concerned in some way in any legal case with broader impact. A further process to widen proceedings was the broadening of the term 'class action', as a result of which several thousands of people and the lawyers of their associations could participate in the action: in a damage suit initiated because of the damaging effect of a product of a manufacturing company; for example, or, in a class action against an authority's order. Another form of this was 'public interest litigation', or in other words "public law litigation", which evolved also in the 1960's, the main point of which was that when an overall legal issue or fact was in focus in an action, then anyone who were somehow concerned in the issue could join the action. Social movement lawyers specialised in political fighting through litigation made sure that the lawsuit focused not on simple provisions of law and the restricted legal deliberation thereof, but overall rights issues.

Finally, it was an important legal support in the development of political fighting through

litigation that from the 1960's, under pressure of presidential administrations supporting it federal laws were passed which allowed the assumption of legal costs by the state if in a rights action the plaintiff had won the action; and in such proceedings the postponement of the payment of legal costs until the end of the proceedings was permitted.

All these formed the basis, even on the level of procedural law, of the unhindered growth of political fighting through litigation in the United States.

3. The organisation of political fighting through litigation

The organisation basis of political fighting through litigation is constituted by non-profit, "public interest" lawyer's offices, jurist departments of human rights institutions and various movements, associations. The existence of such organisations en masse in a country is a precondition required for this kind of litigation to develop to a noticeable level simultaneously with traditional litigation. For lack of these, it is vain that the high court judiciary becomes responsive to political fighting through litigation, it is vain that through their decisions they attempt to urge certain segments of society to attain remarkable changes; mass actions will fail, and without sustained effect the entire political fighting through litigation will come to a sudden stop. The supreme judicial forum in India, e.g., following the American pattern, commenced a practice of activist judgement to shape society at the end of the 1970's, but due to aforesaid causes it died out without any effect after a while (see Epp 1998:110).

It was not like that in the United States. There the organisation of political fighting through litigation began as early as the beginning of 1900, although at that time the judiciary firmly resisted the appeal of fundamental rights and their adherence to the law was characterised by a rigid, conservative attachment to the words and phrases of legal rules. When quite rarely they acted firmly against certain laws in line with fundamental rights, even then they did that in the interest of the forces that protected the existing conditions and relations between forces; as in the *Lochner* case, e.g., which became the symbol of conservative activism for decades. In spite of all these, ACLU (American Civil Liberties Union) the first great fundamental rights organisation was founded in the United States as early as the beginning of the 1920's followed by NAACP (National Association for the Advancement of Colored People) that fought for equality of rights for black people and numerous other fundamental rights organisations. Right from the outset the most important one of these had always been ACLU, which had been funded since its setting up by American financial circles interested in changes, and in the beginning this organisation was the leaven in setting up several similar organisations, both by contributing to their organisation and funding them (see Epp 1998:27-49).

Without these organisations it would have been impossible to launch the rights revolution since legal costs that cover long, multiphase litigation were far more than the financial means of individual litigants. Only the financial support given by ACLU and the other fundamental rights organisation established with its help could guarantee that simple litigation was to be extended to litigation based on constitutional rights and freedoms. Indispensable was the presence of fundamental rights organisations in actions also because with traditional jurist's expertise and methods there would have been no chance for fundamental rights argumentation marshalling facts of moral philosophy, sociology and other branches of science. Only lawyers of organisations specialised in these fields were able to elaborate that.

After these beginnings, by the end of the 1930's, when by breaking the position of the conservative justices who opposed the New Deal the majority of the supreme judicial forum was turned gradually towards supporting the 'progressive' change, the spirit of 'Let's turn society from fundamental rights to progressive direction!' slowly began to spread at the peak of federal judiciary vis-à-vis the conservative majority in the legislature. This had been almost completed by 1947 but finally it was Earl Warren's appointment in 1953 that accomplished the revolution. The readiness of the majority of the justices of the Supreme Court, who turned against the legislature, to apply fundamental rights on an activist basis gave a further push to the development of cause lawyering organisations, and by the 1980's masses of them had been set up (Menkel-Meadow 1998:31-68). Alongside rights legal aid associations either incorporated into movements or built up as ancillary organisations of these, from that time began to take shape *the system of non-profit public interest lawyer's offices*, which were formally independent lawyer's offices just as any normal lawyer's office but the staff committed to specific causes were – and continue to be – actually regarded as activist lawyers, rather than neutral lawyers who worked purely for retaining fee. (The latter were called derogatorily 'hired gun' by activist lawyers contrasted with their unselfish, committed legal work.) But because on the grounds of legal regulations made from the 1960's the funding of constitutional rights litigation from public sources commenced and huge masses of such actions were initiated, alongside the initial committed lawyers entered neutral lawyers working primarily for money; thus, 'lawyer technicians', who worked essentially for retaining fee but continued to maintain a neutral relationship with the case and the client, were now distinguished from genuine activist lawyers (see MacCann/Silverstein 1998:261-292). Since the 1970's in the several hundreds of lawyer's offices of this kind five-six thousand social movement lawyers have worked, including neutral lawyer technicians, and this number has not decreased ever since; although since the 1980's because of the federal judiciary having been shifted towards textual approach to rules of law the chances of this activity winning lawsuits have considerably diminished (Scheingold 1998:118-150).

Litigation based on social movement lawyers (or, as they call themselves 'cause lawyers') show some fundamental differences beside traditional, normal leading of actions by lawyers, and these features well indicate that political viewpoints directly enter the realm of procedure through the various legal aspects kept separately in traditional lawsuits. Five major differentiating features can be discerned in the legal actions of social movement lawyers compared to traditional lawsuits (see a summary on this in Trubek/Kransberger 1998:202-205).

1. *'Humanising the action'*, which means the attempt to confront argumentation confined to traditional legal aspects and the constraint to mould the case into legal categories; and the statement of the facts of the case with as exhaustive sociological data as possible. This kind of action has a great advantage in the American type litigation which is based on an extensive involvement of lay jurors with jurors present, in addition to criminal cases, both in civil actions and lawsuits that fall under other branches of law; and where the advocates of rights activism permanently require that the function of the jurors be augmented. Instead of reduction to legal aspects a wide-ranging statement of facts with emotional, moral, political overtones, addressed as much to the jury as the professional judge – this is what makes an action 'humane'.
2. *'Politicising actions'*, which means that instead of legal arguments and concepts that are

traditional and politically mostly neutral (or, as phrased by social movement lawyers: that apply more concealed political considerations) overtly feminist, antiracist movement, etc. legal arguments are used subject to which particular sector of social movements the political fighting through litigation concerned falls under. It should be noted here that the university sections of American social movement lawyers, who have been able to establish themselves since the 1970's and 80's at law schools of universities, have consciously attempted to work out modifications of concepts and out of them systems of concepts under various branches of law which represent overtly feminist, racial (protective towards black or coloured people) or homosexual/lesbian legal constructions. And social movement lawyers use these in actions, preferably avoiding traditional law dogmatics concepts. Because these are, they believe, antifeminist, racist and heterosexually biased.

