4 2016

The Lawyer Quarterly

International Journal for Legal Research

The Lawyer Quarterly

The Lawyer Quarterly

International Journal for Legal Research

4/2016

Volume 6

Journal The Lawyer Quarterly is registered with the Czech National Bibliography of the National Library of the Czech Republic and European Reference Index for the Humanities and the Social Sciences (ERIH PLUS).

TABLE OF CONTENTS

BETWEEN HISTORY AND SOCIOLOGY – REMARKS ON DIFFERENCES IN PERCEIVING "LEGAL CULTURE" AS A SUBJECT OF INTEREST BY VARIOUS DISCIPLINES OF JURISPRUDENCE, PARTICULARLY SOCIOLOGY OF LAW AND THE DISCIPLINES OF THE HISTORY OF LAW

Anna Kociołek – Pęksa*, Władysław Pęksa**

Abstract: *One of the "pivotal" terms, showing the diversity of phenomena related to the cultural embedding of law is that of legal culture. It is used to describe the diversity of approaches to law as well as of the opinions on how this term is understood, on the role of social order, the practice of law application. The article deals with differences in the research approaches of various jurisprudential disciplines. Among the many topics covered in the article, the authors emphasize in particular the differences between the concept of "legal culture" in the textbooks of the history of law and social sciences, opposing legal history approach by that of legal sociology or philosophy of law. Striking in the attitude to the history of the numerous concepts of legal culture is the treatment of the historical phenomena not as an objective social, economic, or political reality, but as a certain intellectual construct that aims to "complete and justify the concept". This is a purely instrumental approach: the possible phenomena from the past serve to strengthen and justify the shape of the contemporary reflection. This applies both to approaches that describe the legal culture as a predominantly historical phenomenon and to those that treat historical description as supplemental reasoning. It is also accompanied by far-reaching "presentism" as an attitude in the study of the phenomena from the past. Consequently, this may lead to a situation that extremely synthetic and abstract judgments relating to the past phenomena as the culture and the society can be misleading in the study and description of the legal culture insofar as one may combine events from the distant past with characteristics which they had not or reconstruct facts that probably did not occur.*

Keywords: *legal culture, legal sociology, legal philosophy, legal history, jurisprudence methodology*

I. INTRODUCTION

When discussing the research approaches of various jurisprudential disciplines, the crucial question that needs to be addressed at the very beginning is establishing the fundamental subject of interest of the various disciplines. One attempt at tackling this question is the concept of Jerzy Lande indicating that jurisprudence deals with such diversity of questions that it is impossible to combine them or merge them into a coherent whole[1]. The attempt at surmounting this methodological stalemate consisted in identifying the research layers of jurisprudence (logical-linguistic, sociological, psychological, or axiological layers), which provided the answer within their fields of study.[2] In turn, according to Kazimierz Frieske, this approach provides at most a partial solution to the problem as

* Dr. Anna Kociołek – Pęksa, Chair of Public Administration, Collegium of Socio-Economics, Warsaw School of Economics, Poland

** Dr. Władysław Pęksa, Chair of History of Polish Law, Faculty of Law and Administration Jagiellonian University, Poland

[1] ZIEMBIŃSKI, Z. *Socjologia prawa jako nauk*. Państwowe Wydawnictwo Naukowe, Warsaw – Poznań 1975, after FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, pp. 18–19.

[2] OPAŁEK, K., WRÓBLEWSKI, J. *Zagadnienia teorii prawa*. Warsaw 1969, p. 326.

it pushes further away the answer to the question of what law as the subject of study is. And even further, it exacerbates the fragmentation due to the fact that the law is a different subject as regarded by different research layers.[3] In order to overcome this barrier and perceive law from the broadest possible perspective, and at the same time to regard it as an integral phenomenon, one may formulate opinions that refer to the cultural roots of law, indicating the fact that law is a product of culture on the one hand and a factor of culture on the other. It is part of a larger whole: the general culture of the society[4]. The law cannot exist outside the cultural heritage or next to it. It is one of many normative systems that impose social order and build the collective identification system of the community[5]. Whereas the thesis about the cultural embedding of the law has been generally unquestionable since the nineteenth century, its consequences for the different and hitherto separate legal fields of study have been pointed out (Frieske). The first and fundamental consequence undermines the assumption of the autonomy of law as the subject of study and reflection. At this point, it seems noteworthy that this thesis lays the foundation for a number of specific dogmatic sciences and their methodologies. Additionally, the assumption of the autonomy of lawyers' knowledge of law is questioned. The sophisticated legal-dogmatic reasoning and analyses turn out to be part of broader cultural models whereas their practical application is admissible insofar as it is allowed by the resulting conditions. It appears namely that the process of law creation and application may be described from the perspective of its cultural determinisms and the resulting image is far from the statements of dogmatic sciences.[6]

II. THE LEGAL CULTURE: PIVOTAL AND AMBIGUOUS TERM

From this perspective, showing the diversity of phenomena related to the cultural embedding of law, the pivotal term is that of **legal culture**. It is used to describe the diversity of approaches to law as well as of the opinions on how this term is understood, on the role of social order, the practice of law application, etc. As it follows, the very term becomes ambiguous and besides a certain common core that is interpreted by various authors and various fields of study in the same way, differences emerge when it comes to details.

Ties and relationships between the approaches of law and legal history are complex. On the one hand, the historical context of the origin of legal culture is strongly emphasized. The stress on the historical context of the legal culture is visible in A. Kojder's approach, in which "the heritage of legal culture is evident not only in tangible monuments of the past, in the social institutions, myths, and collective identity symbols that are inherited from the ancestors, but also in the ingrained legal and moral rules."[7] The emphasis on the historical context of the phenomenon of law is a characteristic feature of the researcher's opinions on the entirety of legal matters. Consequently, his perception of the legal culture as a historical phenomenon is not unique.[8] According to K. Frieske, this no-

[3] FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 19.
[4] According to PETRAŻYCKI, L. *Wstęp do nauki polityki prawa*. Warsaw 1968.
[5] KOJDER, A. *Godność i siła praw*. Warsaw: Oficyna Naukowa, 1995, p. 252.
[6] FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 30.
[7] KOJDER, A. *Godność i siła prawa*. Warsaw 1995, p. 251.

tion of legal culture corresponds with that of Leon Petrażycki.[9] The Petrażycki's concept, and especially the part in which the author distinguishes between intuitive and positive law, is also strongly embedded in the historical context. Defining his approach to law, Petrażycki considered it in a broad historical perspective as a significant factor of civilisation and cultural progress (law as a crucial "engine of the history").[10] At the same time, interestingly, Petrażycki rejected the major assumptions of legal positivism, especially those that identify law with orders and prohibitions imposed by the state coercion.[11] As a consequence, Petrażycki demanded the return to the division between the study of the existing law and of the desired one, i.e. the search of the ideal of law. As seen by A. Kojder, who referred to the thought of Petrażycki, this "positive" law is equipped with the sanction of state coercion, which is enforced by the authorities and set forth in the historic sources of law – such as statutes and regulations – jointly constituting the agenda of institutionalised state control. Cultural values preserved in such law largely serve pragmatical purposes of the governing elite and the decision-making centre of the state which shapes them at its own discretion.[12] On the other hand, the intuitive law reflects values assumed by the culture that constitute autonomous phenomena and expresses the societal sense of justice performing the cognitive, orientating, and integrating functions.[13] In this sense, the legal culture is a relationship – a crash of these two visions i.e. the layers of law. How to create the positive law in a rational and correct way, how to apply it, what should be its content? The compliance between both spheres harmonises social relationships whereas their discord destabilises them inasmuch as a positive law which is not in line with the intuitive one leads to a crisis and instead of steering the citizens' actions in the right direction, it brings about the opposite effects that are induced by personal interests. In fact the legal culture consists in the relationship between both systems and the various states it undergoes: from internal coherence and high adaptive capacity of a given political and economic system to divergences that lead to dysfunctional legal culture and to the atrophy of the social order. Such additional circumstances that, along with the very content of the statute, should be considered when interpreting and applying the law (such as: practice, theoretical opinions, or the personality of the judge) fall within the scope of the intuitive law as described by L. Petrażycki. In consequence, this leads to the conclusion that, in spite of the formal omnipotence (reflected by the principle of the unlimited scope of the legislative matter), there are limits to the instrumental treatment of law.[14] At the same time, the whole question – according to Petrażycki and Kojder - is placed in the historical and temporal context that acts as a stage providing background to the processes of shaping a specific legal culture on the one hand and as a source of information on such processes on the other hand.

[8] Ibid., p. 11.
[9] FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 29.
[10] KOJDER, A. *Godność i siła prawa*. Warsaw 1995, p. 65 ff.
[11] Ibid.
[12] FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 29.
[13] FRIESKE, K. *Socjologia prawa, Iuris*. Warsaw – Poznań 2001, p. 29.
[14] Ibid.

III. THE LEGAL CULTURE AND SOCIOLOGICAL APPROACH - DIVERSITY AND CLASSICS

Other interpretations of the legal culture attach less importance to the historical context. It may be assumed that this is related to the rejection of the evolutionist paradigm for the benefit of a different approach (e.g. functionalism). L. Friedman formulated the concept that the legal culture consists in ideas, values, and expectations towards the law that are presented in a given community.[15] As a consequence, legal cultures of individual groups, organisations, and of the state may be distinguished. In this sense, further research directions involve legal culture of large groups such as nations, states, or supranational structures on the one hand, and legal culture of smaller groups within a society on the other hand. Following a similar direction to Friedman, J. Kurczewski suggested distinguishing the "popular" legal culture – regarding the society as a whole (the general population) – which is also referred to as the "external" legal culture. At the same time, he distinguishes the legal culture of individual professions – regarding the groups that deal with the law on a daily basis and perform specialised legal tasks. The latter is described as the professional legal culture, internal legal culture, or the "lawyers' culture".[16] This understanding does not refer to the history or it merely treats it as a secondary and supplemental reasoning, more so as an *argumentum a historiae,* used in the discussion to support the argument and indicate the "old age" and historical origin of the discussed phenomena and not as their general background and mechanism. This departure from the presentation of legal culture as a historical phenomenon is also related to the critique of the concept of legal culture as an imprecise and ambiguous and therefore a questionable one. This is because it overlaps with a number of similar notions such as: legal tradition, legal idea, etc. Moreover, as the dominant approach regards legal culture as a part of a larger whole – the general culture, to which the legal culture belongs - the problem of the lack of a precise definition of culture as such arises.[17] The occasional demands to cease the use of this term are probably too extreme. However, e.g. Menachem Mautner distinguishes at least twelve approaches - concepts regarding the relationship between the phenomena of law and culture.[18] Interestingly, as the theme of the relationship between law, culture, and historical context recurs in almost all the above concepts (including the approaches set out by Mautner), in my opinion, the historical aspect is present even where it is deliberately and consciously rejected in an attempt at describing the legal culture. Then it represents a kind of a "negative reference point" justifying the criticism of other, usually earlier, concepts.

In his very interesting essay *Three approaches to Law and Culture* Mautner, among the above-mentioned twelve approaches to the relationship between law and culture, distinguishes three that are worth mentioning here briefly. The first one, so to say a classical and historical approach, regards the relationship between law and culture stating that the culture lays the foundation for the law. Culture is the starting point whereas the law, shaped

[15] FRIEDMAN, L. M. *Legal System: A Social Science Perspective*. New York: Russell Sage Foundation, 1975, pp. 1–24.
[16] STĘPIEŃ, M. Kultura prawna. *Leksykon socjologii prawa*. Warsaw 2013, C. H. Beck, p. 121.
[17] Ibid.
[18] MAUTNER, M. Three approaches to Law and Culture. *Law Review*. 2011, Vol. 96, pp. 841–843.

under its influence, is the result. Law is born within the culture and eventually becomes a law of a nation. Mautner combines this approach with the German historical school and indicates that it was derived from the criticism of the Enlightenment conception of law as a product of a legislative intent of a parliament or authorities as formulated by Friedrich von Savigny. The law is the result of a spontaneous creative process in people's everyday lives. It emerges as the customs, practices, and dominant beliefs are shaped and as such it cannot be imposed by the state legislation. In this approach, lawyers are the "guards of the people", whose task is not to give form and content to the laws, but rather to perform more technical work of "distilling" the law from customs and practices and organising it into a logical system of terms and institutions, and therefore preparing it for the parliament to adopt such organised law. The parliament should not be the creator of law, but only the "legislator" i.e. its preserver. Von Savigny situated the law "in the realm of social life and culture". Mauther quotes the well-known comparison of law and language, which is also shaped as a result of a spontaneous and long process.[19] At this point, Mautner indicates that the von Savigny's model of jurisprudence was related to the concept of a nation state that engaged in creating homogenous culture through the unification of local cultures and assimilating the immigrants in the national culture. However, the model of multiculturalism has prevailed in the recent years. Modern states are perceived as multicultural due to the fact that they usually consist of a number of national, religious, or ethnic groups. From this point of view, even if the citizens share a certain cultural basis - the national culture of the particular state – in many cases they still identify themselves with and are loyal to a culture different than their national one: a culture of an ethnic or religious minority. Consequently, this approach assumes a pluralistic concept of law, which implies a differentiated application of the state law and opposes legal monism in terms of the classical "rule of law" typical of the "nation state" era. Moreover, Savigny saw the culture as a pure, homogeneous, and clearly designated phenomenon; whereas the contemporary research on culture shows culture more so as a hybrid derived from multiple sources and, therefore, the law in such a culture will be a mixture of local and borrowed elements, e.g. foreign sources.

While, according to Mautner, the historical school is obviously nothing more than a relic of the distant past, it still contains some extremely contemporary elements of reflection. An understanding of culture that has appeared recently regards it not as a system of meanings, but as a system of certain practices. This combines historical school not only with the modern understanding of culture but also with one of the modern approaches to the relationship of law and culture.

The second approach to the relationships between law and culture as discussed by Mautner emphasises the creation of the state culture by the state law – in a sense, the reversal of the von Savigny's assumptions. Referring to Joseph Kohler, this approach assumes that the role and vocation of humanity is the promotion and development of culture whereas the law is designed to fulfil this vocation. The law is a developing and dynamic medium that enhances development – and it represents a sophisticated elite culture. It balances between the stabilization and conservatism and the openness to novelty. This

[19] MAUTNER, M. Three approaches to Law and Culture. *Law Review.* 2011, Vol. 96, p. 846.

new approach was revived in the 80s and 90s of the previous century, stressing that the law forms and shapes the social life. Its task is to form and develop adequate approaches and relationships in the social life by the appropriate development of legal institutions. The law should be an active participant of the social life – on the one hand, it is created by the culture and, on the other hand, it is the law that affects the culture in a creative and shaping way. In any case, they remain in a permanent interaction. This shift of approaches is associated with the evolution of the American legal culture. In this sense, until 1920s the so called formalism (similar to the European classical positivism) was dominant, in which organising the law into a hierarchic and logical system was seen as the ideal, whereas the mechanism of decision-making was transformed into a half-automatic, technical and mechanistic process. The concept assumed that all subjective/human elements of the decision-maker will be reduced to the minimum in order not to influence the decisions made (such as personal beliefs, cultural background, etc.). At the same time, the law would be used only in accordance with its internal logic, regardless of the impact the act of its application will have on the society in which it is enforced. Formalism was ultimately criticized and rejected by the proponents of the new approach - the legal realists. At the same time, the personal element was restored to the mechanism of the law operation. The subject of decision in this sense – i.e. of the act of law was not the "legal problem", but the understanding and explanation of the normative sense of the possible legal solutions to the problem and the consideration of the social consequences of the adopted solution. Regardless of other elements of criticism, the rejection of formalism paved the way to the perception of law as an important element that is part of the culture and shapes the culture at the same time. An element that gives sense to the concepts and creates social relations. The law and its application cannot be separated from social relations. The law does not set a framework and does not form such relationships - it consists in these social relationships and acts as a social relationship.[20]

What deserves a particular attention in Mautner's reflection is the third approach to the relationship between law and culture. In this approach, he considers the law created and applied by the Anglo-Saxon courts as a separate legal culture. Taking reference to the approach of the realists, he shows that even the Anglo-Saxon formalists did not claim that the actual decision-making process in the application of law corresponded to the theoretical structure of the act of applying the law. On the contrary, the multitude of contexts and scenarios provided space for a considerable discretionary power and the actual possibility of choice. Realists demonstrated in practice the great extent to which the human factor, i.e. the personality of the judge and his beliefs, affects a particular decision. Thus, they restored the role of the judge as an independent "human" actor capable of affecting the legal outcome of the case. At the same time, the supporters of realism had to face the greatest problem resulting from their concept of law. This problem was "the devil of subjectivism" – the heaviest accusation against appreciating the autonomous and creative role of the judge in the process of law application. How to avoid the situation in which each judge acted according to his or her own discretion? Karl Llewellyn – the intellectual leader of the advocates of realism – developed a concept of dealing with this problem by

[20] MAUTNER, M. Three approaches to Law and Culture. *Law Review.* 2011, Vol. 96, p. 846.

recognizing the law applied by the courts as a cultural system. Llewellyn knew the work of Malinowski and other American anthropologists and was familiar with the concept and notion of culture as seen by anthropologists. The problem, however, was that this concept has been essentially defined by anthropologists for the purpose of description of pre-state and not Western primitive societies. Llewellyn could not, therefore, use this term to describe the operation of common-law courts so he only seldom used the term "tradition", generally referring to the concept of "culture". Nevertheless, the way in which he perceived the law as the subject of his research was exactly the same when he referred to the creation and application of the law by the courts. The Llewellyn's concept of legal culture was based on two pillars. The first pillar consisted of the content of the law and the dominant legal ways of thinking. Llewellyn argued that the wording of the law is segregated according to specific categories and, in addition, that certain ways of legal reasoning and argumentation recur. Lawyers in the course of their professional life internalize both the content of law and the dominant manners of reasoning and argumentation. Thus, such content and manners of reasoning not only define the way in which lawyers act but also significantly reduce the available options. Therefore, the lawyers working within the same legal system will act in a similar manner and there will not be too far-reaching differences when dealing with similar issues. The second pillar supporting the concept of Llewellyn consisted in the professional culture of lawyers that Llewellyn described as "craft", i.e. the set of rules used by the profession: "do this and do not do that", which are internalized by those performing the profession in the course of their careers. The traditional court procedure and the methods of reasoning used in the legal expert opinions act just like those "craft rules" that govern the conduct of judges in a non-subjective way. Moreover, other individuals that act within the professional culture of judges, examine the opinions of judges on the ongoing basis. The same is done by other judges as well as law professors, students, other lawyers, etc. Readers - recipients of judicial opinions react in a positive way to the opinions that observe the norms and rules dominant among the lawyers and in the the negative way to those that diverge from the commonly accepted rules. This process of reading and responding to the opinions certainly serves maintaining the standard of the professional legal culture. Llewellyn solved the problem of subjectivity and views of judicial reasoning but did not solve the problem of lack of uniformity of judicial decisions - adjudications. However, the lack of uniformity is - according to Mautner - inevitable in any case. The culture is created by individuals, and that always means a range of options. Another American thinker, James Boyd White, also defined the law applied by the courts as a specific cultural system. In this approach, judging/adjudication is a process of a certain discourse that allows to clarify and explain the various normative options (whereas the opponent presents his or her own options). In this sense, the courts apply a "creative rhetoric" understood as a process of discourse, in which all arguments are presented and considered in the cultural context, and hence, the dispute leads to an acceptable solution. Such a procedure of reaching a legal decision is a collective process of building the community. However, the normative context of this type of decision requires a special discourse.

Finally, the most sociological model of the relationship between the law and culture is the approach of Pierre Bourdieu. It is based on three key terms - concepts: Habitus, Capital, and Field. The Habitus is a set of categories by which the individual perceives his or her situation in the context of everyday life. It is a structure of the mind on the one hand,

and the set of habits, expectations, and inclinations related to the individual on the other. It has its subjective and objective contexts and it is regarded as reliable and stable. Acting within the Habitus is characterized by simple reactivity and low reflectivity. The second category is the Capital. In this concept, as in the economical sciences, the individuals possess a variety of resources, which they must seek on the one hand and which are useful for achieving their objectives, e.g. power, position, etc., on the other hand. Therefore, they possess a certain capital: economic (such as cash, etc.), cultural (knowledge, skills), social (prestige, reputation, connections), symbolic (social recognition, respect due to the possession of other forms of capital). This forms of capital are interchangeable and transferable (e.g. the economic capital may be converted into the cultural and social one, and subsequently the cultural capital again to the economic one). The third category is the Field, i.e. the context within which the individual undertakes the activity. The aim is to gather social or other capital and "to achieve success in a specific field". This is the Habitus that defines the Fields in which the individual acts and the measures it considers worth applying. The nature of the Field is stable but hierarchical and when acting the individual must engage in two types of conflicts: external one to keep the Field and prevent its capture, and internal one to collect and distribute the Capital available in the Field.[21]

Analyzing legal culture as understood by Bordieu, Mautner shows that it works in a specific Field – the Legal Field. Essentially, lawyers share the same legal Habitus - it also distinguishes them from non-lawyers. That Habitus determines their forms and preferences of activity. Their conflicts include both the conflicts between lawyers representing clients, and in this way gathering the Capital, but also arguments between judges and law professors about different opinions and approaches. The concept of Beurdieu is interesting insofar as it was developed within the European legal system. Nevertheless, it is a concept of the legal culture treated as an integral part of the Pierre Bourdieu's concept of culture – it is in fact not an autonomous approach but more so a mutation of the general system with respect to the Legal Field.[22]

What is particularly striking in the attitude to the history of the numerous concepts of legal culture? It is the treatment of the historical phenomena not as an objective social, economic, or political reality, but as a certain intellectual construct that aims to "complete and justify the concept". This is a purely instrumental approach: the possible phenomena from the past serve to strengthen and justify the shape of the contemporary reflection. Obviously, it has nothing to do with any incorrect establishing of facts from the past, but it is about such matching of contexts and descriptions of the past that will provide an *a priori* documentation of the given thesis. Interestingly, this applies both to approaches that describe the legal culture as a predominantly historical phenomenon and to those that treat historical description as supplemental reasoning. This is also accompanied by far-reaching "presentism" as an attitude in the study of the phenomena from the past. Obviously, what is meant by far-reaching presentism is not of the magnitude that might be seen as a methodological error by historical sciences, but more so a careful search for the past equivalents of the contemporary social phenomena. It is difficult to think of describ-

[21] MAUTNER, M. Three approaches to Law and Culture. *Law Review.* 2011, Vol. 96, p. 860.
[22] Ibid., p. 866.

ing the phenomena from the past without the use of modern conceptual apparatus. It is obvious that there must be a descriptive language understandable to the recipient. However, extremely synthetic and abstract judgments relating to the past phenomena similar to culture - especially as the concept itself is extremely vague and ambiguous as it has been mentioned - can be misleading in the study and description of the legal culture insofar as one may combine events from the distant past with characteristics which they did not show or reconstruct facts that probably did not occur.

In view of the above considerations, the concept of legal culture from the perspective of legal and historical sciences should also be examined, in particular in the context of the approach to the Polish legal culture against the discussed background.

IV. THE LEGAL CULTURE AND THE HISTORY OF LAW – THE POLISH CASE

The first surprise could be the observation that, despite the enormous attention and emphasize on the importance of the German historical school in almost all textbooks on the history of law[23], none of them follows the reflection of the historical school. Analyzing and specifying the subject as well as the research scope of the history of law, in particular the history of Polish law presented in the most recent textbooks, it is emphasized that the history of law exceeds the purely normative level including its role in the history of culture[24]; nevertheless, a broader reflection on the culture of law as an independent and separate research subject of the historical sciences is missing. The literature raises the matters related to the transformation of law and its understanding. The issues concerning the social system as a base for the development of the state forms and the formation of law, and as a reference for the various legal institutions e.g. the principles of the marriage law are also described extensively, particularly by the books on the history of Polish state and law. Among the discussed topics are also those dealing with jurisprudence and legal professions; however, without any indication of the context of legal culture, which might be thus formed. Only the latest textbook by W. Uruszczak includes a separate chapter devoted to the culture of the law of the old Polish era.[25] It describes the characteristics of the historic Polish legal culture; yet, without an attempt at defining the very concept.

