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## Editorial Foreword

This double issue of *De iurisprudentia et iure publico* (Vol. XVI, Nos. 3-4, 2025) presents the revised and written versions of lectures delivered at the *International Jurisprudence Conference*, held between 16 and 18 October 2025. The volume is not conceived as a mere conference proceeding. It reflects a shared normative stance. Law is treated here not as a neutral technique of governance, but as a fragile normative structure whose legitimacy, purpose, and limits must again be made explicit.

The studies collected in this issue are united by a common concern. They examine what happens when law is displaced by legislation, when sanction becomes self-justifying, when technology challenges human norm-creation, or when constitutional language absorbs political conflict without resolving it. The authors approach these problems from different doctrinal fields, yet all assume that law cannot survive on procedural validity alone.

A Spanish contribution opens the volume with a radical critique of modern statutory legality. It argues that legislation has gradually replaced law by reducing normativity to formal imputation and self-referential will. Law, in this view, risks losing its ontological grounding and becoming a closed system that no longer points beyond itself. The paper sets the theoretical horizon of the issue by questioning whether legality can still serve as a source of legitimacy.

Two contributions focus on the apex of the sanction system. One examines life imprisonment from the perspective of the objectives of punishment, while the other analyses the enforcement of life imprisonment without parole. Together, these studies expose a structural tension between declared penal aims such as prevention, proportionality, and reintegration, and the actual legal and institutional design of the sanction. Punishment appears here as a normative test case. It reveals whether criminal law still operates within its own justificatory framework or merely enforces exclusion.

The issue also includes a philosophical contribution revisiting Aristotle's account of justice in Book V of the *Nicomachean Ethics*. Rather than offering a doctrinal reconstruction, the study proposes a method for interpreting political justice that connects Aristotelian ethics, constitutional thought, and the tradition of natural law.

A further group of papers addresses emerging transformations of law. One contribution explores the prospect of machine legislation and raises the question whether automated norm production can preserve responsibility and meaning. Another, authored by a Greek scholar, analyses the constitutionalization of the right to water and shows how basic material needs are transformed into constitutional obligations. Historical and interdisciplinary perspectives further deepen the volume. One contribution examines early modern political theology through the messianic imperial vision of the Spanish Habsburg monarchy, showing how law, symbols, and sovereignty were integrated into a religiously grounded conception of political mission. A study drawing on literary analysis examines cosmic horror and the collapse of natural order, asking what law can offer when the assumption of a stable world disintegrates. Finally, a comparative paper contrasts legal and political constitutionalism and highlights the growing politicization of constitutional structures and reasoning.

The volume as a whole does not aim at synthesis. Its unity lies in its normative sensitivity. Law is presented as something that can fail, harden, or dissolve, and therefore as something that requires constant theoretical vigilance. In this sense, the issue seeks not to close debates but to reopen them.

The *International Jurisprudence Conference* explicitly aimed to strengthen the participation of Hungarian jurisprudence in international theoretical discourse. This thematic issue reflects that ambition. The dialogue it presents is not derivative but reciprocal. Hungarian and foreign perspectives meet on the assumption of shared responsibility for the future of legal thought.

The editors express their sincere gratitude to all institutions that supported both the conference and this publication. Special thanks are due to the *National Research, Development and Innovation Office* for its financial support provided under the Science Patronage – Subprogramme 2 (Identifier: 149144), as well as to the *Károli Gáspár University of the Reformed Church in Hungary* and the *Hungarian Association of Law and Political Sciences* for their continued commitment to international jurisprudential exchange.

This issue rests on a simple conviction. If law is to remain more than a technical language of power, it must again be treated as a normative problem. The contributions collected here take that task seriously.

Balássy, Ádám Miklós  
editor

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## **The abolition of law and the triumph of legislation\***

### **ABSTRACT:**

This paper aims to analyze the process of displacement and eventual abrogation of Law in favour of new artificial legal formulas characteristic of statist formal law, which we call legislation. Legislation unfolds as a mechanism of imputation or as a formal attribution with a condition of possibility, detached from the ordering concept of Law originally oriented toward the attainment of the common good. Rather, legislation is structured as a logical and self-referential mechanism presenting a twofold problem: first, it subjects the idea of legitimacy to the legal order, generating artificial and mutable legal ontologies; second, the only exit from the system is another configuration programmed by itself: Law as a performative representation that discretionarily assigns fabricated realities, operating as false legal ontologies that are entirely changeable. Moreover, by logical extension, this condition of possibility must necessarily rest upon the evanescence of the will, identified with freedom. The act is postponed, and in its place the potential triumphs. Within this structure, the will like morality plays a dual role: as the origin of every order or prescription, and as the final receptacle of the mandate, thus shaping a dynamic of power that is invariably personalist. This paper argues the hypothesis that juridical Modernity, in its most entrenched form, has lost the compass of Law, vindicating the urgency of revitalizing Law from its ontological dimension, restoring it to its being and returning its substance. If statist legality scrutinizes existence by presuming itself moral through self-resolution and self-legitimation, Law must stand as the last bastion of freedom, with all its force and dynamism, seeking its legitimacy beyond the ever-changing social and political transformations.

**KEYWORDS:** Law, legislation, voluntarism, State, Modernity, legality, legitimacy

\* This paper is an expanded and revised version of a lecture delivered at the International Jurisprudence Conference, held between 16 and 18 October 2025. The conference was supported by the National Research, Development and Innovation Office through its financial contribution provided under the Science Patronage – Subprogramme 2 (Identifier: 149144).

## Introduction

The fact that law has become the receptacle or repository of morality, because morality has been reduced to what is potentially imputable, and given the infinite imputability proposed by subjective law – which in turn deals with a multiplicity of infinitely imputable subjects – does not mean that law is in itself moral, or that, failing that, it pursues moral ends. The wake of nominalism is long, and if one thing was clear to Ockham, it was that the purpose of the command is not itself moral – nor immoral – but indeterminate with respect to its horizon, not necessarily its primary or remote causes. Precisely because this teleological amorality implies a strong theological morality, modern law is constructed as an extension of the will, which understands itself as moral because it constitutes a mandate, once divine, still theonomous in its radical origin. To assert that the moral autonomy of law is an update of the *potentia absoluta dei* is probably already a cliché, but it must serve to verify that modern legal systems are crammed with theological invocations which, paradoxically, shift in favor of a completely de-theologized law.

The formula is theoretically simple, since the conjuration of a legislative power that transcends the ordinary order to exchange it extraordinarily can only be placed on the altars formerly reserved for the divine, now clearly politicized by the neutralizing dynamics of the state itself. If the law then becomes an instrument at the service of a personalistic power and is removed from any approximation of a transcendent sense of good, since it is no longer moral in its purpose but exclusively in its origin as imputed, it loses its ultimate meaning, finally transmuting into something else, which is what I call legislation. It is worth remembering that this operation, through which law was relegated in favor of legislation, is not recent, but began to take shape in the light of the projection of statehood onto the European space, which played to the detriment of the sense of universality proper to the *res publica christiana*. A concept that was more metaphysical than political, but which had nevertheless dominated the West for centuries during the Middle Ages until the emergence of state particularism, which became sociologically consolidated in the 17th century<sup>1</sup>. Particularism, which is an extension of modern sovereignty<sup>2</sup> invented by Bodin in imitation of papal *summa potestas*<sup>3</sup>, understands the state as a closed and monistic political unit, fictitiously (self-)limited by artificially manufactured borders, the result of the geopolitical and strategic conveniences of the states themselves. If law ceases to have a universal reference and becomes a purely political matter that concerns only the limits of sovereignty, it seems logical that the next step would be to do away with the objective notion of law, finally replacing it with arbitrary state legislation<sup>4</sup>. Probably the main precedent for the rejection of the classical notion of law

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<sup>1</sup> It is worth recalling here the famous ruptures caused by the state, as pointed out by Elías de Tejada. The sociological rupture following the Peace of Westphalia in 1648 ultimately succeeded in abolishing European unity in favor of the particularism of states that adopted their own religious confessions.

<sup>2</sup> For the concept of sovereignty, we refer to a previous work: "For Modernity, power arises from the very bowels of the world and is placed on the altars of politics with no extrinsic mediation other than the will of those who arbitrarily exercise sovereignty; which reformulates the theological power of divinity by concentrating authority and power under a single notion, whose mission is to artificially and rationally replicate the idea of the Absolute. Sovereignty, which takes on the character of a political miracle, is providentially administered through the constant and capricious oscillations of state legislation, thereby closing off the modulation demanded by the intermediate bodies existing under a government limited by law and custom. This ultimately postpones political freedom, the banner of the Western liberal tradition. Gallego, Francisco de Borja, *Las religiones políticas: sobre la secularización de la fe y la sacralización del mundo*, Madrid, Thomson Reuters Aranzadi, 2021, 13.p.

<sup>3</sup> Dalmacio Negro points out that the key to modern sovereignty lies first in the confusion between *autoritas* and *potestas* and, second, in the subsumption of legal power under the executive. Negro, Dalmacio, *La tradición de la libertad*, Madrid, Unión Editorial, 2019, 56.p.

<sup>4</sup> In this regard, Dalmacio Negro also recently pointed out in a communication that "the fundamental rules of the order created by God of *potentia ordinata*, the *ius naturae*, known and discovered through customs, began to be replaced by law legislated by monarchs, public law that ended up giving primacy to positive law, placed above the human legislator, over Natural Law." The intervention is included in NEGRO, Dalmacio, <<La agonía de la cristiandad>>, Cuadernos, (Dir. Elio Gallego), Madrid, CEU-CEFAS, 2022, 60.p.

in favor of legislation can be found in Hobbes, who had interpreted natural law in rational terms<sup>5</sup>, giving his Leviathan a univocal legal structure representing divine will. Hobbes's main concern, as is well known, was the neutralization of conflict, rather than the moral question of the state, reduced to its famous religious minimum. Nevertheless, despite their differences, Hobbes' ideological horizon aligned very well with that of Luther and his Augustinian exegesis, centered on condemnation and salvation in this world, since at this point the state began to acquire a soteriological role<sup>6</sup>, despite not yet being fully secularized.

Under this premise, peace in the state was only possible through the temporal weight of the law, hence the unbreakable formalism of the political order, representing the divine order. This univocism, detached from the contractualist political-legal theory, is a good indication that law was beginning to be formulated under a rationalist rigor, which is underpinned by a moralizing dimension given its efficiency-based causality. This constitutes, in my opinion, a prolegomenon to the positivism of later centuries. In this regard, Dalmacio Negro understands that the process by which law and politics became artificial constructs, such as the politicization of substance<sup>7</sup>. A process of political invasion of the legal and social spheres, which not only directly affects law, but also the anthropological order as a direct consequence of secularization and the intramundane closure of reality<sup>8</sup>. In the religious sphere, secularization also constituted a process of politicization of the spiritual, with the state arrogating to itself the ownership of morality in the public sphere, something I will discuss further below.

Without going any further in this section, this paradigmatic example from Hobbes is sufficient to demonstrate that pactism initiated an inevitable process of loss and emptying of the substance of law. The result is the abrogation of the ontological dimension of law itself, a recurring theme in the study of legal modernity, but no less substantial for that, since only after the closure of the ontic plane of law can its demise be inferred. Once law has been stripped of its transcendent link via *ex natura rei*<sup>9</sup>, legislation appears, which is a simple technical apparatus at the service of the *ratio status*; a formal invocation or *representation* as an extension of the will of the one who prescribes the mandate. Thus, everything is virtually attributable to being discreetly understood by the will, the dwelling place of morality as a translation of God's will under theological efficiency, that great scholastic principle hijacked by Modernity. However, the constellation of this modern right, transformed into state legislation, requires an unavoidable condition of potentiality in the modal form of its attributions. All the attributions made are essentially possibilities, which take on a univocal character after the relevant resolution via scholasticism under the closure of a logical<sup>10</sup> and theological order that effectively takes the form of the State, whether proclaiming it as a mere union of wills, a machine (Hobbes), a *corpus mysticum* (Suárez), or a composite moral body (Pufendorf).

The truth is that the vicarious power of absolutist kings, still clinging to a theonomic explanation of the political order justified by the divine right of kings, paved the way for future ideological thinking that would understand law not even as an instrument at the service of spiritual morality, but as a factual instrument designed exclusively for the execution of the political power of the State. However, this did not prevent the law born of the Enlightenment from essentially carrying a moral sense in its Promethean

<sup>5</sup> "If Protestantism is the search for the maximum spiritualization of faith, in a strongly Augustinian sense, in Hobbes we find the maximum politicization and worldliness. If for Luther everything is supernatural, for Hobbes everything is political and physically explainable." Gallego, Elio A., *Autoridad y Razón: Hobbes y la quiebra de la tradición occidental*, Madrid, Center for Political and Constitutional Studies, 2016, 83.p.

<sup>6</sup> "The truth is that the 'heavenly city' and the 'earthly city' had been understood by St. Augustine eschatologically; but they became increasingly identified with the ecclesiastical institution and the secular state respectively, entrusting the Church with representing the 'heavenly city', even in the political sphere, and with shaping the state as the ultimate authority." Corral, Salvador, *Teología Política: una perspectiva histórica y sistemática*, Valencia, Tirant Humanidades, 2011, 128. p.

<sup>7</sup> Negro, Dalmacio, *El mito del hombre nuevo*, Madrid, Encuentro, 2009, 55. p.

<sup>8</sup> Reality – a formalization of the real – becomes abstract and immanent, subject to the emergentism of subjective law linked to the absolute will of the individual, which operates by way of exception, discreetly imposing a new reality, which at the same time ontologizes being as legally codifiable by the power, also absolute, of the State.

<sup>9</sup> On this question, it is always useful to refer to Muralt De, André *La estructura de la filosofía política moderna: sus orígenes medievales en Escoto, Ockham y Suárez*, Madrid, Itsimo, 2002, 54-55. pp.

<sup>10</sup> This is not so much the case with Ockham, who understood that the will of God, being absolute, should remain outside any order.

goal of eradicating evil from the world, a kind of secular reflection of sin and the desideratum of utopian-revolutionary thought.

## I. The defeat of law

These intellectual shifts led to the construction of a purely statist legality, understood in terms of positive law. A conceptualization of the legal that is merely performative, and whose accountable subjects are nothing more than discrete individuals, waiting to be filled by a modal attribution, that is, by an imputation. This maneuver, the result of a long process of breaking down the previous legal-political order, would reach its peak after the ontologization of Hegel's state and the subsequent triumph of Kelsen's formalism, opposed to natural law. To differentiate it from statist legality, it is worth making a brief reference to the classical concept of law, insofar as it is a legacy of Aristotelian-Thomistic philosophy. According to this understanding, law is due to a transcendental union between what is just – what is right – and the idea of good. Furthermore, in the Middle Ages, law fulfilled a social function by constituting itself as a secondary body that served as a bastion of defense of political freedom against the abuses of temporal power<sup>11</sup>. According to this classical notion, which is enshrined as the philosophical fabric of the Western legal tradition, law must focus on the search for truth through the measuring rod of justice. This is nothing more than the concretization of the universal value of justice, interpreted through the analogical virtue of prudence<sup>12</sup>, which gives rise to jurisprudence<sup>13</sup>. For Álvaro D'Ors, such jurisprudence confirms the existence of law itself through the interpretative prudence of judges<sup>14</sup>, since it obeys precisely that intimate relationship between the judicial faculty to distinguish what is feasible and advise what is good<sup>15</sup> – Aristotelian phronesis – as an intellectual virtue, that is, judgment or *iusdicum*; and the concept of *ius* as a specification of justice as a cardinal virtue, which is essentially moral because it is relative to the good, an expression of Truth in the world.

Therefore, according to this conceptual scenario, the purpose of law is to organize the common good and achieve the greater good, as I will explain. However, the fact that the purpose of law is rooted in goodness and that its formal structure is based on the pursuit of justice – through the recognition of the rights of others – does not mean that law is inherently moral<sup>16</sup>, a vice inherited from the Reformation, whose corollary is secularization. Protestant theology moralized law in its political battle against sin, to preserve the spiritual from the disruptions caused by the temptations of the temporal world. This formula ultimately resulted in the confinement of faith to the private sphere, as it was reserved for the intimacy of conscience. Paradoxically, law took the form of an instrument for the sanitization of society. In this sense, the state aspired to be a perfect society in imitation of Church<sup>17</sup>, as it was conceived in eternal struggle against evil. An imprint that, as I announced earlier, was later taken up by ideology, especially

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<sup>11</sup> Negro, Dalmacio, *Historia de las formas del Estado: una introducción*, Madrid, El buey mudo, 2010, 11-12. Pp.

<sup>12</sup> "Prudence is the virtue that allows us to recognize what is good in concrete terms, here and now (...) Prudence not only knows what is good in concrete terms but also prescribes its fulfillment. In this sense, prudence is not only an intellectual virtue, but also a moral one (...) Since prudence is the "measure" and "mandate" of human (actionable) behavior, it is, consequently, the "measure" and "mandate" of all moral virtues, including justice." Gallego Elio A, *Tradición Jurídica y Derecho subjetivo*, Madrid, Dykinson, 1996, 63-65. pp.

<sup>13</sup> "The jurist is the one who <<sees>> - prudence derives etymologically from seeing (*pro-videntia*) - what is most just in each case. Hence, only a just and prudent man can be a true jurist, particularly in the case of the judge, who has the highest function of the jurist, *iurisdictio*, that is, to say the *ius*, to declare what is just." Gallego, op. cit. 64. P.

<sup>14</sup> "Thus, there is no law where there are no judges to pass judgment. And to know what the law is at any given time and in any given place, one need only look at what the judges declare. That is why law can be defined in these terms: <<law is what judges approve>>." D'ors, Álvaro, *Una introducción al estudio del Derecho*, Madrid, Rialp, 1963, 14. p.

<sup>15</sup> D'ors, op. cit. 114. p.

<sup>16</sup> It could be said that Modernity is the realm of morality. From law to politics, all abstractions and ideas, that is, formal constructions, become receptacles of morality via imputation. Pufendorf establishes the paradigm with the establishment of *entia moralia*. Muñoz de Baena, cit. op. 65. p.

<sup>17</sup> Corral, op. cit. 203. p.

by revolutionary Jacobinism<sup>18</sup>; and which can still be detected today in systems of political correctness. A kind of secularized puritanism that acts as a moralizing mechanism in the face of social anathema, the banner of today's *culture of cancellation*.

In short, returning to the above, the true moral significance of law in its traditional sense directs the law – as a formal expression of justice – towards the good of correcting the bad. First, it deals with the good, which can be common or particular<sup>19</sup>. Second, it deals with that which violates that good, again either particular or common. If it is common, it is the good of the political community, which at the same time can be a material good or a spiritual good; that is, natural or supernatural<sup>20</sup>. For the common good is not relative only to the goods of individuals, but to the ultimate and transcendent good that gives eschatological meaning to the political community<sup>21</sup>, the place where our otherness and the special communion we have with others are rooted. From this otherness, we can deduce the natural coexistence of individuals in a situation of peace. A situation of conformity to a transcendent order linked to moral unity, which St. Augustine wisely defined as "tranquility in order"<sup>22</sup>. Therefore, law also moves toward the sense of public order, which is a manifestation of a cosmic order expressed in nature. At the same time, law also tends toward the negation of that which abrogates this order, hence it requires violence to preserve it and, if necessary, restore it<sup>23</sup>.

Thus, law is rooted in three fundamental pillars: righteousness, as a criterion for what is appropriate to order; justice, as the realization of justice; and goodness, as the goal towards which it should be directed. According to this, morality is transcendent and extra-legal, since morality should in any case be situated as an expression of good, or a foothold for goodness. Similarly, the immoral must be understood as that which causes injustice by generating disorder, either because it transgresses the social order and destroys otherness or relationships with third parties, making coexistence impossible; or because it violates the primacy of the natural order, which is nothing other than the structure of reality, linked to the universal order of things. The transgression of the natural order constitutes an intrinsically unjust act, derogating from the legitimacy of the law as a formal expression of right. The natural order contains natural law, which responds to the structure of the order of creation under the mode of *potentia ordinata*. The objectivity of natural law therefore responds to a *connaturality* about order and justice, which operate as the primordial unity of legal<sup>24</sup>.

Conversely, in subjective law arising from voluntarism, individuals will have sufficient capacity to penetrate the natural order through the incessant action of desire, whose movement is driven by the very impulse of private will. Legalistic law, which has become a pure imputed and imputing formality, acts by way of exception to penetrate the structure of reality according to its designs, creditors of the divine, subjecting the order of creation to the creative will of the individual. In this way, the order of

<sup>18</sup> On this issue, it is always interesting to read Walzer, Michael, *The Revolution of the Saints: A Study of the Origins of Radical Politics*, Buenos Aires, Katz, 2008.

<sup>19</sup> "A particular good is good because it participates in infinite divine goodness. This means that a particular good has attractive force, because it participates in something of the attractive force of the first good. And if this is so, then every time something is chosen, God will be desired first." Widow, José Luis, *Orden político cristiano y Modernidad: una cuestión de principios*, Madrid, Marcial Pons, 2017, 66. p.

<sup>20</sup> Widow, op. cit. 83. p.

<sup>21</sup> "Man is connected to God publicly and privately, individually and socially." Ayuso, Miguel, Koinós, *El pensamiento político de Rafael Gambre*, Madrid, Speiro, 1998, 126. p.

<sup>22</sup> "In effect, the idea of transcendent justice consists in the preservation of order, of the harmony that arises from just and due balance; for only under that natural order can there be authentic peace, the peace of order, the Augustinian *tranquillitas ordinis*." Negro, Dalmacio, *Lo que Europa debe al cristianismo*, Madrid, Unión Editorial, 2007, p.256.

<sup>23</sup> D'ors, Álvaro, *La violencia y el orden*, Madrid, Ediciones Dyrsa, 1987, 73-75. pp.

<sup>24</sup> "With Christianity, insofar as order is created by God, it is a matter of transcendent justice, which governs directly as a virtue the inner man, guiding his preferences and decisions, and indirectly the outer man, ordering and directing his actions. It is the idea of justice of ordinalism, which had its maximum expression in the Middle Ages. If that period is not considered, it is unintelligible. It is a vision of order whose rules or laws, as far as man is concerned, are those of Natural Law; universal rules in time and space relating to the rectitude of human behavior; with the substantial difference that the Christian, in contrast to the Greek and the Roman, understands natural law as a participation in eternal law explained by St. Augustine as *ratio vel voluntas Dei*. It is not, therefore, the pure and supposedly rational eternal law that governs natural cycles or the destiny of the ancients or the Kismet of Islam: it is intimately linked to the personal Christian God whose essence is love". Negro, op. cit. 255. p.

nature is broken in favor of the capricious oscillations of subjectivism, which transmutes the legal into a kind of desiderative act of the will, manifested in the evanescence of the subject's volitional shifts.

Therefore, in statist legality, the subject enjoys a "*ratione temporis situationis*"<sup>25</sup> in which legislative discretion, both of the individual and of political power, exceptionally transcends the ordinary order of the legal through an act of personalist will, something that, as is well known, Carl Schmitt understood very well in his famous analogy with the miracle in theology<sup>26</sup>. Therefore, the idea that the power of the State is autonomous is, in essence, a myth<sup>27</sup>, although it is self-referential. This brings us back to the dawn of philosophical modernity, in its endeavor to justify the will of the state by replicating the natural order as a reflection of political law, which concerns the individual and his condition as a subject, thus doing away with Aristotelian-Thomistic hylomorphism. For this reason, since the emergence of the state, natural law has been confused with positive law to the extent that legislation constitutes the sole source of legitimacy, dictating what is in nature in strictly rationalizing and positivist terms.

For classical legal tradition, natural law is fundamentally law, as it reflects natural reality, which is the objective and universal foundation of law, perceived through human experience itself. From this experience, we can deduce the concrete fact of what is just in action, whose analogical reference is justice in potential as a universal value. Therefore, the law requires adaptation or ordering in nature as created, which is neither gnosis nor hermeneutics, but an immutable guiding principle. This is unthinkable for the statist mentality, which settles the question of law under its relevance to the sovereign will, which is formally univocal in its construction, essentially ambiguous in its substance, and directed at subjects subsumed in the totality of political artifice. Certainly, modern law or legislation, in its practical sense, is not ordered toward the common good, but rather is arbitrarily imposed on accountable subjects, a new moral realm, because, as has already been said, the cause of morality lies not in the purpose of the command, but in the will of the one who commands. In this sense, Professor Muñoz de Baena points out:

"The specific content of the moral act is irrelevant; what is important is the norm that governs it (...) The reification of the latter (the subject), the abstract construction of his will (whether that of the subject or the sovereign), in terms of imputation, is responsible for the long history of subjective law as the ultimate reference point for the legal system and, at the same time, for its subsumption into the legal-political order represented by the law, the State, and, always, the system..."<sup>28</sup>.

In effect, the subject appears as an essential spell for the efficiency-driven conspiracies of subjective law. The modern subject, whose qualification as a subject is given precisely by his irrevocable subjection to the system, is at the same time the repository of the law – and therefore the dwelling place of morality – and the absolute legislator, being empowered to impute the law at his discretion, in the same way that he is the object of discretionary imputation. The purpose of the law imposed and calculated by and for the subject operates exclusively in reference to a type of private good that is indeterminate in its teleological amorality, as it cannot be hierarchized, only politically organized.

For Modernity, every law is good, given its prescription, regardless of its ultimate purpose or its suitability for the good, since the good lies exclusively in the power to command and in the capacity to accept command. Hence, deep down, all subjects are virtually equal, except for the holder of the absolute will of the State, which is in eternal dispute with the absolute will of the subjects that compose it. The legitimacy of modern law responds solely, as we see and ultimately, to the imputability of the subject. A formal construction that will run transversally through Modernity to the present day, under the hypertrophied emergence of legal relativism. This embitterment of the subjective right of early Modernity will be taken to its ultimate consequences in postmodernity, close to nihilism, derogatory of nature. The subjectivist debacle of law suppresses good as the purpose of law and replaces it with will, which is both the driving force behind it and the source of all sovereign legitimacy. In contrast, the legitimacy of Thomistic law requires an ordering of the natural as created, as well as:

<sup>25</sup> Schmitt, Carl, *Legalidad y Legitimidad*, Granada, Comares, 2006, 68. p.

<sup>26</sup> On this issue, see Gallego, Francisco de Borja, "El Milagro político de la juridicidad moderna en Carl Schmitt", in *El poder de la decisión. La insólita actualidad de Carl Schmitt*, Madrid, Sindéresis, 2022.

<sup>27</sup> Negro, op. cit. 42. p.

<sup>28</sup> Muñoz de Baena, op. cit. 81. p.

"A rational ordering towards the common good, its teleology, its final cause. This prevails over its formal cause (promulgation) and its efficient cause (the will of the one who issues it); all of these are necessary for a law to exist, but the essential one is the reference to the common good, in principal analogy. In the Thomist conception, there is no tension in the law between the universal and the, as it refers continuously to the act: its meaning is the particularization of what is just in reference to each subject"<sup>29</sup>.

## II. The problem of legitimacy

As I have tried to explain, not without a certain degree of inevitable repetition, goodness is placed on the altar of law, constituting its ultimate purpose. The natural shift of law toward goodness and its adaptation to the natural order of creation confirms its legitimacy, which rises above the formalistic legalisms typically found in the state, limited to the contingencies of institutional politics. The legitimacy of the law therefore lies in the eternal and the universal, which is, after all, moral, having its origin in the divine. The source of the legitimacy of the law remains a controversial issue today. For a supposed morality of origin because of an extrinsic imputation by divine mandate can raise suspicions of voluntarism, even in Catholic political theology. A possible re-reading of Álvaro D'Ors, mentioned above, who was directly influenced by Donoso and Schmitt, brings renewed interest to the subject. It is therefore once again appropriate to differentiate between the moral substrate of legitimacy, from which its ontological dimension is deducted, which does not make law or legislation direct instruments of morality, but rather the necessary mediation for the achievement of the common good, whose ontic dimension is moral since it is located at the very end of civil society<sup>30</sup>. This is a theological issue inextricably linked to the otherworldly concept of Christianity, present in these authors with a Catholic background. The very idea of empire, strongly defended by Catholic political theology, requires a concept of universal law. I believe that this explains the universalist – rather than voluntarist – conception of law, at least according to Western legal tradition, which could also be described, in a somewhat heterodox way, as a kind of "legal realism."

In any case, the crux of the legalistic problem of the state, which cannot be separated from a theological meaning under the presumption of its theonomous legalism, is that it is sufficient unto itself to determine good and evil under social and conventional norms. Hence, we can speak of a double dimension of legitimacy. One to determine the purely social origin of law as public convention, that is, as the result of an institutional process, and another to determine its transcendent link with the universal and eternal, as I explained above. For state legalism, the artificial legitimacy of consensus and formal political channels is sufficient to establish the intrinsic good of the law, designed to satisfy the demands of the subject, the receptacle of sovereignty and, at the same time, the source of all possible legitimacy. This is a paradox, since the subject itself cannot suffice to formalize its own will without a jurisdictional apparatus that discretionally imputes this or that right that serves to satisfy its designs. This generates tension with the will of the state that brings us back to the great modern paradox, between the equivocality of the subject and the univocality of state power<sup>31</sup>.

For St. Thomas, the law is only law insofar as it is legitimate, and it is only legitimate insofar as it is good. Therefore, the law can only be law if it is just, that is, if it approximates the good and is ordered to morality, without taking possession of morality for itself<sup>32</sup>. Similarly, law is not law when it

<sup>29</sup> Muñoz de Baena, op. cit. 88-89. pp.

<sup>30</sup> Widow, op. cit. 103-105. pp

<sup>31</sup> "Legitimacy based on the satisfaction of the subject's desires, which are unlimited in themselves, entails the necessary insufficiency of a subject of legality to the limits of what it can guarantee and provide at any given moment, resulting in a political legitimacy that is more or less incomplete, more or less satisfactory, but never complete." Utrera, Juan Carlos, <<La metamorfosis de la legitimidad moderna >> in *Legalidad y Legitimidad en el Estado moderno* (Dir. Juan Antonio Gómez García), Madrid, Dykinson, 40. p.

<sup>32</sup> "Justice will become the unity of law and good, since the two main modes of law are presented as just, in a common nature (justice) that they realize in different ways: law as quiddity, good as exercise (...) Justice, then, constitutes a unity by nature, transcendental (not a merely nominal unity), which is exercised in different ways in each of its own modes and in relation to the main modes: the law, according to the formal mode; the good, according to the final mode. (...) Thus, justice will be the transcendental relationship between the law (general or particular) and the good (general or particular), by virtue of the act of legislative or judicial prudence." Gómez, Juan Antonio, *Derecho y analogía. Estudios de hermenéutica jurídica*, Madrid, UNED, 2017, 75-76. pp.

transgresses or repeals order and strays from the good, thus making the law intrinsically unjust. But law cannot be law, and the law cannot be law, if it becomes intrinsically moral, which is the main legal flaw of Modernity when understood as an imputation, emphasizing the immanent and self-referential nature of law. This is precisely where the main problem of state legislation lies, encapsulated in legalistic legal systems that are supposedly neutral and subject to a purely formalistic concept of legitimacy.

Law in modernity is self-referential because it has become detached from any connection to the idea of fairness, the specific embodiment of justice. The universal concept of justice that underpins the objectivity of law<sup>33</sup> is diminished in its transmutation into the subjectivity of norms, imputable artifacts that operate as technical regulations subsumed in the totality of subjective law, inhabited by the will that precedes sanction. The norm then appears to regulate the order imposed by the State, deploying its factual capacity through the exercise of violence, honoring Max Weber's famous maxim on the legitimate – or rather, legal – monopoly of the same. The norm is, therefore, the instrumental provision that formal legalism uses to attribute and impose sanctions intended to regulate and modulate human behavior, thus preserving the structural order of the system, which is presumed to be self-sufficient. The legal system, a positivist legacy of Kelsenian stamp and indebted to Kantian morality and Ockham's voluntarism, is calculatedly designed to impose regulations that direct human existence under a feigned and fictitious neutrality.

### *Conclusions*

Throughout this brief work, I have attempted to resolve the process of eviction or abrogation of law in favor of new artificial legal formulas that bring statist law, despite its legalistic, formal, and apparently unambiguous veneer, closer to an inescapable nihilism. Legislation unfolds as a mechanism of imputation, which I have attempted to define here as a formal attribution with a condition of possibility. First, it is a mechanism because it is part of a closed and immanent system. It is not definitively an order, since order tends to project itself into the universal, while the system, which is self-referential, tends to fold in on itself. Second, it is a formal attribution because the only way out of the system, is another configuration programmed by itself: law as a performative representation that discretionally adjudicates imposed realities, which operate as false legal ontologies and are completely changeable. Third, and as a logical extension of the above, it has a condition of possibility that must necessarily be rooted in the evanescence of the will, identified with freedom. The act is postponed, and in its place the potential triumphs. That said, and this is something that has already been emphasized, the will, like morality, plays a dual role: as the origin of all ordering or prescription, and as the final receptacle of the mandate.

In short, what can be inferred from this brief corollary is that legal modernity, even more so today than ever before in its most bitter update, known as postmodernity, has disoriented the compass of law. It is an urgent task to revitalize law from its ontological dimension, relocating it in its being and restoring its substance. If statist legality controls our existence, because it presumes itself to be moral by self-determining and self-legitimizing, the law must resist as the last bastion of freedom, with all its strength and dynamism, seeking its legitimacy beyond the ever-changing social and political transformations. Legitimacy limited to subjective will, will always be the enemy of Truth, always the defender of the narrative that mythologizes the political and sacralizes the world. The path to the restoration of authentic law is arduous but necessary, for it is urgent to reclaim a substantive political theology that restores the sense of order to the individual in his or her relationship with the common good, which is proper to the natural world, the prolegomenon of the divine.

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<sup>33</sup> "For the classical legal tradition, objectivity does not lie primarily in the norm but in social reality itself, that is, in things. It is the objectivity of finding what corresponds or is appropriate in justice to a specific case in life." Gallego, op. cit. 57. p.

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## At the Pinnacle of the Sanction System: Life Imprisonment in Light of the Objectives of Punishment\*

### ABSTRACT

This study focuses on life imprisonment particularly life imprisonment without the possibility of parole and examines its substantive and penal enforcement objectives. The study analyzes the position of life imprisonment within the system of sanctions through the lens of current Hungarian criminal law and its commentaries, with special attention to the feasibility of achieving special prevention objectives. The paper highlights legislative anomalies and reveals that the objectives and practical execution of life imprisonment without the possibility of parole in several respects contradict the principles declared in the Criminal Code and the Punishment Enforcement Act. The analysis addresses the principle of proportionality and the requirement of legal certainty. The central hypothesis suggests that life imprisonment without the possibility of parole, in its current form, does not fully comply with the stated substantive and penal enforcement objectives, thereby raising the need for legislative revision. The study applies descriptive, comparative, and empirical methods, aiming to assess the coherence of the sanction system and the enforcement of rule-of-law principles.

**KEYWORDS:** life imprisonment, LWOP, special prevention, penal objectives

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## Introduction

There is a certain parallel between the title of this study and the concept of life imprisonment. Specifically, both titles are somewhat misleading in terms of their actual content. Just as life imprisonment does not necessarily entail perpetual confinement – „over time, the interpretation that has become widely accepted is that, contrary to the literal term, this form of punishment, as a general rule, does not mean incarceration for the entirety of the convict's life”<sup>1</sup> – neither does life imprisonment without the possibility of parole (hereinafter: LWOP) truly live up to its name. In fact, the sanction mentioned in the title of this study cannot fully cover the actual scope of the inquiry either.<sup>2</sup> When analysing the position of life imprisonment within the system of sanctions, one must necessarily touch upon at least „two plus one” types of penalties: in addition to the punishment explicitly referred to in the title, both fixed-term imprisonment as a separate sanction, and LWOP as a specific form of life imprisonment merit consideration. In this regard, Mihály Tóth expresses linguistic concerns, stating that: „The terminology in use today is hypocritical, since in reality, only a single form of »life imprisonment« could exist. It is a legal absurdity to regard an institution as generally existent, but in certain cases as »actually existent»”<sup>3</sup> This study attempts to shed light – through the analysis of the abovementioned sanctions and the objectives of punishment and execution – on certain legislative anomalies that may call into question the full enforcement of the principle of legality in the current criminal law framework, with particular attention to recent legislative developments. Within this context, the study will provide an in-depth examination of special prevention, as one aspect of the broader objective of protecting society. Furthermore, by exploring the objectives of punishment and its execution, the study also seeks to contribute to answering the question of which punishment may – or may not – justifiably stand at the apex of the system of criminal sanctions. The analysis will naturally employ descriptive and comparative methodologies, and will also incorporate minimal quantitative empirical research in the form of statistical data.

Why can the question of which punishment should stand at the top of the system of sanctions become answerable through the examination of the objective of punishment and execution? Based on the ideas of István Bibó, the underlying assumption is that the organic development of criminal law corresponds with the advancement of a society's cultural level, the result of which may be the „softening” of the most severe forms of punishment. Just as the capital punishment has disappeared from the top of the system of sanctions in Hungary, it is conceivable that the days of life imprisonment are also numbered. According to Bibó, society's desire for retribution may diminish, while its demand for prevention may increase. This suggests that an attitude may gradually prevail in society which, in terms of the aims of punishment, indicates a shift away from the desire to retaliate against wrongdoing, and toward a stronger commitment to ensuring that criminal behaviour does not recur. As Bibó puts it: „The retributive character of the system of punishment can only be reduced where, and to the extent that, society's inclination toward indignation and retribution has also diminished. It is beyond doubt that, just as over the course of history society's readiness to take offence against the mentally ill and those suspected of witchcraft could be reduced to a minimum, so too is society's capacity for understanding capable of significant growth across the vast range of contemporary criminal offences.”<sup>4</sup> The more advanced the cultural level of a society, the greater its need and demand for milder forms of punishment. The level of cultural development of a society correlates with the demand for alternative forms of punishment. „The greater the society's level of understanding and tolerance grows, the more the moral and legal system may require punishments that focus on prevention and the avoidance of further crimes,

<sup>1</sup>Own trans. Ferenc, Nagy: *A szabadságelvonással járó szankciókról az új Btk.-ban*. pp. 6. In Börtönügyi Szemle, Vol 33, No4, 2014. pp. 1 – 18.

<sup>2</sup>See: Gergely, Gönczi: *A tényleges életfogytig tartó szabadságvesztés alapjogi vonatkozásai – Alkotmányos büntetőjog és a strasbourg joggyakorlat*. In Acta Humana, Vol. 3, No. 2, 2015. pp. 7 – 40. [https://real.mtak.hu/122344/1/AH\\_2015\\_2\\_Gonczi\\_Gergely.pdf](https://real.mtak.hu/122344/1/AH_2015_2_Gonczi_Gergely.pdf)

<sup>3</sup>Own trans. Mihály, Tóth: *Gondolatok az életfogytig tartó szabadságvesztés lehetséges jövőjéről*. <https://jog.tk.hun-ren.hu/blog/2014/09/eletfogytiglan>

<sup>4</sup>Own trans. István, Bibó: *Válogatott tanulmányok*. Magvető Könyvkiadó, 1986. pp. 170.

rather than on retribution or satisfying society's demand for vengeance.<sup>5</sup> Indeed, criminal policy is primarily determined by the level of civilization of the society.<sup>6</sup> Further insights can be connected to Bibó's line of thought. On the one hand, Ferenc Nagy has stated that „the imposition of life imprisonment for the duration of a person's life is generally not encountered, or is not applied in practice, in more civilized countries with a more developed legal culture.”<sup>7</sup> Referring further back, according to Plato „not that he is punished because he did wrong, for that which is done can never be undone, but in order that in future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing.”<sup>8</sup> Finally, it is also worth presenting the words of Erzsébet Kadlót on this matter:

„The sanctioning tools of criminal law – aligned with humanitarian considerations – are limited. There may be variations depending on legal systems and societies, but there exists an accepted minimum within civilized communities below which a state recognizing human rights and the minimal requirements of Christian-Jewish culture must not fall. It is no longer in question today that the use of the capital punishment does not fit within this civilized minimum, just as mutilating, torturous, and degrading punishments have, fortunately, long been suppressed. An enlightened state cannot, on any grounds, take anyone's life – not even that of a criminal.”<sup>9</sup>

Is it conceivable that the anomalies related to the objectives of punishment and execution in connection with imprisonment are in fact early signs of the „Bibó-style” trajectory of development outlined above? The development described by Bibó can in fact be observed in the current Hungarian criminal law as well: Section 79 of Act C of 2012 on the Criminal Code (a Büntető Törvénykönyvről szóló 2012. évi C. törvény, hereinafter: Criminal Code) and its justification, commentary, and explanatory notes place the greatest emphasis on the aim of prevention. The current objective of penal enforcement largely align with this approach. There is only one exception: LWOP. Precisely for this reason, the hypothesis of the present study may, in my view, be justifiably raised. At the same time, it should also be noted that the current Criminal Code is among the strictest in European Union. This severity is precisely what István László Gál attributes to the existence of LWOP: „Due to the application of LWOP, the Hungarian Criminal Code can be considered the strictest within the EU; Hungary is the only country where such a punishment is applied in practice.”<sup>10</sup> Lastly, it is important to clarify that the aim of this study is not to argue against or refute the notion that, in certain cases, perpetrators of the most serious crimes may remain in penal institutions for the rest of their lives.

## I. Hypothesis

Concerns may arise, as there exists a line of reasoning – when developed thematically – that fails to provide a satisfactory answer regarding the fulfilment of the objectives of punishment and penal enforcement in the case of LWOP. Moreover, based on the analysis of the objectives of punishment and execution, the legitimacy of life imprisonment with the possibility of parole itself may also be called into question. As a result, this may raise concerns regarding the principle of legality that underpins the entire criminal law system, particularly the violation of the maxim *nullum crimen / nulla poena sine lege certa*. In a broader sense, the full enforcement of one of the most fundamental elements of the rule of law – legal certainty – may also be called into question.<sup>11</sup> Why is it essential to define the objectives of punishment and penal enforcement? In my opinion, the significance lies in the fact that, through the

<sup>5</sup>Ibid.

<sup>6</sup>István László, Gál: A köztársasági elnöki kegyelem jogintézményének múltja és lehetséges jövője. [https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#\\_ftn21](https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#_ftn21)

<sup>7</sup>Own trans. Ferenc, Nagy: *A büntetőjogi szankciórendszer továbbfejlesztésének egyes elvi és gyakorlati kérdéseiről*. In Tóth Károly (Ed.): *Tanulmányok Dr. Veres József egyetemi tanár 70. születésnapjára*. Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Szeged, 1999. pp. 209-226. pp. 216.

<sup>8</sup>Plato: *Laws*. (trans.: Benjamin Jowett) <https://classics.mit.edu/Plato/laws.11.xi.html>

<sup>9</sup>Own trans. Erzsébet, Kadlót: *A jogos védelem és a tényleges életfogytig tartó szabadságvesztés a Btk.-ban*. In Hack Péter (Ed.): *Az új Büntető Törvénykönyv. Hagyomány és megújulás a büntetőjogban*. ELTE Bibó István Szakkollégium. 2013. pp. 75 – 88.

<sup>10</sup>Own trans. István László, Gál: A köztársasági elnöki kegyelem jogintézményének múltja és lehetséges jövője. [https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#\\_ftn21](https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#_ftn21)

<sup>11</sup>See: Decision 11/1992 (III.5) of the Hungarian Constitutional Court.

lens of the currently valid objectives of punishment and enforcement, the apex sanction of the penal system can be identified in a manner that is clear, precise, and intelligible, in accordance with the requirements set forth by criminal law. Indeed, only a punishment that can be deemed to fully and unquestionably conform to the prevailing – and, in my opinion, ideal – objectives of punishment and enforcement may justifiably serve as the most severe form of sanction. Should this not be the case, the criminal law system – whose core requirement is internal consistency – would be rendered flawed. „Punishment remains justified only insofar as its objectives are achieved.”<sup>12</sup> Argumentum a simile, only a punishment that realizes concrete objectives – namely, the objectives currently in force – can be regarded as justified. This is also related to a passage from the concurring opinion of János Zlinszky in Constitutional Court Decision No. 23/1990, which states: „Punishment, therefore, [...] is acceptable only in this purposive sense, and it immediately loses its justification as soon as it becomes incapable of achieving its aims.”<sup>13</sup>

## II. Substantive law

The current regulation explicitly states in Section 79 of the Criminal Code that „the objective of punishment shall be, in the interest of the protection of society, to prevent the perpetrator or any other person from committing a criminal offence.” This signifies that the principal objective is societal protection, realized through two subsidiary aims – namely, specific (special) and general prevention. Societal protection is the fundamental duty of the entire criminal legal framework, which, regarding punishment, is effectively synonymous with the prevention of crime. Special and general prevention constitute distinct yet interconnected dimensions of societal protection, whose joint realization is imperative for the effective attainment of punitive aims.<sup>14</sup> Furthermore, while not expressly articulated in the Criminal Code, a clear objective of punishment is retribution and compensation, meaning the restoration of the social order breached by the criminal act and the enforcement of justice principles with respect to the victims.<sup>15</sup> Special prevention, as a component of societal protection, may be implemented through a „two plus one” approach. On one hand, resocialization – understood as the reintegration of the offender into the social fabric – is pursued. This process essentially comprises the moral re-education of the offender, through which their personality undergoes positive development and they come to recognize the wrongfulness of their deeds, thus transforming into a law-abiding member of society. Secondly, by means of deterrence, whereby the offender is dissuaded from engaging in future criminal conduct due to the fear of sanctions. In such instances, the offender’s moral framework remains unaltered and no positive transformation of values occurs. Thirdly, through the neutralization or incapacitation of the offender. In the case of LWOP, this may be achieved solely through isolation, meaning the offender’s permanent segregation from society.<sup>16</sup> Out of the three possible modalities, the first – resocialization – is logically considered the most desirable, and thus may be treated as the principal objective.<sup>17</sup> Nevertheless, the goal of societal protection can also be fulfilled through the second approach, namely deterrence.<sup>18</sup> The commentaries and legislative justifications of the Criminal Code refer to special prevention solely in terms of the first two forms – resocialization and deterrence – recognizing these as integral to the objective of societal protection. In addition, Act CCXL of 2013 on the enforcement of penalties, measures, certain coercive measures and infraction confinement (a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról

<sup>12</sup>Own trans. Péter, Balázs: *Kegyetlen kegyelem? – A tényleges életfogytig tartó szabadságvesztés, avagy egy roskadozó jogintézmény kritikája és jövője.* pp. 32. In Büntetőjogi Szemle, Vol. 7, No. 2, pp. 24 – 38.

<sup>13</sup>Own trans. Point 4 of the concurring opinion of János Zlinszky in Decision No. 23/1990. of the Hungarian Constitutional Court.