3. *'Making actions collective'*, which means that alongside the individual litigant as many number of other parties in similar situation are to be involved as possible. As it has been indicated, since the 1960's this has been made possible by joining public interest actions, class actions and by filling the federal judiciary in these years with judges who are responsive in this respect.
4. *'Making actions media events'*, which means that in the procedure of the action alongside the aim of winning the suit appears the aim of presenting the case (and the 'cause of movement') in the mass media. What is more, the broadest possible presence in the media through litigation constitutes an impact which outdoes the benefit of winning of the action, because the 'cause' becomes known to the general public, multitudes of sympathizers might be won, and the initiation of similar lawsuits in other parts of the country pursuant to the pattern presented in the media might be urged. Therefore, social movement lawyers often acquiesce in losing the action when the circumstances of the lawsuit make huge presence in the media probable. This may, however, be in conflict with the aim of attaining an important precedent, which is one of the essential goals of social movement lawyers in rights actions (strategic litigation), and this urges them to refrain from litigation doomed to be lost. And, indeed, materials on 'cause lawyering' notice that quite often raging battles are fought between non-lawyer activists who prefer presence in the media at any cost and activist lawyers of movements who keep strategic legal aims much more in view (MacCann/Silverstein 1998:263-274).
5. *'Emotionalising the action'*, which means that the litigant, often multitudes of parties, and the lawyer share emotional grounds. Social movement lawyers, cause lawyers are not simply 'hired guns' in the hand of the litigant who are ready to put into action their brilliant legal technique on behalf of any client for a proper fee, but 'associates sharing ideas and principles' who live for the 'cause' very much like their clients represented by them. This, however, often gives rise to the conflict that the client, with a view to concentrating on *his or her own particular interests*, might be inclined to come to an agreement and in general attempts to focus on his or her own specific case, while committed 'cause lawyers' fight for the *overall cause*. This tension can be eased by involving in the action as many clients as possible, because that way the all-embracing nature becomes manifest and the social movement lawyer concentrating on such all-embracing cause can act rather free from the requirements of the individual litigant.

All these features can develop in a powerful form if the costs of constitutional rights lawsuit are undertaken by the state, and in this event social movement lawyers will search for the client indispensable for the action purely as a justification; they may even pay, under some pretext, the

person formally involved as plaintiff so that they could initiate the lawsuit based on the client. In this event, because the client is not to bear any costs, social movement lawyers can freely shape the action in line with the above-described features. That is why it means the greatest danger for political fighting through litigation when public funding of constitutional rights litigation is curtailed either by federal or member state legislature; and this has occurred several times in the United States in recent decades; to say nothing of the endless number of bills lying submitted to federal and member state legislatures.

After the descriptive presentation let us now briefly look at the track along which law and politics are connected in terms of assessment. While the law politics sphere organised around the parliament is based on keeping the logic of the two subsystems sound, and brings over regulatory propositions from the legal dogmatic sphere through double transformation without damaging the closed construction of law, political fighting through litigation takes political fighting and its viewpoints directly into the courtroom. Furthermore, as a precondition of that it politicises law departments of universities, and creates there overtly political law theories, legal constructions that overtly assume political viewpoints. *Political fighting through litigation thus evades legislature and using abstract constitutional rights and freedoms as weapons turns straight towards the courtroom, and with social movement lawyers, university activist law professors or courtroom cause lawyers, realises its goal directly inside law, preferably with huge presence in the media, broadcast live to public opinion.*

4. The appearance of political fighting through litigation in Hungary

The legal culture and the organisation of lawyers in Europe do not favour the evolution of political fighting through litigation in Hungary as it has not been the case in other European countries either. In Hungary the organisation of politics takes place rather steadily around the parliamentary field, and the departments of university law faculties are mostly attached to the politically neutral set of traditional law dogmatics constructions. Here the deep-seated attitude of lawyer's ethic represents adherence to dry/elegant argumentation in courtrooms, and the obligation to exclude direct political overtones. Therefore, political fighting through litigation has not been able to get a foothold even in the countries where constitutional jurisdiction has evolved. (In the beginning, from the end of the 1940's, this referred to Germany, Italy and Austria; then from the end of the 1970's Greece, Portugal and Spain followed suit; and after the political changes in 1989 most of the Central-Eastern European countries have also introduced this institution.) Germany has gone the farthest towards it by acknowledging the effect of fundamental rights in the interpretation of laws, but this legal possibility has not developed into political fighting through litigation, to the contrary, the inclusion of fundamental rights into the interpretation of the provisions of law made them 'embedded in legalese'. That is, it has been more typical that fundamental rights have been supplied with dogmatics and thus 'tamed' than fundamental rights have politicised judicial courtrooms.

After these antecedents it seems surprising that in spite of the fact that the existence of constitutional rights and constitutional jurisdiction in Hungary, as an institution created after the political changes in 1989, goes back only for ten years, but minor lawyer's circles have already set out to exploit the possibilities of political fighting through litigation. Looking at the sources of financing and intellectual motivations, these developments arise directly from the social groups

interested in American political fighting through litigation, and they are actually the transplantation of institutions and solutions tested for decades into Hungary. Their basis is represented by the Central European University, the Fudamentum Human Rights and Documentation Centre and some social movement lawyers of various legal aid organisations and movements of various ethnical groups basically built up on the financial basis of the American Soros Foundation. Let us look at what chances they have for introducing the practice of American political fighting through litigation in our country.

What increase their chances are factors primarily outside law. Very strong support from the media creates the advantage which this little group enjoys, and the extremely centralised operation of the media in the capital city shaping public opinion of the entire country as well as personal ties between executives of the press, the radio and television makes this advantage very serious. Political fighting through litigation rests on the media, as it has been the case in the United States described above where ‘the rights revolution’ has been slowly attained also through the media since the 1920’s.

Factors inside the law, however, do not favour this law politics strategy. The internal courses of judicial career separated from politics in 1997, and the appointment of judges and their promotion in the hierarchy of the profession is not possible unless in adherence to the patterns accepted by the entirety of the judiciary. This course of the career gives not much chance for activist lawyers breaking away from the European legal culture with a tradition of several hundred years – we can state our hypothesis; and, at this point, reference can be made to the effects arising from the patterns of the English judicial career which also hinder the spreading of activist lawyers for the same reasons.

A further obstacle in the way of the spreading of social movement lawyers is the fact that current Hungarian activist lawyers are almost exclusively university jurists, or legal experts at some organisation, but they may not act as lawyers. The few lawyers who quite frequently use human rights motives in their argumentation, either for defence against the abuses in the phase of police investigation in criminal cases, or when threatening to apply to Strasbourg after having lost a case at home, are broadening the range of traditional tricks of lawyering rather than actually acting as social movement lawyers.

Among university jurists, however, a climate of sympathizing with social movement lawyering is more intensely present but it is probably based on the fact that they are not fully aware of the effect exerted by social movement lawyering and political fighting through litigation on the material of specific branches of law – and specific law departments! The positive attitude means much rather that “After all, constitutional rights represent a highly noble aim!” And, this, looking at it in itself, is true.

As a conclusion, it should be noted that in the United States the euphoria of the 1960’s and 70’s, once the effect of political fighting through litigation endangering the legal system had been experienced, was followed by a vehement reversal, and by now political fighting through litigation has become just a shadow of what it used to be. Information regarding this was totally lacking when after 1989 in Hungary we began to introduce constitutional jurisdiction as a counterpole of dictatorship, and public opinion often regarded the taking of constitutional rights further to the courtroom of normal forums of justice as the augmentation of democracy. This

article can be nothing else but a brief introduction to throwing off one-sidedness.

X. Chapter: Legal Education as Part of the Legal System

When grasping law in its totality, in addition to legal norms, the system of the concepts used by norms must be made part of the concept of law. Norms express obligatory or prohibited behaviour patterns only in the event that the concepts in them have a sense in a defined direction. And in highly developed countries these legal concepts are interwoven into an increasingly complicated system of connections, and stand as legal dogmatics for each branch of the law behind the rules of law and codices of statutes as a thick web. The legal theories that exclude the legal dogmatics intellectual aspect from law, and include only legal norms in the concept of law narrow down the actually operating law. We can also say that this way they raise the viewpoint of outsider laymen to the level of legal theory, because on the surface of law only the creation, application and enforcement of legal norms appear. But when one can look at law from inside, and is aware of the occurring decision dilemmas in the light of thousands of cases, will know that without the thick web of law dogmatics concepts, and for lack of their obligatory sense, each judicial decision would be arbitrary, in spite of thousands, ten thousands of detailed legal norms.

By thus extending the concept of law, beside law as a system of norms *law as an intellectual system* comes in sight with greater emphasis, and the spheres of legal activities are supplemented with, in addition to the spheres of creating, applying and enforcing norms, *spheres to ensure the creation and maintenance of the intellectual system of law*. Regarding this role we have referred several times to *the sphere of the jurisprudence-law dogmatics activity*; now *the sphere of legal education should be looked at closely*.