Moreover, in most textbooks on the history of law, the narrative essentially focuses not on different aspects of law and legal culture, but in a way naturally discusses mostly the formal acts – the historic sources of law (codified or later statutory). The only exception is the history of political and legal doctrines, which, however, results from the characteristics of the subject. Presenting the structure of courts and social system serves merely as an introduction to describing the law and its evolution, principally by showing the transformation of legal and political institutions; however, on the basis of the preserved historic sources of law – the formal legal acts. Remarks that could be applied to legal culture, such as attitudes toward the law, the wording and manner of reconstructing the content of the

[23] SÓJKA-ZIELIŃSKA, K. *Historia prawa.* Warsaw 1998, p. 249; PŁAZA, S. *Historia prawa w Polsce na tle porównawczym.* Krakow 2002, p. 44; OLSZEWSKI, H., ZMIERCZAK, M. *Historia doktryn politycznych i prawnych.* Poznań 1994, pp. 208–212.

[24] URUSZCZAK, W. *Historia państwa i prawa polskiego.* Warsaw 2010.

[25] URUSZCZAK, W. *Historia państwa i prawa polskiego.* Warsaw 2010, pp. 185–186.

preserved historic sources, are clearly of secondary importance. It is difficult to object against it – it results from the adopted and accepted methodological model of the historical and legal sciences. It should be noted, however, that this model is a kind of "historical positivism" – the observation of legal phenomena primarily from the same perspective as the nineteenth-century doctrine of positivism and legal formalism did: the history of law regarded primarily as the law contained in the books whereas the law contained in the books perceived as the most important source of law and jurisprudence. Certainly, this is an excellent model with regard to the period from the mid 1800s, when the assumptions of positivism and the great codifications actually tried to reduce the law in Europe, including Poland, to the formal acts of positive law. A different research approach that considers the legal culture as a separate subject of study and focuses on other aspects, e.g. the attitudes towards the law in the historic Republic of Poland is, however, present. For the sake of fairness, it should be noted that there were attempts before the war at tackling these problems within the scope of the history of law, see S. Estreicher.[26] Also, after the war, some scholars such as A. Vetulani[27], M. Sobolewski[28], S. Grodziski[29], or H. Olszewski were interested in the issue. More attention was paid to the political culture of the former nobility and the topic – very much related due to the form of the system – in a sense prevailed over the issues of legal culture.

The most recent work that extensively discusses the historic legal culture is the book by S. Grodziski.[30] The extensive introduction includes discussion on the phenomenon of legal culture and the term in itself. However, no attempt is made at coining a separate notion of legal culture within the research field of the legal history branches. The author uses the generally known definitions of K. Pałecki[31] and A. Podgórecki[32]. The paper, excellent in itself, aims at describing the evolution of legal culture on the former Polish territory and presenting its specific features such as the class character and the civic nature of the legal culture of the nobility. In the Polish legal literature, including in particular both the mere jurisprudence and, more broadly, social sciences as well as the history of law, the terms legal culture and lawyers' culture were used interchangeably until recently (as S. Estreicher and A. Vetulani did). The more recent generation of historians of law has predominantly supported the position that the lawyers' culture constitutes a part of the legal culture in a broader sense.[33] Lawyers' culture in this approach is a characteristic feature of the professional environment of lawyers as a professional group and concerns the manner in which judges, prosecutors, and attorneys-at-law perform their functions. In contrast, legal culture is defined as individual and collective attitudes towards the law that are present in the society – i.e. the broad understanding of law: as a source of normative regulation, the content of the specific legal norms delimiting the extent of freedom and prohibition,

[26] ESTREICHER, S. Kultura prawnicza w Polsce XVI. *Kultura staropolska*. 1932.
[27] VETULANI, A. *Z badań nad kulturą prawniczą w Polsce piastowskiej*. Wrocław-Warsaw-Krakow-Gdańsk 1976.
[28] SOBOLEWSKI, M. Polska kultura polityczna i prawna w dawnych wiekach. *CPH*. 1983, Vol. XXXV, No. 2.
[29] GRODZISKI, S. Z badań nad kulturą prawną Galicji. *Historyka*. 1979, Vol. IX, p. 127 ff.
[30] GRODZISKI, S. *Z dziejów staropolskiej kultury prawnej*. Krakow: Universitas, 2004.
[31] PAŁECKI, K. O pojęciu kultury prawne. *Państwo i Prawo*. 1974, No. 2, pp. 73–74.
[32] PODGÓRECKI, A. *Prestiż prawa*. Warszawa 1966, pp. 179–180.
[33] GRODZISKI, S. *Z dziejów staropolskiej kultury prawnej*. Krakow: Universitas, 2004, p. 10.

but also attitudes towards the state justice system and its institutions or, in broader terms, the state apparatus that is based on the law. Similar definitions describe the legal culture as "the entirety of symbolic legal actions of a community at a specific time" or "the entirety of practices and values related to acceptance, evaluation, criticism, and implementation of the legal system in force".[34] Studying legal culture in this sense is important for many areas of cognitive research – and for the history of law in particular. It is emphasised that this is interdisciplinary research in its nature, which allows the selection of different research methods, as well as taking a broader and comparative perspective. From the perspective of legal historical sciences, the research on legal culture carried out in the framework of the sociology of law allows presenting the process of acceptance of norms in a variety of environments and the arising of legal awareness. It provides the opportunity of studying the evolution of broader opinions related to legal institutions, and the development of social assessment processes, which influences the interactions within the society and the approach to the external environment, resulting in the formation of attitudes (including the ones such as: xenophobia, fanaticism, fundamentalism, intolerance, etc.). In contrast, studies of legal culture conducted from the perspective of the history of law - without formulating their own definitions, but using the methodology of the legal historical sciences – provide means to show the social perception of law in different eras, determine the conditions that favor the development of the legal system and its specific features in the past and the phenomena and factors that proved unfavourable to the development of the legal order. Regarding the legal culture from a historical perspective, in particular, allows the identification of three specific areas: the culture of shaping the law, the culture of applying the law, and the culture of observing the law.

From the perspective of the history of law, the culture of shaping the law includes an extremely wide range of phenomena from philosophy, through the political conditions of the state and social system, to religion and moral beliefs dominant in a given society. The compliance of the legislator's actions - intentional and conscious or intuitive – with the beliefs accepted by the society in the above areas affected the durability and assessment of the legislator's actions. It applies in particular to the assessment that was established as a role model by the historical sources. Legal historical studies show even a myth-making power of the social transfer of knowledge about the historic law (and thus the ideals and founding myths of the "legal culture" in individual countries emerged, such as: e.g. the Roman law with regard to many countries of the Western Europe, and the statutes of Casimir the Great in relation to the law of the old Republic of Poland or, more broadly, to the Polish legal culture). In a sense, the general "law of the old Poland" was at times presented in relation to the nineteenth-century social awareness on the former Polish territory or, more broadly, in the literary and historiographical sources of the Polish culture, almost as an image of the lost paradise, which, as it might be guessed, was far from reality. This myth-making role of the culture of law, especially in the context of its creation, is interesting in that the legal historical research does not confirm that the sources of the historic legislation, both Polish and other, demonstrated the extraordinary qualities that are attached to them in the common belief. For instance, the Roman law is such a multifaceted

[34] PODGÓRECKI, A. *Prestiż prawa*. Warszawa 1966, pp. 179–180.

phenomenon – shaped as a system of law in the historic Roman Empire for nearly 1000 years and then for the next 1500 years during the so-called reception of the Roman law in many Western European countries - that it may provide justification to different and even contradictory statements and concepts. Similarly the Statutes of Casimir the Great are an excellent, yet typical of the fourteenth century, attempt at codifying the common law in the Central Europe – which at the same time is not free from flaws and imperfections. A similar conclusion may be drawn with regard to the entire "old-Polish law". But it is not about the reality and the conformity with the facts, but about the myth of the "legislative perfection" preserved in the legal culture of a given community, which is also the "founding myth" of the legal system and culture. Among other characteristic elements of the culture of law formation - significantly different from the contemporary one – it is worth indicating a different attitude to the mechanism of law formation and to the sources of law that changed with time and societal transformations. Principally, until the eighteenth century, the monarch's power and its scope of competence was not considered in terms of separation of powers, in particular as set out by Montesquieu, whose concept of separation of powers changed the modern understanding of legislation and the rules of lawmaking quite thoroughly. Even if one accepts the implicit legislative competence of the crowned and sovereign monarch who acts autonomously or along with subjects representing certain social classes, this did not mean the acceptance of legislative interference in every aspect of the law. Where regulation referred to religious principles or where the "old custom of the ancestors" ruled, the admissibility of interference through legislation was extremely strictly limited and for a long period reduced to "codifying the eternal custom" (transition from the "pure" and non-codified common law to the codified common law) or to removing the contradictions in the existing common law or completing it. Also for a considerably long period, i.e. at least until the fifteenth century, in the event of a conflict between a rule contained in the codified law and practice of a given community, the priority of the law application was given to the non-codified yet *de facto* observed custom over its codified version. Moreover, the lack of clear separation of the legislative competence of various bodies from their other tasks meant that the legislation was extremely dispersed between various entities.[35] Since the competence to legislate constituted only a part of the general jurisdiction of an authority or body, the king or subsequently the parliament tended to be the lawmaker mainly in the field of land law that applied primarily to the distinguished class and political nation i.e. the nobility. At the same time, the municipal authority or, at times, the chief-owner of the city acted as the legislator for the townspeople and towns, while for the subjects of the noble, royal, or church estates, the legislator was often the owner-master of the village. Thus, the myth of the "Great Codifications" so strongly present e.g. in the current European legal culture is nothing new or extraordinary.

The culture of law application, if separated as it is done nowadays, included another fundamentally different realm. It began in determining the position of the law-maker and the attitude to law of the very legislator. A particular characteristic of the old-Polish legal culture, which was shared by few European countries until the eighteenth and nineteenth

[35] URUSZCZAK, W. *Historia państwa i prawa polskiego*. Warsaw 2010, pp. 156–182.

centuries, should be noted here - namely, the principle "lex est in Polonia rex" recognised from the sixteenth century, which applied even to the monarch - the legislator, and which meant that all entities, even the monarch himself, are bound by the properly established law. A vast majority of European countries with the absolute-state system referred to a different principle: "princeps legibus solutus", which allowed the monarch to legislate but put himself above the law.[36] Therefore, he was not bound by the law that he himself created – as a consequence, he could change and modify it - but he could also suspend its power with respect to certain individuals based on individual grace and privilege. Moreover, one of the most interesting research issues relating to a specific law is that of the culture of law application, primarily due to the dominance of the common law, often non-codified or codified only to a small extent, until the eighteenth century combined with a rather limited range of statutory law that was created by the legislator and the high level of illiteracy, which resulted in the fact that the everyday culture was one of the spoken and not of the written word. Although the constitution of the law by the legislator was known as a mechanism of law creation in Poland since the late Middle Ages, as it has been mentioned, and since then the written sources of law were used, the general codification of law and the belief that only statutory law is the law became common only in the nineteenth century. Thus, the modern "model of law application" related to the legal positivism and based on the interpretation i.e. exegesis of the content of a normative act may not be applied to a more remote past than the mid nineteenth century.

The culture of law observation understood as the respect towards legal norms and the relationship between legal norms with other systems of social life regulation is a field of research with the broadest perspective and at the same time one practiced not only by historians of law, but, in a broader sense, by the general historiography. While the creation or application of the law can often be considered a field of research particularly predestined for historians of law, it is difficult to imagine a historian interested in the political history or in social or economic life that would not refer to the sphere of law governing the discussed issue and to its perception. It is worth noting that the modern research conduced by historians - based on the analysis of less frequently used sources and taking into account other perspectives or research comparisons than the traditional historiography - refuted or verified many traditional myths preserved in the image of the old law or system. One of such contested myths is the perception of the law of the historic Polish Republic as an inefficient mechanism and one poorly fit to govern a modern state - especially with regard to the old-Polish parliamentary and self-government tradition allegedly dominated by an inefficient *Sejm*, paralyzed by *liberum veto* and the lack of efficient royal power or administration, which was apparently leading to a political disaster. It is emphasized that even if the image may be accepted, it is true only with respect to the late eighteenth century. Instead, forgetting that it had been an effective and efficient governance model for the precedent three hundred years distorts its correct perception. As a result, this image predominantly reflects the frustration of the nineteenth-century social elites of the former Polish territory that was preserved in the traditional historiography and culture rather than a fair description of the past phenomena. Similarly, the more recent re-

[36] SÓJKA-ZIELIŃSKA, K. *Historia prawa*. Warsaw 1998, p. 67.

search on the judicial law undermine the vision of the former Polish Republic as a lawless country with ineffective justice system due to lack of strong central government and lack of respect for the legal norms.[37] The characteristics that may be examined through historical sources of the old Polish legal culture include the specific features of certain elements of its origin. The first one is the clash of the local traditions with the Christian culture coming from the South and West that radiated to the North and East. This led to the development of an original form, which from the outset was different from most Western European countries, yet similar to other Central European ones. In its further development, its specific features arise that result from the functioning on the cultural and civilization frontier. In the first place, it was the border between the Latin – Catholic and Byzantine – Orthodox cultures, and further the exposure to the Islamic culture or paganism which maintained a strong position for a long time in this part of Europe. A third, extremely peculiar, factor was related to the two discussed above. The feudal system, very characteristic of the legal and social Western European model, reached the Polish territory considerably late and had a weak impact on the social structure. Apart from the present western Polish lands (i.e. generally speaking, Silesia and Pomerania), which since the thirteenth and fourteenth centuries belonged in various forms to the political framework of the Holy Empire and not to the Kingdom of Poland, the reception of the feudal law institutions was limited. For instance, the possession of the land by the nobility - the knights, that was absolutely essential for the social system was not based on the feudal system, but on the free ("allodial") ownership and direct dependence on the monarch. Similarly, the expansion of the monarchs' sovereignty to the east from the source area in which the state and legal system was formed, and towards the communities representing a different cultural and civilization environment inevitably led to an encounter with different models and to assuming many of them. The intertwining of these factors granted specific and distinctive features to the old-Polish legal culture already since the Middle Ages.[38]

One of the specific features that was revealed during the further development of the old-Polish legal culture was the process of making the class social system an exclusive one, in which the old-Polish legal culture gradually "became" a closed class culture restricted to merely one social class, i.e. the nobility. Solely this class, formed in the system of land law, retained a national and civil character. Paradoxically, the land law, which gradually became an exclusive class law of the nobility i.e., in the most optimistic scenario, it applied to 8-10% of the country population, was also a system in which the political and social system of the country was born. Legal culture of other classes lost its national and social status, becoming an increasingly local ("parish") culture without nationwide aspirations and impact. Its servility and specific passive attitude towards the orders received from the authorities who had the exclusive right to represent the public interests was combined with sabotaging of some of these orders that were perceived as detrimental to the fundamental interests and moral laws. The old Polish system of social classes manifested also other characteristic features compared to the Western European model. In addition to the

[37] GRODZISKI, S. *Z dziejów staropolskiej kultury prawnej*. Krakow: Universitas, 2004, p. 141 ff.; URUSZCZAK, W. *Historia państwa i prawa polskiego*. Warsaw 2010, p. 211 ff.

[38] BARDACH, J., LEŚNODORSKI, B., PIETRZAK, M. *Historia ustroju i prawa polskiego*. Warsaw: PWN, 1999, pp. 137–143, pp. 256–259; SCZANIECKI, M. *Powszechna historia państwa i prawa*. Warsaw: PWN, 1997, pp. 75–84.

strict emphasis on the distinct character of the nobility and building increasingly stronger formal barriers and the overriding principle of equality (*de facto* fictional for the most part), great importance was attached to the separate class identity of the townspeople and rural population. At the same time, participation in a specific "law" (legal system) and related privileges became the criterion of the class identity. Another interesting feature affecting the exclusiveness of the legal culture was the different origin and sources of each of these sub-systems: the land law was seen as the "original" one that was derived from the local common law. At the same time, the municipal law, although applied in the towns subject to the Polish king for centuries, was seen as foreign in terms of its origin (the Magdeburg or "German" law) as it was initially brought and applied as a charter by the settlers and immigrants of foreign origin. In many ways, the rural law was perceived similarly even though it was applied by the vast majority of the population. An extreme consequence of this approach was the virtual reduction of the old-Polish law and its history by the nineteenth-century history of law and historiography in general to the mere land law. The municipal law was long regarded as inferior and secondary due to its alleged "foreign" nature associated with its origin. At the same time, the study of the rural law and legal culture related to this part of the legal system encountered difficulties among others due to the state of the preserved sources as well as difficulties in presenting the old-Polish history as one referring to the state and social history represented by the nobility. This approach has been changing very slowly as the most recent research directions develop that take into consideration social classes other than the nobility.[39]

The fall of political independence is undoubtedly one of the crucial factors that influenced the history of the Polish legal culture. The historic Polish legal culture with its advantages and disadvantages was shaped within the state and legal system of the former Republic of Poland. The historic legal system of Poland was related to the state in which it was created and formed. Usually, the end of a state sooner or later means the end of the legal system connected with this state. Paradoxically, in many territories, the historic Polish legal system survived longer than the political existence of the former Republic. In the territories captured by Russia, the historic Polish legal system survived until the codification reforms of 1830–1840. The process of replacing the old law with new legislation in the remaining territories of the former Republic occurred faster – until the first decade of the nineteenth century. In case of the Polish legal culture, this was a dual process. On the one hand, it meant the replacement of the old-Polish legal system with a new one – in simple terms, Austrian, Prussian, or Russian as well as French respectively. On the other hand, it consisted in the replacement of the old-Polish legal system - which was not only conservative but also to a large extent based on common law whereas its codifications and statutes were archaic as well: for the most part they were edited in the sixteenth century (Lithuanian Statutes, Prussian Correction, etc.) - with a system reminding modern models of the contemporary systems of law, i.e. those based solely on the statutory law with codifications drafted according to the principles of the modern legislative technique. The Polish legal culture survived. With few exceptions, most historic sources of law and codifications were published in Polish, compliant to the requirements of the nineteenth-century

[39] PĘKSA, W. Polska kultura prawna. *Leksykon socjologii prawa.* Warsaw: C. H. Beck, 2013, p. 201 ff.

legislation. In addition, for the most part of the nineteenth century, justice administration institutions were operating with Polish as the official language (e.g. in the Congress Kingdom of Poland, the Free City of Krakow, and the Kingdom of Galicia and Lodomeria, i.e. the Cisleithanian part of the Austro-Hungarian Monarchy that enjoyed a considerable autonomy). Legal education in Polish was functioning as well. Moreover, the Polish legal language and legal literature in the national language as well as customs developed - phenomena of importance to the legal culture. A very distinctive and unusual feature of this nineteenth-century Polish legal culture was a kind of "domestication" and assumption of the French civil legislation of the Napoleonic period. After the loss of autonomy and relative independence of the Kingdom of Poland, the French law, adopted in the Duchy of Warsaw, translated and applied in Polish, in a symbolic way expressed the distinctness of the Polish lands from the rest of the Russian Empire until 1918. In addition, according to the contemporary jurisprudence, it represented a higher level than the Russian codification attempts in the nineteenth century. Therefore, efforts were taken to maintain it in force also as a monument of the Napoleonic era, a peculiar cause of pride, and a way to maintain the connection with the French legal culture. Great codifications implemented on the Polish territory in the nineteenth century and further legislation constituted also an important vehicle of social change with regard to the law - such as introducing the principle of formal equality before the law, general codification, the subsequent constitutional system of government, legalism of the operation of public authorities, the modern judiciary, etc. As a consequence, at the outset of independence in the early 1900s, the system was regarded as the Poland's own and binding legislation that laid the foundations for the Polish legal culture. Another breakthrough, i.e. the creation of an independent state, was undoubtedly important and it contributed to the reconstruction of a fully separate and distinct Polish legal culture in the new, reborn Republic of Poland. But it was not a revolutionary change. On the one hand, the Polish legal culture was restored as a legal culture associated with the state and Polish national legal system while remaining a fully European legal culture. It resulted both from maintaining thriving relationships with the Western European countries and the knowledge of the changes that occurred in their legal systems, and, primarily, from the codification that remained unfinished until 1939 as well as the unification of the legal system. The work of the Codification Committee appointed by the state authorities disseminated the achievements of the European legal culture while implementing many of its elements in Poland. On the other hand, the legal order in force on the Polish lands until 1946 was based on the legislation constituting the major historic sources of the European law. The importance and impact on the European legal culture of the Napoleonic Civil Code (Code Civil), BGB (Buergelische Gesetzbuch), or ABGB (Allgemeine Buergelische Gesetzbuch), in force until 1946 in Poland, was not limited to the countries in which they were issued. The work on the unification and full codification of law for the Polish state in its new borders is attributable already to the period after 1945. This date also launches a new chapter in the history of the Polish legal culture. This chapter remains open. Even though the change of 1989 brought about a new quality, the premise of continuation and continuity of the legal system of the era preceding the turn was assumed.

V. CONCLUSION

The concept of a division within the legal sciences (or jurisprudence) was established in the very traditional way – and it may be a subject of a criticism[40]. The legal history approach to the description of the chronology of the transformation of legal systems, legal institutions, laws, legal traditions and so on, is a descriptive presentation of how the legal phenomena was changing over time. The legal history is focused on the explaining of the origin and effect of single events and wider processes, as well as on the development and transformation of legal institutions and social order. We argue that sociology of law is blind without legal history, on one hand, and the legal history investigations are simply useless without a socio-legal research, on the other hand. It is known that our organization of social order is - at least to some extent - the consequence of our systematic knowledge about human behavior. It is subsequently describe on the basis of a number of types of knowledge including historical research. All people live in social order, but the shape and structure of that order is a consequence of what we know about them.[41] The knowledge of the functioning of a man in his social environment only in the present time is inadequate. There is a need to take into account what has already happened, and how it has evolved through the centuries. Sociologist are disappointed that not only more or less amorphous vision of social reform, but also systematically collected data are ignored - like the experience of Plato, who - as a philosopher and a political schemer - was twice expelled from Syracuse. Widely propagated "platitudes" are used only to legitimize the political decisions - they are not rooted in systematic knowledge gathered by sociologists. The legal historians, in turn, often make the mistake of purely formal approach to the historical sources, without considering the constantly changing social context. And without taking on account the differences in the social order changing throughout the ages - in particular without consideration how the attitude towards the legal system and social order has been change in modern society in the last two centuries. As the result, similar concepts - the concept of "legal culture" is a good example - are used in different contexts of meaning in different disciplines of the legal science.

Moreover a knowledge accumulated by different disciples of the legal science and jurisprudence - as the sociology of law as the legal history - could be a useful instrument of government policy. For example this knowledge gives legislator (lawmaker) the instruments of a proper preparation of legislation. However, it is necessary to take into account a variety of contexts and circumstances - including those associated with the field of interest of different disciplines of the legal science.

[40] In the same way PODGÓRECKI, A. *Sociology of law,* PW "Wiedza Powszechna", Warszawa 1962, p. 190.

[41] In the same way FRIESKE, K. *Nauki społeczne w służbie spraw publicznych – polskie tradycje (Social science in the service of public affairs – Polish traditions),* p. 10. Online 22. 08. 2016 [2016-08-22] Available at: https://www.parp.gov.pl/files/74/81/194/4981.pdf.

HOW FACTS BECOME NORMS (PART I)

Marek Káčer*

Abstract: *I argue that it is possible to derive norms from facts. First of all, I refute the suggestion (shared by external moral realists and social scientists) that there are no norms but only facts, and consequently the derivation is of no scientific interest. In the second step, I will focus on theories which proclaim that norms can be derived only from specially qualified facts, e.g. institutional facts. I maintain that these theories are tenable only under condition that the special qualifier of norm-producing facts can be described in non-normative terms and I suggest that this condition is met when the qualifier is described as "permanent human behaviour".*

Keywords: *bifurcation thesis, external moral realism, social science account of normativity, institutional facts, is/ought problem*

INTRODUCTION

In my article, which is divided into two separate parts, I will try to find an excuse for breaking Hume's law. This law states that norms cannot be derived *directly* from facts; that "the ought" cannot be grounded *solely* on "the is". According to this law it is invalid to think, for example, that a three month old foetus deserves the right to live *just because* its neural system starts to sense pain; it is invalid to claim that we ought to help needy humans *just because* from the evolutional point of view it is the best strategy to win the struggle with nonhuman species. To think the opposite way demonstrates how easy it is to break Hume's law. And how hard it is to find a relevant excuse for it.

