

This year, late Professor Gyula Eörsi (1922-1992), member of the Hungarian Academy of Sciences, editor-in-chief of this periodical for decades, would be eighty years old. The editorial board of Acta Juridica Hungarica, his friends, disciples and colleagues pay their tribute to the memory of the editor-in-chief and the professor with the following essays.

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Hungarian Civil Law since 1990

Abstract. The paper outlines some trends in the development of Hungarian civil law since the political changes. The role of certain social factors having an effect on civil law and trends in court practice are focused upon. In the law of torts the decline of the respect of the State seems to have an importance in recent changes. In the field of contract law problems connected with different kinds of risks are reflected. Both property law and contract law have been concerned in cases where principles of the protection of the owner and those of the protection of bona fide purchaser has been in contradiction. As a result of the growing importance of credit the role of secured transactions has increased.

Keywords: social changes and civil law, torts, contracts, property law, secured transactions

1. The topic of the essay wishes to establish a link with that of one of Gyula Eörsi's works ("On the law of the change-over to a new system of economic management" *A gazdaságirányítás új rendszerére áttérés jogáról*). This has not really been the only one of his works dealing with the legal solutions of a new era. Ever since the 1930's, Hungarian lawyers faced the question of legal transition appropriate for a new stage of history in short periods of time. It is thus understandable that in several works by Gyula Eörsi the analysis of the legal consequences of changes takes center stage. This essay to be published in the volume in honour of Gyula Eörsi corresponds also with its choice of topic to the goals of preparing such a collection. I consider the analysis of the topic for other reasons as well. The time that has elapsed since the collapse of the Communist system is not long, the first period of transition had nevertheless passed, a new phase has begun. The tendencies of the new paths of legal development should be analysed to prepare the ground for future steps. A short essay is naturally nothing else but one of the contributions necessary for completing the great work.

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2. As an introduction, may I first of all make a remark of a personal nature. I had been in contact with Gyula Eörsi since 1957. I listened to his lectures at the university, took part in his seminars and I considered it a great honour that without regard to the difference of the level of knowledge between the two of us, he seriously considered my attempts at presenting views differing from his own. Our contact did not come to an end when I was not allowed to get a job in a legal field after the university. Later, it was by his intervention that I found a position at the Institute for Legal Studies of the Hungarian Academy of Sciences and I had been working for two decades under his guidance. He created possibilities for me to work, to learn, to appear in international scholarly circles. I was, however, maybe most grateful because he did not wish to influence me, but allowed me to follow my own path. He provided me with complete independence in research, organisation of research and library-building (the foundations of later work). I wished to learn a lot from him, but maybe first of all his style of leadership allowing for freedom of scientific research. During our long-lasting relationship the opportunity sometimes arose to express my thanks in public. The same is now expressed by this writing to be included in the volume to be published in his honour.

3. Political factors played a decisive role in the transformation of civil law during and following the time of the change of political system; the essay does not, however, deal with these, as their effect may be regarded as well-known. The basic topic of the present work is the effect on law of changes in society and the economy.

In the recent years there has been a growing interest towards developments taking place in the countries of the previous Communist Bloc. From all the conclusions of the many studies concluded in this area, here and now I only wish to point out that the role of sociological and political factors is more and more recognised, what is more, there is even a view which regards these as more important regarding the process of transformation than economic ones.¹ A considerably influential school of economics highlights that, also from the viewpoint of the transformation process, basic institutions defining the framework, the rules of the process (e.g. property law, contract law) play a decisive role. These institutions change only slowly, as they

¹ Furubotn, E. G.: Legal reforms in Russia: visible steps, obvious gaps and the invisible hand? Comment. *Journal of Institutional and Theoretical Economics*, 2000. 120.

are tied to human consciousness, and consciousness changes only over a longer period of time.²

In the following I shall not deal with those areas of civil law, the basic rules of which are in direct connection with the changes of the political system, as these may be regarded as well-known. Thus, basic rules of privatisation, the freedom of enterprise, rules on entrepreneurship and company law, moreover the rules of competition law which are unavoidable in today's market economy form a basic ingredient in the transformation of civil law. The creation of the rules pertaining to these areas brought about a spectacular change, the formation of new fields of law. Their spreading indirect effect, the role they play in the transformation of civil law thinking is only fulfilled in correlation with other factors, in connection with the changes of society and the economy.

The present essay also does not include analysis of rules of law included in Acts of Parliament or other statutes. I have been driven by the endeavour to try to present phenomena observed in court practice, as opposed to the general approach which tends to concentrate too much on statutory law.

4. The scientific approach stressing the importance of institutions and social development stands in opposition to the neo-classical economic theories, almost dominant in the 1980's, which regarded the market mechanism as playing the definitive role, wished to minimise the role of the state and disregarded social and cultural factors. The other school (the role of which may also be observed in the activity of the World Bank), gaining more and more ground since the end of the 1980's against neo-classical economic theory concentrates on social transformation and analyses also the factors of policy and state institutions significantly influencing social transformation.³

The above-mentioned factors seem distant as regards the institutions of civil law and their analysis is often disregarded in discussing changes of civil law. Studies of the transition process analysing the issue from several, non-legal points of view do, however, regard the transformation of the system of institutions including those governed by civil law as well as their social

² North, D. C.: Big-Bang Transformation of Economic Systems: An Introductory Note. *Journal of Institutional and Theoretical Economics*, 2000. 5–7.

³ Castles, S.: Studying Social Transformation. *International Political Science Review*, 2001. 17–19.

effect as having fundamental importance.⁴ Thus, the endeavour at the basis of the present essay to analyse the changes of certain fundamental social institutions in connection with social and economic factors is in line with the view of several authors. Here, the stress is placed on changes occurring in a relatively shorter span of time, and a mention of processes lasting several decades is only made insofar as this is necessary for understanding the developments of the past ten years.⁵

5. In Hungary the consequences of the demographic situation must be taken into account in bringing about decisions of legal policy, also in the area of civil law. Highlighting two phenomena seems to be necessary in this context.