<sup>14</sup>Róza, Mészár In Kónya István (Ed.) *Magyar Büntetőjog, Kommentár a gyakorlat számára*, 4. kiadás, I. kötet. Orac Kiadó Kft, 2024. pp. 314.

<sup>15</sup>Zoltán, Tóth J.: *Halálbüntetés: pro és kontra.* pp. 27. In *Jogelméleti Szemle*, 2003/2. [https://epa.oszk.hu/05200/05288/00014/pdf/EPA05288\\_jogelmeleti\\_szemle\\_2003\\_2\\_14.pdf](https://epa.oszk.hu/05200/05288/00014/pdf/EPA05288_jogelmeleti_szemle_2003_2_14.pdf)

<sup>16</sup>Ibid. pp. 28. and Péter, Balázs: *Kegyetlen kegyelem? – A tényleges életfogytig tartó szabadságvesztés, avagy egy roskadozó jogintézmény kritikája és jövője.* In Büntetőjogi Szemle, Vol. 7, No. 2, pp. 24 – 38.

<sup>17</sup>Legal justification of the Criminal Code <https://www.parlament.hu/irom39/06958/06958.pdf> (2025.05.25.)

<sup>18</sup>Róza, Mészár In Kónya István (Ed.) *Magyar Büntetőjog, Kommentár a gyakorlat számára*, 4. kiadás, I. kötet. Orac Kiadó Kft, 2024. pp. 314.

szóló 2013. évi CCXL. törvény, hereinafter: Punishment Enforcement Act) – explicitly highlights reintegration as a key objective and principle in the enforcement of custodial sanctions. The third form of implementation, that is, isolation in the context of LWOP, is identified in the legal literature as the least desirable method of realizing special prevention.<sup>19</sup> Nevertheless, the explanatory notes to the Punishment Enforcement Act refer to isolation as an „undesirable side effect” of the enforcement process.<sup>20</sup>

In addition to the regulation set out in Section 79 of the Criminal Code, punishment must also conform to the principles of proportionality and justice. The prevailing Hungarian criminal law rests on the principle of act-proportional liability. The commentary to the Criminal Code states that, for the aims articulated in Section 79 to be fulfilled, adherence to the principle of proportionality is of paramount importance.<sup>21</sup> The legal justification states that the punishment must be proportionate to the social danger posed by the criminal offense.<sup>22</sup> In the interpretation of the commentary, this complex concept primarily denotes proportionality in relation to the act itself; however, it may also encompass the perpetrator's personality, the social dangerousness of the conduct, and, in certain cases, the internal proportionality in a relationship between multiple offenders' actions.<sup>23</sup> The commentary further emphasizes that a just punishment can be achieved through a proportionate penalty – one that complies with substantive legal norms while also satisfying society's sense of justice. The cited commentary further appears to express a certain prioritization regarding the objectives of punishment, indicating that, in the service of proportionality and just retribution, the educative function can only receive a lesser emphasis.<sup>24</sup> Based on the regulatory framework, the term „education” can hardly be misunderstood as referring to special prevention – since its primary and most ideal form of implementation is reintegration through moral education.<sup>25</sup>

<sup>19</sup>See: Balázs Péter: *Kegyetlen kegyelem? – A tényleges életfogytig tartó szabadságvesztés, avagy egy roskadozó jogintézmény kritikája és jövője*. In Büntetőjogi Szemle, Vol. 7, No. 2, pp. 24 – 38.

and Zoltán, Tóth J.: *Halálbüntetés: pro és kontra*. pp. 27. In *Jogelméleti Szemle*, 2003/2. [https://epa.oszk.hu/05200/05288/00014/pdf/EPA05288\\_jogelmeleti\\_szemle\\_2003\\_2\\_14.pdf](https://epa.oszk.hu/05200/05288/00014/pdf/EPA05288_jogelmeleti_szemle_2003_2_14.pdf)

<sup>20</sup>Ervin, Belovics – György, Vókó: *A büntetésvégrehajtási törvény magyarázata*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2014. <https://jogkodex.hu/doc/2116706>

<sup>21</sup>Róza, Mészár In Kónya István (Ed.) *Magyar Büntetőjog, Kommentár a gyakorlat számára*, 4. kiadás, I. kötet. Orac Kiadó Kft, 2024. pp. 314.

<sup>22</sup>Legal justification of the Criminal Code <https://www.parlament.hu/irom39/06958/06958.pdf> (2025.05.25.)

<sup>23</sup>Róza, Mészár In Kónya István (Ed.) *Magyar Büntetőjog, Kommentár a gyakorlat számára*, 4. kiadás, I. kötet. Orac Kiadó Kft, 2024. pp. 314.

<sup>24</sup>Ibid.

<sup>25</sup>Tóth J.: *Halálbüntetés: pro és kontra*. pp. 27. In *Jogelméleti Szemle*, 2003/2. pp 28. [https://epa.oszk.hu/05200/05288/00014/pdf/EPA05288\\_jogelmeleti\\_szemle\\_2003\\_2\\_14.pdf](https://epa.oszk.hu/05200/05288/00014/pdf/EPA05288_jogelmeleti_szemle_2003_2_14.pdf)

## II.1. The Relationship of the LWOP to Substantive Legal Objectives

LWOP is not aligned with the punitive objectives established by the current legal framework. According to Section 79 of the Criminal Code, the objective of punishment is the protection of society, which can only be properly understood in conjunction with both special and general prevention. Thus, the objective of punishment – including societal protection – can only be fulfilled if the sanction effectively achieves both individual and collective prevention. According to the commentary, the legal justification, and the explanatory notes, special prevention is primarily aimed at resocialization, although it may also be achieved through deterrence. The third mode of implementation – incapacitation – is not reflected in the Criminal Code, the commentary, the legal justification, or the explanatory notes, but appears only in the legal literature, and represents the least ideal form of special prevention. Thus, in light of the current objectives of criminal law, incapacitation – which, in the case of LWOP, takes the form of isolation – does not figure among the modes of implementation of special prevention, which constitutes one aspect of societal protection. On this basis, a form of punishment that can achieve special prevention solely through incapacitation is, in theory, not compatible with the current legal framework. László Papp states that complete and permanent isolation renders the penal objectives set forth in the Criminal Code meaningless.<sup>26</sup> It is worth adding, however, that even if isolation were deemed an acceptable mode of realizing the current penal objectives, LWOP would still fail to meet this aim, as the existing legal framework neither guarantees nor can guarantee permanent isolation.<sup>27</sup>

## III. Penal Enforcement Law

When narrowing the focus to the objectives of punishment, it remains necessary to examine the objectives of custodial sentences within the broader conceptual framework of criminal law. The Punishment Enforcement Act further elaborates the objectives of punishment with regard to the most severe form of sanction. The commentary to the Punishment Enforcement Act states, in the context of elaborating the principles of enforcement, that the objectives of punishment must not be violated during execution; in other words, the substantive penal objectives and the enforcement objectives must be aligned and must be realized concurrently. This is confirmed both by the law itself and its explanatory notes: „the task of enforcement is to realize the objectives of punishment.”<sup>28</sup>

### III.1. Section 83(1) of the Punishment Enforcement Act

Section 83(1) of the Punishment Enforcement Act states: „The objective of executing a custodial sentence is to enforce the legal disadvantage prescribed in the final adjudication and, as a result of reintegration activities during enforcement, to facilitate the successful reintegration of the convicted person into society upon release and their transformation into a law-abiding member of the community.”<sup>29</sup> In a hardly ambiguous manner, the primary mode of special prevention – namely, resocialization – is articulated here. According to Popper, resocialization and reintegration (as well as rehabilitation) should be understood collectively.<sup>30</sup> Accordingly, in my view, it is not incorrect to treat these concepts as synonymous in the present context, emphasizing the connection between the objectives of enforcement and special prevention. It should be noted at this point that the Punishment Enforcement Act has expanded the concept of reintegration with a distinctive meaning.<sup>31</sup> Furthermore, it is

<sup>26</sup>See: László, Papp: *Elhúzódó kivégzés. Marad-e a tényleges életfogytig tartó büntetés?* pp. 24. In De Jure. Jogászok magazinja. No.2, 2007.

<sup>27</sup>Decision No. 3/2003 of the Hungarian Supreme Court on the Uniformity of Criminal Law.

<sup>28</sup>Own trans. Punishment Enforcement Act 1. § (1).

<sup>29</sup>Own trans.

<sup>30</sup>See: Péter, Popper: *A kriminális személyiségzavar kialakulása*. Akadémia Kiadó, Budapest, 1970.

<sup>31</sup>Legal justification of the Punishment Enforcement Act <https://www.parlament.hu/irom39/13096/13096.pdf> (2025.05.25.)

noteworthy that the substantive and enforcement objectives of custodial sentences are nuanced by the shared prefix „re-” in these concepts, which refers to the restoration of a previously existing state.<sup>32</sup> However, this approach is not always applicable to offenders, as many have never been in a favorable psychological or social condition worth restoring. For those who have lived in severely disadvantaged circumstances from birth, grappling with numerous social and individual problems as well as various deficiencies in socialization, the ideal objective would not be the restoration of a former state, but rather the establishment of better living conditions.<sup>33</sup> Thus, according to Section 83(1) of the Punishment Enforcement Act, in the case of fixed-term imprisonment and life imprisonment with the possibility of parole, a conjunction of objectives is evident regarding the objective of the punishment. The aims are the enforcement of the legal disadvantage and reintegration, the latter being the most preferred mode of realization of special prevention. The Punishment Enforcement Act states expressis verbis that, in both fixed-term imprisonment and life imprisonment with the possibility of parole, the convicted person's release is anticipated. This calls into question the legitimacy of the term „life imprisonment” in light of the principle *nullum crimen, nulla poena sine lege certa*, as it clearly appears that, contrary to the name, the purpose is not for the sentence to last for life. The legal justification of the Punishment Enforcement Act reinforce the latter statement in relation to Section 83, clarifying that the objective of enforcement is identical for both fixed-term imprisonment and life imprisonment with the possibility of parole: „The conceptual definition of the purpose of imprisonment, in harmony with the provisions of the Criminal Code, distinguishes between fixed-term imprisonment and the so-called LWOP.”<sup>34</sup> Argumentum a contrario: the conceptual definition of the purpose of imprisonment, in accordance with the provisions of the Criminal Code, does not distinguish between fixed-term imprisonment and the so-called life imprisonment with the possibility of parole. Neither the law, nor the commentary, nor the legal justification, nor the explanatory notes differentiate between these two sanctions with regard to the enforcement objectives of custodial sentences. However, such differentiation is made between fixed-term imprisonment and LWOP.

### III.2. Section 83(2) of the Punishment Enforcement Act

The following paragraph of the same section refines the rule as follows: „The purpose of executing life imprisonment imposed without the possibility of parole is, in the interest of protecting society, to enforce the legal disadvantage prescribed in the final adjudication.”<sup>35</sup> Thus, in the case of LWOP the objective of enforcement is reduced to the enforcement of the legal disadvantage. This second paragraph does not dispel the doubts surrounding the purpose of LWOP; rather, it declares them. For it clearly outlines an alarming tendency, namely that in this punishment, the purpose of detention is detention itself,<sup>36</sup> which is inconsistent with both the substantive and enforcement objectives.

The commentary on the Punishment Enforcement Act addresses this troubling assertion with an elegant formulation: „The legislator also reflected on the perspectivelessness of enforcing LWOP from the standpoint of reintegration, by defining the purpose of enforcement solely as the enforcement of the legal disadvantage imposed in the final adjudication. In principle, the »minimization« of the objective of punishment significantly narrows the range of means that can be assigned to that purpose.”<sup>37</sup> On this basis, not only is the substantive law objective of punishment and the enforcement objective of custodial sentences significantly eroded, but it is also explicitly acknowledged that this „minimized” objective

<sup>32</sup>Judit, Szabó: *Rehabilitálható-e a rehabilitáció?* pp. 36. In Börtönügyi Szemle, Vol. 33, No. 4, 2014. pp. 28 – 40.

<sup>33</sup>See: Robinson, Gwen. – Crow, Iain.: *Offender rehabilitation: Theory, research and practice*. Sage Publications Ltd. 2009.

<sup>34</sup>Own trans. Legal justification of the Punishment Enforcement Act <https://www.parlament.hu/irom39/13096/13096.pdf> (2025.05.25.)

<sup>35</sup>Own trans. Punishment Enforcement Act 83. § (2).

<sup>36</sup>Lajos, Garami: *Élő halottak? A tényleges életfogytiglani szabadságvesztés végrehajtásának fő problémái.* pp.56. In Börtönügyi Szemle, Vol. 18, No. 2, 1999. pp. 56 – 63.

<sup>37</sup>Own trans. József, Palló In Zsuzsanna, Juhász (Ed.): *Nagykommentár a büntetések, az intézkedések, egyes kényesintézkedések és a szabálysértési elzárás végrehajtásáról szóló 2013. évi CCXL. törvényhez.* Wolters Kluwer Hungary. 2024. <https://uj.jogtar.hu/#doc/db/375/id/A13Y0240.KK/ts/20250425/lr/chain9539>

does not appear to be effectively realized due to a lack of adequate means. Regarding the enforcement of the legal disadvantage as the sole enforcement objective of LWOP, the explanatory notes to the Punishment Enforcement Act align this with the imperative that imprisonment must be carried out as a punishment. From this perspective, the regime of enforcement plays a crucial role in ensuring the realization of all disadvantages inherent to the nature of the punishment.<sup>38</sup> „Previously, the legal framework contained no provision concerning the purpose of LWOP; this gap was filled by the Punishment Enforcement Act, thus introducing this as a new element in the regulation.”<sup>39</sup> Ergo, the legislator responded to the lacuna surrounding the purpose of LWOP, albeit, in my view, by creating a series of anomalies.

The commentary on the Punishment Enforcement Act also notes that, in the case of LWOP, the regulation focuses on the enforcement of the legal disadvantage and the protection of society.<sup>40</sup> Accordingly, the commentary attempts to link the purpose of LWOP, alongside the enforcement of the legal disadvantage, to societal protection as the primary substantive law objective. However, the determination of the true purpose of LWOP is complicated by the phrasing in the legal justification to the Punishment Enforcement Act, which emphasizes solely the protection of society: „A significant innovation is that the law defines an adequate purpose concept for life imprisonment without parole, which can be none other than the protection of society.”<sup>41</sup> Thus, on the one hand, the Punishment Enforcement Act defines the purpose of LWOP as the enforcement of the legal disadvantage. On the other hand, according to the commentary, the regulation focuses on both the enforcement of the legal disadvantage and the protection of society in cases of LWOP. Thirdly, the legal justification to the Act designate the protection of society as the sole purpose in such cases.

### **III.3. Sections 83 (6) – (8) of the Punishment Enforcement Act**

Proceeding further through the subsections of Section 83 of the Punishment Enforcement Act, it is expressly stated that: „During the execution of a custodial sentence, the convict may only be separated from society to the extent necessary to achieve the objectives of the punishment. The convict must be allowed to establish, maintain, and develop family, personal, and social relationships, provided that these do not conflict with the objective of the punishment or with the order and security of the institution.”<sup>42</sup> In addition, the law also provides that „*during the execution of a custodial sentence, it must be ensured that the convict’s self-esteem, personality, and sense of responsibility can develop, thereby preparing them for an independent life after release in accordance with societal expectations.*”<sup>43</sup> Three key observations can be made with confidence regarding these two subsections. First, they reinforce the reintegrative objective of imprisonment. Second, they anticipate the eventual release of the convict. Third, they draw no distinction between fixed-term imprisonment, life imprisonment with the possibility of parole, and LWOP.<sup>44</sup> This interpretation is further reinforced by the explanatory notes to the Punishment Enforcement Act, which states: „*One of the primary tasks of the penitentiary system is to facilitate the reintegration of the convict into society. This means that upon release, the individual should be in a position, and possess the necessary attitude, to be both capable of and internally*

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<sup>38</sup>Ervin, Belovics – György, Vókó: *A büntetésvérehajtási törvény magyarázata*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2014. <https://jogkodex.hu/doc/2116706>

<sup>39</sup>Own trans. József, Palló In Zsuzsanna, Juhász (Ed.): *Nagykommentár a büntetések, az intézkedések, egyes képnyeszerintézkedések és a szabálysértési elzárás vérehajtásáról szóló 2013. évi CCXL. törvényhez*. Wolters Kluwer Hungary. 2024. <https://uj.jogtar.hu/#doc/db/375/id/A13Y0240.KK/ts/20250425/lr/chain9539>

<sup>40</sup>Ibid.

<sup>41</sup>Own trans. Legal justification of the Punishment Enforcement Act <https://www.parlament.hu/irom39/13096/13096.pdf> (2025.05.25.)

<sup>42</sup>Own trans. Punishment Enforcement Act 83. § (6).

<sup>43</sup>Own trans. Punishment Enforcement Act 83. § (7).

<sup>44</sup>Kornélia, Hagymási: *Végtelen idő a rácsok mögött: avagy mennyiben van ma létfogosultsága Magyarországon a tényleges életfogytig tartó szabadságvesztésnek*. pp.68. In Börtönügyi Szemle, Vol.28, No.2, 2009. pp. 61 – 76.

*motivated to become a useful member of society.*<sup>45</sup> It must again be emphasized that uncertainty may arise in determining the true purpose and content of the aforementioned forms of punishment, as neither the Act nor its commentary makes any distinction at this point between fixed-term imprisonment, life imprisonment with the possibility of parole, and LWOP. In this context, a violation of the principle of legal certainty may also be raised, as the cited provisions of the Punishment Enforcement Act stand in contrast to the Criminal Code, which clearly differentiates between fixed-term imprisonment and life imprisonment. Accordingly, when the Punishment Enforcement Act refers *merely* to imprisonment, it should, in principle, be interpreted as encompassing all three forms. However, the content of the regulation clearly reveals the opposite: the provisions do not treat these forms uniformly. The commentary further affirms the reintegrative purpose of imprisonment – explicitly including long-term imprisonment – by stating that the execution of the sentence must not result in the release of individuals who are physically or mentally harmed. Such an outcome would be fundamentally at odds with the objective of the punishment and the interests of society. Therefore, in order to counterbalance or eliminate the aforementioned harmful effects of long-term imprisonment, the penitentiary system must employ appropriate measures and institutional tools.<sup>46</sup> At this point, the commentary begins to differentiate between types of imprisonment, but it does so by introducing a new term: „*long-term imprisonment*.” However, neither the legal justification of the Punishment Enforcement Act, nor its explanatory notes or commentary, provides a definition of what constitutes long-term imprisonment. There is no consensus in this regard, but several points can be asserted. First, shortly after the turn of the millennium, Ferenc Nagy defined long-term imprisonment as a custodial sentence of five years or more.<sup>47</sup> Second, Recommendation Rec(2003)23 of the Committee of Ministers of the Council of Europe likewise identified, in the context of fixed-term imprisonment, sentences exceeding five years as constituting long-term imprisonment.<sup>48</sup> Third, based on a grammatical interpretation, it may also be inferred that only sentences exceeding ten years fall within this category under Section 186 (1) of the Punishment Enforcement Act which is entitled „*Preparation for release in the case of prisoners serving long-term imprisonment*”.<sup>49</sup> The provision under Section 186 (1) of the Punishment Enforcement Act states: „*A convict who has continuously served at least ten years of a custodial sentence in a penitentiary institution must be included in a reintegration programme, the rules of which the convict is obliged to follow.*”<sup>50</sup> On this basis, the category of long-term imprisonment may encompass fixed-term imprisonment as well as life imprisonment with or without the possibility of parole. Fourth, the picture is further nuanced by the fact that, under the Punishment Enforcement Act, prisoners sentenced to at least fifteen years of imprisonment, in addition to those serving life sentences with the possibility of parole, may be placed in a special unit for long-term prisoners.<sup>51</sup>

<sup>45</sup>Own trans. Ervin, Belovics – György, Vókó: *A büntetésvérehajtási törvény magyarázata*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2014. <https://jogkodex.hu/doc/2116706>

<sup>46</sup>József, Palló In Zsuzsanna, Juhász (Ed.): *Nagykommentár a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás vérehajtásáról szóló 2013. évi CCXL. törvényhez*. Wolters Kluwer Hungary. 2024. <https://uj.jogtar.hu/#doc/db/375/id/A13Y0240.KK/ts/20250425/lr/chain9539>

<sup>47</sup>Ferenc, Nagy: *A hosszú tartamú szabadságvesztés büntetőjogi kérdéseiről: rövid hazai áttekintés és nemzetközi kitekintés alapján*. pp. 15. In Börtönügyi Szemle, Vol. 24, No.2, 2005. pp. 7 – 18.

<sup>48</sup>Ibid.

<sup>49</sup>Own trans.

<sup>50</sup>Own trans. Punishment Enforcement Act 186. § (1).

<sup>51</sup>See: Punishment Enforcement Act 105. § (1).

### III.4. The Relationship of LWOP to the Objectives of Execution

First Proposition: The anomaly between substantive and execution objectives in LWOP. In the case of LWOP a notable anomaly emerges between the objectives set by substantive criminal law and those prescribed by the law governing sentence execution. Substantive law assigns LWOP the objectives of social protection, as well as specific and general prevention, whereas penal enforcement defines its purpose as the enforcement of the legal sanction. This stands in contrast to the principle, reiterated throughout the Punishment Enforcement Act, that the aim of enforcement is to realize the objectives of punishment. What, then, can the enforcement of the legal sanction mean under the Punishment Enforcement Act? The current Criminal Code and Act IV of 1978 demonstrate minimal divergence with regard to penal objectives, a difference that lies primarily in the terminology of „legal sanction.” The current legislation refrains from defining „punishment” or explicitly stating its nature as a legal sanction; however, the legal justification clarifies: „*Punishment is a legal sanction imposed due to the commission of a criminal offense, proportionate to the danger the offense poses to society.*”<sup>52</sup> Thus, under substantive law, the legal sanction is effectively synonymous with the punishment itself. As previously illustrated, according to the explanatory notes to the Punishment Enforcement Act, the enforcement of the legal sanction means that imprisonment must be executed as punishment, and it is the task of enforcement to impose the inherent burdens essential to its nature. The explanatory notes further emphasizes that „*imprisonment as a punishment must consist solely of the deprivation of liberty,*” and that „*the fundamental punitive element, the true punishment, is expressed in the deprivation of freedom, i.e., incarceration.*”<sup>53</sup> Therefore, in the case of LWOP, the punishment – i.e., the legal sanction – is the incarceration itself; the sole objective is the enforcement of this sanction. However, the purpose of punishment cannot be simply the enforcement of the legal sanction, since the sanction’s very nature is an inherent conceptual element of punishment, automatically realized in every instance. This suggests that the legislator has, in effect, removed the penal objective from the regulatory framework in the context of LWOP. Legal sanction equals punishment; in LWOP, the objective of punishment is the enforcement of the sanction. Put differently, the purpose of punishment in LWOP is punishment itself, consisting of the deprivation of liberty – incarceration. In other words, the objective of LWOP is incarceration. How does this relate to special prevention? The Punishment Enforcement Act stipulates that in the case of LWOP, the enforcement of the legal sanction is conducted in the interest of protecting society. Accordingly, LWOP protects society *through incarceration*, which amounts to isolation. As elaborated above, however, isolation cannot fully satisfy penal objectives. Once again, it must be stressed that the current regulation does not guarantee permanent incapacitation even in cases of LWOP.

Second Assertion: The Punishment Enforcement Act, along with its justification, commentary, and explanatory notes, presents a lack of clarity regarding the true purpose of LWOP. Furthermore, the terminology used in these sources is inconsistent, as it is not always clear when they refer to fixed-term imprisonment, life imprisonment with or without the possibility of parole. Additionally, the precise definition of long-term imprisonment remains uncertain.

#### Commentary on the Punishment Enforcement Act:

(1) The execution of imprisonment focuses on the enforcement of the legal sanction and the protection of society.<sup>54</sup>

(2) Regarding the reintegration objective of imprisonment, and specifically long-term imprisonment, the execution must not result in releasing physically or mentally impaired individuals into free life, as this would be fundamentally at odds with the purpose of punishment and the interests of society.<sup>55</sup>

<sup>52</sup>Own trans. See: Anikó, Pallagi: *A tényleges életfogytig tartó szabadságvesztés a büntetőpolitika szemszögéből*. pp. 75. In Belügyi Szemle, Vol. 62, No. 12, 2014. pp. 75 – 98.

<sup>53</sup>Own trans. Ervin, Belovics – György, Vókó: *A büntetésvérehajtási törvény magyarázata*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2014. <https://jogkodex.hu/doc/2116706>

<sup>54</sup>Own trans. József, Palló In Zsuzsanna, Juhász (Ed.): *Nagykommentár a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás vérehajtásáról szóló 2013. évi CCXL. törvényhez*. Wolters Kluwer Hungary. 2024. <https://uj.jogtar.hu/#doc/db/375/id/A13Y0240.KK/ts/20250425/lr/chain9539>

<sup>55</sup>Own trans. Ibid.

The problematics of the (1) first excerpted passage from the commentary have been addressed earlier. The (2) second quoted passage from the commentary is irreconcilable with the concept of LWOP. It must be emphasized again that, in the case of LWOP, prisoners may potentially be released, despite reintegration not being an objective of their execution. Given the strict regime governing their detention, they must comply with the most stringent rules, which tend to reinforce personality traits that are distinctly counterproductive to social reintegration. The commentary mandates that the penal enforcement system employ adequate means to mitigate the harmful effects of imprisonment. Yet, it also stipulates that, in the context of LWOP, the „minimization” of the punishment’s purpose significantly narrows the range of instruments available to achieve this goal.<sup>56</sup> Argumentum *a contrario*: it is fundamentally contrary to the objectives of punishment and societal interests if the penal enforcement system fails to provide instruments to counterbalance the detrimental effects of imprisonment (including long-term imprisonment). According to the execution objectives for LWOP, no such mitigating measures are envisaged, which stands in contradiction to the objectives of punishment. Furthermore, it is important to underscore that additional interpretative difficulties arise here, as the Punishment Enforcement Act – although it previously did not differentiate between various forms of imprisonment – introduces a new term at this point (long-term imprisonment), the exact scope of which remains unsettled even in scholarly discourse.

**Justification of the Punishment Enforcement Act:**

The sole objective of LWOP must be the protection of society.<sup>57</sup>

**Punishment Enforcement Act:**

The purpose of LWOP is the enforcement of the legal sanction in order to protect society.<sup>58</sup>

Regarding the Punishment Enforcement Act and its justification, following the same line of reasoning elaborated above, it can be concluded that, under current regulations, LWOP fails to effectively realize the protection of society.

#### **IV. LWOP in the Context of the Principle of Proportionality in Punishment**

In the realm of penal objectives, the relationship between LWOP and the principle of proportionality emerges as a distinctly relevant issue. This question arguably became particularly pressing following the abolition of the capital punishment. A widely held and by no means unfounded argument in favor of LWOP is that it constitutes the only genuine alternative to the capital punishment, which for a long time stood at the pinnacle of the sanctioning system. In Hungary, the organic connection between these two sanctions was already evident prior to the abolition of the capital punishment: „For example, the Presidential Council often commuted a portion of death sentences imposed to life imprisonment on grounds of clemency.”<sup>59</sup> As Gergely Gönczi highlights, one of the Western world’s greatest challenges for centuries has been to adequately fill the void left by the abolition of the capital punishment.<sup>60</sup> According to many, life imprisonment represents the only viable alternative to fill this

<sup>56</sup>József, Palló In Zsuzsanna, Juhász (Ed.): *Nagykommentár a büntetések, az intézkedések, egyes kényeszerítekedések és a szabálysértési elzárás végrehajtásáról szóló 2013. évi CCXL. törvényhez*. Wolters Kluwer Hungary. 2024. <https://uj.jogtar.hu/#doc/db/375/id/A13Y0240.KK/ts/20250425/lr/chain9539>

<sup>57</sup>Own trans. Legal justification of the Punishment Enforcement Act <https://www.parlament.hu/irom39/13096/13096.pdf> (2025.05.25.)

<sup>58</sup>Own trans. Punishment Enforcement Act 83. § (2).

<sup>59</sup>Own trans. István László, Gál: A köztársasági elnöki kegyelem jogintézményének múltja és lehetséges jövője. [https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#\\_ftn21](https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#_ftn21)

<sup>60</sup> See: Gergely, Gönczi: *A tényleges életfogytig tartó szabadságvesztés alapjogi vonatkozásai – Alkotmányos büntetőjog és a strasbourg joggyakorlat*. pp. 11. In *Acta Humana*, Vol. 3, No. 2, 2015. pp. 7 – 40. [https://real.mtak.hu/122344/1/AH\\_2015\\_2\\_Gonczi\\_Gergely.pdf](https://real.mtak.hu/122344/1/AH_2015_2_Gonczi_Gergely.pdf)

particular void.<sup>61</sup> However, some argue that following the abolition of the capital punishment, life imprisonment alone is insufficient to fulfill this role.<sup>62</sup> Dávid Vig characterized the post-abolition penal system as a „decapitated sanctioning system,” whose fundamental problem lies in the fact that, in cases of life imprisonment, criminal law is powerless against offenders who have committed the most serious crimes<sup>63</sup> meaning it is incapable of delivering a punishment proportionate to the gravity of the offense. András Polgár elaborates that the aforementioned regulatory gap violated society’s sense of justice, exerting a dysfunctional effect on voluntary law compliance. The problem manifested in the absence of proportional punishment. While, in the majority of cases, offenders of lesser serious crimes were sanctioned proportionately by law enforcement authorities, offenders of particularly grave offenses received disproportionately lenient punishments, resulting in the failure to achieve the penal objectives.<sup>64</sup> To support the preceding assertion: Between 1990 and 1998, the Criminal Division of the Supreme Court rendered numerous substantive decisions in concrete cases aimed at remedying the adverse nationwide phenomenon arising in sentencing practices following the Constitutional Court’s abolition of the capital punishment. This phenomenon was characterized by the imposition of disproportionately lenient sentences inconsistent with a just system of proportional responsibility, as well as inconsistent and sometimes extreme disparities in sentencing. The Criminal Division’s efforts sought to eliminate these issues and stabilize judicial practice.<sup>65</sup> The introduction of LWOP was the legislative solution to this situation, excluding the possibility of conditional release and thus serving as a gap-filling measure by the legislator. Its purpose was to protect society from offenders who have exhibited such grave conduct fundamentally opposed to social norms that their reintegration into society is effectively hopeless.<sup>66</sup> András Polgár states that „without this sanction in certain egregious cases, the punishment would not be proportionate to the offense.”<sup>67</sup> Moreover, it is important to highlight the parallel opinion of András Szabó, a proponent of the absolute theory,<sup>68</sup> expressed in the Constitutional Court’s decision 23/1990 AB, where he asserts that it is sufficient for punishment to be proportionate to the offense; it need not serve any other purpose: „The purpose of punishment exists in itself: retribution regardless of any other aim.”<sup>69</sup>

As previously noted, the commentary on the current Criminal Code also addresses that, alongside the enumerated penal objectives in the statutory text, one of the most important requirements imposed on punishments is the principle of proportionality, since Hungarian criminal law is fundamentally based on the principle of proportional liability. Furthermore, it is established that through proportionality, a just punishment can be ensured – one that not only complies with substantive legal norms but also aligns with societal demands. In this regard, education – which inherently encompasses both special and general prevention in the commentary’s terminology – can only be accorded a lesser emphasis.<sup>70</sup> In connection with this, the following observation may be made: according to the

<sup>61</sup> See: Johnson, Robert – McGonagall-Smith, Sandra: *Life Without Parole, America’s Other Death Penalty*. In The Prison Journal. Vol. 88, No. 2, 2008. pp. 328–346.

<sup>62</sup> András, Polgár: *Ad dies vitae. Az életfogytig tartó szabadságvesztés szabályozása, gyakorlata és végrehajtása*. [Doktori disszertáció] Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2017. pp. 21. <https://pea.lib.pte.hu/server/api/core/bitstreams/38a926c4-9e62-426b-8c91-f877dcc940da/content>

<sup>63</sup> Dávid, Vig: Izoláció a társadalomvédelem bűvöletében. Határozatlan ideig tartó szabadságmegvonás Európában. In dr. Virág György (Ed.): *Kriminológiai Tanulmányok* 46. Országos Kriminológiai Intézet. pp. 38 – 51. pp.39.

<sup>64</sup> András, Polgár: *Ad dies vitae. Az életfogytig tartó szabadságvesztés szabályozása, gyakorlata és végrehajtása*. [Doktori disszertáció] Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2017. pp. 21. <https://pea.lib.pte.hu/server/api/core/bitstreams/38a926c4-9e62-426b-8c91-f877dcc940da/content>

<sup>65</sup> Own trans. István, Kónya: *Érzelmek és indulatok az életfogytig körül*. pp. 130. In Magyar Jog. Vol. 64, No. 3, 2017. pp. 129 – 140.

<sup>66</sup> Ádám, Békés: *Életfogytig tartó vita? - Tennivalók egy strasbourgி döntés kapcsán*. pp. 6. In Iustum. Aequum. Salutare. Vol. 10, No.2, 2014. pp. 5 – 12.

<sup>67</sup> Own trans. András, Polgár: *Ad dies vitae. Az életfogytig tartó szabadságvesztés szabályozása, gyakorlata és végrehajtása*. [Doktori disszertáció] Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2017. pp. 24. <https://pea.lib.pte.hu/server/api/core/bitstreams/38a926c4-9e62-426b-8c91-f877dcc940da/content>

<sup>68</sup> Zsuzsanna, Juhász In: Karsai Krisztina (Ed.): *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez*. Wolters Kluwer Hungary, Budapest, 2022. pp. 221.

<sup>69</sup> Own trans. Point 2 of the concurring opinion of András Szabó in Decision No. 23/1990 of the Hungarian Constitutional CourtDecision 23/1990 of the Hungarian Constitutional Court.

<sup>70</sup> Róza, Mészár In Kónya István (Ed.) *Magyar Büntetőjog, Kommentár a gyakorlat számára*, 4. kiadás, I. kötet. Orac Kiadó Kft, 2024. pp. 314.

commentaries, the enforcement of the principle of proportionality enables the achievement of just punishment that satisfies both substantive legal requirements and society's sense of justice. Let us examine these two factors – compliance with substantive law and satisfaction of society's sense of justice – in the context of LWOP. The substantive legal rules here primarily relate to the penal objectives, which were previously detailed. According to these, a proportionate punishment complies with substantive law only if special prevention is realized through resocialization or deterrence. Based on the above, LWOP fails to meet the substantive legal requirements and thus does not fulfill the first „condition” of proportionate punishment. The second „component” is the satisfaction of society's sense of justice, which, in my view, is by no means irrelevant but should be treated at most as a subjective factor. Opinions vary in this regard. For instance, Mihály Tóth warns against conflating social justice sentiments and vengeance with societal protection – the current penal objective.<sup>71</sup> András Polgár, citing Zoltán Márki, argues that the sanction system must also meet social expectations.<sup>72</sup> From a „meta-criminal law” perspective, it is worth emphasizing that in an indirect democracy, society participates in legislation only indirectly. The legislative body is formed based on the votes of the electorate, and this elected body enacts laws – including criminal law norms – thereby representing society indirectly. From a constitutional law standpoint, compliance with social expectations need only be ensured every four years at most.<sup>73</sup> In this context, the role of penal policy is also critical. Penal policy is the branch of criminal policy that determines which human behaviors should be punishable and what the state's response to offenders should be. Criminal policy forms part of general policy; it shapes criminal legislation and sets criteria to be enforced during law application, albeit with only moderate influence over the latter.<sup>74</sup> Accordingly, criminal policy is tied not only to criminal law but also to politics, inevitably reflecting the interests of society and its various groups. The legislator plays a vital role in harmonizing the rule-of-law expectations regarding criminal laws with societal demands.<sup>75</sup> In my opinion, this latter harmony is absent in the case of LWOP, at least concerning its conformity with substantive law. The commentary's assertion that education should play only a minor role when proportional punishment is achieved appears somewhat problematic. As previously discussed, education clearly relates to prevention. Although the normative authority of the commentary may be questioned, it nevertheless risks undermining legal certainty by suggesting a hierarchy among penal objectives. This is done despite the fact that prevention as a penal objective expressis verbis appears in the Criminal Code. Moreover, the primary execution objective of imprisonment focus largely on achieving special prevention through resocialization. As argued above, the principle of proportionality can only be fulfilled if substantive legal norms are met. How could such norms be satisfied if proportionate punishment is subordinated to the normative preventive objective of the Criminal Code? It is undisputed that the requirement of proportionate punishment belongs to the current criminal law; however, it cannot override statutory penal objectives but must be realized together with them. Otherwise, it would be possible, for example, to legitimize the capital punishment since, for certain acts, it could be considered the only proportionate response – applying which, as the commentary put it, would allow the rule-of-law principles to have „only a minor role.”

<sup>71</sup>Mihály, Tóth: Kiszámítható döntések a kiszámíthatlan jövőről. <https://ujbtk.hu/toth-mihaly-kiszamithato-dontesek-a-kiszamithatlan-jovorol/>

<sup>72</sup>András, Polgár: *Ad dies vitae. Az életfogytig tartó szabadságvesztés szabályozása, gyakorlata és végrehajtása.* [Doktori disszertáció] Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2017. pp. 25. <https://pea.lib.pte.hu/server/api/core/bitstreams/38a926c4-9e62-426b-8c91-f877dcc940da/content>

<sup>73</sup>Adám, Balássy et al.: *The normative questions of life imprisonment and capital punishment: Morality or legality.* In *De Iurisprudentia et Iure Publico: Jog- és Politikatudományi Folyóirat.* Vol 14, No. 3, 2023.

<sup>74</sup>István László, Gál: A köztársasági elnöki kegyelem jogintézményének múltja és lehetséges jövője. [https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#\\_ftn21](https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#_ftn21) and József, Földvári: *Kriminálpolitika.* Közgazdasági és Jogi Könyvkiadó. 1987. pp. 32-33.

<sup>75</sup>Pallagi: *A tényleges életfogytig tartó szabadságvesztés a büntetőpolitika szemszögéből.* pp. 76. In Belügyi Szemle, Vol. 62, No. 12, 2014. pp. 75 – 98.

## V. Additional anomalies concerning the LWOP in light of recent legislative developments

The frequently cited commentary on the Punishment Enforcement Act states regarding the purpose of LWOP that „previously, the law did not contain any provision related to the purpose of life imprisonment without parole; this deficiency was remedied by the Punishment Enforcement Act, thus introducing this as a new element in the regulation.”<sup>76</sup> Therefore, the definition of the purpose of LWOP in Section 83(2) of the Punishment Enforcement Act constituted a gap-filling measure by the legislator. Based on the above, it is a concerning trend that this long-overdue legislative measure by the legislator may result in multiple anomalies, threatening the consistency of criminal lawmaking and, consequently, the rule of law principle of *nullum crimen / nulla poena sine lege certa*. Moreover, recent legislation appears to reinforce this particular trend. On one hand, regulations concerning those sentenced to LWOP have become stricter, rendering them even more counterproductive from the perspective of reintegration:

Additional restrictive provisions apply to inmates serving LWOP, requiring their classification in category V, excluding any advancement to categories I or II. Furthermore, even if reclassification to categories III or IV occurs, they are not permitted visitation outside the institution, temporary leave, or furloughs, nor can they participate in external employment.<sup>77</sup> Additionally, a longstanding problem that adversely affects the enforcement of LWOP, independently of other anomalies, is that the Prison and Penitentiary of Szeged fundamentally serves as the executing institution for LWOP sentences in Hungary. However, due to increasing overcrowding challenges, the capacity of the „Csillag ward” has reached its professional tolerance limit. Consequently, inmates sentenced to LWOP are now serving their sentences in other correctional institutions as well, which further undermines the potential for successful reintegration<sup>78</sup>

Secondly, Act XXX of 2024, by amending Section 104 of the Criminal Code, along with the thirteenth amendment to the Fundamental Law, abolished the President’s power to grant pardons in cases concerning certain offences against sexual freedom and sexual morality. This may create further anomalies in relation to LWOP. In light of the case law of the European Court of Human Rights, particularly the case of *Magyar László v. Hungary*, the Hungarian legal system amended the Punishment Enforcement Act through Sections 93–162 of Act LXXII of 2014 and introduced the mandatory pardon procedure for LWOP cases, effective from January 1, 2015.<sup>79</sup> According to this regulation, the „final word” rests with the President of the Republic, who alone may grant pardon. Thus, this amendment gave rise to the contradiction previously identified in this study: LWOP is not truly „life” imprisonment, since after forty years a mandatory pardon procedure must be initiated *ex officio*. As a result, offenders may be released on parole – it must be emphasized again – even if reintegration was never an execution objective in their case. Moreover, the increasingly stringent rules governing execution that must be observed are explicitly counterproductive regarding their (re)integration into society. A brief systematic overview notes that pardon can be divided into general pardon and individual pardon. The former is exercised by the Parliament, while the latter is exercised by the President of the Republic. Pardon granted by the President of the Republic can be further categorized into three types: procedural pardon, executive pardon, and expungement by pardon.<sup>80</sup> At this point, contradictions can be identified among certain commentaries on the current regulations. The commentary on Section 25 of the Criminal Code states that the mandatory pardon procedure qualifies as executive pardon, as it may result in a reduction of the

<sup>76</sup>Own trans. József, Palló In Zsuzsanna, Juhász (Ed.): *Nagykommentár a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról szóló 2013. évi CCXL. törvényhez*. Wolters Kluwer Hungary. 2024. <https://uj.jogtar.hu/#doc/db/375/id/A13Y0240.KK/ts/20250425/lr/chain9539>

<sup>77</sup>Own trans. Ágnes, Czine: *A büntetés-végrehajtási döntések alkotmányossági értékelése, megítélése, fi-gyelemmel a büntetés-végrehajtási kreditrendszer bevezetésére*. pp. 1875. In Belügyi Szemle, Vol. 72, No. 10, 2024. pp. 1859 – 1879.

<sup>78</sup>Pál, Kiszely: *Merre tovább, magyar életfogytiglan?* pp. 47. In Börtönügyi Szemle, Vol. 32, No. 1, pp. 47 – 64.

<sup>79</sup>Decision No. 3/2015 of the Curia on the Uniformity of Criminal Law.

<sup>80</sup>Zsuzsanna, Árva: *Nagykommentár Magyarország Alaptörvényéhez*. Wolters Kluwer Hungary. Budapest, 2025. <https://uj.jogtar.hu/#doc/db/428/id/A20Y2225.KK/ts/20250301/lr/chain8790>

punishment imposed by the judgment.<sup>81</sup> Furthermore, the same commentary on this section also notes in several places that executive pardon within the scope of individual pardon – including pardon granted in the mandatory pardon procedure – may also be exercised by the Pardon Committee as per the Punishment Enforcement Act.<sup>82</sup> In contrast, the Punishment Enforcement Act and other previously cited sources establish that only the President of the Republic can exercise individual pardon, and that the Pardon Committee is an ad hoc body assisting in the mandatory pardon procedure.<sup>83</sup>

Thus, through the thirteenth amendment to the Fundamental Law, Article 9 was supplemented with a new paragraph empowering a cardinal act to limit the President of the Republic's authority to grant individual pardons. Based on this authorization, Section 104 of the Criminal Code was amended, and the newly introduced rules in paragraphs (3)(a) and (3)(b) exclude the President's power to grant pardons in certain cases. Accordingly, Section 464 of the Criminal Code stipulates that Section 104 (3) is cardinal based on Article 9 (8) of the Fundamental Law – this being the only and first cardinal provision of the Criminal Code. This in itself represents a legal anomaly, as numerous legal and quasi-legal sources have affirmed the President's unrestricted and discretionary power to grant individual pardons. Decision No. 3/2003 of the Hungarian Supreme Court on the Uniformity of Criminal Law explicitly affirms that the President's power to grant pardons is unrestricted in nature. The 31/1997 Constitutional Court Decision further affirms that pardon is a discretionary power of the President, whereby the State waives its criminal claim upon its exercise. Equally important are the findings of the 144/2008 Constitutional Court Decision, which hold that „by the very nature of the President's decision-making authority, he/she may, in the exercise of discretion, decide in any case to mitigate or remit the imposed penalty, or to relieve the offender of the disadvantages associated with a criminal record.”<sup>84</sup>

There are strong grounds to assume that Section 104 of the Criminal Code concerns expungement by pardon, which is one of the three forms of individual pardon. This interpretation is supported by both grammatical and systematic interpretation, as the provision is located under the title of „Expungement by pardon.” Furthermore, the commentary on Section 104 of the Criminal Code confirms this: „In addition to procedural and executive pardon, the third form of pardon is expungement by pardon, which grants relief from the legal consequences associated with a criminal record.”<sup>85</sup> However, the commentary to Section 25 of the Criminal Code presents the following statement concerning the types of pardon: „As of 1 July 2024, the provision of the Criminal Code adopted on the basis of a constitutional mandate enters into force, which excludes certain offenders – convicted of specific crimes – from the scope of executive pardon. See the commentary on Section 104 and the new Section 464 of the Criminal Code.”<sup>86</sup> The quoted commentary unambiguously identifies the restriction laid down in Section 104 (3) a) and (3) b) of the Criminal Code as a limitation on executive pardon – despite the fact that, theoretically, Section 104 is intended to regulate the matter of expungement by pardon. Although Section 104 (3) states that „The President of the Republic may not exercise the right to grant individual pardons” – a wording which could arguably be interpreted as applying to all three forms of individual pardon – the grammatical and systematic interpretation indicates, with little room for ambiguity, that this provision can only pertain to expungement by pardon. If the new amendment to Section 104 does indeed restrict the executive pardon, a situation may arise in which the mandatory pardon procedure becomes entirely void of effect: the offender is sentenced to LWOP, yet there is no theoretical possibility of release. This would mean that neither a mandatory pardon procedure nor a general expungement by pardon – independent of the former – would be

<sup>81</sup>Krisztina, Karsai In Krisztina, Karsai (Ed.): *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez.* Wolters Kluwer Hungary. Budapest, 2024. <https://uj.jogtar.hu/#doc/db/346/id/A13Y1369.KK/ts/20250301/lr/chain22041>

<sup>82</sup>Ibid.

<sup>83</sup>Marianna, Végh In Juhász Zsuzsanna (Ed.) *Nagykommentár a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról szóló 2013. évi CCXL. törvényhez.* Wolters Kluwer Hungary. Budapest, 2024. <https://uj.jogtar.hu/#doc/db/375/id/A13Y0240.KK/ts/20240701/lr/chain9539>

<sup>84</sup>Own trans. Decision No. 144/2008 of the Hungarian Constitutional Court.