In the analytic writings from the 20th century to date there have been many attempts to show that Hume's law is not sacrosanct. The first way to do this is to adopt a perspective from which Hume's law can be *reasonably* ignored. This is the stance of those authors who refuse the dualism between "is" and "ought" because they believe that there is only one world which we can reasonably presume exists or which is susceptible to our investigation, namely: the world of facts. From this monistic perspective the notion of the world as it ought to be is at best a theoretical hypothesis which is not necessary for explaining how things actually go on in the world as it is. Purely factual approaches to normativity may vary. For example Stephen Turner maintains that talk about normativity can be reduced to talk about subjective attitudes of particular people. On the other hand Michael Moore insists that normativity, or rather morality, can be explained by reference to objective moral facts which exist independently of human consciousness. In either of these theories the concept of ought is redundant and therefore the problem of transition from facts to norms does not actually appear as a problem. In this article I argue that Turner and Moore are both mistaken when they do not take Hume's law seriously, but nevertheless that in his account of normativity Turner is closer to the truth than Moore, since his theory does not impose on participants in normative practice any unnecessary ontological presuppositions.

* Mgr. Marek Káčer, Ph.D., The Faculty of Law, Trnava University in Trnava, Slovak Republic

Another strategy to cope with Hume's law is to play hide-and-seek. This game usually takes the form of inferential reasoning in which a *specially qualified* fact is posited as the first premise and after a few reasoning steps a norm suddenly pops up as a perfectly valid conclusion. Perhaps the most famous demonstration of this strategy is John Searle's inference of a norm "Jones ought to pay Smith five dollars" from the institutional fact "Jones uttered the words I hereby promise to pay you, Smith, five dollars". Since the meaning of "institutional fact" is usually associated with a normative core, in his demonstration Searle committed *petitio principii*. Although many authors have detected this fallacy, the hide-and-seek strategy goes on. As an example let me use Dennis Patterson's solution of the is/ought problem with special regard to legal practice. Patterson suggests we should look at the factual process of training in rule-following where we will observe that in order to reach the normativity of law, lawyers must learn special "forms of argumentation". Only after successful internalisation of these forms can lawyers show which of their assertions are correct and which incorrect. Again we have here a specially qualified fact from which it is easy to derive a norm, and again we can be reasonably suspicious whether the supposed special qualifier rests solely in its hidden normative core.

What do "institutional fact" and "form of argumentation" have in common? It can be said that the latter is just a special instantiation of the former, but as long as we do not explain what it means for a fact to be "institutionalized" in a non-normative way, it does not help us in solving our problem. In order to eschew recourse to normativity I propose that the specific feature of "institutional facts" is that they are *permanent human behaviour*. This assumption can serve us as a starting point in building a special dispositional theory which shows us how permanent human behaviour can bear upon our normative attitudes. More than a century ago Georg Jellinek noticed that human beings have an inborn disposition to shape their norms according to permanent factual conditions in which they happen to live and he called it the "normative power of facticity" (*"normative Kraft des Faktischen"*). I will try to support his observation by exploiting Leon Festinger's theory of cognitive dissonance, which is regarded as a general theory of attitude change. According to Festinger when an individual experiences a conflict between her (normative) attitudes and her behaviour she can resolve it not only by changing the latter, but also by changing the former. To be a bit more specific: if I participate in a social practice which is contrary to my normative attitudes and with time (and with my active or passive support) this practice gets stable, I can resolve the apparent inner conflict not only by changing my behaviour, but also by changing my normative attitudes. I make "the ought" consonant with my behaviour and apparently also with the behaviour of others. The theory of cognitive dissonance can be used as an explanatory device for solving the is/ought problem, and I think that this device is just what Searle's and Patterson's accounts of the issue were lacking.

I am well aware that my excuse for breaking Hume's law is a bit controversial. The reader may reasonably ask me in what way my proposal is different from that of subjectivists like Stephen Turner, who denies that there is any genuine ought. I suggest that the understanding of normativity does not need to be confined to representational semantics. The meaning of an ought-term capable of justifying human behaviour rests in a series of the term's applications. To understand what an ought-term means is to understand the practical consequences it *usually* leads to and hence the crucial point in ensuring the term's objectivity does not rest in its reference to some object outside our language but rather in social

acceptance of inferences drawn from it. However I do not think that in order to keep this kind of objectivity of ought-talk it is necessary to be "committed" or "entitled" to socially settled inferences. The ought-objectivity is not necessarily a matter of commitment but rather a matter of consistency and not only consistency of what we say but also consistency between what we say and what we do. To be true when saying how we ought to behave is *prima facie* simple – we just need to behave like we say we ought to behave.

To sum up, the brief line of my inquiry is dictated by the following questions: I.1)[1] *The is/ought problem*: What kind of inference does Hume's law forbid us to make? Is every attempt to explain normativity by reference to facts doomed to be fallacious? I.2) *The subject/object problem*: If we accept that normativity can be reduced to facts, then what kind of facts should we rely on? Do ought-terms represent some objective reality or do they represent just our subjective attitudes? I.3) *Hide-and-seek*: If we accept that there is an extraordinary property which enables some facts to produce norms, then is it possible to describe this property in non-normative terms? II.1) *Normative power of facticity*: If it is possible to describe the norm-producing power of facts in non-normative terms, then can we explain this power by reference to some dispositional theory? II.2) *The truth of the ought*: If we accept that we have some disposition to shape norms according to certain facts, then is there any room left for the objectivity of ought-talk?

1. THE IS/OUGHT PROBLEM

David Hume himself:

> "In every system of morality which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not."[2]

Hume is surprised at how easily moralists of all sorts draw normative conclusions from purely factual (or metaphysical) premises. The source of his curiosity rests in the presupposition that there must be some difference between is-sentences and ought-sentences. Is-sentences are designed to have declarative use; people who use them have an ambition to say something about the real world, about matters of fact. On the other hand, ought-sentences are generally used for expression of commitments, for guiding human behaviour in order to be in conformity with some kind of ideal. So between these two kinds of sentences there is a difference at the level of their pragmatic function as well as their meaning[3] and it is not *prima facie* evident whether this can be bridged without making some logical fallacy.

[1] The Roman numeral indicates the part of my article, while the Arabic numeral indicates the section of the respective article part.
[2] HUME, D. *A Treatise of Human Nature.* 2nd Vol. London: Dent & Sons, 1962, pp. 177–178.

If there is any such bifurcation between the representational and expressive functions of language, then we should have a criterion for answering which one of these functions has been used in a particular case. A relevant candidate for this criterion is the standard "direction of fit" test. If we utter a normative claim we get the world to match our words; if we utter a declarative claim, we get our words to match the world.[4] This test relies on the underlying language pragmatics: in the former case the correction of facts in order to be in conformity with a normative claim is contingent on the author's effort to enforce the norm expressed. In the latter case the correction of a declarative claim in order to be in conformity with facts is contingent on the author's effort to seek and preserve the truth. Now how should we understand Hume's law, if we take the direction of fit criterion to be reliable? Is Hume suggesting that is-sentences should be completely ruled out from the domain of moral discourse? Well, it depends on what we mean by "moral discourse".

Even Hume himself was not reluctant to talk *about* morals in a declarative mode. Although he admits that there is no objective matter of fact which we call "vice", he nevertheless concludes that if we turn our reflection into our own breasts, we will find a sentiment of disapprobation. This sentiment is likewise "a matter of fact" though susceptible to our feeling, not to our reason.[5] There is no doubt that this claim by Hume is meant to be declarative because its direction of fit is aimed at getting words to match the world. If Hume by chance discovered that the world consists also of objective moral facts, then he would need to change his sentimentalistic foundations of morals for an account which would better fit this new factual finding. So then how can we explain that by positing his moral sentimentalism Hume did not commit the same fallacy he dissuaded other writers from committing? It is because his declarative claim was *"about"*, and not *"of"*, morals. He engaged in *explaining* how morality works in the world that is, not in *justifying* how we ought to behave. If Hume by chance insisted that we ought to behave according to our inner feeling of dis/approbation he would certainly contradict himself. He would have made the mistake which during the 20th century came to be known as the "naturalistic fallacy".[6]

The naturalistic fallacy is widespread even these days, especially in the domain of evolutionary moral psychology and neuroscience. For example, William Casebeer depicts the project of naturalized ethics as a discipline which aims to show us "that norms are natural,

[3] Many philosophers of the 20th century acknowledged "the bifurcation thesis", which claims that language has two different functions: we can either use it as a representation of the external world or as an expression of our internal attitudes. For a current discussion of this topic see for example PRICE, H. et al. *Expressivism, Pragmatism and Representationalism.* Cambridge: Cambridge University Press, 2013. Trivial but evident illustration of mutual interdependence of pragmatics ("function") and semantics ("meaning") of our utterances is offered by Weinberger. Let us presuppose that we have contradiction in two propositions p and $\neg p$. If the pragmatic function of two utterances with propositional content p and $\neg p$ was irrelevant to the meaning of p and $\neg p$ then we would have to conclude that there is also contradiction between two permissions Pp and P$\neg p$ or between two questions ?p and ?$\neg p$ which is apparently not the case. WEINBERGER, O. *Alternativní teorie jednání.* Praha: Filosofia, 1997, p. 26.

[4] See SEARLE, J. R. A Classification of Illocutionary Acts. *Language in Society.* 1976, Vol. 5, No. 1, pp. 1–23; ANSCOMBE, G. E. M. *Intention.* 2nd ed. London: Harvard University Press, 2000, p. 56 and ENG, S. *Analysis of Dis/agreement with Particular Reference to Law and Legal Theory.* Dordrecht: Kluwer, 2003, p. 304.

[5] HUME, D. *A Treatise of Human Nature.* 2nd vol. London: Dent & Sons, 1962, p. 177.

[6] See MOORE, G. E. *Principia Ethica.* revised ed. Cambridge: Cambridge University Press, 2000, p. 62 ff.

and that they arise from and are justified by purely natural processes".[7] As an example of such a *justification* Casebeer suggests that the plausibility of the Aristotelian virtue theory of ethics may be directly founded on the findings of neurobiology.[8] Following the same footsteps Alex Walter is pretty confident about the prospects of the evolutionary account of morality, and he encourages his colleagues not to be afraid of any Hume's law. Walter makes an appeal to something like "scientific common sense", which excludes from scientific scrutiny everything that is behind nature:

> "I believe that once evolutionists understand that proponents of the naturalistic fallacy are committed to ethical objectivism – which entails that values are supernatural facts, they will have no more fear of the ethical relevance of brute facts than they fear that creationists will successfully argue that the universe was created by divine providence."[9]

Without any reference to available sources Walter submits that Hume was not only describing how people based their morals on their sentiments, but also that he was prescribing that moral sentiments *were* good as well. Walter concludes that "if contemporary evolutionary scholars are hesitant to take that last step, they obviously cannot cite Hume's 'law' as the obstacle".[10]

What would be the proper Humean reaction to this suggestion? Let us suppose that from among all the ethical theories which have been hitherto invented (or just "found") there is one which is in best accord with the up-to-date findings of the natural or social sciences. Now, what would make us think that the criterion of concordance with nature or society should guide us in solving our every moral dilemma? Is it nature or society itself? I am not asking these questions from the position of a sapping sceptic but from that of a worried citizen who knows that the knowledge of science has been misused many times in history for justifying "wrongdoing", whereby I mean "wrongdoing" from my personal moral point of view.

This rejoinder shows us how important it is to keep the representational function of ought-language apart from its expressive function. The question "What part of the factual world do our moral claims represent?" leads to a different answer from the question "What do we do by using our moral claims?" In the former instance we are looking for connections between our words and our world and we are doing it because we want to explain our behaviour by reference to its causes. In the latter instance we are looking for connections between our words and our behaviour and we are doing it because we want to justify that behaviour by inference from some presupposed reasons. Before we proceed to the question whether there is any contact place between the causes and reasons of our be-

[7] CASEBEER,W. Moral Cognition and its Neural Constituents. *Nature Reviews Neuroscience*. 2003, Vol. 4, p. 843.
[8] Ibid., p. 845.
[9] WALTER, A. The Anti-naturalistic Fallacy: Evolutionary Moral Psychology and the Insistence of Brute Facts. *Evolutionary Psychology*. 2006, Vol. 4, p. 34.
[10] Ibid., p. 39. For a more modest evolutionist account of morality see GREENE, J. From Neural Is to Moral Ought : What are the Moral Implications of Neuroscientific Moral psychology? *Nature Reviews Neuroscience*. 2003, Vol. 4, pp. 847–850.

haviour, we will discuss a proposition according to which we do not need to look for this place because there are only causes and no reasons; there are only facts and no norms.

2. THE SUBJECT/OBJECT PROBLEM

We can solve the is/ought problem by claiming that there is no "ought". Even the avoidance of a problem can be deemed as its solution if it is well grounded. So upon what ground can we reasonably insist that there is no normativity at all? The common-sense starting point is that we cannot touch it or smell it like we are used to doing with regard to natural phenomena. The factualist (or naturalist) reductionism stems from the presupposition that our words have their meaning in so far as we are able to pick up a piece of our world which these words represent.[11] While it is certainly true that we are not able to back up all our is-sentences by our immediate observation, nevertheless we use them because we believe that this back-up is essentially possible; maybe only after making a few inferential steps back to some "protocol sentence", maybe only under special laboratory conditions, but still we believe that in the world of facts there must be some truth-maker which gives our is-sentences a meaning. On the other hand ought-sentences are essentially counterfactual; they are supposed to hold even against the factual state of affairs. Moreover, they have an inherently reason-giving nature, so an object which they potentially represent would be, in comparison with objects of natural sciences, simply "queer".[12] Why not to try to eliminate "the ought" from our vocabulary before we consider bifurcating our semantics?

So what does the bit of the is-world look like, which is supposed to be represented by our normative terminology, for example by "wrongness"? There are two basic approaches to answering this question. Either we conceive "wrongness" as a representation of some objective property of things as they are or we conceive it as a representation of some subjective attitude of people who think that something is wrong. The former approach is a basic presupposition of moral realism and here I will call it "normative objectivism", while the latter approach is a basic presupposition of the social science account of normativity and I will call it "normative subjectivism". Let us start with normative objectivism in the version of Michael S. Moore.

According to Moore the realist thesis that a mind-independent moral reality exists "makes better sense of the experience of us most of the time".[13] So the thesis that moral entities or qualities such as rights, justice or culpability are somehow built into natural phenomena is supposed to serve as the best scientific explanation of our ordinary moral practice.[14] For demonstration of this thesis Moore uses Harman's example of two young boys pouring gasoline on a cat and setting it afire. Observing this state of factual affairs we come to the conclusion that the children are doing "wrong". According to the realist account the wrongness of voluntary cat-burning is an objective moral fact which causes

[11] PRICE, H. et al. *Expressivism, Pragmatism and Representationalism*. Cambridge: Cambridge University Press, 2013, p. 9.
[12] MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, p. 38 ff.
[13] MOORE, M. S. Moral Reality Revisited. *Michigan Law Review*. 1992, Vol. 90, No. 8, p. 2472.
[14] Ibid., p. 2492.

corresponding moral belief in the human mind. The connection between our observation of the boys' behaviour and our belief that something wrong is happening is mediated through several causally dependent sets of beliefs:

> "The wrongness of the boys' act lies in the facts that it was voluntary, unjustified, and causative of a bad state of affairs; that it was voluntary, unjustified, and causally relevant lies in the facts about its volitional character, its failure to cause beneficial effects, and its actual causation of harmful effects; the truth of the last of these facts lies in the fact that the cat did suffer and did die."[15]

According to Moore wrongness *supervenes* on nonmoral qualities like suffering; this means that wrongness depends like other moral properties "on natural properties in the sense that the moral properties of a thing cannot change without some change in the natural properties possessed by a thing".[16] The supervenience creates a token-identity between moral property instances and natural property instances and it does not require us to have any special moral sense organ to detect it. So a Moorean realist claims that there is only one realm, the realm of facts, in which moral properties supervene on nonmoral properties and in which we can perceive the former exactly in the same way as we perceive the latter, i.e. by our normal five sense organs.[17] Since Moore denies that the recognition of moral qualities necessarily motivates people to behave morally (the externalist realism), in his account of morality he does not bother himself with "the ought", with the prescriptivity of morals. For him it is just an "extra feature" of moral terms which is not a part of their meaning.[18]

In apparent contrast to this Moorean realism is normative subjectivism, which claims that normativity is best reduced to the subjective attitudes of particular people. Stephen Turner dives into the controversy over the nature of normativity by introducing two competing explanations of "the ought". According to *normativism* "the ought" cannot be reduced to the social facts about what people do or say or what they believe in: "The mere sociological fact that people believe a given practice to be obligatory does not make it so".[19] According to Turner normativists claim that "the genuine ought" has a privileged position in the description of our normative practice;[20] this means that for the accurate picture of normativity it is necessary to use concepts like meaning, obligation, or reason.[21] In opposition to the normativism Turner himself champions the *social science account* of "the ought" which relies purely on empirical (non-normative) facts about normativity. According to this view a normative practice can be understood in wholly empirical terms; we do not need to know what the ought is, we just need to know what particular people believe the ought is. Turner claims that "every time something goes on normatively, something

[15] Ibid,, p. 2515.
[16] Ibid., p. 2516.
[17] Ibid., pp. 2517–2519.
[18] Ibid., p. 2473, p. 2524.
[19] TURNER, S. P. *Explaining the Normative*. Cambridge: Polity Press, 2010, p. 5.
[20] Ibid., p. 21 ff.
[21] Ibid., p. 12.

also goes on causally" and he supports this with the observation that everything normative needs to be learned; that means that the ought consists in "learnables" which are part of the ordinary empirical world.[22] From this Turner does not hesitate to draw the following implications:

> "Learning is a causal process – even for the learning of false beliefs. Normative inferential relations, as they are actually operative in the social world, are redescriptions of, or idealizations of, causal processes. At no point is a special new normative fact inserted into the relevant processes. The same facts are redescribed in normative terms. These terms have no special privilege. They do not correspond to an essence. There is a non-normativist alternative description at every step."[23]

In explaining the trivial fact that people understand each other when they are talking about their obligations, instead of normative terms like rationality and correctness Turner suggests using empirical terms like empathy and feedback. He thinks that normative terminology can do its job only as a transcendental presupposition which may or may not be true. On the other hand empathy and feedback do the proper explanatory work because they are upshots of natural processes; they are facts of social theory and of neuroscience, and through them we can get to what is *evident* to everyone, and hence to the only empirically accessible objectivity of ought.[24]

For some readers it might seem strange to put Michael Moore and Stephen Turner next to each other as authors of mutually competing conceptions of normativity. First of all, they share the view that there is no normativity at all; according to both of them, there is only the world of facts and that is all we need to explain our talk about "wrongdoing", "correctness", "rights", "obligations" and the like. Moore and Turner agree with each other in one fundamental presupposition: our normative language is essentially representational; our normative terms are designed and used in order to grasp some part factual reality. But which part of factual reality do we grasp with these terms? Just this is the point where Moore and Turner diverge. According to Moore moral talk represents mind-independent objects, the alleged moral factual properties which supervene on non-moral factual properties, while according to Turner moral talk represents social science facts about actually held attitudes of people who understand each other by employing their empathy and by responding to their mutual feedback.

In a sense, both of the authors take an externalist approach to normativity. Externalists are spectators of, not participants in, normative practice. Their ultimate goal is to give us reports on how normativity works, not to give us recommendations or orders how we ought to behave. This does not mean that externalists do not take notice of what participants in normative practice think they are doing when they participate. Externalists try to understand the practice of normative justification but without letting themselves engage in the justification itself. At this point I would dare to make a conjecture according

[22] Ibid., p. 40.
[23] Ibid., p. 147.
[24] Ibid., p. 178, pp. 191–205.

to which Turner's account of normativity is much more suitable for scientific fructification than Moore's one.

First of all, although Moore wants to make better sense of our moral practice, he does not accept any invitation to discuss the motivational force of the moral facts he envisages in his theory. Moore chose this position perhaps because he wanted to avoid encountering John Mackie's "argument from queerness" according to which if there were any facts with justificatory or motivational force, they would be very queer, "utterly different from anything else in the universe".[25] Unlucky for him, when Moore cut off the motivational force from the moral facts, he unwittingly undermined the realist ambition to put morality on rock solid ground. Jeffrey Goldsworthy explains this paradox as follows:

> "An externalist moral realist could intelligibly be an amoralist who accepts both that moral properties exist, and that this logically entails that "objective" reasons for action also exist, but who nevertheless denies that those reasons have any practical relevance and therefore ignores them."[26]

Goldsworthy concludes that if we want to take our morality practically, like for example when we want to reach a decision whether to torture or to release a cat, then we need to look for subjective rather than objective reasons for action: "This is because we want to act for the best reasons we can find, and that is possible only in the case of reasons which can motivate us to act".[27]

In comparison with the externalist moral realism the social science account of normativity is much more open to the ought-pragmatics. Inasmuch as actual attitude-holders by and large follow their normative attitudes, there is no theoretical difficulty in admitting that facts (actual holding of normative attitudes) exercise motivational force on people (attitude-holders).

Moreover, the social science account of normativity may enjoy the luxury of avoiding the contentious debate between moral cognitivists and moral non-cognitivists, because social scientists are not committed to exploring whether actually-held normative attitudes are in fact beliefs or desires or something between them. Social scientists may take a cautious stance, admitting that they do not know for sure if there is any ought in itself. What they know for sure is that there is ought in the minds (and acts) of actual people. Why should they bother with the question of what nature the supposed objective ought would be, if they do not need it to carry out their explanatory enterprise? Regarding the belief/desire distinction there is only one important thing for social science: ought in the form of actually-held attitudes is an object of factual beliefs, not of desires, and these beliefs are backed up by observation of ordinary social practice.

I assume that the main virtue of the social science account of normativity is precisely this strict reliance on observable social facts. Unlike Moorean moral facts, social facts about what people do and say are evident, or at least more evident, in the sense that in

[25] MACKIE, J. *Ethics: Inventing Right and Wrong.* New York: Penguin, 1977, p. 38.
[26] GOLDSWORTHY, J. Some Scepticism about Moral Realism. *Law and Philosophy.* 1995, Vol. 14, No. 3/4, p. 367.
[27] Ibid., p. 368.

acknowledging their existence we do not have to rely on quite controversial ontological presuppositions. Indeed, the theory according to which moral beliefs are results of ordinary sensual perception of moral facts is, at its best, only a provocative hypothesis which contradicts to a quite frequent observation that people who agree on what state of affairs factually happened (e.g. Mary underwent an abortion) disagree on how this state of affairs should be morally judged (Mary did/did not commit a murder).

But to subscribe to the representationalist semantics of social sciences does not entail claiming that this semantics is the only possible way to approach the ought. It is simply not true that *all* we can do with the ought is just its "explanation", because what we usually do with the ought is "justification". The ought is not only an object of scientific inquiry, but also a source of reasons for our action. The social science view of normativity is not controversial (I myself will take it up in II.1), except assuming that this view is the only one (I will try to refute this assumption in section II.2) But before I proceed to elaborate these issues let me look at another theoretical strategy to solve the is/ought problem.

3. HIDE-AND-SEEK

Some authors think that if we cannot infer norms from facts in general, maybe we can do it at least in very special cases. But what special cases? If we wanted to proceed this way we would need to bifurcate the whole set of facts into two subsets – ordinary facts and extraordinary facts – and claim that norms can be inferred only from one of them, the "special" one. The principal objection to this method comes from the suspicion that behind the supposed extraordinary property of certain facts there might be concealed some normative component and in that case the inference of norms from these "facts" would suffer from *petitio principii*. At first glance the "extraordinary facts strategy" might resemble a game of hide-and-seek: a norm hides behind an extraordinary fact, smuggles itself into a crowd of ordinary facts waiting to be discovered, and we, in an urge to validate the suspicion just mentioned, have to seek it out. At very least I assume that this strategy can show us the way out; all we need is just to take extra care to demonstrate that the supposed extraordinary property of certain facts is delimited solely in non-normative terms.

By way of illustration, perhaps I can start with an interesting suggestion by Bebhinn Donnelly.[28] Donnelly finds implicit awareness of the is/ought problem as well as attempts to solve it already in traditional natural law theory. According to him the "oughts" of traditional natural law were somehow built into nature, and the task of natural lawyers was to find them. If they wanted to succeed, they would have to find and pick out only those parts of the natural world behind which some normative core was hidden. Among these parts classical natural lawyers counted the essentials of our natural conditions of life, such as existence, communality and reason. Donnelly depicts the view of traditional natural lawyers like this:

[28] DONNELLY, B. The Epistemic Connection between Nature and Value in New and Traditional Natural Law Theory. *Law and Philosophy.* 2006, Vol. 25, No. 1, p. 4.