One of the factors to be considered is the decrease of the population of the country, which had to be counted upon since the beginning of the 1950's. Policy decisions born in 1953, 1968, 1973 and 1984 to counter the danger brought, however, only short-lasting, temporary results. The economic problems appearing and later strengthening already before the political transition period nullified even the temporary effects of these population policy measures. The situation turned critical in the 1990's.⁶ What we are really dealing with here are the consequences of a negative trend in effect—with short lapses—for a longer period of time. The current situation is represented by the following data:

The rate of live births per 1000 population in 1930–1931 numbered 34.6 a year, in 1959–1960 14.9 a year, in 1989–1990 12.0 a year and in 1999 only 9.4 a year.⁷ This is coupled with the increase in the death rate which may be observed since the end of the 1960's. The rate had been per 1000 population

⁴ Tian, G.: A Theory of Ownership Arrangements and Smooth Transition to a Free Market Economy. *Journal of Institutional and Theoretical Economics*, 2001. 381, 383.; Blommestein, H.—Marrese, M.—Zecchini, S.: Centrally Planned Economies in Transition, in: *Transformation of Planned Economies* (ed.: H. Blommestein—M. Marrese), Paris, 1991. 12–13.

⁵ Changes within a longer span of time were analysed in: Harmathy, A.: A polgári jog a századfordulón. *Jogtudományi Közlöny*, 2000/4, 117–125.

⁶ Miltényi, K.: Népesedéspolitika (Policy of demographic). In: *Demográfia*. (Ed.: Kovacsicsné Nagy Katalin), Budapest 1996, 477–479., Vukovich, Gy.: A magyar népesedéspolitika néhány vonatkozása (Some relations of Hungarian Policy of demographic). In: *Magyarország történeti demográfiája (1896–1995) [The historical demography of Hungary (1896–1995)]*. (Ed.: Kovacsics, J.), Budapest, 1997. 395.

⁷ Központi Statisztikai Hivatal, *Demográfiai évkönyv 1999. (Hungarian Demographic Yearbook 1999)*, 84.

in 1930–1931 16.1 a year, decreasing to 10.3 a year by 1959–1960, then rising to a level of 14.0 by 1989–1990, the rate for 1999 having been 14.2.⁸ The decrease in the number of births, the growing number of deaths resulted—as opposed to previous slow growth—in a decrease of 300,000 in the country’s population between 1980–1989; the decrease in population in one year had been 19,981 in 1990 and already 48,565 in 1999.⁹ Available data show a decrease in the rate of population loss for 2000 and 2001.¹⁰

The second factor to be considered is the negative change in the proportion of age groups within the population. In comparison with the whole of the population, the proportion of people between ages of 40–60 was 20.1% in 1930, 25.3% in 1980 and 27.9% in 2000; the proportion of those above 60 was 9.8% in 1930, 17.1% in 1980 and 19.7% in 2000.¹¹ Before the transition the majority of men above 60 and women above 55 were employed, however, already by 1989 a significant change has taken place. Comparative data of 151 countries show Hungary to be in one of the most unfavourable positions. The proportion of economically active persons to the whole of the population had been 44.4% in 1949, dropping to 36% by 1994.¹² Inactive persons per 100 economically active persons in gainful employment numbered 107 in 1975, 119 in 1988 and 174 in 1994.¹³

6. The decrease in population shall have a considerable long-term effect even if population policy and family protection measures will be able to reverse this unfavourable development, even if a favourable change occurs. The death rate deserves a special attention in this regard.

The growing rate of accidents among the causes of death is once again not in connection with the changes of the past ten years, although the economic-social system does have a secondary effect alongside technological development. Between 1930 and 1949 no significant change occurred in the rate of those dying as a result of accidents, the rate being 2–2.5% of all deaths. In the following period, however, the number of accidents grew fast and continuously. In 1989–1990 accidents represented 5.9% of all

⁸ Hungarian Demographic Yearbook 1999. *op. cit.* 156.

⁹ Hungarian Demographic Yearbook 1999. *op. cit.* 2.

¹⁰ A KSH jelenti (*Reports of the Central Statistics Bureau*) 2001/9. 43–44, 88.

¹¹ Hungarian Demographic Yearbook 1999. *op. cit.* 8–9.

¹² Miltényi, K.: A demográfia egyes gazdasági és társadalmi összefüggései. In: *Demográfia. op. cit.* 533.

¹³ Katona, T.: Magyarország társadalmi és gazdasági fejlődése. In: *Magyarország történeti demográfiája. op. cit.* 276.

causes of death. Later the number of accidents has dropped and in 1998 and 1999 the rate of fatal accidents to all causes of death represented 4.7% and 4.6%, respectively. Of all accidents resulting in death, traffic accidents represented around 25% according to relevant data for 1999.¹⁴ Thus, although the significance of accidents is not to be neglected, more than 95% of all deaths occur from other reasons. Thus, in the majority of cases, living conditions and the health-care situation have a prevailing significance. In this area we are once again confronted with a phenomenon developing and having effect for decades. Economic historians have stressed as far back as the 1970's that—partly in connection with the backwardness of social policy—the state has volunteered to provide such benefits in the form of full health care free and accessible for all which were well above all financial means. This step had a damaging effect on the quality of these services and resulted in other areas of tension.¹⁵

7. The Hungarian situation described above causes grave problems in general, but its effect may also be felt in the area of civil law as well. This is shown by a recent discussion of the topic by Atiyah, which argues that in several European states, an explosion of the demographic bomb may be expected within the relatively near future, as the expenses of the welfare state, including those to be covered within the framework of compensation for damages, will not be able to be covered by the decreasing number of persons in gainful employment. According to the highly regarded author, who has dealt with questions of liability for damages for decades, the state effort for the protection of individuals resulted in a great extension of the sphere of application of compensation for damages, in particular with the spread of insurance for traffic accidents—especially as regards personal injuries. Presently, however, welfare expenditures should be decreased as a result of the decrease of population, and liability for damages should also, as a consequence, be relieved.¹⁶

¹⁴ Demográfiai évkönyv 1999. (Hungarian Demographic Yearbook 1999), op. cit. 242.

