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Symposium

Guest Editorial Preface

Symposium on ‘What Can Central and Eastern Europe Learn from the Development of Canada’s Constitutional System?’

As a result of the development of technology, transport, and the increase in political, economic, cultural and legal connections, by the 21st century the world had become more integrated than ever before. This also affects constitutional law, which today is not merely a national issue for states but rather a global field with many interrelations.

Comparative constitutional law is applied during the processes of constitution-making and legislation, where best practices are sought. Judges in domestic courts have a judicial dialogue with their colleagues abroad and look at foreign judgements to improve their legal reasoning. To help these developments, constitutional scholars use often a comparative approach in their works and, to better understand their own constitutional system, they compare it with other states’ solutions.

Alongside dealing with single constitutional law questions from a comparative point of view, it is essential to study the constitutional system of a country also in its entirety, analyzing its historical roots, rules and practice. The international conference entitled ‘What can Central and Eastern Europe learn from the development of Canada’s constitutional system?’ was one of the events where we tried to make a step in this direction.

The conference, held at the ELTE Faculty of Law on 28 June 2017, with the kind support of the Embassy of Canada to Hungary, convened a group of scholars to reflect on the history and evolution of the Constitution of Canada, on its written and unwritten dimensions and on its influence abroad. The occasion of the conference was Canada’s 150th anniversary of Confederation. The Constitution Act of 1867, which is still forming part of the Constitution of Canada, was ratified that year on 1 July.

This special volume of the ELTE Law Journal contains the written versions of some of the presentations.

After the words of greeting from Isabelle Poupart, Canada’s Ambassador to Hungary and Attila Menyhárd, Dean of the ELTE Faculty of Law, the two Canadian keynote speakers give their overview on the history and current state of the Canadian constitutionalism. Jeremy Webber’s standpoint is that Canada has an agonistic constitution, based on the co-existence

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of different languages, different legal systems, and even different modes of life. Richard Albert deals with the challenges of Canadian constitutionalism, showing that even a country with a constitutional system regarded as model by several nations around the world needs reflection – its constitution is always an unfinished and unfinishable document.

Each of the next papers analyses one element of the constitutional system of Canada, always raising the question of what the Central and Eastern European region should learn from Canada.

Balázs Rigó gives an overview of the revolutionary importance of 1867 in view of the changes in constitutional systems. Zoltán Pozsár-Szentmiklósy discusses the particularities of the methods of constitutional interpretation and the proportionality test developed by the Supreme Court of Canada in 1986, also evaluating the influence of these.

János Mécs addresses the problems of possible electoral reforms in Canada and Hungary, analysing not only the possible changes towards more proportionate systems but also the practical and theoretical obstacles of their amendment. Eszter Bodnár compares the selection systems of several European countries with the very transparent appointment process of the justices of the Supreme Court of Canada, looking for models which would help in selecting more independent, competent and experienced justices.

Dragan Dakić's paper on the new challenges of reproductive choice with a view to technological improvements raises questions about what protection shall be provided for the foetus growing in an artificial womb – if protection shall be provided at all –, and why such situations are different from the conflicts we all know when abortion or in vitro fertilization is the subject for discussion. Marcin Górski's paper concerns the notion of artistic expression, which he examines through a fascinating case-law analysis.

One of the most important conclusions of the Symposium was that the main export products of Canada, such as diversity, openness and transparency, are precisely the values which the domestic market for constitutional ideas is in need of in Central and Eastern Europe. As we speak a common language, the discussion can and should be continued.

We would like to express our thanks to the speakers, discussants and chairs of the event, and for the generous support of the ELTE Scientific Council and the Embassy of Canada to Hungary.

Opening Remarks by Prof. Attila Menyhárd, Dean of the Faculty of Law, Eötvös Loránd University

Although Canada is a country that is part of another continent, almost 5,000 miles away from Hungary and across the Atlantic Ocean, it played an important role in modern Hungarian history that could hardly be overestimated. During the Great Depression and in 1956–1957, more than 60,000 Hungarian refugees fled Europe and settled in Canada, which provided generous help to Hungarian immigrants. Some of these people became successful entrepreneurs. Linamar, the second largest automobile parts manufacturer in Canada, and which has almost 30,000 employees worldwide, was founded by one of these Hungarian refugees, *Ferenc (Frank) Hasenfratz*, in 1966. This company bought *Mezőgépi Rt.* in Orosháza, Hungary, in 1992 and recreated it as a dynamically growing enterprise that is the most important employer in the region.

Canada is known for having the most multicultural, most multilingual and the most tolerant society in the world. Perhaps it also is the most innovative one. Innovation is the key factor of development in society and in the economy, as in all aspects of life as well. Innovation is always a response to challenge. One of the most potent examples of the innovative mind is the history of Bombardier. The first registered patent of the founder of this company, *Joseph-Armand Bombardier*, was the B7 snowmobile, a vehicle for travelling over snow. This was the basis of establishing a small company in 1942, which expanded over the past decades into a multinational firm engaged in air and railway technology.

The snowmobile was a response to a challenge coming from the natural environment, while the legal system of Canada has responded to the challenges of social diversity and a multicultural society with refined, sophisticated and unique (innovative) solutions. As a mixed legal system, it provides a unique regime, uniting the benefits of common law and legislation. The law provides for social and multicultural diversity with freedom, which requires flexibility in structural issues, as well as when construing the content of norms. Canada shows a very good way of managing diversity, which should also be an example for all of the other legal systems of the world. The year 2017 was an anniversary for Canada and for the ELTE Law Faculty, too. Canada celebrated the 150th anniversary of its confederation and independence, while we celebrated the 350th anniversary of establishing our Faculty. This coincidence may be a good start for developing academic relationships. The social and economic interactions between our countries can be an inspiration for our work to build such relationships further.

Opening Remarks by H. E. Ms. Isabelle Poupart, Ambassador of Canada to Hungary

On behalf of the Embassy of Canada, I would like to express my sincere thanks to the Faculty of Law at Eötvös Loránd University and the organizers of this important symposium for the positive recognition that it gives to the 150th anniversary of Canada's Confederation. I would also like to convey my appreciation to Professor Jeremy Webber, Dean of the Law School of the University of Victoria, who agreed to share his thoughts on Canada's constitutional experience with this distinguished audience.

While we are here to discuss the development of Canada's constitutional democracy, I find that it is equally important to focus on what Canada and countries in Central and Eastern Europe can learn from each other's experiences, rather than concentrating on what this region can learn from Canada alone. Given my legal training, it will come as no surprise that I am personally interested in learning about how the legal and constitutional systems in Canada, Hungary and the broader region have been shaped through the centuries. Comparative law has always been one of my favourite disciplines.

Canada took on its modern constitutional form on July 1, 1867, when the British North America Act, a piece of legislation passed in the British Parliament, came into force and united the provinces of New Brunswick, Nova Scotia, Ontario and Quebec, to form the Dominion of Canada. Ottawa became the capital, and Sir John A. Macdonald became the Dominion's first prime minister. This was the birth of Canada, my country. More than a century later, the *Constitution Act, 1982*, which transferred the power to amend the Constitution from Great Britain to Canada, was adopted.

I am sure that many of you will agree with me when I say that the topic of this symposium is incredibly relevant in today's world, given that constitutions are central to the healthy functioning of liberal democracies and the rule of law. Genuine democracy cannot operate without the rule of law; it requires a parliament that is elected directly by voters and a judicial system independent of political control. Liberal democracies stay strong by upholding their constitutions and the system of checks and balances that they include, while constantly seeking to improve through economic, social and cultural progress that benefits their citizens.

For Canadians, in this important anniversary year, our Constitution is also of direct relevance when one considers the four themes that our government has chosen to highlight for Canada 150: promoting a diverse and inclusive Canada; reaffirming the importance of strong environmental stewardship; engaging and inspiring youth; and supporting efforts towards national reconciliation between Indigenous and non-Indigenous Canadians. These

are the themes the Embassy will be highlighting through the year and I am glad to see them reflected, in one form or another, in today's proceedings.

I take this opportunity to thank all the students and professors who are present here today for your time, your dedication and your interest in Canada. Academic study of Canada, efforts to explore who we are (or who we think we are), what we do and how we do it are extremely valuable, including through a comparative lens. The work that you undertake is greatly appreciated and genuinely contributes to a better understanding of Canada around the globe as well as our own understanding of how we can better cooperate with our friends and partners.

To all of you, I wish you the very best with this symposium and your future legal studies or research. As you keep up your interest in Canada, please count on the Embassy's support.

Thank you, merci, köszönöm!

Jeremy Webber*

Canada's Agonistic Constitution

Themes, Variations, Tensions, and Their On-Going Reconciliation

It was a great pleasure to return to Budapest, in the summer of 2017, for an International Symposium on the topic, 'What Can Central and Eastern Europe Learn from the Development of Canada's Constitutional System?' at Eötvös Loránd University. I first came to Budapest in 1995 for a seminar sponsored jointly by the Hungarian Academy of Sciences and the Royal Society of Canada.¹ That earlier meeting was organized within a few years of the collapse of communist regimes throughout Central and Eastern Europe. Its principal organizer was Professor Denis Szabó, a renowned criminologist who is a member of both the Hungarian Academy of Sciences and the Royal Society of Canada. He had left Hungary following World War II, obtained his doctorate from Université Catholique de Louvain, and emigrated to Canada in 1958 where, in 1960, he founded the influential *École de criminologie* at the Université de Montréal. I will never forget swimming alongside Szabó in the Hotel Gellért pool as he recounted the story of his departure from Hungary and, above all, the courage and vision of those who rose up against Soviet domination in 1956. Those struggles were acutely relevant to what was occurring in Hungary at the time of the 1995 symposium, as democratic constitutionalists worked to establish the rule of law in a society that had had a distinguished tradition of democratic thought but where that tradition had been eroded by the ideological conflicts and authoritarian regimes of the interwar period, followed by long years of communist rule. That experience was yet another lesson that constitutions are perennially works in progress, and that constitutionalism always depends upon the dedication, courage and insight of scholars and citizens. It was a great privilege, then, for me to return to Budapest for the symposium at which this paper was presented – a symposium of constitutional scholars from throughout the region who share those qualities of dedication, courage and insight.