<sup>85</sup>Own trans. Zsuzsanna, Juhász In Krisztina, Karsai (Ed.): *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez.* Wolters Kluwer Hungary. Budapest, 2024. <https://uj.jogtar.hu/#doc/db/346/id/A13Y1369.KK/ts/20250301/lr/chain22041>

<sup>86</sup>Own trans. Krisztina, Karsai In Krisztina, Karsai (Ed.): *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez.* Wolters Kluwer Hungary. Budapest, 2024. <https://uj.jogtar.hu/#doc/db/346/id/A13Y1369.KK/ts/20250301/lr/chain22041>

available. This is particularly problematic given that, under the previously applicable rules, an offender sentenced to LWOP could still submit a pardon request under the general provisions, regardless of the mandatory pardon procedure.

Decision No. 3/2020 of the Curia on the Uniformity of Criminal Law establishes that LWOP may only be imposed for offences listed in Section 44 (1) of the Criminal Code. Accordingly, where an offender is sentenced to LWOP and, pursuant to Section 104 (3) of the Criminal Code, is rendered ineligible for presidential pardon, an illustrative case would be the concurrence (real concurrence) of aggravated homicide and a sexual offence. Under current law, such sentencing is not excluded. For instance:

If the defendant commits the sexual act in connection with a homicide motivated by financial gain, the aggravating circumstance of acting out of a base motive can only be established if the sexual act was at least one of the motives behind the killing. In all other cases, the two offences are to be treated as a real concurrence.<sup>87</sup>

If the intent to commit the sexual offence arises independently of (or subsequent to) the homicide, the basic case of homicide – or another aggravated form thereof – exists in real concurrence with sexual assault.<sup>88</sup>

This is concerning for two main reasons: First, such a legislative approach may violate Hungary's previous legislative obligations, as pointed out by Gál. „If we categorically exclude any type of criminal offence from the scope of individual pardon, we once again fail to comply with the jurisprudence of the European Court of Human Rights in Strasbourg.”<sup>89</sup> Second, this would render the President's individual, unlimited, and discretionary power of pardon void – contrary to the findings of the Constitutional Court in Decision 144/2008. Thus, this segment of the Hungarian legal system would not only regress to the state prior to the Magyar v. Hungary judgment, but would in fact represent a narrower framework. Notably, in Magyar v. Hungary judgment, one of Hungary's core arguments was that presidential pardon served as a legal institution capable of making release possible in any case. Following the present amendment, however, this mechanism is no longer available in certain cases.<sup>90</sup> An additional anomaly arises from the rule that if the President does not grant pardon during the mandatory pardon procedure, the procedure must be repeated *ex officio* every two years. According to the legal justification of the Punishment Enforcement Act this mirrors the rules on conditional release in the case of life imprisonment with parole. However, in such cases, if conditional release is not granted at the earliest possible date, the law requires annual review thereafter. No such rule exists with regard to the mandatory pardon procedure.<sup>91</sup>

### *Conclusion*

The complex set of anomalies surrounding LWOP raises serious concerns, particularly in light of Section 79 of the Criminal Code (social protection, specific and general prevention), Section 83 (2) of the Punishment Enforcement Act (application of legal disadvantage), the commentary to the Criminal Code (primacy of proportionate punishment), and the contradictions found between the law, legal justification, commentary, and explanatory notes of the Punishment Enforcement Act. In addition, the relationship between LWOP, the objectives of punishment, and the principle of proportionality also appears problematic, and recent legislative developments do not seem to adequately address the underlying risks of codification-related inconsistencies.

The principle of legality – *nullum crimen, nulla poena sine lege* – is a constitutionally declared, systemic rule of the criminal law. One specific aspect of this is *nullum crimen, nulla poena sine lege certa*, that is, the requirement of clear and precise legal provisions and the prohibition of vague or indeterminate penal norms. Closely connected to this is another key rule-of-law principle: subsidiarity, from which the *ultima ratio* nature of criminal law is derived. All of this underlines the fundamental

<sup>87</sup>Own trans. Court decision No. BH 1995.194.

<sup>88</sup>Own trans. Court decision No. BH 1978.111.

<sup>89</sup>Own trans. István László, Gál: A köztársasági elnöki kegyelem jogintézményének múltja és lehetséges jövője. [https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#\\_ftn21](https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#_ftn21)

<sup>90</sup>Decision No. 3/2015 of the Curia on the Uniformity of Criminal Law.

<sup>91</sup>Punishment Enforcement Act 57. § (8)

importance of legal certainty, a core element of the rule of law,<sup>92</sup> which can only be fully realised through the proper application of the principle of legality. Therefore, the objectives of punishment and enforcement, the relevant legal commentaries, and the legislative justifications must always be clear, unambiguous, and internally consistent – especially in the context of the harshest criminal sanction in a legal system that imposes the greatest restriction on individual fundamental rights. The fulfilment of these standards is the „zero point” of social protection.

The study briefly touched on the importance of criminal justice policy, which fundamentally determines criminal legislation and is inevitably influenced by broader political currents. Recent legislative changes have been driven by high-profile criminal cases that sparked public reaction. While such reactionary legislation may yield short-term satisfaction among the public, it poses the risk of triggering systemic anomalies, some of which this study has attempted to illustrate. As Gál aptly observes: „It is not necessarily a healthy trend for our criminal code – already sufficiently deterrent in nature – to be further tightened to satisfy actual political expectations or the real or perceived emotions and demands of society.” It must also be acknowledged, however, that certain legislative changes are the necessary consequences of the extraordinarily rapid societal and economic transformations of our time. This helps explain why the current Criminal Code has already undergone numerous amendments.<sup>93</sup> Although LWOP affects a relatively small group of people – slightly more than fifty individuals are currently serving this sentence<sup>94</sup> – and there has been no significant increase in recent years (3 in 2023,<sup>95</sup> 4 in 2022,<sup>96</sup> 8 in 2021,<sup>97</sup> and 2 in 2020<sup>98</sup>) – the number of affected individuals should not determine the legal significance of the issue. Recent developments have also highlighted that even „minor details” can challenge the enforcement of rule-of-law criminal justice, proportionality, and fairness – for example, in connection with the limitation periods for the most serious offences committed by juveniles. It is conceivable that an isolated „minor detail,” a regulatory anomaly, a legislative gap, or an extreme case may never actually affect the full enforcement of rule-of-law criminal justice; however, if it does – and empirical experience supports this – it can cause serious problems. For this reason, the elimination of the anomalies surrounding LWOP should, in my view, be considered a matter of urgent and high-priority legal reform.

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<sup>92</sup>Lénárd, Himpli: *Jog és erkölcs a büntetőjog tükrében*. In Péter, Miskolczi-Bodnár – Éva, Jakab (Eds.): XXV. *Jogász Doktoranduszok Országos Konferenciája*. Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar. 2023. pp.137 – 146. pp. 141.

<sup>93</sup>Own trans. István László, Gál: A köztársasági elnöki kegyelem jogintézményének múltja és lehetséges jövője. [https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#\\_ftn21](https://ujbtk.hu/prof-dr-gal-istvan-laszlo-a-koztarsasagi-elnoki-kegyelem-jogintezmenyenek-multja-es-lehetsegese-jovoje/#_ftn21)

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## Heading towards machine legislation? \*

### ABSTRACT

The text of legislation must be clear and understandable.<sup>1</sup> In addition to many other requirements, the legislator must communicate the normative content he wishes to convey in accordance with these two requirements, which I believe are important and which are also specified in legislation. Legislative activity is in many ways similar to translation, where the translator transfers the message and linguistic content formulated in one language into another language. According to my research hypothesis, the similarity between legislation and translation is evident not only in the activities themselves, but also in the digitization of these activities; the digitization and automation of translation can serve as a model for the transformation of legislation.

In this study, the Integrált Jogalkotási Rendszer is introduced as a consequence of the digitization of legislation in Hungary through legal digitization. The experiences gained during the teaching of the system are also discussed. Furthermore, the architecture of an ideal electronic legislative system is outlined, based on the research findings of the author. The present study continues to follow the path of digitization, formulating ideas related to the automation of legislation. These ideas are again drawn from parallels with the automation of translation. Finally, I will comprise the results of my experiment: Chat GPT was tasked with generating standard text based on three texts of varying complexity, or „prompts,” initially in 2023 and subsequently in 2025. The investigation focused on two key areas: the effectiveness of the task, and the evolution of the final result over the two-year period.

**KEYWORDS:** legislation, digitalisation, automation, Integrált Jogalkotási Rendszer, Chat GPT.

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<sup>1</sup> The legal regulation of legislation consists of multi-level legislation, already in the Legislative Act (Act CXXX. of 2010 on Legislation) the requirement appears that the legislation must have a regulatory content that is clearly understandable for the addressees, the regulation must not be unduly parallel or multi-level. The legislation may not repeat a provision of the Fundamental Law or a provision of a law with which the legislation may not be in conflict under the Fundamental Law. The Decree on the drafting of legislation (IRM Decree 61/2009 (XII. 14.) on the drafting of legislation) further specifies the requirements: draft legislation must be drafted in accordance with the rules of the Hungarian language, in a clear, comprehensible and consistent manner.

## Introduction

My research hypothesis was based on the conference and round table discussion entitled *Jogalkotás érhetően - A pontos fogalmazás művészete* (Clear Writing) held on 26<sup>th</sup> November 2014. at the Károlyi-Csekonics Palace.<sup>2</sup>

The link between legislation and linguistics is demonstrated by the fact that the conference was organised by the Institute for Hungarian Language Strategy, and several valuable presentations were given on the relationship between translation and legislation.

In his presentation, Tamás Sárközy explained that the lack of linguistic clarity leads to a reduction in the effectiveness of the law, which also jeopardises the translatability of legislation. „The linguistic clarity of the law engenders greater certainty; conversely, linguistic inconsistencies in its drafting jeopardize its effectiveness. Furthermore, the linguistic clarity of our laws – both in their drafting and dogmatic elements – also facilitates their translation into foreign languages, thereby enhancing the effectiveness of our legal propaganda abroad”.<sup>3</sup> Translated legislation can also improve the country's economic competitiveness and therefore have an indirect economic impact.

Tamás Sárközy spoke about the relationship between legal informatics and computational linguistics as early as 2014, „The field of rural science is also encountering novel challenges in the domain of linguistic culture. One such discipline is computer linguistics, which emerged as a consequence of the information revolution, electronisation, and digitalisation. This phenomenon has been shown to have a number of positive effects; however, it has also been demonstrated to have negative effects, including oversimplification and excessive formalization of legal terminology”.<sup>4</sup> The approach was still distant at this conference, but the interaction between law and language technology was already outlined in the presentations. In the case of machine translation, for example, the so-called „sensitisation phase” has lasted for several years and is still ongoing.

Legislation and language technology are linked through digitisation, as the drafting of legislation is an editing task, different from general drafting in that, in addition to grammatical rules, the text of the legislation must also comply with another set of rules, the norms of legislation.

## I. Legal digitalisation

The digitalisation of law in Hungary started in the early 2000s with the introduction of electronic company procedures. This was followed by the creation of the website magyarorszag.hu, which provides electronic communication, then by the electronisation of civil litigation in 2016 and the introduction of electronic case management from 2018. After such a history, remote communication due to the pandemic, which started in 2020, could build on existing digital foundations, but there was still much to improve on the systems already in place.<sup>5</sup>

I will demonstrate the international achievements of digitisation of legislation using the World e-Parliament Report 2022<sup>6</sup>, based on data from 123 parliaments. The 2022 study looks at the impact of the Covid-19 epidemic and finds that the epidemic was a catalyst for innovation and digital transformation in parliaments, where the real need for remote working emerged, and digitalisation is the tool for this. Digital transformation has increased the resilience and flexibility of parliaments, which is considered to be a strategic imperative for their future.

It is characterised by „greater use of cloud and software as a service (hereinafter: SaaS), and changing patterns of ICT management, procurement and support. According to the survey respondents,

<sup>2</sup> The presentations were published in *Jogalkotás érhetően - a pontos fogalmazás művészete - Clear writing Nyelvstratégiai Füzetek II.*, Magyar Nyelvstratégiai Intézet, Budapest, 2016.

<sup>3</sup> Sárközy, Tamás *Civiljogi kodifikáció és a nyelv* in: *Jogalkotás érhetően- a pontos fogalmazás művészete- Clear writing Nyelvstratégiai Füzetek II.*, Magyar Nyelvstratégiai Intézet Budapest, 2016, pp. 108-114.

<sup>4</sup> Uo.

<sup>5</sup> Cf. Kántor, Ákos: *Az e-ügyintézéstől az e-jogalkotás felé* in: Dr. Miskolczi\_Bodnár Péter (szerk.) *XXIII. Jogász Doktoranduszok Országos konferenciája 2022*. Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara, Budapest, 2022. (pp. 145-154) pp 145-147.

<sup>6</sup> *World e-Parliament Report 2022 Parliaments after the pandemic*, (Inter-Parliamentary Union), 2022 <https://www.ipu.org/resources/publications/reports/2022-11/world-e-parliament-report-2022> (2025.08.26.)

these strategic objectives are underpinned by the need for teleworking, strong cybersecurity, greater public participation, more user training and digital workflows (e.g. to support legislative management and remote voting).<sup>7</sup> The survey suggests that the main directions for the digitisation of parliamentary work are the creation of a virtual parliament, both for plenary and committee meetings, but also the holding of hybrid sessions. The possibility of working remotely has also been introduced in parliamentary work, as well as for economic operators, for which the creation of cloud-based systems has been key. The study also addresses the future of digitalisation, stating that „Digital tools can complement and enhance traditional parliamentary functions, but cannot replace them entirely”.<sup>8</sup>

The World e-Parliament Report 2024 clearly demonstrates the prevalence of artificial intelligence. „Twenty-nine per cent of survey respondents reported that AI was becoming more widely adopted in their parliament, with this technology being used for transcription, translation and cybersecurity. However, only 11% of parliaments are bound by laws regarding the use of AI and just 14% have internal procedures or regulations on this subject”.<sup>9</sup> As it can be seen, AI pertains to ancillary activities, rather than legislation, the parliament’s primary function.

According to the report, the main elements of the digitisation of parliamentary work were the review of processes, followed by the review of developments and procurement, which is the basis for the introduction of new procedures. The spread of teleworking is also an opportunity to widen public participation. Benchmarking, whereby national parliaments benchmark their progress against each other to determine the way forward, is a new element. The Inter-Parliamentary Union also promotes knowledge sharing in the field of digitalisation; national parliaments share best practices and encourage each other to further develop, with the aim of increasing resilience.

## II. Digitisation of legislation

Digitalisation can be understood in the context of the legislative process as a whole, regardless of whether the legislative process is the result of a central administration, an external consultative body, a Member of Parliament, a political group or a social initiative. It is also possible to digitise participation in the legislative process, in the administrative, general or public consultation of draft legislation. The present study will examine the digitization of legislative activity in the central administration and the legislature.

The first necessary step in the development of an electronic legislative system is the creation of a digitised legislative repository, which also serves as a database for building a future system. This can be created inductively: the first system will simply contain the text of the legislation in force in a displayable format. From this stage, it will lead to a complete corpus of legislation, in many cases including even historical (repealed) legislation and translations of legislation, developed as a linguistically based digital database. Once a legal repository with the appropriate technical content has been established, the second step is to develop legal editing software, which is essentially a legaltech tool, a document editing application that works with the data set of the legal repository as a database. It is specialised in that it works according to the rules of the legal system, enforces them and helps users to produce a higher quality legal text. The third level of development, in my view, could be the integration of the different sub-processes of legislation into a single common interoperable system.

By this time, the database and the legal drafting tool will be linked, so that the processes for drafting valid legislation will also be standardised.<sup>10</sup> The need then arises to program the entire legislative process in such a way that interoperability between the separate systems is achieved. The complexity of this is that in domestic legislation, the way in which proposals for amendments to the text are signalled and handled in the administrative conciliation process is different from the way in which

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<sup>7</sup> Uo. p. 6.

<sup>8</sup> Uo., p. 14.

<sup>9</sup> World e-Parliament Report 2024, (Inter-Parliamentary Union, 2024) <https://www.ipu.org/resources/publications/reports/2024-10/world-e-parliament-report-2024> (2025.08.26.) p. 16.

<sup>10</sup> Tóth J., Zoltán (szerk.): *Jogalkotástan. Jogdogmatikai és jogszabályszerkesztési ismeretek*. Budapest, Dialóg Campus Kiadó, 2019. p. 127.

they are handled in the parliamentary stage, but the single system must integrate both sets of signals in an efficient and non-confusing way.

### III. Integrált Jogalkotási Rendszer

In January 2017, the Ministry of Justice in Hungary announced in a press release that the EU co-financed KÖFOP-1.0.0-VEKOP-15 - 2016-00029 project entitled Reducing Administrative Burdens - Integrált Jogalkotási Rendszer (hereinafter: IJR) will provide for the development of projects aimed at reducing administrative burdens through the electronic support of so-called internal (intra-administrative, inter-office/government) processes.<sup>11</sup>

The Integrált Jogalkotási Rendszer resulting from the project was operational in 2021 in several phases. The system linked existing systems as modules and subsystems with newly developed elements.

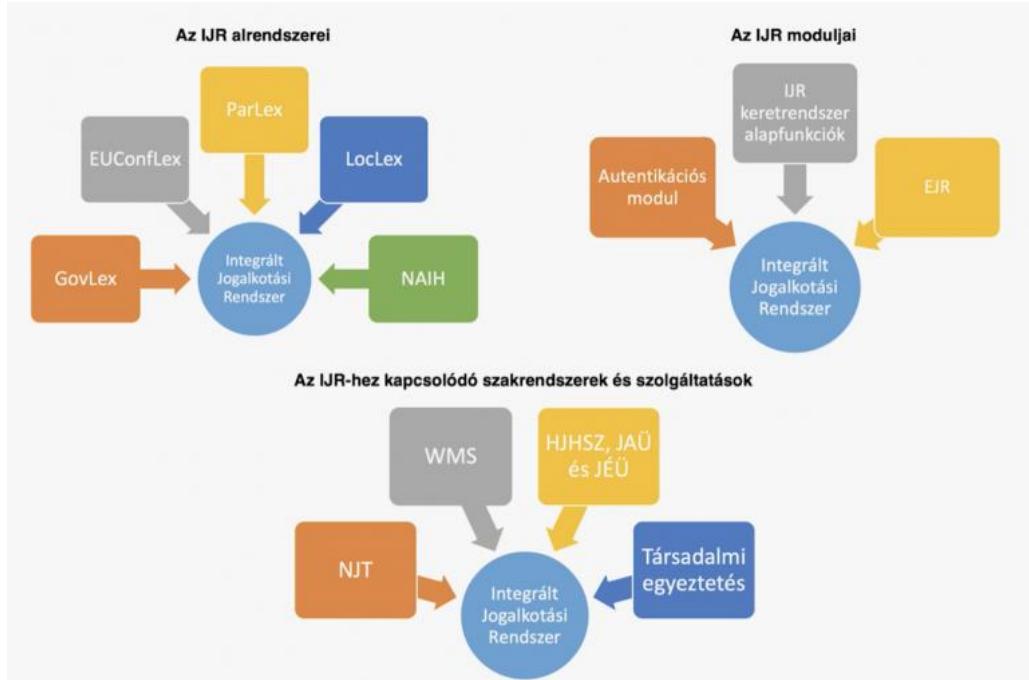


Figure 1. IJR structure, source: Mátyás Ferenc: Április 1-jétől kötelező lesz az IJR és a Loclex használata. Jogászvilág, 2021. március 18.

<sup>11</sup> [KÖFOP-1.0.0-VEKOP-15 – 2016-00029 Integrált Jogalkotási Rendszer sajtóközlemény. Sajtóközlemény az Integrált Jogalkotási Rendszer című projekt indulásáról](#). 2017. (2023.02.03.)

Its significance is that it integrates legislation into a single system, from the first letter of the law to the promulgation or publication of a completed and signed piece of legislation or public law instrument.

IJR can be considered to be a 3.0 level Legaltech system, which is typically an automatic or semi-automatic document production system. Similar systems appeared in the 2010s, consisting of a database of text elements (like Nemzeti Jogszabálytár) and rules, usually with form-like input interfaces and are able to produce documents that are used repeatedly easily and almost automatically.<sup>12</sup>

From the point of view of my research, the Nemzeti Jogszabálytár (hereinafter: NJT) service is of particular importance, as it is the alpha and omega of the system, since it is the starting point of the external legislative process, for example a legislative amendment, and the published legislation is entered into this database. In the legislative process, the substantive legislative drafting activity takes place in the Elektronikus Jogszabályszerkesztő modul (hereinafter: EJR) which is a legislative drafting module, where the legislative text is created and modified. A comparable significance is attributed to the GovLex subsystem, which generally executes coordinating tasks. These tasks include the management of draft opinion procedures, the submission of the draft to the meetings of the decision-making bodies, and, in the case of a bill, the transfer of it to the ParLex system. The latter is also of major importance in the parliamentary phase of the bill's adoption.

The text of the legislation is created in an electronic legislative drafting module EJR, which at first glance looks like a text editing application, but is very different in functionality. The GovLex subsystem is used for the coordination of drafts, such as their negotiation and submission to meetings of the State Secretary, Cabinets of the Government, Cabinet meetings. From here, draft laws are transferred to the Parliament's ParLex system and Government Decrees to the specialised system for publication in the National Gazette, the Hungarian Gazette, WMS, and later to the Nemzeti Jogszabálytár. The legal harmonisation of legislation is followed by the EUConflex subsystem. LocLex is the subsystem for local government, and the legislation produced here is also published in the NJT.<sup>13</sup>

The optimal method for drafting a bill within the IJR system would be as follows: the text of the bill is created in the GovLex subsystem using the EJR module. This module is programmed with the legal norms and practical knowledge for drafting legislation<sup>14</sup>. The module is directly linked to the NJT service and is therefore able to incorporate the amending provisions into the codified text independently, after the legislative amendment has been made to the existing text of the legislation. An important feature of the system is that it performs a codification check on the text: without correction of errors, the draft cannot be closed. The draft's journey continues in GovLex, where internal consultations within the proposer's own institution can be carried out<sup>15</sup>, as well as consultations under the Government's Rules of Procedure, preliminary consultations under Chapter 5, peer reviews under Chapter 3, consultations under Chapter 4 and public consultations on the draft using the Társadalmi egyeztetés (hereinafter: public consultation)<sup>16</sup> service. The system can handle changes to the text of the draft during the consultations.

In the case of a draft law, depending on the decision of the government meeting, the draft is submitted by data transfer, the GovLex subsystem transfers the draft to the ParLex subsystem. At this point, the draft's journey through the administration ends, and the ParLex system carries the draft through to its adoption.<sup>17</sup> After the adoption of the draft law, the text is prepared for publication in the WMS specialised system, and after its publication in an electronically authenticated form in the online interface of the Hungarian Gazette, the text of the law is entered in the Nemzeti Jogszabálytár.

The modelled process imagined above shows how much data transfer is required between subsystems, modules, specialised systems and services, and therefore the interoperability of these

<sup>12</sup> Cf. Zödi, Zsolt: *Bevezetés: Jogi technológiák* In Zödi, Zsolt (szerk.): *Jogi technológiák – Digitális jogalkalmazás*. Budapest, Ludovika Egyetemi Kiadó, 2022 p. 26.

<sup>13</sup> Government Decree 338/2011 (XII. 29.) on the Nemzeti Jogszabálytár 4. §,

<sup>14</sup> E.g. a guide to drafting legislation

<sup>15</sup> E.g. MvM Instruction No. 5/2022 (VI. 17.) on the Organisational and Operational Rules of the Prime Minister's Office, § 186 (3)

<sup>16</sup> Read more: Rixer, Ádám: *Consultation and central public administration in Hungary* In: International Journal of Public Law and Policy 2024 Vol.10 No.3, pp.334 - 358 p.342-343

<sup>17</sup> The adopted law is signed on paper. I will not examine it from a digitisation perspective.

elements is of paramount importance. It should be noted that the process modelled above is different for other types of legislation (Government Decree, Ministerial Decree) and even different from each other, which highlights the complexity that is expected from the system.

The use of the IJR is currently mandatory in the Parliament, as the President of the National Assembly, in his resolution on the electronic submission of certain motions, ordered the submission of bills and other documents using IJR-ParLex, pursuant to Article 27 (1) (a) of the OGY Resolution 10/2014 (II. 24.) on certain provisions of the Rules of Procedure (hereinafter: HHSZ). The use of the system is currently not exclusive in the public administration, with most legal documents being entered into the system prior to submission to Parliament.

## **IV. Educational experiences**

I was invited to participate in the training of the Integrált Jogalkotási Rendszer, which allowed me to familiarise myself with its services, in particular those related to my research topic. In this paper I will briefly describe the functionality and experiences of the EJR module and the GovLex subsystem.

### **IV.1. Az Elektronikus Jogszabályszerkesztő modul - EJR**

The electronic legislation editor module - EJR is essentially a text editor for lawyers. Many of its features are similar to traditional text editors, and anyone who is familiar with such a program can use the basic EJR features. A special feature of the module is that it is programmed with the legislative rules: the Jat<sup>18</sup>, Jszr<sup>19</sup> and the less well-known Legislative Drafting Guide.<sup>20</sup> The module uses these as a basis for the work of the legislative drafter, offering different types of legislative templates and text templates to be filled in by the user. The system also helps to keep the structure of the legislation: for example, it indicates in the template the location of the preamble or introductory part, the enacting provisions, etc., thus helping to ensure precision.

The module is directly linked to the legislative texts stored in the Nemzeti Jogszabálytár as a database. This allows the accurate creation of external legal (rigid) references and the easy generation of amending provisions. When the legal editor makes the desired modification to the normative text in the EJR module by rewriting the text, the system automatically generates the amending provision in the amending legislation. In conjunction with this, the system also manages the time states of the legislation, in line with the intended effective date of the amending legislation and the amending provisions.

There are two ways to import standard text into the module, firstly by creating it in the EJR module as a text editor, and secondly by importing text created in other text editors. In both cases, however, the system performs a so-called codification check on the normative text and, if it detects a deviation from the legislative rule set, it indicates this in an itemised list of errors and then traces each error, indicating where and how it should be corrected. The module divides codification errors into two groups: one type, minor errors, are only flagged and do not block the codification process; while more serious errors block the codification process until they are corrected.

The aim of using this module is to improve the quality of legislation, since drafts produced here can only be passed on to the next stage of the legislative process, i.e. formal compliance with the legislative rules, after a codification check to correct errors.

### **IV.2. The GovLex subsystem**

The GovLex subsystem is used to program the rules of procedure for legislation in central administration, in accordance with the Government's Rules of Procedure. The advantage of the system is increased information security, as the preparatory material for decisions is classified as „non-

<sup>18</sup> Act CXXX of 2010 on Legislation

<sup>19</sup> IRM Decree 61/2009 (XII. 14.) on the drafting of legislation

<sup>20</sup> It was available on the IRM ministry's website as „Jogszabály-szerkesztési Helpdesk”

public".<sup>21</sup> Therefore, the IJR's live system is closed, can be accessed after double authentication and has a strong privilege management system. The subsystem supports and manages collaborative working, and the system supports change logging with version tracking functionality. Users perform their tasks based on the rights associated with the digitised workflows: for example, the system indicates precisely who is directly authorised to transmit a document and who is authorised to submit the same document for approval before transmission, just as in day-to-day office work.

Within the framework of its process management function, the subsystem is able to carry out the consultations specified in the legislation, to automatically generate a note based on the comments made on the normative text, and to automatically generate a ministry opinion based on the notes. It is also capable of preparing meetings of decision-making forums, compiling agendas, publishing material and making it available to those entitled to do so.

For the whole IJR, it is important to emphasise the interoperability between the elements of the system, as the path of the draft legislation from inception to publication in the National Gazette goes through several modules, subsystems and related specialised systems; it is important that the information is interpretable and editable in all elements of the system, as the draft changes throughout the legislative process.

Reducing the administrative burden was an expectation when the IJR project was set up. A full definition of this would require further study, but it can be concluded that a single system is typically paperless, that the elimination of the need to route non-publicly classified documents over an open network also has a cost-reducing effect and represents a significant improvement in terms of information security, and that the use of templates and text templates has a positive impact on the resources of the drafters and commentators.

## V. An examination of the optimal digital legislative system

Based on an analysis of national and international experiences and best practices, what would be the characteristics of an ideal digitised legislative system?

In terms of its structure, the system follows the architecture of the legislative system described above, with a legal database - codification module - coordination service structure. The law repository section contains the legislation in force in a linguistically processed database, with the previous and subsequent, already promulgated, time-states, segmented text, in such a way that not only the legislation but also its individual structural units (segments) can be linked through the website. Each piece of legislation is accompanied by a data table that includes its name, number, issuer, date of promulgation and entry into force. In some cases, the data table also includes amendments to the legislation, as well as a separate link to the legislative provisions as metadata. Each time state that has been selected can be compared with each other. The comparison will show the amendments with a correction mark.

The codification module is an ergonomically designed<sup>22</sup> editing application with similar functionality to the most prominent or notable text editors. It is directly linked to the legislation repository, which also includes the possibility, if there is another user working on an amendment to a piece of legislation, to indicate who (which ministry/department) is working on it,<sup>23</sup> with which entry into force (time status); preventing the possibility of amendments to a piece of legislation confusing or make each other impossible, even before the administrative conciliation.

For this module, the use of an AI-based chat application should already be considered. On the one hand, it can help to identify the links between laws, it can provide a list of the legal texts related to

<sup>21</sup> See Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information 27. § (5) Data prepared or recorded in the course of a procedure for the adoption of a decision falling within the scope of the duties and powers of a body performing public functions and serving as a basis for the decision shall not be made public for ten years from the date of its creation. Access to such data may be authorised by the head of the body managing the data, after weighing the weight of the public interest in disclosure and the public interest in excluding disclosure.

<sup>22</sup> E.g. it knows the most common keyboard shortcuts of word processors and can use them, it does not define any other function for them, it works in a similar logic as a text editor.

<sup>23</sup> It has already reached a certain point in the codification process.

the given legal content, and it can also help to draft the legal norm - by working on the legal database - it can be able to produce a shorter text proposal, if not a whole law. Here, of course, integrity issues must be taken into account: it is not allowed that, when using public applications, the text of draft legislation is - even accidentally - leaked from the closed system.

From a coordination point of view, it is important that the legal draft moves from the first letter to the publication within the system, so there is no need for printing, external e-mailing or other logistics. In addition, the legislative process can be statused in the digitised system, and it is possible to see at a glance where each piece of legislation is in the legislative process. If visualisation is used, thus making it possible to monitor the timetable of the „legislative project” and to refine it if necessary. This requires the creation of a high level of semantic interoperability of the systems, which means that the draft actually moves within the system, i.e. the opinions, public consultations, even the electronic signature of the President of State and the drafting for publication are all done within the system, in its subsystem (module), in other words, the legislative process becomes completely paperless.

From this point on, the business question is at which point can join market-based legal database providers the process, from where, in what form and for how much they can obtain the input data they need to update their own database.

This would make the legislative process transparent, the preparation of legislation could be monitored by both professionals and lay people, and a system organised in this way would allow for meaningful public participation in the legislative process, in any of its sub-processes.

The system would benefit from the inclusion of signalling functions to create transparency and the possibility of group work, even when several teams are working on the same draft. The implementation of a chat application would facilitate the creation of text variants, as the content can be re-generated instantly, with the possibility of refining the content by prompting, until the desired linguistic quality and clarity is achieved.

The disadvantage of such a legislative system is that, also because of its cost, it is usually implemented as a project, has a relatively small number of users, so as a non-market-based system it is slow to evolve, is typically linked to changes in legislation,<sup>24</sup> is relatively inflexible in dealing with user needs, and therefore the ergonomics of operation are not predicted to be very high.<sup>25</sup>

## VI. Looking ahead: heading to machine legislation?

Artificial intelligence has also arrived in the legal profession worldwide, typically on the user, or legal practitioner side. Following the progress of digitalisation, the next target may be automation, which in turn suggests that in time AI will also be applied in legislation. A related argument is that the globalisation of the economy has made the translation of legislation increasingly important, and there may be a need for machine translation of legislation, for which machine-assisted translation of legislation may be a good source material.

The initial hypothesis of my research is that the digitisation of translation is a model for the digitisation of legislation. In the case of translation, digitisation has been followed by automation, using machine translation solutions, which nowadays are based on neural network-based self-learning artificial intelligence (hereinafter: AI), as opposed to statistical-based machine translation applications, which are now considered rudimentary, such as the eTranslation application developed by the European Union and launched in 2018. The Chat GPT application was launched in 2022. and proved revolutionary in comparison to other systems. Since then, it has evolved at an incredible pace, with its sixth version being used in just three years.<sup>26</sup> This means that on average, a new version is released every six months.

<sup>24</sup> E.g. Act XVI of 2024 amending Act CXXX. of 2010 on Legislation has made the use of preambles in legislation general. This is a change that the legislative drafting application must follow, otherwise it cannot comply with the legislation in force. Such amendments can therefore be described not as improvements but as compliance with the law.

<sup>25</sup> Kántor, Ákos: *Jogalkotási rendszerek digitalizációja néhány nemzetközi jó gyakorlaton keresztül* In: Studia Iuris Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola, Budapest, 2024 I. évf. 3.szám pp 56-76. p. 74.

<sup>26</sup> For more information see: <https://www.searchenginejournal.com/history-of-chatgpt-timeline/488370>

The use of machine translation solutions<sup>27</sup> is now commonplace in the translation industry, something that was unthinkable just a few years ago, but is now increasingly being used to support translators, and an ISO standard<sup>28</sup> has been developed to ensure the quality of machine translation with post-editing. Following this example, it is perhaps conceivable that in a few years' time, legislation will also be drafted by an artificial intelligence-based system, it is to be hoped that the process will be subject to human post-editing.

Based on translation practice, where there are also digitised translation tools named computer-assisted translation (hereinafter: CAT) tools and human-assisted translation tools (hereinafter: HAT tools, or machine translation) it should be noted that neither CAT tools nor machine translation tools are used regularly by professional translators. Their aim (also due to their business activity) is to translate the text of a given length into the target language with the highest (or at least the expected) quality and speed. Therefore, a well-trained, modern translator's toolbox includes both CAT tools and machine translation applications, the use of which is determined by the characteristics of the text to be translated. So, after machine translation of a text, it may be necessary to use a CAT tool to rework the parts that have not been translated correctly or with certainty, and then to re-translate the whole text. In other words, in the case of translation, it is not the method used but the end result that counts, just as in the case of legislation. The expectation is not that the legislative process will be chiselled, but that the legislation will be promulgated at the end of the process, in accordance with the legal provisions, in a high-quality and clear way; in this, translation and legislation are again common.

If we consider the potential use of artificial intelligence in the legislative process, compared to the use of artificial intelligence-based (hereinafter referred to as machine) translation tools, we are in a difficult situation; on the one hand, while artificial intelligence-based machine translation solutions have been around for years, are available to all and are widely used, the creation of an artificial intelligence-based legislative system - outside the scope of this paper - has not yet been conceived.

„Artificial intelligence has already arrived in the legal profession, but typically on the user, law enforcement side, but in my opinion, it will also appear in the legislative field in time, especially because the translation of legislation - its translatability in view of our membership of the European Union - may become a demand in the future, with the increase in the machine translation capacity of the EU's Directorate-General for Translation (DGT). This process is also noteworthy from a jurisprudential point of view”.<sup>29</sup> The global economy may make the translation of legislation a demand as machine translation capacity grows.<sup>30</sup> Although translation as a linguistic mediation does not affect the linguistic quality of legislation, it should be noted that it is easier to translate a good quality, readable legal text and the translation will be of better quality and comprehensibility. In the context of machine legislation - machine translation, this would mean that a text produced by machine legislation - with consistent wording, well-structured, simple sentence structure - could be translated into a foreign language by a machine translation application with greater efficiency (less post-editing, thus in less time and at lower cost).

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<sup>27</sup> E.g. DeepL, eTranslation, limited: Google Translate

<sup>28</sup> ISO 18587:2017 Translation services – post-editing of machine translation output – Requirements, forrás: <https://www.iso.org/standard/62970.html> (09.06.2022.).

<sup>29</sup> Kántor, Ákos: *A jogalkotás digitalizációja és a mesterséges intelligencia alkalmazási lehetőségeinek vizsgálata* In Prof. Dr. Miskolczi-Bodnár, Péter (szerk.): *XXI. Jogász Doktoranduszok Konferenciája 2021. Jog és Állam 39.* Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest:, 2022. pp 27-35. p. 34

<sup>30</sup> See translations of legislation in the [National Legislation Database - Translated legislation](#)

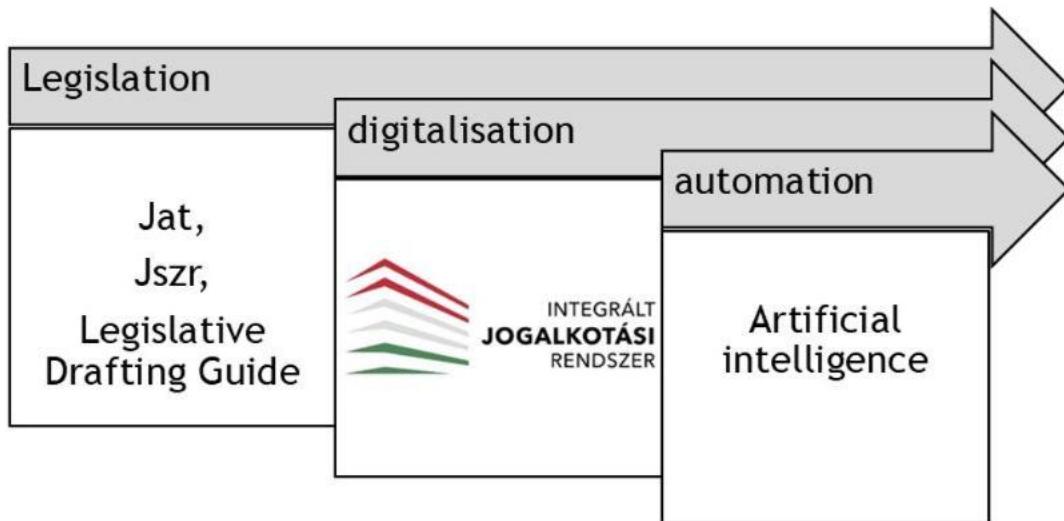


Figure 2 - Digitalisation and automation in legislation - own editing

In addition to the technological argument for linking a digitalised legislative system with artificial intelligence, the two main components of such systems are the algorithm and the database. The database is available, as the NJT is essentially a legal, lexical database, which can also be made available as a training database. The algorithm could be built using the digitised rules programmed into the IJR as a starting point. According to Péter Homoki, solutions based on multi-layer neural network models may also be promising in the field of legal text summarisation, but their use in a small language of a given Member State requires further investment in research and development.<sup>31</sup>

It is hypothesized that the digitalization of legislation will be followed by the automation of legislation, which will also be based on artificial intelligence. This technology has already arrived in the legal profession. A recent illustration of this phenomenon is the utilization of OpenAI's ChatGPT application by Colombian judge Juan Manuel Padilla to solve a specific case, which has caused a lot of press coverage<sup>32</sup>. This has come despite the fact that Colombia passed a law in 2022 proposing that public lawyers use technological tools to make their work more efficient. The first AI-generated law was also adopted in Brazil in October 2023.<sup>33</sup>

Machine translation has become so ingrained in the professional translation process that since 2018 there is a separate ISO standard for Machine Translation Post Editing (MTPE). In my estimation, the automation of legislation should also progress in this direction, towards human post-edited legislation following machine legislation. This could be designated „MLPE,” an acronym for „Machine Legislation Post Editing,” similar to the term „MTPE,” which stands for „Machine Legislation Post Editing”.

In machine legislation, AI can produce the normative text based on programmed rules and patterns in its database, but AI is not expected to be able to interpret the complex content of the normative text. In order to demonstrate, I used the OpenAI Chat GPT application to generate law drafts of varying complexity, first in 2023, and then, as an experiment to test the evolution of AI systems, I

<sup>31</sup> Homoki, Péter: *Miként lehet a szöveggeneráló eszközöket a jogászi hivatások körében hasznosítani?* In: Zödi Zsolt [szerk.]: *Jogi technológiák – Digitális jogalkalmazás*. Budapest, Ludovika Egyetemi Kiadó, 2022. p. 198

<sup>32</sup> Colombian judge says he used to chatGPT in ruling, (The Guardian), <https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling> (2023. 02.04.)

<sup>33</sup> In October 2023, the city council of Porto Alegre, Brazil, adopted the first legislation drafted by ChatGPT, prompted by Councilman Ramiro Rosário, and passed by the Council without knowing about the fact of machine editing, In: Brazilian city enacts an ordinance that was secretly written by ChatGPT (AP News) <https://apnews.com/article/brazil-artificial-intelligence-porto-alegre-5af1240afe7b6ac202bb0bbc45e08d4>, (30. 11. 2023.)

reran the prompts with the latest free version of Chat GPT-4o, available in August 2025, following the instructions below.<sup>34</sup>

## VI.1 Instructions 1

„make a law draft not to feed pigeons in the park, whoever does it will have to pay a fine”

Answer (2023):

„It is prohibited to feed pigeons in the area designated for this purpose. Those who do violate this regulation will be fined by the park's law enforcement agency”.

The AI produced law draft-like content, with technical terms such as: prohibited, violating, in a designated area - in addition, the territorial scope of the park does not appear in the answer, but the machine has filled the gap in the instruction, as it did not specify who should pay the fine, the machine specified: the park's law enforcement agency.

Answer (2025):

„Feeding pigeons is prohibited in the park. Feeding them not only makes the pigeons' reproduction uncontrollable, but the birds can also invade humans, spread infectious diseases and damage the park's infrastructure. Please respect the ban and do not feed the pigeons. The park warden monitors compliance and fines those who break the ban. Thank you for your cooperation and respect for the park rules.”

The text in this version differs considerably from the law draft, being rather descriptive, circumscriptive, adding many circumstances to the text for which no instructions were given, e.g. „the reproduction of pigeons becomes uncontrollable,” „damage to the park's infrastructure”. The last sentence is remarkably polite, but it is not at all standard, in my opinion because of the chat character of the text. The 2023 version was closer to the law text.

## VI.2 Instruction 2

„Make a traffic rule that the first person to cross the intersection is the one coming from the right. If there is more than one, the first to cross is the first to arrive.”

Answer (2023):

„The vehicle coming from the right-hand side of the intersection may cross first. If more than one vehicle is entering the intersection from the right-hand side at the same time, the one that entered the intersection first may cross first.”

The machine uses standard turns of phrase, the colloquial wording of the first sentence of the instruction is tighter, i.e. it knows the characteristics of the „rule”. The term „vehicle” was inserted by the machine, recognising the context of the content as similar to a traffic rule, but the -intentional-deviation from the existing traffic rule was not corrected to the actual content of the rule in the Kresz.<sup>35</sup>

Answer (2025):

„Under the traffic rule, the first person to cross the intersection is the person coming from the right. If there is more than one such vehicle, the one who arrived first at the intersection crosses first. It is important to obey this rule to ensure safe and smooth traffic. Violators may be fined. Thank you for your help in maintaining traffic order and safety.”

In this case, Chat Gpt did not write a rule, but explained the rule and even referred to the traffic rule itself. It seems as if he did not fully understand the instruction. He did not reformulate the content of the text, but rather just politely explained it and then politely thanked the driver for following the rule. The result is far from being a law draft.

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<sup>34</sup> The original text was in Hungarian

<sup>35</sup> Hungarian traffic rule decree

### VI.3 Instruction 3

„Make a rule that at a meal, soup is to be eaten first, then the main course, and finally dessert, except when there is no soup, in which case the main course is first. If there is only soup and dessert, eat in that order.”

Answer (2023):

„At a meal, the soup should be eaten first, then the main course, and finally dessert. If no soup, the main course is the next meal. If only soup and dessert are available, then soup and dessert should be consumed in that order.”

The aim was to test the handling of the main rule and the exceptions, in which case the machine broke away from the instructions the least, almost only working through the text at the level of conjunctions.

Answer (2025):

„According to the rules of the meal, the soup should always be eaten first, followed by the main course and finally dessert. If there is no soup in the meal, the main course must be eaten first. If there is only soup and dessert at the meal, the soup should be eaten first, followed by dessert. It is important to follow this order to support the quality of the meal and digestion. Failure to follow the rules of the meal may result in a ban. Thank you for following these eating rules for a healthy diet.”

In the latter version, the system did not even try to generate a law content, it almost just repeated the content of the prompt. It also inserted elements that went beyond the prompt, e.g. „digestion”, and introduced a sanction of its own: „Failure to follow the rules of the meal may result in a ban” Finally, as in all cases in the 2025 test, it politely thanked the rules for compliance, which is not at all normative.

In the two and a half years between the 2023 and 2025 tests, the system has been updated about 4-6 versions. In the 2023 experiment, the generated texts were concise and short, the first two were almost or close to normative, and in the third case the more complex logical structure was no longer followed by the application. In 2025, however, the generated texts were not legal draft-like at all, but rather a sort of polite explanation of how to implement a rule in a prompt, followed in each case by a polite thank you for following the rule.

In summary, the early Chat GPT generated „better” law text than version 4o based on the same prompts. Of course, no far-reaching conclusions should be drawn from this test.

The short tests above also show that human intervention is necessary for machine generated law texts. In the case of post-editing, there is a possibility that this could be done in the digitalised legislative system, which would ensure that the formal correctness of the legislation, guaranteed by the machines, is maintained even after the content (human) clarification.

### Conclusion

Since the 2010s, digitization has been present in the field of legislation, as a millennial, typically written activity, and the Hungarian system is the Integrált Jogalkotási Rendszer. The IJR has been demonstrated to facilitate formal compliance with the substantive and procedural rules of legislation by enhancing the quality and efficiency of legislation and reducing administrative burdens. The interoperability between the individual modules, services, and subsystems of the IJR has been demonstrated to enhance the information security of legislation. This is achieved by ensuring that non-publicly classified preparatory material does not need to be transmitted over open networks. Consequently, the delivery activities can be conducted exclusively within the system. The electronic transfer of legislative data between systems has been demonstrated to reduce the time and financial resources expended on legislative activities, thereby enhancing their efficiency. The development of the system cannot be regarded as gradual as at the translation support systems, it's the primary emphasis placed on the transposition of legislative changes.

At the age of artificial intelligence, it is no longer a question of whether automation will reach the legislature, but rather when and in what form. The question of how the classical human codifier will

interact with automated and digital legislative systems is of particular interest. Given the current state of science, it is evident that human intervention will be necessary in conjunction with machine processes for the foreseeable future. The findings of the experiment detailed in the study demonstrate that the AI-based chat application under investigation has evolved away from producing law drafts based on the instructions it receives over a period of two years. This does not imply, however, that an artificial intelligence system trained on a legal teaching database and specifically trained for codification tasks will not be capable of achieving much better results in the near future.