¹⁵ Berend, T.—Ránki, Gy.: A magyar gazdaság száz éve (100 years of Hungarian economy). Budapest, 1972. 315.

¹⁶ Atiyah, P. S.: Personal Injuries in the Twenty-First Century: Thinking the Unthinkable. In: Wrongs and Remedies in the Twenty-First Century (ed.: Peter Birks). Clarendon Press, Oxford, 1996. 7–8.

Hungarian analyses of legal policy should also take into account the financial capacities of society and the connections with the social security system in the formation of civil law institutions. In this context especially the trend of the continuous expansion of liability for damages requires analysis. Liability for damages is connected with a lot of factors and in this complicated system in which, among other things, social consciousness and public opinion play a great role, a place for the risk distributed to individual actors of economic life and the financial capacity of the society should also be found. (The requirement, generally accepted by now, that the regulation of liability for damages should be examined in connection with the system of insurance is well highlighted by the recently published study describing and analysing the Scandinavian system, by Jan Hellner, the highly respected expert of the field.¹⁷)

8. The effect of different factors arising in the sphere of liability for damages are also shown by the officially published court decisions of the last ten years. The fact that such decisions were published does not automatically mean that similar cases arise in great numbers in court practice. However, the fact that the Supreme Court considered it justified to publish a given decision does signal the significance of the issue. Conclusions regarding new phenomena may thus be drawn from these decisions.

It may be pointed out as one of the new trends in tort cases that the practice of an expansion of liability for damages, which may be regarded as prevailing in the 20th century in general, has been continued in Hungary, arriving to ever newer fields. In referring to the existence of certain phenomena, I regard efforts at their introduction as decisive, and not whether or not the court has in fact extended the application of liability for damages (this should be ascertained in further analyses).

Of claims for damages appearing previously only in rare instances or not at all, the following are especially spectacular:

— Claims for damages caused in relation to medical activity arise more frequently. In these cases doctors—in consequence of their role played in the given relationship—command respect and are, in reality, not on an

¹⁷ Hellner, J.: Compensation for Personal Injuries in Sweden—A Reconsidered View. *Scandinavian Studies in Law*, vol. 41, 2001. 249–277.; on the system of liability regulation alongside a partial insurance of liability for damages in general see Honoré, T.: The Morality of Tort Law. In: *Philosophical Foundations of Tort Law* (ed.: D. Owen), Oxford, 1995. 73–95.

equal footing with the patient, the damaged party. Here, making claims in court signals a change in the social perception of the doctor—patient relationship as well as the previously mentioned unfavourable development in the situation of health-care services, besides raising specific issues of liability insurance. Decisions brought in such cases appear in much larger numbers than in the previous era.¹⁸

— Claims for damages caused by courts had previously been rare exceptions, but may be found surprisingly often since 1990.¹⁹ This fact requires examination from several points of view (which is not, however, the purpose of this essay).

— Previously no claims for damages caused by legislation appeared, following 1990, however, decisions on such claims have repeatedly been published.²⁰

9. When discussing in the present paper selected trends one may often draw conclusions as to the joint effect of several factors and it is not clear which of these is of greater importance. The above grouping is thus only of a relative value, it only serves to highlight different factors. Thus in the previous trend, as regards claims for damages caused by courts and legislation, an element of a political nature may well be presumed to exist. The process of political transformation went hand in hand with the downgrading of the role of the state and besides that, the previously also existing but less expressed emotional basis of opposition to the state has surfaced. The more frequent appearance of claims for damages caused by administrative actions may also be a sign of this trend.

Several types of damages caused by administrative actions may be found among the officially published cases. Actions against the police, the organs of law enforcement, the tax authority and the customs office are to be mentioned on the first place.²¹ Questions of liability caused by official

¹⁸ Bírósági Határozatok (*Supreme Court Decisions*) (hereinafter referred to as B. H.) cases no. 1992/5. 317., 1995/6. 344., 1998/2. 78., 1998/ 380., 1998/12. 585., 1999/11. 501., 2000/8. 347., 2000/12. 536.

¹⁹ B. H. cases no. 1992/1. 60., 1992/2. 103., 1995/7. 403., 1996/2. 91., 2000/2. 55.

²⁰ B. H. cases no. 1994/1. 31., 1994/6. 312., 1998/7. 334.

²¹ B. H. cases no. 1996/6. 312., 1998/5. 224. 1998/10. 484., 1999/5. 207., 1999/8. 359., 1999/9. 403., 2001/7. 319.

actions also appear in housing, registration and social security affairs and in connection with public road maintenance.²²

10. Following the transition process, the tendency of placing questions of personal rights in the focus of attention has strengthened. In actions started for an infringement of personal rights rulings on awarding damages for non-pecuniary losses often appeared. A lot of problems await analysis and solution in these two topics. Here we just point out the existence of the phenomenon together with stating that an extension of liability for damages may be observed also in this respect.