This second symposium was prompted by the 150th anniversary of Canadian Confederation – 150 years of a country, founded on 1 July 1867 and destined, ultimately, to include all the territory of North America north of the United States. That history has made me. I am Canadian, deeply anchored in Canada, engaged by its debates, proud of my ancestry. But like all sources of national pride, my attachment to Canada needs to be tempered by an equal

* Jeremy Webber is professor at the Faculty of Law, University of Victoria, Canada.

¹ That symposium was on 'National Minority and Multicultural Policy'. Its papers were published in Kálmán Kulcsár, Denis Szabó (eds), *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Royal Society of Canada and Hungarian Academy of Sciences 1996, Budapest).

commitment to critical reflection, by which the national experience is tested for what is most important, most true, so that we draw upon what is valuable and correct what needs correcting. Let me suggest three sources of critical reflection for me upon this 150th anniversary.

– First, if one thinks of my ancestry as composed of four stems, each associated with one of my grandparents, three of those stems only took root in Canada immediately prior to WWI. What then does Canada’s history, prior to 1911, have to do with me?

– Second, much of my scholarly work has to do with the constitutional position of Indigenous peoples. For them, Canada’s 150th anniversary is not a subject of celebration. Rather, it marks a history of displacement, dispossession, imposition, and impoverishment. How can I have pride in my country in the face of that story?

– Third, I am not simply Canadian. I spent several years in Australia, married an Australian, and became an Australian citizen. That country too has a hold on me. Does that second significant allegiance somehow impair my first?

Now, I am not going to answer fully all the questions posed by those complexities. They may not even sound very constitutional – although in Canada, constitutional scholars have long grappled with texts and Canadians’ complicated allegiances, with constitutional interpretation and constitutional debate, with legalism and statecraft. In part this is a product of Canadians’ periodic, protracted engagement in constitutional reform. But the two enterprises – constitutional analysis and constitutional aspiration – have not been entirely separate even in the judicial interpretation of the constitution, for courts too have sought to give meaning to the constitution in a manner that would foster the continued development of the Canadian polity. And in that broad conception of the domain of constitutionalism, questions such as those posed above are acutely relevant. They shape our experiences of nationhood in ways that condition citizenship in Canada; they inform the relationship between our political institutions and our various societies.

Continued reflection on the nature of Canada – reflection on our positioning within Canada’s history, which both informs our understanding of Canada and structures the institutions through which we define ourselves politically – is relevant to all Canadians. As individuals, none of us – without exception – lives our countries’ entire constitutional histories. Each of us is in a sense a latecomer, stepping into an ongoing national conversation as we come to political awareness. That history has some good things, but it also has some bad things, some unresolved elements. How do we position ourselves in relation to that history?² Moreover, we all possess complex allegiances, complex commitments. We may have a different religion from our fellow citizens – or no religion. We may speak different languages. We may combine different national stories, as indeed Denis Szabó did, working for the future of his first country, Hungary, and becoming one of Canada’s leading criminologists and Fellow

² For an excellent reflection on this question from a scholar who has been intensely committed to constitutionalism in both Australia and Poland, see Martin Krygier, *Beyond Fear and Hope: Hybrid Thoughts on Public Values* (ABC Books 1997, Sydney) 64–98.

of the Royal Society of Canada. Even if we share whatever orthodoxy we understand characterizes our country, we generally argue, sometimes fiercely, over what that orthodoxy should mean. How do we understand the foundation of our institutions, and our relations as citizens, in the face of that shared inheritance, complex history, and continued disagreements?

Canada has developed a set of resources for sustaining a country in the face of such complexities of belonging and citizenship. Not perfectly. Canada came within a hair's breadth of failing as a country, not least at about the time of my last visit to Budapest. In a referendum held in that year (1995), Quebecers rejected the secessionist option by a margin of less than 1.2 percent: 49.42 percent 'Yes' to 50.58 percent 'No'. Moreover, there are deep-seated challenges, deep-seated injustices, that we have yet to repair, as Indigenous peoples' lack of celebration of the 150th anniversary makes clear.

Nevertheless, through hard experience, Canadians have been forced to adopt particular methods of constitutional practice. If we learn the lessons of that experience, we can see striking approaches – productive approaches – for thinking about constitutions and constitutionalism. That is what I want to urge on you today. I will address three pervasive presumptions that are common in how constitutional scholars and governmental leaders talk about and practice constitutionalism. I will show how those presumptions do not fit Canadian constitutional history at all well. I will suggest how and why we should reconsider them and the implications of that reconsideration for constitutional interpretation, the demands of citizenship, and the health of our nations.

I Presumption 1: Constitutions are the Product of Constitutional Moments

The first of those presumptions is that we speak of constitutions as though they took shape in a moment in time. We think of them as documents, with those documents being discussed, deliberated upon, and drafted as concerted acts of political will. Thus, we celebrated at the conference a country – Canada – that we say is 150 years old, created on 1 July 1867, through the coming into force of Canada's original constitution: the *British North America Act* (now renamed the *Constitution Act, 1867*). Anniversaries certainly serve useful functions. They allow us to pause, take stock, and celebrate. But when it comes to understanding the role of constitutions in defining the foundational structure of a political and legal community, how helpful is it to think of them as being formed in a 'constitutional moment'?

That phrase was used by the American scholar Bruce Ackerman as part of an influential justification for judicial review. He argued that there are, from time to time, dramatic moments in which a people as a whole are engaged in political decision-making. The decisions they make at such times are, because of the depth and intensity of popular participation, worthy of special respect. Those decisions set the constitutional order; they can be enforced by the courts to constrain later decisions made by the people's representatives in the course of ordinary politics, which lack the same popular engagement and therefore the same

legitimacy. Ackerman recognizes three principal constitutional moments in the history of the United States of America – that country’s Founding, Reconstruction, and New Deal – although he acknowledges there were also other lesser moments.³

Ackerman’s argument is unconvincing as a justification for judicial review. It depends entirely on there being a profound difference in popular participation between ‘constitutional moments’ and political life generally, a contrast that both understates the extent of popular attention paid to political decision-making in ordinary times (at least in countries with a vibrant democratic culture) and overstates citizens’ engagement in periods of constitutional change.⁴ My concern here, however, is not with Ackerman’s theory of constitutional review. Rather, it is the underlying assumption – very broadly shared – that constitutions are best understood as formal documents crafted by an act of will at salient moments in a country’s history. It is true that constitutional documents play an important role in legal and political decision-making. It is also true that constitutional history has been punctuated, in many societies (including Canada), by important periods of self-conscious statecraft. But it is crucial that we keep those episodes in proportion, realizing both that they intervene in ongoing histories that have their own dynamism and impact, and that, no sooner do they occur, than they are shaped and reshaped by the day-to-day evolution of constitutional orders. Constitutions are continually being made and remade through the actions of their citizens and their citizens’ representatives. We all participate, either through our action or inaction, in making our countries’ constitutions. We all share responsibility for their health (or lack thereof).

One sees that dynamic character of constitutions if we ask: In what sense was the Canadian constitutional order created in 1867?⁵ If we project ourselves back to 1867, Canada looked very different. It consisted of four provinces, not ten, and the two largest of those provinces, Ontario and Quebec, were very much smaller than they are now. Local allegiances to the provinces were stronger. Two potential provinces, Prince Edward Island and Newfoundland, which were involved in the negotiations leading up to confederation, initially held themselves outside the federation, Newfoundland for more than 75 years until 1949. Even in the original four provinces, local allegiances were in the early years very strong; those units had, after all, been independent colonies within the British Empire prior to 1867 (although the two central units, the core of what were to become Quebec and Ontario, had been joined to form a new ‘Province of Canada’ in 1841). Moreover, the land to the north and west of what was then Canada – the lands to which three-quarters of my ancestors came – were not yet annexed to

³ Bruce A. Ackerman, *We the People: Foundations* Volume I (Belknap Press of Harvard University Press 1991, Cambridge MA) especially at 262.

⁴ See Jeremy Webber, ‘Democratic Decision Making as the First Principle of Contemporary Constitutionalism’ in Richard W. Bauman, Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006, New York) 411 at 416 n11.

⁵ For discussions of Canada’s long constitutional history – a history which, while fundamental to this paper, can only be touched upon – see Peter H Russell, *Canada’s Odyssey: A Country Based on Incomplete Conquests* (University of Toronto Press 2017, Toronto); Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (McGill-Queen’s University Press 1994, Montreal).

Canada. They were inhabited and controlled by Indigenous peoples, with the European population limited to small numbers of, predominantly, fur traders. There was an intention to expand Canada north and west, and that process began soon after confederation, but the Canadian constitution was in no real sense accomplished. It was an on-going project.

Confederation therefore constituted a step in a much longer history of constitutional practice. It drew upon the lessons of previous political experiments – the co-existence of French and English, Catholic and Protestant – and it also responded to the challenge of pursuing effective policy at the level of the previously independent colonies, especially in the face of a vigorous, economically-dynamic, populous, and militarized neighbour (the United States) to the South. It consolidated a liberal structure of government, especially the principle that the executive had to be accountable to the majority within the legislature – the principle, that is, of responsible government, which had been achieved in the colonies less than twenty years before. The new federation was to build a transcontinental market; construct canals and railways; and extend the modernization of the law in Canada, which had been changed dramatically in at least two important respects in the 15 years prior to confederation: the abolition of seigneurial tenures in Quebec (1854) and the adoption of the *Civil Code of Lower Canada* (1865). The new division of powers between the federal and provincial governments was shaped by all these aims.