> "The moral ought can be derived from the is of theoretical truth simply because good consists in that, same, is; the essential is's embody moral norms for they are, at its foundation, what morality is. For this same reason Aquinas' principles of practical reason whilst normative are reducible to a definition of the human self, an existing, rational, communal, animal."[29]

So the way we, humans, happen to exist, determines the content of law which guides our behaviour. Of course, not all parts of our ordinary life create the content of our natural law, but only those which can be deemed to be our "essentials". So we have here ordinary facts about human nature, but we have here also essential facts about our nature and just these latter ones are specially qualified to produce the only universally valid and ever-lasting ought. But what would make us think that certain facts about human nature are not "essential" only because of the normative core which is possibly hidden behind them? How can we exclude the possibility that classical natural lawyers did not want to make us play their hide-and-seek game?

We could ask similar questions of Dennis Patterson. He insists that the problem of normativity is not related to mind, but to action.[30] Inspired by Wittgenstein he suggests that the key to normativity is to be found in the causal process of training rule-following. Why is this training crucial for explaining normativity? Patterson thinks that rule-following is based on a special kind of social agreement; agreement understood as a "regularity in reaction to use", as "harmony in application over time".[31] With specific regard to normativity in law, Patterson suggests that this regularity and harmony can be sustained by training "forms of legal argument":

> "The forms of argument are the ways in which we make meaning with rules (or do meaningful things with rules). The forms of argument make it possible for us to engage in the myriad activities we call "law" (e.g. arguing, asserting, deciding). The forms are the very thing that gives law its normativity, for they enable us to show how assertions are correct and incorrect, true and false. The forms are the grammar of law."[32]

Patterson concludes that legal norms are objective "to the degree the forms of argument continue to be recognized as legitimate forms of legal justification".[33] As was the case with "essential human nature", here too we can ponder why the "forms of legal argument" are so specific that they produce genuine normative standards. Patterson draws our attention to ordinary training in rule-following, but how can we be so sure that we usually train just the right pattern of conduct? Indeed, it might be possible that we train those patterns of conduct which only our trainers deem to be right, but which are nevertheless wrong.[34]

---

[29] Ibid., p. 17.
[30] PATTERSON, D. Normativity and Objectivity in Law. *William and Mary Law Review*. 2001, Vol. 43, No. 1, p. 328.
[31] Ibid., p. 348.
[32] Ibid., p. 355.
[33] Ibid., p. 356.
[34] Cf. TURNER, S. P. *Explaining the Normative*. Cambridge: Polity Press, 2010, p. 25.

One of the most famous applications of the hide-and-seek strategy is John Searle's distinction between "brute facts" and "institutional facts". Searle suggests that it is perfectly intelligible to derive a sentence "Jones ought to pay Smith five dollars." from the sentence "Jones uttered the words I hereby promise to pay you, Smith, five dollars. ".[35] Searle explains the possibility of this derivation by pointing out that the factual premise does not represent a "brute fact", but an "institutional fact". By saying the words "I hereby promise" a speaker invokes the institution of promising. According to Searle, institutions are systems of constitutive rules of the form "X counts as Y in context C".[36] So in the present example, invoking the institution of promising means invoking the rule according to which in a certain context the words "I hereby promise" count as "I place myself under obligation to do something". According to Searle, this constitutive rule "is a meaning rule of the descriptive word promise ".[37] If we understood the factual premise only as a representation of a brute fact, i.e. if we believed *only* that somebody called "promisor" had uttered some words called "promise" in a given situation, then we would not understand the words "I hereby promise" in its literal sense. Searle claims that it is simply a linguistic fact that promising is by definition undertaking an obligation to do something.[38] In order to exclude the suspicion that words representing institutional facts are just disguised evaluative statements, Searle stresses that understanding these words in their literal sense does not presuppose approval of the institutions they represent: "It is perfectly possible for someone who loathes the institution of promising to say quite literally, Jones made a promise , thus committing himself to the view that Jones undertook an obligation".[39] This is the reason why Searle believes that institutional facts are still facts, and not disguised norms. He believes that in his solution of the is/ought problem he did not employ the hide-and-seek strategy. Nevertheless, he did.

In a standard account, the concept of institution is usually associated with the concept of norm. Thus according to John Mackie an institution has rules or principles with a normative content which guides the actions of the participants in the institution.[40] According to Neil MacCormick participation in an institutional practice means doing something which each of the participants understands as norm-governed.[41] Similarly, Ota Weinberger claims that institutions also embrace normative rules, which means *inter alia* that these rules can be either observed or violated.[42] Even Searle himself, when explaining the concept of institution, recourses to normative terminology, although his position is a bit trickier. Searle does not straightforwardly admit that institutional facts have any normative

[35] Searle's derivation in its complete form looks like this: "1. Jones uttered the words' I hereby promise to pay you, Smith, five dollars'. 2. Jones promised to pay Smith five dollars. 3. Jones placed himself under (undertook) an obligation to pay Smith five dollars. 4. Jones is under an obligation to pay Smith five dollars. 5. Jones ought to pay Smith five dollars." SEARLE, J. R. *Speech Acts: An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press, 1970, p. 177 ff.

[36] Ibid., pp. 51–52.

[37] Ibid., p. 185.

[38] Ibid., p. 193.

[39] Ibid., p. 195.

[40] MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, pp. 80–81.

[41] MACCORMICK, N. Norms, Institutions, and Institutional Facts. *Law and Philosophy*. 1998, Vol. 17, No. 3, p. 322.

[42] MACCORMICK, N., WEINBERGER, O. *An Institutional Theory of Law: New Approaches to Legal Positivism*. Dordrecht: D. Reidel Publishing Company, 1992, pp. 23–24.

core. When talking about them, Searle wants to stay at the level of description; he just wants to report how we use our language in special contexts of human interaction. However in his explanation he uses the concept of constitutive rule, and it is not *prima facie* evident if it is meant wholly descriptively.[43] Searle calls the constitutive rule of promising a "meaning rule", so it is a rule which looks like a definition. However definitions, even the custom-based ones, need not be only descriptive.[44] If we take the constitutive rule of promising as a special case of normative definition, then we can reinterpret it like this: When somebody utters "I hereby promise" we should infer that he places himself under an obligation. In sum, the constitutive rule of an institutional fact can be plausibly understood in a normative conceptual framework and consequently the derivation of a norm from an institutional fact suffers from *petitio principii*.

I assume that even if Searle conceded that constitutive rules are susceptible to normative interpretation, he would refuse to conclude that this interpretation is necessary for successful derivation of ought from is. According to him the derivation can be just a matter of reporting the respective normative component in our language usage ("meaning rule of promising"), but not necessarily a matter of endorsing it. The main criticism of Searle's solution of the is/ought problem was centred precisely on the issue of whether the inference "he ought" from "he promised" holds only for the participants in the institution of promising or also for its observers.[45] In order to keep his descriptive way of talk, Searle claimed that the inference held for both, even for an observer who incidentally happened to loathe the institution. According to Searle even this loathing observer was "committed" to say that promises produce obligations. I suppose that even if Searle was right in this matter, he could not have based a solution of the is/ought problem on it. My point is that the "commitment" to say something on the part of the loathing observer is not just a matter of reporting some institutional practice. In the eyes of the loathing observer people are committed to derive "he ought" from "he promised" only in the course of their scientific observations, but not in the course of their other life activities. If the loathing observer just observes, the only behaviour she needs to keep justified is the observation itself. As an observer the only commitments she could possibly hold during her observation come from the constitutive rules of science, for example from the rule according to which linguistic facts exercise constraint over what she might publish in a scientific journal.[46] On

[43] See complaints about the vagueness of the concept of constitutive rule in RAZ, J. *Practical reason and norms*. New York: Oxford University Press, 2002, pp. 108–111. Enrico Pattaro suggests that "constitutiveness" is not a feature of rules, but a feature of types: "Types are constitutive of the possibility of being instantiated by actual tokens, and it does not matter to this end where a type is set forth: It could be in a rule, a deontic sentence, a norm, an apophantic sentence, or a question, or anywhere else." PATTARO, E. *The Law and the Right – A Reappraisal of the Reality that Ought to Be*. Dordrecht: Springer, 2005, p. 18.

[44] The concept of custom-based normative definitions is clarified by Svein Eng. He suggests that these definitions have a qualification modality, not a duty modality. It means that "they qualify what is to be regarded as correct use of the words and expressions of the language" but they are not accompanied by the "you must/must not". If one violates them, he just risks not being understood. ENG, S. *Analysis of Dis/agreement with Particular Reference to Law and Legal Theory*. Dordrecht: Kluwer, 2003, pp. 110–111.

[45] See for example MACKIE, J. *Ethics: Inventing Right and Wrong*. New York: Penguin, 1977, pp. 67–68; WITKOWSKI, K. The Is-Ought Gap: Deduction or Justification? *Philosophy and Phenomenological Research*. 1975, Vol. 36, No. 2, p. 236 ff and SEARLE, J. R. *Speech Acts: An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press, 1970, p. 190.

the other hand, when the loathing observer engages in some other activity than observing the loathed institutional facts, for example when she tries to excuse her wrongdoing before the tribunal of her own conscience, then it would be strange to insist that in this cause she is committed or entitled to invoke the institution which she loathes. I suppose that if she was accidentally undergoing "the Last Judgment", she would certainly not be committed (or entitled) to tell to her judge that "You ought to X because once you uttered into my face I hereby promise you X ". Why not? Because as one who loathes the institution of promising, she by definition cannot regard promising as an ultimately valid reason for human behaviour. So as a human observing promises, she should claim that promises produce obligations, but as a human loathing promises, she should deny it. How could we possibly explain this change in perspectives, if they were not underlain by the normative component of the respective constitutive rules?

Despite the objections, let us suppose that the extraordinary property which enables certain facts to produce norms can be described in non-normative terms. Do the "essentials of human nature", "forms of legal argument" and "institutional facts" have something non-normative in common? I suggest that they do. They are *relatively permanent human behaviour*. When Patterson spoke of rule-following backed up by social agreement, he mentioned "regularity in reaction to use" and "harmony in application over time". Institutions are likewise depicted in similar terms. According to Mackie "an institution is constituted by many people behaving in fairly regular ways"; he insists that an institution is not only an abstract game of rules and concepts, but also a "traditionally maintained" and "persisting social practice".[47] According to MacCormick institutions are not only about norms, but also about "recurrent instances of ordered practice" imputable to them.[48] In classical natural law theory this "extraordinary" feature was absolutized to the extent that essential facts of human nature were not regular, but eternal.[49] In any case, what we understand by the expression "persistent human behaviour" can be described in non-normative terms. It is everything that we repeatedly say and repeatedly do in repetitious situations. Can this laconic description of the extraordinary property we have been looking for help us to demonstrate how facts produce norms? In the next part of my article I will try to prove it can.

4. PRELIMINARY CONCLUSIONS

1. Hume's law forbids us to jump from the level of explanation to the level of justification in the sense that our normative claims cannot be grounded solely on our factual claims.

[46] "Linguistic facts as stated in linguistic characterizations provide the constraints on any linguistic theory. At a minimum, the theory must be consistent with the facts; an acceptable theory would also have to account for or explain the facts." SEARLE, J. R. *Speech Acts: An Essay in the Philosophy of Language.* Cambridge: Cambridge University Press, 1970, p. 193.

[47] MACKIE, J. *Ethics: Inventing Right and Wrong.* New York: Penguin, 1977, pp. 80–81.

[48] MACCORMICK, N. Norms, Institutions, and Institutional Facts. *Law and Philosophy.* 1998, Vol. 17, No. 3, p. 324.

[49] "Traditional natural law theory was concerned, first, with the human nature that was beyond modification, with only the facts that made man, man, and would withstand any type of evolution." DONNELLY, B. The Epistemic Connection between Nature and Value in New and Traditional Natural Law Theory. *Law and Philosophy.* 2006, Vol. 25, No. 1, p. 15.

2. It is scientifically expedient to explain our normative terminology in representationalist language and thus to understand our ought-terms as representations of facts. It is more plausible to adopt the social science account of normativity than the moral realism account of normativity, since the latter one relies on fairly controversial ontological presuppositions. However adopting the social science account of normativity does not make us assume that it is the only approach towards the ought. Beside the position of an observer who just explains there is still the position of a participant who justifies.

3. According to some theories there are extraordinary facts which enable us to draw normative consequences from factual premises. However in order to avoid *petitio principii* the supposed extraordinary feature of these norm-producing facts has to be described in non-normative terms. I suggest that this feature can be described as *permanent human behaviour*.

In the next part of this article I will try to prove that permanent human behaviour produce subjective normative attitudes and that these attitudes, settled in regular inferential practice, can be understood as the genuine ought.[50]

[50] Work on this manuscript was supported by the Slovak Agency for Advancement of Science and Research under the grant no. APVV-0502-11. I am granteful to Jiří Přibáň, Tomáš Sobek, Lucia Berdisová and Eduard Korpáš for their comments on the earlier version of this paper.

INDEPENDENT INVESTMENT ADVICE UNDER MIFID II[1]

Martin Hobza*

Abstract: *The paper deals with independent investment advice institute under MiFID II. The content of this paper is mainly characterization of the institute and analysis of selected issues associated with its prospective application, along with the distinction of independent and non-independent investment advice. The paper focuses primarily on analysis of assessment of a sufficiently wide range of financial instruments as a conceptual characteristic of independent investment advice. Attention is also given to the question of "limited" independent investment advice. Within the paper the author points out several problematic issues that might lower the legal certainty level of the investment firms providing independent investment advice in the future.*

Keywords: *investment firm, independent investment advice, variety of financial instruments*

INTRODUCTION

In connection with the upcoming, though by one year postponed application date of the MiFID II,[2] issues related to the new regulation of provision of investment services are becoming increasingly important. Both entirely new legislation, as for example a new category of unregulated market (so-called organised trading facility) and legislation, significantly modifying the existing MiFID[3] based European regulatory framework, should be taken into account. This article deals with some of the issues included in the latter area.

These are the new rules for investment advice as one of investment services under MiFID II. Deepening regulation of the provision of this investment service, whose essence is provision of personal recommendations to clients regarding financial instruments or transactions with financial instruments, is justified by the growing importance of investment advice to retail clients[4] and belongs to the most important changes that the new Eu-

* JUDr. Martin Hobza, Faculty of Law, Charles University in Prague, Czech Republic

[1] This text has been written within the program "PRVOUK – Public Law in the Context of Europeanization and Globalization" implemented at the Law School of the Charles University in Prague in 2016. This paper has been elaborated with a financial support from the project *"Finance and Information Technology from the perspective of the recent European Union legislation"* within the framework of the Specific University Research No. 260 245/2016 which is realized at the Faculty of Law of the Charles University in Prague in the year 2016.

[2] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. On February the 10th 2016, the European Commission proposed a draft directive, extending by one year the application date of MiFID II. See European Commission [online]. 2016. [2016-02-22]. Commission extends by one year the application date for the MiFID II package. Available at: http://europa.eu/rapid/press-release_IP-16-265_en.htm?locale=en. Such possibility was openly discussed within the industry already in the previous months. See JESCH, T. A. *MiFID II – Zurück in die Zukunft. Recht der Finanzinstrumente* [online]. 2015. [2016-01-30]. Available at: http://finanzen.ruw.de/rdf-news/standpunkte/MiFID-II--Zurueck-in-die-Zukunft-28613 or VERLAINE, J. A. *Banks May Get Extra Time to Soften Up EU Financial-Market Rules*. Bloomberg Business. [online]. 2015. [2016-01-30]. Available at: http://www.bloomberg.com/news/articles/2015-11-10/eu-commission-proposes-to-delay-mifid-ii-rules-by-a-year.

[3] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

[4] See Rec. 70 MiFID II.

ropean legislation brings to the area of investment services provided to this category of clients. It must be noted that the regulation of investment advice under MiFID II is not a revolution but rather an evolution of the existing European legislation. Existing and according to the European legislator functional regulatory framework is therefore only deepened and at the same time enhanced by some hitherto unknown institutes. One of these is the independent investment advice.

Within the scope of the article, I will focus both on the characteristics of this institute in terms of European financial law and the analysis of one of the conceptual characteristics of independent investment advice, namely the assessment of a sufficiently wide range of financial instruments. I will also briefly refer to the related problems. With regard to the delay of the European Commission in the release of Delegated acts, the presented analysis of the issue must currently be based directly on the MiFID II and also take into account documents issued by ESMA,[5] namely the Technical Advice, which serves as a relevant basis for creating the final version of the respective Delegated act.[6]

DISTINCTION OF INDEPENDENT AND NON-INDEPENDENT INVESTMENT ADVICE

In comparison with MiFID I, the definition of investment advice remains unchanged. The basic novelty introduced by MiFID II in the area of investment services with an advisory element presents the institute of independent investment advice.[7] This institute, which is as *Honorar-Anlageberatung* known, for example, to German legal order[8] and which is typical for the investment services market in the UK, presents an alternative to the in practice widespread model of by brokerage fee covered investment advice, prevailing besides the already mentioned Germany[9] for example also in the market practice of the Czech Republic. The aim of enactment of the independent investment advice institute is to establish an easily recognizable category of service, where the possibility of a conflict of interest is excluded.[10]

Although the relationship between independent and non-independent investment advice is not apparent at a first glance, I consider that the independent investment advice should be understood not as a contradiction to the non-independent, by brokerage fee

[5] European Securities and Markets Authority, hereinafter "ESMA".

[6] ESMA [online]. 2014. [2016-02-10] ESMA's Technical Advice to the Commission on MiFID II and MiFIR. Available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1569_final_report_-_esmas_technical_advice_to_the_commission_on_mifid_ii_and_mifir.pdf, hereinafter "ESMA's Technical Advice".

[7] See Art. 24 (4) a) point i) MiFID II.

[8] See s. 31 Abs. 4b Gesetzes über den Wertpapierhandel (Wertpapierhandelsgesetz - WpHG) vom 9. 9. 1998 (BGBl I S. 2708) and Gesetz zur Förderung und Regulierung einer Honorarberatung über Finanzinstrumente (Honoraranlageberatungsgesetz) vom 15. 7. 2013 (BGBl. I S. 2390). The institute is used in a limited way in the German market practice.

[9] KURZ, A. I. MiFID II – Auswirkungen auf den Vertrieb von Finanzinstrumenten. *Der Betrieb*. Düsseldorf: Handelsblatt Fachmedien GmbH, 2014, Vol. 67, No. 21, p. 1183.

[10] GRUNDMANN, S. Wohlverhaltenspflichten, interessenkonfliktfreie Aufklärung und MIFID II: jüngere höchstrichterliche Rechtsprechung und Reformschritte in Europa. *WM – Wertpapiermitteilungen*. Frankfurt am Main: Herausgebergemeinschaft Wertpapier-Mitteilungen, Keppler, Lehmann, 2012, Vol. 66. No. 37, p. 1753.

covered investment advice, but like its superstructure, both in the area of conduct of business rules and, at least potentially, in the qualitative area. This conclusion is supported by both the systematic position of the institute within the framework of the Directive, where general rules are common to both investment advice regimes and provisions ensuring the independence of investment advice are in the position of special legislation, and the opinions of certain representatives of the professional community.[11]

Although MiFID II creates prerequisites for independent investment advice to become an investment service with higher added value to more informed and more demanding part of retail clients, in my opinion, it is not possible to automatically deduce from this fact that independent investment advice will be, according to the client's perspective, always of a higher quality than non-independent investment advice, especially in cases where the investment firm materially meets all the requirements laid down by MiFID II for independent investment advice (see below), but will be (albeit partially) remunerated by brokerage fees paid by financial institution, whose investment products the respective client includes in his investment portfolio based on the recommendations of the respective investment firm.

Concerning distinction between both regimes of investment advice, MiFID II leaves the initiative on the side of the industry. Investment firms have the autonomy of choice whether they will provide investment advice on an independent or non-independent basis, they are, however, always obliged to disclose to their clients in a good time before the actual provision of investment advice the regime of the investment advice provided. Such information should clarify whether and why investment advice could qualify as independent and which restrictions therefore apply.[12] In case the same investment firm offers its clients both types of investment advice, which is generally admissible under the Directive, it is firstly obliged to explain to the clients the difference between the two types of investment advice and secondly should avoid presenting itself in general as an independent investment advisor or emphasize its independent investment advice services over the non-independent when dealing with a client.[13] Within its organizational structure, the investment firm is also required to separate clearly both types of investment advice provided and individuals providing the advice (so called Chinese walls), in particular it is required in order to prevent the risk of confusing the client to ensure that the relevant individual is not allowed to provide independent and non-independent investment advice.[14] Compliance with this requirement could be problematic particularly for smaller investment firms and may lead to the need to choose one of both types of investment advice provided for business of the respective investment firm as a whole. The consequence of presenting the investment advice provided to the client as independent is then the necessity to comply with related regulatory standards in relation to such client.[15]

[11] CAVROIS, J. P. *Independent advice under MiFID II*. Contribution within the conference MiFID II: Latest Developments for Practice, held by the Academy of European Law in Trier on 22nd–23rd of October 2105.
[12] ESMA's Technical Advice, p. 108.
[13] ESMA's Technical Advice, pp. 108–109.
[14] ESMA's Technical Advice, p. 148.
[15] Art. 24 (7) MiFID II.

What makes independent investment advice independent?

The regulatory regime of independent investment advice is a superstructure of the general regime in three following levels: the level of variety of financial instruments considered,[16] the level of taking into account the relationship between respective investment firm and providers, issuers or distributors of financial instruments considered within the provided investment advice[17] and finally in the level of inadmissibility of receiving incentives related to the provided investment advice.[18] To the latter point can be with respect to focus of the article only briefly noted that the investment firm shall not in case of providing independent investment advice accept or retain any fees, commissions or any monetary or non-monetary benefits (i.e. incentives) paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the respective service to clients.[19] Although the above mentioned characteristics of independent investment advice are directly determined by the Directive, their concretization in the Delegated act is assumed. The Delegated act should take into account the already mentioned ESMA's Technical Advice. With regard to the aforementioned delay of European Commission with the release of the delegated acts for MiFID II, for the time being it is necessary to take into account the ESMA's Technical Advice and at the same time draw attention to the fact that the respective Delegated act can still change a lot.

The range of assessed financial instruments

The fundamental characteristic of independent investment advice, along with the above mentioned restriction on receiving incentives from third parties,[20] is the requirement on quality of the analysis provided within the investment advice. Where an investment firm informs the client that investment advice is provided on an independent basis, it shall assess a sufficient range of financial instruments available on the market. Financial instruments should be diverse with regard to their type and issuers or providers and should not be limited to financial instruments issued or provided by entities with a close link or other close legal or economic relationships to the investment firm.[21] This rather abstract rule applicable exclusively in the case of independent investment advice relates to a similarly formulated rule applicable to investment advice under MiFID II in general, which requires specifying the extent of analysis provided within the investment advice.[22] Formulation of the rule raises several difficulties of interpretation.

Above all, the definition of the extent and composition of the spectrum of assessed financial instruments or other investment products necessary to fulfil the requirement of

[16] Art. 24 (7) a) MiFID II.
[17] Art. 24 (7) a) point i) and ii) MiFID II.
[18] Art. 24 (7) b) MiFID II.
[19] Art. 24 (7) b) MiFID II.
[20] Art. 24 (7) b) MiFID II.
[21] See Art. 24 (7) a) point i) and ii) MiFID II. A close link is defined by the Art. 4 (1) point 35) MiFID II and simplified means the control relationship between entities or participation of at least 20% of the voting rights or capital of an entity.
[22] See Art. 24 (4) a) point ii) MiFID II.

sufficiency and diversity within the meaning of the Directive appears problematic. Teleological interpretation in the context of the preamble of MiFID II brings a not very useful specification, according to which it is not necessary to assess investment products available on the market by all product providers or issuers.[23] It is however apparent that such a requirement would be very difficult to implement in most cases. Unclear is the question whether it is necessary to include into assessment under Article 24 (7) a) MiFID II solely financial instrument as the object of regulation of MiFID II, or investment products, different from financial instruments or even other financial products, such as standard bank deposits, insurance-based investment products etc.