11. A different group of cases involving claims for damages may be brought into connection with the build-up of the market economy. I wish to emphasize the following cases of such character (not bearing their relative frequency in mind):

— The borders of the freedom of economic activity are defined, among other things, by the law of torts. In this field the sanctioning of illegal conduct towards market competitors with an obligation to pay damages is especially significant. The first appearance of the question may be found in cases published within the last ten years. Similarly, damages awarded for the infringement of tender rules for privatisation sales are also meant to ensure an adequate functioning of the market.²³

— The fact that claims for damages have been asserted against receivers in liquidation stands in connection with the effect of the market economy.²⁴

— Cases similar to those involving receivers include claims asserted in connection with the negligence of bailiffs, the land registry and the activity of public notaries.²⁵

12. In a large part of the listed tort cases of varying subject matter, the previously not mentioned feature that the decision on liability has to be brought in connection with some professional activity may also be observed.

²² B. H. cases no. 1991/5. 209., 1992/1. 57., 1993/11. 677., 1993/11. 679., 1996/12. 638.

²³ B. H. case no. 1998/9. 442 and case no. 1997/5. 246.

²⁴ B. H. cases no. 1995/11. 663., 1996/12., 654., 2000/1. 25., 2000/9. 417., 2001/10. 488.

²⁵ B. H. case no. 1998/6. 285., cases no. 1996/11. 587., 1997/5. 224. 1998/3. 131., 1999/1. 25., and case no. 2001/9. 423.

This is understandable, as economic data show an increase in the importance of services.²⁶ A significant circumstance regarding a decision on liability is the fact that the conduct causing the damage is a professional activity, in which case the ruling depends on an evaluation (of a hidden or open legal policy nature) of the requirements of the given profession and the distribution of risk on a case-by-case basis. This element should also be taken into account when re-evaluating the basis of liability for damages.

13. A social change influencing the whole of civil law to a significant extent has taken place after 1948. In order to picture this well-known process it is enough to refer to certain data published already in 1972 by analysts of economic history: as a consequence of agricultural policy, more than 600,000 people left the agricultural sector, the number of townspeople and city-dwellers has grown by about 1 million, to which around 350,000 commuters should be added; as a result of measures against middle-class citizens, around 400,000 people have lost their previous positions.²⁷ One of the consequences has been a great social mobility,²⁸ another one being an acute shortage of housing, described at the end of the 1960's as one of the "most neuralgic areas of tension" of social life.²⁹

Great social movement has again occurred following the transition process. State-owned companies have practically ceased to exist, cooperative membership numbers have gone into a steep decline, the number of private companies has multiplied in a quantum leap.³⁰ Of all enterprises, individual enterprises accounted for 58%, limited partnerships for 20% and limited liability companies for 17% according to data for the year 2000.³¹

²⁶ While the rate of those employed in the services sector was 44.9% in 1989, this number had grown to 59.7% by 1997. see *INFO-Társadalomtudomány* 43. Budapest, 1998. 85.

²⁷ Berend—Ránki: *op. cit.* 290, 308, 312–313.

²⁸ Ferge, Zs.: *Társadalmunk rétegződése (About our social strata)*. Budapest, 1973. 298.

²⁹ Szelényi, I.—Konrád, Gy.: *Az új lakótelepek szociológiai problémái (The sociological problems of the new housing estates)*. Budapest, 1969. 140.

³⁰ *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 1990*. Budapest, 1991. 192., *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 1997*. Budapest, 1998. 30, 120., *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 2000*. Budapest, 2001. 162.

³¹ *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 2000. op. cit.* 162.

Following 1990 the situation wherein the numbers of inhabitants in Budapest and certain industrially developed cities had grown year by year has changed, and population has slowly started to decrease in these areas, while starting to grow in villages.³² The distribution of agricultural production according to types of business entities has significantly changed: while in 1990 individual farmers cultivated 14% of the land, by 2000 this number has reached 42.8%, with companies taking up another 27.5%; as opposed to this, cooperatives cultivated 59.9% of arable land in 1990, while only 13.2% in 2000.³³ All this has a significant effect on legal issues of real estate ownership and the lease of the land.

Turning from owners and individual businessmen into employees in the years after 1948 and then from employees into entrepreneurs after 1990 went together with changes that resulted in, among other things, the loss of traditional social values. After the loss of the previous attitude of awareness of risk, the sudden confrontation with risks in a business environment characterised by high inflation³⁴ and a high unemployment rate³⁵ meant a great shock.

The above-mentioned factors had several social, economic and political consequences. In the following, I shall emphasise certain civil law consequences.

14. A large-scale housing scheme had been implemented as early as 1957 to counter the housing problems. In 1960 a house-building programme spanning 15 years was prepared, the objectives of which were not successfully achieved and by 1980 the rate of state-owned flats has dropped (from 27%

³² *Demográfiai évkönyv 1999. (Hungarian Demographic Yearbook) 1999. op. cit.* 308.

³³ *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 1990. op. cit.* 130., *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 2000. op. cit.* 230.

³⁴ The rate of increase in the price of consumer goods is shown by the fact that by the end of 1996 the level of prices was four times as high as in 1990, and within this period prices have nearly doubled between the beginning of 1994 and the end of 1996, see Magyar Nemzeti Bank: *Havi Jelentés (Monthly Report of the Hungarian National Bank), 2000. no. 12., 55.*

³⁵ The number of registered unemployed in 1993 was more than 632,000, slowly dropping afterwards, but remaining as high as 464,000 in 1997, see *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 1997. op. cit.* 37.

in 1970 to 25.6% in 1980).³⁶ A part of the housing problems was also represented by the facts that, first, satisfactory funds could not be attributed to maintenance, which had become a state activity due to the nationalisation of apartment buildings in cities, the task was not adequately dealt with (around 56,000 flats in Budapest were registered as being in a perilous condition already by the early 1980's), second, that the question of rent was regarded as a political issue.³⁷