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## Constitutionalizing the right to water \*

### ABSTRACT

This presentation examines the right to water through the lens of jurisprudence and constitutional theory. Building on international and comparative jurisprudence, it argues that access to water transcends mere social policy and should be understood as a fundamental constitutional right. In particular, the presentation analyzes how the right to water functions as a precondition for the protection of human dignity and private and family life under the Greek Constitution, while also introducing the concept of “climate resilience of water” as a jurisprudential innovation. This concept captures the state’s responsibility to safeguard water resources not only for present but also for future generations, thus bridging individual rights with collective environmental obligations. The presentation situates this discussion within broader theoretical debates on the justification of constitutional rights, judicial review, and the interaction between domestic and international law. It ultimately argues that explicit constitutional recognition of the right to water could provide a stronger normative framework, clarifying both its ownership regime and principles of provision. In doing so, it contributes to the jurisprudential debate on how constitutions adapt to global challenges while redefining the scope of fundamental rights

**KEYWORDS:** Right to Water, Human Dignity, Climate Change, Constitutional Law, Environmental Rights, Climate Change Litigation, Intergenerational Justice.

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## *Introduction*

This study examines the right to water and its relationship with climate change and the principle of human dignity. Water constitutes the most essential natural resource for the life of ecosystems<sup>1</sup>. According to recent United Nations data<sup>2</sup>, 2.2 billion people lack access to safely managed drinking-water services and, consequently, to the natural resource of water itself – amounting to 26% of the world’s population. A total of 3.6 billion people (46% of the global population) do not have full access to water intended for domestic use. At the same time, 44% of household water worldwide is not used sparingly, meaning that water is consumed without restraint. The same data make clear that 3 billion people do not have full access to safe and clean water, and 2.5 billion people live in countries classified as water-stressed.

## **I. The principle of human dignity and its connection with the right to water**

### **I.1. The concept of human dignity in Greek constitutional theory**

In Greek constitutional law, human dignity holds a foundational position. It is enshrined in Article 2 (1) of the Greek Constitution, which states that “respect and protection of the value of the human being constitute the primary obligation of the State”. Similar provisions appear in Article 1 of the Charter of Fundamental Rights of the European Union, while implicit references can also be found in Article 7 (2) of the Greek Constitution, which prohibits torture and inhuman treatment, and in Article 106 (2), which prohibits private economic initiative from developing at the expense of the general interest<sup>3</sup>.

### **I.2. Human dignity as a foundational principle under Article 2 (1) of the Greek Constitution**

Human dignity functions as a general constitutional principle that guides the interpretation of all other constitutional and legislative provisions<sup>4</sup>. Its philosophical foundation can be traced to Immanuel Kant, who argued that the human being must never be treated merely as a means to an end, but always as an end in itself<sup>5</sup>. Within his framework, the individual’s inherent worth and moral autonomy form the cornerstone of constitutional democracy<sup>6</sup>.

In practical terms, human dignity implies the right to live under conditions that ensure a dignified existence. The increasing commercialization of water services raises important constitutional questions regarding human dignity, especially when access to this fundamental resource depends on market dynamics rather than basic human needs. As the Greek constitutional tradition suggests, human beings cannot be reduced to consumers, and the market cannot be permitted to exploit human necessity for profit<sup>7</sup>.

Dignity also embodies the unity of all fundamental freedoms: to respect the dignity of a person is to guarantee the free development of their personality. It therefore serves as both a constitutional foundation and a constitutional limit, balancing the exercise of other rights through the principle of practical concordance.

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<sup>1</sup> Shiklomanov, Igor: *World fresh water resources*. In Gleick, Peter (eds.): *Water in Crisis: A guide to the World’s Freshwater Resources*. Oxford University Press, New York, 1993. p. 13.

<sup>2</sup> UN-Water: *Summary Progress Update, 2021 – SDG 6 - water and sanitation for all*. [https://www.unwater.org/sites/default/files/app/uploads/2021/02/SDG-6-Summary-Progress-Update-2021\\_Version-2021-03-03.pdf](https://www.unwater.org/sites/default/files/app/uploads/2021/02/SDG-6-Summary-Progress-Update-2021_Version-2021-03-03.pdf) (2025. December 15.)

<sup>3</sup> Chrysogonos, Kostas: *Individual and Social Rights*. Sakkoulas Publications, Athens-Thessaloniki, 2023. p. 157.

<sup>4</sup> Manitakis, Antonis: *Rule of Law and Judicial Review of Constitutionality*. Sakkoulas Publications, Athens-Thessaloniki, 1994. p.410.

<sup>5</sup> Stratilatis, Kostas: *Kant the Political Thinker Today*. Nisides, Thessaloniki, 2011. pp. 73-74.

<sup>6</sup> Chrysogonos, Kostas: op. cit. 1 p.

<sup>7</sup> Chrysogonos, Kostas: op. cit. 1 p.

From a broader constitutional perspective, dignity encapsulates the symbolic essence of the democratic order itself - it is not only a legal concept but also an ideological one, reflecting the humanistic and egalitarian ethos of the polity. A characteristic example is Judgment No. 40/1998 of the Greek Supreme Civil and Criminal Court, which examined whether the legislative provision providing for the extinction of civil sanctions relating to violations of human dignity committed through the press was compatible with Article 2 (1) of the Constitution<sup>8</sup>.

In European human rights law, the European Court of Human Rights (ECHR) has repeatedly held that human dignity constitutes an implicit core value of the European Convention on Human Rights, permeating the interpretation of several of its articles (e.g. *Pretty v. United Kingdom*)<sup>9</sup>.

In the context of the right to water, human dignity acquires a crucial role: it provides constitutional legitimacy to rights that are not explicitly enumerated but derive from the very notion of a life worthy of a human being. For example, in this direction moves the judgment of the Greek Supreme Civil and Criminal Court (Areios Pagos) No. 13/1999<sup>10</sup>. While the Greek Constitution refers to environmental protection in Article 24, it does not explicitly recognize a right to water. It is therefore through Article 2(1)-as a principle of human dignity-that the protection of access to water can be constitutionally grounded.

### **I.3. The international recognition of the right to water and its connection with human dignity**

The international protection of the right to water merits close examination. Article 11 of the International Covenant on Economic, Social and Cultural Rights refers to the right of individuals to an adequate standard of living, including adequate food, clothing and housing. Ensuring such a standard of living, as well as the enjoyment of the right to food, clearly presupposes access to safe and potable water. Article 12 of the same Covenant enshrines the right of everyone to the highest attainable standard of physical and mental health, a goal supported-according to the Covenant-by general environmental hygiene; the right to water therefore operates as an implicit normative requirement. Article 23 further specifies the obligation of States to take all necessary measures for the effective implementation of these rights.

In the same spirit, Article 25 of the Universal Declaration of Human Rights establishes the right to an adequate standard of living and to health, listing among its component's food, social services (which necessarily include water), and security, which the absence of disease is implied. Comparable protections appear in Article 24 (2) of the Convention on the Rights of the Child. To ensure the highest attainable standard of health for children, States undertake the obligation to provide safe and potable water (subparagraph c), a requirement that constitutes a precondition for combating malnutrition and disease. Similarly, Article 28 (2) of the Convention on the Rights of Persons with Disabilities imposes an obligation on States to ensure accessible and adequately equipped water services for persons with disabilities and their families.

Article 14 (2) (h) of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women to the right to an adequate standard of living with respect to hygiene and water supply systems. The provision of water and sanitation services thus constitutes a measure for combating discrimination against women. Additional significance arises from the protection of water in the Geneva Convention relative to the Treatment of Prisoners of War, where Articles 85,89 and 127 refer to the right to adequate water, sanitation facilities and personal hygiene. Moreover, the First Additional Protocol concerning international armed conflicts prohibits the destruction of water installations – clear indication that, even in wartime, water constitutes a minimum threshold of human dignity that must not be eliminated.

At the European level, the European Water Charter recognizes water as a common heritage, while the European Charter for Water Resources establishes each citizen's entitlement to adequate water for the satisfaction of basic daily needs. At the African level, analogous provisions appear in Article 11(1) of the Additional Protocol to the Pan-American Convention on Human Rights and in Article 14 (2) (c) of the African Charter on the Rights and Welfare of the Child.

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<sup>8</sup> Greek Supreme Civil and Criminal Court (Areios Pagos), No. 40/1998

<sup>9</sup> European Court of Human Rights, *Pretty v. United Kingdom*, 29.4.2002

<sup>10</sup> Greek Supreme Civil and Criminal Court (Areios Pagos), No. 13/1999

These instruments collectively demonstrate that water operates as an implicit interpretative basis for a wide spectrum of human rights – a right that remained largely self-evident until the emergence of climate change. It is also evident that, historically, the right to water was primarily associated with vulnerable groups (women, children, persons with disabilities) facing water-related challenges, whereas for the average European citizen access to water was regarded as an unquestioned aspect of everyday life.

Primarily the connection between human dignity and the right to water is recognized by the United Nations itself. The connection between the right to water and the principle of human dignity is confirmed by the fact that the right to water was recognized as a human right by the United Nations General Assembly in 2010. In that truly historic resolution, the General Assembly emphasized that 884 million people die each year due to lack of water, 2.6 billion people do not have the required access to sanitation, and 1.5 million children under the age of five die from diseases attributed to contaminated water. The resolution links the right to water with life and human dignity, recognizing water as an essential element for the enjoyment of all other rights. In other words, according to the resolution, water constitutes a human right indispensable for the full enjoyment of life and all human rights. It is therefore regarded as a foundational, prerequisite right<sup>11</sup>.

General Comment no. 15 of the CESCR on the right to water systematically develops the inherent connection between these two concepts<sup>12</sup>. The Committee, which deals with economic, social and cultural rights, sought in this Comment to elaborate the main aspects and extensions of the right to water through articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, to which reference has already been made. The Committee notes that the right to water is intrinsically linked to life and human dignity and constitutes a fundamental human right. According to the Committee, safe and clean water enables individuals to live and to avoid diseases that originate from, or are associated with, bacteria that may develop in this natural resource.

The Committee also refers to the Convention on the Elimination of All Forms of Discrimination against Women, which (Art. 14 par. 2) obliges States Parties to take measures ensuring that women enjoy adequate living conditions with respect to water supply systems. It likewise cites Article 24 par. 2 of the Convention on the Rights of the Child, which establishes the obligation of States to combat malnutrition by providing safe drinking water. Ensuring access to food, employment, and participation in cultural life presupposes conditions of dignified living, and a prerequisite for all of these elements of rights is the right to water – at least with regard to its individual uses.

In view of the close connection between the right to water and human dignity and life, the right must be interpreted with considerable breadth and leniency. This is interpretative approach befitting a right possessing primarily social and cultural characteristics.

A fundamental level of protection of the right involves the prohibition of discrimination in this provision of this natural resource. Any discrimination in access to water on the basis of characteristics of individuals would necessarily amount to a violation of human dignity. States therefore assume an obligation to avoid or eliminate de facto discrimination in this field. The Committee places particular emphasis on vulnerable groups (women, children, refugees, nomadic populations, detainees, the elderly, persons with disabilities, victims of natural disasters, and populations in water-scarce regions), as these groups are inherently more exposed to living conditions incompatible with human dignity, a fact that is also confirmed by the case law of the ECHR. Consequently, States are required to ensure the existence – and continuous improvement – of adequate and high-standard sanitation facilities

## II. Jurisprudential Approaches to Human Dignity and the Right to Water

### II.1. ECHR case law and the vulnerability approach

The jurisprudence of the European Court of Human Rights (ECHR) provides a concrete illustration of how the right to water can be derived from the broader principle of human dignity. Although the European Convention contains no explicit provision on access to water, the Court has

<sup>11</sup> UN: General Assembly 64/292. <https://docs.un.org/en/A/RES/64/92> (2025. Decemeber 15.)

<sup>12</sup> Committee on Economic, Social and Cultural Rights: *General Comment no. 15: The right to water*. [https://www2.ohchr.org/english/issues/water/docs/cescr\\_gc\\_15.pdf](https://www2.ohchr.org/english/issues/water/docs/cescr_gc_15.pdf) (2025. December 15.)

consistently linked inadequate access to water and sanitation to violations of Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to private and family life), both of which are grounded in the notion of human dignity.

In *Eugen Gabriel Radu v. Romania* (2009)<sup>13</sup> <sup>14</sup> and *Marian Stoicescu v. Romania*<sup>15</sup>, the Court found that the lack of access to drinking water and basic hygiene facilities in detention centers constituted degrading treatment contrary to Article 3 of the European Convention on Human Rights. In both cases, the Court emphasized that the denial of access to water undermines the inherent dignity of the individual, as it subjects human beings to conditions incompatible with respect for their physical and moral integrity.

Similarly, in *M.S.S. v. Belgium and Greece* (2011), the Grand Chamber held that the living conditions of an asylum seeker in Greece - marked by homelessness, lack of sanitation, and lack of access to clean water-violated Article 3 of the Convention. Lack of sanitation deprives a person of the minimal conditions required for a life with dignity<sup>16</sup>.

In *Peers v. Greece* (2011), the Court again found a violation of Article 3, stressing that the applicant's detention in overcrowded and unsanitary conditions-where access to clean water and hygiene was severely restricted-was incompatible with the respect due to human dignity<sup>17</sup>.

Collectively, these judgments articulate a consistent principle: denial of access to water constitutes a denial of human dignity. Even though the Court has examined these situations within the context of detention, the reasoning has broader implications. It demonstrates that access to water is not merely a social necessity but a precondition of human dignity, and therefore of the effective enjoyment of all other rights protected by the Convention.

In this sense, the ECHR jurisprudence provides a solid interpretative basis for understanding Article 2(1) of the Greek Constitution as encompassing the right to water. Where human dignity is at stake, the State's obligation extends beyond abstention-it includes the positive duty to ensure that individuals are not deprived of the basic material conditions for a dignified existence<sup>18</sup>.

## II.2. National courts confronting water scarcity and pollution

At the national level, there is value in examining court decisions from countries facing genuine water scarcity challenges. The following decisions are of exceptional theoretical interest. The first is the Constitutional Court of South Africa, *Mazibuko v. City of Johannesburg and Others*<sup>19</sup>, which is considered a landmark case for the constitutional protection of the right to water in South Africa. In Phiri, a poor area originally settled during the Apartheid era, the existing water system did not reflect actual water consumption, and numerous leaks were recorded. A new system was therefore introduced, offering three options:

- a communal standpipe located within 200 meters of each household,
- a yard connection with a limited flow of 6 kiloliters per month,
- a household connection equipped with a pre-paid meter.

Most residents opted for options (b) and (c). For households that did not choose any option, water supply was discontinued after a seven-day notice.

The Court applied the principles of proportionality and reasonableness in order to assess whether the measures were compatible with section 27 of the South African Constitution, which enshrines the right to water and its progressive realization through measures adopted by the state within its available resources. Interpreting Section 27(1), the Court linked the right to water with human dignity, freedom, equality and more broadly, with social security, expressly invoking General Comment No. 3 of the UN

<sup>13</sup> European Court of Human Rights, *Eugen Gabriel Radu v. Romania*, 13.10.2009

<sup>14</sup> De Albuquerque, Catarina et al.: *The Human Rights to Water and Sanitation in Courts Worldwide. A Selection of National, Regional and International Case Law*. WaterLex and WASH United, Geneva, 2014. p. 242

<sup>15</sup> European Court of Human Rights, *Marian Stoicescu v. Romania*, 16.7.2009

<sup>16</sup> European Court of Human Rights, *M.S.S. v. Belgium and Greece*, 21.1.2011

<sup>17</sup> European Court of Human Rights, *Peers v. Greece*, 19.4.2001

<sup>18</sup> Darellis, Dimitris: *Human Dignity*. In: Spyridon Vlachopoulos (ed.): *Fundamental Rights*. Sakkoulas Publications, Athens-Thessaloniki, 2017. p. 33 {36}

<sup>19</sup> Constitutional Court of South Africa, *Mazibuko v. City of Johannesburg and Others*, CCT 39/09, 8.10.2009

Committee on Economic, Social and Cultural Rights regarding the obligation to secure the minimum core content of all rights.

Ultimately, the Court held that the pre-paid meter system did not violate Section 27 of the Constitution, since the Constitution does not prescribe a specific minimum core of the right to water, such a minimum necessarily depends on the availability of resources, the state's financial capacity, and the reliability of payments by consumers.

Another significant judgment is that of the Supreme Court of Bangladesh in *Rabia Bhuiyan MP v. Ministry of Local Government and Rural Development et al.* (2007)<sup>20</sup>. In this case, an application was brought against the Government and various public authorities concerning the widespread contamination of groundwater with arsenic. This contamination had resulted, first, in the systematic breach of environmental legislation – namely the Environment Conservation Act 1995, the National Policy for Arsenic Mitigation, and the Environment Conservation Rules 1997 – and second, in the poisoning of a large number of people. According to the applicants, these failures amounted to violations of Articles 15 (basic needs of citizens), 18 (public health), and 31 (right to life) of the Constitution of Bangladesh.

The Court relied on Article 12 of the International Covenant on Economic, Social and Cultural Rights, which – according to General Comment No. 15 of the UN Committee on Economic, Social and Cultural Rights – is intrinsically linked to human dignity. At the same time, the Court referred to General Comment No. 14 on the right to health and emphasized the State's positive obligation to adopt effective measures to limit arsenic contamination of water sources. Failure to do so would amount to a violation of the aforementioned constitutional provisions.

Crucially, the Court held that the constitutional right to life includes the right of every individual to live in a healthy environment within which life can be fully enjoyed – that is, a life lived with dignity. Accordingly, the Court ordered the Government to implement the relevant environmental legislation and required periodic progress reports to be submitted, as well as public information campaigns through national media regarding arsenic pollution.

In Colombia, two noteworthy judicial decisions address the relationship between the right to water and human dignity. In the first case the Constitutional Court of Colombia held that the disconnection of water services (and electricity) constitutes a violation of the right to life under conditions of dignity<sup>21</sup>. Such a disconnection was found to breach the Colombian Constitution as well as the International Covenant on Economic, Social and Cultural Rights (Articles 11 and 12), whose connection with human dignity has already been analysed at a theoretical level.

In this context, particular attention should be paid, first, to Article 366 of the Colombian Constitution, which provides that social well-being and the improvement of quality of life constitute fundamental social objectives of the State, and that the means for achieving these objectives include access to drinking water; and, second, to Article 365 of the Constitution, which refers more generally to public services. This primarily individual dimension of the right gives rise to a corresponding obligation on the State to adopt appropriate public services. In other words, the improvement of quality of life with the right to water.

In the present case, the applicant suffered from chronic renal failure, and medical evidence confirmed that access to water directly affected her life, daily handwashing and catheter cleaning were required. Without access to water, neither proper medical preparation nor adequate recovery was possible-conditions incompatible with human dignity.

The Court also relied on General Comment No. 15 of the United Nations Committee on Economic, Social and Cultural Rights, which recognizes water as a prerequisite for a life in dignity and as an essential condition for the exercise of other human rights. Furthermore, the Court referred to Articles 11 and 13 of the Colombian Constitution, namely the right to life and the principle of equality. It developed the reasoning that water constitutes an indispensable element for life and, consequently, for the dignity of the person. Article 11 of the Constitution is central in this respect, while Article 13 emphasizes equality and freedom, as well as the obligation to prevent discrimination, particularly against vulnerable groups - an obligation that likewise finds its theoretical foundation in human dignity.

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<sup>20</sup> Supreme Court of Bangladesh, *Rabia Bhuiyan MP v. Ministry of Local Government and Rural Development et al.*, 27.8.2007

<sup>21</sup> Constitutional Court of Colombia, *Flor Enid Jimenez de Correa v. Empresas Publicas de Medellin*, 17.4.2007

The Court additionally invoked Article 93 of the Colombian Constitution, which provides that international treaties recognizing human rights prevail within the domestic legal order, thereby affirming the recognition of water as a human right. Consequently, the disconnection of water services was found to place the applicant's human dignity at risk. Ultimately, the Court ordered the immediate reconnection of the water supply.

In the second case, the Constitutional Court of Colombia ruled that the failure to connect a property to the water supply network and the failure to provide the user with a minimum quantity of water constitute a violation of the right to water under the Colombian Constitution, which, as already noted, recognizes this right as a human right<sup>22</sup>. In the present case, the water utility company refused to connect the property to the water supply network on the ground that the property was not located in close proximity to the existing network and that such connection would therefore require an extension of the network, entailing additional costs.

As a result, the families were forced to obtain water from neighbouring households or to collect rainwater. The Court applied General Comment No. 15 of the United Nations Committee on Economic, Social and Cultural Rights, which, as previously analysed, identifies water as an essential element of a dignified standard of living. It further relied on Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, which guarantee the right to an adequate standard of living (Article 11) and the right to the highest attainable standard of physical and mental health (Article 12).

With regard to domestic constitutional law, the Court applied Articles 79 (right to a healthy environment), 356 (public water services), and 366 (water as a prerequisite for quality of life and human development) of the Colombian Constitution. The Court held that water has a fundamental character insofar as it is intrinsically linked to life, human dignity, and health. Water thus constitutes a guarantee of physical survival and human dignity, as well as a core component for ensuring humane living conditions for vulnerable groups (such as women).

To the extent that water is recognized as an element of human dignity, it must necessarily be available at a minimum level corresponding to the basic needs of the individual. Accordingly, the refusal to connect a property to the water supply network constitutes a violation of the right to water and of the human dignity of the individual and his or her family. For these reasons, the Court granted the water utility companies a period of one month to connect the property to the water supply network in order to prevent further violations of the applicant's dignity and private and family life.

At the European level, the Constitutional Court of Slovenia held that a dwelling disconnected from the water supply system does not meet the conditions necessary to ensure human dignity<sup>23</sup>. According to the Court, the fact that one quarter of the residents of an apartment building had failed to pay their water bills did not constitute a legitimate ground for the disconnection of water services, as such a measure violated the principle of proportionality and the right to property.

The Court applied Articles 15 (protection of human rights and fundamental freedoms) and 33 (right to property and inheritance) of the Slovenian Constitution, since at the time Slovenia had not yet constitutionally enshrined the right to water. This contrasts with the current constitutional framework, under which water is expressly recognized as a constitutional right pursuant to Article 70a of the Slovenian Constitution.

The Court emphasizes the fundamental importance of water for human life and dignity. The principle of proportionality was found to have been violated insofar as all residents were deprived of access to water, despite the fact that only a minority had failed to meet their payment obligations.

On the basis of this reasoning, the Court ordered the reconnection of the water supply to the apartment building in question.

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<sup>22</sup> Constitutional Court of Colombia, Hernan Galeano Diaz v. Empresas Publicas de Medellin ESP and Marco Gomez Otero and Others v. HidroPasifico SA ESP and Others, 5.8.2010

<sup>23</sup> Constitutional Court of Slovenia, Up 156/1998, Ustanovo Sodisce, 11.2.1999

### II.3. Comparative insights: convergence between European and non-European courts

In conclusion, it is evident that national courts—across Europe, Africa, and Latin America—consistently recognize the close relationship between the right to water and human dignity. Nevertheless, a form of contextualism emerges, varying according to the continent in question.

In the European context, the right to water is primarily linked to human dignity in cases involving vulnerable groups and minorities, such as prisoners, detainees, and refugees. By contrast, in Latin America and Africa, the right to water and its connection with human dignity extend to all citizens in their everyday lives.

However, in light of climate change, this distinction is likely to diminish. In the coming years, water-related disputes grounded in human dignity are expected to concern the population at large at the European level as well, rather than being confined to particularly vulnerable groups.

## III. Climate Change and the Transformation of the Right to Water

### IV.1. Climate Change as a Factor Redefining the Right to Water

Climate change profoundly reshapes the conditions under which the right to water can be realized. Rising global temperatures, prolonged droughts, desertification, and extreme weather events increasingly threaten both the availability and quality of freshwater resources. The legal recognition of this interdependence has been progressively reinforced through international environmental agreements and emerging judicial practice<sup>24</sup>.

Climate change affects the way in which the right to water is understood. According to recent studies, the global water crisis is exacerbated by climate change, since approximately 90% of climate-related disasters concern water<sup>25</sup>. For this reason, the need for a hydrological transition that respects aquatic ecosystems is strongly emphasized, as well as the necessity to adopt measures aimed at combating water scarcity among impoverished populations and persons living in vulnerable conditions.

The impact of climate change on human rights and vulnerable groups had already been highlighted by the UN Human Rights Council in Resolutions 7/23<sup>26</sup> and 10/4<sup>27</sup>. In a more recent resolution, the same Council recognized the right to a clean, healthy and sustainable environment, which necessarily includes access to sufficient and safe water<sup>28</sup>.

At this point, it is essential to identify accurately and systematically the main effects of climate change on the right to water:

1. Reduction of water resources: Climate change diminishes global water reserves and renewable surface water and places into doubt the natural availability of water in the coming years<sup>29</sup>.
2. Disturbance of the hydrological cycle: Rainfall patterns and the hydrological cycle more generally have been affected, resulting in increasing droughts and extreme weather events that may jeopardize water quality and water-supply services.
3. Increased water stress: Climate Change is expected to alter water-pressure levels, resulting in heightened water stress<sup>30</sup>.
4. Temperature rise: Rising temperatures facilitate the development of bacteria in water, thus threatening that dimension of water quality<sup>31</sup>.

<sup>24</sup> Darrow, Mac: *Climate Change and the Right to Water*. In Langford Malcolm – Russell, Anna (eds.): *The Human Right to Water: Theory, Practice and Prospects*, Cambridge University Press, Cambridge, 2017. p. 174

<sup>25</sup> UN Human Rights Special Procedures: *Special Thematic report on climate change and the human rights to water and sanitation*. p. 1. <https://www.ohchr.org/sites/default/files/2022-01/climate-change-1-friendlyversion.pdf> (2025. December 15.)

<sup>26</sup> Human Rights Council Resolution: 7/23/28.3.2008

<sup>27</sup> Human Rights Council Resolution: 10/4/25.3.2009

<sup>28</sup> Human Rights Council Resolution: 48/13/18.10.2021

<sup>29</sup> UN Human Rights Special Procedures: op. cit. p. 3

<sup>30</sup> Bates, Bryson et al. (eds.): *Climate Change and Water*. Intergovernmental Panel on Climate Change (IPCC), Technical Paper, 2008, p. 45.

<sup>31</sup> Falkenmark, Malin – Lannerstad, Mats: *Consumptive Water Use to Feed Humanity – Curing a Blind Spot*. In Hydrology and Earth System Sciences, Vol. 9 (2005), pp. 15-28.

5. Impact on daily life and gender inequality: Climate change affects the daily lives of many people-especially women in developing countries, who are responsible for water collection<sup>32</sup>. This illustrates the “gender inequality” embedded in the enjoyment of the right to water.

6. Food security: Climate change affects the relationship between water and food, as it increases the risk of food insecurity and the spread of new diseases<sup>33</sup>.

7. Climate-included displacement, thereby affecting the right to housing due to environmental degradation, as has already been established by the international conference of United Nations member states held in Indonesia in 2007.

Consequently, it becomes clear that water, as a human right, is increasingly threatened. Rising competition exacerbates water scarcity, while global competition over water resources casts doubt on the long-term preservation of affordable water prices for all individuals<sup>34</sup>.

Furthermore, climate change is expected to increase the evaporation of surface waters<sup>35</sup>. This finding is particularly relevant for Greece, which already suffers from a shortage of surface water and is therefore driven towards excessive extraction of groundwater<sup>36</sup>. Floods are expected to increase simultaneously, affecting specific river basins. It is also well established that agricultural activities influence water quality. In Greece, eutrophication is a significant problem for which the Greek State has been condemned twice by the Court of Justice of the European Union-first for failing to designate the affected areas, and second, for failing to adopt a complete program to limit this phenomenon.<sup>37 38</sup>

Climate Change now creates even more unfavorable conditions for agriculture and directly affects its efficiency. In particular, due to climate change:

- a) soil quality deteriorates,
- b) drought phenomena intensify,
- c) extreme weather events become more frequent.

Under these circumstances, agricultural activities will struggle to comply with good agricultural practices, ultimately undermining water quality. The negative effects of climate change are especially evident in countries such as Greece, where 86% of water consumption is used for irrigation.

Although the extent and intensity of climate-change effects vary from country to country<sup>39</sup>, it is evident that this phenomenon threatens the human right to water and reveals the limitations of the traditional one which cannot accommodate new and future challenges<sup>40</sup>. The re-conceptualization of the right is essential if related rights are to be preserved, such as the right to food, the right to health, and the right to participate in the political and cultural life of the country. This need for adaptation of the right is also reflected in emerging case-law linking climate change with the right to water, which will be examined in the following sections.

Within the broader framework of protecting the right to water, the need to protect the biodiversity of aquatic ecosystems also emerges. The term biodiversity covers all forms of life within aquatic environments<sup>41</sup>. For this purpose, Directive 92/43 and the corresponding Greek Ministerial

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<sup>32</sup> Darrow, Mac: op. cit. p.174

<sup>33</sup> Tilman, David – Balzer, Christian – Hill, Jason and Befort, Belinda: *Global food demand and the sustainable intensification of agriculture*. In PNAS, November 2011, 108 (50), pp. 20260-64

<sup>34</sup> Zikos, Dimitrios – Hagedorn, Konrad: *Competition for Water Resources from the European Perspective*. In: Ziolkowska, Jadwiga R. - Peterson, Jeffrey M. (eds.): *Competition for Water Resources. Experiences and Management Approaches in the US and Europe*. Elsevier Inc., Amsterdam, 2017. pp. 19-35.

<sup>35</sup> UN Human Rights Special Procedures, op. cit. p. 5.

<sup>36</sup> Gogos, Konstantinos: *The planning of Water Resources Management as a Prerequisite for the Authorisation of Projects*. In: Proceedings of the Conference “Environment – Public Procurement: Recent Developments”. Association of Members of the Legal Council of the State – Hellenic Single Public Procurement Authority. Nomiki Vivliothiki, Athens, 2016. pp. 269-296

<sup>37</sup> Court of Justice of the European Union, C-149/2014, European Commission v. Greece, 23.4.2015.

<sup>38</sup> Court of Justice of the European Union, C-298/2019, European Commission v. Greece, 27.2.2020

<sup>39</sup> UN Human Rights Special Procedures, op. cit. pp. 13-20

<sup>40</sup> WWAP – Connor, Richard: *World Water Development Report 2015: Water for A Sustainable World*. UNESCO, Paris, 2015. pp. 65-67.

<sup>41</sup> Chrysogonos, Kostas: op. cit. 1 p. 850

Decision 33318/3028/11-12-1998 were adopted<sup>42</sup>. Similarly, Directive 79/409/EEC – now replaced by Directive 2009/147/EC along with Greek Ministerial Decisions 414985/29-11-1985 and 37338/1807/E.103/1-9-2010, and Laws 1650/1986 and 3937/2011, provide relevant protection.

International literature stresses that climate change affects the biodiversity of aquatic ecosystems<sup>43</sup>. For example, significant threats have been recorded<sup>44</sup>, particularly with respect to birds and migratory waterfowl. This discussion is internationally significant, as it aims to minimize the risk of extinction of aquatic life forms, which are already particularly vulnerable.<sup>45</sup> The preservation of biodiversity depends largely on maintaining minimum water flows and levels – elements which, as previously noted, are themselves affected by climate change<sup>46</sup>.

### **III.2. International Climate Change Frameworks and Water**

#### **III.2.1. United Nations Framework Convention on Climate Change (1992)**

The United Nations Framework Convention on Climate Change (UNFCCC), adopted in 1992, established the first global framework for addressing anthropogenic climate change. While the Convention does not explicitly mention water, it recognizes that climate change “will affect natural and human systems” and calls upon States to adopt measures ensuring “sustainable management of resources essential to human well-being (Articles 1-4).

#### **III.2.2. Kyoto Protocol (1997)**

The Kyoto Protocol (1997) deepened this commitment by setting binding emission-reduction targets for developed countries. In its preamble and implementing mechanisms, it implicitly acknowledges that mitigation and adaptation policies must protect vital resources, including water, whose scarcity and contamination are among the most severe consequences of climate disruption.

#### **III.2.3. Paris Agreement (2015)**

The Paris Agreement (2015) marked a paradigm shift, explicitly linking climate action to human rights. Article 7 emphasizes the importance of adaptation, including measures to safeguard water security, while the preamble recognizes that States must respect, promote, and consider their obligations concerning “the right to health, the rights of indigenous people, local communities, migrants, children, persons with disabilities, and people in vulnerable situations”. Water is implicitly situated at the heart of these rights.

Together, these instruments outline a normative evolution: access to water has become a climate-dependent human right, demanding both mitigation and adaptation obligations from States.

### **III.3. Case Law on Climate Change and Water**

In recent years, courts around the world have begun to address the human rights implications of climate inaction, progressively acknowledging the connection between climate change, environmental degradation, and fundamental rights, including the right to water.

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<sup>42</sup> Gogos, Konstantinos: *The Environmental Permit for Projects in Natura – 2000 areas – the Rules of Article 6 of Directive 92/43*. Sakkoulas Publications, Athens-Thessaloniki, 2009. p. 29.

<sup>43</sup> Stefanidou, Natasa: *Climate Change and biodiversity loss: marine phytoplankton community tolerance to temperature and salinity stress* (Dissertation). AUTH, Thessaloniki, 2019. p. 17.

<sup>44</sup> Bairlein, Franz – Huppop, Ommo: *Migratory fuelling and global climate change*. In Moller, Anders Pape et al. (eds.): *Birds and Climate Change*. In *Advances in Ecological Research*. 2006/35, p. 33-47.

<sup>45</sup> Senapathi, Deepa: *Climate Change and Birds: Adaptation Mitigation & Impacts on Avian Populations: A report on the BOY'S Annual Conference held at the University of Leicester, 6-8 April 2010*. In *Ibis*, Issue 2010/4, pp. 869-872.

<sup>46</sup> Tsiaousi, Vasiliki et al. (eds.): *Water regime and Biota: proposed minimum values of lakes water level of rivers discharge in Macedonia and Thrace, Greece*. The Goulandris Natural History Museum/Greek Biotope – Wetland Center, Thermi, 2007. p. 197.

### III.3.1. European Court of Human Rights

The first landmark judgment is *Klimaseniorinnen v. Switzerland* (ECHR, 2024)<sup>47</sup>. The Court in this judgment linked climate change to Article 8 of the ECHR on private and family life, holding that Switzerland's inaction in addressing the climate crisis amounted to a violation of that right. In particular, in this case, the association of elderly women brought proceedings against Switzerland, arguing that the heatwaves caused by climate change were deteriorating their health. The Court found a violation of Article 6 of the ECHR concerning access to justice, as well as Article 8 of the ECHR on private and family life. According to the ECHR, climate change is encompassed within the scope of Article 8 ECHR and obliges member States to take measures to address its negative consequences, both under the Climate Change Convention and since Switzerland had delayed in adopting measures to mitigate climate change.

The Court, explicitly linking climate change to its impacts on water, referred to this issue repeatedly: (1) it emphasized the connection between the environment and the right to water; (2) it stressed the necessity of ensuring this right in order to achieve sustainable development; (3) it highlighted the global water crisis; (4) it stated that safe and potable water is linked to the right to health and to a dignified standard of living and private life; (5) it clearly noted that the consequences of climate change affect all forms of water.

The Court further underlined that the impacts of climate change disproportionately affect the most vulnerable groups, such as the elderly, and observed that climate change will lead to severe droughts and water scarcity. Accordingly, it held Switzerland responsible for violating Articles 6 and 8 of the ECHR. This judgment makes it clear that, since climate change affects water, this in turn affects individuals' private life, as access to adequate water constitutes a precondition for a dignified existence.

### III.3.2. Domestic Jurisprudence

At the national level, we must first examine the decision in *Luciano Lliuya v. RWE AG* (Oberlandesgericht Hamm, 2025)<sup>48</sup>. This case concerned the action brought by a Peruvian mountain guide and farmer against RWE, a major German electricity producer. The company emits greenhouse gases, thereby contributing to climate change and increasing the risk of flooding in the claimant's area in principle, rely on the German Civil Code (Article 1004) and, if adverse effects on his property were shown to result from climate change, he could claim both compensation and the implementation of flood-prevention measures. This could operate both preventively and repressively. The court also held that the great geographical distance between the claimant's property and the company's facilities did not constitute an obstacle for establishing legal responsibility.

By contrast, the court appeared to stress that the fact that the claim was brought by a single individual – rather than a collective group – posed a difficulty, highlighting once again the collective and structural dimension of climate-change-related water issues. The claim was ultimately dismissed because the risk that the water from the glacial lake would reach the claimant's house within the next 30 years was assessed at below 1%. Consequently, there was no sufficiently concrete danger to his property arising from potential flooding of the lake. The court also underlined that lowering the lake's water level was technically feasible and that the protective capacity of the dam had been underestimated.

Despite the negative outcome for the claimant, the court's reasoning is notably progressive regarding the right to water. First, it explicitly links climate change with the right to water and the risk of dangerous flooding affecting an individual's property. Second, it recognizes a legal basis for bringing damages claims in climate-related water cases even when the alleged harm lies in the future (the court examined the relevant risks over a 30-year-horizon). Article 1004 of the German Civil Code concerns the prohibition of installing or maintaining harmful conditions on a neighbouring property.

The judgment reflects a significant reconfiguration of the right to water in the era of climate change and raises new legal questions about how citizens can be protected from such phenomena. Since RWE operated lawfully under a valid permit, the claim could not have been framed under the Greek model of state liability based on Article 105 of the Introductory Law to the Civil Code.

<sup>47</sup> European Court of Human Rights, Verein Klimaseniorinnen Schweiz and Others v. Switzerland, 9.4.2024

<sup>48</sup> Oberlandesgericht Hamm, Luciano Lliuya v. RWE AG, 28.5.2025

Drawing once again on German case law, the decision of the Federal Constitutional Court in *Neubauer et al. v. Germany*<sup>49</sup> is particularly instructive. In this case, several citizens and activists argued that the Climate Protection Act lacked clarity regarding the measures the government was required to take in order to protect individuals from climate change. The Court held that the Act violated Article 20a of the German Basic Law, in the sense that it did not ensure adequate protection of rights in the future, especially for the generations to come, since this is a right that entails long-term guarantees of freedom. In other words, there was no balanced and proportionate allocation of obligations between present and future generations. Therefore, the Court's reasoning, as in the previous decision, concerned future violations of rights.

According to the Federal Constitutional Court, the fact that Germany cannot halt climate change on its own does not exempt it from responsibility; each state must periodically reassess the impacts of climate change at regular intervals. Article 20a of the Basic Law refers – according to common translations – to the natural foundations of life and animals. It explicitly provides that “Mindful of its responsibility toward future generations, the state shall protect the natural foundations of life and animals”.

We observe that climate change jurisprudence introduces a forward-looking dimension to rights-based claims: it requires legislative clarity and effectiveness, and it does not allow the state to rely on the fact that climate change constitutes an international, transboundary issue.

Reference must be made to *Kivalina v. ExxonMobil* (U.S. Federal Court, 2009)<sup>50</sup>. In the United States, the Inuit community of Kivalina sued major energy corporations for damages resulting from climate-induced erosion and loss of access to freshwater. Although the claim was dismissed for lack of justiciability, the case remains emblematic of how climate change directly undermines the right to water and habitation, exposing the limitations of existing legal frameworks in providing effective remedies.

A landmark decision is *Urgenda Foundation v. State of the Netherlands*, decided by the Supreme Court of the Netherlands<sup>51</sup>. The Supreme Court upheld the judgment of the Court of Appeal and found the Dutch State liable. The reasoning of the Dutch courts may be summarized as follows.

First, the courts refer to the effects of climate change, such as water scarcity, droughts, sea-level rise, flooding, and melting ice caps. The decisions rely on Articles 2 and 8 of the European Convention on Human Rights (ECHR), concerning the right to life on the one hand and the right to respect for private and family life on the other. On the basis of these provisions, an obligation emerges for the State to reduce greenhouse gas emissions by at least 25% by 2020.

Second, the courts establish that States have a duty to take measures against threats which they know endanger human life. At the same time, a corresponding obligation of the Netherlands is identified under the United Nations Framework Convention on Climate Change and the Paris Agreement of 2015, to which it is a contracting party. In other words, under Articles 2 and 8 of the ECHR, the Dutch State is under an obligation to adopt measures to ensure that climate change does not threaten the life, or private and family life, of Dutch citizens.

The Dutch courts place particular emphasis on the consequences of climate change, such as the lack of access to drinking water, flooding resulting from sea-level rise, and the loss of biodiversity. Accordingly, by failing to adopt adequate measures, the State violates Articles 2 and 8 of the ECHR. The Court of Appeal, whose findings were upheld by the Supreme Court, notes the existence of a real risk that the lives of Dutch citizens may be threatened and that their private and family life may be disrupted on the basis of the available scientific evidence on climate change. It is thus established that the Dutch State has failed to take the necessary measures to prevent the threat posed by climate change and, for this reason, has breached Articles 2 and 8 of the ECHR.

Article 2 of the ECHR gives rise to obligations concerning protection against natural disasters and industrial activities. These obligations must also extend to long-term risks, such as climate change, in light of the principle of intergenerational equity. Article 8 of the ECHR further encompasses measures aimed at protecting individuals from other environmental risks. Notably, the courts underline the collective dimension of the protection afforded by these provisions, insofar as society as a whole is

<sup>49</sup> Federal Constitutional Court of Germany, *Neubauer et al. v. Germany*, 24.3.2021

<sup>50</sup> U.S. Federal Court: *Kivalina v. ExxonMobil*, 30.9.2009

<sup>51</sup> Supreme Court of the Netherlands, *Urgenda Foundation v. Netherlands*, 20.12.2019

protected – an observation also made in other judicial decisions. For example, residents of areas threatened by climate change are expected to initiate legal proceedings collectively.

According to the courts' reasoning, the Dutch State is under a mandatory obligation to take action, while retaining discretion as to the specific type of measures to be adopted. Those measures must, in turn, be reasonable and appropriate, in accordance with the principle of proportionality, a requirement to be assessed on the basis of environmental impact studies. At the same time, the measures must not impose a disproportionate burden on the State. Nevertheless, the existence of an immediate and real risk arising from climate change is unequivocally recognized. Particular emphasis is placed on sea-level rise, which, within a few decades, could render parts of the Netherlands uninhabitable.

Finally, although climate change constitutes a global problem, each State bears responsibility for its own share of mitigation measures within its territory and, simultaneously, an obligation not to cause harm to other States through its conduct, in accordance with the principle of non-harm. Pursuant to Article 13 of the ECHR, national courts are empowered to review whether a State complies with its obligations to mitigate the effects of climate change.

A similar approach is reflected in *Future Generations v. Ministry of Environment*, decided by the Supreme Court of Colombia<sup>52</sup>. The claimants brought an action against the Republic of Colombia concerning the increased deforestation of the Amazon rainforest. The Colombian government is obliged to take measures pursuant to the Paris Agreement on climate change, as well as under the corresponding national legislation aimed at reducing deforestation. According to the Court, deforestation of the Amazon is primarily linked to: (a) the disruption of the water cycle; (b) the reduced capacity of soil to absorb water during rainfall, thereby causing floods; and (c) changes in water availability and the overheating of the planet.

Overall, the claimants argued that, as a result of these processes, they are deprived of access to a healthy environment. These issues, they maintained, affect both the present generation and future generations in an intergenerational manner. The court of first instance dismissed the claim on the ground that the matter concerned a collective problem rather than an individual one. However, the appellate court held that legal action may be brought where a collective problem is linked to an individual right and where the violation of that right is fully established.

The Court emphasized the direct connection between the right to a healthy environment and ecosystems, on the one hand, and human dignity, private life, life, and health, on the other. Without the existence of a healthy environment, individuals – and sentient beings more generally – are unable to act, develop their private lives, or fully realise their personality. According to the Colombian Court, the non-enjoyment of the right to water, and more broadly of the right to a healthy environment, prevents Colombian citizens from living a dignified life.

On page 4 of its judgment, the Court highlights the international threats posed by climate change to the environment, including intense rainfall, droughts, and extreme weather events, as well as the extinction of species, namely forms of life inhabiting aquatic ecosystems. These rights are said to possess an element of “otherness”, that is, a value not only for the rights-holder asserting them, but also for the rest of the planet’s inhabitants, as third-generation rights. The intrinsic value of nature requires the protection of fundamental rights for future generations as well.

The Colombian Court further notes that natural resources are no longer sufficient and are inherently limited. Consequently, the right acquires a legally binding dimension of “abstention”, in the sense of restricting the freedom of action of States with regard to the environment, in order to preserve it for future generations. To support its reasoning, the Court refers to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, the 1992 Rio Conference, and, most importantly, the 2015 Paris Agreement on climate change.

On the basis of the Paris Agreement, the Court finds that Colombia has indeed undertaken an obligation to reduce deforestation. This agreement was followed by the Sustainable Colombia initiative and the Vision Amazon Fund, both of which aim to mitigate the effects of climate change that have altered water sources. Emphasising the “green” orientation of the Constitution and the notion of an ecological Constitution, the Court notes that deforestation entails sea-level rise and the intensification

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<sup>52</sup> Supreme Court of Colombia, *Future Generations v. Ministry of Environment*, 5.4.2018.

of pollution originating from water resources. It also leads to reduced water availability and widespread droughts.

The Court refers to an anticipated increase in temperature of 2.14% by 2071 and, on the basis of the principle of intergenerational solidarity, holds that the Colombian State is obliged to reduce deforestation. It thus becomes apparent that water, as the most fundamental component of the environment, is not merely a present-day concern but a future-oriented rights - a third-generation right that concerns the entire world and all future generations.

Consequently, the Court held that the Colombian State had breached its obligations under the Paris Agreement on climate change by failing to reduce deforestation and had therefore violated the right to a healthy environment, within which the right to water is embedded. Finally, the Court recognized the Amazon rainforest as a subject of rights. In light of the above, it ordered the Colombian State to formulate and implement a plan to reduce deforestation in the Amazon.

The legislative and judicial developments examined so far allow us to draw certain conclusions regarding the relationship between climate change and the right to water. It is evident that climate change dramatically affects all dimensions of this right. Specifically, it impacts both its individual dimension – namely access to drinking water and personal hygiene – and its environmental dimension, as an integral component of the ecosystem. The right thus acquires a need for prospective and collective protection, insofar as, in most judicial decisions, these rights appear to be pursued through collective litigation, while the risks are assessed over a long-term horizon.