1. Basic functions of legal education

As a starting point it must be established that the results of the activities of exploring and further developing the legal dogmatics connections must be permanently transferred into the activity of all the lawyers because they are performed by only a segment of lawyers (university jurists and a few members of high courts), but in creating and applying new norms attention must always be focused on legal dogmatics connections. This transfer is ensured by periodicals on jurisprudence, by involving law professors in the elaboration of concepts in the course of legislation, especially codex like major changes; and there are numerous other ways of such transfer. *Alongside continuous conveyance of information, the handing over of the complete legal dogmatics to the entire legal profession can be implemented only in the course of legal education, the training of*

jurists. Highlighting the intellectual system of law and considering it the basis of law thus makes the process of legal education the central element of law. In another approach it can be added that legal education preparing for legal work can be placed outside the legal system when looking at it statically, but considering the operation of the legal system in its dynamism the necessity of inclusion becomes apparent. Today's shaping of legal students determines the sphere of tomorrow's judges, prosecutors, lawyers.

Beside this function, there is another basic function legal education must fulfil to support the intellectual system of law. As legal education must create the way of thinking in the prospective lawyer which develops evaluation in the dimension of lawful/unlawful a routine in approaching the events of the world, and simultaneously eliminates evaluation pursuant to political fights as well as evaluation pursuant to ideological differences and possible other evaluation of events from any other aspect. The stable operation of the legal system always contains this dual output of legal education: handing over the law dogmatics system of the main branches of law in an outlined form and the attained skill to view the events of the world in the dimension of lawful/unlawful, and pushing political, ideological, etc. values alien to this in the background.

The functions of legal education beyond that are contingent, from country to country different functions may come beside these. For example, while the higher education system in European countries has developed into a single grade scheme, and covers both preparation for profession and general intellectual training, in the United States by separating undergraduate (general) and graduate training (preparation for profession) legal education, medical education, etc. contain only professional training. Now let us disregard this contingency and concentrate solely on professional training in the analysis pertaining to the basic functions of legal education.

Furthermore, regarding the legal subsystem of society, the question arises how is it possible to include university legal education in this subsystem with such strength because basically the university sphere constitutes an institutional part of the subsystem of science beside research institutes? To answer this question we can start from the dual nature of jurisprudence. In the activity of jurisprudence, contrary to most branches of science, in addition to the examination in the dimension of true/false, the evaluation of another subsystem, the evaluation in the dimension of lawful/unlawful is dealt with too. Thus beside establishing, grouping, classifying facts, which dominate primarily in the sociological, historical researches of law, a logically unified system must be aimed at that can ensure a contradiction free domain behind thousands and ten thousands of legal rules. This activity mixes the abstract and logical dimensions of scientific thought with the normative view of facts and conflicts arising from the practical sphere of law, and thus creates the intellectual system of overall legal dogmatics for each branch of law. If science is considered an approach in the dimension of true/false, then the approach to jurisprudence in this dimension of true/false might raise qualifying problems. For example, at the end of the 1940's the German Franz Jerusalem, or at the beginning of the 1980's the Hungarian András Sajó raised the point of the "dubious" status of jurisprudence (Jerusalem 1948, Sajó 1983).

So these are the peculiar features that explain that legal dogmatics and legal education are more forcefully interwoven into the system of law. Whilst in the event of numerous other social subsystems university professional training remains in the university-scientific subsystem to a greater extent, and it is usual for the representatives of the profession to join the given subsystem only after the postgraduate training, once they have spread in the subsystems.

2. The dilemmas of legal education

(Either legal dogmatics theoretical training or practical legal training) Legal education in European countries in the past centuries developed pursuant to the model of legal dogmatics training, more specifically, especially in the areas under the influence of German law – and in the United States from the beginning of the 20th century – it developed in the direction of this model, even if beside legal dogmatics training the role of practical legal training remained strong (see Edwards 1992, Ostertag 1993). This model, however, was and is constantly criticised, and the attempt to achieve a minor or major reform of legal education is constantly on the agenda of jurists both in Western European countries and the United States.

One of the critical remarks that always emerges regarding legal education is that its subjects, educational methods are overtly aimed at handing over abstract legal connections, and it does not do its best to produce a freshly graduated, available, complete practical lawyer as its output. This critical remark can be called permanent not only in the countries with more abstract legal education but also in the more practical American training. In a witty remark theoretical legal education is compared to the school of driving which attempts to teach how to drive by teaching a detailed manual of the car and then letting trainees to drive in traffic (Ostertag 1993). In spite of the witticism in this comment, it rests on a deeply rooted misunderstanding, and that is why the role of legal dogmatics in the legal system and the role of legal education in this field must be clarified.

The university training of legal students is the only place in the system of the operation of law where the categories of developed dogmatics for each branch of law and the connections among them can be handed over in their complete form to the prospective lawyers; and compared to that it is a secondary question to what depth the drilling of practical legal skills must be integrated into university training; or, whether these, in a contrary manner, should be left for the practical training after the university, which is to be implemented by the organisations of lawyers, prosecutors and judges.

One of the basic dilemmas of legal education concerns the point whether legal dogmatics in each branch of law should be handed over in the first place, with the legal rules currently in force and judicial case law being taught merely with a view to attain deeper understanding of legal dogmatics categories by means of application; or, contrary to that, the aim of education should be to produce as extensively as possible a “complete” lawyer immediately available for allocating practical work to him or her? Only in an aside reference should be made to the kind of legal education representing a dead end road in which neither any legal dogmatics system, nor practical legal skills are handed over, and which makes legal students mug up statutory provisions just in force, and even during the final examinations prior to graduation they need to be questioned about new rules due to the changes in the rules of law having occurred in a short time. Apart from this dead end road kind of training, the inappropriateness of which is admitted by everybody, regarding the resolving of the basic dilemma confronting views are held in the communities of lawyers in each country. This confrontation mostly focuses on the point that in the circles of

university jurists the importance of education centred around law dogmatics is much more emphasised, while in the circles of practical lawyers criticism attacking the “sterile” and abstract nature of university education is supported.

If we look at the Hungarian legal training closely, confronted with other legal education models, then the criticism can be partly deemed right. During the five year training period organised participation in practical legal work is scarcely arranged. In spite of the continuous criticism regarding this not much has been accomplished in recent years in this field. Let us look at two solutions that attempt to include practical legal skills and knowledge in university legal training with greater emphasis. One of them represents the German two grade legal education where in the first grade legal theory and legal dogmatics bases, legal history knowledge are handed over, and once this has been completed by passing the first state examination, comes the two and a half year long second grade under which the “referendarius” having passed the first state examination obtains fluency primarily in the judicial, and partly in the prosecutor’s and lawyer’s profession. This second, practical training is completed by passing the second state examination, and in possession of this the trained student becomes a fully qualified lawyer (Volljurist). After that one may ask for being registered among lawyers without any further examination or training, but having started a judicial or prosecutorial career, within these organisation frameworks, one needs to go through further, more special professional training (Ostertag 1993). In this model the teaching of practical knowledge and skills are incorporated into the legal training not at the expense of legal dogmatics training but by extending the term of education and *organising practical training outside the university centrally*, as well as by attaching half of that, through the second state examination, to the university.