There also were challenges that lay in the future, unanticipated, that were to mark Canada's constitutional history in dramatic ways. These included:

- the coming of waves of immigration, especially from sources other than Great Britain & Ireland;
- the development of a Canadian national identity that caused the country to drift away from its imperial allegiance to Great Britain, ultimately severing it;
- the fact that national identity came to be felt differently in different parts of the country: French-speaking Quebecers were especially devoted to their own language, religion, and laws, which they saw as under threat in an anglophone North America; they therefore retained a strong commitment to Quebec's autonomy as other Canadians gravitated, in most cases, to a predominantly Canadian allegiance;
- the advance of industrialization and urbanization and, in their train, the changing role of the state;
- the longstanding question of Canada's relationship with Indigenous peoples, which did not fade away but which remains a central challenge today; and
- the rights revolution, as part of which Canadians ultimately adopted the *Canadian Charter of Rights and Freedoms*, which formed the centrepiece of Canada's second major constitutional document, the *Constitution Act, 1982*.

The *British North America Act* of 1867 consolidated and refocused developments that had begun prior to confederation and it also – importantly – set Canada on the path to becoming a transcontinental power. But Canada's constitutional structure was far from complete, far from crystallized in a constitutional moment. It remains a work in progress, one whose details are shaped by the actions of its citizens, their governments, and their courts.

II Presumption 2: Constitutions are Comprehensive, Internally-Consistent, Rationalized Structures of Government

That brings us to the second ingrained assumption about constitutions. Constitutional lawyers tend to treat them as though they create comprehensive, internally consistent, highly rationalized structures of government. Or at least, even if we know they are not actually like that in their historical origins, we interpret them with that objective in mind. We do so for good reason: constitutional interpretation is about defining the relationship between the various institutions of government, and it makes sense to interpret constitutions in a manner that clarifies institutional roles, minimizes conflicts, respects fundamental rights, and resolves interpretive disagreements. But we should not be so enamored of coherence that we *a)* misunderstand our practice, or *b)* neglect other possibilities.

The complex and incompletely consolidated nature of the Canadian constitution is manifest in its textual foundation. Two constitutional documents tower above all the others: the *Constitution Act, 1867* and *Constitution Act, 1982*. But there are, in fact, more than 30 constitutional documents: 30 are listed in the schedule to the *Constitution Act, 1982*, and to that list must be added the *Constitution Act, 1982* itself. Moreover, no pre-confederation documents are listed. At least one – the first British constitution to apply to most of what became Canada, the Royal Proclamation of 1763, remains an important foundation for the recognition of Indigenous rights. It is expressly protected by section 25 of the *Canadian Charter of Rights and Freedoms*. Moreover, there are many additional documents that are protected by constitutional provisions so that they cannot be infringed by ordinary legislation, at least not without meeting special conditions. Canada's treaties with Indigenous peoples fall into that category. And we have thus far referred only to written instruments having constitutional status, not to the whole panoply of practices, statutes, constitutional principles, and constitutional conventions that remain important elements of the Canadian constitution. To take one important example, the central institutions of democratic governance – legislative, executive, courts – have only the most skeletal treatment in the constitutionally entrenched texts. The constitutions of provincial governments are virtually absent. Both these elements – the institutions of democratic governance, and the constitutions of the provinces – represent the most obvious legacy of Britain's unwritten constitutionalism within the contemporary Canadian order.

This large number of sources reflects the fact that the Canadian constitution has evolved incrementally over time. It is also a product of the fact that Canadian constitutionalism has addressed itself to at least six themes, each of which has had its own distinctive dynamic, its own champions, and often its own privileged sources:⁶

⁶ See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Hart Publishing 2015, Oxford), which introduces these themes in its first chapter, sketches Canadian constitutional history in its second chapter, and then, in successive chapters, provides an overview over Canadian constitutional law.

- 1) the territorial organization of Canada – a theme that was most obvious in the period of territorial expansion, but that is still active in, for example, the creation of the new Inuit-majority territory of Nunavut in 1999, the current delimitation of the territorial jurisdiction of Indigenous governments, and of course the question of Quebec's potential secession.
- 2) The structure and operation of democratic government, including the historical struggle for responsible government, but also the perennial contemporary questions of reform of the Canadian Senate, electoral reform, and expanding the scope for autonomous action by members of parliament.
- 3) Canada's federal structure, which is continually being interpreted in new ways and adjusted through political negotiation. One thinks especially of the significance of the federal government's spending power in post-World War II Canada, including its recent limitation.⁷
- 4) Human rights – a theme that was present from the very earliest days of Canadian administration, but that is now dominated by – but by no means limited to – the application of the *Canadian Charter of Rights and Freedoms*.
- 5) The encounter between Indigenous peoples and non-Indigenous institutions – perhaps the oldest of the themes, but one which is attracting very substantial attention right now in government policy, litigation before the courts, the negotiation of treaties and other agreements, the development of the Indigenous-majority territories of Nunavut and the Northwest Territories, and, above all, the autonomous action of Indigenous peoples, as they reclaim their laws, reassert their jurisdictions, develop their governance structures, negotiate with the federal and provincial governments, and build their own conceptions of citizenship and participation.⁸
- 6) Finally, Canada's association with political institutions beyond the Canadian state, including the actual and potential limitations on Canadian governmental authority posed by trade and investment treaties.

These themes do interact, but in unpredictable ways. I have used elsewhere the analogy of minimalist music – the music, for example, of Philip Glass or Steve Reich – to suggest their relationship.⁹ Each theme has its own starting point and its own meter, and as they are pursued they shift in and out of phase, producing varying, displaced, sometimes dissonant, sometimes harmonic interactions. The courts and constitutional commentators frequently reflect upon how those themes should be ordered relative to each other, but those relationships are hardly settled or predefined. Indeed, they are, in many cases, the subject of perennial debate.

⁷ For recent developments in the federal spending power, see Jeremy Webber, 'The Delayed (and Qualified) Victory of the Meech Lake Accord: The Role of Constitutional Reform in Undermining and Restoring Intercommunal Trust', in Dimitrios Karmis, François Rocher (eds), *Trust, Distrust, and Mistrust in Multinational Democracies: Comparative Perspectives* (McGill-Queen's University Press 2018, Montreal).

⁸ See especially John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010, Toronto), his many other works, and the works of Val Napoleon and the Indigenous Law Research Unit, available here: <<https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php>> accessed 31 August 2018.

⁹ Webber (n 6) 1–2.

III Presumption 3: Constitutions Must Be Based on Agreed Principles, from Which Determinate Rules of Governance Must Be Derived

Thus we come to the final underlying assumption about constitutionalism: that constitutions must be based on a set of foundational principles, settled and agreed in advance, upon which the structure of government is based and from which constitutional rules are derived. This assumption has not been true of important dimensions of the Canadian constitution – and, as will become clear, I wonder whether it is true of any country’s constitution, at least in the strong sense it is often asserted. Certainly in the Canadian case, there are intractable disagreements on some very fundamental matters.

These contentions have been central to Canadian constitutionalism since the very beginning. One thinks, for example, of the long debate between adherents of the compact theory and statute theory of the constitution.¹⁰ The compact theory asserted that the Canadian constitution was fundamentally a pact among the original colonies, so that the institutional heirs of the colonies (presumed to be the provinces) – or Quebec and the rest of Canada, or the French and English linguistic communities, for there were different descriptions of the parties to the compact – were the primary units and the federal government was derived from their act of federation. The theory was used to justify a decentralized view of confederation in which the provinces were the foundation of Canadian political legitimacy. The statute theory was a rejoinder to the compact theory. It asserted that all elements of Canada’s federal structure were created by the British Parliament simultaneously when it adopted the *British North America Act*, and therefore neither level of government had precedence. This debate was never resolved, although it was eventually superseded by other terms which proved equally controversial: especially whether Quebec should be granted ‘special status’; Quebec’s character as a ‘distinct society’; or Quebec’s status as a nation within Canada.

Often, these differences of principle have been associated with the collectivities that make up Canada, especially but by no means exclusively Quebec’s relationship to the rest of Canada. They are remarkably persistent, expressing in constitutional imagery the varying patterns of allegiance that persist within the Canadian federation. Nor are they simply a matter of constitutional politics, irrelevant to a constitutional lawyer. On the contrary, they have shaped some of the most important decisions in Canadian constitutional law.

This is clear when one considers the most remarkable decision by the Supreme Court of Canada in recent memory: *Reference re Secession of Quebec* (hereafter: *Secession Reference*).¹¹

¹⁰ See Roderick A. Macdonald, ‘...Meech Lake to the Contrary Notwithstanding (Part I)’ (1991) 29 Osgoode Hall LJ 253 at 284–288; and, for the classic exploration of the historical foundations of the compact theory, Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867–1921* (Queen’s Printer 1969, Ottawa).

¹¹ [1998] 2 SCR 217.

That case was decided in the aftermath of the 1995 referendum on Quebec's independence, a referendum that (as noted above) the secessionist side narrowly lost. The Supreme Court's decision addressed whether, in the case of a future referendum, a unilateral declaration of independence by Quebec would be legal under Canadian law. The straightforward way of approaching these issues would have been to determine whether secession constituted an amendment to the Canadian constitution and, if so, which branch of the constitution's amending formula would apply to the situation. The Court did indeed decide that secession would require an amendment to the Canadian constitution but, remarkably, it declined to determine which branch of the amending formula would apply. Instead, it held that, if a clear majority of Quebecers voted 'Yes' in a referendum held on a sufficiently clear question, an obligation on all governments to negotiate would arise. There was no textual foundation for this obligation; the Court itself fashioned the duty after reflecting upon four general principles underlying the Canadian constitution: federalism; democracy; constitutionalism and the rule of law; and respect for minorities. Nor did the Court specify what the negotiations' outcome should be; the government of Canada was not required to concede, for example, that Quebec was entitled to secede, even after a clear referendum victory for the secessionist side. Moreover, the Court stated that it would not supervise the conduct of the negotiations. Why did the Court adopt such an unusual (and inconclusive) result?