The housing situation remained unsolved by the time of political changes. In the course of privatisation, housing estates previously owned by the state and administered by housing management companies founded by local councils were handed over to the municipalities with Act XXXIII of 1991. Act LXXVIII of 1993 later regulated the appropriate legal framework for housing management in a market environment and the sale of flats owned by municipalities. These measures naturally did not relieve the housing shortage which has been causing serious problems for decades. Home-building has steeply declined in general, while the sale of flats owned by municipalities has taken a quantum leap in 1994–1995.³⁸ A fitting picture of the quality of flats remaining the property of municipalities may be given by the following selected data:

In 1997, 43.6% of all flats owned by municipalities belonged to the category of single room flats, temporary accommodation or similar living space; 25.2% of all housing estates (33.9% in Budapest) had been built before 1900, the rate of those built between 1970–1989 being 18.3%, of those built after 1989 being 1.2%; of all housing estates, only 34.2% required no intervention, the rest required renewal or were not even economically renewable (the rate of unrenovable flats is 8.6%).³⁹

When evaluating the housing situation, the fact that the differences in wealth of different classes of society have significantly grown should also

³⁶ Barta, B.—Vukovics, Gy.: A lakáshelyzet alakulása és jellemzői (The development and characteristics of the housing situation). In: *Lakáspolitikánkról (About our housing policy)*. (Ed.: Böröczfy, F.). Budapest, 1983. 205, 214, 216.

³⁷ Sándor, P.: A lakásvagyon védelmében, and Dávid, G. J.: Lakáskérdés: piac és normák (Housing problem: market and norms). In: *Lakáspolitikánkról. op. cit.* 223 and 304.

³⁸ *Magyar Statisztikai Zsebkönyv (Pocket-Book of Hungarian Statistics) 1997, op. cit.* 50–51.

³⁹ Központi Statisztikai Hivatal: *Az önkormányzatok ingatlanvagyonja, 1997.* (Central Statistics Bureau: *The real estate property of municipalities, 1997*). Budapest, 1997. 14, 30–31.

be taken into account. In the 1980's the rate of those living below poverty level was around 10%, in 1995 this rate was already estimated at 30–35%. The difference between the lowest and highest income brackets has also grown: from 5.8 a year in 1987 to 7.0 in 1994. To this it should be added that fees for public utilities, kept on an artificially low level until the end of the 1980's, have also significantly risen. In the 1980's expenditures related to housing took up 10–12% of average income, in 1997 this rate was already estimated at 25–30% (this could mean as much as 45% for those with low income). Thus only a relatively small portion of society has been in the position to build new homes, as support for housing in the form of credit has also dropped, the real value of housing loans in 1995 having been only 15% of the value in 1990.⁴⁰

The above-mentioned phenomena did not only result in significant changes in the law of lease of flat contracts. They have had a direct effect on the legal rules pertaining to owner-occupied blocks and the problems arising in their application. A further, indirect effect—through the medium of hardships of execution—may also be felt in the law of contracts and the fulfillment of contractual obligations.

15. The crisis of values generally accepted in society is shown by the rising crime rate. Statistical data show a continuous rise in the number of highest registered criminal offences starting with the 1980's. At the end of the 1980's the number of criminal offences has taken a quantum leap. The numbers are found in data for 1998. Crimes against property represent the largest portion (their rate of all crimes committed was around 60% until 1987, ranging between 70% and 80% in the following years, the rate being 69% according to data for the year 2001).⁴¹ Among crimes against property, theft (larceny) appears at a rate several times that of any other offence (72.4%).⁴²

⁴⁰ Hegedűs, J.: A magyar lakásszektor piaci átalakulásának ellentmondásos folyamata (The contradictory process of the market transformation of the Hungarian housing sector). *INFO-Társadalomtudomány* 43. op, cit. 52–54.

⁴¹ A KSH jelenti (Reports of the Central Statistics Bureau) 2001/10. 23–25.; Igazságügyi Minisztérium: A bűnözés és jogkövetkezmenyei (Ministry of Justice: Crime and legal consequences), 10. *A vagyron elleni bűncselekmények miatt elítélt fiatalok 1991–2000*. Budapest, 2001. 1–2.

⁴² Igazságügyi Minisztérium: A bűnözés és jogkövetkezmenyei (Ministry of Justice: Crime and legal consequences), 12. *A vagyron elleni bűncselekmények elkövetése miatt elítélt felnőttek 1991–2000*. Budapest, 2001. 4.

The fact that in court practice the interpretation of the rule governing acquisition of property from non-owners has caused problems may be evaluated as one of the civil law consequences of crimes against property becoming more frequent. The Supreme Court has committed itself in several consecutive published decisions for a restrictive interpretation of the rule allowing for acquisition of property from non-owners in transactions with merchants.⁴³ Beside a restrictive interpretation, the question arises whether the court practice will be able to find a solution for making claims against merchants, who do not themselves formally sell cars later proved to be stolen, merely allow somebody to sell the car on their premises, but do not appear as sellers in the contract of sale. The good-faith buyer does not acquire property in this case (therefore the victim of the crime, the owner is protected as opposed to the buyer), but problems arise in the context of security of transactions if no sanctions may be applied against the merchant at all.⁴⁴

Rules governing acquisition of property from non-owners need to be revised in any case, as a considerable change has occurred from the business environment existing at the time of the creation of the Civil Code. In this area the Civil Code differs from both Art. 563 of the Civil Code Draft of 1928 and Art. 299 of the previous Commercial Code. In 1959 the official ministerial grounding to Arts. 117 and 118 of the Civil Code emphasized the sale of second-hand goods, the role of marketplaces and the Commission Shop in this respect. It is questionable, what solution is the most adequate in the present as regards the conflict of the protection of security of transactions and the protection of property. From an overview of regulation existing in different countries the conclusion may be drawn that the German legal solution of the issue which concentrates on the protection of security of transactions (supporting acquisition of property from non-owners) is to some extent not followed even in the Austrian and Swiss regulation which start out from a similar basis, while a very different attitude is taken by French and English law.⁴⁵ I believe this issue to be a significant area of

⁴³ B. H. cases no. 1996/1. 48., 1996/8. 418. and 419., 1997/3. 119.