Another solution to increase the proportion of practical training in legal education is offered by the way of *the American legal clinic training* (see Amsterdam 1984, Floyd 1997, Rekosch 1998, Wilson 1998). University legal training takes three years, following the four year university undergraduate (general) training, and its syllabus contains only legal subjects; furthermore, although it is also aimed at handing over the system of law dogmatics categories similarly to the European model, the role of case law, practical training is more dominant in this function than in the countries on the Continent. Still, the criticism regarding “too abstract” legal education is permanently asserted, and since the 1980’s a reform experiment has been launched to directly involve legal students in practical legal work. The idea goes back to 1933 when the legal realist, Jerome Frank suggested that similarly to the practical training at clinics applied in medical training legal training should be moved in this direction too. The strength of legal realists was yet not enough to put this into practice, but “the rights revolution” launched from the 1960’s breaking up the internal opposition of law faculties of universities and the force of intellectual-media power circles to shape public opinion created a good background to the reform of the legal education. Traditional lawsuits controlled by legal dogmatics in several fields was drastically replaced by politicised constitutional litigation, and the road through judicial litigation became one of the main roads for radically changing society; and the fermentation that began after that made law faculties open to receive legal clinical training. The point of this is that students (first only senior third-year students, later second-year, what is more, first-year students could also join) are made available at clinics to give legal advice for those who belong to poorer layers of society and have lower income, and under the control of a supervising lawyer they may fulfil tasks of preparing proceedings (Amsterdam 1984, Floyd 1998). In another solution when only simulation takes place and students play that they participate in proceedings by allocating various

legal roles among themselves, or giving legal advice.

The aim of legal clinics, however, to put it clearly, goes beyond the students' legal education, furthermore, it is also one of its key goals to help poorer layers of society (black and other coloured people, immigrants) receive legal aid (Rekosch 1998, Floyd 1997). In spite of all the elevated attitude present in this humanitarian goal, it must be noted that through clinical training students inevitably get into the intellectual-political fights going on among social groups, and this character of legal clinics often goes together with developing the position of cause lawyering within the university (see Scheingold 1998:118-151). Nevertheless legal clinics have spread in recent years at American law faculties, and although they have not attained the status of obligatory subjects, a minor or major part of students include one or more of their subjects in their studies. (Approx. ten percent of the necessary credits can be accomplished in such courses.)

For Hungarian legal education it is important to think over the aforesaid two alternatives of practical training because legal clinics supported by American foundations have already appeared in a few Central-Eastern European countries, and one of their bases has been established at the Law Faculty of ELTE. (See the Internet for the description of legal clinics in Central-Europe: <http://www.pili.org/publications/colloquim2000/index.html>).

We can implement full-scope evaluation of this when having in sight that practical training in the Hungarian legal education has not developed as a course attached to the university, as in the aforesaid German model in the second state examination, *but as part of each legal profession's own organised training* (training of lawyers, judges, prosecutors, notary publics) after the university education. Therefore it is somewhat misleading to take what university legal training provides as the full picture. By pointing this out, it can be seen that the complete legal training in our country consists of university training and the training complying with specialised juristic work. If we are dissatisfied with practical training thus developed, completely cut off from university training, then there is the option of opening toward the German model, and by extending the term of training it is possible to integrate practical training much more into university training, and its role could be evaluated by setting state examinations after that. So this would be the path for the shift to the two grade legal education. It should be noted, of course, that even today there are views with strong positions on the agenda of jurists in Germany that the two grade structure should be given up, and, similarly to our system, profound preparation for specialised juristic professions should take place after the university within the domain of each profession (Coing 1973, Weber 1989). Nevertheless, the advantage of the German solution is that it allows a time frame for the basic law dogmatics training, and it is not at the expense of this that it extends practical training.

It is exactly in this respect that there are problems with the American legal clinic training, especially when, in addition to senior students, first- and second-year students are also involved in solving the narrow cases of practical legal affairs. Through that the aforesaid basic functions of university legal training become questionable: the opportunity to hand over law dogmatics for each branch of law as a complete whole decreases, and qualified lawyers cannot make up for it later. And this threatens with the intellectual systematic nature of law falling apart. The aforesaid other function might be also injured, provided that training at legal clinics is much more interwoven with social-political fights through cause lawyers. Instead of the neutral and unemotional processing of the events of reality in the dimension of lawful/unlawful and the skill

attached to it becoming fixed, the attitude to perform revolutionary changes in social conditions might evolve by the end of the legal training. This other distortion can be, of course, decreased if practical training takes place merely with the aforesaid simulation method, and the “social worker” function and cause lawyering are cleaned off this form.

(Training judges or training lawyers) Another dilemma regarding legal education is shown by the disputes that blew up over the German juristic training (see Coing 1973, Weber 1989, Ostertag 1993). This training takes basically the judge’s position as its basis, and this is manifested both in the fact that in practical training constituting the second grade of the two grade juristic training most of the time is addressed to gaining knowledge of judicial work, and that proposals made by groups of lawyers to extend the syllabus of legal education so important for them are regularly rejected by university law faculties. For more expansive lawyer’s activity goes at several points beyond juristical work in the strict sense, and this demands partial involvement in tax advisory, financial, business, etc. activities, which requires knowledge that is almost entirely left out of the syllabus of legal education.

Contrary to the German education centred around the training of judges, *the American training can be called one centred around the training of lawyers*; and the law dogmatics training prevailing here too shows that overall law dogmatics training can be attained even in this version. Nevertheless lawyer’s organisations in the US and the authors accepting their viewpoints often raise objections against most of the subjects keeping the lawyer appearing in high courts in view, and preparing prospective lawyers for high court precedent material and argumentation there. Contrary to that, critics deem that the path to the necessary reform of legal education is handing over the knowledge of a more comprehensive lawyer’s activity, and this would shift subjects from the more comprehensive law dogmatics connections toward knowledge outside law (Floyd 1997).

When examining the solutions in terms of the basic functions focused on above, then the German legal education centred around the judge’s viewpoint can be deemed optimal. By placing the judge’s position remaining more clearly in the internal logic of law in the centre the system of categories of law dogmatics can be more comprehensively handed over. An intermediary solution can be the training centred around the lawyer’s viewpoint in the American legal education as it is actually carried out, which educates lawyers in the light of procedure and precedent material at stages prior to high courts and focusing more clearly on legal issues. Finally the most problematic solution might be the one that attempts to build legal training by placing the lawyer going half beyond law and being involved in the activities of other professions in the centre. And this would indeed fundamentally oppose law dogmatics training representing the summary of the intellectual totality of law, and would shift the legal system toward conditions threatening with law intellectually falling apart.

(Legal dogmatics training or social science training) In numerous legal concepts, beside forcing back legal dogmatics training, great emphasis is given to the necessity of creating more powerful social science training in legal education. This emphasis appeared, in the last century, subsequent to the Marxist legal theories, in the American realist school of law, and today it is fostered especially by the adherents of the economic theory of law. The actual situation is that since the beginning of the 20th century the subjects of economics, sociology, philosophy, political science have been getting one after the other, in a brief introductory form, into legal education. What is

more, on top of all that an introductory kind of subject of numerous branches of science have been included in American undergraduate training. The debate is much more about whether this should be extended with further number of training periods, or how deeply the jurist him or herself should base the knowledge, material of rules and dogmatic solutions for each branch of law on social science knowledge? That is, this approach represents both a more extensive social science training for the students and, in addition to that, a call for the legal dogmatics activity becoming sociological jurisprudence.

When looking at the starting points stimulating each legal concept in this direction, then it can be seen that, for example, Marxist legal concepts at the end of the 1800's considered fully conscious social control attainable, and in their view "scientific" state could handle rules of law as means for implementing planned social changes. The entire legal interpretation of the Hungarian Gyula Pikler, or under his influence that of Bódog Somló, was imbued with that notion (see Pikler 1892, Somló 1901). But the American realist school of law believing in social engineering performed by lawyers, for similar reasons, deemed that society was controllable and changeable the same way, albeit not through legislation but judicial lawmaking, and they attempted to make use of the results of the newly evolved branches of social sciences. Following the realists, today the adherents of the economic theory of law, while being sceptical about the attainability of law dogmatics review of and control over judicial decisions, intend to have judges guided by the findings of social science, and therefore attempt to shift legal education from legal dogmatics toward social science training (see Posner 1990).