The answer lies in the interaction of two elements: 1) a particular conception of how the principal elements of the Canadian constitution should be approached – not through the establishment of a fully-determined theory to govern their interrelationship but as a continual work in progress, the elements being held in tension, perennially unresolved, open to further reflection and evolution; and 2) the Court's realization that such an open and unresolved constitutionalism might be essential to the continuation of the Canadian political community, given the different definitions of political community that Canadians bring to their country, together with the complex balancing Canadians conduct among these definitions. The second of these two elements is primary; it has, over time, driven the development of the first, so that practice has preceded theory. But let's start with the theory.

In the lead-up to the 1995 Referendum, the essential argument of *indépendantiste* governments in Quebec had been that, if a majority of Quebecers voted in favour of secession, the democratic legitimacy of that decision was sufficient to support a declaration of independence; no further requirement should be imposed.¹² But in the *Secession Reference*, the Court took the position that democracy, albeit very important, was merely one of the four principles underlying the constitution. Each of those principles, including democracy, had to be tempered by the other three. Indeed, the very definition of which parties needed to participate

¹² The Government of Quebec did not itself make this argument before the Supreme Court of Canada. Quebec was led at the time by the *indépendantiste* Parti Québécois, which declined to participate in the proceeding. The Court appointed a lawyer to make, as *amicus curiae*, the arguments that the Quebec government would otherwise have made.

in a democratic decision was shaped by the other principles. The Court was not willing to say which principle should take precedence in any particular situation. ‘These defining principles function in symbiosis,’ it said. ‘No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.’¹³ It found, in other words, that each of the principles was important, and the Court was not going to recognize any pre-established hierarchy among them that might have the effect of exalting one principle over another, diminishing their mutual interaction. The principles existed in unresolved tension. The Court declined to foreclose that tension and thereby diminish the force of some of the principles. Instead, the relationship among the principles should be a matter of continual consideration, with specific outcomes determined by negotiations.

That vision of constitutional principles was grounded in the Court’s intense engagement with the contrasting conceptions of political community held by Canadians in practice. The tension among those conceptions was clear from the very question posed to the Court, which addressed whether a secessionist government in Quebec could rely solely upon a referendum victory to declare independence, without the participation of the government of Canada, citizens outside Quebec, or any other entities in the decision. Moreover, the volatility of those questions – their potential to trigger severe conflict – was evident from developments outside the courtroom. At the same time as Quebec’s 1995 referendum, three Indigenous peoples – the Cree, Inuit, and Innu (Montagnais) – held their own referenda on Quebec’s secession. In each case the vote was more than 95 percent against secession. These referenda directly challenged the notion that Quebec was the only appropriate unit for the exercise of the right of self-determination. In these proceedings, the Cree, Inuit, and Innu asserted their own contrasting claims to political status. The potential implications of those claims were significant. Even though Indigenous peoples constituted a small minority within Quebec as a whole, their traditional territories were extensive: the Cree and Inuit alone were the majority population in more than half the land mass of Quebec.¹⁴

¹³ *Secession Reference* (n 11) para 49. The Court declined to hold that specific principles trump other principles at paras 91, 92 and 93. The Court’s reasoning has clear affinities with the notion of ‘value pluralism’: that we are, at times, committed to several values that bear upon a particular decision, without us possessing any convincing formula for how they ought to be traded off against each other. See, for example, Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (2nd ed., Princeton University Press 2013, Princeton) 12–20. One difference between the case of the Canadian constitution and most discussions of value pluralism is that in Canada the relevant values are also differentially associated with different constituent sections of the Canadian community (see below), so that a choice among the values can be tantamount to a choice among the groups (although note that Berlin too contemplates this possibility in the reference above).

¹⁴ For the Cree, Inuit, and Innu referenda, see A. Derfel, ‘The Message is Clear: We Won’t Go’ *The [Montreal] Gazette* (26 October 1995) A15; A. Derfel, ‘Quebec Inuit strongly reject sovereignty in own vote’ *The [Montreal] Gazette* (27 October 1995) A10; A. Derfel, ‘Montagnais reject Quebec independence’ *The [Montreal] Gazette* (28 October 1995) A9; Grand Council of the Crees (of Quebec), *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Grand Council of the Crees 1995, Nemaska, Que.). Prior to the 1990s, the Innu were generally referred to as ‘Montagnais’; they now make clear that they prefer ‘Innu’.

This potential for conflict informed the Supreme Court's decision in the *Secession Reference*. To decide that one party's claim should take precedence over another's would be tantamount to deciding that one of those communities – in the example above, either the province of Quebec as a whole or the Indigenous peoples resident within Quebec – should be entirely subjected to others' will. The Court realized that it might one day be forced to make such a decision, but it was not going to make the decision before it had to. The decision itself would likely provoke deep alienation on the losing side. It would communicate to the loser that it was a subordinate party, held in what might appear to be an essentially colonial relationship – in Quebec's case to the rest of Canada, in Indigenous peoples' case both to Canada and Quebec.¹⁵ Such an outcome would foreclose the development of more nuanced responses by the parties, responses that did not amount to a simple choosing of one over the other and that therefore might address the fundamental concerns of all. Hence the call for negotiations. More nuanced responses had been found in the past. They had arguably permitted the very persistence of Canada. The Court sought to foster such outcomes, not foreclose them.

Remarkably, the Court's decision was greeted with widespread approval. Quebecers were pleased that the Court had emphasized that a majority vote in favour of secession must be treated seriously, so that all parties had to negotiate the consequences. Canadians outside Quebec and Indigenous peoples throughout Canada were satisfied that the Court insisted that their concerns too should be considered – that secession could not simply occur by unilateral action. The Court's refusal to determine a simple winner and loser, its emphasis on mutual respect and the continued search for a working consensus, appeared to satisfy an essential orientation in Canadian constitutionalism.

¹⁵ Long after the decision, in private conversation, one judge who had participated in the *Secession Reference* expressed this reasoning in pointed terms. Had the Supreme Court proceeded to decide which branch of the amending formula applied, it is very likely that the answer would have been 'unanimity': the branch that requires the approval of each and every provincial legislature plus the two houses of the Parliament of Canada: Jeremy Webber, 'The Legality of a Unilateral Declaration of Independence under Canadian Law' (1997) 42 McGill Law Journal 281 at 287–291. This meant that in theory (but likely not in practice), the majority in a single provincial legislature, even that of Prince Edward Island (which, according to the census of 1996, had a population of 135,000 (0.5 percent of the population of Canada as a whole) in comparison to Quebec's 7,139,000 [25 percent of Canada as a whole]) could have entirely blocked Quebec's secession. The judge said (this is a paraphrase, but one as close as I can remember to the original): 'We weren't going to have anything to do with unanimity. We weren't about to say that the democratic will of Quebecers was subject to that of every other province.' This was an astute reading of the politics of such a decision, but for the reasons developed in the text, there are also good reasons of constitutional principle for the Court's reticence.

IV Canada's Agonistic Constitution

But does such an approach really represent an approach to constitutional government worthy of being called 'constitutionalism'? Isn't it just political compromise – a protracted instance of muddling through?

FR Scott – distinguished constitutional scholar, eminent poet, and dean of McGill's Faculty of Law in the early 1960s – wrote a biting satirical poem upon the death of William Lyon Mackenzie King, prime minister of Canada for many years through the 1920s, 1930s, and 1940s. The poem reads in part:

He blunted us.

We had no shape
Because he never took sides,
And no sides
Because he never allowed them to take shape.

He skilfully avoided what was wrong
Without saying what was right,
And never let his on the one hand
Know what his on the other hand was doing.

The height of his ambition
Was to pile a Parliamentary Committee on a Royal Commission.
To have "conscription if necessary
But not necessarily conscription",
To let Parliament decide –
Later.

Postpone, postpone, abstain.¹⁶

Is such a picture of normless evasion the essence of the Canadian constitutional tradition sketched in this paper? My answer, of course, is an emphatic 'No'. The constitutionalism explored here is founded on a vision of political life that is normatively grounded – one especially appropriate to a country such as Canada which embodies such deep diversity.¹⁷ It is, moreover, by no means limited to such a country.

It is a mistake to think that the identity and cohesion of countries require that their citizens express agreement to a set of foundational principles. Even if one considers the United

¹⁶ FR Scott, 'W.L.M.K.' in FR Scott and AJM Smith (eds), *The Blasted Pine: An Anthology of Satire, Invective and Disrespectful Verse Chiefly by Canadian Writers* (Macmillan 1967, Toronto) 36.

¹⁷ The phrase is that of the eminent Canadian philosopher Charles Taylor, 'Shared and Divergent Values' in Guy Laforest (ed), *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (McGill-Queen's University Press 1993, Montreal) 155 especially at 183.