Possible requirement to assess also other investment or financial products derives from recital 73 of MiFID II, but the legal text of the Directive itself refers in this context only to financial instruments.[24] Using the grammatical and systematic interpretation and having regard to the scope of MiFID II, I reach the conclusion that the requirement to assess a wide range of products according to the mentioned recital applies exclusively to financial instruments within the meaning of Annex I Section C of the Directive. It does not, however, exclude the possibility of the investment firm to take into account other categories of financial products under the loyalty principle as well, especially if the respective investment firm is entitled to their distribution.

The sufficiency of width of variety of financial instruments considered should, under the consideration of EU legislator, be assessed primarily in relation to the link between the investment firm providing investment advice and the issuers or providers of the recommended financial instruments.[25] However, as is apparent from the EMSA's Technical Advice, which is very likely to be reflected in the final text of the delegated act of the European Commission, this criterion is not the only indicator that an investment firm providing independent investment advice shall take into account in order to fulfil the requirement posed on the sufficiency of the provided analysis.

When assessing the suitable financial instruments, the investment firm providing independent investment advice shall take into account the fulfilment of the following five criteria, related primarily to the variety of financial instruments considered, their category and other characteristics. These are the following criteria:

1. assessment of wide range of financial instruments diversified by type, issuer or provider, not limited to financial instruments provided by related entities,
2. the number and variety of financial instruments considered is proportionate to the scope of advice services offered by the investment firm providing independent investment advice,
3. the number and variety of financial instruments considered is adequately representative of financial instruments available on the market,
4. the quantity of financial instruments issued by the investment firm itself or by entities closely linked to the investment firm itself is proportionate to the total amount of financial instruments considered,

[23] See Rec. 73 third sentence MiFID II.
[24] See Art. 24 (7) a) MiFID II.
[25] See. Rec. 73 fourth sentence MiFID II.

5. criteria of comparison include risks, costs and complexity of financial instruments and take into account characteristics of client to prevent provision of biased recommendations.[26]

In case the above mentioned requirements cannot be fulfilled, for example because of the business model or the specific scope of the advice provided, the investment firm providing advice should not be allowed to claim itself as independent.[27]

"Limited" independent investment advice

Investment firms focusing on certain categories or a specified range of financial instruments can benefit from mitigation of the aforementioned relatively strict rules brought by ESMA's Technical Advice. The definition of these specific categories or specific range of financial instruments could be problematic. I believe that it is necessary to take into account both the category of financial instruments within the meaning of Annex I Section C MiFID II, as well as other legal or economic criteria, such as particular industry, to which the financial instrument relates.[28] In such case the investment firm shall present itself in a way that firstly only attracts clients with a preference for such specific category or a range of financial instruments and secondly enables the clients to easily identify such focus of the investment firm with a high degree of accuracy. In such case the clients should indicate that they are only interested in investing in the specified category or range of financial instruments and the investment firm should be able confirm that its limited business model matches the client's needs and objectives and the range of financial instruments is suitable for the client, otherwise the independent investment advice shall not be provided.[29] In this context, it might be possible to talk about a kind of limited independent investment advice. The ESMA's approach modified some previous views, based on the principle that the substantive restriction regarding the variety of financial instruments considered excludes *per se* the provision of independent investment advice.[30]

CONCLUSION: SELECTED PROBLEMATIC ASPECTS OF INDEPENDENT INVESTMENT ADVICE

A relatively high level of multivalence, which could result in the reduction of legal certainty of the addressees of the new legislation and could cause application problems, is characteristic for some of the above mentioned requirements of MiFID II and ESMA set down on the analysis provided within the independent investment advice. This fact is especially noticeable by the requirements of ESMA according to the point 1 to 3 above, implementing Article 24 (7) a) MiFID II. The primary criterion for assessing the sufficiency of variety of financial instruments considered within the independent investment advice is the limitation

[26] ESMA's Technical Advice, p. 147.
[27] ESMA's Technical Advice, point 2, p. 147.
[28] This might include the provision of independent investment advice restricted to shares and bonds issued by companies operating in the sector of information technology, automotive, etc.
[29] ESMA's Technical Advice, point 3, p. 147.
[30] LOFF, D., HAHNE, K. D. Vermögensverwaltung und Anlageberatung unter MiFID II: Neuregelungen, Gestaltungsmöglichkeiten und deren steuerliche Implikationen. *WM – Wertpapiermitteilungen*. Frankfurt am Main: Herausgebergemeinschaft Wertpapier-Mitteilungen, Keppler, Lehmann, 2012, Vol. 66. No. 32, p. 1519.

of consideration solely on the financial instruments issued or provided by a related entity,[31] a secondary criterion is then the type of financial instruments considered.

Under the term type of financial instrument can be understood partly, and in my opinion primarily, the category of the financial instrument within the meaning of the relevant annex of MiFID II (transferable securities, units in collective investment undertakings etc.), partly other characteristics that are not based on the technical structure of the respective financial instrument, for example, its connection to a specific industry or a specific region.

In case the investment firm is interested in providing independent investment advice in full, not limited scope, it should be capable to take into account all aforementioned relevant criteria when creating the variety of considered financial instruments. Besides, in accordance with the loyalty principle, the firm should be able to prove the actual performance of the mentioned assessment. This fact raises a question whether such requirements will not be too burdensome for the majority of investment firms and if the institute of independent investment advice will be a success in practice compared to the non-independent investment advice.

An unanswered question further remains whether the independent investment advice regime can be applied in case that MiFID II directly prohibits the investment advice provider to take into account certain categories of financial instruments, regardless of their further characteristics. This is the case of investment services providers operating in the national regime on the basis of optional exemption specified in Article 3 MiFID II. These entities, which include, for example, institute of an investment intermediary under the legal order of the Czech Republic,[32] are, based on MiFID II and implementing national legislation, not authorized to provide investment advice to other than listed categories of financial instruments.[33] Having regard to the mentioned limitation in relation to certain categories of financial instruments, I come to conclusion that in case of these entities only limited independent investment advice or non-independent investment advice can be considered, because of the fact that such entity will not be, unlike the harmonized investment firm, able to assess a wide range of financial instruments diversified by type and category due to the limitations set down at the level of the Directive itself.

It is apparent that many of the mentioned problematic questions can hardly be answered without specification of rules laid down by the Directive in the Delegated act, which is eagerly awaited by the industry. In the current state of things, I am afraid that the uncertainties and the associated legal uncertainty could significantly weaken the interest of the financial services industry about independent investment advice and reduce the relevance of the institute for the market practice. I would therefore *de lege ferenda* suggest to focus particular attention on the question of defining the variety of financial instruments considered as an essential condition for the provision of independent investment advice, question of limited investment advice and further the question of admissibility or inadmissibility of providing independent investment advice by entities, who are according to the Directive limited in relation to the variety of financial instruments considered when providing investment advice.

[31] As is apparent from the wording of Art. 24 (7) a) MiFID II.
[32] See s. 29 and following Act No. 256/2004 Coll., on Capital Market Undertakings, as amended.
[33] See Art. 3 (1) MiFID II.

THE CONCEPT OF ALTERNATIVE SANCTIONS IN SLOVAK REPUBLIC[1]

Lucia Šimunová*

Abstract: *As the title suggests this article deals with the description of primary and significant knowledge about alternative sanctions in Slovak Republic as noticeable attribute of restorative justice. It is also based on using theoretical and methodological approach from own exploration (criminological research).*

First part of this article contains the introduction to types and systems of alternative sanctions and reasons for their establishment in our country. We also mention new important legislative reforms connected with application or enforcement of alternative sanctions.

The second part of this article describes phenomenology of alternative sanctions. It provides more knowledge about the current situation of using and efficiency of alternative sanctions in Slovak republic.

Finally, we summarize advantages and disadvantages of applying and enforcement of alternative sanctions in our country. We offer some ideas and characteristics based on the study of results of the application of alternative sanctions and judge's argumentations.

Keywords: *alternative sanctions, home arrest, community service, financial penalty, sentence of prohibition to participate on public events, suspension of sentence and suspension of sentence with probation, imprisonemnt*

1. INTRODUCTION TO ALTERNATIVE SANCTIONS IN SLOVAK REPUBLIC

In Slovakia we have many views and definitions of alternative sanctions. We consider the alternative sanctions as sanctions that are not connected with imprisonment, but they substitute it. These sanctions are meant to fulfil the same purpose as imprisonment. The purposes are individual resocialization and correction of the offenders, protection of society, deterrence of criminals and offenders's moral conviction by society.

Many experts focus on value and future of alternative sanctions in context of restorative concept of punishment, because in many cases traditional retributive justice failed. Also the criminal justice has started to gather positive experience with new forms of punishment in many European and democratic countries. Also Slovak Republic has started new period in the field of criminal justice and alternative sanctions were found in new Criminal Code No. 300/2005.

In our case we mean these alternative sanctions:

- home arrest (§ 53),
- punishment of compulsory labour – in many countries is known as community service (§ 54 – § 55),
- financial penalty (§ 56 – § 57),
- sentence of prohibition to participate on public events (§ 62a),
- suspension of sentence (§ 49 – § 50),
- suspension of sentence with probation (§ 51 – § 52).[2]

* JUDr. Lucia Šimunová, Ph.D., The Faculty of Law, Trnava University in Trnava, Slovak Republic

[1] This article was written as part of solution of project of Slovak Research and Development Agency which called: Restorative Justice and the system of alternative sanctions in terms of Slovak Republic, project APVV-0179-12, main researcher of project is doc. JUDr. Tomáš Strémy, Ph.D.

[2] Read more Explanatory report of Criminal Code Act No. 300/2005.

There were several reasons for establishing alternative sanctions in Slovakia. Criminal justice in Slovakia is based on traditional continental criminal proceedings. Criminal law has very strict legal regulations. It offers limited space for judges, police or prosecutor reflections and investigation. There is no place for sufficient care of victims. But there are still more reasons for the establishment of alternative sanctions.[3]

Sanctions like home arrest, punishment of compulsory labour and suspension of sentence with probation were established in new Criminal code in 2005 (Act No. 300/2005). This Act No 300/2005 is effective from 1st January 2006.

Among the benefits that the experts hoped for were decrease in the number of prison population, decrease of financial amount connected with prisoners, higher effectiveness of imprisonment, better social integration of the convicted, effectiveness of reintegration of prisoners and less overcrowded prisons.[4]

Establishing of alternative sanctions is a one of the changes in the general tendency of using criminal punishment. Imprisonment is viewed as so called *ultima ratio*[5] solution and is meant to be avoided especially in the less serious crimes. Important part of criminal policy is individual approach in each case when a wide range of possibilities and solutions should lead to heighten the offender's motivation to correct his behaviour.

After long period, lawmaker created new Act No. 1/2014 called *"Act about the organization of public sport events"*. This act was a reaction to the important and increasing phenomenon of hooliganism. Within criminal proceeding, this Act No. 1/2014 brought new alternative sanction - sentence of prohibition to participate in public events. The purpose of this sanction is to punish the parts of perpetrator's life, in which perpetrator commits crime. For the perpetrator it will be forbidden to participate on some public events such as the matches of "his" sports team, events connected to particular sports league or public events in general.[6]

We also focus on new legal instrument known as an electronic monitoring. Although there was a legal option to apply an alternative sanction, the lack of technical instrument made this hard to work in real conditions. This concerns especially the punishment of home arrest. There was no effective way to gather information about abiding the conditions of home arrest. The only form of control was the work of few probation and mediation officers. As a result of this, the application of home arrest among the judges is very rare (see: part II of this article – The phenomenology of alternative sanctions). Because of this, the lawmaker created new government Act No. 78/2015 about using the technical devices which provides the legal frame for control of abiding the diversions and alternative

[3] Compare STRÉMY, T., KURILOVSKÁ, L., VRÁBLOVÁ, M. *Restoratívna justícia*. Praha 2015, pp. 88–97.

[4] Read more MAREŠOVÁ, A. Důsledky dlouhodobého uvěznení. *Trestní právo*. 2004, No. 5, p. 23; HERETIK, A. Forenzná psychológia pre psychológov, právnikov, lekárov a iné pomáhajúce profesie. Bratislava 2004, pp. 328–330.

[5] See KALVODOVÁ, V. Alternativní sankce a novely trestního zákoníku – nový trend v alternativním trestání? In: STRÉMY, T. (ed.). *Restoratívna justícia a alternatívne tresty v teoretických súvislostiach*. Praha 2014. p. 105.

[6] Read more Explanatory report of Act about the organization of public sport events No. 1/2014.

sanctions.[7] In Slovakia there was also the ESMO project running dunng 2015 that is focused on electronic monitoring of offenders. It was founded by Ministry of Justice using the financial help of European Union.[8]

This act redefines the institute of probation and home arrest and a possibility of changing the rest of imprisonment to home arrest is mentioned.[9] Act also deals with the implementation of some proceedings in the field of imprisonment as instructed by the European committee for the Prevention of Torture (CPT).

Technical solution of electronic monitoring offers new possibilities in execution of other judicial decisions as well. It is therefore suggested to use this system of monitoring as a part of suspension of sentence with probation, parole or sentence of prohibition to participate in public events. In order to strengthen the protection of victims of domestic violence it is also suggested to use these devices in cases of interlocutory judgment to prevent the aggressor to enter the household of victim during certain period of time. A possibility of application monitoring in prisons is discussed as well.[10]

2. PHENOMENOLOGY OF ALTERNATIVE SANCTIONS[11]

In order to monitor and evaluate the state of sanction policy it is necessary to observe the numbers of prisoners and arrested people. In fact, information about these numbers is important to understand many factors in society, justice, policy and economics. This part of article is based on an analysis of this statistic data. Therefore it is our goal to know the influence of each alternative sanctions on convicted people, so we can define more accurate prediction of the development of offender's criminal career.

[7] Act No. 78/2015 about using the technical devices is full effective from 1st January 2016. The Act modifies and amends other Acts such as: Act No. 99/1963 Civil Procedure Code, Act No. 300/2005 Criminal Code, Act No. 301/2005 Criminal Procedure Code, Act No. 550/2003 about probation and mediation officers, Act No. 475/2005 about the enforcement of imprisonment, Act No. 221/2006 about the enforcement of custody, Act No. 330/2007 about criminal records.

[8] This project runs in 27 European countries. It is known for its great results in the field of reducing the financial costs. It has two phases – pilot phase (from 1st July 2015) and full phase (from 1st January 2016. In pilot phase the monitoring system was tested on students of Police Academy in Slovak Republic and on imprisoned convicts.

[9] For example a changing the rest of sentence of imprisonment to home arrest is an essential part of this Act, that has transformed Act No. 300/2005 Criminal Code. The court can change the rest of the sentence of imprisonment to home arrest under these conditions:

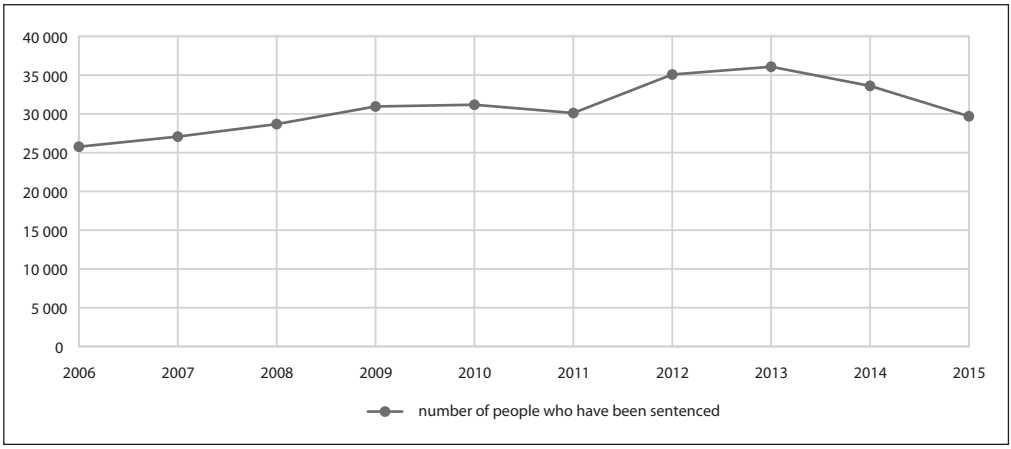
1. Offender is convicted for offenses.
2. Convicted offender has to carry out his/her duties and his/her behaviour is corrected.
3. Convicted offender has already served one third of the sentence of imprisonment or the president of Slovak Republic reduced him/her the sentence of imprisonment.
4. Rest of the sentence of imprisonment does not exceed two years.
5. Convicted offender was not committed to prison after violation of suspended sentence, suspended sentence with probation, or after violating parole.
6. The court has not changed home arrest to sentence of imprisonment.
7. Convicted offender was not committed to prison before.

[10] See also Explanatory report of Act about control using technical devices No. 78/2015.

[11] In this chapter we analyse Statistic data of Ministry of Justice Slovak Republic. This data was chosen according to following facts: Graph No. 1 and Graph No. 2 – for whole period after 1989. Graph No. 3 – from the effectiveness of alternative sanctions in 2006. Graph No. 3 – from publishing the Statistic data by Ministry of Justice Slovak Republic. Scheme No.1- an example from criminological research that took place in April 2014 (2013 year was analysed) See more https://www.justice.gov.sk/Stranky/Informacie/Statistiky.aspx (cited 10th January 2016).

Main resource of next graphs and schedule are data of Ministry of Justice that were analysed.[12] In this part of article we are describing the phenomenology of alternative sanctions. This part of article deals with the current state of their application and enforcement.[13]

The important points in the field of phenomenology of alternative sanctions are the number of convicted offenders and indicted people in Slovak prisons. I must say, that Slovak population was about 5, 5 million in 2014. From the whole number of Slovak population was 33 610 people who have been sentenced in this year. The total percentage proportion of people who have been sentenced was only 0, 61 %. In spite of that I must say, that the population of sentenced people has been increasing in period of last years. Also we can see the increasing number of recidivists (in 2014 it was about 30 %) and decreasing number of first time offenders. These facts are demonstration of changes in criminal scene in Slovakia. Many people view a crime as an opportunity to easily gain money and other advantages.



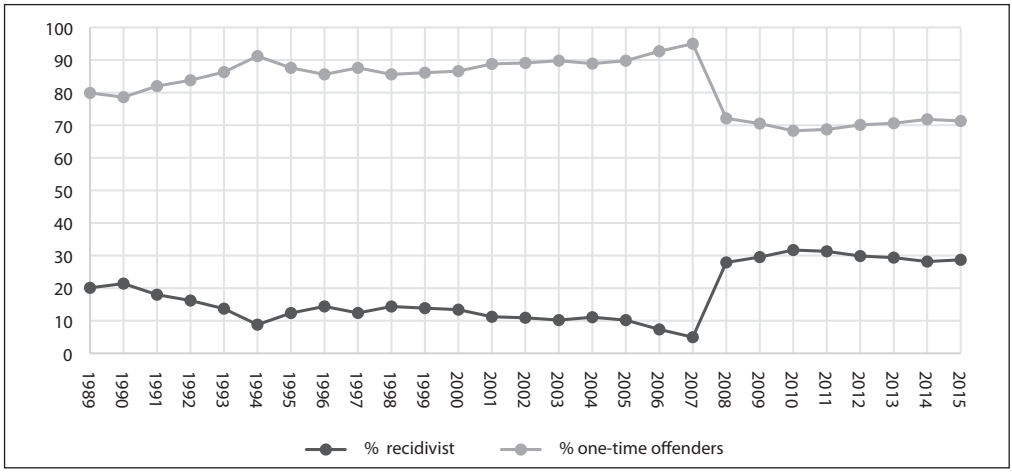
Graph No. 1: The graph indicates the number of people who have been sentenced during period of 1989–2015.

Graph No. 1 shows the increase of the number of sentenced people from 1991. But in last years we see decrease of the number of people who nave been sentenced. However, we can see the decrease of number of registered crimes and registered perpetrators in police statistics.[14] The number of the recidivist has grown since 2007 (see graph No. 2).

[12] See more Statistic data Ministry of Justice http://www.justice.gov.sk/Stranky/Informacie/Statistiky.aspx (cited 10th October 2016).

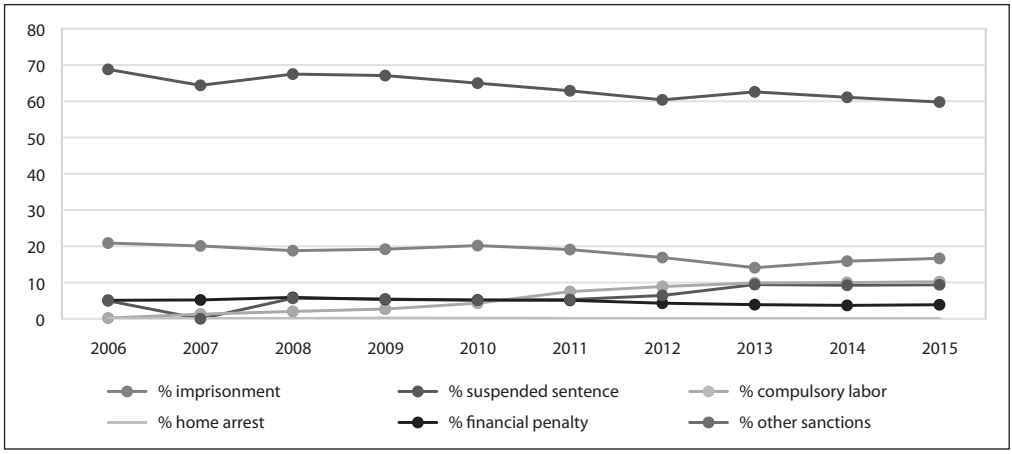
[13] See also: SČERBA, F. Procesní alternativy a jejich vliv na využívání alternativních trestů. https://www.law.muni.cz/sborniky/dny_prava_2012/files/trestnepravnialternativy/ScerbaFilip.pdf (cited 10th October 2016).

[14] Compare Police Statistic data in Slovakia http://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-xml (cited 10th October 2016).



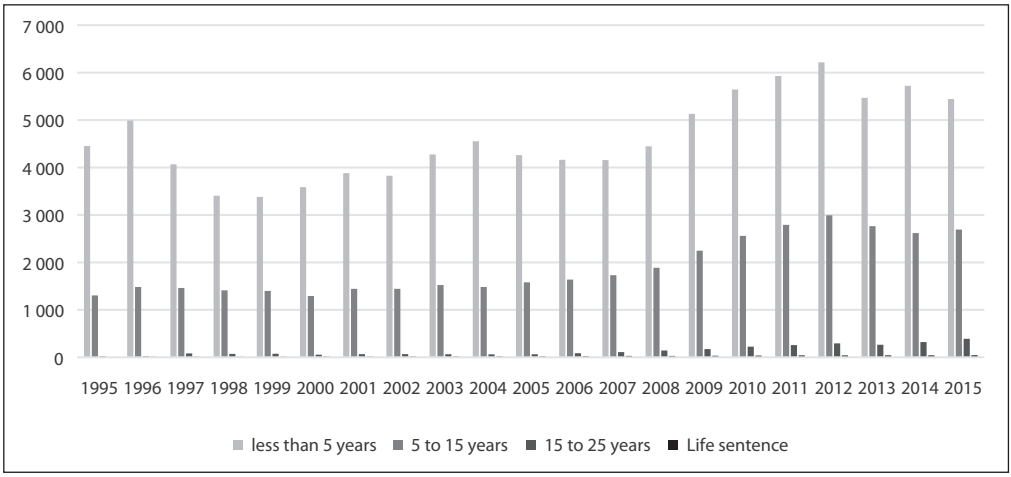
Graph No. 2: The graph indicates the number of recidivist and number of one-time offenders during period of 1989–2015.

In the graph No. 3, we can see a percentage proportion of sentencing of particular sanctions from 2006 to 2014. We can also say that the sanctions most applied by court are still suspended sentence and imprisonment. The Suspended sentence, as traditional alternative to imprisonment, is still dominating. The suspended sentence was sentenced to 59,8 % of perpetrators in 2015 (17 752 perpetrators). Punishment of compulsory labor is still rising very slowly but of all alternative sanctions it is the most frequently applied (only about 10 %). On the other hand, home arrest hasn't been applied by courts very often. The percentage is only about 0, 1 %.[15]



Graph No. 3: The graph indicates the application of particular sanctions during period 2006-2015.