Having thought over the complexity of society deeper and admitted the importance of the independent social subsystem character of law, the establishment of principles in system theory bids one to be cautious in the field. Niklas Luhman, who in spite of his legal qualification (and practice) became a profound expert of sociology, philosophy, economics and numerous other branches of social science during the half century of his scholarly activities, always warned against the euphoria of "turning law into social science" (see Luhmann 1974, 1981). The independence of law requires that the findings of social science should not be incorporated into the law unless the law dogmatics unity is kept uninjured. Rested on this theoretical base it can be said that relevant social science knowledge should be made part of lawmaking not by trying to train lawyers to master numerous types of knowledge but by attempting to ensure a more complex way of looking at things through involving the representatives of various branches of social science in the process of lawmaking as experts. The same way in judicial procedures it is not so much the judge that should be retrained to become an economist, sociologist, etc. but this should be solved by involving experts more extensively. The introductory type of economics, sociology, etc. subjects, which now are already taught, are needed to prepare prospective lawyers to be able to evaluate the materials prepared by the involved experts to some extent.

In summary it can be stated that the central task of university legal education is to hand over law dogmatics for each branch of law and develop the attitude of processing reality in the dimension of lawful/unlawful. The social science training becomes important as a supplement to that since handing over practical juristic skills can be only one of the goals of university legal training. By extending the period of training it is conceivable to proceed in these two fields, as it is the usual practice in Germany through the system of the two grade state examinations, but at the expense of law dogmatics training their proportion must not be increased.

3. Legal education and the theory of critical legal studies

The analysis of the state of affairs of the legal education outlined above rests on a few system theory considerations, and these must be indicated explicitly to make our reservations about different legal education views understandable.

One of our starting points in this respect comes from the multi-layered structure of modern legal systems, in which we deem primacy prevails, out of the intellectual layers of law (the layer of the text, the layer of law dogmatics, the layer of judicial cases, the layer of constitutional basic rights), in the layer of law dogmatics. In spite of the importance of the other layers of law, the intellectual unity of the legal system, and the avoidance of the chaos permanently and threateningly arising at the level of complex systems is ensured only by the layer of legal dogmatics. This starting point makes it understandable that from the approaches to law which narrow law down to only one layer and do not believe in a multi-layered structure follows a different model of legal education, that is, legal education itself is not considered as part of the legal system. For example, the concepts of judicial law deem that activities related to law outside the court room are not important. Similarly, on the other hand, the text positivist attitude to law disregards legal dogmatics and, subsequently, the central role of legal education in law, because lawyers will anyway need to become aware of the new texts of statutes from time to time, which according to this view exclusively constitute law, and university legal education itself does not fulfil any special function. Taking this to extremes, and owing to the optimism of the enlightenment, which had its effect, the point is that simple law open to the intelligence of every human being must not be put in the hand of a narrow profession, the lawyers, and it is one's civic right to fulfil juristic tasks. After the French revolution in 1789 this view also contributed to terminating university legal training, and only after leaving out a generation's time, in the 1820's was this restarted (see Dawson 1968). And this view also exerted an impact in the United States, and until the end of the 1800's reservations about university legal training strengthened this impact (Friedman 1973). *The university training itself can be permanently established only on condition that we acknowledge a more lasting system of intellectual connections behind the ever-changing text of statutes.* Without that a general kind of intellectual training would be sufficient but specialised legal training would be aimless. This is what highlighting law dogmatics in our multi-layered concept of law raises awareness of.

Another starting point refers to the fact that political fights with a view to resolve tensions and injustices prevailing under current social conditions and in institutions have shaped their own ways outside law in political and ideological subsystems, and the impact and compromises of such political fights appear in law only in a formalised way as enshrined in the statutes of parliamentary legislation. In modern societies there is an institution system realised through pluralistic mass media, the freedom to found parties and associations to fulfil this task. Or, if there are insufficiencies in this respect, and the institution system of political democracy is not proper to ensure the social formation of will, then it is the political system that must be reformed, but in order to solve these problems the legal system or the sphere of social science universities must not be politicised "as a substitute". Politicising these spheres represents too great a price for remedying the problems of political institutions, and may as well cause a modernisation dead end

road should we try to find solution this way like a smith who removes the scales from someone's eyes with tongs.

These starting points served as points of reference in our determining the position of legal education and basic functions, and again these serve as points of reference for criticising different approaches to legal education.

The farthest from our starting points stands the approach of the American critical legal studies ("Critical Legal Studies"), but on the grounds of its own starting point even in this approach to law legal education plays a central role. The representatives of this approach to law, the "Crits" as they call themselves, set out from the fact that law operates absolute entirely as part of the political system, and actually it represents a, masked, field of social fight. The Crits strive to explore power interests present in each legal construction, and through that expose the functions of each legal institutions and legal solutions as means of class struggle. They consider law dogmatics constructions also as the summary of the ruling classes' interests, and key law dogmatics changes as shifts of power among various groups of the ruling classes.

It follows from this approach to law that *they analyse the legal education aimed at handing over law dogmatics categories as the sphere meant to maintain the hegemony of the ruling class*. It must be also noted that the Crits quite often twist traditional Marxist terminology regarding the hegemony of the ruling classes with a view to adjust them to the camps of the current American political fights, and by stressing the terminology of political camps of black and other coloured people, homosexuals, feminists, etc. *grasp this sphere as the law of upper class heterosexual white men* (see Kennedy 1996:427-437). According to the Crits legal education is an eminent part of the political legal sphere of power where the concealed means of class power is hammered into the prospective judges, lawyers, prosecutors, so that later when getting into office they would be able to ensure that oppressed groups of society (women, black, homosexual, etc.) are subjected to the ruling groups.

Two tasks follow from this analysis of the situation of legal education for the Crits. One of them is to make legal analyses in their studies that explore both the upper classes (white men) gaining advantage in each law dogmatics construction and the disadvantageous features affecting the oppressed as well as the impacts of political fights for power present in legal changes when analysing the history of law (see Hunt 1986, Tushnet 1991). This jurisprudence activity (or rather legal ideological fight activity) in this approach to law is, however, not simply for making scientific justice public, as in the event of most approaches to law, but the main aim is, once "the legal education invaded by the enemy" has been cleared, to spread it in legal education. For the Crits admittedly represent not simply a group of jurisprudence but a law policy combat unit. And as they have not been able to directly capture the practical domains of the legal sphere, or because of the traditionally conservative character of lawyers it was not lifelike to set this aim, they identify the occupation of legal education as the prime goal (see Tushnet 1991). Looking at it in its dynamism, whoever dominates legal education today will be able to exert huge impact through properly socialised activist lawyers, activist justices, etc. in the overall fields of law as well. Accordingly, the key activity of the Crits, since the time they organised their group at the end of the 1970's, has been built up in this direction, and although they have either split up into internal camps in many respects (feminist legal theory, racial legal theory, etc.), or been shifted toward post-modern theoretical directions, basically they pursue their activity primarily at

American campuses even today.

The activity of the Critics have greatly contributed to politicising the American legal profession and the university law faculties in the past quarter of the century. Owing to their successful political organising activity, which helped them to conclude a political alliance with the representatives of the groups dissatisfied for various reasons with the current social conditions, they attained a dominant position at numerous American law faculties by the beginning of the 1990's. As Harry T. Edwards, federal justice, professor of law from Michigan put it in his article published in the beginning of the 90's bringing storms and heated debates, at most law faculties a political trench warfare had evolved between the Critics and their allies and the university lecturers writing and lecturing on traditional law dogmatics works who opposed them; and in the procedure of engaging new lecturers, renewing the contracts of existing lecturers and especially regarding the commencement of their tenure, that is, entering the finalised professorial contract the key issue was which camp out the two the candidate supported, and it was purely the standing of the balance of forces and not the actual scientific and educational achievement that was determinant in these decisions (Edwards 1992). The Critics are fostering the idea of pushing the subjects on legal dogmatics categories in the background, and, instead of these, they teach the works of philosophers, sociologists, professors of literature (Edwards 1992).