This observation reasonably gives rise to questions concerning the narrowness of existing constitutional provisions relating to the right to water. For example, in Greece, only one extension of the right to water – the environmental one – is interpreted as deriving from Article 24 of the Constitution, and even this in a manner that appears outdated, to the extent that climate change has reshaped its environmental dimension.

At a second level, the question arises as to whether current procedural frameworks adequately address the new form and renewed content of the right to water. Courts have recognized both a positive obligation on states to adopt measures aimed at mitigating climate change in relation to water, and a negative obligation to refrain from actions that would undermine this right. It appears that such protection may be afforded either through civil liability legislation (Articles 105-106 of the Introductory Law to the Civil Code in Greece) or through the development of a new form of tort liability.

### *Conclusion*

In conclusion, the present research has sought to summarise the main findings regarding the relationship between the right to water and the principle of human dignity. The principle of human dignity is intrinsically linked to the right to water, elevating it to a prerequisite right for the effective enjoyment and protection of other fundamental rights within contemporary legal orders. This connection is recognized both at the European level and across other regions of the world, with particular emphasis on Latin America, Asia, and Africa.

Nevertheless, a significant divergence can be observed. Within the European legal order, the linkage between the right to water and human dignity has thus far been articulated primarily in exceptional contexts and has mainly concerned vulnerable or minority groups. By contrast, in other regions, this connection directly affects the average citizen and everyday life, constituting a general and persistent constitutional and social concern.

Climate change, however, fundamentally reshapes this contextual assessment. It directly affects the definition and normative content of the right to water, rendering traditional conceptualisations increasingly inadequate and, in some respects, obsolete. Contemporary case law now clearly acknowledges that climate change primarily impacts the right to water and the communities and regions that depend upon it. Phenomena such as flooding, the degradation of water quality, and threats to private property and personal security are expected to intensify and increasingly affect Europe in the coming years.

Under these conditions, constitutions can no longer treat water merely as an element of environmental protection or solely as a social right. They must recognise that this most fundamental natural resource is under direct threat. Accordingly, states are required – whether at the constitutional or legislative level – to incorporate legal frameworks capable of addressing these new dimensions of the

right to water, in order to safeguard citizens' rights both in the present and for future generations. Procedural mechanisms must also integrate effective tools to protect individuals from the impacts of climate change and to ensure the qualitative protection of water resources, which are likewise affected by climate change.

Such constitutional and legislative developments would contribute significantly to the protection of citizens in light of the emerging threats that climate change poses to the right to water. To the extent that water is intrinsically linked to human dignity, violations of individuals' rights resulting from the adverse effects of climate change on water resources necessarily entail a violation of human dignity.

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## The Messianic Imperialism of the Spanish Habsburg Monarchs \*

### ABSTRACT

The Medieval history of the Iberian Peninsula was marked by the Reconquista, the 16th and 17th centuries were marked by the construction of the Spanish Empire, the process of the evangelization of the New World, the struggle against the Ottomans, France and the Protestant Powers. The Spanish Habsburg monarchs inherited and continued the messianic visions of the Catholic Monarchs Isabel of Castile and Ferdinand of Aragon in the Early Modern period. The evangelization of the New World was a messianic mandate given by Pope Alexander VI to the Spanish Crown, the Habsburg rulers considered their kingdoms and subjects not only as countries and nations but as instruments for a higher purpose, to serve God, the Catholic Church, to propagate and to defend the Catholic Faith as well. Among the symbols of their visions, we can find the use of the motto Plus Ultra and the Pillars of Hercules in their royal coat of arms, the use of the titles 'King of Jerusalem' or the 'Catholic Majesty'. They used the Cross of Burgundy, the Cross of Saint Andrew as their imperial flags, not the coat of arms of their countries. The Spanish monarchs were the grand masters of the Spanish Orders of Santiago, Calatrava, Montesa, Alcántara and the Burgundian Order of the Golden Fleece. Their messianic visions were described by themselves in their own testaments and laws.

KEYWORDS: Habsburg, Spanish empire, early modern age, political visions, America, indies

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“Ruego e mando a la dicha prinçesa, mi hija, e al dicho príncipe, su marido, que como católicos príncipes tengan mucho cuidado de las cosas de la honra de Dios e de su sancta fe, selando (sic) e procurando la guarda e defensión e enxalçamiento della, pues por ella somos obligados a poner las personas e vidas e lo que touiéremos, cada que fuere menester, e que sean muy obedientes a los mandamientos de la santa madre iglesia e protectores e defensores della, como son obligados, e que no cesen de la conquista de África e de pugnar por la fe contra los ynfieles, e que siempre fauorezcan mucho las cosas de la Sancta Ynquisición contra la herética prauidad”

(Isabel la Católica, 1504)

## Introduction

Present study tries to give a short sum about the pillars of the political vision of the Spanish Habsburg Monarchs in the Early Modern Age. The term *Messianic Imperialism* used by the Historiography refers to the attitude and the actions of the Spanish Crown during the 16<sup>th</sup> and 17<sup>th</sup> centuries, mainly its struggle with the enemies of the Catholic Faith and the Catholic Church on one hand, the propagation of the Catholic Faith in the entire World on the other hand.<sup>1</sup> This period is known as the Golden Age of the Spanish Empire (*el Siglo de Oro*), its zenith of power, high culture, worldwide known literature, enthralling architecture etc.<sup>2</sup> It was the time of the illustrious School of Salamanca, and its famous representatives, Francisco de Vitoria, Domingo de Soto, Francisco Suárez, Juan de Mariana etc.<sup>3</sup>

In the case of the *Messianic Imperialism* of the Spanish Crown we talk about non a unique author or a philosopher, but the late Medieval and Early Modern Spanish Monarchs, Queen Isabel of Castile and her successors, the Habsburg kings of Spain. The Spanish Monarchs wrote their visions, their attitude, their wills into their political and legal testaments,<sup>4</sup> laws and royal orders during the centuries. Reading these documents, we can notice – at least in my own interpretation – that the imperial policy of the Spanish Crown the so called *Messianic Imperialism* was based on at least five essential pillars during the 16<sup>th</sup> and 17<sup>th</sup> centuries. Of course from a different perspective (military, social, economic etc.) other or additional viewpoints could be detected as well. So in my own interpretation, which now is a geopolitical perspective, these pillars should be the following.

### I. Political and Religious Unity

The first pillar of the imperial policy of the Spanish Monarchs was the creation of the political and religious unity within the Spanish territories. The cultural and religious background in the Iberian Peninsula was the *Reconquista* during the entire Middle Ages.<sup>5</sup> Almost eight hundred years-long struggle (from the 8<sup>th</sup> century to the 15<sup>th</sup> century) for the recovery of the Peninsula from the Moors. During these centuries various Christian kingdoms and states (León, Navarre, Castile, Portugal, Aragón, Valencia etc.) were created, which provoked territorial, linguistic, legal, political fragmentation among the Christians. Later the monarchs came to understand that a kind of union (at least a political one) would be more benefit for the Spaniards to reach their main goal, to fulfil the century-old dream, the

<sup>1</sup> Geoffrey Parker: *Felipe II*, Barcelona, Planeta, 2020, 240.

<sup>2</sup> Manuel Rivero Rodríguez: *La España del Siglo de Oro*, Madrid, Alianza Editorial, 2023.

<sup>3</sup> David Torrijos-Castrillejo – Jorge Luis Gutiérrez: *La escuela de Salamanca: la primera versión de la modernidad*. Madrid, 2022.

<sup>4</sup> Manuel Fernández Álvarez: *Testamentos de los reyes de la Casa de Austria*, Madrid, Editora Nacional, 1982.

<sup>5</sup> Joseph O'Callaghan: *Reconquest and Crusade in Medieval Spain*, Philadelphia, University of Pennsylvania Press, 2004.

*Reconquista*.<sup>6</sup> This recognition led to the creation of the *mayorazgo* in the Castilian Law,<sup>7</sup> which substance was to conserve the unity of the state, which became an important principle for the succession of the throne as well, thus the monarch shall never divide its country among the heirs.<sup>8</sup>

By the end of the 15<sup>th</sup> century the marriage between Isabel of Castile (1474–1504) and Ferdinand II of Aragon (1479–1516) allowed to the Spaniards to unite their forces and thus they became able to abolish the last Moorish Kingdom and reconquer the entire Iberian Peninsula.<sup>9</sup> This policy was supported by Cardinal Rodrigo Borgia,<sup>10</sup> future Pope Alexander VI (1492–1503) who played fundamental role in the legal construction of the global Spanish Empire. This experience encouraged the monarchs to unite – at least personally if not legally – their realms and states, thus both Isabel of Castile and Ferdinand of Aragon named the eldest survival daughter, Princess Joana in their testaments as *successor universal* of all their crowns.<sup>11</sup> It meant the personal and political, but not legal unification of the Spanish Kingdoms of the Peninsula after the death of Ferdinand of Aragon in 1516.<sup>12</sup> This policy was crucial for the Catholic Monarch's successors as well, so the Habsburgs maintained this principle through the next two centuries, and from case to case they stated that all their kingdoms and crowns shall be inherited by the first-born heir, and no division or separation shall be permitted.<sup>13</sup> This *mayorazgo* principle was extended to all their possessions, to the Low Countries,<sup>14</sup> to the various Italian possessions, and later to Portugal during the Iberian Union (1580–1640) as well.<sup>15</sup> The unique case was Philipp II (1556–1598) who ceded the Low Countries to his daughter in 1598 and thus separated those territories from the other possessions and took them under the jurisdiction of sovereign co-rulers, but it was just a tactic decision and an exception.<sup>16</sup> The Spanish monarch, Philipp III (1598–1621) stated and

<sup>6</sup> H. Salvador Martínez: *Alfonso X, el Sabio: Una biografía*, Madrid, 2003.

<sup>7</sup> Joseph O'Callaghan: *Alfonso X the Justinian of His Age: Law and Justice in Thirteenth-Century Castile*, New York, Cornell University Press, 2019.

<sup>8</sup> “Ordeno y mando, que el príncipe don Phelipe, mi hijo, después de mis días, no pueda en su vida enagenar cosa alguna de todos los dichos reynos, señoríos y estados, ni dividirlos ni partirlos aunque sea en sus propios hijos, ni en otras personas algunas”, *Testamento de Felipe II*... 41.

<sup>9</sup> Miguel Ángel Ladero Quesada: *La España de los Reyes Católicos*, Madrid, Alianza Editorial, 2023.

<sup>10</sup> The marriage between Isabel and Ferdinand was legitimized with the help of Cardinal Rodrigo Borgia, let see Susanne Schüller Piroli: *Los papas Borgia Calixto III y Alejandro VI*, Valencia, 1991, 110.

<sup>11</sup> Their only son, Infante Juan died in 1497 with no heirs, next year died their eldest daughter, Infanta Isabel, her son died in 1500, thus Infanta Juana became the heir to the throne, let see: “otrosí, conformándome con lo que deuo e soy obligada de derecho, ordeno e establezco e ynstituyo por mi vniuersal heredera de todos mis regnos e tierras e señoríos e de todos mis bienes rayzes después de mis días, a la illustríssima princesa doña Juana, archiduquesa de Austria, duquesa de Borgoña, mi muy cara e muy amada hija primogénita, heredera e sucessora legítima de los dichos mis regnos e tierras e señoríos”, *Testamento y codicillo de Isabel la Católica*.

<sup>12</sup> Navarre was conquered after the death of Queen Isabel but still in the lifetime of Ferdinand of Aragon.

<sup>13</sup> “Establezco e instituyo por mi heredero y sucesor universal de todos los dichos mis reynos e señorío”, *Testamento de Carlos V*... 27.

<sup>14</sup> “Que doresenavant en tous nosdits Pays Patrimoniaux, & héréditaires d'embas, & de Bourgogne representation en matière de succession, soit de masles on femelles, estans sélon les anciennes Coustumes, Droicts, & Privilèges de nosdits Pays-Bas, capables à succeder, ait & aura lieu en ce que touche la succession du Prince ou Princesse d'iceux Pays tant en Ligne directe que transversalle, & jusques au nombre infini, nonobstant toutes Coustumes d'aucuns de nosdits Pays à ce contraires, disposans que representation ne doit avoir lieu”, *Pragmatique sanction du 4 novembre 1549*, it was an edict, promulgated by Emperor Charles V reorganising the Low Countries into a unique and indivisible territory.

<sup>15</sup> “Declaro expressamente que quiero y es mi voluntad, que los dichos reynos de la Corona de Portugal ayan siempre de andar y anden juntos y unidos con los reynos de la Corona de Castilla, sin que jamás se puedan dividir ni apartarlos unos de los otros, por ninguna causa que sea, o ser pueda”, *Testamento de Felipe II*... 23.

<sup>16</sup> In 1598 Philipp II of Spain ceded the Low Countries to his first-born daughter, Infanta Isabel Clara Eugenia, and his nephew, Archduke Albert VII, let see the conditions: *Acta de Cesión de 6 de mayo de 1598*, In: Marqueses de Pidal y de Miraflores y Miguel Salva: *Colección de documentos inéditos para la historia de España XLII*, Madrid, 1865, 219–228.

confirmed in his last will that since those possessions belong to his Crown as *mayorazgo antiguo*,<sup>17</sup> they shall be separated never again.<sup>18</sup>

After the voyages and discoveries of Columbus, and the bulls of donation issued by Pope Alexander VI, Queen Isabel declared that all the states and kingdoms of the Indies under her jurisdiction shall be incorporated to the Crown of Castile.<sup>19</sup> Her grandson, Charles I of Castile (1518–1556) stated during his inauguration oath in Barcelona in 1519 that all the Kingdoms of the Indies – the newly discovered and to be discovered lands – shall be fully united with the Crown of Castile forever, and cannot be separated from it for any reason.<sup>20</sup> One hundred years later Philipp IV (1621–1665) declared that the Kingdoms of the Indies (New Spain and Peru) and the Kingdom of Castile are from the same Crown.<sup>21</sup> Thus Spain had no colonies, but overseas territories legally full part of the Spanish Crown.

During the Middle Ages the Iberian Peninsula culturally was an authentic patchwork which was the obvious consequence of the various conquests through the long centuries, the Roman conquest in the Ancient times, the Visigoth one at the end of the Roman Empire, and the Arab conquest at the beginning of the 8<sup>th</sup> century.<sup>22</sup> This made a real cultural and ethnical mosaic with significant Jewish and Moorish population living together with the Spaniards.<sup>23</sup> This was the source of serious internal conflicts, a permanently growing problem to be solved for the Crown by the end of the 15<sup>th</sup> century.<sup>24</sup> Having fulfilled the Reconquista in 1492, Isabel and Ferdinand decided that all their Jewish subjects must convert to the Catholic faith, those who did not want to do so, had to leave the Peninsula.<sup>25</sup> Ten years later (1502) all the Mudéjar population<sup>26</sup> of the Crown of Castile were forced to convert to the

<sup>17</sup> “Por ser los dichos Estados Baxos mayorazgo indivisible y inseparable de esta Corona de España”, *Testamento de Felipe III*... 43.

<sup>18</sup> “Se dissolviere el dicho matrimonio por muerte de qualquiera de los dichos Señores mi Hermana o Tío, que desde agora para entonces, declaro y quiero, que se tenga entendido, los dichos Estados han de pertenecerme a mí, y me han pertenecido por derecho propio, y mayorazgo antiguo”, *Testamento de Felipe III*... 45.

<sup>19</sup> “E por quel dicho reyno de Granada e las Yslas de Canaria e las Islas e Tierra Firme del Mar Océano, descubiertas e por descobrir, ganadas e por ganar, han de quedar yncorporados en estos mis reynos de Castilla e León, segund que en la bulla apostólica a nos sobrelo conçedida se contiene”, *Testamento y codicillo de Isabel la Católica*.

<sup>20</sup> “Por la donacion de la Santa Sede Apostólica y otros justos y legítimos títulos, somos Señor de las Indias Occidentales, Islas y Tierra firme del Mar Océano, descubiertas, y por descubrir, y estan incorporadas en Nuestra Real Corona de Castilla. Y porque es nuestra voluntad, y lo hemos prometido y jurado, que siempre permanezcan unidas, para su mayor perpetuidad y firmeza, prohibimos la enagenacion de ellas. Y mandamos, que en ningun tiempo puedan ser separadas de nuestra Real Corona de Castilla, desunidas, ni divididas en todo, o en parte, ni sus Ciudades, Villas, ni Poblaciones, por ningun caso, ni en favor de ninguna persona. Y considerando la fidelidad de nuestros vasallos, y los trabajos que los descubridores, y pobladores pasaron en su descubrimiento y poblacion, para que tengan mayor certeza y confianza de que siempre estarán y permanecerán unidas á nuestra Real Corona, prometemos y damos nuestra fe y palabra Real por Nos, y los reyes nuestros sucesores, de que para siempre jamas no serán enagenadas, ni apartadas en todo, ó en parte, ni sus Ciudades, ni Poblaciones por ninguna causa, ó razon, ó en favor de ninguna persona; y si Nos, o nuestros sucesores hiciéremos algna donacion, ó enagenacion contra lo susodicho, sea nula, y por tal la declaramos”, *Recopilación de las leyes de los Reynos de las Indias*, Madrid, 1681, Libro III, Título I, Ley I (1519).

<sup>21</sup> *Recopilación*... Libro II, Título II, Ley XIII (1636).

<sup>22</sup> Hugh Kennedy: *The Great Arab Conquest, How the Spread of Islam Changed the World We Live in*, Boston, Da Capo Press, 2007.

<sup>23</sup> For example, in Valladolid – which served as the capital for a period – under Christian jurisdiction the Muslims could have mosque, own houses, crofts, vineyards etc., let see: Henry Kamen: *La Inquisición española: Mito e historia*, Barcelona, Crítica, 2023, 18.

<sup>24</sup> María del Pilar Rábade Obradó: La élite judeoconversa de la Corte de los Reyes Católicos y el negocio fiscal, *En la España Medieval* 37, 2014, 205–222, Ser judeoconverso en la corona de Castilla en torno a 1492, *Kalakorikos: Revista para el estudio, defensa, protección y divulgación del patrimonio histórico, artístico y cultural de Calahorra y su entorno*, 10, 2005, 37–56.

<sup>25</sup> “Hasta en fin del mes de Julio primero que viene de este presente año de 1492 años salgan de todos los dichos nuestros reynos y señoríos con sus hijos é hijas, criados y criadas, y familiares judíos así grandes como pequeños, de qualquier edad que sean”, *Novísima Recopilación de las Leyes de España*. Tomo V, Madrid, 1805, Libro XII, Título I, Ley III (1492).

<sup>26</sup> They were Muslims who remained in Iberia in the late medieval period following the Christian reconquest (1492–1502).

Christianity, or to leave the country<sup>27</sup> as well. From this time they were called Morisco population,<sup>28</sup> this rule came into force in the Crown of Aragon only in 1525. Why the monarchs urged the religious unity?

For example, a subject of the Crown for once Catholic – no matter he/she was Jew or Muslim before – shall not leave the Holy Catholic faith. To ensure this policy, the Santa Inquisición (*Tribunal del Santo Oficio*) was erected both in Castile by Isabel (1478) and in Aragon by Ferdinand (1483) as well.<sup>29</sup> The task of the Inquisition was not to propagate the faith, but to avoid that the faithful subjects leave the Catholic faith, because it could lead to religious conflicts. So this concept later became the essential part of the religious policy of the Spanish Monarchs. In Germany, England, France etc. the reformation led to serious internal conflicts, various countries were marred into religious wars during the 16<sup>th</sup> century, a ‘luxury’ that Spain could not afford it to happen within its territories meanwhile facing a permanent threat from the Ottomans in the Mediterranean.<sup>30</sup> That is why no reformation or freedom of religion was permitted in the Spanish Empire during the 16<sup>th</sup> and 17<sup>th</sup> centuries. We know that the Spanish Habsburgs tried to break down the Protestant Dutch rebellion during the Eighty Years’ War (1568–1648) unsuccessfully.<sup>31</sup> The expulsion of a part of the Moriscos, the Catholic descendants of the Moors from the Spanish Kingdoms between 1609 and 1614 was the consequence of the failure of the integrity and fear from the Ottoman intervention, suspecting the Moriscos as the ‘fifth column’ of the Ottomans.<sup>32</sup>

## II. The defence of the Catholic Church and the propagation of the Catholic faith

The second pillar was to defend the Catholic Church and the Catholic faith. This policy comes from the struggles of the Reconquista, the Crusader attitude of the Spanish Monarchs and the Spanish nobility.<sup>33</sup> King Alfonso X of Castile (1252–1284) stated in his testament at the end of the 13<sup>th</sup> century that his heart shall be buried in the Church of the Holy Sepulchre in Jerusalem.<sup>34</sup> The century-old Medieval idea to liberate Jerusalem and the Holy Land was maintained by all the Spanish Habsburg Monarchs during the Early Modern Age as well. The Spanish monarchs made gracious donations for the Franciscans in Jerusalem regularly,<sup>35</sup> and to collect alms for that cause was allowed even in the Indies, among the Indians too.<sup>36</sup> The Spanish Habsburgs inherited the title *King of Jerusalem* from Ferdinand of Aragon, which made their attitude even more dedicated.<sup>37</sup> This policy was intact and so

<sup>27</sup> Serafín de Tapia Sánchez: 1502 en Castilla la vieja, de mudéjares a moriscos, *Edad Media* 17, 2016, 133–156.

<sup>28</sup> Spanish Muslims (or their descendants) who became baptized Christians.

<sup>29</sup> Cristian Rodrigo Iturralde: *La Inquisición, un tribunal de misericordia*, Ediciones Parresía, 2019,

<sup>30</sup> Fernando Martínez Laínez: *La Guerra del Turco*, Madrid, Edaf, 2010.

<sup>31</sup> Anton van der Lem: *Revolt in the Netherlands The Eighty Years War, 1568–1648*, London, Reaktion Books Ltd, 2022.

<sup>32</sup> Antonio Domínguez Ortiz – Bernard Vincent: *Historia de los moriscos – Vida y tragedia de una minoría*, Madrid, Revista de Occidente, 1978.

<sup>33</sup> Faustino Menéndez Pidal: *La nobleza en España: ideas, estructuras, historia*, Madrid, Real Academia de la Historia, 2015, 125.

<sup>34</sup> “Mando, otrosí, que quando sacaren el nuestro corazón para llevarlo a la Sancta Tierra de Ultramar, segund que es ya dicho, e que saquen lo otro de nuestro cuerpo e lo lleven a enterrar al monesterio de Sancta María la Real de Murcia”, Juan Torres Fontes: *Documentos de Alfonso X el Sabio*, Murcia, 2008, 345.

<sup>35</sup> Víctor de Lama: Un breve de Inocencio VIII dirigido a los Reyes Católicos, que nunca recibieron, y la financiación de los Santos Lugares, *En la España Moderna*, vol 38, 2015, 231–240.

<sup>36</sup> “Para que se aumente la devoción de nuestros vasallos a los Santos Lugares de Jerusalén, y sean socorridas las necesidades de los Religiosos de San Francisco, que con muchos trabajos y gastos asisten a su veneración y ornato: Mandamos nuestros Vireyes, Presidentes, Audiencias, Gobernadores y Capitanes Generales, y a todos nuestros Jueces y Justicias; y rogamos y encargamos á los Arzobispos y Obispos, y sus Vicarios [...] pedir, demandar y recoger cualesquier limosnas, y ayuden por su parte quanto sea posible y requiere la piedad de tan santa obra”, *Recopilación...* Libro I, Título XXI, Ley VIII (1618).

<sup>37</sup> The title King of Jerusalem was bought by Charles I of Naples, and thus incorporated into the royal titles of the Kingdom of Naples (officially: *Regnum Utriusque Siciliae*) during the Angevin period in the 13th century, let see: Philipp Baldwin: Charles of Anjou, Pope Gregory X and the crown of Jerusalem. *Journal of Medieval History*, 2012, 1–19.

popular even in the 16<sup>th</sup> and 17<sup>th</sup> centuries too, just let see the works written by the great poets of the Spanish Golden Age, for example the famous novel *Don Quixote* by Miguel de Cervantes, *Las mocedades del Cid* by Guillén de Castro about the story of one of the most iconic Spanish hero of the Reconquista, El Cid. The same crusader attitude can be detected in the novel *Jerusalén conquistada* written by Lope de Vega, or in the novel *Napoles recuperada por el rey Don Alonso* by Francisco de Borja y Aragón, ex viceroy of Peru. This *crusader image* was portrayed by the Spanish art in numerous works. In Spain various Chivalric Orders were established during the Middle Ages, but the Council of the Crusade was created by the Habsburgs only in the 16<sup>th</sup> century. The monarch became the grand master of all the Chivalric Orders of the Spanish Kingdoms, under the Union with Portugal, they became the grand masters of the Portuguese Chivalric Orders as well. Despite of that, all of them were painted exclusively with the great collar of the Order of the Golden Fleece.<sup>38</sup> The official feast of Apostol Santiago, patron of Spain was established by Philipp IV in 1643.<sup>39</sup>

The Spanish monarchs stated in their laws that all their subjects must believe and confess what the Roman Catholic Church teaches and confesses.<sup>40</sup> All the monarchs stated in the last will that the heir to the throne shall be a faithful Catholic, those who leave the Catholic faith are to be deprived from the succession immediately.<sup>41</sup> A good question would be whether a sovereign has limits or not if he/she wants to convert to another religion? Can a sovereign change the law freely? Or there are fundamental rules that cannot be changed not even by the sovereign itself?

### III. Struggle with the Ottomans and the Protestants

The third pillar is the logic consequence of the second one. Although the Spanish Monarchs could fulfil the Reconquista at the end of the 15<sup>th</sup> century, but two new challenges appeared in the same time. The seemingly unstoppable rise of the powerful Ottoman Empire from the East<sup>42</sup> on one hand, and the new Schism within the Western Christianity<sup>43</sup> on the other hand. The Habsburgs detected the correlation of the two challenges in time, Archduke Ferdinand I of Austria (1521–1564) wrote this to his aunt, Margaret of Austria, the governor of the Low Countries in 1526.<sup>44</sup> Emperor Charles V wrote

<sup>38</sup> Carlos de Ayala Martínez: *Las órdenes militares hispánicas en la Edad Media (siglos XII-XV)*, Madrid, Marcial Pons Historia, 2007, Daniel Rodríguez Blanco: La organización institucional de la Orden de Santiago en la Edad Media, *Historia. Instituciones. Documentos*, 12, 1985, 167–192, 178.

<sup>39</sup> “Por quanto son notorios los beneficios y favores tan continuados, que los Señores Reyes mis progenitores é yo, y estos mis reynos hemos recibido, y cada dia recibimos mediante el auxilio del glorioso Apóstol Señor Santiago, como Patron de ellos y los que me promete la confianza con que lo espero por su intercesion, me obligan á mostrarlo con algun reconocimiento dedicado á su mayor culto y veneracion, he resuelto, que estos mis reynos de Castilla tambien por via de reconocimiento envien al Santo Apóstol en cada un año perpetuamente mil escudos en oro del dinero que se distribuye por su mano; los quales ha de llevar á aquella santa Iglesia, en mi nombre y de los Reyes mis sucesores, el Alcalde Mayor mas antiguo de la Audiencia de mi reyno de Galicia, y hacer entrega de ellos el mismo dia del glorioso Apóstol cada año, empezando el de este presente”, *Novísima Recopilación...* Tomo I, Libro I, Título I, Ley XV (1643).

<sup>40</sup> *Novísima Recopilación...*, Tomo I, Libro I, Título I.

<sup>41</sup> “Si lo que Dios no quiera ni permita alguno de mis sucesores profesare alguna secta, o herejía de las condenadas y reprobadas por nuestra Santa Madre Iglesia Cathólica Romana, y se apartare y separare de esta única verdadera y sagrada religión, por el mismo hecho, le doy y declaro por incapaz y inhábil para la governación y regimiento de todos los dichos reynos y estados y de qualquier de ellos, y de el oficio y dignidad de rey y le privo de la sucesión, posesión y derecho de ellos”, *Testamento de Felipe IV...* 11.

<sup>42</sup> Gábor Ágoston: *The Last Muslim Conquest: The Ottoman Empire and Its Wars in Europe*, Princeton, Princeton University Press, 2021.

<sup>43</sup> Peter Marshall: *1517: Martin Luther and the Invention of the Reformation*, Oxford, Oxford University Press, 2017.

<sup>44</sup> Mihály Hatvani: *Monumenta Hungariae Historica 1. Diplomataria I: Okmánytár a Brüsseli Országos Levéltárból és a Burgundi Könyvtárból*, Pest, 1857, 38, “Dont apres pouez, madame, penser, en quel dangier et péril mes pays Dautrice seront, et consequamment toute la Germanie, pour les grans troubles et jnvnions que y regnent a cause de la secte lutteriane, qui jurnellement augmente de plus en pis. [...] Et que pis est, non seulement en mes pays Daustrie, qui son voisins dillecq; ains en ceste Germanie, et consequamment en toute la chrestiente est ou dangier densuyr tel mal et jnconuenient, que si dieu par sa saincte bonté ny mect la main, actendu mesmes

his experience and instructions to his son, the future Philipp II in his political testament in 1548.<sup>45</sup> The regular clashes with the Ottomans and the permanent religious wars in Europe required the significant part of the resources of the Spanish Empire.<sup>46</sup> The Habsburg Monarchs were ready to act for the defend of the religion and the Catholic Church, we can see the religious wars Europe-wide during the 16<sup>th</sup> and 17<sup>th</sup> centuries where the Spanish Empire was deeply involved. Philipp IV wrote in his last will in 1665 that “all the resources of the empire must be devoted to the protection of the Catholic Church and the glory of God”.<sup>47</sup> This policy is the survival of the Medieval Idea of the Christian universalism, so the Spanish Monarchs treated their kingdoms not only as states and nations, but as an instrument and servant to defend the Catholic Church and the Catholic faith as well. If we check the symbols, we can notice this attitude well, the imperial flag was the Burgundian Cross, the Cross of St Andrew which symbolised the fight for the Christianity. In Europe this period was marked by the *raison d'état*,<sup>48</sup> the opponent idea of the *Christian universalism*, the very interest of a state, invoked as politically superior to moral or religious considerations, like in France, England or the Netherlands happened when those countries made alliance with the Sublime Porte.<sup>49</sup> The ideological background of the Franco-Ottoman, the Anglo-Ottoman etc. alliances during the Early Modern Age was the *raison d'état*, since these were openly against the main power of the Catholic faith, the Spanish Empire and the House of Habsburg.

#### IV. The propagation of the Catholic Faith

The fourth pillar was to propagate the Holy Catholic faith in the entire World. It is the Age of Discoveries, Columbus,<sup>50</sup> Magellan<sup>51</sup> etc. After Columbus had returned from the New World, Pope Alexander VI issued various bulls in which he divided the New World – which territory was under no Christian prince’s jurisdiction still – between the Portuguese and Spanish Crowns.<sup>52</sup> The Borgia pope imposed an important condition to the privilege, a *messianic mandate*, to propagate the Catholic faith in the newly discovered lands. The Spanish Monarchs took this mandate in serious way, from the second voyage of Columbus, friars were sent to the New World,<sup>53</sup> that is why Pope Alexander VI gave them

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le desordre, que y est, et que ceste secte litteriane sespauche et augmente tousionrs de mal en pis; jl y a plutot apparance que le tout tumbe et succédé a ruyne et totale désolation que autrement”.

<sup>45</sup> “Debéis tener siempre muy encomendada la observancia, sustentamiento y defensión de nuestra santa fe generalmente, y en especial en todos los dichos reinos, Estados y señoríos que nos heredaréis, favoreciendo la divina justicia y mandando que se haga curiosamente, y sin elección de personas y contra todos sospechosos y culpados, y teniendo solicitud y cuidado de obviar por todas las vías y maneras que pudiéredes con derecho y razón en las herejías y sectas contrarias a nuestra antigua fe y religion”, *Instrucciones de Carlos V a Felipe II*, In: Manuel Fernández Álvarez: *Corpus Documental de Carlos V Tomo II* (1539–1548), Salamanca, 1975, 570.

<sup>46</sup> Mauricio Drellichman – Hans-Joachim Voth: *Lending to the Borrower from Hell, Debt, Taxes, and Default in the Age of Philipp II*, Princeton and Oxford, Princeton University Press, 2014, Carlos Javier de Carlos Morales: *El precio del dinero dinástico: endeudamiento y crisis financieras en la España de los Austrias, 1557–1647*, Vol. 1, Madrid, Banco de España, 2016.

<sup>47</sup> “En todos mis reynos, estados y señoríos, se ha guardado y guarda la Religión Cathólica Romana, y mis gloriosos predecesores la han guardado y mantenido y gastado y empeñado en defensa de ella el patrimonio real, anteponiendo la gloria y honra de Dios y de su Santa Ley a todas las cosas y consideraciones temporales; y porque esta es la primera obligación de los reyes, ruego y encargo a mis sucesores, que cumpliendo con ella, hagan y ejecuten lo mismo”, *Testamento de Felipe IV*...11.

<sup>48</sup> Friedrich Meinecke: *Machiavellism: the Doctrine of Raison d'état and its Place in Modern History*, New Haven, Yale University Press, 1957.

<sup>49</sup> Let see for example: Evrim Türkçelik: El Imperio otomano y la política de alianzas: las relaciones franco-ottomanas en el tránsito del siglo XVI al XVII, *Hispania*, Vol 75, No 249, 2015, 39–68, Jerry Brotton: *The Sultan and the Queen, the Untold Story of Elisabeth and Islam*, New York, Viking, 2016.

<sup>50</sup> István Szászdi León-Borja: Dos nuevos documentos para el conocimiento de la intervención de Luis de Santángel en el descubrimiento de las Yndias. *Estudios de historia de España*, No. 8, 2006, 163–174.

<sup>51</sup> Eduardo Andrades Rivas: Notas sobre las capitulaciones del almirante Fernando de Magallanes. *Derecho Público Iberoamericano*, No. 23, 2023, 131–145.

<sup>52</sup> Let see the full text of the donation letters, Samuel Edward Dawson: *The Lines of Demarcation of Pope Alexander VI and the Treaty of Tordesillas A.D. 1493 and 1494*, Toronto, 1899, 529–540.

<sup>53</sup> István Szászdi León-Borja: Isten első szava az Újvilágban. *Világörténet* 2, 2016, 183–210.

the title “Catholic Kings” a few years later.<sup>54</sup> The Catholic Monarchs got the right of the tithe from the pope in 1501 to construct and found churches and monasteries in the Indies.<sup>55</sup> The first archbishopric was established in Santo Domingo in 1504, a few years later the Spanish Monarchs got the right of patron of the Indies<sup>56</sup> from Pope Julius II in 1508. The Spanish Monarchs interpreted their own main task to fulfil the mandate of the supreme pontiff, to convert all the New World to the Catholic faith.<sup>57</sup> At least two clerics had to be on every ships going to the New World.<sup>58</sup> A Franciscan friar, Toribio de Benavente (one of the Twelve Apostles of Mexico) wrote in his chronicle that “by 1536 four million souls were baptized in New Spain”<sup>59</sup> We read in the Laws of the Indies that the viceroys, archbishops, bishops and land-owners’ main obligation was to ensure the conversation of the local communities to the Holy Catholic Faith, to build monasteries, chapels, churches, cathedrals, schools, universities for the people in the New World.<sup>60</sup> By the mid-16<sup>th</sup> century the most important cities a good part of the Indians participated in the Catholic feasts.<sup>61</sup> If we check the religious map of the World now the heritage of this policy can be clearly detected.

## V. To create a ‘New Jerusalem’ in the Indies

And finally the fifth pillar was to integrate the New World into the Hispanic civil culture as well. The Spanish monarchs used the title *King of the Indies*,<sup>62</sup> and as I mentioned above, they treated the newly discovered lands and its people as they were part of the Castilian world, the Indians were called ‘*our vassals*’ by the monarchs.<sup>63</sup> In the lack of special rules for those territories, the Laws of

<sup>54</sup> Eusebio Rey: „La bula de Alejandro VI otorgando el título de 'católicos' a Fernando e Isabel”. I. Evolución del tema y texto. *Razón y Fe*, No. 146, 1952, 59–75.

<sup>55</sup> “Ecclesiis in dictis Insulis erigendis, per vos et successores vestros præfatos, de vestris et eorum bonis dote sufficiente, ex qua illis præsidentes earumque Rectores se commode sustentare, et onera diotis Ecclesiis pro tempore incumbentia perferre, ac cultum divinum ad laudem omnipotentis Dei debite exercere, juraque Episcopalia persolvere possint, Decimam hujusmodi percipere et licite ac libere valeatis, auctoritate Apostolica, tenore præsentium, de specialis dono gratiæ indulgemus”, Francisco Javier Hernández: *Colección de Bulas, Breves y Otros Documentos Relativos a la Iglesia de America y Filipinas*, Bruselas, A. Vromant, 1879, 21.

<sup>56</sup> “absque eorumdem Ferdinandi Regis et Joannæ Reginæ ac Regun Castellæ et Legionis pro tempore existentium consensu, erigi aut fundari possint; et cum, expeditat eidem Regi, Ecclesiis et Monasteriis præfatis, personas fidas et gratas et acceptas præsesse, jus Patronatus et præsentandi personas idoneas, tam ad Metropolitanas, quam alias cathedrales Ecclesiæ erectas, et pro tempore erigendas, et alia quæcumque Beneficia ecclesiastica, infra annum a die illorum vacationis computandum”, *Colección de Bulas, Breves...* 24.

<sup>57</sup> “Porque el fin principal, que nos mueve á hacer nuevos descubrimientos es la predicacion, y dilatacion de la Santa Fe Católica, y que los Indios sean enseñados, y vivan en paz y policía”, *Recopilación...* Libro IIII, Título I, Ley I.

<sup>58</sup> *Recopilación...* Libro IIII, Título II, Ley III (1556).

<sup>59</sup> “Yo creo que despues que la tierra se gano, que fue el año de 1521, hasta el tiempo que esto escribo, que es en el año de 1536, mas de cuatro millones de animas se bautizaron, y por donde yo lo se, adelante se dira” Toribio de Benavente: *Historia de los Indios de la Nueva España*, Parte II, Cap. II.

<sup>60</sup> “Segun la obligacion y cargo con que somos Señor de las Indias ninguna cosa deseamos mas que la publicacion y ampliacion de la Ley Evangélica y la conversion de los Indios á nuestra Santa Fe Católica”, *Recopilación...* Libro II, Título II, Ley VIII (1636), By 1630 fourteen universities were established by the Spanish Crown in the Indies.

<sup>61</sup> Juan Chiva Beltrán: El Corpus y el Imperio hispánico. Autoridades, naturales y usos de la devoción al cuerpo de Cristo. In: Víctor Minguez – Íñmaculada Rodríguez (ed.): *La Piedad de Casa de Austria*. Valencia, 2018, 63–86, 73.

<sup>62</sup> “que en todas las Provisiones y títulos que despacharen en nuestro nombre, hagan poner los títulos en la forma siguiente. Don N. por la gracia de Dios, Rey de Castilla, de Leon, de Aragon, de las Dos Sicilias, de Jerusalen, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Córdoba, de Córcega, de Murcia, de Jaen, de los Algarves, de Algecira, de Gibraltar, de las Islas de Canaria, de las Indias, Islas y Tierra firme del Mar Océano; Archiduque de Austria; Duque que de Borgoña, de Bravante y Milan; Conde de Abspurg, de Flandes, de Tirol, y de Barcelona; Señor de Vizcaya, y de Malina”, *Recopilación...* Libro II, Título I, Ley VIII (1581).

<sup>63</sup> “Entre las materias, que mas importan para servicio de Dios nuestro Señor conservacion, y aumento de los Estados de las Indias, es el amparo, y buen tratamiento de los Indios, y que sean bien gobernados, y mantenidos en paz, y justicia, como vasallos de esta Corona”, *Recopilación...* Libro IIII, Título XV (1618).

Castile had to be applied in the Indies.<sup>64</sup> The Castilian court system was installed in the Indies as well.<sup>65</sup> The first royal court was established by Ferdinand of Aragon in Santo Domingo,<sup>66</sup> the most of the royal courts of the Indies were founded by the 1560s.<sup>67</sup> The ancient customs and ‘laws’ used by the Indians were also respected by the Spanish Crown if those rules were not against the Catholic faith.<sup>68</sup> A kind of a legal continuity was represented by the art, the Habsburg monarchs as fifteenth, sixteenth seventeenth etc. Inca rulers.

The local nobles and communities were respected and recognized by the Spanish Crown, the monarchs stated in their laws that the lands and properties of the Indians must be respected by everyone.<sup>69</sup> The Crown tried to integrate the local nobility into the Castilian nobility, numerous Indian elite figures got Spanish noble title from the monarchs, like in the case of Pedro Tesifón de Moctezuma – the direct descendent of the Aztec Emperor Moctezuma – who got the title Count of Moctezuma.

The Crown from the beginning advocated the policy of the racial mixing between the Spaniards and the local people, “the Spaniards shall have right to marry Indians and vice-versa, the Indians shall have right to marry to Spaniards as well”.<sup>70</sup> I mention only two famous examples, Martín Cortés, the son of Hernán Cortés born to an Indian woman became the knight of the Order of Santiago, or Inca Garcilaso de la Vega, born to a Spanish conquistador and an Inca Princess.<sup>71</sup> We can see the various paintings from the 16<sup>th</sup> and 17<sup>th</sup> centuries which represent the local elite dressed to elegant silk or velvet dresses with full of gold and silver jewels with the coat of arms got from the monarch mixed with the Castilian and local symbols.

### Conclusion

The imperial policy of the Spanish Habsburgs cannot be understood without the knowledge of the primary sources. The essence of their imperial policy can be clearly detected from their laws and testaments, which was a Messianic vision based on the Medieval Christian universalism.

<sup>64</sup> “Ordenamos y mandamos, que en todos los casos, negocios y pleitos en que no estuviere decidido, ni declarado lo que se debe proveer por las leyes de esta Recopilación, ó por Cédulas, Provisiones, ó Ordenanzas dadas, y no revocadas para las Indias, y las que por nuestra orden se despacharen, se guarden las leyes de nuestro Reyno de Castilla, conforme á la de Toro, así en quanto á la substancia, resolucion y decision de los casos, negocios y pleitos, como á la forma y orden de substanciar”, *Recopilación...* Libro II, Título I, Ley II (1530), Pablo Rodríguez: *Testamentos de indígenas americanos siglos XVI–XVII. Revista de Historia* 154 (2006) 1:15–35. 16.

<sup>65</sup> *Recopilación...* Libro II, Título XV, Ley XVII (1570).

<sup>66</sup> *Recopilación...* Libro II, Título XV, Ley II (1526).

<sup>67</sup> Ramón María Serrera: *La América de los Habsburgo (1517–1700)*. Sevilla, Editorial Universidad de Sevilla, 2019. 184.

<sup>68</sup> “Ordenamos y mandamos, que las leyes y buenas costumbres, que antiguamente tenian los Indios para su buen gobierno y policía, y sus usos y costumbres observadas y guardadas despues que son Christianos, y que no se encuentran con nuestra Sagrada Religion, ni con las leyes de este libro, y las que han hecho y ordenado de nuevo se guarden y executen”, *Recopilación...* Libro II, Título I, Ley III (1555).

<sup>69</sup> “á todos nuestros subditos, naturales, y habitantes en las Indias, que no les hagan mal, ni, daño en sus personas, ni bienes, ni les tomen contra su voluntad ninguna cosa, excepto los tributos, conforme, sus tasas, pena de que cualquier persona, que matare, o hiciere, ó pusiere las manos injuriosamente”, *Recopilación...* Libro VI, Título X, Ley III (1523). The Indians had right to make a testament, *Recopilación...* Libro VI, Título I, Ley XXXII (1580).

<sup>70</sup> “es nuestra voluntad, que los Indios, é Indias tengan, como deben, entera libertad para casarse con quien quisieren, así con Indios, como con naturales de estos nuestros Reynos, o Espanoles nacidos en las Indias, y que en esto no se les ponga impedimento”, *Recopilación...* Libro VI, Título I, Ley II (1514).

<sup>71</sup> There is an allegoric painting from Lima, Peru, which represents the double marriage of three families, the Loyola, the Borja, and the Inca families, with the guests of the wedding both Indians and Spaniards, and in the middle of the picture there are the two saint members of the families, San Ignacio de Loyola and San Francisco de Borja, the former is the relative of the founder of the Jesuit Society, the latter is the descendent of Pope Alexander VI.

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## What Has Cosmic Horror to Offer Law (or Deprive It from)? The Collapse of Natural Order in H. P. Lovecraft's Fiction\*

### ABSTRACT

One of the most ancient and enduring issues in the history of legal philosophy is the relationship between law and morality. This can be explained with the fact that the birth of legal philosophy can be traced back to the emergence of philosophy in general. For this reason, for a large period in Western intellectual history, the philosophical analysis of law traditionally implied the assumption that fundamental moral principles and human-made legal rules are related, the former, with a validity beyond human volition, serving as a source of legitimacy for the latter, which are susceptible to change by temporary human will. Thus, one of the main pursuits of classic legal philosophy was to identify the eternal values supplying the foundations of positive law. My paper is an attempt at viewing the “law and morality” question through the lens of the “law and literature” approach. Interdisciplinary movements in legal scholarship like “law and literature” or “law and (popular) culture” offered insight into the various ways literature and other cultural products touch upon problems that are pertinent to how law works or how it is perceived in the popular imagination. From the principles of just distribution to retributive justice and the desire for vengeance to social inequalities, from the greatest literary classics to contemporary popular fiction, a plethora of interactions between fictitious stories and the world of law have been and are being explored to date. My paper focuses on weird fiction and cosmic horror, partly overlapping subgenres of horror fiction pioneered by H. P. Lovecraft (1890-1937). The central motif in cosmic horror is the insignificance of all kinds of human endeavour, and the meaningless world's indifference towards humanity; an affront to our perception of ourselves as being inherently worthy or possessing some kind of inherent value. My claim is that cosmic horror, by annihilating the teleology attributed to the world by many, implicitly touches on the problem of the destabilization of universal values, a problem that led to the critique and marginalisation of natural law theory by the 19th century. While Lovecraft does not describe situations in which his protagonists face moral dilemmas, he repeatedly hints at an implicit belief in rules and limits inherent in the natural order of things—an assumption not unlike those found in classic natural law theories—and the realization that there is no “cosmic order” is an important writerly tool in his specific brand of horror. This way, cosmic horror offers an opportunity to reflect by the means of fiction upon the fragility of a universal (or any kind of) moral order.