In case of the sentence of imprisonment, it is very important to describe the classification of imprisonment according to its length. Even though short-term imprisonment is criticized by many experts in a lot of countries over the world, it is still very common. It is probably because of its expected resocialization impact. We can see the prevalence of short – term sentence of the imprisonment (less than 5 years). In 2014 there were 49 % of sentences less than 3 years.



Graph No. 4: This graph indicates the classification of the sentence of imprisonment according to its length from 1995 to 2015.

type of crime	Sentence of home arrest (%)	Sentence of compulsory labor (%)	Sentence of financial penalty (%)
theft § 212	24	48	29
threat under the influence of addictive substances § 289	9	2	38
credit fraud § 222	10	2	3
mayhem § 155 – § 158	5	67	27
endangering the moral education of youth § 211	19	18	2
obstruction of official decision § 348	0	5	4
hooliganism § 364	0	4	24
malpractice of nutrition § 207	0	6	
dangerous threats § 360	0	49	11

Scheme No. 1: Scheme indicates number of alternative sanctions, which were applied to perpetrators for their crimes the most in 2013.

[15] 1 Read more ŠIMUNOVÁ, L. Trestnoprávna a kriminologická analýza ukladania a výkonu trestu povinnej práce. *Kriminalistika*. 2015, No. 1.

In the structure of crimes we can see standard petty crimes such as theft, hooliganism, obstruction of official decision and dangerous threats. However, we see economic crime, mayhem, or drug crimes as well. It results from actual structure of crime scene in Slovakia. Economic crime and property crime are dominant crimes in Slovakia.

3. IDEAS ABOUT APLICATION OF ALTERNATIVE SANCTIONS

Since the alternative sanctions have been established, we have a chance to see their advantages and disadvantages. Replacing expensive the sentence of imprisonment, decreasing prison population, better resocialization of convicted people and a more frequent participation of victims and the community in process of investigation of crime are the advantages.

Still, alternative sanctions are not applied frequently in Slovakia. There are many reasons for that:

- limited and general determinations of alternative sanctions in criminal code,
- a small number of people who would care about convicted persons (We mean probation and mediation officers. In Slovakia we have only 62 officers. In 2014 there were 93 cases for one officer),
- rigidity amongst the judges combined with the lack of interest to apply alternative sanctions (in many cases they do not know how to apply the alternative sanction effectively),
- no ambition of politicians to see and to solve the problems of criminal (sanction) policy,
- little knowledge or awareness of application and enforcement of these sanctions combined with traditional society understanding about punishment,
- there are no conditions for co-operation among legal practice and criminological science. We mean the fact, that there is not any institution that would provide interdisciplinary research that is needed for criminal policy,
- unfortunately, we have no data informing about the number of second offenders after an alternative sanction enforcement. We have data about how many second offenders have been sentenced alternatively. These data could provide the picture of situation in the field of criminal policy (effectiveness of alternative sanctions).[16]

Also, we have to know the experience with application and enforcement of various alternative sanctions. In 2015 there was ongoing criminological research in the field of alternative sanctions. As a part of research there was a questionnaire for judges. According to their statements the main problems in sentencing alternative sanctions are following:

Community services, there are a lot of circumstances that make community services worse:

- perpetrator must say "yes" if judge would like to choose this sanction,
- many perpetrators only try to avoid imprisonment, but later they also try to avoid the alternative sentence as well,

[16] 2 According to judge's inquiry that we realized in September 2015 we carried out main results. From 30 inquired judges, 60 % inquired judges claim that the system of alternative sanctions was sufficient. But only 16, 7 % of inquired judges apply mentioned sanction regularly. Read more ŠIMUNOVÁ, L. Ukladanie alternatívnych trestov v súdnej praxi I. (Postoje sudcov k ukladaniu alternatívnych trestov). In: STRÉMY, T. (ed.). *Restoratívna justícia a alternatívne tresty v aplikačnej praxi*. Trnava 2015, pp. 229–240.

- there are only a few job opportunities for the convicted and a mistrust on the part of providers of work because of bad experience (stolen tools, lack of work habits),
- lack of coordination among main institutions, which ensure of the application and the enforcement of this punishment,
- many judges think, that this kind of sanction is inefficient, too general and inapplicable and has no value for criminal law.

Home arrest, there are lot of circumstances that make home arrest worse:

- absence of system of control (electronic monitoring) till 1st January 2016. Home arrest was legally established nine years ago, but there was no electronic system of control. Until 2016 only the control of probation officers was used.
- many judges think, that this kind of sanction is inefficient, too general and inapplicable and has no value for criminal law, so they don't apply it.[17]

Financial penalty: there are a lot of circumstances that make financial penalty worse:

- possibility to sentence only several offenders (rich offenders) – who can *afford it*
- absence of system of day fines such as in Finland for example. Day fines system where a penalty is not defined in sum of money but in the number of daily wages that offender has to pay. The system of day fines simplify the court's procedure if financial penalty is applied. It is useful for application praxis.[18]

CONCLUSION

Restorative justice (alternative sanctions) in Slovakia is not the mainstream criminal system and it is a supplement to usual retributive justice (concept). Restorative justice as well as alternative sanctions represent the state of thinking of the society and functioning of criminal policy and its individual institutions. They both express the measure of co-operation among offender, victim and community.

We think that it is necessary to monitor the situation in the field of criminal policy through gaining knowledge about the phenomenology of application of sanctions in our society and by realizing the criminological research too. Thanks to longitudinal study of this topic and acquired knowledge we can establish the laws, which have impact in the field of criminal policy. Inter alia it is necessary to analyse problems of sanction policy in international context. We see the future of criminal policy in cooperation of preventive and repressive forms of control of criminality, but also in cooperation among institution, which care about assurance of criminal justice.

We consider the choice of suitable sanction to be one of the hardest among the decisions of judges. Strict legislative support and consequentiality is needed in order to make a right decision. However, another aspect is the personality of every judge and his or her compliancy to approach new concept of criminal justice. Therefore we see alternative sanctions as the challenge to get over the stereotypes connected with judge's conveniences.

[17] 3 SCHEINOST, M. et al. *Sankční politika pohledem praxe Teoretické a trestněpolitické aspekty reform trestního práva v oblasti trestních sankcií II.* Praha 2014. pp. 13–23.

[18] 4 GREGUŠOVÁ, A. Ukladanie alternatívnych trestov v súdnej praxi II. (Prax sudcov pri ukladaní alternatívnych trestov). In: STRÉMY, T. (ed.). *Restoratívna justícia a alternatívne tresty v aplikačnej praxi.* Trnava 2015, pp. 242–256.

ON THE CONCEPT OF LEGISLATIVE ACTS IN THE EUROPEAN UNION LAW

Magdaléna Svobodová*

Abstract: *The paper focuses first on the status of legislative acts in the EU law and aims to outline the consequences of being afforded such a status. Subsequently, it deals with specific issue concerning the concept of legislative acts. There is a "grey area" of secondary legislation in the EU law, i. e. basic legal acts that are not adopted formally by a legislative procedure and therefore they are not formally considered to be legislative acts. The author calls them "innominate acts". Particular legal bases serving for adopting of innominate acts are analysed with conclusion that these acts should be, de lege ferenda, recognized in most cases as legislative acts. The author also mentions the problem of democratic deficit and fundamental rights with regard to the issue in question.*

Keywords: *legislative acts, innominate acts, legislative procedure, democratic deficit, fundamental rights*

INTRODUCTION

The Lisbon Treaty introduced the concept of legislative acts as a substantive part of secondary legislation of the European Union[1] (EU). Although the hierarchy of secondary law is not new, the Lisbon Treaty reinforced the status of this kind of secondary legislation and thus, in a particular case, it is important to know whether a given regulation, directive or decision is or is not a legislative act.

This paper focuses first on the status of legislative acts under primary law and aims to outline the consequences of being afforded such a status. Subsequently, the paper deals with specific issues concerning the concept of legislative acts. The Treaty on the Functioning of the European Union (TFEU) basically distinguishes between legislative acts[2], i.e. legal acts adopted in accordance with the ordinary or with a special legislative procedure (by the Council and the European Parliament), on the one hand, and delegated acts[3] and implementing acts[4] (issued usually by the European Commission), on the other hand. Moreover, there is a "grey area" of secondary legislation, i.e. basic legal acts that are not adopted formally by a legislative procedure.[5] This paper concentrates on a specific part of this gray area: the Council and the European Parliament have been given the power to adopt regulations, directives and decisions by *de facto* legislative procedure, not *de iure,* as explained below. There are several provisions in the TFEU which anticipate the adoption of such acts. This brings uncertainty about the status of these acts. Are they or are they

* JUDr. Magdaléna Svobodová, Ph.D., Faculty of Law, Charles University in Prague, Czech Republic. This paper was supported by Development of Scholarly Areas at Charles University Programme P06 – Public law in the context of Europeanization and globalization. The author thanks to Martin Kavěna, LL.B., B.C.L. for his useful comments.

[1] Hereinafter also referred to as "Union".

[2] Article 289(3) TFEU.

[3] Article 290 TFEU.

[4] Article 291 TFEU.

[5] For more details see TÜRK, A. Lawmaking after Lisbon. In: A. Biondi – P. Eeckhout – S. Ripley (eds.). *EU Law after Lisbon*. New York: Oxford University Press, 2012, pp. 69–71.

not legislative acts? This issue was recently brought up in the actions regarding the relocation mechanism act brought by Slovakia and Hungary before the Court of Justice[6], but the Court has not decided the cases yet.

Development of the hierarchy of secondary legislation in brief

A certain hierarchy of secondary law was apparent a long time before the Lisbon Treaty entered into force. Already in the early years of the European integration it was not only the Council which adopted secondary legislation. Secondary acts also authorized the European Commission[7] to adopt implementing legislation. This mechanism was reminiscent of typical legislative systems in states where national parliaments[8] adopt laws and executive bodies adopt implementing acts. However, the powers of the Commission were limited by committees representing the Member States. This led to the creation of a unique system of so-called Comitology[9], although there was no legal framework defined in primary law. Nevertheless, the Court of Justice confirmed this practice in its well-known judgment *Köster*[10]. After the Single European Act supplemented Article 145 of the EEC Treaty[11], the Council Decision 87/373/EEC[12] (based on this Article) laid down conditions for the Council to confer on the Commission powers for the implementation of the rules adopted by the Council and for the Commission to exercise implementing powers. Subsequently, two other decisions were adopted[13] involving the European Parliament in these procedures. In these decisions, we can also find the origin of the current provisions regarding delegated acts in the TFEU (as amended by the Lisbon Treaty), although previous primary law did not mention delegated acts explicitly.[14]

The Treaty Establishing a Constitution for Europe from 2004[15] intended to amend primary law in the area of legal acts. It brought a new system of secondary legislation[16], but never entered into force. The Constitutional Treaty introduced new terminology, e.g. a Eu-

[6] C-643/15 Slovakia v Council and C-647/15 Hungary v Council.

[7] Hereinafter also referred to as "Commission".

[8] The difference was that in the European Economic Community, the legislator was the Council which was not a democratically elected body.

[9] See CRAIG, P., DE BÚRCA, G. *EU Law. Text, Cases, and Materials*. Oxford University Press, 2015, p. 137; Read more: BLOM-HANSEN, J. *The EU Comitology System in Theory and Practice. Keeping an eye on the Commission?* Palgrave Macmillan UK, 2011.

[10] 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster a Berodt & Co., ECLI:EU:C:1970:115.

[11] Treaty establishing the European Economic Community. Article 145 stipulated as follows: the Council shall "confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down".

[12] Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 197, 18. 7. 1987, p. 33–35.

[13] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17. 7. 1999, p. 23–26 and Council Decision 20006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22. 7. 2006, p. 11–13.

[14] See also KRÁL, R. Prameny práva EU ve světle Lisabonské smlouvy. *Acta Universitatis Carolinae Iuridica*. 2010, No. 3, p. 24.

[15] Hereinafter referred to as "Constitutional Treaty" or "CT".

[16] Articles I-33 and following CT.

ropean Law, a European framework law, a definition of legislative acts[17] as well as non-legislative acts[18]. The Lisbon Treaty now in force was partially inspired by the Constitutional Treaty but did not take over everything: the TFEU maintained the existing list of secondary acts (i.e. regulations, directives, decisions, recommendations and opinions)[19], but new terms, such as "legislative acts" and "delegated acts", were introduced. The distinction between the various kinds of secondary acts obviously has significant legal consequences (for more details see below).

The status of legislative acts in EU law

The Lisbon Treaty introduced a definition of legislative acts in Article 289(3) TFEU, as mentioned above, which is linked to the procedure for the adoption of such acts. It provides that *"[l]egal acts adopted by legislative procedure shall constitute legislative acts*". Legislative procedures are either ordinary or special, however, in these procedures, the European Parliament and the Council always participate in order to adopt a regulation, directive or decision, usually on a proposal from the Commission.[20] Although the definition of legislative acts in the Treaty simply refers to legislative procedures, it is also important to consider the content of legislative acts. It is clear that legislative acts are legally binding[21] and usually have normative character.[22] They stipulate rights and duties of Union institutions, Member States and individuals. Normative content may thus be regarded as a key characteristic of legislative acts.

There are several important consequences outlined in primary law associated with legislative acts. For the purpose of this paper, the author will focus on two of them. First, draft legislative acts shall be forwarded to national parliaments to scrutinize their compliance with the principle of subsidiarity under Protocol (No. 2) on the application of the principles of subsidiarity and proportionality. [23] Second, the Council shall meet in public when it deliberates and votes on a draft legislative act.[24]

Legislative acts are called "Gesetzgebungsakten"[25] in German and indeed, it seems legislative acts in the EU law are comparable with national laws in democratic states. In the

[17] Article I-34 CT.
[18] Article I-35 CT.
[19] Article 288 TFEU.
[20] See Art. 289(1)-(2) TFEU.
[21] See Art. 288 TFEU.
[22] As an exception, see for example Article 182(1) TFEU. Under this provision, a multiannual framework programme concerning research, technological development and space shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. The framework programme shall establish the scientific and technological objectives to be achieved by the activities provided for in Article 180 and fix the relevant priorities, indicate the broad lines of such activities etc. See also Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020) and repealing Decision No 1982/2006/EC, OJ L 347, 20. 12. 2013, p. 104–173 which is based on Article 182(1). Another inconsistency in the concept of legislative acts can be demonstrated on legal acts which are formally considered as legislative acts but in fact amend primary law - see e.g. Article 129(3) TFEU. Legislative acts are normally used as legal instruments to implement primary law, not to amend it.
[23] Hereinafter also referred to as "Protocol No 2".
[24] Article 16(8) TEU and Article 15(2) TFEU. The European Parliament shall meet in public as a general rule. See Art. 15(2) TFEU.
[25] "Gesetz" means "law" in English.

constitutional systems of democratic states, the legislative process is most often governed by the following principles. National laws - which very often impose duties on individuals (natural and legal persons) - are adopted most often by national parliaments, being democratically elected bodies. National constitutions are based on the principle that state authority is derived from the people and that the people exercise it through legislative, executive, and judicial bodies or directly.[26] This approach is crucial for democracy. Moreover, the national legislative process has to be transparent. National parliaments therefore meet in public so that they may be controlled by the public.

The European Union is an international organization *(sui generis)*, not a state. However, the Member States have conferred on the Union legislative powers. Above all, the EU institutions adopt legal acts that may impose duties not only on Member States or EU institutions, but also on individuals. Thus, the democratic principles of law-making have to be applied at the EU level as well. The European Union itself declares that it is founded on the values of democracy and the rule of law.[27] The legislative procedure in the European Union has evolved over the years and it is much more democratic at present than it was at the beginning of European integration.[28] In most cases, the European Parliament - being the only directly democratically elected EU institution - plays a key part in the EU legislative process (together with the Council).

To reinforce the democratic level of decision-making in the EU, current primary law tries to involve national parliaments more into this process. The Lisbon Treaty introduced new powers of national parliaments in relation to the principle of subsidiarity, as set out in Protocol (No 2) on the application of the principles of subsidiarity and proportionality. Any national parliament or its chamber[29] may, within an eight week period, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft legislative act does not comply with the principle of subsidiarity.[30] The ensuing process depends on the number of reasoned opinions issued by the national parliaments of Member States. Where only a small amount of reasoned opinions has been issued (less than one third of the votes), the EU bodies shall take account of the reasoned opinions. Where reasoned opinions represent at least one third of all the votes or a quarter of votes in the area of freedom, security and justice, the draft legislative act must be reviewed (so called yellow card or early warning mechanism). After such review, the EU institutions may decide to maintain, amend or withdraw the draft and must give reasons for their decision.[31] Furthermore, under the ordinary legislative procedure, where reasoned opinions of national parliaments represent at least a simple majority of all votes, a rather complicated process follows which may lead to the end of

[26] See for instance Article 2(1) of the constitutional act No. 1/1993 Sb., Constitution of the Czech Republic, as amended; Article 20(2) of Basic Law for the Federal Republic of Germany, 23 May 1949, BGBl. S. 1., as amended.
[27] Article 2 TEU.
[28] Although there is still certain democratic deficit left in the EU.
[29] Each national parliament shall have two votes. In the case of bicameral parliaments, each of the two chambers shall have one vote. See Art. 7(1) par. 2 of the Protocol No. 2.
[30] Art. 6(1) of the Protocol No 2. All draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise with these principles. – See Art. 5 of the Protocol No. 2.
[31] Art. 6(2) of the Protocol No. 2.

the legislative process (the so-called orange card).[32] The powers of national parliaments described above are often criticised for being too weak.[33] Nevertheless, the mechanism may be also seen as a first step to involve national parliaments more into legislative process at the EU level with the possibility of further future development of these powers.

Since legislative acts may have significant impact on the rights of individuals, as mentioned above, the legislative process should be transparent.[34] On that account, the TFEU stipulates that the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.[35] In accordance with the Rules of Procedure of the EP[36], debates in the European Parliament shall be public. Its committees shall normally meet in public as well, but they may decide to debate certain items of the agenda closed to the public.[37]

Regarding Council meetings, there has been a shift after the Lisbon Treaty. Before, when the Council acted in its legislative capacity, only the results of votes and explanations of vote as well as statements in the minutes had to be made public.[38] But there was no duty of the Council to meet in public. Under current primary law, Council meetings are open to the public when the Council is considering and voting on a draft legislative act.[39] Beyond the wording of the TFEU, the Rules of Procedure of the Council broaden the use of the transparency principle in relation to non-legislative acts, but only to a certain extent. Where a non-legislative proposal is submitted to the Council relating to the adoption of rules which are legally binding in or for the Member States, by means of regulations, directives or decisions (with some exceptions), the Council's first deliberations on important new proposals shall be open to the public. The Presidency shall identify which new proposals are important and the Council or Coreper may decide otherwise. The Presidency, the Council or Coreper may decide, on a case-by-case basis, that subsequent Council deliberations on the proposal shall be also open to the public.[40] There are several problematic aspects to these provisions. First, in accordance with the Rules of Procedure, deliberations on not all, but only on **important** new proposals shall be open to the public. It may be questionable which proposals are important and which proposals are not. Second, it is the Council which identifies which new proposals are to be considered as being important. Arguably, this may be influenced by political motives. Third, the principle of public deliberation of non-legislative proposals is only provided by the Rules of Procedure of the Council, but it is not guaranteed by the Treaties[41].

[32] Read more: PÍTROVÁ, L. *Evropská dimenze legislativního procesu*. Praha: Leges, 2014, p. 221 ff.
[33] See for instance ZALEWSKA, M., GSTREIN, O. J. National Parliaments and their Role in European Integration: The EU s Democratic Deficit in Times of Economic Hardship and Political Insecurity. *Bruges Political Research Paper*. 2013, No. 28, [2016-07-04]. Available at: https://www.coleurope.eu/website/study/european-political-and-administrative-studies/research-activities/bruges-political.
[34] Art. 1 TEU and Art. 15(1) TFEU.
[35] Art. 15(2) TFEU.
[36] Rules of Procedure of the European Parliament, 8th parliamentary term, July 2014.
[37] Art. 115(2)-(3) of the Rules of Procedure of the EP.
[38] Art. 207(3) of the Treaty establishing the European Community.
[39] See also Art. 7 of the Rules of Procedure of the Council, December 2009.
[40] Art. 8(1) of the Rules of Procedure of the Council.
[41] TEU and TFEU.

"Grey area" of EU secondary legislation – innominate acts

As explained above, legislative acts are legal acts which are adopted by a legislative procedure. Specific Treaty provisions detail whether a given legislative act is to be adopted by an ordinary or by a special legislative procedure. The ordinary legislative procedure is a single process and is described in Article 294 TFEU. Apart from the ordinary legislative procedure, there are different procedures for decision-making called special legislative procedures and the given Treaty provision always specifies which special procedure will be used in a specific case (if the ordinary legislative procedure is not to be used). For example, in accordance with Article 113 TFEU, the *"Council shall, acting unanimously in accordance with a* ***special legislative procedure*** *and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation* (...)." Another example is Article 23 par. 2 TFEU where the Council shall act by a qualified majority[42]: *"The Council, acting in accordance with a* ***special legislative procedure*** *and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection."*[43] Other Treaty provisions refer to the ordinary legislative procedure.[44]

Interestingly, there are also legal bases in the TFEU for the adoption of directives, regulations or decisions which do not specifically refer to any legislative procedure (ordinary or special). Yet they set out an obligatory procedure for the adoption of such acts. As an example, Article 103(1) TFEU may be cited: *"The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.*" This Treaty provision serves as a legal basis for the adoption of measures in competition policy.[45] It determines the procedure which has to be followed in order to lay down the rules: the Council makes decisions on a proposal from the Commission and after consulting the European Parliament. Thus, the procedure is, in fact, identical to the special legislative procedure set in Article 23 TFEU. In both cases, the measures are adopted by the Council acting by qualified majority after consulting the European Parliament. Significantly, however, Article 103(1) TFEU, unlike Article 23 TFEU, does not explicitly use the term "special legislative procedure". The rules anticipated by Article 103(1) TFEU were adopted by means of Regulation 1/2003[46]. The regulation is generally binding, as it lays

[42] Art. 16(3) TEU.

[43] In this context, "protection" means protection of Union citizens by the diplomatic or consular authorities of any Member State under the conditions stipulated by the Treaties.

[44] One example for all – Art. 114(1) TFEU regarding adoption of measures in the area of internal market: *"The European Parliament and the Council shall, acting in accordance with the* ***ordinary legislative procedure*** *and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*"

[45] Art. 101 TFEU concerns prohibition of cartel agreements, Art. 102 TFEU prohibition of abuse of a dominant position.

[46] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 4. 1. 2003, p. 1. Its legal basis is Article 83(1) TEC because it was adopted before the Lisbon Treaty entered into force. Article 83 TEC was renumbered by the Lisbon Treaty and it is Article 103 at present. Its wording was not amended by the Lisbon Treaty.

down rights and duties of undertakings and competences of Union institutions and national bodies.[47]

The cardinal question is, should acts adopted in accordance with Article 103(1) TFEU or any other similar provision which anticipates the adoption of acts with a *de facto* legislative procedure (hereinafter referred to as "innominate acts") be considered to be legislative acts (with all of the consequences of being a legislative act) or not?

This question was raised by national parliaments in 2010, shortly after the Lisbon Treaty entered into force, because under Protocol No 2, national parliaments gained new powers to issue a reasoned opinion on a draft legislative act's non-compliance with the principle of subsidiarity. In the Annual report 2010 of 10 June 2011 on relations between the European Commission and national parliaments[48], the Commission stated: *"During the first half of 2010, several exchanges, both written and oral, took place between the Commission and national Parliaments as regards the scope of the subsidiarity control mechanism. In reply to specific questions raised by national Parliaments, the Commission was able to clarify that the new mechanism covers only draft legislative acts, i.e. proposals subject to either the ordinary or a special legislative procedure, provided they do not fall within the Union's exclusive competence. This interpretation is shared by the European Parliament and the Council."*[49] In the footnote No 13, the Commission is adding: *"Article 289 establishes that legislative acts are legal acts adopted by legislative procedure, whereas a legislative procedure may be an ordinary legislative procedure or a special legislative procedure. Therefore, where the Treaty's legal basis makes no explicit mention of one of the legislative procedures, either ordinary or special, the act in question is formally speaking not a legislative act."* Thus, the EU institutions apply a formal criterion, i.e. what is important is whether the relevant Treaty provision explicitly refers to a legislative procedure or not; the Commission does not undertake a substantive analysis or consideration of why the consultation procedure is, in some cases, to be regarded as a legislative procedure, while in others it is not.