⁴⁴ The arising questions and problems are highlighted by the decisions published in the *Bírósági Döntések Tárának (Collection of Court Decisions)* 2001/11 nos. 169 and 170.

⁴⁵ An interesting comparative law overview of the attitudes accepted in different countries is given by Schwenzer, I.—Müller–Chen, M.: *Rechtsvergleichung, Fälle und Materialien*, Tübingen, 1996. 305–337.; for English law see *Chitty on Contracts*, 28th ed. H. Beale, London, 1999. Vol. 2, 1176. ff.; see moreover Harmathy, A.:

the law of property, having an effect on several questions (including the role of the land register, the legal effect of registration as well). I regard it possible to form the main lines of a new regulation, following an analysis encompassing thorough comparative studies and stretching to several questions of the law of property.

16. Society has not easily dealt with the insecurity resulting from growing crime. This lack of personal security has arisen parallel with the other type of insecurity which many felt to be burdensome because—as it has been briefly mentioned above—the possibility of loss of employment became an everyday problem and development into individual entrepreneurship has occurred beside a high inflation and considerable risk. The factors of insecurity have really been in existence already before 1990 (thus the crime rate has already risen and inflation had been causing problems already earlier⁴⁶), with the transformation process their effect has, however, become manifest and has strengthened considerably.

The functioning of the economy was hampered by the fact that already about ten years before the transition process companies and cooperatives had run into considerable debt which caused serious problems following 1986.⁴⁷ During the 1987 reform of the banking system, a significant portion of the credit owed to banks was classified as bad loan. Changes in the local and international economy only increased red tape, as, due to the loss of a large part of the markets in the East, the decline of local demand, the hardships of transformation vast numbers of businesses showed a deficit or went bankrupt. Small enterprises, on the other hand, battled with a lack of capital and lacked sufficient experience. The state was forced—not the least in order to help certain large companies—to execute several instances of bank consolidation, using large sums of money.⁴⁸

The insecure situation of the participants of economic life, inflation, increased market risk appear in a variety of forms in civil law. In the

Dologi jog — kötelmi jog (Law of property—Law of contract). In: *Liber Amicorum, Studia L. Vékás dedicata*. Budapest, 1999. 130–131, 134–135.

⁴⁶ For questions arising in relation to inflation already in 1982, see Harmathy, A.: Az árak változása és a polgári jog (Price amendment and civil law). *Jogtudományi Közlöny*, 1982/2. 73–83.

⁴⁷ Magyar Nemzeti Bank: *Éves Jelentés (Yearly Report of the Hungarian National Bank) 1989*. Budapest, 1990. 44–45.

⁴⁸ *A magyar bankrendszer konszolidációja (The consolidation of the Hungarian bank system)*. 1994/10. 145–150.

following those phenomena shall be discussed which may have a serious impact on the civil law approach.

17. One of the phenomena that deserve attention is the new role of security instruments. Security instruments did not have a great importance under the conditions of the planned economy, the legal issues of security instruments gained emphasis in the countries of the previous Communist Bloc following the transformation of the economic system.⁴⁹ It is to be noted that the significance of security instruments has grown all around the world since the end of the 19th century. On the basis of an analysis of the development of law in several countries, Ulrich Drobniġ—a well-known expert in the field—has found that the traditional rules of pledges and mortgages have lost much of their significance, the needs of practice required new solutions. As the chairman of the working group on European harmonisation of law in this field, he thus tries to create a future common European regulation along new lines, with a settlement that, among other things, regulates pledges alongside the transfer of receivables as security.⁵⁰ This represents a contract law solution of the regulation of property law security instruments—without leaving property law aspects out of account.

In the field of personal securities a development similar to that of securities in property may be observed, insofar as the use of a form of security usually not regulated in codes of civil law has become widespread in commercial practice: the independent guarantee. Differences appear, however, in the field of consumer protection, where the legislative activity in European countries has been intensive in recent years and the statutes protect persons not qualifying as merchants from an ill-advised acceptance of risk.⁵¹

The growing number of published court decisions relating to security rights in property or in connection with that area since 1990—to a certain degree independently of changes in the regulatory regime—is also remarkable in Hungarian civil law (this deserves attention also because few decisions

⁴⁹ In relation to this see essays in the volume *Systemtransformation in Mittel- und Osteuropa und ihre Folgen für Banken, Börsen und Kreditsicherheiten* (hrsg.: U. Drobniġ, K. J. Hopt, H. Kötz, E. J. Metsmäcker). Tübingen, 1998. 297–405.

⁵⁰ Drobniġ, U.: Security Rights in Movables. In: *Towards an European Civil Code* (ed.: A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. Du Perron), 2nd ed. The Hague—London—Boston, 1998. 511, 522–524.

⁵¹ Drobniġ, U.: Recent Legislative Trends in the Field of Personal Security. *European Business Organization Law Review*, 2001. 512–513. and 515–524.

have previously been published in this field). Decisions as to a large number of questions in the law of pledges and mortgages have been published by the Supreme Court.⁵² By the way, a lot of articles have been published about the law of pledges and mortgages (primarily in the bulletin of public notaries), which shows a strong interest in the field. The transfer of receivables as a security instrument has also appeared in Hungarian court practice,⁵³ which serves the same purpose as a fiduciary transfer of property of goods (a substitute for mortgages accepted in the law of certain countries). Contractual solutions whereby the creditor does not demand mortgages as security, but attempts to achieve making certain of being reimbursed by other means may also be found. Thus, an aim to provide security may be found in contracts wherein the parties provide for an option to purchase property beside a loan (practically replacing pledges or mortgages),⁵⁴ or apply the combination of a temporary lease and a sales contract leasing instead of retention of title.⁵⁵