States – which is the epitome of a country founded on a canonical set of principles, agreed to in a ‘constitutional moment’ – one quickly realizes that the extent of agreement is much less than one might think. On the contrary, its history has been marked by profound disagreement over its most fundamental principles. Think, for example, of its long struggles, right up to the present day, over the definition of liberty and equality – conflicts over which the country fought a civil war and that still bedevil American politics. Political debate in the United States certainly does have a distinctively American character, but it is not based on ideological agreement. It resides in the distinctive terms of American political debate: Americans’ preoccupation with distinctive sets of questions; their attention to past answers to those questions; their privileging of rival versions of concepts such as liberty and equality, often in forms that have a distinctively American cast; the structuring impact of their political and legal institutions; their reliance on a common set of references in making their arguments (their constitution, the declaration of independence, the words and actions of their most revered leaders, and, above all, the history of their country since its founding) – all these, however, subjected to different interpretations. The nature of the terms matters, but Americans’ identification as Americans is, in a very real sense, independent of the particular meaning they give those terms. One might say that Americans’ political identity is characterized as much by the structure of their *disagreements* as by their agreements.¹⁸

I argue elsewhere that the character of political communities, and the grounds of citizens’ allegiance to those communities, are best understood through the analogy of language, where citizens share the distinctive terms of a debate but are nevertheless fully capable of disagreeing strongly, all within the terms provided by the language.¹⁹ The terms matter: they constitute the medium through which ideas are expressed, they convey the historical experience of that society, and they do condition what can be said, or at least the ease with which things can be said. They also are the object of strong attachment on the part of those raised within the society: they furnish the terms in which participants have formulated their understanding of public life, their understanding of themselves, their wants, and their aspirations. And those distinctive terms often are the only terms over which participants possess anything like mastery, certainly the terms in which they have the most experience. The linguistic analogy captures the balance between continuity and change that exists in any political culture. The

¹⁸ Interestingly, Ulysses S Grant, commander-in-chief of the victorious Union forces in the United States’ Civil War and president during reconstruction, in his reasons for rejecting a right of the southern states to secede, did not emphasize their original agreement to enter the Union. On the contrary, he accepted that, in the years immediately following the formation of the United States, the southern states should have been able to secede. Rather, it was the events that occurred in the many years following Union – the common undertakings, the common investments, the formation of new states – that, in his view, had knit the sections so thoroughly together as to remove the right. He used proprietary language – the fact that new territories had been ‘purchased with both blood and treasure’, for example – to emphasize how the interests of all sections had become entangled. The point can be generalized. Our national identities are forged overwhelmingly by what happens after the founding moment, not by the terms expressed in that moment. See Ulysses S Grant, *Personal Memoirs of US Grant* (Barnes & Noble 2003, New York) at 125–127.

¹⁹ See Webber (n 6) 183–228.

terms of that debate are continually being adapted to say new things, they are affected by encounters with other political cultures, and in the process the terms themselves evolve.

Constitutions are an integral part of those terms. They shape public life, but they do so as sites of debate and disagreement. The concepts they express, the principles they articulate, are continually subjected to reflection, argument, deliberation, and attempts at specification. They constitute traditions of inquiry rather than documents whose meaning is fixed in a founding moment.²⁰ Their implications do need to be explored as the constitutional system develops. Courts are important actors in that exploration, alongside governments and their citizens. But it is a serious mistake to assume that that process has, as its natural endpoint, a single right theory of the society, that the law ‘works itself pure.’²¹ That expectation takes insufficient account of the fact that constitutions are not merely philosophical enterprises, that they exist by and for their peoples, that they draw upon the complexity and the dynamic character of their peoples’ understandings and interactions, and that that fact gives to the constitutions’ principles a perennially unresolved and evolving character.²² And, as the *Secession Reference* makes clear, there may be times when the path of wisdom requires that the constitutional actors refrain from settling a question – when the issue is not ripe for decision, and when the principles are so resistant to definition²³ and so fundamental to the country, that the dialogue ought to be allowed to continue, not be foreclosed by decision.

This, then, is ‘agonistic constitutionalism.’²⁴ The term derives from the Greek *agōn*, which refers to the athletic contests that occurred in ancient Greece as part of public ceremonies.

²⁰ The traditional character of law has also been a major theme in the work of Martin Krygier. See Krygier, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237; Krygier, ‘The Traditionality of Statutes’ (1988) 1 *Ratio Juris* 20; and Krygier, ‘Thinking Like a Lawyer’ in Wojciech Sadurski (ed), *Ethical Dimensions of Legal Theory* (Rodopi 1991, Amsterdam) 67. See also Jeremy Webber, ‘The Grammar of Customary Law’ (2009) 54 *McGill LJ* 579.

²¹ The phrase was adopted and popularized by Ronald Dworkin, who assimilated it to his notion of law as integrity: Ronald Dworkin, *Law’s Empire* (Belknap Press of Harvard University Press 1986, Cambridge MA) 400ff.

²² For conceptions of constitutionalism, grounded in the Canadian constitutional tradition, that are very similar to that presented here, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995, Cambridge); Jean Leclair, ‘Le fédéralisme comme refus des monismes nationalistes’ in Dimitrios Karmis and François Rocher (eds), *La dynamique confiance/méfiance dans les démocraties multi-nationales: Le Canada sous l’angle comparatif* (Presses de l’Université Laval 2012, Québec) 209.

²³ See also Rod Macdonald’s fruitful analogy between the compact and statute theories of the Canadian constitution on the one hand, and the wave and the particle theories of light on the other: *supra* note 10 at 291–292. He argues that our theories are frequently inadequate to the phenomena we are trying to express, and that there are times when the articulation of two competing theories, apparently unreconciled, provides a better understanding of the phenomenon than does either theory alone. I am about as certain as I can be that the decision in the *Secession Reference* was not the product of reflection on the great Hindu epic, the *Mahābhārata*, but I am tempted to invoke David Shulman’s observation on the limits of language in expressing profound truths (if the reader will forgive such a cosmic reference): ‘The Yakṣa’s Questions’ in David Shulman, *The Wisdom of Poets: Studies in Tamil, Telugu, and Sanskrit* (Oxford University Press 2001, New Delhi) 40 at 59–62. My thanks to Jyotirmaya Sharma.

²⁴ See also Webber (n 6) at 8 and 259–265; Jeremy Webber, ‘Contending Sovereignties’ in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017, New York) 281 at 290–291.

It has been adapted by a school of political theory to denote a conception of politics in which conflict is foregrounded – in which disagreement, contention, and argument are seen as the very essence of political life, ineradicable, and where an emphasis on maintaining consensus can silence the voices of dissenters, especially the powerless.²⁵ The emphasis on conflict might suggest a negative vision of political life, a connotation evident in *agōn*'s most familiar derivative in the English language: agony. But it can be seen in a more positive light, emphasizing the full participation of all members of society, the stimulus derived from encounters among a diverse citizenry, and the insight gained from those encounters with diversity. I have, in other work, spoken of a society's political culture as being a 'conversation' through time,²⁶ and there is much to recommend that more peaceable metaphor. But there are also reasons to prefer the tougher language of agonism with its acceptance that we do often disagree on fundamentals and that our relations can therefore be conflictual. Agonism warns us away from trying to insist, too quickly, on agreement. It alerts us to the fact that our societies' dynamism is often the product of challenge and a reconsideration forced by encounter with the unexpected. It urges us to value the contentious dimension of deliberation and to build our political life in a way that enables rather than suppresses it.

This does not exclude the use of agreement as an ideal towards which political argument ought to aim (although it does reject a requirement that every citizen needs to consent to laws for those laws to be legitimate). Persuasion is, of course, an important objective in political discourse. Agonistic theory's emphasis on inclusion in political life implies that one should build a society responsive to all its members. But, agonists would argue, a goal of universal assent is impossible. Moreover, citizens do not conduct themselves as though that were the standard of legitimacy. Their attachment to their political institutions, their implicit authorization of those institutions, their version of Renan's *'plébiscite de tous les jours'*,²⁷

²⁵ For foundational works in this school, see William Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (Cornell University Press 1991, Ithaca); Chantal Mouffe (ed), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (Verso 1992, London); Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993, Ithaca); Chantal Mouffe, *The Democratic Paradox* (Verso 2000, London). Unsurprisingly, agonistic democrats have important differences among themselves. I would not, then, want my arguments to be identified with everything in the agonistic literature. I especially resist the romanticization of conflict or the antagonism towards all forms of authority, especially the state, that are found in some agonistic work. Some theorists of agonism are radically skeptical of the role of reason in politics, a position that I also reject; in my view we should be humble in our reasoning, always attentive to our own fallibility. We should welcome our exchanges with others for the opportunity they provide for us to access a wider range of experience and to test and correct our understandings, but reasoning continues to play a cardinal role in those exchanges. Thus, I do not see agonism as being in any way contrary to a deliberative conception of democracy, as long as that deliberation is genuinely dialogical and resists the temptation to place preconditions beyond the reach of dialogue. On this I find Tully's position entirely convincing: James Tully, *Public Philosophy in a New Key Vol 1: Democracy and Civic Freedom* (Cambridge University Press 2008, Cambridge) at 71–132. There is one essential point that agonistic democrats and I do share: the realization that disagreement is an ineradicable and productive dimension of public life.

²⁶ Webber (n 5) at 190–193 and 309–319.

²⁷ Ernest Renan, *Qu'est-ce qu'une nation?* (Pocket 1992 [1882], Paris) at 55.

is tolerant of profound disagreement. It does make sense, within agonism, to see *consent-building* – the progressive deepening of citizens’ attachment to their polities – as a worthwhile aim, but that must be seen as a continual process, one never entirely realized. What is more, the form of consent is likely to be quite different from full subjective agreement, by each citizen, with every enactment. The outcome in the *Secession Reference* is a model of the kind of result one might envisage.²⁸

Agonistic constitutionalism is, then, a fundamentally democratic ethos, in which the outcome of collective self-determination lies in the hands of the citizenry as a whole acting through their institutions, citizens’ participation and freedom of expression are valued, and the diversity of a society’s citizenry is considered to be enriching rather than regrettable. It is also epistemologically humble, recognizing that any theory of politics is partial and that the requirements of justice, even the fundamental premises of justice, must be open to democratic debate. The primary role of constitutional provisions, then, is not to settle all questions of principle – the agonistic vision accepts that disagreement over questions of principle will continue – but to provide a robust framework through which those issues can be debated, considered, elaborated, and decisions made. Its first objective is to sustain and support the capacity for democratic decision-making.²⁹

This concern with process, this acceptance of conflict, does not mean that agonistic constitutionalism is unconcerned with issues of principle. It is just that questions of principle are pursued through political action, not set outside politics. And the form of political action agonism envisages is founded on its own commitments to breadth and equality of participation, freedom of expression, and an ideal of an active, vibrant sphere of public decision-making. Moreover, the parties bring their substantive commitments to that process, seeking to achieve those concrete objectives in their political lives. Indeed, they are often driven to participate precisely because of their substantive commitments, as they pursue their visions of a decent and just society.