As far as the author is aware, the Court of Justice of the European Union has not dealt with the issue described above. Recently, Slovakia and Hungary brought actions before the Court of Justice demanding review of the legality of the Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece[50] based on Article 78(3) TFEU. In accordance with Article 78(3) TFEU, the Council adopts a decision on a proposal from the Commission after consulting the European Parliament. The term "special legislative procedure" is not mentioned.

The Hungarian government states in the action that the contested decision establishes in fact an exception in respect of a legislative act, Regulation 604/2013[51], and itself consti-

[47] E. g. the Commission may impose fines on undertakings where they infringe competition rules, Art. 23(1)(a) of the Regulation 1/2003.

[48] COM(2011) 345 final, hereinafter referred to as "Annual report 2010".

[49] The Commission also reminds that national parliaments may issue opinions on proposals which are not draft legislative acts within the political dialogue. However, these opinions cannot lead to the so called yellow or orange card.

[50] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248, p. 80.

tutes, in view of its content, a legislative act. The Council therefore would have had to respect the right of the national parliaments to issue an opinion on legislative acts, recognised in Protocols No 1 and Protocol No 2. As a result, the Court of Justice has an opportunity to tackle the issue, although the context here is specific.

Legal bases for the adoption of innominate acts

In the following part, the author will concentrate on particular provisions of the TFEU that serve as legal bases for adoption of innominate acts and the nature of these acts will be analysed as well.

Article 78(3) TFEU has been already mentioned. It enables passage of acts in the event of a sudden inflow of nationals of third countries. The Council, on a proposal from the Commission after consulting the European Parliament, may adopt provisional measures for the benefit of one or more Member States concerned. This procedure is known as a consultation procedure - other Treaty provisions specifically recognise this as special legislative procedure. However, arguably, acts adopted under Article 78(3) TFEU are more likely non-legislative, because of their provisional nature.[52] Under the Constitutional Treaty, these measures had non-legislative character.[53]

Under Article 95(3) TFEU, the Council shall, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, lay down rules for implementing the non-discrimination principle in transport policy set out in paragraph 1. This provision prohibits any discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods. Again, these acts are adopted by a consultation procedure which is not explicitly called a "special legislative procedure". It might be useful to confront this legal basis with similar Treaty provisions dealing with the prohibition of discrimination. Article 18 TFEU is especially relevant in this respect. Under Article 18, rules may be adopted to prohibit any discrimination on grounds of nationality. The European Parliament and the Council shall adopt the rules in accordance with the ordinary legislative procedure. It is unclear why the approach of the Treaty, in two similar cases, is different. In the case of Article 95(3) TFEU, the acts are not explicitly considered to be legislative acts because of the absence of any reference to the ordinary or to the special legislative procedure. In the case of Article 18 TFEU, the acts are regarded as legislative acts, without any doubts, due to the use of the expression "ordinary legislative proce-

[51] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180, p. 31–59, hereinafter referred to as "Dublin regulation".

[52] In the case of the above-mentioned Council Decision (EU) 2015/1601 contested by Slovakia and Hungary, the character of such act is disputable. Acts based on Art. 78(3) TFEU should not be regarded as legislative acts, in the author s opinion. On the other hand, the decision in question actually modifies a legislative act, the Dublin regulation. It remains in force for two years (see Art. 13) which is a relatively long period to be merely "provisional". The legal basis should have been better the same as for the Dublin regulation, Art. 78(2)(e) TFEU. For more details see also ZBÍRAL, R. Nad rozhodnutím Rady o povinném přerozdělení uprchlíků v rámci EU: lze politickou porážku zvrátit právními argumenty? *Právní rozhledy.* 2015, No. 23–24, pp. 845–846.

[53] Article III-266 in connection with Article I-35(2) CT.

dure". The rules anticipated in Article 95(3) TFEU have been adopted in Regulation 11/1960[54] which lays down duties on individuals (prohibition of discrimination by carriers which takes the form of charging different rates and imposing different conditions[55], requirements for a transport document[56]). Although the Regulation was adopted before the entry into force of the Lisbon Treaty, it was based on Article 79(3) EEC Treaty which is now Article 95(3) TFEU. It is therefore evident that acts based on Article 95(3) TFEU are of normative character and should have the status of legislative acts. Concerning the Constitutional Treaty, however, these rules were explicitly considered as non-legislative acts.[57]

Competition rules set in secondary law are also based on Treaty provisions that do not refer to ordinary or special legislative procedures. In accordance with Article 103(1) TFEU, regulations or directives to implement principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. The Council likewise, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of the Treaty provisions on state aids in accordance with Article 109 TFEU. Competition rules based on Article 103(1) TFEU have significant impact on rights and duties of individuals. Regulation 1/2003, for instance, provides for the Commission's powers of inspection, including inspections conducted at homes of directors, managers and other staff members of undertakings.[58] Furthermore, the Commission may impose penalties on undertakings.[59]

The state aid Regulation 2015/1589[60], based on Article 109 TFEU, lays down procedural rules mostly for the Commission and the Member States regarding notified aids and existing aid schemes. Duties are also imposed upon individuals. For example, the Commission may require undertakings to provide information. If the undertaking in question does not cooperate properly, the Commission may impose a fine on it.[61] Furthermore, in the case of a negative decision regarding unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.[62] It follows that the beneficiary has to return the state aid.

It is apparent that rules based on Articles 103(1) or Article 109 TFEU have normative content and should therefore have the status of legislative acts.[63] A further problematic aspect has to be mentioned in this regard. The above-mentioned rules, especially those based on Article 103(1) TFEU, suffer from a democratic deficit. These rules are not only

[54] Regulation No 11 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the Treaty establishing the European Economic Community, OJ P 052, 16. 8. 1960, p. 1121.
[55] Article 4 of the Regulation 11/1960.
[56] Article 6 of the Regulation 11/1960.
[57] Article III-240(3) in connection with Article I-35(2) CT.
[58] Art. 20-21 of the Regulation 1/2003.
[59] Art. 23-24 of the Regulation 1/2003. See for example a fine of 1,06 billion EUR imposed on Intel Corp. by the Commission, Commission Decision C(2009) 3726 final of 13 May 2009. For more details see: ŠMEJKAL, V., DUFKOVÁ, B. *Průvodce aktuální judikaturou Soudního dvora EU k ochraně hospodářské soutěže.* Praha: Univerzita Karlova v Praze, Právnická fakulta, 2015, pp. 124–126.
[60] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. OJ L 248, 24. 9. 2015, pp. 9–29.
[61] Art. 7-8 of the Regulation 2015/1589.
[62] Art. 16(1) of the Regulation 2015/1589.
[63] These acts were of non-legislative nature under the Constitutional Treaty, see Article III-163 and III-169 in connection with Article I-35(2) CT.

considered as non-legislative, but they are also adopted by the Council after consulting the European Parliament, i.e. the dominant legislator is the Council. Since the rules may have significant impact on rights of individuals, the European Parliament should be more greatly involved. From this perspective and at least in the case of Article 103(1) TFEU, it would be more appropriate for the competition rules to be - *de lege ferenda* - adopted by the ordinary legislative procedure.

Article 129(4) TFEU entitles the Council to adopt provisions referred to in the Statute of the European System of Central Banks[64] and of the European Central Bank[65] in the field of monetary policy. The Council acts either after consulting the European Parliament and the ECB or after consulting the European Parliament and the Commission (it depends if the proposal comes from the Commission or from the ECB). Based on Article 129(4) TFEU, a wide range of legal acts may be adopted. For instance, the Council may adopt conditions for the imposition by the ECB of fines or periodic penalty payments on undertakings.[66] Although these conditions were set out already before the entry into force of the Lisbon Treaty, they have been subject to amendments. The post-Lisbon Regulation 2015/159 amending these rules[67] stipulates specific rules for sanctions imposed by the ECB in the exercise of its supervisory tasks, including upper limits of sanctions or time limits.[68] It is evident this act has normative character and should have the status of a legislative act. Under the Constitutional Treaty, these measures were of a non-legislative nature.[69]

Article 148(2) TFEU anticipates the adoption of guidelines which the Member States shall take into account in their employment policies. The guidelines shall be drawn up by the Council, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee. It follows from the Treaty that the guidelines are not binding for the Member States, but the Member States shall take them into account. Indeed, the Decision 2008/618/EC[70] implementing the Treaty provision has the character of soft-law[71] and substantively should not be considered to be a legislative act. Under the Constitutional Treaty, the guidelines were considered neither as a legislative, nor as a non-legislative act.[72]

The Council, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt the provisions to set up joint undertakings or any other structure for the execution of Union research, technolog-

[64] Hereinafter also referred to as "ESCB".
[65] Hereinafter also referred to as "ECB".
[66] Article 132(3) TFEU.
[67] Council Regulation (EU) 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, OJ L 27, 3. 2. 2015, p. 1–6.
[68] Article 1(5) of the Regulation 2015/159.
[69] See Article III-187(4) in connection with Article I-35(2) CT.
[70] Council Decision 2008/618/EC of 15 July 2008 on guidelines for the employment policies of the Member States, OJ L 198, 26. 7. 2008, p. 47–54. Its legal basis is Article 128(2) TEC because it was adopted before the Lisbon Treaty entered into force. Article 128 TEC was renumbered by the Lisbon Treaty and it is Article 148 at present. Its wording was not amended by the Lisbon Treaty.
[71] See e. g. following guideline contained in the annex to the Decision: "Member States should also enact measures for improved (occupational) health status with the goal of reducing sickness burdens, increasing labour productivity and prolonging working life".
[72] Article III-206(2) CT.

ical development and demonstration programmes, in accordance with Article 188 par. 1 (together with Article 187) TFEU. Such provisions were adopted in Regulation 557/2014 establishing the Innovative Medicines Initiative 2 Joint Undertaking.[73] The joint undertaking in question is established for the implementation of the Joint Technology Initiative on Innovative Medicines for a period until 31 December 2024[74]. The joint undertaking replaces and succeeds previous IMI Joint Undertaking, established by Regulation 73/2008[75]. Regulation 557/2014 lays down rules regarding for instance financial contribution to the joint undertaking, its staff, contractual and non-contractual liability. It follows that Regulation 557/2014 contains rules concerning tasks, operation, structure, etc. of the joint undertaking and has a normative character. Although the joint undertaking has been established for a limited period of time, the period is long enough and, moreover, the undertaking succeeds a previous joint undertaking established in 2008. It is interesting to compare Regulation 557/2014 with the regulation laying down detailed rules for Eurojust. Under Article 85(1) TFEU, the European Parliament and the Council shall lay down these rules by means of regulations adopted with the ordinary legislative procedure. Such a regulation laying down detailed rules for Eurojust is therefore a legislative act due to the explicit reference to the ordinary legislative procedure. From a substantive perspective, Regulation 557/2014 is of a similar nature, having normative character, and should thus also have the status of a legislative act as well. In spite of this and already under the Constitutional Treaty, these acts had a non-legislative character.[76]

CONCLUSION

It is clear that the Member States, being "Masters of the Treaty", did not have the will to refer, in certain cases, to the "special legislative procedure" in the TFEU and thus to recognize innominate acts as legislative acts, although the logic of this approach is not apparent (there are probably political reasons). When we compare TFEU provisions which lack a reference to a special (or ordinary) legislative procedure with the equivalent provisions in the Constitutional Treaty, we find that the equivalent Constitutional Treaty provisions expressly marked such acts as "non-legislative". The only exception is Article 148(2) TFEU, serving as a legal basis for guidelines for employment policies, which was marked neither as a legislative, nor as a non-legislative act, under the Constitutional Treaty. The double-approach to legal acts therefore could have been seen even more sharply in the Constitutional Treaty[77]. The Lisbon Treaty took over the system of legislative acts from the Constitutional Treaty but – unlike the Constitutional Treaty – left innominate acts without any explicit label of "non-legislative acts", thus causing uncertainty about the status of these acts.

The issue was first dealt with by the Union institutions in connection with the new power of national parliaments to scrutinize draft legislative acts from the perspective of

[73] Council Regulation (EU) No 557/2014 of 6 May 2014 establishing the Innovative Medicines Initiative 2 Joint Undertaking, OJ L 169, 7. 6. 2014, pp. 54–76.
[74] Article 1(1) of the Regulation 557/2014.
[75] Council Regulation (EC) No 73/2008 of 20 December 2007 setting up the Joint Undertaking for the implementation of the Joint Technology Initiative on Innovative Medicines, OJ L 30, 4. 2. 2008, pp. 38–51.
[76] Article III-253 in connection with Article I-35(2) CT.

the principle of subsidiarity. In the view of the Commission (the Council and the European Parliament), acts based on TFEU provisions which make no explicit reference to the ordinary or special legislative procedure (i.e. innominate acts), do not constitute legislative acts. As far as the author of this paper is aware, the Court of Justice of the EU has not dealt with this issue, but it has an opportunity to do so in pending cases concerning the relocation mechanism act.

After analysing relevant legal bases in the TFEU and innominate acts themselves it must be concluded that innominate acts have mostly normative content and may have substantial impact on rights of individuals. As a result, the author puts forward that such innominate acts having a normative character should be considered to be legislative acts. Some of the legal consequences of being characterised as a legislative act have been mentioned in this paper. Draft legislative acts shall be forwarded to national parliaments to scrutinize their compliance with the principle of subsidiarity. Moreover, the Council shall meet in public when it deliberates and votes on a draft legislative act. These rules make the decision-making process at the EU level more democratic and transparent. Therefore, *de lege ferenda,* explicit reference to legislative procedure should be inserted in the TFEU in these cases.

Another problematic issue has been mentioned in connection with innominate acts. These acts are adopted by a consultation procedure, meaning it is the Council that dominates the decision-making procedure - the position of the European Parliament is weak since it is merely consulted. These procedures therefore suffer from a democratic deficit which is a problem specifically where legal acts impose duties on individuals (see for example competition rules). *De lege ferenda,* these legal acts should be adopted in accordance with the ordinary legislative procedure or with a special legislative procedure, where the consent of the European Parliament is required. Such a Treaty amendment would strengthen the powers of the European Parliament in the decision-making process and would also make clear that these acts are legislative acts.

The current situation is also not sustainable also due to other grounds. As described above, innominate acts in fact sometimes restrict the rights and freedoms recognised by the Charter of Fundamental Rights of the European Union.[78] For instance, Regulation 1/2003 stipulates the Commission's powers of inspection which can be exercised at the homes of directors, managers and other members of staff of undertakings[79] which restrict their right to respect for private and family life, home and communications[80]. Under the Charter, any limitation on the exercise of the rights and freedoms must be provided by "law"[81]. An act which is treated as non-legislative, adopted by a consultation procedure where the European Parliament has only a minimum power to influence the legal act, cannot be – in the author's opinion – considered to be a "law".

[77] A. Türk critically states the legislative procedure in which the European Parliament is merely consulted is indistinguishable from procedures under the Constitutional Treaty that lead to the adoption of European regulations as non-legislative acts. See TÜRK, A. The Concept of the "Legislative" Act in the Constitutional Treaty. In: DANN, P., RYNKOWSKI, M. (eds.). The Unity of the European Constitution. *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht.* 2006, Vol. 186, p. 161.

[78] Hereinafter referred to as "Charter".

[79] Article 21 of the Regulation 1/2003.

[80] Article 7 of the Charter.

[81] Article 52(1) of the Charter.

REVIEWS AND ANNOTATIONS

Tomášek, Michal. Právní systémy Dálného východu I. Praha: Karolinum, 2016, 316 s.

Part I of a monograph on Legal Systems of the Far East (by M. Tomášek) is focused on historical comparison of Far Eastern legal systems. It is divided into three books entitled Background, Crossroads and Decline.

BOOK ONE – ROOTS

In the book entitled "Background" the author starts by discussing emergence of the state and points out that creation of a State requires power and territory. In case of the first state mentioned – China – the author points out a peculiar aspect of state power: here, it was seen in two forms - as military and administrative power on the one hand, and as criminally repressive power on the other. The author also claims that the state power did know the term "punishment", and yet did not know the term "law". The author then proceeds to present a series of mythical ancient Chinese state entities (ex. the Shang and Zhou states).

The author also points out that Chinese statehood was not necessarily the oldest in the Far East, and draws our attention to the territory of present-day Vietnam, proving existence of primal state entities as well, before moving on to Korea and Japan.

In the ancient Far Eastern State all power emanated from the ruler while the basis of this concept was his association with the deity, conceived differently in various Far Eastern cultures. The most sophisticated concept of association between the ruler and divine powers was the Chinese one, where the idea of direct genetic relationship between divine powers and the ruler arose in the Western Zhou state entity – the Zhou king began to conceive himself as the son of heavens and this title had been attributed to Chinese rulers until 20th century. The importance of the ruler still persists in present-day legal culture of the Far East, but the author suggests that only on a symbolic level. For example, in Japan the emperor is a symbolic being in the constitutional system with no influence on the operation of the political and legal systems of the country. In the case of China, the Empire had been dealt with decisively after the fall of the Republic in 1911 and even more vigorously by the communists after 1949.

The author also points out that the idea of link between the existence of law and state, that there is no law without a state and no state without law, did not apply quite literally in the ancient Far East. In China, the law was only understood in penal sense and a legal relationship could only occur when a moral standard was violated. Such an understanding of the law, however, had an impact on the relationship between morality and law. The moral aspect was the main one and the legal was only inferred from it. Historically, the oldest concepts of Chinese law were actually the basic legal concepts. The law began to be called *fa* only in connection with occurrence of the legists school in the middle of the 1st millennium BC. Around the same time the term *lü* emerged as well, denoting written law – statutes as its codification. Subsequently, the author presents individual codifications emerging in the Chinese environment, mainly in criminal law. He concludes that the ancient Chinese system of relationships between the natural order of things, as materialized in moral rules on one hand and penalties on the other, appears to be the most historically documented from the entire Far East.

However, he also notes that in Korea the criminally repressive power of the Kojoseon state was even codified in the Eight-Article Law, with the "eye for an eye, tooth for a tooth" principle: he who kills another will himself be put to death. Ancient Korean law was characterized by simplicity and rigor, codification was minimal and the application of criminal law was strongly linked to religious ceremonies. In Vietnamese state entities of earliest times a system of criminal repressive power is

not documented, but the author is inclined to claim that although punishment certainly existed here, the penalties were most likely imposed ad hoc for breaching or disobeying orders and their mechanism was likely neither institutionalized nor codified. He believes that here the ancient statehood was only implemented by a military and administrative mechanism and no developments of criminal law in Vietnam or other indications of Vietnamese society juridisation are documented.

Further attention is paid to family law and the author points out that family relationships most likely had matriarchal basis in ancient times. The transition from matriarchy to patriarchy in China can be traced back to the reign of Western Zhou and was not associated with any constitutional influences or even acts. Evidence of the transition to the patriarchal organization of Chinese society were fairly accurately captured in Rites of Zhou (Zhou-li) where the first important range of social relations are issues of ownership and a highly sophisticated range of social relations involves family relations. Marriage could be monogamous and polygamous, but for economic reasons monogamy was much more widespread. In case of a polygamous marriage, women were not equal to each other because the woman that the man married first according to his parents' choice held the position of chief wife, associated with various privileges. All other wives were considered minor and were have hierarchically subordinated to the chief wife.

Tomášek also points out that, unlike in China, on Japanese territory the matriarchal elements retained rather longer and a strong presence of matriarchal elements in the Japanese system is evidenced by numerous cases of rulers, queens and empresses heading the Japanese states in ancient times. In case of Vietnam he also considers that the withdrawal from matriarchy to patriarchy was much less significant in expressions than it was in China. While in the Chinese system the role of husband was clearly superior to that of his wife, Vietnamese customs worshipped the woman more as the donor of offspring.

In the chapter on emergence of the term "law" and birth of codification the author presents individual schools and movements dealing with law and codifications. In China, the emergence of the term "law" (*fa*) is linked to the occurrence of the Legists school. It was based on a despotic mechanism under absolute control of the ruler via draconic laws and blindly loyal bureaucracy, fuelled by a system of rewards and penalties. The doctrine of Legalism fought obstinately with Confucianism (another Chinese legal ideology). Legalism was very important for the history of Chinese law as it influenced further developments of legal codification in China and also introduces the term for law (*fa*) in both the language and ideas of the people. Characteristic outcome of legalism influencing the positive law is introducing new legal terms, some of which can still be found in Chinese legal terminology. The basis of legalistic doctrine is the primacy of written law, to be enforced by iron-clad discipline involving severe penalties even for small infractions. The author, nevertheless, also points out instances of correspondence between Legalism and Confucianism, such as the absolute suppression of the individual and incentives for mutual monitoring and following of people. Confucianism, however, was a philosophy of morality, while Legalism worked with the reality of life and politics: hard-handed, with no emotions and ideals. Thus in many aspects legalism mirrors the much more recent ideas of Florentine politician and philosopher Niccolò Machiavelli.

Chinese law-making was almost entirely based on positive law, natural law staying in seclusion. Laws and regulations were paramount, and a man was merely a mechanical part of state machinery, with no regards to his will, emotions, and needs, apart from the need to eat and secure continuation of his lineage.

Traditional Chinese legal doctrine did not separate law from morality, or more precisely: the moral norm *li* was deemed considered to be the law. Publication of laws brought about a breakthrough in understanding the relation of morality and law. Disclosing laws provoked a considerable controversy. The author presents it in further pages of his work and says that despite all protests of those opposing disclosure of laws their publication continued and strengthened – laws were engraved in tripods and began to be recorded in other ways as well. The author also states that in terms of availability of historical sources the process of law codification in China before 771 BC can only be traced in the part of Chinese territory stretching north of the Yangtze river. He also points out that for 2 000 years the

hallmark of Chinese codifications was that they banned violating moral customs (*li*) without describing these customs in writing. Thus the subsidiarity of criminal law and was related to customs rather than to a standard of written law.

An important feature of classical Chinese law was its nature of "mixed law". Ancient Chinese system was based on written law, customs, and judicial precedents – case law was mainly relevant in criminal process. Chinese judicial precedents were extensive judicial decisions (here, the author points out the similarity of European and American precedents) in specific legal cases. They contained a number of legal dicta, forming rules for other judges on how to assess and decide on analogous matters. Since the Chan era precedents were an integral part of sources of Chinese law, along with the customs and norms of written law.

In further part of his work, the author deals with the organization of public administration and states that the Chinese system of public administration affected the entire Far East. In China, the state power faced very stiff competition of the power of family clans. Only by gradually overcoming decentralization and concentrating power in the hands of single ruler pre-conditions were created for the formation of an executive power directed from the centre. In Japan, we encounter great families performing administrative functions. The institution of elected elders gradually grew into one of regents controlling small appanage units. In an attempt to gain control over the individual family states the ruler awarded hereditary titles to some families, thereby creating the foundations of government institutions. Here, the author stresses that the concept of state administration in Japan has its root in hereditary titles and offices, which is different from the Chinese concept where already in the period presented by the author a tendency to appoint office holders was prevailing. In Vietnam, the gradual overcoming of decentralization created conditions for the formation of the executive power directed from the centre, and the conditions of its enforcement were similar to those in China.

The author also mentions structure of the judiciary. He points out that in China and later in all Far East countries judicial authorities were considered to be specialised authorities of state administration, dependent on the ruler. The ruler possessed the supreme judicial power. Only in early 20th century, in connection with reception of western law, a conception of courts forming a separate power, independent from the executive, took hold.

Additionally, Tomášek pays attention to Buddhism, which significantly disrupted the isolated development of law in the Far East. In China, the rapid spread of Buddhism was aided by the fact that since the 3rd century the country had been weakened by decentralization. In China Buddhism blended very smoothly in with the local environment and thinking, which was among other things also helped by the fact that, at least outwardly, it adapted well to Chinese ideologies, especially Taoism. Just like other teachings, Buddhism is reflected differently in lay or folk layers of society and differently in higher, "intellectual" circles. In the popular strata Buddhism soon became an offshoot of Chinese Taoism. Higher layers of Chinese society drew much more from Buddhism. In the case of Japan, Buddhism did not manage to quickly become widely accepted ideology in terms of its penetration into the lower strata of Japanese society. In Vietnam, Buddhism was seen as Chinese import and was disseminated in its Mahayana form.

First in China, later also in other Far Eastern countries, Buddhism had a peculiar influence on development of the law. In Chinese law it lead to its humanisation, and above all to distancing the legal doctrine from Confucian idea of "natural order of things".