Personal securities appear relatively rarely among the published cases in comparison with securities in property. In spite of that, cases of typical and atypical suretyship arose more frequently than in the previous era.⁵⁶ More remarkable is the relatively frequent appearance of guarantees serving as security (especially taking into account that this type of security—with the exception of export trade practice—was almost unknown). Most cases dealt with bank guarantees, but “guarantees” taken on by persons other than financial institutions are also to be found.⁵⁷

18. The element of insecurity in contractual relationships may also be found in the form that the party crediting his contractual counterpart is unable to know whether the debtor will fulfill his obligations in accordance with the

⁵² B. H. cases no. 1992/11. 719., 1993/1. 46., 1993/4. 245., 1995/10. 584., 1995/11. 649., 1996/5. 267., 1996/6. 308., 1996/11. 601., 1997/1. 20., 1997/5. 243., 1998/1. 38., 1998/3. 147., 1998/6. 290. and 292., 1999/2. 83., 1993/3. 127., 1999/4. 180., 1999/11. 533., 2000/2. 67., 2001/3. 133., 2001/8. 393.

⁵³ B. H. case no. 2001/10. 489, a similar background may be presumed to exist in B. H. case no. 1996/7. 380.

⁵⁴ B. H. cases no. 1996/11. 603., 1998/7. 350.

⁵⁵ B. H. cases no. 1992/12. 758., 1994/1. 40., 1994/2. 97.

⁵⁶ B. H. cases no. 1992/4. 239., 1993/6. 375., 1993/10. 631., 1994/12. 681., 1995/2. 108., 1994/12. 681., 2000/3. 117.

⁵⁷ B. H. cases no. 1992/2. 120., 1993/7. 448., 1993/11. 690., 1997/3. 134., 1998/6. 293., 1999/6. 267., 2000/5. 214.

contract. Under the circumstances of the market economy, several other factors of insecurity and risk have to be taken into account, starting with the change of prices. The planned economy made an attempt to eliminate commercial risk in several ways, or, if this was not possible, to counter its consequences through the economic control activity of the state. The reform of the economic control mechanism did not change a lot in this practice, in spite of that, however, the subjects of economic life were more burdened with business risk after the transformation period, then before that. Accordingly, in contractual relationships the question of business risk has been raised, whether in the context of the application of the rule on obligation to pay damages for allusive conduct, or the voidability of the contract on account of mistake, or the modification of the contract by court, or impossibility arising out of a change of prices.⁵⁸ In evaluation of the risk in the past era, the great changes brought about by the transition process, the extraordinary risk has played a great part. Following the completion of the transformation of the economy, however, the effect of the extraordinary circumstances need no longer be taken into account. An important consideration under usual market conditions is how big a role elements of risk should play in the regulation of contracts and in the application of rules on contracts by judicial practice.

The change in rates of interest and prices requires a special analysis among economic risks. Changing prices affect not only contractual relationships but also other areas of civil law (a change in interest rates has less of a direct effect in other issues). The fact that prices are not the same at the time of the damaging conduct and the order by the court to pay damages, and at the time of actual payment is especially important in establishing the amount of damages. A different solution is needed in contractual relationships, where the parties conclude the contract based on an evaluation of eventual risk, from the one in tort cases. In cases of breach of contract, however, considerations similar to those found in tort may have effect. It seems that in the case of both torts and breach of contract the protection of the interests of the damaged party are in the forefront in court practice.⁵⁹

⁵⁸ B. H. cases no. 1992/2. 123., 1992/12. 775., 1993/9. 562., 1994/4. 179., 1996/6. 326., 1998/6. 291., 1998/6. 296.

⁵⁹ B. H. cases no. 1990/4. 153., 1991/12. 491., 1994/12. 664., 1995/3. 154., 1995/10. 573., 1996/9. 472., 1997/4. 185.

During the transition period high interest rates had been charged in connection with the high inflation. The interest on short-term loans in 1991 was around 33–36% a year, and the interest on deposits was also high.⁶⁰ After a temporary drop, rates in 1995 were about as high as in 1991, a decrease having occurred in 1997.⁶¹ In April 2000, the National Bank interest rate was 11%.⁶² The high risk involving interest rates was a temporary phenomenon. A significant change from the times of the planned economy in the material of civil law, however, is that the use of money and its price is an important factor regardless of temporary disturbances. Several decisions with regard to interest have been published by the Supreme Court.⁶³

In cases of invalidity of contracts, taking into account the risks arising in a market economy, establishing the legal consequences of invalidity needs to be examined when the contract may not be reformed to become valid. Under market circumstances, an uncoordinated change in the value of performance and counter performance (e.g. real estate, seasonal goods, products strongly affected by technological development etc.) and the rate of interest may lead to consequences incapable of being pre-calculated by the parties. This may not always be neutralised by applying the legal consequences of invalidity.

19. In the market economy the actual possibility of the enforcement of rights in contractual relationships, in the lack of a specifically stipulated (or statutorily prescribed) security instrument is another factor of insecurity. In the social conscience of the era following 1948 the precise fulfillment of contractual obligations did not receive great respect. Under circumstances, when connections with state economic management organs was more important than the relationship with contractual partners, when factors outside the realm of law did not require a long-term, reliable partnerly conduct, this approach is understandable. The long time that passed since transition did not prove to be long enough to change this approach, what is more, the period of changes may have even strengthened previous

⁶⁰ Magyar Nemzeti Bank: *Éves Jelentés 1991*. (Yearly Report of The Hungarian National Bank 1991). Budapest, 1992. 102.

⁶¹ Közponi Statisztikai Hivatal: *Magyarország 1997*. (Central Statistics Bureau: Hungary 1997), Budapest, 1998. 84–85.

⁶² Magyar Nemzeti Bank: *Havi Jelentés (Monthly Report of the Hungarian National Bank)* 2000/12. 141.