In many agonistic theories, diversity is not merely an empirical fact but something valuable in its own right. These theorists – William Connolly is a good example³⁰ – see real merit in there being a wide array of modes of life and normative commitments precisely in order to expand the range of standpoints from which debate is joined. I see the attractions in such a view, but I find it too abstract to be fully satisfying. This paper has argued that our attachment to political communities is to a set of conversations through time – a specific set of conversations, which have shaped our lives, and through which we have come to pursue

²⁸ See the exploration of consent in Jeremy Webber and Colin Macleod (eds), *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press 2010, Vancouver), especially chapter 1 in that volume (Webber, ‘The Meanings of Consent’), which canvasses alternative meanings that have been attributed to consent, and chapter 9 (James Tully, ‘Consent, Hegemony, and Dissent in Treaty Negotiations’), which makes the case for a dynamic conception of consent-building.

²⁹ Webber (n 4).

³⁰ See, for example, William Connolly, *The Ethos of Pluralization* (University of Minnesota Press 1995, Minneapolis), xiii ff, although I do share Connolly’s commitment to a dynamic and relational conception of identity.

our own aspirations. Our commitment is to those conversations – the conversations that have made our society what it is – and the diversities with which we are most directly concerned are those that are already present within our society.

The task of engaging more fully and effectually with our own society, and of fostering greater inclusion and participation among its members, is itself demanding. Canada's constitutional struggles from the 1960s until now have, in large measure, been about expanding the scope of political participation to include all its members, moreover doing so on terms that would allow for the flourishing of French-speaking and Indigenous political cultures long into the future. That has required – still requires – careful attention to, for example, the long-neglected articulation of law and governance within Indigenous peoples, and that is just one of an plethora of challenging (though enriching) projects. The diversities in question have been, above all, those of the Canadian community. Canada has long been open to immigration and, more recently, to the acceptance of other visions of how to live that are not primarily cultural, such as greater varieties of sexual orientation (although I would not want to exaggerate the extent to which Canadians have accepted a vision of continually expanding diversity; that, like so much else, remains contested). In those respects, Canada might appear to be gravitating towards Connolly's ideal. But I am not so sure. I suspect that those extensions have, like the others, depended upon a concrete perception of community: on perceiving more clearly and embracing more fully the nature of the existing people of Canada and, internationally, recognizing a sense of community and responsibility on the international plane. Canadians are, if nothing else, well practiced in federal conceptions of identity.

V Final Comments

The vision of agonistic constitutionalism described here is one that is especially appropriate to the Canadian constitutional order, which has, since its earliest days (well prior to Confederation) had to grapple with the co-existence of different languages, different legal traditions, indeed different modes of life. Canadians have not always understood their constitutions in this way, but they ought to have done so, and at their best they have found ways to do so. The *Secession Reference* is only one of many examples.³¹

These examples have implications for our understanding of constitutionalism generally. We constitutionalists often exaggerate the extent to which our societies are founded on agreement. We often fail to see that *every* society is marked by substantial disagreement, even over fundamentals (or, if we do see it, we put it quickly out of our minds). Think, for example, of the endless arguments we have had, in the British constitutional tradition, over the precise

³¹ I discuss another striking example, the *Haida Gwaii Reconciliation Act*, SBC 2010, c 17, in *The Constitution of Canada: A Contextual Analysis* and 'Contending Sovereignties' (n 6).

location of sovereignty. We would do well to be less extravagant in our claims for principle and, in doing so, be better democrats and more appreciative citizens.

I began this paper with reasons for critical reflection upon Canada's 150th anniversary. By now, I hope it is clear why critical reflection is the necessary counterpart to pride in our societies – why both, welded together, constitute the very substance of citizenship, not its betrayal. I hope I have helped explain how we come to be engaged by our countries' whole histories, even if we are latecomers, and how we can participate in and owe allegiance to more than one nation's tradition. And I look forward to the variety of ways in which we Canadians will, through reckoning with our legacy of encounters among Canada's peoples, continue to enrich our lives as citizens.

Richard Albert*

The Challenges of Canadian Constitutionalism**

In an interview on Alhayat Television in Egypt on January 30, 2012, United States Supreme Court Justice Ruth Bader Ginsburg stirred some controversy in America. She remarked that 'I would not look to the U.S. Constitution, if I were drafting a constitution in the year 2012.'¹ Where would she look instead? To two countries, she said: Canada and South Africa.

Justice Ginsburg's revelation did not come as a surprise to scholars of comparative public law. For years, the United States Constitution has declined in its global influence, due in no small part to its exceptionalism on matters of rights and liberties.² In its place, Canada has risen to prominence on the strength of its modern *Constitution Act, 1982*, which after years of failed attempts finally entrenched a domestic amending formula as well as the now-celebrated *Canadian Charter of Rights and Freedoms*.³ Admired abroad for its constitutional success, Canada has since become a model for the promise and possibilities of constitutionalism in the democratic and democratizing world.

The global importance of the Constitution of Canada has grown as we have approached its sesquicentennial in 2017. Since Confederation began with the *British North America Act, 1867*,⁴ Canada has evolved into a global economic, cultural and now constitutional force. The country has survived the Great Wars, the Great Depression, the internal challenges of regionalism, bilingualism, bijuralism and secession. By its resilient example, the Constitution of Canada has influenced the design of the South African Bill of Rights, the Israeli Basic Laws, the New Zealand Bill of Rights and the Hong Kong Bill of Rights.⁵ The Constitution of Canada

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¹ Adam Liptak, 'We the People' Loses Appeal with People Around the World' N.Y. Times, Feb. 6, 2012, available at: <www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html> accessed 1 August 2016.

² See David S. Law & Mila Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 N.Y.U. L. Rev. 762.

³ *Canadian Charter of Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982, 1982*, c. 11 (U.K.).

⁴ Since renamed to '*Constitution Act, 1867: Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) [*Constitution Act, 1867*].

⁵ Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 Ind. L.J. 819, 821–822.

was perhaps fated to occupy this role in global constitutionalism given that the drafters of the *Charter* went to great lengths to incorporate international human rights principles.⁶

I A Country of Many Peoples

Yet for all of its successes, the Constitution has yet to constitute Canadians into one people. Instead, it accommodates and recognizes different peoples, and in some cases even creates new categories of peoples. Many of these peoples continue to challenge of the legitimacy of the very Constitution that binds them under law. The Constitution of Canada in many ways therefore defies the conventional theory of democratic constitutionalism that a constitution, in order to endure, should concretize a political settlement that is seen as legitimate and is in fact legitimated in a single democratic moment by the consent of the governed.

The remarkable endurance of the Constitution of Canada suggests that its legitimacy derives neither from its founding moment nor from its veneration but rather from its continued contestability. The Canadian commitment to the living constitution entails the political reality that the Constitution is both an unfinished and an unfinishable project of self-government. It is a political arrangement that is not quite settled nor perhaps ever will be. This unsteady state invites both challenges and opportunities.

The Lockean formation of the constitutional consensus thought critical to legitimate the new order concretizes a settlement among the people. The people, as Locke understands it, 'enter into society to make one people, one body politic, under one supreme government,'⁷ and though 'there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them,'⁸ they strike an agreement that repudiates difference or accommodates it, but in either case it is an agreement that constitutes one new people.

The United States Constitution is born of a revolutionary democratic moment. Since its adoption, it has been the battleground for the formation of a new constitutional settlement, or for the defense of the old. The Constitution, deeply imbedded within a tradition of revolutionary constitutionalism, has been transformed by dialogic interactions among the constituted branches of government, civil society groups and movement parties that have struck a new agreement, whether at the founding, the Reconstruction, the New Deal or the Civil Rights era. Each of these 'constitutional moments' has resolved an open question of polity and identity, concretizing though not necessarily formalizing in a new written

⁶ Claire L'Heureux-Dubé, 'The Importance of Dialogue' (1998) 34 *Tulsa L.J.* 15, 24.

⁷ John Locke, *Second Treatise of Government at 47–48* (§89) (Hackett Publishing Co., C.B. MacPherson ed. 1980, Indianapolis).

⁸ *Id.* at 77–78 (§149).

constitutional text, a new constitutional settlement that has governed subsequent generations of constitutional politics.⁹

The Canadian Constitution, however, is something of a departure from the conventional theory of constitution-making. Neither prompted nor attended by revolution, nor rooted in a tradition of revolutionary constitutionalism, the Constitution of Canada is not the product of the kind of settlement we commonly associate with constitutions,¹⁰ and indeed has spent much of its life in search of one. For Canada's leading scholar of constitutional politics, this is the story of the country's 'constitutional odyssey', a journey that has taken its peoples through multiple rounds of mega constitutional politics that have on each occasion failed to bring constitutional peace.¹¹ Worse still, these recurring periods of mega constitutional politics have hardened the differences that define the many peoples of Canada and indeed have deepened the fault lines that divide them.

II Unity in Dissimilarity

Some constitutional states manage difference in the construction of cultural homogeneity but this has never been the Canadian way.¹² As Lipset has argued, Canada has chosen instead 'to work out agreements among disparate cultures rather than assimilate them into one.'¹³ Since the founding of the dominion of Canada by British and French settlers, Canada has self-consciously understood and governed itself as a union of different peoples.¹⁴

The Canadian polity and its peoples constitute a multinational state composed of what Kenneth McRoberts has described as 'internal nations.'¹⁵ Canada is not a binational state, nor perhaps ever was despite the founding myth of Canada's English and French negotiated beginnings; it is rather an agglomeration of peoples whose shared interests bind them first to

⁹ See generally Bruce Ackerman, *We the People – Volume 1: Foundations* (Harvard University Press 1991, Cambridge, MA) (introducing theory of 'constitutional moments'); Bruce Ackerman, *We the People – Volume 2: Transformations* (Harvard University Press 1998, Cambridge, MA) (illustrating two major constitutional moments: Reconstruction and the New Deal); Bruce Ackerman, *We the People – Volume 3: The Civil Rights Revolution* (Harvard University Press 2014, Cambridge, MA) (arguing that the Civil Rights movement created a constitutional moment).