As a closing remark it should be indicated that in the university struggles having become permanent the adherents of the economic theory of law, in spite of all their differences in respect of theory and ideology, are willing to conclude alliance with the neo-Marxist Critics, and this makes it understandable that in the current situation they are still able to proceed in the same direction in getting the law dogmatics teaching method, dominant for decades, "out of balance" with the support of the leftist Critics, whom they otherwise fundamentally oppose both in terms of world view and political attitude (see Posner's criticism on Edward's article: Posner 1993). After the victory attained in fights at universities, however, the recipe of the economic theory of law does not aim at politicising legal education in a neo-Marxist manner, but teaching specialised branches of social sciences in detail, and this is what they intend to replace the law dogmatics based legal education with.

XI. Chapter: Private and public command of law

Law and legal standards are taken out of the sphere of social standards and ethical standards by the fact that eventually they are sanctioned by state authority. In terms of legal theory, however, it is an open question what the extent of public command of law is in view of the entire process of law, or, contrary to that, to what extent private parties', private authorities' force can prevail? Disregarding the few approaches to law that fully identify law and state (Hans Kelsen's, or the Hungarian Bódog Somló's legal theory, e.g.), in most works on legal theory we find that the partial independence of law of the state is declared but more detailed analyses into how it is so cannot be really found.

From legal history materials conclusions can be drawn that under initial circumstances law and the enforcement of law was performed to a greater extent by the participation of the parties, especially the offended party, and through development more and more phases of the legal process were determined by the state. In the development of Roman law, for example, only after a long period was the “private criminal law” in the initial phase transferred to public law, and alongside the authorisation of the private offended party to persecute crime crimes to be persecuted by the state began to appear (see: Coing 1996, Marton 1993: 40-52; Zlinszky 1991:10-13). Also, several tendencies show that the more and more extensive state machinery took over the determining force at several points of the legal process. It can be shown both in law making, law enforcement and the execution of judicial decisions. Following the same thread of thought, it can be stated that the punitive power, the power of life and death liege lords were entitled to, and the system of manorial courts sitting in judgement on serfs represented the influence of private law in the Middle Ages alongside public administration of justice on the determination of law, and this was gradually stopped by law development in the modern age, followed by the establishment of the monopoly of state jurisdiction.

From all this the conclusion can be drawn that historic tendencies show that in modern societies command of law is more and more transferred from the one time private command to public determination. In addition to the general truth of the thesis, however, at several points contrary processes can be also seen, and thus only specific analyses can give a reassuring reply in this field. In the following analyses we examine public determination in creating legal standards and in the enforcement of such standards in particular cases, and the cases of the survival of private command. Then we shall touch upon the analysis of the execution of case-law decisions.

First, let us examine the tendencies of the increasing strength of the state authority, then the forms of private command and their extension.

1. The increasing determination of law by the state authority

1.1 Public command of law making

In this part of the legal process a clear tendency can be shown, and it can be seen that if society has reached a certain level of development, then the state organising the overall community will play an increasingly strong part in creating legal standards, and the factors beyond the state will be pushed into the background. This trend can be seen in the development of the Roman law as well as in the European legal development of the Middle Ages and the Modern Age, also the development of law in 19th century North America shows the fast growth of the role of the state apparatus after the establishment of more complex social relations.

In the development of Roman law after the common law and jurist law development, the free law making of the emperor’s power was acknowledged, and the Digests already contained the “Princeps legibus solutus” thesis which represented the emperor’s legislative power (Caenegem, 1980:616). Through that the law of the early Republican Rome created mostly independently

became more and more determined by the emperor's state apparatus.

In the development of law in the early Middle Ages the track already covered in the Roman legal development was repeated, and first alongside, then more and more to replace the spontaneous law making of the initial common law, the law made by the central state authority was established by the end of the 1700's. In the 12th century, once the Digestas had been found, the ruler's legislative power was debated. Contrary to the aforesaid provisions of the Digestas Accursius found provisions in Gratianus's *Institutio* which suggested that the ruler was subject to law, and contrary to the "Princeps legibus solutus" thesis it took the position that "re vera maius imperio est submittere legibus principatum" (Caenegem 1980:619). However, once the central state machinery had become powerful in the late medieval development, out of the ancient Roman legal theses again the "princeps legibus solutus" thesis became emphasised, and later Jean Bodin, for example, built the thesis of the absolute ruler's sovereignty on this.

Due to all that instead of the concept of "the good and untouchable old law" the idea of the law made by the central state authority became dominant, and owing to the Enlightenment and the political revolutions in the 1800's only the subject of the making of statute law changed, and the ruler was replaced by the parliamentary legislation. (See Csaba Varga's excellent study for the changes from the codification of common law to conscious, written law code making, Varga 1976).

In the Anglo-Saxon law development this was coloured only by the fact that statute law was fulfilled only in the 20th century over the dominant precedent law. But the relations in complex society and the necessity of adequate legal regulations required by these called for the primacy of the statute law made by the state apparatus (see MacCormick/Summers 1991).

1.2 The state's command of law enforcement

There are several aspects of the development of the state's command of law enforcement. One of the points here is the statement of legal decisions with regard to individual cases on the grounds of legal standards, and the decisive role of the state in that. In England the settlement of legal issues in cases was placed in the hands of the king's travelling judges right after the Norman Conquest, from 1066, and common law was made out of their accumulating decisions. Apart from later changes, however, the members of the high courts were appointed by the central state authority, even if this became subject to increasingly strict rules, and after a while the Lord Chancellor was allowed to appoint only barristers to be judges.

Contrary to that, in German legal development for a long time judges purely executed judgements, and judgements themselves with regard to individual cases were made by the law professors of university faculties under the so-called file submission procedure ("Aktensendung"). This procedure was, however, forced back when the absolutist control of the state was established in the 1700's, but it was fully put to an end only in the middle of the 1800's, and the judges' decision making power in individual cases became complete (Dawson 1968).

Another point is the extent of the decisive force of the state authority and private parties in conducting court proceedings.

The role of the judge that represents public authority and the extent of his activity in shaping legal proceedings were fundamentally different, and are mostly different even today, in Anglo-Saxon legal systems and in the Continental legal systems. In the latter the judge's role is central in the shaping of legal actions, and both in the exploration of facts, the production of evidence and making decisions on legal issues the judge dominates the action vis-à-vis the parties and their lawyers. On the other hand, in lawsuits in the UK and the US the judge's role is highly passive and the presentation of facts and the production of evidence and the shaping of the facts of the case are in the hands of the opposing parties (Thalmann 1989; Maxeiner 1990), and the judge can only state the judgement on the outcome of the facts of the case described to him. And this may as well be directly opposite to what he believes to be the actual facts of the case and the judgement related to it. If, however, the facts necessary for it are not brought into the action by the interested party, or if he has brought them in but cannot prove them, then in spite of his discretion the judge may consider only the facts of the case described to him. The action is thus shaped rather by the private parties, and the role of the judge who represents public power is less.

Recently, however, shifts have taken place both in the UK and the US, at least in private law actions, and regulation has moved to a certain extent towards the judges dominated conduct of action prevalent on the Continent (see Sobich 1999). The judge's more active action shaping power has forced back the procedural power of private parties and their lawyers to a certain extent. This shows that the requirements of a complex society for predictable law forced the strengthening of the public momentum, as it happened in Continental legal systems from the 1800's.

The role of the jurors still restricts the role of judges representing the state authority in determining law in the legal system of the United States. Contrary to the UK where from the end of the 1800's the role of the jurors was almost entirely eliminated from passing private law judgements, and was forced back also in passing judgements in criminal cases. In actions, dominated anyway by the lawyers of the two opposing parties, the convincing of the lay jurors will determine the judgement which the judge announces as the judgement after playing the part of simply maintaining the order. In Continental legal systems on the other hand, alongside the judges appointed by the state who determine the action, lay jurors, assessors have a definitely minor role, and their part has further decreased in recent decades.

2. The forms of private command of law

The state authority pushing forward along the entire length of the legal process both in law making and law enforcement can be considered a phenomenon realised as a tendency on higher levels of social development. Furthermore, contradictory tendencies can be identified regarding certain aspects of law, and a quantum leap in private power influence can be observed in them. Out of these we are examining four tendencies below. One of them represents the option of pushing aside law realised through arbitration, another one is shown by the "private" labour law of collective agreements beside state labour law; the fact that law dogmatics "centred around the victim" gains ground represents the partial privatisation of criminal procedure and criminal law where the bargain concluded between the perpetrator's lawyer and the offended party steps in a certain sense in front of the state's punitive power; and finally the privatisation phenomena of the

execution of sentences can be connected here.