⁶³ B. H. cases no. 1993/5. 311., 1994/10. 551., 1995/3. 154., 1995/6. 342., 1997/5. 223., 1997/12. 594., 1998/8. 391., 1998/10. 495., 2001/2. 78., 2001/4. 181.

trends, or, if it has not strengthened them, it made them conspicuous. The more frequent appearance of contracts concluded in order to deprive creditors from funds may be attributed to this development.⁶⁴

The frequent use of transfer of receivables as security is partly in connection with the hardships of execution. The transfer against money of receivables the execution of which is uncertain appears as a business activity also known in other countries (from the point of view of the economic goal, a similar tool is agency for the purpose of executing receivables, but in that case no transfer occurs). The transfer may, however, also be used for other purposes: different business goals may lie behind the transfer of receivables. In the law of European countries in general, thus also in Hungarian law, the transfer as a whole of all the rights and obligations arising out of a contract of one of the parties to that contract poses a problem. In these cases a transfer of receivables occurs only as regards rights. As regards obligations, one may only talk of an overtaking of obligations which requires the agreement of the other party to the original contract. Taking into account the need arising in practice for the transfer of businesses as a whole, the question needs to be examined, whether one may treat rights and obligations in a given contract as a thing, as a financial unit. This requires a revision of the definition of thing and related categories of property law in addition to the problems of contract law. In the Hungarian court practice of the last few years, alongside the use of transfer of receivables as security, other uses of the transfer of receivables have also appeared, such as transfer used in order to execute receivables, as payment of debt and in order to achieve a change of partners to a contract.⁶⁵ This means that today Hungarian law has to treat the transfer as one of those legal methods of forming economic ties which may be used in more ways than one and consequently requires an adequate legal approach and set of rules.

In connection with the hardships of execution and the growing importance of money circulation, the use of bills of exchange has become more frequent. Questions related to bills of exchange often arise in court practice. All this creates a need to analyse abstract obligations, the requirement of making use of such experiences in civil law theory and practice.

⁶⁴ B. H. cases no. 1995/8. 458., 1996/5. 252., 1997/11. 549., 1999/5. 220., 1999/11. 508., 2000/8. 365., 2001/2. 62.

⁶⁵ B. H. cases no. 1990/7. 268., 1993/2. 114., 1993/7. 446., 1995/5. 294., 1996/7. 379. and 380., 1996/8. 422., 1997/5. 244., 1997/9. 449., 1998/8. 379., 1999/2. 77.

20. During the transition process efforts at taking advantage of the faults and gaps of legal regulation could be pointed out. These phenomena are only mentioned because when evaluating these efforts, court practice has repeatedly ruled that these are “contra bonos mores”. An especially interesting feature of the relevant judgements is that in certain cases they reflect a change in social consciousness, whereas in others they show an unchanged attitude. It seems, by the way, that the rulings at issue do not search to find a connection with either the requirement of good faith and fair dealing formulated in Art. 4 (1) of the Civil Code, or the obligation to cooperate, declared in several parts of the Code and often appearing as a command of morality. They are more prone to apply the principles of good morals similarly to requirements of public order.⁶⁶ The invalidity of immoral contracts is generally recognised, but its current interpretation is somewhat vague, therefore the creators of common principles of European law did not even attempt to formulate a common rule for this issue.⁶⁷ Moral requirements, the obligations of good faith and fair dealing and of cooperation are adequate methods for the control of the terms of the contract, to regulate the distribution of risk in a way not provided for by the contract. Also with this in mind, it is to be examined, what direction the practice will take in this field.⁶⁸

21. In examination of civil law questions often not enough attention is being paid among the changes occurring in the economy to the growing importance of services. This development has referred to previously in connection with torts (part 12), another one of its significant consequences needs, however, to be separately mentioned. This consequence is the growing significance of public services. Previously, public services had

⁶⁶ B. H. cases no. 1993/9. 578., 1993/10. 604., 1997/5. 241., 1997/6. 306., 1998/3. 138., 2000/5. 215., 2000/6. 260.

⁶⁷ *Principles of European Contract Law* (ed.: O. Lando, H. Beale), Parts I and II, The Hague, London, Boston, 2000. 227–228., Zweigert, K.—Kötz, H.: *Einführung in die Rechtsvergleichung*, 3. Aufl. Tübingen, 1996. 375.

⁶⁸ Mayer-Maly, T.: Die guten Sitten des Bundesgerichtshofs. In: *50 Jahre des Bundesgerichtshof*. (hrsg.: C.-W. Canaris, A. Heldrich, K. J. Hopt, C. Roxin, K. Schmidt, G. Widmaier). München, 2000. Bd. I. 69–79.; Harmathy, A.: A Ptk. reformja, különös tekintettel a szerződési jog fejlődésére, az ingatlanjogra és a fogyasztóvédelemre (The reform of Civil Code wint special regard to the development of the law of contracts, estates, and consumer protection). In: *Második Magyar Jogászgyűlés (2nd Hungarian Jurist Assembly)* (ed.: Erdei Árpád). Budapest, 1994. 291–293.

only been in a marginal connection with civil law. The transition process, the creation of the market economy has, however, strengthened the civil law aspects of the field. In court practice, this appears first, as a property law aspect, in use of property in the public interest,⁶⁹ and second, in public utility contracts.⁷⁰ This development of transition should be taken into account when elaborating the theoretical foundations of the rules of civil law.

⁶⁹ B. H. cases no. 1995/12. 700., 1998/5. 240., 1998/6. 289., 1998/8. 376.

⁷⁰ B. H. cases no. 1992/6. 408., 1993/8. 497., 1999/1. 30., 1999/5. 208., 1999/7. 302. 1999/9. 419., 2000/2. 68., 2000/9. 409., 2001/2. 64.