KEYWORDS: law and literature, law and morality, natural law, representation of law,

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## Introduction

Fiction and law are intertwined in a great variety of ways. Since the emergence of the law and literature movement in the 1970s as an initiative to reintroduce the human to the law, pioneered by James Boyd White, the interrelatedness of the two fields has been explored from an infinitesimal of perspectives. Literary fiction can be an apt tool to reflect on hypothetical dilemmas on law and morality,<sup>1</sup> to highlight issues of contractual interpretation,<sup>2</sup> to enhance the empathy of law students by introducing artistic representations of social issues to them,<sup>3</sup> to express common sentiments (mostly anxieties) regarding the complexities of modern law,<sup>4</sup> the representation of law in popular culture as an expression of public sentiments and as a source of peril in affirming a simplified perception of law and the legal profession,<sup>5</sup> and a row of other problems. While not without substantial criticism, law and literature has by now gained a firm foothold in the scholarly discourse about law.

The aim of this paper is to explore certain connections between genre fiction and the fundamental issues of legal philosophy. I offer and analysis of the writings of American horror author H. P. Lovecraft, and – using the increasing scholarship on his work – I aim to highlight their moral philosophical connotations and the way these connotations target the reader's belief in a world where there are natural and objective moral truths. To achieve this, I rely on two insights that comprise the main line of my reasoning. First, I consider it settled that popular fiction and genre fiction are legitimately eligible for scholarly analysis. The distinction of high-brow and popular fiction is an old one that persists even in our present. Yet a significant and growing amount of research attests the fact that popular fiction can be a way of expression that reflects some of the most important questions of human society. Second, I consider horror as a genre that, due to its specific tropes, is capable of expressing some abstract philosophical issues, including moral philosophical ones.

In Chapter II of this article, I offer a short overview of Lovecraft's place in horror fiction, first focusing on horror as a genre that questions modernist rationalism, and then highlighting how Lovecraft fits into this pattern. In Chapter III I briefly recall classic legal philosophy's reflections on natural order. Then in Chapter IV I turn to how the collapse of natural order is present in the selected short stories of Lovecraft.

## I H. P. Lovecraft and Cosmic Horror

In this chapter, I aim to place Lovecraft's work in the context of the development of horror fiction. For this, I first attempt to briefly outline the significance of the appearance of Gothic fiction, as a branch of fiction directly aimed at evoking fear, in the century of Enlightenment. My claim is that Gothic, and later horror fiction gain meaning as ways of expression that can explicitly be contrasted with the rationalist paradigm inaugurated by the Enlightenment. Then I continue with placing the work of Lovecraft himself in the history of horror fiction.

### I.1. Gothic, Horror and the Recourse to Irrationalism

<sup>1</sup> Probably the most well-known example for this approach is the use of Sophocles' *Antigone* as an illustration of the natural law versus legal positivism debate.

<sup>2</sup> Shakespeare's *The Merchant of Venice*, the plot of which is centered around the interpretation of the contractual provision about the "pound of flesh," is the archetypical example for this kind of usage.

<sup>3</sup> A significant amount of scholarship has been devoted to the thematization of social issues and its relevance to the legal profession. Perhaps the most influential of such attempts is Nussbaum's *Poetic Justice*, which devotes a chapter to Dickens' *Hard Times*, and the ways a perceptive reader can take the viewpoint of the characters and gain a deeper understanding of their legal position.

<sup>4</sup> The textbook example for this approach is viewing Kafka's *The Trial* in the light of the increasing complexity of modern law in the eyes of ordinary people, their experience of alienation.

<sup>5</sup> Sherwin offers a broad range of arguments that popular culture's representation of law and legal issues influences the way law operates, and legal procedures, in certain ways, become similar to scenes visible in products of popular culture.

While fear, including fear of the supernatural, has been a part of fiction since the earliest forms of literature,<sup>6</sup> writing fiction for the sake of evoking fear in the reader can be traced back roughly to the emergence of Gothic fiction in the 18<sup>th</sup> century, commonly connected to the publication of Horace Walpole's *The Castle of Otranto* in 1764. Gothic fiction emerged as a counterreaction to the Enlightenment's agenda of rationalism. Gothic plots usually feature elements that defy rational explanation (supernatural beings, monsters, mystery, etc.) and often place emphasis on the psychological turmoil of the characters. The lingering effect of the shadowy past is also a recurring element; Gothic stories often feature atavistic secrets that originate from the distant past and haunt the present. Furthermore, works in this branch of literature were often centered around the deconstruction or criticism of the rationalistic perception of the world.

It is a peculiar coincidence that Walpole's *The Castle of Otranto* and Beccaria's *On Crimes and Punishments* were published in the same year. The former symbolizes the birth of a genre that is grounded in irrationalism and mystery; the latter is considered to be one of the most important and enduring classics of the Enlightenment's legal thinking. In the field of legal philosophy, Beccaria argued that torture and death penalty generally have no practical use, and because of this, they should be abolished from criminal law. His book is a hallmark of the voice of reason produced against archaic elements of law. On the other hand, Gothic fiction gained inspiration from the very archaic practices and customs modernist legal thought attempted to reform; it in fact often borrows from the excessive atrocities that were attributed – sometimes justly, sometimes unjustly – to Christianity and medieval times by Enlightenment thinkers and authors.

This paradox deserves mention, because it underlines the strong – and controversial – relationship between Gothic (and generally horror) fiction and the modernist narrative of rationalism. Enlightenment is the chapter in Western thought that led to the abandonment of transcendental authority as the fundament of argumentation. The world lost its appearance as something that contains a decipherable higher meaning that can be attributed to a transcendental creator or order. Rather, it came to be seen as a methodically observable and rationally understandable set of phenomena in causal relationships with each other that does not carry any higher message.

In literature and the arts, this tendency resulted in the appearance of an attraction towards irrationalism and sentimentalism. Romanticism embraced an aesthetics of mood, feelings, passions, instead of Classicism's attachment to regularity and symmetry. Burke devoted a book-length treatise on the “sublime” as a prime motif in arts. In his words, “[w]hatever is fitted in any sort to excite the ideas of pain, and danger, that is to say, whatever is in any sort terrible, or is conversant about terrible objects, or operates in a manner analogous [sic] to terror, is a source of the *sublime*,”<sup>7</sup> an aesthetical experience that is “productive of the strongest emotion which the mind is capable of feeling.” The sublime in the Burkean sense is strongly related to emotions like fear, and Burke explicitly categorizes terror as one of the passions caused by the sublime,<sup>8</sup> which strongly connects Gothic fiction to Romanticism's sentiment oriented aesthetic values.

It is plausible to argue that the emergence of Gothic fiction and the ongoing development of horror can be understood, or at least gets a new layer, in the context of a modernist, rationalist *Zeitgeist*, a way of thinking that presumes, first, that the world can be measured and comprehended, second, that moral argumentation can be founded on rational insights instead of unyielding, absolute authority, and third, that with the proper knowledge, progress is possible and humankind can obtain the means to change its environment to its advantage. In the medieval ages there was “no concept of ‘horror’ as a

<sup>6</sup> Edith Birkhead, the author of one of the earliest attempts at a comprehensive history of horror fiction (originally published in 1921), argues that the genre is rooted in ancient mythical tales of the supernatural. Birkhead, Edith: *The Tale of Terror. A Study of the Gothic Romance*. Russell & Russell Inc., New York, 1963. Lovecraft, in his long essay on the history of horror, relies heavily on Birkhead's insights with respect to the early origins, and they may have partly inspired the essay's famous opening sentence: “[t]he oldest and strongest emotion of mankind is fear, and the oldest and strongest kind of fear is fear of the unknown.” Lovecraft, Howard Phillips: *Supernatural Horror in Literature*. In Lovecraft, Howard Phillips: *Collected Essays Volume 2: Literary Criticism*. Hippocampus Press, New York, 2004. p. 82.

<sup>7</sup> Burke, Edmund: *A Philosophical Enquiry into the Origin of our Ideas of the Sublime and Beautiful*. R. and J. Dodsley, London, 1757. p. 13.

<sup>8</sup> Ibid. p. 42.

genre,” the distinction between fiction and nonfiction was born in a later age.<sup>9</sup> With the advent of what Weber called as “the disenchantment of the world,”<sup>10</sup> the dividing line between reality and fantasy became more marked, the supernatural moved to the realm of pure fiction and imagination. This separation catalyzed the emergence of supernatural stories – horror stories among them – as a distinct branch of fiction instead of tales about real perils beyond our imminent perception (e. g. cautionary tales that serve the purpose of warning people about the punishment for committing sins or breaching taboos).

## I.2. The Significance of Lovecraft in Horror

Throughout his lifetime, Howard Phillips Lovecraft (1890-1937) experienced meagre, if any, literary success – unless we consider the praises from his peers, some of whom also grew to become acknowledged authors in the development of speculative fiction.<sup>11</sup> He came from a wealthy bourgeoisie family, but with the death of his father, and then his grandfather, he experienced a slow and steady loss of caste; and he was never able to secure a stable job. The short stories that were published in his lifetime were published in pulp magazines, most notably *Weird Tales*. Pulp magazines were the main forums for fantastic fiction in those times, and *Weird Tales*, founded in 1922, was one of the leading magazines in the field, with Lovecraft as one of its most popular authors.<sup>12</sup>

Lovecraft, though writing for a profit-oriented type of media, did not care much for the tropes that make a piece of fiction more marketable,<sup>13</sup> and this is where we turn to his unique *ars poetica* that contained the framework of cosmic horror. Cosmic horror is a subgenre of horror that, instead of the explicit depiction of gore and monsters, focuses on the creation of a specific atmosphere. Its central issue is the insignificance of humankind, our vulnerability and ephemerality in the shadow of an indifferent universe that does not care about humanity in any way. Cosmic horror aims at evoking the sentiment of this vulnerability. The plots of the classics of cosmic horror are virtually nonexistent, the emphasis is on the feeling of being decentered and lost, not only as an individual, but also as a species. Cosmic horror was not invented by Lovecraft,<sup>14</sup> but he was the one who elaborated it as a literary program and an aesthetical endeavor.

The core of cosmic horror is the destabilization of the notion that humankind in any way stands in the center of the world. The thought that humans are the measure of all things is intuitively evident for anybody. People shape and interpret the world in a way that is suitable for them. This is nothing less than any species would do. In most historical eras, humans considered it natural that they are on top of the hierarchy between living (or even non-living) beings on earth. Religious worldviews held it that in the divine order of things, the world is, to a varying extent, at the disposal of humans to reap its fruits.

<sup>9</sup> Cardin, Matt (ed.): *Horror Literature through History. An Encyclopedia of the Stories That Speak to Our Deepest Fears. Volume 1*. Greenwood, Santa Barbara, 2017.

<sup>10</sup> Weber, Max: *Science as a Vocation*. In Weber, Max: *The Vocation Lectures*. Hackett Publishing Company, Indianapolis, 2004. p. 13.

<sup>11</sup> Perhaps the most well-known of them all, Robert Bloch, author of the novel *Psycho*, exchanged letters with Lovecraft in his teenage years, and as a beginner writer, he wrote some short stories in the Lovecraftian vein. Another of Lovecraft's friends was Fritz Leiber, known among fantasy fans for his works about Fafhrd and the Grey Mouser. Lovecraft was also close friends with Robert E. Howard, the creator of the figure of Conan the barbarian. All of this, of course, is just miscellaneous information, but it may offer a glimpse of how Lovecraft, despite all his obscurity, was present at the formation of some of literature's present day popular genres.

<sup>12</sup> Nevins, Jess: *Horror Fiction in the 20<sup>th</sup> Century. Exploring Literature's Most Chilling Genre*. Praeger, Santa Barbara, 2020. pp. 30-39.

<sup>13</sup> This is clearly perceptible in Lovecraft's letter, dated July 5, 1927, to Farnsworth Wright, then editor of *Weird Tales*. In this letter, Lovecraft confidently denounces the schematic clichés often applied in the pulp magazines, as a reaction to the refusal of the first manuscript of his short story “The Call of Cthulhu.” Cf. Lovecraft, Howard Phillips: *Selected Letters II*. Arkham House, Sauk City, 1968. pp. 149-151.

<sup>14</sup> It is a matter of interpretation how far one predates cosmic horror. The trope of human insignificance can be traced back to as far as antique Greek dramas. But if one would like to identify the direct predecessors of Lovecraft's cosmic horror, one may turn to some of British writer Algernon Blackwood's fiction, most notably “The Willows,” in which a pair of travelers encounters unidentifiable entities, possibly from another dimension. The story is about nothing more than the realization that the world holds a much greater amount of information than we could ever comprehend.

Later, Western modernity began to see humans as rational – and for this reason, supreme – beings, and the world as a range of phenomena governed by laws of nature, as well as a set of resources that can be used and exploited to our advantage. In the meantime, science began to reveal more of the world, and, especially with the advances in astronomy, it became more and more obvious and well-known that the human world, our planet, even our solar system and our galaxy are just small parts of the universe, and the more we know of the world, the more questions and doubts arise.

Lovecraft, who was personally very fond of natural sciences, seems to have sensed something from this tendency. While in his lifetime in the first third of the 20<sup>th</sup> century, the Western world was under the spell of the optimism caused by technological progression, he infused his fiction with an atmosphere that mitigates this optimism, and depicts humans as susceptible to forces that go well beyond their comprehension. This sentiment is aptly expressed in the famous opening paragraph of Lovecraft's most well-known and perhaps most important short story, "The Call of Cthulhu":

The most merciful thing in the world, I think, is the inability of the human mind to correlate all its contents. We live on a placid island of ignorance in the midst of black seas of infinity, and it was not meant that we should voyage far. The sciences, each straining in its own direction, have hitherto harmed us little; but some day the piecing together of dissociated knowledge will open up such terrifying vistas of reality, and of our frightful position therein, that we shall either go mad from the revelation or flee from the deadly light into the peace and safety of a new dark age.<sup>15</sup>

This paragraph, as an opening text, serves as a tool to lay the foundations of the brooding atmosphere Lovecraft wishes to achieve. And more importantly, it tersely encapsulates the most characteristic attributes of cosmic horror. The reader is warned about a knowledge that, once achieved, has a detrimental effect on people, because it is not meant to be obtained by human beings. It hints at a peril that cannot be overcome by humankind, rendering them susceptible to marginalization, disaster, perhaps even extinction. Instead of tangible horrors, the text evokes and existential dread; and of course, the short story will introduce a visible monster later (the eponymous Cthulhu), but this monster is not only fearsome because it can cause physical harm (although it definitely can), but also, and more importantly, because it cannot be wholly grasped by our senses, and the possibility of the awakening of its kind makes "even the skies of spring and the flowers of summer ... poison" to anyone who became cognizant of it.<sup>16</sup> The most significant motif is not simply a monster, but a realization and a paradigm shift.<sup>17</sup>

At this point, we should take a recourse to the above mentioned antagonistic relationship between Gothic or horror fiction and the rationalism of the Enlightenment and modernist thought. Lovecraft's fiction perfectly fits into this pattern. In David A. Oakes's words, Gothic fiction held up "a mirror that captured the dark side of a society and country founded, in part, on a bedrock of optimism and progress,"<sup>18</sup> and "it raises questions as to the goals of scientists in their quest for knowledge, explores the frightening revelations that may arise from scientific inquiry, and illustrates the difficult search for individuality in a world that grows more technologically complex with each passing year."<sup>19</sup> It deserves mention that Oakes had American Gothic fiction in mind when he wrote down these lines, but it can be extended to Gothic fiction in general. Anyway, his thesis is crucial for the central tenet of this article. In Lovecraft's fiction, knowledge turns from blessing to threat, a transformation that flies in the face of everything we believe in the modern era. Normally, we believe that the more information we gather about the world, the better it will be for humanity. In Lovecraft, gaining knowledge results in the destabilization not only of what we think about science – as Oakes discusses in his book – but also of

<sup>15</sup> Lovecraft, Howard Phillips: *The Call of Cthulhu*. In Lovecraft, Howard Phillips: *The Call of Cthulhu and Other Weird Stories*. Penguin Books, London, 2002. p. 139.

<sup>16</sup> Ibid. p. 169.

<sup>17</sup> Kálmán Matolcsy offers a thorough and insightful analysis about the ways the logic of Kuhnian paradigm shift can be perceived in Lovecraft's fiction. Cf. Matolcsy Kálmán: *Knowledge in the Void. Anomaly, Observation, and the Incomplete Paradigm Shift in H. P. Lovecraft's Fiction*. In Lovecraft Annual, 2008, pp. 165-191.

<sup>18</sup> Oakes, David A.: *Science and Destabilization in the Modern American Gothic. Lovecraft, Matheson, and King*. Greenwood Press, Westport, 2000. p. 1.

<sup>19</sup> Ibid. p. 2.

our perception of our place in the world. The theme of forbidden knowledge, itself a characteristic feature of Gothic fiction,<sup>20</sup> is reinterpreted by Lovecraft in a thoroughly modernist context.

## II. Natural Law, Modernism, and the Paradigm of an Objective Moral Order

The sudden turn from Gothic and cosmic horror to the millennia old doctrine of natural law might seem to be on the verge of the absurd. Yet it is necessary to recall some key elements of this more or less bygone doctrine of classical legal thinking.

Natural law, in Finnis's words, is a "set of propositions picking out (1) basic human goods, (2) general requirements of right choosing, and (3) the specific moral norms deducible from those requirements as they bear on particular basic goods." And natural law theory is "a theory which argues that propositions of those three sorts can be true, and offers to identify at least some of these true propositions and their implications for theory and practice."<sup>21</sup> This definition reveals nothing of the manifold character of natural law theory and the various intellectual attempts throughout history at finding the source for the moral truths underlying moral, political, and legal principles. However, the afore cited definition contains one important element: the propositions of natural law are *true*, in the sense that they are valid, they offer reasonable arguments and justification, regardless of one's personal convictions, social conditions, or any other contingent circumstances. Natural law, in this sense, constitutes an objective order, a set of insights that ought to be accepted by reasonable people.

If natural law is considered as such, a further question to answer is what justifies its objective status. Throughout the ages, from antiquity on, various answers were given to this question. The purpose of this article is not to offer a textbook-style enumeration of the well-known stages of natural law's development. Yet, as a brief overview, I would like to sketch the framework offered by Stephen Feldman. Feldman placed legal thinking in a context of the history of ideas, connecting schools of legal theory to premodernism, modernism, and postmodernism.

In Feldman's characterization, premodernism is a way of thinking that presupposes the existence of a universal framework that originates from the supernatural. This attachment to the supernatural can be distinguished into two varieties: the "cyclical" and the "eschatological,"<sup>22</sup> the former basically referring to antique philosophy, the latter indicating Christian thought and its belief that human history is a linear progress towards the destination of the second coming of Christ and the Final Judgment. In premodern thought, the world is imbued with an immanent purpose, a *telos*, and this belief pervades political thought, be it Aristotle's ideal of the human being as a political being living virtuously in a regulated community, or the great theologians' belief of good governance's principles originating from the divine law.

Modernism, in Feldman's interpretation, has three marked features that distinctly diverge from premodernism: the concept of secularism (instead of a view on the sacred), the possibility of endless progress (instead of either the repetition of cycles or heading towards a final goal), and the high valuation of human skills and efforts (instead of relying on divine will or providence).<sup>23</sup> Modernism went through three stages from rationalism (the ultimate source of knowledge lies in methodical human thinking) to empiricism (the ultimate source of knowledge lies in experience and observation) to transcendentalism (the ultimate source of knowledge lies in abstract categories independent from us), until it arrived at a stage of crisis, because neither of the enumerated paradigms could offer a lasting solution to the problem

<sup>20</sup> The problem of forbidden knowledge is especially prevalent in Mary Shelley's novel *Frankenstein*. For an analysis in this regard, see Ellis, Markman: *The History of Gothic Fiction*. Edinburgh University Press, Edinburgh, 2000. pp. 141-156.

<sup>21</sup> Finnis, John: *Introduction*. In Finnis, John (ed.): *Natural Law. Volume I*. Dartmouth, Aldershot, 1991. p. xi. (emphasis in original)

<sup>22</sup> Feldman, Stephen F.: *American Legal Thought from Premodernism to Postmodernism. An Intellectual Voyage*. Oxford University Press, Oxford, 2000. p. 11. It should be remarked that the bulk of Feldman's book – as indicated by its title – deals with American legal thought. However, his focus on premodernism, modernism, and postmodernism, as stages of thought influencing legal doctrine and theory, offers a valuable perspective outside American legal thought, too.

<sup>23</sup> *Ibid.* p. 18.

of truth that has been separated from the divine.<sup>24</sup> Legal thinking of the modernist era tried to discover the source of law, justice, and morality with the help of these approaches. Perhaps the most symbolic manifestation of this kind of thinking in law is Grotius's famous – one might even say, platitudinized – utterance that the truths of natural law would be valid even supposing that God did not exist. Anyway, the main pattern that should be seen here is an attempt to justify fundamental legal principles and values by reliance to some sort of objective, yet earthly considerations that are wholly accessible to the human mind.

The inability to settle with one lasting justification for natural law led to the gradual abandonment of this doctrine. Of course, natural law never really functioned as “living law,” as a system of rules and principles directly and consistently applied by courts in everyday debates. Natural law, as seen earlier, is more a set of principles for good policy, than a detailed system of everyday rules. Radbruch's famous vision of retrospectively abolishing outrageously and unbearably unjust statutes<sup>25</sup> never became everyday practice. Nevertheless, the search for the justification of law with recourse to natural law theory did not cease until the 19<sup>th</sup> century, when natural law received almost fatal blows from criticism.

The criticism launched against natural law theory rests on two interrelated insights: pluralism and relativism. Criticism based on pluralism emphasizes that in a time when fundamentally diverging worldviews can coexist without threatening each other or the public order, the objectivity requirement cannot be fulfilled, as there is not one single, salient value system (like Catholicism in the medieval ages) that might serve as the basis for any natural law doctrine. For this reason, the recourse to natural law cannot be strongly validated. Criticism based on relativism, on the other hand, argues that one cannot pass a conclusive judgment over the validity of any value system above the others, because they all rest on persuasive grounds.

Due to the criticism launched against natural law, legal theory lost interest in issues of the moral foundations of law.

### III. The Collapse of Order in Lovecraft's Writings

The above sketch tried to concisely summarize the nature of natural law and the reasons it lost significance in modernity. The crisis in legal theory was the reflection of a crisis in general, and as philosophy failed in the quest for ultimate truths that excluded all others, so did law abandon the effort to attach to philosophical principles. Lovecraft's fiction is about the loss of points of reference in the world, and the point of my article is that this theme is relevant to the discourse about law, too. For this reason, I now turn to Lovecraft's fiction itself and point out some occurrences of this theme.

Lovecraft's writings are almost always about disruption and incapacitation: our convictions fall apart and we find ourselves incapable of overcoming the perils that manifest themselves before us. Science loses its ability to explain the world around us,<sup>26</sup> language becomes unable to describe things,<sup>27</sup> reality shies away from our ontological thinking,<sup>28</sup> the enumeration could go on much longer. The moral implications of Lovecraft's works did not receive as much scholarly attention as the examples indicated here, even though they're there. Lovecraft was personally an atheist, a materialist, and a moral skeptic.<sup>29</sup> This personal stance most certainly inspired him in imagining material monsters instead of magical ones, making him “the Copernicus of the horror story.”<sup>30</sup> It is easy to state that his fiction was a direct

<sup>24</sup> Ibid. pp. 22-28.

<sup>25</sup> Radbruch, Gustav: *Statutory Lawlessness and Supra-Statutory Law*. In *Oxford Journal of Legal Studies*, Vol. 26, No. 1, 2006. pp. 1-11.

<sup>26</sup> Joshi, Sunand Tryambak: *Time, Space, and Natural Law: Science and Pseudo-Science in Lovecraft*. In *The Lovecraft Annual*, 2010. pp. 171-201.

<sup>27</sup> Houstoun, Alex: *The Language of Lovecraft: Naming and Writing in “The Call of Cthulhu.”* In *The Weird Fiction Review*, Fall 2011, Issue 2. pp. 161-183.

<sup>28</sup> Harman, Graham: *Weird Realism: Lovecraft and Philosophy*. Zero Books, Winchester, 2012.

<sup>29</sup> For an overview, see Joshi, S. T.: *H. P. Lovecraft: A Life*. Necronomicon Press, West Warwick, 1996. pp. 202-212.

<sup>30</sup> Leiber, Jr, Fritz: *A Literary Copernicus*. In Joshi, S. T. (ed.): *H. P. Lovecraft: Four Decades of Criticism*. Ohio University Press, Athens, 1980. p. 50.

expression of this intellectual position, and I may not be amiss to say that the thoughts reflected in his stories are in line with the author's personal beliefs. Yet I do not wish to conjecture a direct connection between biography and fictitious content. What I would like to attempt in this section is an overview of references to moral implications in Lovecraft's texts.

### III. 1. A Contradiction to Cosmic Order: Existential Threat in "The Call of Cthulhu"

"The Call of Cthulhu," written in 1926, first published in 1928 in *Weird Tales*, is possibly the most famous short story in the so-called first phase of Lovecraft's major fiction.<sup>31</sup> It encapsulates the style and motifs of Lovecraft's fiction and was crucial in inspiring the fan base that contributed to the fictitious universe with their own writings.

This short story relates the first-person account of the narrator who "pieces together dissociated knowledge."<sup>32</sup> Having inherited from his grand-uncle a box of curious research material concerning a secretive cult unknown to scholars of religion, he decides to uncover the anthropological mystery of this religious group, only to realize that Earth is infested with beings of great power – only referred to as Great Old Ones – who are currently in a state of semi-sleep, but once they awake – when the start are right – they will wreak havoc on our species.

In "The Call of Cthulhu," the threat posed by the Great Old Ones is demonstrated by their sheer size, our inability to fully comprehend their appearance of language, their ability to infiltrate dreams, and, last but not least, the hint that they are powerful enough to eliminate humankind without any significant effort. Yet there is another aspect to the threat. The typical Lovecraftian hero is a middle-class, white, male intellectual, not unrelated to "New England's traditional 'salt of the earth.'"<sup>33</sup> As a member of this social class, this hero possesses a perspective that is embedded in his cultural and moral environment. Lovecraft never really devoted much effort to the psychologically realistic portrayal of flesh and blood human beings.<sup>34</sup> Yet the reader can attach an implicit normality to these stock characters: they are, in a way, average people who live their lives according to the socially accepted framework and values they interiorized.

This is the point where another kind of breach occurs in "The Call of Cthulhu." As the narrative progresses, the reader, together with the narrator comes to the realization that the secret behind the singular cult and its vaguely disquieting relics is not just an ancient religion never known before, but a fundamental shift in power relations, too, the displacement of humans from the center of the world order. Humanity is not only endangered in its existence – quite a grave issue in itself – but the morality followed by humans would go astray, too. In the second chapter of the short story, old Castro, an elder member of the cult incarcerated and interrogated by Inspector Legrasse, relates the outlines of their tenets. Among these is the anticipation of the awakening and coming of the aforementioned Great Old Ones, an event that the cult members await as some sort of salvation. This lore is perhaps analogous to the

<sup>31</sup> Cf. Joshi, Sunand Tryambak: *A Subtler Magick. The Writings and Philosophy of H. P. Lovecraft*. Wildside Press, Berkeley Heights, 1999. pp. 112-149.

<sup>32</sup> Cf. 15. footnote.

<sup>33</sup> Lovecraft 2002: p. 145. It is needless to dwell on it any longer, but it may be briefly remarked that the word "hero" is to be used cautiously in the context of cosmic horror, as the whole point of the subgenre is that the autonomy and agency of the hero is reduced to zero or rendered absolutely meaningless.

<sup>34</sup> In a letter from 1934, Lovecraft wrote the following famous lines about his attitude to character portrayal:

Individuals and their fortunes within natural law move me very little. They are all momentary trifles bound from a common nothingness toward another common nothingness. Only the cosmic framework itself – or such individuals as symbolise principles (or defiances of principles) of the cosmic framework – can gain a deep grip on my imagination and set it to work creating. In other words, the only 'heroes' I can write about are *phenomena*.

Lovecraft, Howard Phillips: *Selected Letters V*. Arkham House, Sauk City, 1976. p. 19. I let the reader decide whether Lovecraft only tried to conceal his lack of talent with this utterance, or it was a genuine and elaborate *ars poetica*. Anyway, this excerpt, quite well-known among Lovecraft scholarship and fandom, aptly and concisely expresses his writerly purposes.

Apocalypse and the elevation of the chosen ones to the heavens, but in the story, it only results in chaos and upheaval. As the narrator summarizes:

The time would be easy to know, for then mankind would have become as the Great Old Ones; free and wild and beyond good and evil, with laws and morals thrown aside and all men shouting and killing and revelling in joy. Then the liberated Old Ones would teach them new ways to shout and kill and revel and enjoy themselves, and all the earth would flame with a holocaust of ecstasy and freedom.<sup>35</sup>

The followers of the cult await the predicted coming of the Great Old Ones, and believe that this would bring liberation to them. Lovecraft, admittedly never caring much for realistic character depiction in fiction, possibly did not even surmise how much he was on the note when attributed a desire to liberation to “men of a very low, mixed-blooded, and mentally aberrant type.”<sup>36</sup> This aspect aside, the prophecy sketched by Castro hints at the transformation, or rather, elimination, of whatever the dominant WASP group considers moral. From this viewpoint, it is not only humankind in general that becomes endangered, but also the dominant morality. This threat shows the idea of objective morality as an ephemeral, what more, inherently human phenomenon.

### **III.2. Common Humanity Cruelly Judged by the Law: The Destabilization of Human Values in “The Colour out of Space”**

“The Colour out of Space” is not only considered as one of the most salient pieces of fiction in Lovecraft’s work in terms of composition, atmosphere, and quality in general, but also as one of the most definitive classics within the subgenre of cosmic horror. Its narrator-protagonist, a waterworks employee surveying the landscape for a reservoir west of the fictitious town of Arkham, relates the local gossip about the origins of a desolate field nearby. According to the rumors, a meteorite fell onto the place of the farmer Nahum Gardner sometime in the 1880s. This meteorite behaved unlike any known material on Earth, and seemed to be the source of some sort of extraterrestrial parasite that not only possessed its prey, but transformed it in horrendous ways, and finally literally turned it to dust. The parasite was visually imperceptible, because its color fell outside the range of the spectrum normally visible to the human eye. No defense was known against this being, and the reader is left with the hint that the area it occupies spreads slowly but steadily.

Not only is “The Colour out of Space” the story of a strange and inexplicable disease, not only does it displace humans from their position as supreme beings on this planet, it is also a chronicle of moral invalidation. The formless, imperceptible “color” is the most authentic Lovecraftian monster: it cannot be interpreted in moral terms. Horror fiction often has moral connotations, and the monsters are often representations of morally dubious or forbidden acts. This feature is absolutely missing from Lovecraft’s short story. The color, so far as the reader can learn it from the gossip mediated by the narrator, is a mindless entity, or, if it has a consciousness, it is fundamentally different from what we consider as such. The color seems mostly analogous to protozoa or other kinds of rudimentary forms of life. It is not something that can be interpreted in any kind of moral framework. It only tries to sustain itself by the provender it needs, and in this case this provender seems to be organic matter.

Our almost absolute lack of knowledge about the extraterrestrial organism makes us defenseless against it. This defenselessness questions the place of humanity on the “top” of the world’s evolutionary “hierarchy.”<sup>37</sup> Lovecraft illustrates this experience on a personal level, and offers a sight that borders on the ironic and the miserable. We see Nahum rationalizing all the tragedies that have befallen on him and his family. He seems to try to convince himself that “[i]t must all be a judgment of some sort; though he

<sup>35</sup> Lovecraft 2002: p. 155.

<sup>36</sup> Ibid. p. 153.

<sup>37</sup> The use of quotation marks is highly advisable in this case. Humankind as the occupant of the top of any kind of hierarchical order is an obsolete thought from more aspects. For the antiquity or the middle ages, and even modernistic rationalism, it seemed natural to assume that humankind is inherently superior to other forms of organic life. This somewhat arrogant belief has been overcome, because any kind of hierarchy presupposes the existence of an inherent order, an assumption that is outright denied by modern thinking. Also, it is especially harshly criticized by posthumanist thinkers who aim to abolish all forms of anthropocentrism.

could not fancy what for, since he had always walked uprightly in the Lord's ways so far as he knew.”<sup>38</sup> Nahum, a simple farmer who does not ponder on the vastness of the universe and follows the faith of his ancestors, stands helpless against the unknown menace. His faith, the mere fact that he has any faith at all, is fundamentally alien from the indifferent nature of the world as revealed by the “color:” the world lacks all kinds of *telos*, the very thing Nahum places his trust in, and it is this contradiction that bestows this single sentence from Lovecraft with a singularly tragic tone.

The subversion of the notion of inherent order finds expression in another scene in “The Colour out of Space,” and it is directly related to the law, too. When Ammi Pierce, a friend of Nahum, visits the Gardner place, only to witness the family’s gruesome fate caused by the parasite, he looks around in the attic, where he discovers Nahum’s transformed wife, Nabby. The text makes the unmistakable hint that Ammi, in an act of mercy, killed Mrs. Gardner, relieving her from the agony of her state. At this point the narrator remarks that “what is done in common humanity is sometimes cruelly judged by the law,” and the reader also learns that “to leave anything capable of motion there would have been a deed so monstrous as to damn any accountable being to eternal torment.”<sup>39</sup> On the one hand, the Lovecraft places the character outside criminal law: he exempts Ammi from murder, pointing out that the state of Nabby justified taking her life to end her suffering. But on the other hand, the fact that killing Nabby is justified indicates that the invading extraterrestrial entity poses a challenge that requires humanity to rethink its moral positions.

### III.3. Tampering with Nature beyond Limits: Excessive Hubris in *The Case of Charles Dexter Ward*

*The Case of Charles Dexter Ward* is Lovecraft’s longest piece of fiction, perhaps more a short novel than a short story. Its title character is a young man who is passionately enamored with the past of his hometown Providence and that of his family. He learns about a remote ancestor called Joseph Curwen. Curwen was a strange, reclusive man whose secretive way of life led to gossips of him being involved into witchcraft and black magic. The gossips finally resulted in action, and in the 1770s, a large party of Providence townsmen killed Curwen and eradicated his memory. About one and a half century later Charles Dexter Ward discovers that Curwen devised a recipe to resurrect people by using certain remains extracted from their corpses called their “essential Saltes.”<sup>40</sup> Ward learns this technique and resurrects Curwen. It turns out, however, that Curwen has evil intentions with the knowledge he has amassed. He kills Ward and, taking advantage of their likeness, tries to disguise himself as the young man. But the Ward family’s physician, Marius Bicknell Willett discovers the scheme and destroys Curwen with counter-magic.

In my view, *The Case of Charles Dexter Ward* is a take on Shelley’s *Frankenstein*, at least in its focus on the limits and ethics of knowledge. The moral of *Frankenstein* is that knowledge is not a value in itself, because it can be used erroneously or with evil intent. In Shelley’s novel, Victor Frankenstein’s transgression lies in creating a living, sentient being, and then abandoning him like a botched experiment, even though the creature has feelings as well as. Due to the constant refusal and hatred he receives from others, the creature’s Rousseauian *tabula rasa* gives way to a death wish and an ardent desire for vengeance. In other words, the central motif of *Frankenstein* is the reckless and irresponsible use of science and knowledge.

*The Case of Charles Dexter Ward* goes a little further than that. In this case, the central discovery is not creating new life, but the resurrection of the old, and the extraction of knowledge from it. Curwen instrumentalizes the resurrected persons (“Specimens”<sup>41</sup>) as stores of knowledge required to aid him in his endeavors to gain unheard-of power. Even though the story features the resurrection of the dead and magical procedures, Curwen’s proceedings and mentality is quite modern in its instrumentalism, the

<sup>38</sup> Lovecraft, Howard Phillips: *The Colour out of Space*. In Lovecraft, Howard Phillips: *The Call of Cthulhu and Other Weird Stories*. Penguin Books, London, 2002. p. 185.

<sup>39</sup> Ibid. p. 187.

<sup>40</sup> Lovecraft, Howard Phillips: *The Case of Charles Dexter Ward*. In Lovecraft, Howard Phillips: *The Thing on the Doorstep and Other Weird Stories*. Penguin Books, London, 2001. p. 90.

<sup>41</sup> Ibid. p. 118.

notion of the “Saltes” itself bears a mark of materialism, and Curwen has no scruples in utilizing human beings to reach his goals.

Curwen’s ruthless intentions are countered by Willett’s naïve belief in the natural order of things. He throws this in the face of Curwen before the final confrontation: “[t]here are abominations and blasphemies which must be stamped out, and I believe that the writer of those words will attend to Orne and Hutchinson. ... Curwen, a man can’t tamper with Nature beyond certain limits, and every horror you have woven will rise up to wipe you out.”<sup>42</sup> Earlier, in the frantic letter he wrote to Willett when he realized that Curwen had evil in mind, the real Charles Dexter Ward referred to a menace that threatens “all civilisation, all natural law, perhaps even the fate of the solar system and the universe,” and must be defeated “for the sake of all life and Nature.”<sup>43</sup> Willett refers to “Nature” as a thing no one should “tamper with,” and Ward mentions “natural law” as a thing that should be protected, because it is at peril from an unknown evil. In these utterances nature gets a normative connotation: it is not the laws of physics that should be protected (why should they?), but “normality” as a way of life, as a point of reference, an order our values can be grounded on. Viewed in this light, the conflict in *The Case of Charles Dexter Ward* lies between the natural order of things as a human construction, represented by Willett, and the abolition of all such concepts, like Curwen did.

### Conclusion

In his dissenting opinion in *Southern Pacific Co. v. Jensen*, Justice Oliver Wendell Holmes wrote the famous words the common law “is not a brooding omnipresence in the sky.”<sup>44</sup> In its original context, Holmes argued that maritime law can be supplemented by statute or common law. But, like any good Holmes phrases, it can be used as a powerful rhetorical tool. While the doctrine of natural law is considered obsolete and outdated for a row of reasons, it may yet not be denied that law is – or is expected to be – based on rational considerations. Viewed in this light, the law is not just “a brooding omnipresence in the sky,” it is tied to certain rational considerations, or at least, is justified by reference to such. Therefore, the question where these rational considerations may lie is not irrelevant even today.

This article is an attempt at connecting one of the fundamental issues of legal philosophy – the source of legal justification – with horror fiction as a tool of reflecting on human values. I tried to achieve this aim by introducing the example of H. P. Lovecraft’s fiction and highlight a portion of its moral dimensions. For this, I first sketched the significance of the genre of horror and the subgenre of cosmic horror as fields of literature that reflect on the questionable nature of some assumptions that people take for granted, be they ontological, epistemological, or moral in nature. Then I briefly sketched how legal philosophy has for millennia tried to identify the fundamental principles that can be relied on as guidance to the law. Then, in the last chapter, I offered an overview of three Lovecraft stories and analyzed the way they thematize the destabilization of natural order.

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<sup>42</sup> Ibid. p. 204.

<sup>43</sup> Ibid. p. 158.

<sup>44</sup> 244 U.S. 205, 222 (1917)

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## The Conditions and Practice of the Enforcement of Life Imprisonment Without Parole

### ABSTRACT:

This study examines the conditions and practice of enforcing life imprisonment without the possibility of parole (LWOP), with a particular focus on the structural, psychological and security-related challenges faced by the penal system. The defining feature of LWOP is the permanent exclusion of release, which fundamentally alters the traditional purpose of imprisonment and renders the reintegration function largely inapplicable. This shift necessitates a re-evaluation of detention strategies, as a purely custodial approach carries serious risks both for the psychological well-being of prisoners and for institutional security.

The paper outlines the preparatory professional work preceding the introduction of LWOP in Hungary and the early risk assessments identifying persistent hopelessness, depressive states, increased suicide risk and the potential for heightened aggression among this prisoner population. In response to these concerns, the first Long-Term High Security Regime unit (HSR) was established at Szeged Prison. The HSR was designed to combine maximum security with psychological stabilisation, functioning not solely as an isolating measure but as an intermediate and preparatory regime aimed at fostering cooperation and institutional adaptability. Domestic experience demonstrates that prisoners serving LWOP do not constitute a homogeneous group. With appropriate treatment, therapeutic interventions and access to educational and occupational activities, some prisoners may, after a certain period, be integrated into standard prison units. The psychological condition of prisoners serving extremely long sentences evolves dynamically, with phases of resistance, hope and acceptance alternating throughout the prison life course. In this context, isolation cannot be regarded as a permanent solution but rather as a time-limited and professionally justified element within a differentiated regime structure.

By situating the Hungarian practice within the framework of international research, the study highlights that LWOP is frequently experienced by prisoners as a form of the death penalty. The permanent absence of parole, the gradual erosion of personal relationships, prolonged isolation and elevated suicide risk are recurring features of this punishment. The study concludes that the enforcement of LWOP can only be considered compatible with the requirements of a rule-of-law system if security considerations are consistently balanced with safeguards ensuring psychological stability, respect for human dignity and individualized treatment throughout the period of detention.

**KEYWORDS:** life imprisonment without parole (LWOP), prison system, high security regime (HSR), absence of reintegration

## *Introduction*

Penitentiary professionals also participated actively as commentators and advisors in the process of introducing actual life imprisonment, as the change brought countless new tasks for them as law enforcement officers. They had to prepare for the new situation, examine its expected consequences and develop the most effective long-term strategy. The fact that LWOP (life imprisonment without parole) convicts have no chance of release is a completely new situation, meaning that, in principle, their detention is not aimed at reintegration. The purpose of their detention is detention. At the same time, it is essential to recognise that these prisoners will spend decades behind bars. It is unacceptable to deprive them of the self-development and occupational programmes that are part of everyday life for other prisoners, leaving them with no goal in life other than survival. This approach is not only inhumane, but also extremely risky, as psychologically neglected, unmotivated and disenfranchised prisoners pose a significant threat to both prison staff and their fellow inmates.

Following the entry into force of Act LXXXVII of 1998<sup>1</sup>, the National Prison Service established a professional committee to prepare for the changes and organise the processes. Under the leadership of András Csóti, this committee began working with the then heads of the Szeged Penitentiary and Prison, as the institution designated to receive LWOP prisoners.<sup>2</sup>

The committee organised professional exchanges in various countries, studied the literature on the subject and, based on its own experience with long-term prisoners, sought to establish regulations.<sup>3</sup>

As a first step, based on previous statistical data, they created a profile of the expected 1 LWOP prisoners: they estimated that they would mainly be men between the ages of 25 and 35 with a completed primary school education. It was assumed that their ties with the outside world would be fragile and that their personal relationships – assuming they were not severed immediately upon admission due to the lack of prospects for release – would wear out over time due to divorce or the death of family members. Their behaviour was likely to be extreme and difficult to manage, both because of the serious crimes they had committed, which had led to their harsh sentences, and because of the hopelessness of their situation.

In 1999, Lajos Garami, head of the BVOP's Department of Detention Affairs, drew on his experience to describe the personality traits of the expected new prison population.<sup>4</sup> According to his findings, convicts enter prison in a fundamentally depressed state of mind after their sentence is handed down, and this state can persist in the long term. This persistent psychological stress may be accompanied by an increased tendency to commit suicide, which is a major risk factor for the prison service.<sup>5</sup> The prospect of release fundamentally disrupts the structure of life as it has been, as the loss of predictability means that the lives of prisoners are defined by uncertainty and what seems like an endless period of time. In this situation, consciously choosing the time of one's own death can represent a form of control and an illusion of self-determination. However, the reason for the development of suicidal tendencies is not only the loss of control over life and decisions, but also the grieving process caused by the loss of family members, spouses and external relationships. In addition, in the case of certain perpetrators, feelings of guilt for the crime committed may also play a significant role in increasing psychological stress.

At that time, all predictions pointed to increased aggression in these prisoners, which was probably already part of their personality at the time of sentencing, as the most severe penalties are imposed on the most cruel offenders. However, in their case, this aggression may intensify, as a new situation arises: the convict has nothing to lose and does not have to face criminal responsibility. For this reason, particular attention must be paid to the possibility of hostage-taking, attacks on staff and

<sup>1</sup> 1998. évi LXXXVII. törvény a büntető jogszabályok módosításáról

<sup>2</sup> Later, similar facilities were established in 'Sátoraljaújhely, Tiszalök, Budapest, and near Szeged'

<sup>3</sup> CSÓTI András: A magyar börtönügy új kihívása: a tényleges életfogytig tartó szabadságvesztés. Börtönügyi Szemle, 2005/2, p. 25.

<sup>4</sup> GARAMI Lajos: Élő halottak? A tényleges életfogytiglani szabadságvesztés végrehajtásának problémái. Börtönügyi Szemle, 1999/2, pp. 56 - 63.

<sup>5</sup> At that time, it was typical for the TÉSZ to predict an increased suicide rate among convicts, which later proved to be incorrect. It is a fact that at that time, this punishment did indeed mean imprisonment until death for all convicts.

aggression towards each other. This can be particularly problematic in the case of those who react with aggression to everyday problems, as this is dangerous for staff, fellow prisoners and the environment within the prison walls.

József Csapó, former commander of the Szeged Prison and Penitentiary, also drew attention to the potential security risks arising from the new legal institution: In his view, „*in the case of prisoners serving the most severe sentences, the greatest security risk for the prison system is that these people have nothing to lose. Although their behaviour may jeopardise certain privileges they enjoy in prison, they can no longer be held criminally responsible for anything (...) we cannot predict the future: we do not know what will happen in three, five or ten years' time, when the prisoners may become aware of their hopeless situation as a result of personality changes.*”<sup>67</sup>

The committee had to lay down the basic principles of detention in close cooperation with the Szeged prison.

Prison without any reintegration function raised fundamental theoretical and practical problems. The law says that the purpose of punishment is to help prisoners get back into society and learn to obey the law.<sup>8</sup> Detention without reintegration and development programmes would essentially mean that prisoners would only have their basic needs met, under the necessary security conditions, while their lives would continue unchanged until their death. Such deprivation would artificially increase feelings of hopelessness and despair, which would ultimately make it much more difficult to treat them.<sup>9</sup>

The committee adopted a unanimous position on this issue. These prisoners should also be included in education, vocational training, and a wide range of therapeutic programmes and training courses. These activities keep them occupied, help them relieve tension and contribute to maintaining their mental and physical health. It was emphasised that prisoners sentenced to life imprisonment should not be excluded from the possibility of receiving rewards. In their case, rewards should primarily be aimed at strengthening personal relationships and, where possible, supplementing their personal needs. At the same time, it was emphasised that, where justified and well-founded, disciplinary proceedings should be continued against these prisoners in the same way as against other prisoners (...) and disciplinary sanctions should be applied where necessary.<sup>10</sup>

In the case of LWOP prisoners, taking into account the above risks, personalised treatment and individual security instructions are of paramount importance. With regard to their placement and detention, it is of paramount importance that the institution ensures the continuous safety of the detainees, other prisoners, staff and the institution as a whole, as well as the protection of life and property. A security system must therefore be established and operated in their case that fully meets this objective. The predominant idea was to provide single-occupancy accommodation in a section of the facility that includes all necessary functions, has sufficient space for movement and allows for the implementation of special programmes, thereby reducing the frustration of prisoners while ensuring maximum security.<sup>11</sup>

## I. Creation of the first long-term high security regime unit<sup>12</sup>

The Szeged Prison, which had experience in the enforcement of long-term imprisonment, was designated for the enforcement of actual life imprisonment. The first LWOP prisoner was placed here, and the first HSR unit was also established here.