2.1 The possibility to push aside public law: arbitration

Within private law relations it is primarily economic relations that offer the possibility in modern legal systems to push aside public law and normal jurisdiction and obtain arbitration mutually controlled by the parties instead. The extent of this option is different subject to the fact that traditionally overall social organisation is mostly realised through the state, or on the contrary, the state's role to organise society can be deemed less (Kotzorek 1987). In Soviet type societies fully based on the state's social organisation, for example, there was no arbitration at all, or only to a very low extent, while after the change of regime in 1989 its significance definitely grew in these countries, thus in our country too.

It was a general feature of arbitration that it could be obtained in the relations between parties engaged in business professionally, but as a result of the spreading tendency in the recent decades the prime rule is going to be soon that it is sufficient if one of the parties fall under this category. In Germany, for example, regulation has moved towards this direction (Wolfgang 1994:120-125) and the sample law worked out by UNICITRAL also proposes that. In Hungary in the euphoria of liberalisation after the change of regime it was enacted in the same form and today this is the current law.

The basic feature of arbitration is that it has one grade and no appeal can be lodged against the judgement. Only on the grounds of strictly defined invalidity is it possible to seek remedy against the judgement of the arbitration tribunal at normal courts, but it is possible only in a negligible percent of the cases due to strict circumscription of the invalidity reasons. The final award can be executed the same way as a normal court's binding decision, here there is no difference between "private jurisdiction" and public jurisdiction.

This kind of jurisdiction is attractive because of its briefness, and its spreading is greatly fostered by the fact that the normal public jurisdiction becomes to have several grades and the spreading of retrial techniques owing to the integration of various procedural guaranties in normal jurisdiction. Another reason can be the spreading of the options either to reject an agreement, or to wriggle out on the basis of "softer" legal grounds generated by the establishment of constitutional jurisdiction and other ways of review. Time is money, and it is particularly true in the event of people who professionally deal with business. Thus, winning a case after several years is hardly better than losing a case, and both the former and the latter may bring along bankruptcy. Subsequently, to a certain extent, the increase of the role of arbitration may be considered "revenge" for making jurisdiction to have more guaranties. And it explains that this kind of "private jurisdiction" is available today even if one of the parties is a simple private party beside the business of the professional party.

The actual extent of applying arbitration in Western countries is well shown by the data from the beginning of the 90's, that at that time in the sector of German engineering industry in 80% of all the export agreements parties to the agreement stipulated the need for it (Böckstgiegel 1992). And in Germany the option to obtain arbitration was liberalised only after that! In Hungary the Act on Arbitration of 1994 created one of the most liberal solutions in the world, but this legal option was actually applied to a very low extent in the 90's. (See the volumes of the periodical

Gazdaság és Jog where arbitration awards are commented under a separate column.)

To what extent does the “private” momentum prevail in arbitration, and to what extent the state’s decisive force is present here? This question may be answered if we distinguish between the parties’ role to select the arbitrators and to determine the procedure.

The appointment of the arbitrator is primarily based on an agreement reached between the parties. In domestic practice it is usually the parties themselves who select their arbitrator from the list of arbitrators of the chamber of commerce and industry, and this list includes names of lawyers, university jurists and representatives of other professions. The parties may as well agree in an arbitrator from outside this sphere. The arbitrator himself undertakes to perform his task vis-à-vis the parties under a civil agreement, and by setting a term in it he may commit himself to make the judgement before a defined date (Wallacher 1994:115).

The rules of arbitration procedure are primarily based on the agreement reached between the parties, and they may as well regulate as part of their agreement how the procedure shall be applied should there be any dispute between them. However, if they do not regulate this procedure, then the relevant provisions set forth under the separate law on arbitration or the laws on normal litigation shall apply. (Domestic regulation has set forth rules under Act LXXV of 1994 on arbitration tribunal.)

This “privatisation” of our administration of justice is undoubtedly radically accelerates the settlement of legal debates between the parties, but the parties’ possible further economic and other kind of inequalities may prevail to a greater extent in the settlement of the debates. Therefore, the former German regulation, for example, set forth that the agreement which has been reached by making use of the economic and social position of one of the parties shall become null and void. This has, however, “softened” this procedure and made the arbitration award contestable in a wider sense, in addition to strict invalidity provisions, and has thus questioned its function, subsequently the new regulation has ruled it out (Wolfgang 1997:125). Pushing aside public law and state courts is thus realised more completely through more liberal regulation.

2.2 Public labour law and “private” labour law

In the field of regulating labour relations it is especially apparent that the question of the proportion between the public regulation and private determination beyond the state is open. In societies where the state organises society’s life extensively, and usually the features of etatism dominate, the regulation of work relations is basically implemented by detailed public regulation, tendentially taking labour contracts out of the sphere of private law. Whereas, if trust in the public organisation of society is less typical in a country, there labour contracts, similarly to other types of agreements, will be determined basically by private law, and the state will intrude only some points upon them. Accordingly, in the Soviet type organisation of society, thus for a long time in Hungary too, labour law was exclusively public labour law, and labour relations were entirely severed from private law. Under the labour contract the parties had to consider numerous obligatory legal stipulations, which regulated the employee/employer relation at all key points on a central level (see Czuglerné 1990).

After the change of regime in 1989 Hungary also turned to labour law regulation pursuant to the market economy of democratic political systems, in the course of which public regulation was eliminated at the definitive points of the employee/employer relation, and it was up to either the parties to the labour contract to come to an understanding or the collective agreements of employers' and employees' interest representation bodies to cover this point. The actual situation in the 90's has been that instead of the withdrawn public labour law the "private" labour law of collective agreements has been able to gain ground to a limited extent. The reason for that can be that the division in the trade unions on the employee's side usually does not allow and the employer's side is not interested in making collective agreements (see D.J. 1998; Kádár 1998). If no collective agreement is made at the place of work, or in an entire sector, then the labour contract will show the features of a private law agreement, and the economic and other kind of inequalities between the parties will shift the possibility to determine the agreement towards the employer. What is more, a regulation technique can be observed in current labour law regulation that this as a minimum determines numerous things for the employees, and under the collective agreement amendments regarding several issues can be made only to the benefit of the employees. And this makes employers interested in rather not reaching any collective agreement. As a result of that, now, at the turn of the millennium collective agreements have been entered into at hardly 30% of the companies, and only one third of them could be extended to entire sectors, that is, in not more than 10-12% of all the sectors are there accepted collective agreements (see D.J. 1998). Furthermore, these collective agreements refer to almost nothing else than wages, and the other issues of labour relations are left to be regulated by the individual labour contract.

In fact, out of the three layers of the regulation of labour relations the private law labour contract is decisive in today's domestic regulation, and alongside the withdrawn public labour law the "private" labour law of collective agreements has reached only a rudimentary level of development.

On the contrary, in Western European countries the decisive emphasis is placed on private labour law, and employers and employees' interest representation bodies conclude a bargain on the detailed regulation of labour relations for each branch (see Rupp 1998; Sodan 1998).