¹⁰ Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke L.J.* 364, 370.

¹¹ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press 1992, Toronto).

¹² Eva Mackey, *The House of Difference: Cultural Difference and National Identity in Canada 16* (University of Toronto Press 2002, Toronto).

¹³ Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada 79* (Routledge 1990, New York).

¹⁴ For a discussion of the dimensions of difference in Canada, see Daiva Stasiulis, Radha Jhappan, 'The Fractious Politics of a Settler Society: Canada' in Davia Stasiulis, Nira Yuval-Davis (eds), *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (SAGE Publications 1995, London – Thousand Oaks – New Delhi) 95–131.

¹⁵ Kenneth McRoberts, 'Canada and the Multinational State' (2001) 34 *Can. J. Pol. Sci.* 683, 688.

themselves, and also, though loosely, to Canada, the result being that the country is a nation of nations.

The consequences of Canada's multinationality were evident in the outcome of the Charlottetown Accord in 1992. The package of comprehensive constitutional reforms may have been doomed to failure in light of the varied and competing demands of Canada's diverse peoples. As Michael Behiels explains, 'virtually every dimension of the Charlottetown deal had its staunch defenders and its vociferous critics',¹⁶ making the package unlikely ever to be accepted. In addition to the complexity of the package – complexity occasioned by the need to speak to the interests held by many of the peoples of Canada – there was an additional problem, writes Richard Johnston:

The package Canadians rejected was formidably complex. It became so by a decade's accretion of elements, each calculated to appeal to, or to offset concessions to, groups excluded at an earlier stage – Quebec, the western provinces, and aboriginal peoples. Negotiators hoped that by 1992 they had finally found an equilibrium, a logroll sufficiently inclusive to survive referral to the people. Instead they seem to have gotten the logic of the logroll upside down: they may have overestimated both how much each group wanted what it got and how intensely some groups opposed key concessions to others.¹⁷

There is another observation worth making. Canada's Constitution has not only recognized a multiplicity of peoples but it has also created the possibility of recognizing new peoples, a group that Behiels identifies as 'Charter Canadians' – peoples different from those historically recognized.¹⁸

English and French Canada have always been the dominant actors in constitutional politics, and so too the provinces. But Indigenous peoples, territories and the 'Charter Canadians' whom Behiels identifies in passing have not traditionally had a seat at the table. That changed in 1982, when the *Charter* constitutionalized their rights, and it changed once again ten years later in 1992 with the demise of the Charlottetown Accord, when these groups gathered alongside traditionally empowered groups to negotiate the future of Canada. The Charlottetown negotiations included the federal government, nine provincial governments, territorial governments, and four major national organizations of Indigenous peoples; Quebec joined in late and women's groups were consulted throughout.¹⁹ All told, the Special Joint Committee of the House of Commons and the Senate responsible for shepherding the proposals for reform heard testimony from 700 individuals and received 3,000 submissions.²⁰ It is hard to imagine such broad consultation without the impetus of the *Charter*.

¹⁶ Michael D. Behiels, 'Charlottetown: The Anatomy of Mega-Constitutional Politics' Policy Options (Dec. 2002 – Jan. 2003) 65, 66.

¹⁷ Richard Johnston, 'An Inverted Logroll: The Charlottetown Accord and the Referendum' (1993) 26 Pol. Sci. & Pol. 43, 43.

¹⁸ Behiels (n 16) at 65.

¹⁹ See Kathy L. Brock, 'Learning From Failure: Lessons from Charlottetown' (1993) 4 (2) Const. Forum 29; Richard Albert, 'The Conventions of Constitutional Amendment in Canada' (2016) 53 Osgoode Hall L.J. 399, 404–412.

²⁰ *Consensus Report on the Constitution*, August 28, 1992, at Preface.

The enactment of the *Canadian Charter of Rights and Freedoms* brought with it recognition and accommodation for many of the peoples of Canada.²¹ In addition to affirming language rights,²² the *Charter* recognizes Aboriginal rights and freedoms,²³ as well as gender equality,²⁴ territorial rights and privileges,²⁵ and it insists that the *Charter* 'shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'²⁶ The Supreme Court's recent recognition of Métis and non-status Indians is a step in this direction.²⁷

The freedoms entrenched in the *Charter* also created new groups of Canadians bound neither by geography nor language nor culture but rather by interest and commitment. For example, the fundamental freedoms of conscience and religion have served as a focal point for the mobilization of religious groups.²⁸ The same is true of the entrenchment of the 'freedom of the press and other media of communication,' which has given the Fifth Estate a textual referent in which to ground its claims.²⁹ These are some of the 'Charter Canadians' to which Behiels referred as groups that now have constitutional rights to protect and indeed to seek to expand. The same may be said of the interests of criminal defendants, now entrenched in the *Charter*.³⁰ Just as important is the recognition of rights and freedoms that are not currently entrenched in the *Charter* but that may in the future be enforced.³¹ The most generative source of new protected classes of Canadians, however, each of whom now has interests to defend in the context of any effort to comprehensively reform the Constitution, is Section 15, the locus of equality rights.³²

The *Charter* has therefore entrenched, expanded and revolutionized the meaning of citizenship in Canada, giving rights and recognition to classes of Canadians, old and new. As Alain Cairns has observed, the Canadian Constitution is a 'citizens' constitution' that identifies and empowers the peoples of Canada:

The Charter brought new groups into the constitutional order or, as in the case of aboriginals, enhanced a pre-existing constitutional status. It bypassed governments and spoke directly to Canadians by defining them as bearers of rights, as well as by according specific constitutional recognition to women, aboriginals, official language minority populations, ethnic groups through the vehicle of multiculturalism, and to those social categories explicitly listed in the equality rights

²¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the 'Charter').

²² See *id.* at ss. 16–23.

²³ See *id.* at s. 25.

²⁴ See *id.* at s. 28.

²⁵ See *id.* at s. 30.

²⁶ See *id.* at s. 27.

²⁷ See *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

²⁸ See *Charter*, s. 2(a).

²⁹ See *id.* at s. 2(b).

³⁰ See *id.* at ss. 7–14.

³¹ See *id.* at s. 26.

³² See *id.* at s. 15.

section of the Charter. The Charter thus reduced the relative status of governments and strengthened that of the citizens who received constitutional encouragement to think of themselves as constitutional actors.³³

All of these peoples, established and nascent both, makes it is no surprise that the grand political settlement that drives the march to constitutionalism has continued to elude Canada. And yet it is in this very unsettled state that we may find the core of the legitimacy that sustains the Constitution.

III Constitution as Noun and Action

In Canada, 'constitution' is a verbal noun that reflects 'the action or activity of constituting.'³⁴ Constitution, in this sense, never ends, is never complete, and no final settlement is attainable, nor perhaps even desirable since it could entail the extinguishment of the equally valid claims of others. The peoples of Canada constitute and reconstitute themselves in their daily interactions and in the intermediated politics of parliamentary and legislative lawmaking. Though Canada may one day return to mega constitutional politics, today Canada remains in the necessary yet unsettled state of recognized and unrecognized difference, sometimes celebrated sometimes not, but always at the foreground of the peoples' conscious self-understanding as a polity.

Canadian constitutional politics are therefore open to possibilities that are not always available in states bound by a final settlement. The Constitution of Canada is a constitution ever in constitution, in which the people remain in conversation, contested to be sure, with each other, looking ahead to what shape an eventual political settlement might take but knowing that it remains as elusive as ever before. This conversation and the contestability of the Constitution is what gives its peoples validation as participants in the project of constitution and reconstitution, and also what breathes legitimacy into the constitutionalized agreements that to this day remain unfinished. Perhaps the future will bring some resolution, some settlement, however difficult this may be to envision in the present day.

Of course no constitution is ever finished. Even where its text does not change, the meaning of a constitution evolves over time through judicial interpretation, the enactment of statutes, the accretion of political practices, and the evolution of societal norms. All of these change constitutions in ways that may be stronger than a formal amendment. In Canada, judicial interpretation has been the most common way – and by comparison to the stringency of the amending formula, the easiest as way as well – to update the meaning of the

³³ Alan C. Cairns, 'Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake' (1988) 14 *Can. Pub. Pol. Supp.*: Meech Lake Accord S121, S122.

³⁴ Hanna Fenichel Pitkin, 'The Idea of a Constitution' (1987) 37 *J. Leg. Ed.* 167, 168 (1987); see also Richard Albert, 'Counterconstitutionalism' (2008) 31 *Dalhousie L.J.* 1, 3 (comparing constitution as both 'noun' and 'verb').

Constitution.³⁵ The Supreme Court of Canada has been the subject of criticism for what is labelled its judicial activism,³⁶ yet it is important to remember that it is through its politically deft if sometimes purposefully ambiguous judgments that Canada has most clearly advanced its ethic of accommodation, and with it, the country's reputation as a constitutional model.

IV A Moment for Reflection

The stakes are high in this anniversary project just as they are in many anniversary specials. In the bicentennial year of the United States Constitution, Supreme Court Justice Thurgood Marshall observed that the object of their celebration had grown 'vastly different from what the framers barely began to construct two centuries ago.'³⁷ Justice Marshall declined the invitation to join the chorus of good cheer for a document that had been enacted to exclude many from the rights and privileges of citizenship:

The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union' it is said we now enjoy. I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.³⁸

There is nuance in Justice Marshall's words. His message was not that the Constitution was not worth celebrating. It was that the Constitution as designed in 1787 was intrinsically unjust, but through war and sacrifice it had earned its status as a national symbol worthy of pride. The true miracle, he stressed, 'was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.'³⁹ For Justice Marshall, it was the transformation of the Constitution, not its founding text, that the bicentennial anniversary ought to celebrate. Rather its adaptive capacity to accommodate profound social change than its inegalitarian foundations. Justice

³⁵ Allan C. Hutchinson, 'Constitutional Change and Constitutional Amendment: A Canadian Conundrum' in Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (1st edn, Routledge 2013, London – New York) 51 1 at 57; Richard Albert, 'The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada' (2015) 41 *Queen's L.J.* 143, 167–176.