Éles Éva (prison psychologist): „*The first LWOP prisoner arrived in 2000. We treated him like an easter egg. We didn't know what to do with him, we were still unsure about this type of detention, and he took advantage of that. He was unfriendly, we asked him if he needed anything. I didn't deal with*

<sup>6</sup> PAPP László: *Mindörökké rács mögött. Szükség van-e a tényleges életfogytig tartó szabadságvesztésre?* De Jure, 2007/2, pp. 22 - 25

<sup>7</sup> The quoted section was generated with the assistance of machine translation.

<sup>8</sup> Act CCXL of 2013 on the enforcement of penalties, measures, certain coercive measures and detention for minor offences, Section 1(2).

<sup>9</sup> GARAMI: *Élő halottak?* i. m., pp. 56 - 63.

<sup>10</sup> CSÓTI: *A magyar börtönügy új kihívása: a tényleges életfogytig tartó szabadságvesztés.* i. m., p. 25.

<sup>11</sup> op. cit.

<sup>12</sup> Here in after HSR

*him, my colleague did, but our chaplain also visited him often and brought him a radio so he could listen to it. We arranged for him to be allowed to go to the canteen to buy food because he complained that he wasn't allowed to. Then the second one arrived. They started to rival each other. One of them found out how many times the other one had gone shopping, so he demanded the same, feeling that he was entitled to everything the other LWOP member had.”<sup>1314</sup>*

From the end of 2003, preparatory committee work took place at the Szeged Penitentiary and Prison, with the support of the previously established committee. Experience in the execution of sentences imposed on long-term prisoners showed that, despite behavioural similarities, this group differed significantly from the prison population known to date. The differences were primarily observable in their reactions: in the event of rejection, they often displayed extreme verbal behaviour, made aggressive threats against themselves or others, and showed an increased tendency towards isolation. These observations clearly supported the need to establish a separate unit.<sup>15</sup>

Initially, several options were considered: creating a new institution that would meet the security requirements of the time, constructing a separate building, or converting an existing separate building or part of a building for this purpose.<sup>16</sup> Finally, taking into account the budgetary constraints of the prison service, a decision was made to establish the temporary LWOP unit on the third floor of the Csillag building of the Szeged Prison and Penitentiary, on 2nd Street. Construction began on 17 January 2005, and the name was chosen to reflect the nature of the prisoners who would be housed there: Long-Term Special Regime Unit, or HSR.<sup>17</sup>

Éles Éva: prison psychologist: „Initially, prisoners sentenced to long terms who required special attention were housed on the second floor on C Street, which later became the HSR. We involved the prisoners in minor decisions regarding the design of the unit in order to reduce the stress associated with the change. For example, they could decide what colour the walls should be. We developed a treatment programme, which was approved by the national command, and they began to populate the unit. There were numerous inspections and very strict security regulations at the beginning, and the prisoners complained that they were even fitted with restraints when going to the shower. Later, the system was gradually relaxed”.<sup>18</sup>

The wing was designed to be separate from the rest of the building: the suspended corridor was converted into a continuous floor and closed off from the corridor with a metal grating. Eight single cells and two crisis cells were set up in the wing to house the prisoners. The layout of the cells is unique, as they are divided into two small rooms (7.81 m<sup>2</sup>): a living room and a sleeping room. This division allows prisoners to separate their living spaces functionally and to arrange them according to their lifestyle, tastes and individual needs. The design of the night cell contributes to the expansion of the prisoner's personal and intimate sphere, thereby enhancing their sense of independence within the prison environment.<sup>19</sup>

The cells are equipped with a bed, a chair, a cupboard, a washbasin, a table, a waste bin, an ashtray, a television, a mirror and cleaning equipment. The HSR wing has an additional bookshelf and a reading lamp.

The Szeged Prison took its first steps without any previous experience or model for developing the "prison within a prison" model. In the absence of such experience, the system was put together from several elements that had already been tried and tested in detail and were guaranteed to work, creating a problem-solving repertoire focused on education, treatment, care and support. One of the key aspects of this complex approach was the consistent enforcement of detention security.<sup>20</sup>

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<sup>13</sup> The quotations are taken from interviews I conducted from 20 to 24 February 2023 at the Szeged Penitentiary and Prison.

<sup>14</sup> The quoted section was generated with the assistance of machine translation.

<sup>15</sup> ÉLES Éva - MATOVICS Csaba - TIKÁSZ Sándor: *A Szegedi Fegyház és Börtön hosszúidős fogvatartási tapasztalatai*. Börtönügyi Szemle, 2018/2, p. 34.

<sup>16</sup> MATOVICS Csaba: *A Szegedi Fegyház és Börtön hosszúidős speciális rezsimű körletének működési tapasztalatai*. Börtönügyi Szemle, 2009/2, pp. 99 - 108.

<sup>17</sup> op. cit. p. 101.

<sup>18</sup> The quoted section was generated with the assistance of machine translation.

<sup>19</sup> op. cit. p. 102.

<sup>20</sup> op. cit. p. 103

In designing the HSR unit, the committee's aim was to create a so-called "residential prison" with a dual mission: to ensure, as far as possible, meaningful living conditions for prisoners serving life sentences within the framework of the penal system, and to prevent acts that undermine prison security and the occurrence of extraordinary events.

The inmates have weekly consultations with a psychologist and are visited by a doctor. Specialist examinations and dental care are available on request at pre-arranged times.

There is little space available for organising leisure activities. The multifunctional activity room mentioned above provides a place for relaxation with a kitchenette, sports equipment, wall bars, table football, table tennis and a film corner.<sup>21</sup>

## **II. Experiences of the HSR unit at Szeged Prison immediately after its establishment**

One of the supervisors serving in the HSR unit recalled that the majority of the prisoners assigned to move in had been known to them for years, individual treatment instructions had been prepared for each of them, and the team of supervisors formed a close-knit community. According to him, the initial strict security measures were relaxed over time, and the use of restraints was gradually phased out. He said that they tried to treat the prisoners in the same way as in other units, and that the most important thing for him was always that everyone could return home safely at the end of the day.<sup>22</sup>

According to prison psychologist Éva Éles, those serving life sentences at Szeged Prison form a special group, only a small number of whom are assigned to the HSR unit. She said that the psychological work done with them is basically no different from that done with other prisoners, the difference being rather the special environment: the bars, the plexiglass, the presence of cameras. He said that psychologists initially feel anxious in this environment and need time to adapt to the circumstances and to the prisoners themselves.

According to Éles, the admission of a new inmate, a suicide, a death, the suffering of a terminally ill patient, or even institutional changes can pose a critical situation in the department. At the HSR, everything slows down, the implementation of the daily program becomes the most important thing, and the silence is frightening at first, but later becomes calming and even necessary for processing losses. In his experience, inmates gradually accept confinement and isolation over a long period of time and often even find it comfortable because they do not have to adapt to others. However, this weakens their adaptability, and in conflict situations they tend to represent their own interests, while the fundamental traits of their personality remain largely unchanged.<sup>23</sup>

What was initially a question for prison staff was confirmed in the first few years of the HSR unit: some of the inmates sentenced to life imprisonment, just like other inmates serving long sentences, can be integrated without any problems into larger, multi-person cells after a certain period of time, where they have significantly more opportunities and activities available to them.<sup>24</sup>

Nowadays, the HSR wing is no longer exclusively reserved for prisoners sentenced to LWOP, although there is a tendency for them to begin serving their sentences in this wing. It cannot be proven or predicted that extremely long prison sentences can only be served under such strictly regulated conditions. Similarly, it cannot be justified that individual prisoners cannot be placed in a "normal" prison ward, especially since their work, education and participation in cultural programmes can be organised much more smoothly in other educational groups within the prison. It is important to bear in

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<sup>21</sup> op. cit. p. 104.

<sup>22</sup> ÉLES - MATOVICS - TIKÁSZ: *A Szegedi Fegyház és Börtön hosszúidős fogvatartási tapasztalatai*. i. m., p. 32.

<sup>23</sup> ÉLES Éva: *A fogvatartottakkal kapcsolatos pszichológiai feladatok bemutatása, kiemelt téma körként ismertetve a tényleges életfogyatagos fogvatartottakkal kapcsolatos kihívást*. Börtönügyi Szemle, 2019/2, pp. 5-11.

<sup>24</sup> ÉLES - MATOVICS - TIKÁSZ: *A Szegedi Fegyház és Börtön hosszúidős fogvatartási tapasztalatai*. i. m., p. 33.: "Since reintegration cannot be a goal for this group of prisoners, our sole aim is to make prison socialisation as effective and simple as possible. The big question is therefore whether they will be able to socialise after HSR in a more open prison regime and with their fellow prisoners arriving from there." (The quoted section was generated with the assistance of machine translation.)

mind that the psychological state of prisoners changes dynamically during the course of their sentence: rebellious, hopeful and calm phases alternate in the individual prison life cycle.<sup>25</sup>

One of the defining features of the HSR unit is isolated placement, the primary purpose of which is to enable prisoners assigned here to process their sentences and the traumas that preceded them in a professionally supported environment and to prepare themselves for cooperation with the prison service. This approach is in line with the original concept of the long-term section, according to which the HSR has a preparatory function in the initial phase of the prison sentence.

Convicts placed in this unit are first confronted with the special rules and experience the additional privileges they can obtain through cooperative behaviour, while uncooperative behaviour is met with consistent regime restrictions and limitations. The unit also offers various therapeutic options that contribute to the psychological stabilisation of prisoners and facilitate their subsequent reintegration.

Based on these characteristics, the HSR unit can be seen as a kind of "intermediate regime" that provides a transition to normal prison reintegration units through periodic reviews. The purpose of the time spent in the HSR is to prepare the prisoner to serve the remainder of their sentence in another prison or special reintegration unit, in a larger prison community.<sup>26</sup>

The following quote is from the confession of a prisoner serving a life sentence. The confession highlights what the slower pace of life in the HSR wing meant to him in terms of experience and opportunity, and how he felt when he was transferred to the normal wing, among the other prisoners, in accordance with the decision: „*It's been ten years since the gates of the 'Star' closed behind me, so looking back, it doesn't seem like that long. Back then, I was immediately placed in the HSR unit and had no idea what life in a 'normal' unit would be like. As a result, I had no point of reference. I entered this closed world known as HSR, preparing for the 'life in a large cell' I had become accustomed to in pre-trial detention. It was shocking, but at the same time reassuring. It may sound strange, but it's true.*

*I don't know how my fellow inmates sentenced to LWOP reacted to the final verdict, but I was devastated. In my state of mind at the time, the best decision the BV leadership could have made was not to place me in a community. Being crammed in with other convicts and trying to process the unprocessable seemed like an impossible task, and I am grateful that I did not have to fight that demon. Nevertheless, over the past decade, I have fought countless battles with the soul-destroying monster that is this way of life. The first ones were right there, at the HSR.*

*In that artificially slowed-down section of the prison, it may seem to someone entering for the first time that time has stopped. In a sense, this is true, but the days, months and years spent there make those who live there realise that this is far from the truth. The silence and tranquillity, which are shocking at first – almost overwhelming compared to the previous hustle and bustle – slowly sink into the convicts, who themselves become quiet and calm. The unstimulating environment, the lack of community programmes and the isolation of those living here kill the spirit over the years, but at the same time they protect the residents of the HSR. It is precisely this loneliness that has given me the opportunity to recalibrate my life. It was difficult and took a long time, but I have now reached the point where I know what I want from life. I took my first tentative steps on this path, struggling with myself, right there in that special microenvironment. I learned patience, self-control and self-awareness, and above all, to accept my fate. This does not mean that I have resigned myself to my situation, but rather that I am trying to become a better person while serving my sentence. Mainly so that when my time comes – because it will, I am sure of that – the people who will decide my future will be able to say: this person deserves a second chance. When I realised this, I had already been living in the HSR ward for four years. After that, this living space became very cramped for me in a very short time. I longed for community, for people, where I could experience the life-sustaining process of belonging to a community. After five years, the loneliest period of my life came to an end and I was transferred to a normal ward.*

*It was like being reborn, living among people – which I still do today – and it made me feel human. I was given a chance by the management, which I am living with, and since then, through new*

<sup>25</sup> KISZELY Pál - NAGY István: Az idő rabságában. Börtönügyi Szemle, 2012/3, p. 11.

<sup>26</sup> ÉLES - MATOVICS - TIKÁSZ: A Szegedi Fegyház és Börtön hosszúidős fogvatartási tapasztalatai. i. m., p. 30.

*impulses, this closed world inside has expanded before me. I go to school, I have grown to love learning, and I learn values and acceptance from my teachers beyond the curriculum.* <sup>27</sup>

### **III. International research on the conditions and practice of actual life imprisonment<sup>28</sup>**

The study of the effects of imprisonment has a long history in the field of prison sociology. Much of the research focuses on prisoners sentenced to life imprisonment or long-term imprisonment, and on institutions where heightened security measures are in place and prisoners often serve indefinite sentences. However, the results are far from uniform. The scale ranges from the completely destructive effect of life imprisonment on personality to its complete ineffectiveness.<sup>29</sup> This difference stems in part from the different approaches of researchers: sociologists mainly use qualitative methods, while psychiatrists and psychologists generally use quantitative methods. Another important factor is that they focus only on individual prisoners.<sup>30</sup> These differences inevitably make it difficult to summarise the overall effects of life imprisonment.

For prisoners serving actual life sentences, the challenge is not only the prospect of spending many years in prison, but also the knowledge that they are likely to remain there for the rest of their lives. According to a 2013 survey conducted in the United States by the , many consider their situation to be an alternative form of execution. They often describe their punishment as „*the other another death penalty*”, „*slow death*” or „*a fate worse than death*”, while referring to themselves as „*living dead*”.<sup>31</sup>

They consider their punishment inhumane because it does not offer them the possibility of parole, which also means a complete loss of hope:

*„It's a persistent dashing of hopes as appeal after appeal is arbitrarily denied, as well as a permanent experiment in self-delusion as you strive to convince yourself that there is still hope. It's a compounding of second upon second, minute upon minute, hour upon hour, of wasted existence, and decade upon decade of mental and emotional torture culminating in death. It's a death by incarceration.”*<sup>32</sup>

These prisoners are particularly affected by the gradual breakdown of personal relationships, which they often compare to the experience of death. Over time, they typically maintain contact with fewer and fewer people, and the amount of communication steadily decreases. They report feelings of deep loneliness as family ties weaken and relatives die while they remain behind prison walls.

*„I had to deal with the fact that I was never going home, and all the attendant grief that went along with my time.... Most devastating was dealing with the loss of my children. Their absence from my life left me bereft....[I]n the frenzy of my grief, the only solution I could imagine when I contemplated*

<sup>27</sup> The quoted section was generated with the assistance of machine translation.

<sup>28</sup> This chapter is based on the ideas and research findings presented in the book Life Imprisonment: A Global Human Rights Analysis by Dirk van Zyl Smit and Catherine Appleton (ZYL SMIT, Dirk - APPLETON, Catherine, Life Imprisonment: A Global Human Rights Analysis, Harvard University Press, Cambridge, Massachusetts - London, England, 2019).

<sup>29</sup> RASCH, Wilfried: *The Effects of Indeterminate Detention: A Study of Men Sentenced to Life Imprisonment*. *International Journal of Law and Psychiatry*, 4 (1981), pp. 417-431; BANISTER, P. - SMITH, F. - HESKIN, K. - BOLTON, N.: *Psychological Correlates of Long-Term Imprisonment I: Cognitive Variables*. *British Journal of Criminology*, 13 (1973), pp. 312-323; BANISTER, P. - SMITH, F. - HESKIN, K. - BOLTON, N.: *Psychological Correlates of Long-Term Imprisonment II: Personality Variables*. *British Journal of Criminology*, 13 (1973), pp. 323-330; LIEBLING, Alison - MARUNA, Shadd: *Introduction*. In: LIEBLING, Alison - MARUNA, Shadd (eds.): *The Effects of Imprisonment*. Cullompton, Devon, Willan, 2005.

<sup>30</sup> LIEBLING, Alison: *Prisons and Their Moral Performance: A Study of Values, Quality and Prison Life*. Oxford, Oxford University Press, 2004.

<sup>31</sup> HARTMAN, Kenneth (ed.): *Too Cruel, Not Unusual Enough: An Anthology Published by the Other Death Penalty Project*. Lancaster, The Other Death Penalty Project, 2013, pp. 173, 29, 125 and 147.

<sup>32</sup> DOLE, Joseph: *The Meaning of Life*. In: HARTMAN, Kenneth (ed.): *Too Cruel, Not Unusual Enough: An Anthology Published by the Other Death Penalty Project*. Lancaster, The Other Death Penalty Project, 2013, p. 124.

*the loss of my children and freedom was death....I fantasized about elaborate plans to kill myself .As an intelligent, creative woman, I knew that I would be able to pull it off without being caught.* <sup>33</sup>

For prisoners serving actual life sentences, the punishment is not only psychological but also involves significant physical hardship. Research shows that they often face inadequate medical care and are completely at the mercy of the prison system in this regard. In a Leigey study conducted by the in the United States, several elderly prisoners reported that their fellow inmates had died from illnesses that could have been treated in a free society. <sup>34</sup>

According to both individual accounts and empirical research, the prospect of dying in prison is particularly distressing for the prisoners concerned. For older prisoners, this expected outcome represents a significant psychological burden, which further reinforces their anxiety about dying. Although hospice care is provided in some institutions, it is often not considered sufficiently humane due to the prison environment in which it is provided. Even if the care is professionally adequate, the absence of family members and the inner conviction that dying in prison has a stigmatising effect not only on prisoners but also indirectly on their relatives exacerbates the last days. <sup>35 36 37</sup>

In the case of prisoners serving actual life sentences, an additional difficulty is that, due to the nature of their punishment, they have no chance of reintegration into society and are therefore not usually provided with rehabilitation programmes. Consistent exclusion from such programmes sends them the message that their lives are worthless in the eyes of society, that they have no chance of improvement, and that any efforts they make to improve themselves are futile. <sup>38</sup>

Hopelessness and complete lack of prospects are the factors that clearly distinguish prisoners serving life sentences from other prisoners. Victor Hassine, who himself served such a sentence, recounted his life in various editions of his book *Life without Parole: Living in Prison Today*, which began in 1981. In his work, he reflected on the pain and deprivation associated with the sentence, which defined his daily life behind bars. <sup>39</sup> He hoped that by devoting his life in prison to helping others and improving prison conditions, the parole board would eventually grant his request for clemency. After serving 27 years of his sentence, he submitted a clemency petition to the board, but the members rejected it without consideration. Shortly after learning of the decision, Hassine committed suicide in prison. <sup>40</sup>

A similar case is that of John MacKenzie in New York, who was sentenced to life imprisonment and was granted the possibility of review after 25 years. Despite his exemplary behaviour in prison, the committee repeatedly rejected his request for parole, citing only the seriousness of his crime. MacKenzie spent a total of 41 years behind bars before committing suicide in July 2016. The court later criticised

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<sup>33</sup> GEORGE, Erin: *A Woman Doing Life: Notes from a Prison for Women*. New York, Oxford University Press, 2010, pp. 31-32.

<sup>34</sup> LEIGEY, Margaret: *The Forgotten Men: Serving a Life without Parole Sentence*. New Brunswick, Rutgers University Press, 2015, p. 127.

<sup>35</sup> BOLGER, Maggie: *Offenders*. In: OLIVIERE, David - MONROE, Barbara (eds.): *Death, Dying and Social Differences*. New York, Oxford University Press, 2004, p. 139; See also: ADAY, Ronald - WAHIDIN, Azrini: *Older Prisoners' Experiences of Death, Dying and Grief behind Bars*. *Howard Journal of Crime and Justice*, 55 (2016), pp. 312-327.

<sup>36</sup> HANDTKE, Violet - BRETSCHNEIDER, Wiebke - ELGER, Bernice - WANGMO, Tenzin: *The Collision of Care and Punishment: Ageing Prisoners' View on Compassionate Release*. *Punishment and Society*, 19 (2017), pp. 5-22, p. 6.

<sup>37</sup> See also: ADAY, Ronald - WAHIDIN, Azrini: *Older Prisoners' Experiences of Death, Dying and Grief behind Bars*. *Howard Journal of Crime and Justice*, 55 (2016), pp. 312-327.

<sup>38</sup> WILLIS, Anthony - ZAITZOW, Barbara: *Doing "Life": A Glimpse into the Long-Term Incarceration Experience*. *Laws*, 4 (2015), pp. 559-578; See also: NELLIS, Ashley: *For Henry Montgomery - A Catch 22*. 28 February 2018. Available at: <https://www.themarshallproject.org/2018/02/28/for-henry-montgomery-a-catch-22> (Downloaded on 29 July 2025).

<sup>39</sup> HASSINE, Victor: *Life without Parole: Living in Prison Today*. 2nd ed. Los Angeles, Roxbury Publishing Company, 1999; See also: JOHNSON, Robert - TABIZ, Sonia (eds.): *Life without Parole: Living and Dying in Prison Today*. New York, Oxford University Press, 2011.

<sup>40</sup> SCHAUER, Edward: *Book Review: Life without Parole: Living and Dying in Prison Today (5th ed.)*, by Victor Hassine, edited by Robert Johnson and Sonia Tabriz. *Southwest Journal of Criminal Justice*, 8 (2011), pp. 177-178.

the committee's practice of failing to take into account other relevant factors, such as positive changes in the prisoner's personality.<sup>41</sup>

Convicts serving this type of sentence often have to spend part of their time in solitary confinement or maximum security units. These prisoners are usually separated from other inmates and kept in closed cells for 22 to 24 hours a day under strict supervision, with no human contact or sensory stimulation.<sup>42</sup> Such isolation is used either because these prisoners are considered dangerous or, conversely, because it is felt that they need to be protected from other prisoners for some reason.<sup>43</sup> Research conducted in the United States has shown that prolonged isolation and time spent in solitary confinement cause psychological trauma in a very high proportion of inmates held in solitary confinement.<sup>44</sup> Haney pointed out that the complete isolation and sensory deprivation of solitary confinement causes a number of psychiatric symptoms, including heightened negative emotions and attitudes, insomnia, anxiety, panic, withdrawal, hypersensitivity, manic thoughts, cognitive impairment, hallucinations, loss of control, irritability, aggression, paranoia, hopelessness, depression, feelings of emotional breakdown, self-mutilation, and suicidal thoughts and behaviour.<sup>45</sup> A growing body of research shows that in severe cases, the effects of solitary confinement can lead to "extreme self-mutilation," and the rate of suicide in solitary confinement far exceeds that of the normal prison population.<sup>46</sup> Nearly 50% of prisoners who commit suicide do so while in solitary confinement.<sup>47</sup>

It is significant that prisoners serving actual life sentences are considered more dangerous than other prisoners. Some believe that these sentences create a new type of prisoner who is prone to violence and uncontrollable because they have nothing to lose.<sup>48</sup> Empirical research, however, shows that the majority of prisoners serving LWOP are less prone to disorderly conduct or violence in prison than those serving life sentences with the possibility of parole.<sup>49</sup> According to Johnson and McGunigall-Smith, many actual life- e prisoners try to avoid trouble in prison, knowing that the privileges they have acquired can easily be lost, and strive to maintain a stable, conflict-free environment. The researchers explain: "Any serious breach of the rules threatens the rhythm of life that these prisoners have

<sup>41</sup> MacKenzie v. Stanford, Index No. 2789/15, at 1\*-2\* (N.Y. Sup. Ct. 2016); *A Challenge to New York's Broken Parole Board*. *New York Times*, 13 June 2016, p. 18; GOLDSTEIN, Joseph: *Merciless End for a Long Island Cop Killer*. *New York Times*, 28 October 2016.

<sup>42</sup> CASELLA, Jean - RIDGEWAY, James - SHOURD, Sarah (eds.): *Hell Is a Very Small Place: Voices from Solitary Confinement*. New York, New Press, 2016; LIEM, Marieke: *After Life Imprisonment: Reentry in the Era of Mass Incarceration*. New York, New York University Press, 2016; RHODES, Lorna: *Total Confinement: Madness and Reason in the Maximum Security Prison*. Berkeley - Los Angeles, University of California Press, 2004.

<sup>43</sup> SHALEV, Sharon: *Supermax: Controlling Risk through Solitary Confinement*. Cullompton, Willan, 2009.

<sup>44</sup> HANEY, Craig: *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*. *Crime and Delinquency*, 49 (2003), pp. 124-156; HANEY, Craig - LYNCH, Mona: *Regulating Prisons of the Future: The Psychological Consequences of Solitary and Supermax Confinement*. *New York University Review of Law and Social Change*, 23 (1997), pp. 477-570; SCHARFF-SMITH, Peter: *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*. *Crime and Justice*, 34 (2006), pp. 441-528; SHALEV, Sharon: *Supermax: Controlling Risk through Solitary Confinement*. Cullompton, Willan, 2009.

<sup>45</sup> HANEY, Craig: *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*. *Crime and Delinquency*, 49 (2003), pp. 130-131.

<sup>46</sup> CASELLA, Jean - RIDGEWAY, James: *Introduction*. In: CASELLA, Jean - RIDGEWAY, James - SHOURD, Sarah (eds.): *Hell Is a Very Small Place: Voices from Solitary Confinement*. New York, New Press, 2016, p. 11.

<sup>47</sup> KABA, Fatos - LEWIS, Andrea - GLOWA-KOLLISCH, Sarah - HADLER, James - LEE, David - ALPER, Howard - SELLING, Daniel - MACDONALD, Ross - SOLIMO, Angela - PARSONS, Amanda - VENTERS, Homer: *Solitary Confinement and Risk of Self-Harm among Jail Inmates*. *American Journal of Public Health*, 104 (2014), pp. 442-447.

<sup>48</sup> STEWART, Jim - LIEBERMAN, Paul: *What Is This New Sentence That Takes away Parole?* *Student Lawyer*, 11 (1982), pp. 14-17, p. 16; See also: BLAND, Archie: *Crime and Punishment: Why Throwing away the Key Doesn't Work*. *Independent*, 13 March 2014. Available at: <http://www.independent.co.uk/news/uk/crime/crime-and-punishment-why-throwing-away-the-key-doesnt-work-9039185.html> (Downloaded on: 02.08.2025).

<sup>49</sup> REIDY, Thomas - CUNNINGHAM, Mark - SORENSEN, Joe: *From Death to Life: Prison Behaviour of Former Death Row Inmates*. *Criminal Justice and Behaviour*, 28 (2001), pp. 67-82; CUNNINGHAM, Mark - SORENSEN, Jon: *Nothing to Lose? A Comparative Examination of Prison Misconduct Rates among Life-without-Parole and Other Long-Term High-Security Inmates*. *Criminal Justice and Behaviour*, 33 (2006), pp. 683-705; APPLETON, Catherine: *Life without Parole*. In: *Oxford Handbooks Online*. Oxford, Oxford University Press, 2015; LEIGEY, Margaret: *The Forgotten Men: Serving a Life without Parole Sentence*. New Brunswick, Rutgers University Press, 2015.

established over a long period of time. An act of violence, even if committed in self-defence, disrupts the normal way of life of prisoners serving life sentences. In such cases, they are isolated and have to start prison life practically from scratch: in a new environment, with new neighbours, new staff, few resources, but with a lot to prove. By maintaining their routine, they are able to avoid conflict, thereby gaining some control over their daily lives in the uncertain world of prison and making it safer.<sup>50</sup> Leo Lalonde, an employee of the Michigan Corrections Department, said: "After a few years, life prisoners become the best prisoners. They usually adapt and simply fill their time. They have a calming effect on younger prisoners; there are many more problems with those serving short sentences."<sup>51</sup> Leigey's sociological study, which analysed the situation of 25 elderly prisoners serving actual life sentences in the United States, concluded that the participants were not only able to survive decades of imprisonment, but also drew on their inner resources to learn new skills and sought to spend their time in prison in a meaningful way. The key to their resilience lay in facing their personal problems, developing new skills, and engaging in activities that were personally meaningful to them. They attributed their resilience and ability to endure the hardships of long-term imprisonment to a "positive attitude," which in some cases was fuelled solely by the hope of clemency, even though the chances of this were slim.<sup>52</sup>

Although most research on the experience of actual life imprisonment has been conducted in the United States, a small-scale study by Liem and colleagues in the Netherlands raised similar concerns about long-term imprisonment.<sup>53</sup> Research conducted in Dutch prisons has shown that, compared to prisoners serving long sentences, the main concerns among prisoners sentenced to actual life imprisonment are increased uncertainty, a feeling that life is meaningless, fear of mental deterioration and the impact of the depressing prison environment. According to the study, many prisoners serving life sentences did not accept the finality of their sentence in the early stages of their imprisonment and focused their energy on the appeal process. This served as a key coping mechanism in the initial period, as the hope that the sentence might be overturned helped to suppress the awareness of the finality of the punishment.<sup>54</sup>

Prisoners participating in the Dutch studies were also confronted with the complete hopelessness of their punishment and often emphasised the incomprehensibility of its purpose. Their responses indicated that, if they had had a choice, they would have preferred the death penalty to life imprisonment.<sup>55</sup>

There was a sharp contrast between prisoners serving fixed-term sentences and those serving life sentences in the Netherlands. The majority of the latter had completely broken off contact with the outside world and expressed strong concerns about the meaninglessness of their lives and the futility of their existence. Many prisoners lacked access to education, work and rehabilitation programmes and were particularly concerned about the consequences of mental decline. According to the research, many of them had also contemplated suicide.

At the international level, many prisoners experience actual life imprisonment as a form of the death penalty. Although less direct and coercive than execution, the inevitability of death in prison fundamentally determines their daily existence. Due to the lack of any possibility of parole, many prisoners feel deprived of their human dignity, of any meaning in life and of any hope for the future.

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<sup>50</sup> JOHNSON, Robert - DOBRZANSKA, Sandra: *Mature Coping among Life-Sentenced Inmates*. [Journal name], [year], p. 36; See also: CULLEN, Eric - NEWELL, Tim: *Murderers and Life Imprisonment: Containment, Treatment, Safety and Risk*. Winchester, Waterside Press, 1999, p. 78.

<sup>51</sup> DIETER, Richard C.: *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*. Washington, D.C., Death Penalty Information Center, 1993. Available at: <https://deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty> (Downloaded on: 02.08.2025).

<sup>52</sup> LEIGEY, Margaret: *The Forgotten Men: Serving a Life without Parole Sentence*. New Brunswick, Rutgers University Press, 2015, p. 130.

<sup>53</sup> LIEM, Marieke C. A. - VAN KUIJCK, Y. A. J. M. - RAES, B. C. M.: *Detentiebeleving van (levens)langgestraften. Een empirische pilotstudie*. Delikt en Delinkwent, 2 (2016), pp. 10-29.

<sup>54</sup> op. cit. p. 17

<sup>55</sup> op. cit. p. 19

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**A brief comparison of legal and political constitutionality –  
The development of politicization, institutional and individual aspects<sup>\*</sup>**

**ABSTRACT**

The emerging constitutional court set an obstacle to the policy-making of democracy, and at the same time pushed the political system towards duplication, building the power mechanisms of juristocracy alongside democracy. The basic idea of the need to establish a constitutional court led to the recognition that the provision of cassation power also means interference in democratic processes. The study undertakes a short, sketchy presentation from the role of the 'Das Gericht als negativer Gesetzgeber' to the intervention close to the positive situation (or from Kelsen to Rawls as preferred).

**KEYWORDS:** juristocracy, democratic legitimacy, negative legislator, constitutional adjudication

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## Introduction

Currently, particularly in advanced cultures, Pericles' statement that decisions regarding the constitution and, through it, governance should be placed in the hands of the majority rather than the minority can be considered fundamental in terms of political organisation. The concept of elections based on equal rights for millions of people and governance based on this (political constitutionalism/democracy) excludes the conclusion of collective agreements by a body of officials. In other words, the law cannot rule on its own, as the law is also embedded in 'political circumstances', and appropriate procedures ensure that citizens are treated with equal attention and respect. In this respect, the role of judges in ensuring legality is indispensable through the consistent and equitable application of enacted laws, but they cannot ensure that laws are not arbitrary; this is achieved through the self-determination of citizens<sup>1</sup>.

The key concept in this study is political value choice and its manifestation and consequences in adjudication. According to Béla Pokol, anything that depends on political value choice cannot be made into a logically neutral decision<sup>2</sup>. It is therefore necessary to review the processes that lead to the politicisation of judicial decisions and to present the consequences of this.

Interest in the recent strong growth of "judicial power" has clearly gone beyond the realm of academic interest and is increasingly becoming a topic of public discourse. Titles such as "The Global Expansion of Judicial Power" (Tate and Vallinder 1995) and terms such as juristocracy (Hirschl 2004) and courtocracy (Scheppel 2002) appear precisely because this form of power has spread worldwide, in a development that only really began after the Second World War and has gained real momentum over the last fifty years<sup>3</sup>. It is worth starting with a distinction here in the introduction, as the previous sentence deliberately used the term form of power rather than the concept of branch of power. Form of power refers to the fact that the branch designated as a separate judiciary in the idea of separation of powers encroaches on the political sphere, on the one hand in a comprehensive manner (at the level of abstract constitutional adjudication/norm control), and on the other hand at the level of individuals, in which case a few – unelected – individuals may be able to shape political will, contrary to the decisions of millions. As a brief reference back to the earlier quotation, it is worth noting that Scheppel also used the term courtocracy to describe the Hungarian political system after the change of regime, emphasising the role of the Sólyom court<sup>4</sup>.

In line with this, the first part of the study provides a historical overview of judicial power, attempting to show how it came about and how it reached its current form. The following chapters attempt to explore the driving forces behind this, and the study concludes with a presentation of the consequences.

## I. Brief historical overview

Constitutional adjudication in the modern sense, i.e. the form of judicial power in which the courts can decide on the constitutionality of laws at the highest level, is the result of a long development. One of the earliest precedents can be traced back to the British colonial period, when the Imperial Privy Council was the highest judicial forum for the vast territories. This body initially functioned primarily as an appellate council and did not directly exercise constitutional review; however, the idea that the judiciary had powers distinct from those of the central legislature, particularly in legal disputes concerning the validity of laws, had already emerged in the legal systems of many colonies and dominions<sup>5</sup>. These precedents later gave rise to the widespread judicial activity that we now know as

<sup>1</sup> Bellamy, Richard: *Political Constitutionalism*, MCC Press Budapest, 2022. p. 22

<sup>2</sup> Pokol, Béla: *Kettős állam és jogduplázódás*, Alapjogokért Központ Budapest 2020 p.141

<sup>3</sup> Goldstein, Leslie Friedman: *From Democracy to Juristocracy*, Law & Society Review, Sep., 2004, Vol. 38, No. 3 (Sep., 2004), pp. 611-629

<sup>4</sup> Boulanger, Christian: *Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe"* In book: Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders (pp.263-280) Publisher: Springer Editors: Sadurski W, Czarnota A, Krygier p. 265.

<sup>5</sup> Silverstein, Gordon (2003): „Globalization and the rule of law: 'A machine that runs of itself?' International Journal of Constitutional Law 1(3): 427-445

"juristocracy", referring to the fact that in many countries, the courts – partly through agreement between social and political actors, and partly through practices developed over time – are able to exert considerable influence on the political decision-making process<sup>6</sup>.

The example of the Privy Council is also significant because in the first half of the twentieth century, the view that parliament was the sovereign power and that the courts had no power to override the will of the legislature was still strongly held<sup>7</sup>. For a long time, British thinking took parliamentary sovereignty as its starting point, according to which the courts were merely enforcers of already adopted laws and not institutions exercising constitutional control. Over time, however, especially in the states that became independent after the break-up of the British Empire, the view emerged that a court could declare a law unconstitutional and thus invalidate it in certain cases. This process was complemented by the experience of the United States: the practice that developed following the *Marbury v. Madison* (1803) decision pointed out that the constitution itself is above the legislature and is guarded by the Supreme Court.

This marked the emergence of constitutional adjudication in modern history, which at that time was still largely jurisdictional adjudication and was limited to deciding disputes between federal and state authorities over their respective powers. All this changed in the early 1900s, when, invoking constitutional fundamental rights and principles, the highest federal court began to strike down laws on the grounds of unconstitutionality, even beyond jurisdictional disputes<sup>8</sup>. As a result, constitutional adjudication largely became fundamental rights adjudication and began to function as a competitor to democratic decision-making and congressional lawmaking.

We cannot omit to mention the New Deal and the "switch in time" in the 1930s, which meant judicial obstruction of Franklin D. Roosevelt's policies (*Schechter Poultry*, 1935), after which the conservative members of the Supreme Court (e.g. Justice Roberts) spectacularly "changed direction". This led to the famous saying: "*the switch in time that saved nine*" – i.e. the court's strategic retreat prevented Roosevelt's "court-packing" plan. From then on, the Court began to operate *as a more active political player*.

This approach became even stronger in the period following the World War and then the Cold War, especially in Europe: independent constitutional courts were established (in Germany, Italy, Spain and Portugal), and it became established practice that courts could review the constitutional limits of legislators' powers<sup>9</sup>.

The fundamental rights movements of the 1950s and 1960s further reinforced this change, the reasons for which will be discussed later. Suffice it to say that, with human rights movements standing alongside/above the legislature, fundamental rights constitutional adjudication became the main norm-setter, not only controlling the creation of laws, but also allowing for direct constitutional litigation on fundamental rights<sup>10</sup>. Cause lawyers, or lawyers for good causes, appear to represent minority movements, fighting for the political goals of the movement in courtrooms by using constitutional fundamental rights and setting precedents (Scheingold 1998:115-150). The Warren Court period (1953–1969) was characterised by activism and the pursuit of social justice. During this era, the Supreme Court implemented a number of radical changes: the abolition of racial segregation (*Brown v. Board*), the Miranda rights, and equal electoral districts. The judges derived new rights from the Constitution that were not explicitly mentioned in its text (e.g. the right to privacy). This provoked a reaction from originalists, leading to the counter-movement led by Bork and Scalia in the 1970s and 1980s.

In many states, this control extended to civil law, human rights, economic and even administrative and budgetary areas. The parallel strengthening of the international treaty system, the global protection of human rights and the emergence of European Union regulations also increased the importance of the role of judges, so that in many places, courts are able to encroach on the powers of parliaments with human rights and constitutional references, thus "politicising" the judiciary. The term

<sup>6</sup> Moustafa, Tamir & Tom Ginsburg (2008): „*Introduction: The Functions of Courts in Authoritarian Politics.*” In Rule by Law: The Politics of Courts in Authoritarian Regimes, ed. Tom Ginsburg & Tamir Moustafa, Cambridge University Press

<sup>7</sup> Williams, Robert F. (2006): „*Juristocracy in the American States?*” Maryland Law Review 65(1): 68–83

<sup>8</sup> Pokol, Béla: *Autentikus jogelmélet*, Dialóg Campus Kiadó Pécs, 2010. p 126

<sup>9</sup> Goldstein op.cit

<sup>10</sup> Pokol (2010) op.cit

‘judicialisation of politics’ has become commonplace, referring to the fact that disputes over public authority are often brought before constitutional courts.

The scope of this study does not allow for a comparison of the relevant theories of political philosophy. Suffice it to say at this point that there is a conflict between the legal constitutionalism represented by Rawls and the political constitutionalism of Oakeshott, Dicey and Bellamy and neo-republican theories. At the same time, it is necessary to note that since the 1950s, courts have been moving away from the Kelsenian procedural approach and have been steadily taking over political decision-making on legal grounds. As mentioned in the introduction, this is also reflected at the institutional level, but it is necessarily based on individual preferences.

## **II. Reasons for politicisation, review and open norms – institutional level**

With regard to the causes, it is worth looking back to where the idea of adjudicating jurisdiction, or in other words the procedural approach, is replaced by the substantive view that there should be an organisation independent of the legislature that examines (reviews) the laws on their merits. Hans Kelsen recognised the danger of this early on. At the much-cited conference of German constitutional law professors held in Vienna on 23 and 24 April 1928, Kelsen emphasised that constitutionally enshrined political declarations (“justice”, “freedom”, “equity”, “morality”) is “a power that must simply be considered intolerable”<sup>11</sup>.

At the same time, this was not exclusively a legal recognition. The danger – to quote Hegel indirectly – was also an opportunity. From the beginning of the 20th century, especially from the 1910s onwards, certain groups of American big capital, recognising the transformation in the nature of political power, gradually moved away from traditional mechanisms of interest representation based on elections and legislative majorities. Instead, they began to use judicial forums, primarily bodies authorised to interpret the constitution, as a strategic tool. Referring to fundamental rights, which play a central role in legal discourse, and focusing on the grievances of various social minorities, these groups developed a political strategy that enabled them to build long-term influence against the conservative majority forces in society. The aim of this strategy was to gain a hegemonic position in the discourse that determined the direction of society, while ousting their competitors – primarily the interests of productive capital and their social base – from key decision-making positions<sup>12</sup>.

According to Bork, from the 1950s and 1960s onwards, the US Supreme Court took on an overly politicised role when it read new rights into the text on the basis of the principle of the ‘living constitution’. He considered this to be the “political seduction” of the law, as referred to in the title of his book *The Tempting of America: The Political Seduction of the Law* (1989). According to Bork, judicial activism undermines the principle of democracy, as unelected judges impose their own views on society. The case of Robert H. Bork (1927–2012), a law professor who was one of the intellectual leaders of the conservative legal movement of the 1980s, is particularly noteworthy in this regard, especially . As a Supreme Court nominee, he emphasised during his Senate confirmation hearing (1987) that only a person “*who understands and is committed to the philosophy of originalism*” is fit for the Supreme Court. After the Democrats openly obstructed his nomination for political reasons, Bork’s nomination was ultimately rejected in such a heated political battle that his name became synonymous with the verb “to Bork,” meaning to use political means to defeat a nominee.

In practical terms, the emergence of the demand for judicial review also represented a political opportunity for hegemonic groups that wanted to gain social influence by means other than elections. Four theories are worth briefly discussing.

According to Martin Shapiro, in countries with federal or highly decentralised political structures, judicial review necessarily develops as a means of managing conflicts between different levels. Federal systems (such as those in the United States, India, Germany or Brazil) require, by their very nature, an institution capable of deciding whether the central or state level has the authority to regulate certain issues. Due to the nature of these conflicts, the court, as an “independent third party,” becomes the arbiter of political disputes, and thus the separation of powers is not merely a declaration

<sup>11</sup> Kelsen, Hans: *Die philosophischen Grundlage der Naturrechtslehre und des Rechtspositivismus*. Charlottenburg: Pan-Verlag Rolf Heise 1928 p. 68

<sup>12</sup> Pokol op.cit 2010. p. 127

but also an institutionalised practice. Here, the theory is shaped purely by a procedural approach and does not take into account the role of the individual.

In his work *Rights from Wrongs*, Allan Dershowitz argues that the institutionalisation of human rights and constitutional protection is not based on natural law, but stems from injustices suffered throughout history. According to Dershowitz, modern states create legally enforceable rights because they want to learn from the mistakes of the past: after experiencing totalitarian regimes, war crimes, colonial oppression, racial segregation or state violence, society wants to enshrine norms at the constitutional level that can prevent similar abuses from recurring. As examples, Calabresi cites Germany, where an extremely powerful and independent Constitutional Court was established after Nazism, and South Africa, where the new constitutional order was also embedded in guarantees of the rule of law after the dismantling of the apartheid system. It is worth mentioning that Calabresi does not take into account the well-known fact that it was the lawyers of the victorious American occupying forces who drafted the new German constitution, enshrining the institution of the constitutional court in it<sup>13</sup>.

The third example is Tom Ginsburg, who developed the so-called "insurance theory". According to this theory, the political elite is willing to establish independent courts when it perceives its power to be unstable or temporary. The possibility of being ousted from power motivates the creation of institutional safeguards that allow former leaders to count on legal protection if they find themselves in opposition. This is particularly true during democratic transitions, when former ruling parties often see the courts as the last guarantee of their own protection. Ginsburg's examples include Taiwan, Mongolia and the new democracies of Eastern Europe.

In contrast, Ran Hirschl offers a more radical interpretation. According to his theory, judicial review does not serve to strengthen democracy, but often has the opposite effect: it serves to "cement the power legacy of the hegemonic elites". Hirschl argues that when the ruling political, economic or cultural elite perceives its position as threatened by democratisation or social mobility, it tends to "pass on" constitutional rights to independent courts in order to preserve its own value system and privileges. The aim of such strategic constitutional reforms is therefore not to extend democratic rights, but to maintain elite political stability, now with a legal safety net. Examples include Israel, Canada, New Zealand and South Africa, where the strengthening of judicial power has often been accompanied by the political decline of the former hegemonic forces<sup>14</sup>.

The above analyses must necessarily be supplemented by the individual level, where political preferences emerge and have a direct impact.

### **III. The concrete manifestation of politicisation – the individual level**

Judicial politicisation – that is, the increasing political role of the courts – is not simply an institutional anomaly or moral deviation, but a phenomenon that can be understood historically and structurally, which has developed at the intersection of several factors. As noted above, since the second half of the 20th century, the role of the courts, especially constitutional courts, has grown to such an extent in many countries – from the United States to continental Europe – that they have become equal or even superior opponents of the executive and legislative branches. Béla Pokol calls this trend a "juristocratic form of government," in which constitutional adjudication is no longer merely an element of the separation of powers, but functions as an independent, quasi-sovereign centre of power<sup>15</sup>.

Here it is worth mentioning the phenomenon of political selection and the filling of judicial positions. One of the main drivers of the politicisation of the judiciary is the mechanism of judicial appointment controlled by political actors. Whether selection is made by a parliamentary majority or by presidential authority, the political preferences of judges – especially in the case of constitutional judges – are almost inevitably reflected in their judicial practice. According to Pokol, a distinction must be made between party-affiliated judges and judges bound by political values: while the former actively

<sup>13</sup> Feldman Noam: *Imposed Constitutionalism*. Connecticut Law Review (Vol. 37) 2005. 851-865. p

<sup>14</sup> Hirschl, Ran: *Towards Juristocracy The Origins and Consequences of the New Constitutionalism* Harvard University Press 2004. p 22

<sup>15</sup> Pokol, Béla: *A jurisztokratikus kormányforma és szerkezeti kérdései*, Pázmány Law Working Papers 2016/8 p. 5

pursue the political goals of the appointing party, the latter's decisions are guided by their ideological orientation, but with legal coherence and case law construction.