It should be noted that an influential legal concept has also evolved in the past decades, which has attempted to work out "negotiation" labour law beside public law as a model for the other fields of law. This is the concept of "reflexive law" elaborated by the German jurists, Günther Teubner and Helmut Wilke in the first half of the eighties. This legal concept has taken its social theory starting-points from the theory of complex systems, and based on this it asserts that the development of society and its individual sectors has reached a stage of complexity by now that makes it hopeless to see through and properly regulate relations on the level of central legislation. In this situation the statutes of the state centre, while attempting to remedy problems having some points in sight, due to the effect in another direction of the situation not seen through will generate a lot of problems themselves, and new laws drafted in order to remedy these will produce masses of new problems. The direction of solution is seen by Taubner in that the state must give up the hopeless fight on the level of statutory regulation, and must entrust each social sphere's interest representation bodies opposing each other and top association agencies to make a deal on the internal regulation of the relevant social sphere. This extended collective agreement

law would be amended by the state only through its executive apparatus, on the other hand, the procedure of making a deal on collective agreements would be regulated at key points by state legislation in order to prevent the stronger party taking advantage of its position, and to establish the regulation indeed through the compromise of the relevant parties in the given sphere. In addition to the employee/employer relation, through this solution the interest representation bodies, the top association agencies of the opposing groups in higher education, health care, mass communication would determine regulation, and this would be the “reflexive law” instead of the current public statute law (see Teubner 1982; 1986; Teubner/Wilke 1984).

2.3 The private party’s decisive force in criminal law

The tendencies clearly identifiable in the criminal law show that simple societies’ “private” criminal law is forced back in the course of development by the law of crimes persecuted by public authority, and the criminal law that originally represented the community’s support of the offended party’s private revenge will change into the law of the state’s punitive authority (see Marton 1993; Zlinszki 1996). By this change the injury and loss of the victim of the crime is pushed in the background and replaced by the protection of the entire community to prevent future perpetration of crime. Thus the public prosecutor becomes the central figure of criminal law and criminal procedure, and will encounter the person accused of the perpetration and his or her lawyer in front of the judge also standing on the side of the state administering justice. In this structure the victim of the crime and his or her particular injury is thrust into the background. This process, of course, took place in the legal development of Western European countries at different pace, and while in Continental countries through an extensive building up of the public prosecutor’s office and making the clearing up of crimes a state function it was achieved in the second half of the 1800’s, in the English development even at the beginning of the 1900’s it was still the task of the offended party to take steps to clear up the crime, collect proofs and present such proofs in court (Günther 1973). Thus the private persecution of minor crimes survived to a greater extent in the UK than in the public prosecutor dominated Continental criminal law, but during the 20th century the state’s role to persecute crime became decisive here as well.

This long term tendency seems to be changed by the new criminal policy attempt appeared in recent years, which intends to restore the reparation of the victim of the crime instead of the protection of the state’s punitive authority and the entire community (from future perpetration) (see Seelman 1990). Thus the reparation of the injury of the victim becomes the main aim of criminal law, and as a result of that, the punishment of the perpetrator becomes subject to what extent he or she undertakes the reparation of the victim’s injury. (While in the punitive policy aimed at the prevention of future perpetration it is not taken account of, and the weight of the act committed and the lower or higher degree of the guiltiness of the perpetrator is what really counts.)

This “victim orientated” punitive policy entail basic changes in criminal procedural law, and in addition to thrusting the public prosecutor’s central role in the background, the victim and his or her lawyer come to the front. For the perpetrator the settlement with the victim regarding reparation will influence the entire further criminal procedure, and may as well allow the cancellation of any further procedure, or, at least, the perpetrator may get away with much less

punishment, on the other hand, failure in this respect will entail more severe punishment (Seelman 1990:165). In practice this change makes the bargaining between the lawyers of the accused and the offended party (victim) the central part of the criminal procedure, while the power of the public prosecutor who represents the state's punitive authority will be subject in the criminal procedure to the bargain made between the two lawyers. In Germany the idea was also addressed that a central state fund should be raised from fines paid for offences, of which the perpetrator who undertakes to provide reparation to the offended party may take out a loan with favourable interest because the perpetrator's financial status often makes it impossible to reach an agreement (see Rixen 1994).

Through this change the criminal action gets very close to the structure of the private action, and this change can be described, so to say, as "the privatisation" of criminal law. And if the judge's passive role in ascertaining the facts of the case contributes to this, as it is more typical even today in Anglo-Saxon legal systems compared to Continental legal systems, then the role of the lawyer of the victim and the accused will be realised in a more dominating way.

This change set out from the United States but, to a lower extent, shifts in this direction took place in European countries too. As of now, it is yet unforeseeable how much this "privatised" criminal law remains temporary, or how much it becomes permanent.

2.4 The privatisation of the execution of sentences

During the Enlightenment it was gradually acknowledged that application of force by private parties, private authorities is prohibited, and it is the exclusive right of the state in society, and the state that has the monopoly of legitimate force shall be put under society's control. This idea became a cornerstone of modern democratic constitutional state, therefore it is interesting to examine the changes which have taken place in the execution of sentences, the most exclusive territory of the state in recent years. As here in a free constitutional state the strongest sanctions may be imposed by legally depriving a person of his or her freedom with the punishment of imprisonment, and carrying it out has represented the most exclusive task of the liberal constitutional state since the Enlightenment (Flügge 2000: 259-262). In spite of that, since the middle of the 1980's in the United States the privatisation of prisons has begun, and it has been followed by the UK and France, also in Germany there are influential law politics groups which intend to realise it there too (see Smartt 1995; Maelicke 1999; Lilly 1999; Paulus 2000).

Pursuant to the original American idea, based on which the establishment of private prisons falling into the category of lower grades of imprisonment requiring less security began as part of the general "denationalisation" launched President Reagan, the entrepreneurs running the prisons receive financing from the state on a convict and daily basis, and they have to solve the execution of imprisonment out of that. The key points of behaviour in prison are determined by law, but otherwise it is up to the prison entrepreneurs how they solve the organisation of spending the time of imprisonment. By random checks, of course, the state prison supervision attempts to control the order in prisons, and in the 90's in a prison in South Carolina, for example, the usual annual state contract was not extended at the end of the year because it was proved that a part of the convicts were kept all the time with their hands and feet shackled (Lilly 1999:78-80). In any

case, in 1998 in the US there were already 102 private prisons, and 75 thousand convicts were guarded in them, true that the total number of convicts was 1.6 million at the time (Maelicke 1999).

Following the American example, in the UK they have taken this track since 1988 because experience revealed that private entrepreneurs could manage the execution of imprisonment 15-20% cheaper, and they could still make profit, therefore venture capital could be involved in building private prisons (Braum/Varwig/Bader 1999). Being in a difficult situation because of the circumstances prevalent in crowded English prisons, but refraining from increasing the state's role taking the Thatcher cabinet decided then that the problem should be solved through operating the newly built prisons by private entrepreneurs. This trend of development has not changed in spite of changes in the government ever since, and the current labour party government attempts to solve the problems of lack of room through private prisons under the prison development program running until 2005 (Lilly 1999; Maelicke 1999).

Also in France steps have been taken in this direction since the 90's but here state supervision of the operation of prisons has been maintained regarding several points, and only partial privatisation can be observed here. In Germany, on the other hand, not even partial privatisation has been realised so far, but the law politicians of the CDU and the Greens have entered the institutionalisation of private prisons in their programs. True that it indicates the possibilities of realisation and restrictions in this country that in the provinces where these parties have taken over the government and would have the legal possibility to do it, have not begun implementation. Anyway, in Germany the public opinion is concerned because of the wide authority of the constitutional court about the possibility of approving the legal option of applying private prisons and thus legitimate private force (Flügge 2000:259). Pursuant to this kind of opinion, the imprisonment of citizens and the execution of coercive measures may not be in the hands of private entrepreneurs, and only the state controlled by the community is entitled to do that.

To sum it up, it can be said that as regards the privatisation of the execution of sentences the situation is quite open these days, and while in most of the countries the state still has monopoly in this field, numerous major countries are moving with long steps towards privatisation.

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The situation of the state's power to determine law is more colourful than what is expressed by the traditional views of legal theory on the level of legal concepts. Fundamental tendencies, however, point at the state's increasing determining role at key points of the legal process when approaching the level of development of complex societies, but as it has been shown in this analysis, at several points the starting of essential processes in the opposite direction can be observed too. Well founded legal theory statements cannot be made unless having detailed information on the changes that take place inside each branches of law. The intention of this short study, in addition to give a brief examination of the subject brought up, is to make public opinion in jurisprudence aware of this direction of approach to legal theory examination.

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