BOOK TWO – CROSSROADS

Here the author states that, one by one, all countries around China took over Chinese scripture, and hence the introduction of Chinese scripture in Japan, Korea or Vietnam is unavoidably linked to emergence of written law.

The Chinese can also be seen as pioneers of division of powers – just not of the division of legislative, executive, and judicial powers. Here, judicial power was part of the executive one, and legislative power was in the hands of the ruler. In the Tang conception the two other powers were con-

trolling power and testing power. The controlling power was performed by an independent control office called Censorate. Its duties and activities are described in further pages of this work. In this context the *guanxi* phenomenon is also dealt with. Even with the Censorate, all the safeguards, and a system of state examinations the traditional Chinese bureaucracy was not free of corruption and protectionism, and in some periods significant role was played by personal connections – *guanxi*. The *guanxi* phenomenon is an inherent part of Chinese culture (including Chinese legal culture), and with the dissemination of Chinese law to neighbouring states it spread to those states as well. It could best be translated into English as "propinquity", familiarity involving no family, but rather connections and relationships, linked interests, and common goals.

Gradually, the developed political and legal system was becoming more and more of an example for the Japanese state of Jamato. For example, the new model of state organisation in Japan introduced the Chinese system of appointing officers. The offices were not supposed to be awarded according to hereditary titles (as had been the case in the past), but rather according to skills and merits. Chinese language also influenced the formation of written Japanese, including its legal terminology. An attempt to introduce Chinese-inspired Censorate also occurred in Japan, and in criminal law the Japanese took over the Chinese possibility for privileged castes to pay-off their penalties in money.

In the Japanese Heian period (lasting until 1192) a crisis of Chinese model in Japanese legal system occurred, laying foundations for a peculiar Japanese model of law. One of the basic causes of divergence of Japanese and Chinese law was the abandoning of basic Chinese concepts by Japanese legal practice. The crisis of Japanese law and state deepened in 11th and 12th centuries, mainly by the crisis of imperial power and thus also by a crisis of the central government.

Gradually, the Japanese law drifted more and more away from its Chinese predecessor, even developing further in its own way. Thus the legal systems of the Far East were differentiated into Chinese (or Chinese-Korean-Vietnamese) and Japanese legal systems. Chinese law was mixed in nature, relying on written law, on customs, as well as on judicial precedents. Japanese law seemingly kept this structure, but ordering norms gradually gained on importance within it. Eventually the Japanese legal system took shape of a peculiar legal system, not denying, however, the elements of inspiration it had taken in Chinese law.

In conclusion of this part the author claims that while in ancient times the Chinese legal system was exclusive in the Far East, medieval era witnessed the mighty Chinese legal culture clearly influencing the surrounding states. However, in other countries the Chinese legal system underwent certain development resulting in emergence of variations of the Chinese model. The divergence was greatest in Japanese legal system, characterised by the author, in terms of comparative law, as a peculiar legal system. Korean and Vietnamese law showed only some mutations of their Chinese model, often reflecting national specificities.

BOOK THREE – DECLINE

In the third part of his work the author presents "conservation" of Chinese, Vietnamese, and Japanese law. In a chapter on neutralisation of traditional law he points out that for centuries the legal systems of the Far East were developing isolated from development of continental and common law legal systems, with the exception of few rare contacts with the West. It was not until the economic, political, and military expansion in 19th century that the Far East was drawn into world events. Continental and common law legal systems brought about isolation of Far Eastern law and its gradual (and uneven) adaptation to these legal systems.

Western powers brought their own law into eastern Asia, and ignored local laws and courts. Japan was the fastest to understand this new situation, introducing norms of western, mainly German law in the Meiji reform of late 19th century. Later occupation of Korea by Japan involved imposing modern Japan law on Korea as well. French occupation of Vietnam also brought French law to that territory. Eventually even the Chinese, resisting reception of western law for longest, acknowledged the need

to modernise their law. In the beginning there were attempts to look for links between traditional Chinese legal thought and western legal doctrine, but eventually the 1920-30s witnessed reception of western law, mainly filtered via Japan.

This statement concludes Part I of Legal Systems of the Far East. This book is devoted to historical comparison of Far Eastern legal systems, mainly in the territory of China, Japan, Vietnam and Korea, until the reception of western law. It includes a detailed outline of a range of legal concepts, and also involves the religious and philosophical context.

It must be said that the presented analysis of historical developments of law in the Far East before it became influenced by reception of western legal concepts is well-performed. The book is recommendable both to scholars focusing on this issue and to wider public of readers. Looking forward to Part II, currently being prepared by the author!

Antonín Lojek*

* JUDr. Antonín Lojek, Ph.D., Institute of State and Law of the Czech Academy of Sciences, Czech Republic, Prague.
The work was created under subsidies for long-term conceptual development of the Institute of State and Law of Sciences, the Czech Republic, Identity Code RVO: 68378122.

Prague Law Working Papers Series No II/2016 – New issue of Charles University in Prague Faculty of Law Research Papers

The new issue of Prague Law Faculty s open source electronic periodical offers a set of working papers on various topics. The following provides a general outline of their content. Their full versions can be downloaded free of charge from http://www.prf.cuni.cz.

Zdeněk Kühn contributed an article titled "**Transformation of the concept of privacy and liability for its invasion at the outset of the third millennium**". The starting premise of the author is that the Internet has substantially changed the way we conceive human conduct; it has fundamentally altered our chance to have control over spreading information and the impact of human behaviour in the course of time. The paper analyses the transforming modes of privacy invasion over centuries. It explains the transformation of invasion of privacy in the Internet era and the transformation of the concept of privacy itself. Next, it attempts to show that the protection of privacy by public law against giant providers of telecommunications and data services and corporations such as Google and Facebook is relevant. Efficient regulation should be exercised by the law of the European Union because autonomous domestic regulations would endanger free movement of services across the EU; moreover, separate national regulation in fighting global giants like Google could hardly be successful. On the other hand, not much sense can be seen in public-law or even European regulation of activities that are local by nature, such as monitoring cameras in private buildings which are to serve the protection of property of the camera system operators. The author explains that regulation under public law becomes toothless in such cases, and sanctioning becomes selective and essentially random. In addition, such regulation has a potential to further alienate the law from its ordinary recipients.

Magdaléna Svobodová treated the issue of "**The concept of legislative acts in the European Union law**". Her paper focuses first on the status of legislative acts in EU law and aims to outline the consequences of being afforded such a status. Subsequently, it deals with a specific issue concerning the concept of legislative acts. There is a "grey area" of secondary legislation in EU law, i.e. basic legal acts that are not adopted formally by a legislative procedure and therefore are not formally considered to be legislative acts. The author calls them "innominate acts". Particular legal bases serving for the adoption of innominate acts are analysed with the conclusion that these acts should be, *de lege ferenda*, recognised in most cases as legislative acts. The author also mentions the problem of democratic deficit and fundamental rights with regard to the issue in question.

Tomáš Dobřichovský contributed a paper about "**Perspectives on legal protection of databases in the EU and the Czech Republic"**. It is aimed at analysing the legal framework for the protection of databases in the EU and the Czech Republic with special regard to "sui generis" protection, primarily taking into account relevant provisions of the Database Directive that still maps EU database law despite the unsatisfactory effects of "sui generis" protection in practice. Above all, the problem of the accessibility of databases to the public is addressed, viewing this critical issue within the context of relevant precedential judgements of the CJEU in the *British Horse Racing Board* case, the *Fixtures Marketing* case and, in particular, the *Ryanair* case. Perspectives and regulation options for future prospects and the workings of both copyright and "sui generis" protection of databases are outlined, above all in order to avoid the contractual locking-up of unprotected non-original databases.

Finally, **Kamol Tanchinwuttanakul**, a Ph.D. student, analysed in his paper the issue of "**Protection of public health under the model bilateral investment agreement (BIT) of Thailand: the case of tobacco**". The author first briefly introduces a dispute between Thailand and the Philip Morris Group tobacco company and also explains the concept of public health in Thailand and its internal public health measures aiming to reduce the consumption of tobacco products with respect to WHO standards and Thai fiscal and customs measures. In the BIT Model of Thailand, the phrase "Public Interest

Protection" is used instead of "Public Health Protection". Therefore, when this issue is interpreted, it is not clear whether "Public Interest Protection" has the same meaning as "Public Health Protection". As BIT will mostly be interpreted in terms of trade and investment, it usually does not cover public health protection. As a result, the public health protection measures of Thailand are problematic. For example, tax and fiscal measures are ineffective methods of enforcement because they are viewed as trade barriers, which breaches WTO principles. This ambiguity and conflict in the public health protection of Thailand increases the risk of legal action by cigarette companies such as Phillip Morris, which may take legal action in arbitration with regard to BIT. Hence, to solve this problem, the BIT model of Thailand should be reformed and re-negotiated. For instance, BIT should include exceptions for investment protection involved with tobacco products. The author then analyses measures to reduce the consumption of tobacco in response to public health concerns. The author considers problems in the model BIT of Thailand, in particular tax and fiscal measures, the protection of investments, and the expropriation of trademark in violation of the principles of investment protection. In the end he also recommends reform of the Thai model BIT concerning the protection of public health.

Václav Šmejkal*

* Associate Professor, JUDr. Václav Šmejkal, Ph.D., Faculty of Law, Charles University, Prague, Czech Republic and ŠKODA AUTO University, Mladá Boleslav, Czech Republic

CONFERENCES AND REPORTS

International conference "What was Czechoslovakia? State, nation, culture", Prague 21th and 22th January 2016

In my opinion one of the most interesting Prague interdisciplinary conferences of this year was the International conference "What was Czechoslovakia? State, nation, culture" („Co bylo Československo? Stát, národ, kultura"), held in the beautiful modernist venue of the National Gallery, originally build between 1925 and 1928 for the Prague Trade Fairs. The conference lasted two days, Thursday, 21st January and Friday 22nd January, 2016. Two respected institutions shared the burden of its organisation: National Gallery in Prague and the University of Arts and Crafts in Prague. The large exhibition of the National Gallery called "Building a State" („Budování státu"), valuably supplemented the conference. During the morning session of Thursday, the conference was opened by the organisers and by the speech of **Petr Pithart** from the Faculty of Law of the Charles University in Prague.

The **first panel** about Czechoslovakism (Čechoslovakismus) brought five valuable lectures of the Czech and foreign scholars. In the first lecture, **Marek Krejčí**, member of the Centre for Slavic Art Studies in Prague, contributed to the problem of the image of the unified Czechoslovak culture during the interwar period, especially in regard to the activities of leading art historian Zdeněk Wirth and in the official agenda of the interwar Ministry of Schools and Popular Education. The second lecture, given by **Milan Ducháček** of the Institute for History and Archives of the Charles University in Prague (Ústav dějin a archiv Univerzity Karlovy, Praha) was devoted to the problems with the idea of Czechoslovakism, especially to the case of Karel Chotek, the first professor of ethnography at the newly founded Comenius University in Bratislava. The third lecture of **Marta Filipová** from the University of Birmingham posed the questions of the role of folk art (lidové umění) in the interwar Czechoslovakia, especially in relation to the (possible) dichotomy between "folk art" and the notion "art of the people" („umění lidu"). Filipová researched the idea of the new, contemporary folk art, the urban and suburban art in the work of the leading artists (Karel and Josef Čapek, S. K. Neumann) and theorists (Karel Teige, V. V. Štech) of that time. The theme of colonial imagery and colonial discourse in relationship to Slovakia was opened by Ivan Jurica from Museum of Modern Art (Museum moderner Kunst, MUMOK) in Vienna. He spoke about the clash between universalism and colonial mentality in the relationship of the Czechs and Slovaks. The last and very interesting lecture of this panel by **Zdeno Kolesár** from University of the Fine Arts in Bratislava (Vysoká škola výtvarných umení) researched the fate of one of the new educational institutions established by our Republic, the School of Artisan Crafts (Škola umeleckých remesiel) in Bratislava, founded by Josef Vydra, who moved to Slovakia in 1919. Vydra, inspired by German Bauhaus School, tried to use the Slovak pre-industrial tradition of home craftsmenship. The forgotten institution had many leading artists among its teachers (Jaromír Funke, Karel Plicka, Zdeněk Rossmann etc.) and hosted also Karel Teige or Zdeněk Pešánek. Despite of its end in 1939, the influence of the School has remained important for Slovak artists of the successive decades.

The **second** Thursday panel was devoted to the problems of cultural constructions of the new state identity. In the first lecture, **Tomáš Klička** spoke about the special phenomenon, the art exhibitions of the legionaries (members of the Czechoslovak WW1 Legions, fighting against Austria-Hungary and Germany). **Mariana Dufková** from the University of Arts and Crafts in Prague spoke about the reconstruction and restoration works on the Saint Vitus Cathedral in the Prague Castle during the first decade of the Republic. She argued that this reconstruction was a rare crossing and communication of two different ideologies, the Czechoslovak state and national ideology on one hand and conservative Roman Catholic ideology on the other hand. The third lecture of **Miloš Zapletal** from the Etnological Institute of the Czech Academy of Sciences in Brno was devoted to the problem

of the relationship of the well-known and worshipped composer Leoš Janáček to the official governmental doctrines. **Helena Maňasová Hradská** from Institute of Music Research of the Philosophical Faculty of Masaryk University in Brno spoke about the development of advertising towards modernist, dynamical and progressive patterns during the interwar period. She pointed out the key motives of the power and destruction as the elements of the progressive move forwards. Quite interesting was the lecture of **Alena Janatková** from Institute for Art Research and Historical Urbanism of the Technical University in Berlin on the German Werkbund and the Czechoslovak culture at the Jubillee Exhibition in Brno in 1928, devoted to the "residential culture" (bytová kultura). Following the Stuttgart exhibition in 1927, the Brno exhibition was organised by Union of the Czechoslovak Work (Svaz československého díla), but also with participation of the German "Werkbund der Deutschen in der Tschechoslowakei"). In the last lecture of this panel, **Kristýna Zajícová** from University of Arts and Crafts in Prague spoke about the sensitive question of the commercial promotion versus state promotion at the World Exhibition in Paris in 1937. She emphasized the contribution of nearly-forgotten Jan Brabec to the development of the ethics of advertising. Quite unusually, the same panel continued on Friday morning with two other papers. **Markéta Ježková** from the National Gallery in Prague analysed the role of two funds, the National Masaryk Fund (Národní fond Masarykův) and the Jubillee Fund (Jubilejní fond) in the development of the art collections of the Prague Castle, the representative collection build as a representation of the continuity of the art in the Czech Lands and of the ideals of V. V. Štech and T. G. Masaryk. In the second lecture, **Jitka Šosová** from the National Gallery in Prague delivered the picture of the same collection from another point of view. The building of the Prague Castle collections had also its social aspects as the source of financial help to the selected artists or to their families.

The **third panel**, "Buildings of the Republic", was devoted mostly to the architecture and urbanism in its wide social and symbolical contexts. The historian of architecture from Institute of Art History of Czech Academy of Sciences, **Vendula Hnídková**, opened the panel with her paper called "Czechs among Czechs: Optimal extent of the existence minumum and architecture of the internation camps in Prague in 1938", reflecting the participation of the architects (e.g. Pavel Janák) and students of architecture on planning of internation camps during the short period of the conservative, authoritarian regime of the 2nd Czechoslovak Republic (October 1938 – March 1939). In my view, this excellent lecture was one of the best of this conference. The interesting paper of **Ladislav Zikmund-Lender** from the University of Arts and Crafts in Prague researched the influences of the patriotic members of Free Masons on the shaping of the national identity between 1918 and 1938. Following the ideas of male bonding and brotherhood between all Free Masons of the Republic with no regard to their language or religion, Zikmund-Lender argued that Free Masons (similarly as other groups, like Sokols or Czechoslovak (Hussite) Church) aspired to create and disseminate specific cultural and spiritual awareness as an important vehicle for the strengthening of the new state. The valuable lecture of sociologist and historian **Zdeněk Nešpor** from the Faculty of Humanities of the Charles University in Prague on "national crematories" researched the crematory movement and its struggle against the prohibition of cremation during the Habsburg Monarchy (preserved by the influence of the Roman Catholic Church). The Cremation movement has contributed to the hygienical funerals as well as to the process of secularisation in Czechoslovakia. Newly build crematories were percieved as icons of modern attitude towards death, symbols of progress and of the emancipation from religious superstitions, but became also the field of competition between Czech and German cremation associations.

The last paper by **Jan Kober** from the Institute of State and Law of the Czech Academy of Sciences adressed the complicated historical process of search for the venue and design of the new parliament building, especially during the 1920s. Despite of the initial enthusiasim and extraordinary financial sources for the construction of representative state buildings, provided for the period between 1920 and 1940 by the special act, the attempts to build the new Czechoslovak parliament were – because of complex causes – not successful. However, the unrealised building designs by Josef Štěpánek, Jaromír Krejcar or Kamil Roškot became the valuable part of the architectural heritage of the interwar Czechoslovakia.

The **fourth panel**, called (however not very exactly) **Socialist Czechoslovakia** included six lectures, devoted to the Czechoslovakia after 1948. Quite interesting was the first lecture delivered by **Kristina Uhlíková** from Institute of Art History of the Czech Academy of Sciences analysing the various plans and phases of usage of the nationalised castles and chateaus in the Czechoslovakia and the development of the (doubtful) conception of its opening to the wide public as the museums of historical furniture and living culture. The second lecture, given by **Petr Hlaváček** from the Collegium Europaeum, was devoted to the observation of Czech and German post-war relations and to the possible colonial stereotypes, especially in the Czech novels of 1940s and 1950s (Václav Řezáč etc.) as well as to the development of the population and language use in the borderland districts of the Czechoslovakia. Very interesting lecture of **Marcela Chmelařová** of the Philosophical faculty of the Masaryk University in Brno opened the problem of the legally unclear position of private art collecting in the Czechoslovakia of 1950s and 1960s. An apparent tension between art as a "consumer good" (e.g. furnishing of the home) and art as object of the art trade, speculation, clandestine value transfers and especially of the prohibited accumulation of property became the object of court decisions. In fact, this complicated legal and social problem has never been clearly solved in that period. Another very interesting theme was delivered by **Petra Nováková** of the Palacký University in Olomouc. She researched the participation of the Czech and Slovak artists at the Triennale di Milano and its importance for the Czechoslovak government. Similar exhibitions were regarded as "soft power" for the advancement of the Czechoslovak interests in the intricate situation of the Cold war. The lecture of **Blanka Nyklová** and **Petr Gibas** from the Sociological Institute of the Czech Academy of Sciences in Prague was devoted to the rather neglected problem of the use of pictures of industry and modern architecture for the representation of the town or region. Especially interesting was their analysis of the gender-based attribution of certain town spaces and of the constructions of emotionality at the photographs. In her closing lecture, **Mária Topoľčanská** from Prague spoke about the postponed intellectual reflection of the architectural heritage of the period between 1972 and 1989.

In my opinion, the last panel, devoted to the Socialist Czechoslovakia, has generally little lower quality and intensity than the panels devoted to the older decades. The reason is probably the paralysing lack of time distance necessary for neutral research ("sine ira et studio") and lack of environment free of (mis)use of historical interpretations of the past for political goals of the present time. Another reason might be lack of prior research of many themes and problems. Therefore, the number of the papers covering the mentioned period in this panel has been rather low in comparison to other panels (especially to the second panel). It is also understandable that for the conference devoted to such a long period (1918–1992) it is not possible to handle the whole period with the same intensity. I am generally regretting the rather limited number of the themes with relation to the law, legal history and legal symbolism. Is it an illustration of the fact, that the traditional and highly unfortunate divide between legal science and other social sciences persists? However, few exceptions as well as the symbolically important opening speech of the legal scholar might be interpreted as signs of change. I am glad to say that the organisation of the conference was exquisite and also its location in the representative public building of the interwar period was highly fortunate and inspiring.

Jan Kober*

* Mgr. Jan Kober, Ph.D., student of the Faculty of Law, Charles University, Prague, Czech Republic

CONTENTS OF VOLUME FROM YEAR 2016

TABLE OF CONTENTS

ARTICLES

DISCUSSION

REVIEWS AND ANNOTATIONS

CONFERENCES AND REPORTS

The Lawyer Quarterly

International Journal for Legal Research

4/2016

Volume 6

This issue was submitted for printing on 24th November 2016.

Four issues are published per year.

Publisher:
Ústav státu a práva AV ČR, v.v.i. / Institute of State and Law of the Academy of Sciences of the Czech Republic
Národní 18, 116 00 Praha 1
IČ: 68378122
www.ilaw.cas.cz
Phone: 0420 221 990 711

ISSN 1805-8396 (Print)
ISSN 1805-840X (Online)

reg. No. (MK ČR) E 21154

Orders to subscribe and requests for individual issues should be directed to the Publisher.

email: tlq@ilaw.cas.cz

Price of single issue: € 4,-

www.ilaw.cas.cz/tlq

INFORMATION FOR AUTHORS

The Lawyer Quarterly (TLQ) is a peer-reviewed journal. All manuscripts received are evaluated by the editorial board of TLQ and by two anonymous external referees. Please note that our evaluation process takes account of several criteria. Excellence is a necessary condition for publication, but it is not always a sufficient condition. The need for a balance of topics, the Journal's particular areas of interest, which may change over time, the fact that something similar has already been published, etc., may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of a piece.

The TLQ submission evaluation process is completely anonymous. Therefore, before you submit, make sure that you have two separate files containing:

1. A manuscript with no information to identify the author/s. The editorial board of TLQ bears no responsibility for any consequences of insufficient level of anonymity of the text. An insufficient level of anonymity may result in a delay during the review proceeding.
2. A title page, which indicates the author's name with all academic titles, workplace, article title and e-mail address.

TLQ welcomes submissions of the following types of manuscript: original articles, short reports and commentaries. In addition, TLQ also commissions book reviews and 'discussion' papers.

Please read the following instructions before submitting your paper to the TLQ magazine.

Instructions for authors

Submissions should be accompanied by an assurance that the manuscript has not been published, submitted, or accepted elsewhere. Submissions, in an electronic form only, are to be send to the editorial board of TLQ to the e-mail address tlq@ilaw.cas.cz. Also all other correspondence is to be addressed to the editorial board of TLQ using the same e-mail address tlq@ilaw.cas.cz.

Manuscript submission guidelines

A manuscript that does not meet the formal requirements following from these Guidelines cannot be accepted for the review proceeding.

1. The number of pages of an article (paper) should not, in general, exceed 25 standard pages. The head of editorial board of TLQ may exceptionally accept also larger articles, if considered highly relevant. The number of pages of a book review and commentaries should not, in general, exceed 5 standard pages. In addition, TLQ also accepts 'discussion' papers, and short reports of maximum 5 standard pages. Messages regarding events from scientific life are to be sent to the editorial board of TLQ within one month after taking place.
2. The manuscript shall meet the following formal requirements: the article, including an abstract (c. 5-6 sentences) and keywords (2-5), shall be written in English language using one of the generally available text editors (e.g. MS Word, preferred file suffix is rtf), font size shall be 12, type of font Times New Roman, line spacing 1.5 and borders at each side 2.5 cm. The manuscript must be paginated and divided into paragraphs and chapters, possibly with secondary titles. Notes in the manuscript are to be numbered in one series for the entire document and always included at the bottom of the corresponding page (footnotes).
3. For more details on bibliographic references and other requirements see citation samples, available for downloading from the magazine's website: www.ilaw.cas.cz/tlq.
4. Authors bear full responsibility for the language, contents and formal level of the manuscript. The editorial board of TLQ will only make basic necessary language modifications of the texts received.
5. A manuscript that does not meet the formal requirements from these Instructions may not be accepted for the review proceeding.

Copyright and originality of the offered manuscript

1. It is assumed that the manuscript offered has not been previously published. It is expected that the authors will inform the editorial board of TLQ if the entire manuscript, its parts or some relevant results have been previously published in a different publication at the level of an article in a reviewed scientific magazine or monograph. Should the editorial board of TLQ conclude that this condition was not fulfilled the review process may be terminated.
2. It is assumed that the submitted manuscript is an original academic work. If that is not the case the author needs to provide information regarding all circumstances that could raise doubts whether the manuscript is the outcome of original research.
3. By submitting the manuscript the author acknowledges that after the publication in The Lawyer Quarterly her/his work will be made available online to the Internet users and also kept by the Library of the Academy of Sciences of the Czech Republic. Author's rights to further use the work remain unaffected.


12
9 771805 839003