The structure and selection mechanisms of the judiciary fundamentally determine the political sensitivity of a given judicial system and the degree of so-called "politicisation". The differences between the European and American judicial systems illustrate how different types of judicial habitus and institutional role perceptions develop in the two models. In the European system, the judicial career is of a "career model" nature: after completing their legal training, young people enter the judicial system at an early age and, subject to strict evaluation, promotion and disciplinary regulations, they rise to higher judicial positions<sup>16</sup>. The career path is therefore structured according to an internal bureaucratic order, which promotes the development of a type of judicial personality that is conformist, good at managing hierarchical relationships and easily integrated into the organisation<sup>17</sup>.

In contrast, the majority of American judges are "merit judges", i.e. they are appointed on the basis of their merits in other areas of the legal profession (e.g. in positions as lawyers, academics or in public administration), usually with a lifetime mandate. This type of judge is independent of the internal promotion pressures and disciplinary hierarchy of the system, and thus relies more heavily on their own professional and political worldview, thereby enjoying greater decision-making autonomy<sup>18</sup>. However, it is important to note that the selection of American judges is typically overtly political in nature, especially at the federal level. The filling of judicial positions depends on the decisions of the political elite – primarily the government and the Senate – so that the "recognition" aspect actually becomes political recognition (Garoupa, 2011).

European constitutional judges, who can also be considered "recognition judges", form a separate category: they are elected not on the basis of their career path, but on the basis of their previous achievements in the legal community. Moreover, due to the institutional logic of constitutional adjudication, these judges are inherently closer to the political sphere than members of ordinary courts.<sup>19</sup> As a result, constitutional judges are more politicised at both the structural and personal levels.

On this basis, two degrees of political commitment can be distinguished: (1) party-committed and (2) politically value-committed constitutional judges. The former closely follow the political will of the appointing party and are primarily active in cases that affect party political interests, while in other cases they act formally, relying on their delegated colleagues, they do not seek to develop coherent case law, and they often ignore the internal logic of the constitutional system of norms<sup>20</sup>. The latter type of judges, on the other hand, pursue a more independent decision-making practice, their deliberations are guided by their political values, but they interpret the constitution within a coherent system of cases. This requires that the institutional level provide the existential and operational guarantees that make them independent of the constraints of party political loyalty.

Both attitudinal (behaviourist) and strategic approaches to judicial behaviour theory attempt to describe these two types. The former emphasises the dominance of individual political preferences, while the latter argues that these only have a reduced weight in judges' decisions, with institutional logic and strategic considerations prevailing. A distinctive feature of European constitutional adjudication is that these models can be applied simultaneously: both party-affiliated and value-bound judges can be found, and their behaviour can be clearly identified through longitudinal analysis.

To conclude this chapter, it can be said that constitutional judges necessarily make political value choices and can therefore be interpreted as actors of state power, albeit not in the same way as government actors. Their politicisation differs from the party-political determinations of the executive, but they have independent political weight, which often influences political processes through constitutional interpretation. They can therefore be placed within the concept of a 'juristocratic form of government', which interprets the courts not only as supervisory actors but also as decision-making political actors.

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<sup>16</sup> Pokol op.cit (2016)

<sup>17</sup> Garoupa & Ginsburg op.cit

<sup>18</sup> (Garoupa & Ginsburg, op.cit

<sup>19</sup> Pokol 2016. p. 98

<sup>20</sup> Pokol op.cit 2016.

### Conclusions

Before concluding, it is worth recalling that in the United States, the appointment of chief justices is preceded by specific election campaigns, similar to presidential election procedures, of which there are three main types: partisan elections, where candidates run under the colours of political parties; non-partisan elections, where no party affiliation appears on the ballot, but political backing is common; and so-called "retention" elections, in which judges who have already been appointed participate in a confirmation vote. A common feature of these electoral systems is that campaigning – including media appearances, fundraising and support from interest groups – plays an increasingly important role. This raises several serious problems: on the one hand, the risk of political and financial influence jeopardises judicial independence; on the other hand, the pressure to campaign exerts populist pressure on judges, especially in criminal cases, where judges seeking re-election often hand down harsher sentences. In addition, the campaign influence of interest groups, especially PACs using 'dark money', raises the issue of institutional bias. The system therefore operates in a delicate balance between democratic accountability and impartial adjudication, while it is becoming increasingly clear that the logic of elections is profoundly reshaping the perception of the role of judges and decision-making.

There is no sign of this on the European stage, as conflict of interest rules do not allow judges to openly approach political parties (see, for example, Section 42 of the Hungarian Judges Act - a bírák jogállásáról és javadalmazásáról.). An interesting exception is Germany, where the Richtergesetz does not expressly prohibit party membership; indeed, under Section 39 of the Act, German judges are free to exercise their full civil rights, including membership of political parties or trade unions and active participation in political life. This image of the German "judge as citizen" is very important, both from the point of view of the ongoing process of democratic integration and the internal democratisation of the judiciary<sup>21</sup>.

The following conclusions can be drawn from the above. Politicisation occurs when, as a result of elections by millions of people, a legislature comes to power alongside an institution of norm control that no longer operates on a procedural basis. By recognising the possibility of substantive review, a more stable and deeper social influence can be built through the courts than through legislation tied to electoral cycles. Thus, building on constitutional fundamental rights (rather than parliamentary majorities), social coalitions can be formed through legal discourse (e.g., the protection of minority rights, which in the United States was the structural displacement of productive capital factions from the centre of political dominance (cf. Gramsci, 1971; Lindblom, 1977; Horwitz, 1977).

This is necessarily accompanied by the spread of unnecessarily open norms (fundamental rights) and their teleological interpretation. In the process, the courts have in many cases created something "new" through their interpretative activity, extracting (or reading into) provisions or rules from the constitution that are not actually there. It would go beyond the scope of this study to detail the textualist and contextualist approaches, but it suffices to refer to two examples. Béla Pokol 27/2015 (VII. 27.) AB decision, where he explains that deriving the right to a name from human dignity means "overstretching" the law, and refers to his previous rejection of the constitutionalisation of civil law name rights (ABH 2015, 695). In the more comprehensive wording of Varga Zs. András, the previous (under the provisional Constitution) normative declaration of the rule of law without a substantive background gave the Constitutional Court a free hand to freely shape the concept of the rule of law, thereby becoming the unrestricted master of legislation<sup>22</sup>.

Considering the above together with the practice that, for example, in the American system, judges are appointed for life, this allows for lasting political influence, especially when (as another structural reason) the Court itself decides which cases to hear (writ of certiorari).

All this can work as long as the law unnecessarily allows for the prevalence of open norms and the idea that fundamental rights are prerequisites for political decision-making<sup>23</sup>. In this regard, Bellamy

<sup>21</sup> Böttcher, Hans-Ernst: *The Role of the Judiciary in Germany*, German Law Journal, Vol.5. No. 10 p. 1324

<sup>22</sup> Varga Zs. András: *Eszményből bálvány? A joguralom dogmatikája* Századvég Kiadó 2015. Budapest p. 122

<sup>23</sup> Rawls, John: *Political Liberalism* Columbia University New York 1993. p.

is most convincing in his view that the strengthening of judicial control is a limitation on democratic self-determination<sup>24</sup>.

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**Political Justice and Natural Law  
Some Preliminary Thoughts on Aristotle's *Nicomachean Ethics*, Book V<sup>\*</sup>**

**ABSTRACT**

Aristotle's fifth book of the *Nicomachean Ethics* offers Aristotle's most complete treatment of justice. Besides being an invaluable source for understanding Aristotle's virtue ethics, this account of justice is believed to have considerable bearing on Aristotle's politics, especially his classification of constitutions, and his potential contribution to a doctrine of natural law. In this paper, I intend to tackle the problematic interpretation of political justice, and in doing so, I wish to engage both with Aristotle's original text and its different interpretative traditions in proposing a plausible method of assessment. The principal aim of this study is, thus, to sketch out a tenable procedure for interpreting Aristotle's idea of political justice and accommodating his potential contribution to the doctrine of natural law.

**KEYWORDS:** Aristotle, Nicomachean Ethics, justice, natural law

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## Introduction

This paper endeavours to offer some preliminary insights to the interpretation of the fifth book of Aristotle's *Nicomachean Ethics* which constitutes Aristotle's fullest treatment of the subject of justice, both as a disposition or interpersonal relation (τό δίκαιον) and as a particular virtue of character (δικαιοσύνη). Aristotle considers several issues, attending on the idea of justice, such as how may a just action be characterised and whether justice, like the other virtues, could be understood in terms of proportions, namely is the virtuous a mean between two extremes? Are there different sorts of justice? And, of course, the problem of agency, that is whether justice and injustice are voluntary, which prepares for the crucial discussion on whether one can be unjust to oneself? Though, these questions may, at first, appear to be just accidentally related to the study of jurisprudence, central to Aristotle's discussion is a query of tremendous significance: is the artificial order of the polis entirely made of arbitrarily posited conventions, or is there a natural source of justice to the legal order as well? In other words, is it legitimate to speak of natural justice, and if so, how does it relate to law?

This latter problem may also be referred to as the controversy between the natural law position and legal positivism, but that is a gross oversimplification of the matter at hand. According to Hans Kelsen, the doctrine of natural law "ist eine Metaphysik des Rechts" which he explains with reference to Plato's idealism; just like the Platonic ideas are immaterial forms of the material world, the natural law doctrine, a form of higher law (ein höheres Recht), is to inform the positive law in terms of legal justification or validity.<sup>1</sup> Nevertheless, there are prominent exponents of the natural law doctrine who do not subscribe to any metaphysical justification for the legal phenomenon. As such, John Finnis, for instance, claims that the knowledge of natural law precedes the knowledge of any positive norms, and that is why strictly speaking natural law could not have a history because its principles are eternally and intrinsically bound to practical reasonableness.<sup>2</sup> And, as a matter of fact, Aristotle himself described the legal order a product of the legislative science, which he understood to be a kind of φρόνησις.<sup>3</sup> Hence, if Aristotle was, indeed, a natural law thinker, he would imagine natural law to be operating within the contingent domain of πρᾶξις.

This latter issue, that is Aristotle's potential contribution to the natural law tradition, cannot simply be passed by, since as early as Aquinas' commentary on the *Nicomachean Ethics*, it has been forcefully vindicated that Aristotle's distinction of natural and conventional justice happens to coincide with the Roman law categories of *ius naturale* and *ius positivum*.<sup>4</sup> But Aquinas arrives to this conclusion by making two interpretive leaps, unaccounted for by the text itself, namely equating natural justice with natural right (*quod ius dicitur quasi iustum*) and ascribing its operation to human reason, which has made room for a *ius naturale* reading of the *Ethics*, founded on natural law principles, such as the natural law principle that prisoners ought to be ransomed, the price of which should be determined by positive law.<sup>5</sup>

Though, from a methodological point of view, Aquinas' commentary has some serious flaws to it, the reading of the *Nicomachean Ethics*' chapter on political justice (V. 7) still centres around the issue of natural law and positive law. While several commentators still endorse Aquinas' rendering, either on the basis of a shared understanding of natural law between the two,<sup>6</sup> or endeavouring to highlight their doctrinal discrepancies, yet within the confines of an intrinsically Thomistic framework,<sup>7</sup> others argue

<sup>1</sup> Hans Kelsen: *Naturrechtslehre und Rechtspositivismus*. p. 316. In Politische Vierteljahresschrift, Vol. 3, No. 4, 1962. pp. 316–327.

<sup>2</sup> John Finnis: *Natural Law and Natural Rights*. 2nd edition. Oxford University Press, Oxford, 2011. pp 23–29. John Finnis: *Natural Law Theory: Its Past and its Present*. p. 85. In The American Journal of Jurisprudence, Vol. 57, 2012. pp. 81–101.

<sup>3</sup> Aristoteles: *Ethica Nicomachea*. 1141b24–26. p. 121. Recognovit breve adnotatione critica instruxit Ingram Bywater. Clarendon, Oxford, 1908.

<sup>4</sup> Thomas de Aquino: *Sententia libri Ethicorum*. Liber V, lect. 12.

<sup>5</sup> Ibid.

<sup>6</sup> E.g.: Tony Burns: *Aristotle and Natural Law*. Continuum, London, 2011. pp. 11, 52–58, 174. George Duke: *Aristotle and Natural Law*. pp. 22–23. In The Review of Politics, Vol. 82, No. 1, 2020. pp. 1–23.

<sup>7</sup> E.g.: Harry V. Jaffa: *Thomism and Aristotelianism. A Study of the Commentary by Thomas Aquinas on the Nicomachean Ethics*. The University of Chicago Press, Chicago, 1952. pp. 182–188. Ross J. Corbett: *The Question of Natural Law in Aristotle*. pp. 231–233. In History of Political Thought, Vol. 30, No. 2, 2009. pp. 229–250.

for the impossibility of understanding Aristotle in terms of the natural law positive law dualism.<sup>8</sup> But some even goes as far as to regard Aristotle the founder of the natural law doctrine, or some version of it,<sup>9</sup> and there is Kelsen, of course, who ascribes Aristotle's theory to legal positivism.<sup>10</sup>

The inquiry into Aristotle's idea of political justice, a part of which is said to be natural,<sup>11</sup> begs the question, then, of what is natural law? Now, there cannot be a ready answer to this query, but given the scholarship on Aristotle's idea of justice is still largely determined by Aquinas' *ius naturale* interpretation, and due to the apparent plausibility of Kelsen's false conceptual assumptions, one cannot attempt to tackle Aristotle's idea of justice without some *a priori* criteria of natural law. It is no wonder therefore that the bulk of Aristotle's modern commentators labour, to various extents, to reconstruct his likely sense of law (vόμος) and nature (φύσις), and to propose certain criteria for natural law with which Aristotle may reasonably be associated.<sup>12</sup>

In this paper, I endorse this line of reasoning, and so I propose to analyse Aristotle's idea of political justice after the following fashion. First, I intend to consider those questions that are related to Aristotle's writing project of the fifth book of his *Nicomachean Ethics*. What are the main conceptual units of this book, and what are the stumbling blocks of its interpretation? Next, I take a look at the various kinds of justice and try to accommodate political justice within Aristotle's general framework. And finally, I am going to tackle the problem of political justice with reference to the essence of conventional and natural justice. In doing so, I wish to engage both with Aristotle's original text and its different interpretative traditions in proposing a plausible method of assessment. The principal aim of this study is, thus, to sketch out a tenable procedure for interpreting Aristotle's idea of political justice and accommodating his potential contribution to the doctrine of natural law.

### I. Some general remarks on the fifth book of the *Nicomachean Ethics*

The fifth book of the *Nicomachean Ethics* is traditionally divided into eleven chapters. The first chapter introduces the problem of justice, and it raises three questions, namely: (1) what sort of actions is justice concerned with; (2) what sort of mean is justice as a virtue; and (3) what is the just a mean of, or what are its extremes?<sup>13</sup> These questions are, then, dealt with through the subsequent inquiry from chapter two to five which analyses 'the various species of justice' being 'united by the goal of showing how justice is a mean'.<sup>14</sup> Chapter six and seven somewhat abruptly start a new discussion about political justice, which has made those passages subject to editorial emendation or reorganisation.<sup>15</sup> Finally from

<sup>8</sup> Donald N. Schroeder: *Aristotle on Law*. pp. 25–30. In Polis: The Journal for Ancient Greek and Roman Political Thought, Vol. 4, No. 1, 1981. pp. 17–31. Jesús Vega: Aristotle's Concept of Law: Beyond Positivism and Natural Law. p. 28. In Journal of Ancient Philosophy, Vol. 4, No. 2, 2010. pp. 1–31. Francisco L. Lisi: *Aristotle on Natural Right*. p. 148. In Manuel Knoll – Stephen Synder – Nurdane Şimşek (eds.): *New Perspectives on Distributive Justice*. De Gruyter, Berlin, 2019. pp. 133–150.

<sup>9</sup> Max Salomon Shellens: *Aristotle on Natural Law*. p. 72. Natural Law Forum, paper no. 40, 1959. pp. 72–100. Leo Strauss: *Natural Law*. pp. 81–82. In David L. Sills (ed.): *International Encyclopedia of the Social Sciences* Vol. 11. Collier-Macmillan Publishers, New York, 1968. pp. 80–85. Fred D. Miller Jr.: *Aristotle on Natural Law and Justice*. p. 306. In. David Keyt – Fred D. Miller Jr. (eds.): *A Companion to Aristotle's Politics*. Blackwell, London, 1991. pp. 279–306. Burns: op. cit. pp. 173–174. Duke: op. cit. pp. 13–23.

<sup>10</sup> Hans Kelsen: *The Foundation of the Theory of Natural Law*. pp. 127–131. In Hans Kelsen (ed.): *Essays in Legal and Moral Philosophy*. Selected and Introduced by O. Weinberger. Translated by P. Heath. D. Reidel Publishing, Boston, 1973. pp. 114–153.

<sup>11</sup> Aristoteles: *EN* 1134b18–21. Bywater: op. cit. p. 103.

<sup>12</sup> E.g.: Schroeder: op. cit. pp. 17–23; Bernard Yack: *Natural Right and Aristotle's Understanding of Justice*. p. 218. In Political Theory, Vol. 18, No. 2, 1990. pp. 216–237. Anthony A. Long: *Law and Nature in Greek Thought*. pp. 412–421. In Michael Gagarin – David Cohen (eds.): *The Cambridge Companion to Ancient Greek Law*. Cambridge University Press, Cambridge, 2005. pp. 412–430. Thornton C. Lockwood Jr.: *Physis and Nomos in Aristotle's Ethics*. pp. 24–32. In The Society for Ancient Greek Philosophy Newsletter, 2005. pp. 23–35. Vega: op. cit. pp. 6–11; Burns: op. cit. pp. 1–48; Lisi: op. cit. pp. 133–140.

<sup>13</sup> Aristoteles: *EN* 1129a3–5. Bywater: op. cit. p. 88.

<sup>14</sup> Thornton C. Lockwood Jr.: *Ethical Justice and Political Justice*. p. 43. In Phronesis, Vol. 51, No. 1, 2006. pp. 29–48.

<sup>15</sup> Ibid. p. 31.

chapter eight to eleven, Aristotle is occupied with the problem of ethical agency, injustice and unjust actions, and the criticism of Plato's theory, that is whether it is possible to be unjust to oneself?

There are two current scholarly divisions of the fifth book that seem to make sense to me. The first was put forth by Thornton Lockwood who disconnects V. 6–7 from the discussion of V. 2–5 and claims that V. 6 is the introduction to the problem of ethical agency, set out in V. 8.<sup>16</sup> In his opinion, Aristotle's treatment of the various species of justice is related to the initial question of justice being a mean (μεσότης), and 'the analysis of political justice in *EN* V.6 initiates a new inquiry'.<sup>17</sup> He argues that virtuous actions presuppose deliberation (προαίρεσις) which, in turn, necessitates full ethical agency, a character state that allows virtuous action. Since slaves, children, and women were not thought to be fully ethical agents, the discussion of agency from V. 8 should be preceded by a description of its scope, which is political justice.<sup>18</sup>

The other arrangement is proposed by Ronald Polansky who also divides the fifth book into two parts, only that he sees V. 1–5 are providing the account of justice of character, whereas the remainder of the book is the defence of this account.<sup>19</sup> He rests his claim on Aristotle's stated intent of inquiry, as the questions introduced at the beginning of V. 1 are dully dealt with in the first five chapters; hence, the issues raised in the subsequent part, 'seemingly disconnected, are linked because a problematic answer to any of them threatens the entire account of justice'.<sup>20</sup> As such, the principles of justice may have some bearing on non-citizens as well which may lead to the observation that at least a part of it is natural. 'If some of the politically just is natural, this supports the extension to all human relationships inasmuch as the just in other relationships approximates that of citizens and gives justice of character strong standing'.<sup>21</sup>

Of these two accounts, I favour Lockwood's proposition for its strong textual basin. I agree that the beginning of chapter six does constitute an introduction to the problem of agency,<sup>22</sup> and Lockwood's interpretation of τὸ ἀπλῶς δίκαιον and τι δίκαιον are also rather convincing. Whether the two chapters on political justice are continuous with the discussion on the special varieties of justice or not is largely dependent on how ἀπλῶς δίκαιον and τι δίκαιον are translated. Lockwood claims that the particles function adverbially and epexegetically in the sentence δεῖ δὲ μὴ λανθάνειν ὅτι τὸ ζητούμενόν ἐστι καὶ τὸ ἀπλῶς δίκαιον καὶ τὸ πολιτικὸν δίκαιον (let it not escape notice that we seek also unqualified justice, that is, political justice),<sup>23</sup> which would clearly indicate the passages' discontinuity with V. 2–5. Since most recent editions adopt this translation,<sup>24</sup> I think it can be accepted for the time being.

This conclusion is amplified, then, by the translation of τι δίκαιον as a 'sort of justice', implying that those relations in which the agents are lacking full ethical agency do not have justice to themselves, but only something which resembles justice.<sup>25</sup> This could have political implications and could perhaps be extrapolated to Aristotle's distinction of natural and unnatural constitutions, but that is beyond the scope of the *Nicomachean Ethics*.<sup>26</sup>

## II. The *Nicomachean Ethics*' definition and division of justice

<sup>16</sup> Ibid. pp. 29–48.

<sup>17</sup> Ibid. p. 43.

<sup>18</sup> Ibid. pp. 35–36.

<sup>19</sup> Ronald Polansky: *Giving Justice Its Due*. p. 152. In Ronald Polansky (ed.): *The Cambridge Companion to Aristotle's Nicomachean Ethics*. Cambridge University Press, Cambridge, 2014. pp. 151–179.

<sup>20</sup> Ibid. p. 168.

<sup>21</sup> Ibid. p. 170.

<sup>22</sup> Aristoteles: *EN* 1134a17–23. Bywater: op. cit. p. 102. Lockwood (2006): op. cit. p. 37.

<sup>23</sup> Aristoteles: *EN* 1134a24–26. Bywater: op. cit. p. 102. Lockwood's translation. Lockwood (2006): op. cit. 39. Emphases mine.

<sup>24</sup> E.g.: Aristotle: *Nicomachean Ethics*. Third edition. Translated with Introduction, Notes, and Glossary by Terence Irwin. Hackett Publishing, Indianapolis, 2019. p. 91. Aristotle: *Nicomachean Ethics*. Translated with an Interpretive Essay, Notes, and Glossary by Robert C. Bartlett and Susan D. Collins. The University of Chicago Press, Chicago, 2011. p. 103.

<sup>25</sup> Lockwood (2006): op. cit. p. 40. Marco Zingano: *Natural, ethical, and political justice*. pp. 204–207. In Marguerite Deslauriers – Pierre Destree (eds.): *The Cambridge Companion to Aristotle's Politics*. Cambridge University Press, Cambridge, 2013. pp. 199–222.

<sup>26</sup> Gianfrancesco Zanetti: *Problematic Aspects of Aristotle's Philosophy of Law*. pp. 56–58. In ARSP: Archiv für Rechts- und Sozialphilosophie, Vol. 81, No. 1, 1995. pp. 47–64.

Aristotle maintains that according to the common opinion, justice is a disposition (ἔξις), a virtue of character, that makes those who partake in justice the doers of just things (πρακτικοὶ τῶν δικαίων), and it causes them to indulge in doing and wishing for justice (δικαιοπραγοῦσι καὶ βούλονται τὰ δίκαια).<sup>27</sup> Unlike the sciences and capacities, characteristics do not admit opposites; hence, if the character state of justice is unknown, it could be defined through its opposite, injustice.<sup>28</sup> Obviously, there are two kinds of injustice, the unlawful (παράνομος) on the one hand, and the overreacher and unequal (ὁ πλεονέκτης καὶ ἄνισος) on the other hand. From this follows, then, that there should be two apposite states of justice, namely the lawful (νόμιμος) and the equal (ἴσος).<sup>29</sup> Of these, the lawful covers justice in the broader sense, since most of the things commanded by the laws are prescribed on the basis of the whole of virtue. Particular justice is characterised by equality, as it is opposed to unequal gain, arising from the want of honour, money, etc. That is why particular justice occurs either in the distribution of these things, or in the rectification of unequal gain.<sup>30</sup>

Though, *prima facie* it looks as if Aristotle had proposed two kinds of particular justice, ‘there should in fact be merely one virtue, particular justice of character, which displays itself especially in distribution or rectification.’<sup>31</sup> For Aristotle’s distinction lays between the whole of justice and particular justice, but the latter is referred to as in the singular.<sup>32</sup> So, instead of distributive and rectificatory justice, one ought to ‘distinguish two spheres of *just action* in which the single virtue justice comes into play: justice in character should enter into both distributive and rectificatory actions.’<sup>33</sup> Thus, political justice, the subject-matter of our inquiry is wholly unrelated to the discussion on particular justice, and so, it should be interpreted irrespective of V. 2–5.

### III. The political justice of the *Nicomachean Ethics* V. 6–7

Political justice is unqualified justice (ἀπλῶς δίκαιον), and so Aristotle seems to have returned to his original inquiry about justice according to the whole of virtue. Now, the precondition for political justice is a proper delineation of agency; hence, political justice belongs only to those who are by their very nature suited for law (ἐν οἷς ἐπεφύκει εἶναι νόμος) and whose relations are governed by it.<sup>34</sup> What is more, there is no justice proper, only a sort of justice (τι δίκαιον) in non-political relations, from which follows that there is no rule of justice independent of law (νόμος). And this consideration must be a crucial criterion in assessing Aristotle’s subsequent analysis.

Unfortunately, Aristotle’s rather brief account of political justice is very controversial and open to contradictory interpretations, for which reason it is necessary, I think, to identify those issues on which a proper rendering of Aristotle’s sense may hinge. Given the importance of the passage, I am quoting Aristotle in full.

One part of the politically just is natural, and the other part legal. The natural has the same validity everywhere / alike, not by its seeming so or not. The legal originally makes no difference <whether it is done> one way or another, but makes a difference whenever people have laid down the rule – that a mina is the price of a ransom, for instance, or that a goat rather than two sheep should be sacrificed. The legal also includes laws passed for particular cases (for instance, that sacrifices should be offered to Brasidas)<sup>1</sup> and enactments by decree. Now some people think everything just is merely / legal. For the natural is unchangeable and equally valid everywhere – fire, for instance, burns both here and in Persia – whereas they see that the just changes <from city to city>. This is not so, though in a way it is so. With us, though presumably not at all with the gods, there is such a thing / as the natural, but still all is changeable. Nonetheless one sort of things is natural and one sort is not. Then what sort of thing, among those that admit of being otherwise, is natural, and what sort is not natural, but legal

<sup>27</sup> Aristoteles: *EN* 1129a6–9. Bywater: op. cit. pp. 88–89.

<sup>28</sup> Aristoteles: *EN* 1129a11–16. Bywater: op. cit. p. 89.

<sup>29</sup> Aristoteles: *EN* 1129a31–b1. Bywater: op. cit. pp. 89–90.

<sup>30</sup> Aristoteles: *EN* 1130b6–1131a1. Bywater: op. cit. pp. 92–93.

<sup>31</sup> Polansky: op. cit. p. 158.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid. op. cit. pp. 158–159.

<sup>34</sup> Aristoteles: *EN* 1134a30; 1134b13–15. Bywater: op. cit. pp. 102, 103.

and conventional, if both natural and legal are changeable? It is clear in other cases also, and the same distinction will apply; for the right hand is naturally superior, even / though it is possible for everyone to become ambidextrous. The sorts of things that are just by convention and expediency / are like measures. For measures for wine and for corn are not of equal size everywhere, but in wholesale markets they are bigger, and in retail smaller. Similarly, the things that are just by human *<enactment>* and not by nature differ / from place to place, since political systems also differ. Still, only one system is by nature the best everywhere. Each *<type of>* just and lawful *<action>* is related as a universal to the corresponding particulars; for the *<particular>* actions that are done are many, but each *<type>* is one, since it is universal. An act of injustice is different from the unjust, and an act of justice from the just. For the unjust is unjust / by nature or enactment; when this has been done, it is an act of injustice, but before it is done it is only unjust. The same applies to an act of justice *<in contrast to the just>*. Here, however, the general *<type of action contrary to an act of injustice>* is more usually called a just act, and what is called an act of justice is the *<specific type of just act>* that rectifies an act of injustice. Later we must examine each of these actions, to see what sorts of species, and how many, they have, and what they / are concerned with.<sup>35</sup>

Obviously, the first such interpretive issue concerns the relationship between natural and conventional justice (*τὸ μὲν φυσικόν ἔστι τὸ δὲ νομικόν*).<sup>36</sup> But actually, this question ought to be preceded by another inquiry, namely what is, in fact, the subject of Aristotle's analysis? All commentators take it for granted that Aristotle is deliberating on actions, but in the light of his latter distinction of justice (*τὸ δίκαιον*) and the doing of justice (*δικαίωμα or δικαιοπράγμα*),<sup>37</sup> which is a reaffirmation of his introduction to the problem of agency, this is rather far from being that evident. Another issue is the apparent contradiction between the claims of variability and invariability for the domain of natural justice.<sup>38</sup> The precise role of the example of right handedness. And finally, there is Aristotle's controversial insistence on the best constitution by nature (*ἄλλὰ μία μόνον πανταχοῦ κατὰ φύσιν ἡ ἀρίστη*).<sup>39</sup>

Let us start with the preliminary question of Aristotle's subject-matter. Aristotle is expounding the meaning of political justice (*πολιτικὸν δίκαιον*), a part of which is natural, another conventional. The neutral *τὸ μὲν* and *τὸ δέ* refer to *δίκαιον*, implying that political justice has a part which is natural justice, and another which is conventional justice. The subject of his inquiry is, thus, justice as a disposition or interpersonal relation (*τὸ δίκαιον*). In this respect, Aristotle is thoroughly consistent. He only starts discussing justice and injustice in action when he introduces the problem of agency, at the very end of the chapter.

Now, throughout the fifth book of the *Nicomachean Ethics*, *τὸ δίκαιον* should be rendered as a relationship or disposition between distinct persons and with respect to some value judgment, based on which there is room for distribution or rectification, that is, based on which there exists a relationship governed by law. For justice is the outcome of a just action, something which should be aimed at by anyone possessing the virtue of justice (in action).<sup>40</sup> As such, it is fundamentally wrong to see Aristotle as deliberating on justice in action (*δικαίωμα or δικαιοπράγμα*) and to view at his examples of ransom and sacrifice in terms of normative ethics.

As early as Aquinas' commentary on Aristotle's *Nicomachean Ethics*, Aristotle is being associated with a theory of natural law operating on the basis of unchanging and rationally discernible moral precepts. Aquinas argues that even in practical matters there are some indemonstrable principles naturally known to man (*in operativis sunt quaedam principia naturaliter cognita quasi indemonstrabilia principia et propinqua his*) which applies to legal justice as well: legal justice either originates from natural justice as a conclusion from a principle (*sicut conclusio ex principiis*), or by way of a closer determination (*per modum determinationis*). And Aquinas takes the opportunity to support his reading through demonstrating that Aristotle's examples of ransom and sacrifice contain an element of invariable truth, e.g.: prisoners ought to be ransomed or that divine honours may be given, which are

<sup>35</sup> Aristoteles: *EN* 1134b18–1135a15. Bywater: op. cit. pp. 103–104. Irwin's translation. Irwin: op. cit. pp. 92–93.

<sup>36</sup> Aristoteles: *EN* 1134b18–19. Bywater: op. cit. p. 103.

<sup>37</sup> Aristoteles: *EN* 1135a8–13. Bywater: op. cit. p. 104.

<sup>38</sup> Aristoteles: *EN* 1134b19–20; 1134b29–33. Bywater: op. cit. p. 103.

<sup>39</sup> Aristoteles: *EN* 1135a5. Bywater: op. cit. p. 104.

<sup>40</sup> E.g.: Aristoteles: *EN* 1129a7–9; 1129a33–1129b1. Bywater: op. cit. pp. 88–90.

commixed with variable, positive rules that determine the particulars of the just action.<sup>41</sup> But Aristotle's ethics revolves around justice as a virtue without much concern as to moral precepts.<sup>42</sup>

This fallacy, then, has dire consequences to the second issue, the translation of the  $\mu\acute{e}v$  and  $\delta\acute{e}$  particles. Since the Greek text allows two plausible translations, namely that the natural and conventional parts of political justice are either separated from one another, or they ought to be discernible, yet without essential opposition, the text could be rendered to imply both that there are two distinct sources for law, or that there are two distinct domains which are nonetheless united in political justice. Apart from a minority view, represented by Donald Schroeder, Bernard Yack, Ross Corbet, and Jesús Vega, Aristotle's modern commentators tend to adopt some version of the latter option which is often referred to as the so-called horizontal interpretation.

According to Tony Burns, Aristotle's partition of political justice 'might be interpreted in two quite different ways' which he refers to as the 'vertical' and the 'horizontal' divisions.<sup>43</sup> In line with the former position, the rules of political justice ought to be divided into 'those laws which are entirely natural in so far as their substantive content is concerned, on the one hand, and those laws whose content is entirely legal or conventional on the other.'<sup>44</sup> Now, this is clearly untenable, for which reason Burns sides with the latter possibility in which 'each and every individual principle of political justice (or civil law) within a system of political justice is thought of as having at one and the same time, both a part which is natural and a part which is legal or conventional.'<sup>45</sup> It is some version of this interpretation which is adopted by the bulk of Aristotle's commentators, such as Fred Miller,<sup>46</sup> Jean Roberts,<sup>47</sup> Gianfrancesco Zanetti,<sup>48</sup> Marco Zingano,<sup>49</sup> Francisco Lisi,<sup>50</sup> George Duke,<sup>51</sup> Thornton Lockwood,<sup>52</sup> and Ronald Polansky.<sup>53</sup> They all argue for some more or less fixed and unchanging principles of natural justice which could inform the legislator with a view to the natural ends of the polis, or even to provide a normative criterion for the assessment of legislative decisions.<sup>54</sup>

There is, however, an obvious problem to this interpretation, namely it can hardly account for Aristotle's paradoxical statement concerning the variability and invariability of natural justice. When the distinction itself is introduced, Aristotle seems to have separated natural justice from conventional precisely by virtue of its fixed and eternal nature ( $\varphi\sigma\iota\kappa\acute{o}\nu\mu\acute{e}v\tau\acute{o}\pi\alpha\tau\acute{a}\chi\acute{o}\nu\tau\acute{h}\alpha\acute{e}\chi\acute{o}\nu\delta\acute{u}\nu\alpha\mu\acute{m}\nu$ ,  $\kappa\acute{a}\iota\mu\acute{v}\tau\acute{h}\delta\acute{o}\kappa\acute{e}\nu\eta\mu\acute{v}$ ).<sup>55</sup> Nevertheless, he was also apt to point out that all rules of justice are equally variable, the rules of natural justice being included ( $\varepsilon\pi\acute{e}\pi\acute{r}\acute{e}\acute{a}\mu\acute{m}\nu\kappa\acute{v}\eta\eta\tau\acute{a}\acute{o}\mu\acute{m}\nu\delta\acute{h}\lambda\acute{o}\nu$ ).<sup>56</sup> In order to save his reading, Burns distorts Aristotle's sentence and claims that 'natural justice might also be said to be *unchangeable*, although again only in a sense, and not in any unqualified way.'<sup>57</sup> This means that though the principles are unchangeable, their implementation to civil law may be subject to variance, and so, they are, after all, changeable in a sense.<sup>58</sup>

Since Burn's solution is in open disregard of Aristotle's text, I cannot find any merit in his interpretation. Neither do Aristotle's more cautious readers who tend to elaborate on the cultural

<sup>41</sup> Thomas de Aquino: *Sententia libri Ethicorum*. Liber V, lect. 12.

<sup>42</sup> Yack: op. cit. p. 233.

<sup>43</sup> Burns: op. cit. pp. 48–49.

<sup>44</sup> Ibid. p. 49.

<sup>45</sup> Ibid.

<sup>46</sup> Fred D. Miller Jr.: *Aristotle's Philosophy of Law*. p. 98. In Fred D. Miller Jr. – Carrie-Ann Biondi (eds.): *A Treatise of Legal Philosophy and General Jurisprudence. Volume 6: A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*. Springer, New York, 2015. pp. 79–110.

<sup>47</sup> Jean Roberts: *Justice and the polis*. p. 349. In Christopher Rowe – Malcolm Schofield (eds.): *The Cambridge History of Greek and Roman Political Thought*. Cambridge University Press, Cambridge, 2005. pp. 344–365.

<sup>48</sup> Zanetti: op. cit. pp. 50–51.

<sup>49</sup> Zingano: op. cit. p. 214.

<sup>50</sup> Lisi: op. cit. p. 143.

<sup>51</sup> Duke: op. cit. pp. 7–8.

<sup>52</sup> Lockwood (2005): op. cit. pp. 34–35.

<sup>53</sup> Polansky: op. cit. pp. 170–171.

<sup>54</sup> E.g.: Miller (1991): op. cit. p. 296; Zanetti: op. cit. p. 54; Duke: op. cit. pp. 2–3.

<sup>55</sup> Aristoteles: *EN* 1134b19–20. Bywater: op. cit. p. 103.

<sup>56</sup> Aristoteles: *EN* 1134b32–33. Bywater: op. cit. p. 103.

<sup>57</sup> Burns: op. cit. p. 59.

<sup>58</sup> Ibid. p. 57.

subjectivity of social norms and the variety of constitutions<sup>59</sup> or on the ontological and epistemologically adjusted sense of nature<sup>60</sup> in offering their solutions to Aristotle's paradox.

Quite close to this majority view is Bernard Yack's idea who emphasises the 'intrinsic merits of particular actions' and proposes a somewhat dialectical approach in finding 'those judgements that are correct and correspond somehow to the nature of things'.<sup>61</sup> His response to the query is, however, far from a metaphysical misconstruction of Aristotle; rather, it is a more or less cogent attempt to rationalise Aristotle in terms of the 'manner' of individual actions.<sup>62</sup> A less coherent attempt of this sort recurs in Ross Corbett's analysis who, on the other hand, argues for the intrinsic moral qualities of certain actions which position is,<sup>63</sup> I believe, inconsistent with the methodological premises of Aristotle's ethics.

Finally, Jesús Vega utterly denies the possibility of understanding Aristotle's account as a reference to principles of any kind.<sup>64</sup> He challenges Aquinas' reading and labours to show the artificial nature of Aristotle's sense of law. In his opinion, natural justice is a sort of ante-political moral order which informs the positive rules, still they are '*normatively* relevant to law only when *incorporated* by law'.<sup>65</sup> Nevertheless, he concludes that natural justice 'is then about the universal *in the law*', which he equals with 'the basic axioms of a true philosophy of law'.<sup>66</sup> In effect, this conclusion is shared by Donald Schroeder as well, who nonetheless somewhat evades the question, as it is only accidentally related to his inquiry. He maintains, however, that in Aristotle's system no law can exist by nature, and that natural justice is to highlight the 'moral functions' of law.<sup>67</sup>

I think, there are elements of truth in the latter, minority views, yet they cannot provide any plausible answer to the initial query. But such an answer is, I believe, readily at hand in Aristotle's discussion.

Given Aristotle's statement is explicating the opposition between natural and conventional justice, the one being invariable and existing irrespective of our understanding of it, the other being conventional and posited, the Greek text should be rendered as separative, that is the domains of natural and conventional justice are mutually exclusive. Yet, contrary to the thesis of a vertical division, it does not imply that there exists any hierarchy between these two. It does follow, however, that there are two distinct sources for law. Political justice is intrinsically associated with law; hence, both of its parts cannot but be linked to legal formulation. Still, the source of authority may be mere convention, or nature itself. Aristotle is speaking of φύσει δίκαιον in which the instrumental-dative denotes the cause of association.<sup>68</sup> That is to say that the rules belonging to natural justice have their source of origin in nature. And Aristotle does explain his meaning when he points out that justice is of two sorts, the lawful on the one hand, and the equal on the other hand.<sup>69</sup> It follows, then, that the domain of φύσει δίκαιον is characterised by equality, a proportion which does not change and does not depend on our understanding. Nevertheless, equality is not unqualified but being dependent on judgements of worth which results in the establishment of different constitutions with different criteria of equality.<sup>70</sup> And so, it is, in some way, subject to variance.

But there are two additional questions that may challenge my reading, namely the argumentative position of right handedness and Aristotle's reference to the best constitution.

The problem of right handedness is treated in elaborate details by Fred Miller who proposes a theory of normative nature, encompassing that which is normal or regular in the natural world.<sup>71</sup> Such a

<sup>59</sup> Roberts: op. cit. pp. 352–353, 360–361; Zanetti: op. cit. pp. 52–54; Lisi: op. cit. pp. 147–148; Polansky: op. cit. pp. 171–172.

<sup>60</sup> Miller (1991): op. cit. pp. 289–298; Lockwood (2005): op. cit. pp. 34–35.

<sup>61</sup> Yack: op. cit. p. 216.

<sup>62</sup> Ibid. p. 233.

<sup>63</sup> Corbett: op. cit. pp. 234–237.

<sup>64</sup> Vega: op. cit. pp. 10–21.

<sup>65</sup> Ibid. pp. 23–25.

<sup>66</sup> Ibid. p. 28.

<sup>67</sup> Schroeder: op. cit. pp. 25–28.

<sup>68</sup> Ibid. p. 24.

<sup>69</sup> Aristoteles: *EN* 1129a33–1129b1. Bywater: op. cit. pp. 89–90.

<sup>70</sup> Aristoteles: *EN* 1131a25–29. Bywater: op. cit. p. 94.

<sup>71</sup> Miller (1991): op. cit. pp. 289–292.

reading is closely related to the *Magna Moralia*'s exposition,<sup>72</sup> yet it could also be entertained irrespective of it. It could show that the principles of natural justice are capable of admitting variance, but it could also show that like right handedness, the domain of natural justice is variable. Since, the problem of right handedness is introduced by καὶ ἐπὶ τῶν ἄλλων ὁ αὐτὸς ἀρμόσει διορισμός,<sup>73</sup> I think it is more plausible to assume that right handedness serves as an example for variance, but not an example for natural justice or normative nature.

Finally, great stress has been laid on Aristotle's controversial insistence on the best constitution. The Greek text itself (ἐπεὶ οὐδ' αἱ πολιτεῖαι, ἀλλὰ μία μόνον πανταχοῦ κατὰ φύσιν ἡ ἀρίστη) allows two translations: Aristotle could either mean that there is one constitution which is by nature best everywhere, or that everywhere there is one constitution which is best by nature. Most commentators side with the first option,<sup>74</sup> which sets the stage for a normative comparison of constitutions by virtue of their intrinsic merits.<sup>75</sup> This majority view is challenged only by Ronald Polansky, who argues for the existence of 'one universal standard of the just',<sup>76</sup> and John Mulhern, who offers a rather compelling interpretation to Aristotle's use of πανταχοῦ.

According to Mulhern, Aristotle's employment of πανταχοῦ betrays that he could not possibly mean 'one and the same' because, in line with the other occurrences in the chapter, Aristotle 'should not have availed himself of the idiom μία καὶ ἡ αὐτή or something else of the kind'.<sup>77</sup> Moreover, Mulhern is apt to note that Aristotle fails to designate the best form of constitution in the *Politics*; rather, he is talking about natural and unnatural forms,<sup>78</sup> implying that different people may be suited with different laws. Hence, Mulhern's interpretation escapes the fallacious metaphysical reading of one best constitution, serving as the normative criterion for validity, as it makes room for a variety of constitutions and a variability of natural justice.<sup>79</sup>

### Conclusion

After having dully investigated the crucial chapters, chapter six and seven of the *Nicomachean Ethics*, I think it can be settled with confidence that Aristotle's analysis of political justice is an elaboration on justice *simpliciter*, and so it is unrelated to his prior treatment of special justice in distribution or rectification. Political justice is, then, that variety of justice which belongs only to those who are equal and whose relations are naturally governed by law; hence, all considerations of political justice cannot but be dependent on law itself. And it is this premise on which any sound analysis of Aristotle's potential contribution to the doctrine of natural law, that is, his ambiguous division of natural and conventional justice, may be established.

Based on a thorough overview of the interpretive traditions, I have identified two obstacles, capable of frustrating our understanding of Aristotle. The first such obstacle is the delineation of Aristotle's subject-matter, namely, what is political justice concerned with? And secondly, how may Aristotle's distinction of variable custom and invariable nature may be reconciled with? Since I could not endorse and subscribe to any established interpretive traditions due to the varying degree of their immanent inconsistencies or methodological fallacies, I have proposed a novel reading but in alignment with the traditional patterns. As such, I have argued that the subject-matter of chapter seven is political justice as a disposition or interpersonal relation which is regulated by law and having its authority derived either from legislative enactment or natural equality. And so, Aristotle's distinction of natural and conventional justice is far from being a horizontal division; rather, it is a separative division of two opposite sources for legal authority. This means that those relationships in which political justice may be rationalised are either established through legal enactment, like the settling of ransom or rules of

<sup>72</sup> Aristoteles: *Magna moralia*. I.33.

<sup>73</sup> Aristoteles: *EN* 1134b33. Bywater: op. cit. p. 103.

<sup>74</sup> Corbett: op. cit. pp. 238–240; Lisi: op. cit. pp. 142–144; Miller (1991): op. cit. p. 288; Zanetti: op. cit. pp. 51–54; Zingano: op. cit. pp. 213–214.

<sup>75</sup> Lisi: op. cit. p. 144; Miller (1991): op. cit. p. 288; Zanetti: op. cit. p. 54.

<sup>76</sup> Polansky: op. cit. pp. 171–172.

<sup>77</sup> John J. Mulhern: *MIA MONON ΠΑΝΤΑΧΟΥ ΚΑΤΑ ΦΥΣΙΝ Η ΑΡΙΣΤΗ (EN 1135 a 5)*. p. 262. In *Phronesis*, Vol. 17, No. 3, 1972. pp. 260–268.

<sup>78</sup> Aristoteles: *Politica* 1287a8–16, 1287b37–40.

<sup>79</sup> Mulhern: op. cit. pp. 267–268.

sacrifice, or they are stemming from natural equality, combined with a peculiar understanding of worth, attending on the principle of equality. Aristotle does not provide any examples of this latter sort, but the classification of different constitutions could serve as such an example.<sup>80</sup>

Finally, as to Aristotle's potential contribution to the doctrine of natural law, I think it can be settled that based on the *Nicomachean Ethics* there is no recognisable natural law position with which Aristotle may reasonably be associated. The natural justice of the *Ethics* does serve as a source for law but only in terms of authority, without any implications to moral validity. What is more, natural justice does not have the force of law, unless it is posited and being accepted by a given political community.

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<sup>80</sup> Aristoteles: *EN* 1131a24–29. Bywater: op. cit. p. 94.

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