³⁶ See, e.g., Rory Leishman, *Against Judicial Activism: The Decline of Freedoms and Democracy in Canada* (McGill-Queen's Press 2006, Montreal); Robert Ivan Martin, *The Most Dangerous Branch* (McGill-Queen's University Press 2003, Montreal); F.L. Morton, Rainer Knopff, *The Charter Revolution and the Court Party* (University of Toronto Press 2000, Toronto).

³⁷ Thurgood Marshall, 'Reflections on the Bicentennial of the United States Constitution' (1987) 101 (1) *Harv. L. Rev.* 1.

³⁸ *Id.* at 1–2.

³⁹ *Id.* at 5.

Marshall saw something to celebrate in the redemptive possibilities of a constitution that would have been unrecognizable to those who had written it two hundred years prior. I take another message from Justice Marshall's reflections: that we must understand what it is we are doing when we mark an anniversary and also how our marking of it will be perceived. For us, as we mark the sesquicentennial of Confederation in Canada, the task is no different.

I am reminded of a powerful exchange between Mary Ellen Turpel-Lafond and Patricia Monture in the aftermath of the failure of the Meech Lake Accord in 1990.⁴⁰ Turpel-Lafond (then Turpel) suggested as they opened their public conversation that they start by identifying a period of time or a year to trace aboriginal history in the land now identified as Canada. One option was 'first contact 500 years ago', suggested Turpel-Lafond, or 'if not there, at least we have to mention 1867, a date which I hate to use.'⁴¹ Monture responded in no uncertain terms that the year 1867 was not one she believed was worth celebrating:

I do *not* want to start with 1867. Canada's birth is not something I celebrate; anymore than I believe the history of the country dates back to 1763 and the *Royal Proclamation*, or when the first European stepped onto the shores of what First Nations know to be Turtle Island.⁴²

Despite the accolades Canada has earned abroad for the theory and doctrine of its constitutional law, the lived experience of many of the peoples of Canada remains one of misgiving, disenchantment and also of anger for a past that remains unreconciled with the present. This anniversary presents an opportunity for the stewards of Canada's Constitution to reach righteous and just resolutions to longstanding internal challenges – both because the time is long past and because the world is now watching. How and whether public law succeeds in repairing what remains broken in Canada may well determine whether the Constitution of Canada will continue to be as influential in the world when the time comes to mark its bicentennial.

⁴⁰ See M.E. Turpel, P.A. (Trisha) Monture, 'Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord' (1990) 15 Queen's L.J. 345.

⁴¹ *Id.* at 346.

⁴² *Id.*

1867 as the Year of Constitutional Changes Around the World

I Introduction and Methodology

The composite jubilee of the year 1867 provides the topic for this paper. We will see how 1867 influenced both international relationships and constitutional changes through the world. The apparent and evident parallelism between Canada and Hungary because of the jubilee of 1867 gave the hint to examine other events of constitutional history. The significant changes in the form of government or constitution of a country have a great impact on the neighbouring countries and politics. This phenomenon was the root of our examination; namely to analyse the corresponding events and the constitutional changes closely relating to the Canadian and Hungarian changes with an eye to other determining and / or neighbouring countries in the international relationship. Our objective is therefore to describe the process of the changes of 1867, or more precisely, the second half of the 1860's, mostly in a descriptive way, since Hungarian and / or other foreign readers may not be so well-read on the history of the other side of the world, as they are on their own history. After that, our other incentive is to make a comparison of the detailed processes of the constitutional development of the examined countries, with an eye to the formation of the alliances of the First World War, as the end of the old world order started in 1867.

The combination of these incentives, namely the description of the events and the internal developments, and placing of these developments into the external, foreign relationships basically determines which countries are to be analysed. Since Canada was a colony of the British Empire, and the English did not want to wage war against her as they did with the US, it is evident that apart from the Canadian internal development, we examine 'the host country' i.e. England from inside. This means the examination of the constitutional changes of England. Meanwhile, Canada's neighbouring country, the US that had some interests in the Canadian territory allowed both Canada to acquire autonomy, and England to let Canada autonomous. This is the reason why we shall examine the US constitutional

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developments of that epoch. The net and frame are always the international relationships of the relating countries.

Another part of this paper that comes from the Canadian-Hungarian constitutional jubilee, is the examination of the counterpart, the Hungarian constitutional development in its status of 1867. That is why we have chosen to examine the Austro-Hungarian Compromise, with an eye to the Croatian-Hungarian Compromise of 1868. Since this paper has an Anglo-Saxon, mainly Canadian orientation, we are just referring that we are aware of the other constitutional changes in Serbia, Romania, North-German Confederation (*Norddeutscher Bund*) and Prussia, but the examination would exceed the limits of this paper.

The third country that we are examining is Japan. All the great powers had commercial interests in Japan. The international relationships were very ‘harmonic’ between them, because they coerced unequal commercial treaties to Japan in mutual understanding. Yet, this colonising expansion gave the birth of modern Japan. Since practically Japan did not take part in World War I, her regime from 1868 lasted until World War II, thus functionally the war waged for new colonies or recolonization of the world was the Second for Japan. The other reason for examining Japan is that the Constitution of 1868 is very unique, though a bit neglected by literature, in the sense that it was a true and very transitional document between feudalism and modernity. Therefore, the path from the feudal society to the modern, capitalist one can be detected.

We have therefore chosen to scrutinise the constitutional changes in Canada, the USA, Great Britain, Austria–Hungary and Japan. This spectrum may seem too broad at first; however, their mutual dependence requires even a schematic or orientating examination of all these countries. Constitutional changes are always embedded in the international relations and policies of the countries, as they are the net or frame that makes the changes either possible or, to the contrary, hinders the countries from realising them.

We are aware of the fact that each of the chosen countries had their own way in history. Their developments had different roots and their constitutional solutions had different consequences. Therefore the questions emerged in the second half of the 1860’s, differ from country to country. That is why we cannot have the same field of examination in 1867 in all the countries. Certainly, the historic events emerged in those years, created several different problems to solve. Among others, the problems were for Canada autonomy and self-governance, for Hungary independence, for England suffrage, for the US the reunion of the nation and the abolition of slavery, for Japan to avoid colonisation etc. Thus, it is almost impossible to find the greatest common denominator of the constitutional changes of these countries, not even speaking of the ones that are omitted from the paper. The scope of the paper is to give an overall picture of the constitutional changes of the second half of the 1860’s and to reveal the net and the frame of the international relationships that were decisive in the constitutional settlements. Thus the evaluation of the historical phenomena and the constitutional developments may be done together with the international relationships. This combined and complex net constitutes the frame of all the changes, and since it lasted for five decades it is worth to analyse them in their complexity.

This complexity and the limits of comparability explains the ‘changes’ word in the title. Since the constitutional developments differed from country to country, and even they were described and evaluated differently both by the contemporaries at that time and the scholars later, we have chosen the neutral word ‘changes.’ Furthermore, we will with the terminology of the changes in each country in another chapter in this paper. Thus, let’s see the international relationships of the epoch as the sine qua non of the changes.

II International Relationships in the 1860’s

In 1848, in the year of revolutions or the spring of nations, all Europe rebelled against the regime of the Holy Alliance. These revolutions were combined with wars of independence. The objective of the revolutions differed from country to country. Italy and Germany intended their own unification, though they could only succeed in 1861¹ and 1870, respectively. The French expelled Louis Philippe; the ‘bourgeois monarch’ abdicated or was expelled from the throne, yet after the second republic, Napoleon III became the emperor. The revolutions in Eastern-Central Europe were defeated by the Habsburgs with the help of the army of the Tsar, Nicholas I. However, several social achievements of the revolutions were preserved. England and Russia remained out of the revolutions, but both empires had to face the strength of their people. England pre-empted the turmoil with the First Reform Bill, and the Chartists were not strong enough to start any revolution. Russia, on the other hand, was defeated in the Crimean War (1853–1856) and in 1861 she had to abolish serfdom.

In the 1860’s, mainly in 1867–1868, the whole world rose up against the old regimes and, unlike the events of 1848, these two years were the dates of the establishment of regimes that lasted until World War I. The constitutional frameworks were settled in those two years, yet, in Meiji Japan, for example, the new constitution was only issued in 1889. In Europe, Bismarck’s policy determined the changes and gave the potential and impetus for new institutions. Austria had to compromise because of her defeat in 1866 and Croatia could make her own one with Hungary for the same reason. Italy could deepen her unification more because Austria was preoccupied with Hungary.

France was busy preparing for the world expo, held in Paris in 1867, and having no allies she was isolated as Bismarck’s main objective but in 1870, after a brief and hopeless war with Prussia, the Second French Empire collapsed, and gave way to the Paris Commune and to the Third Republic. In Spain, there was civil war and continuous regime changes and mass executions for six years (1868–1874). In 1867, England had to deal with the Second Reform Bill and the Chartist Movement, not to mention the Fenians in Ireland. The USA threatened the British North American Border and the North put the South under military administra-

¹ The last phase of the unification (*Risorgimento*) was when Rome became part of Italy after the Capture of Rome (*Presa di Roma*) in 1870.

tion and forced the Amendment of the era by a simple law in Congress. Moreover, the US purchased Alaska from Russia in 1867. As a result, Canada had only one very powerful neighbour left. Mexico executed her emperor, and became a republic. In the Far East, Japan was successfully transformed from the threat of colonization to the most powerful nation of the region by the Meiji reforms. The powers of emperor were restored and Japan was ready to wage war at the end of the era.²

The common feature was that in all regions, apart from some marginal events, domestic affairs were the main focus. None of the countries could pay attention to foreign affairs, or intervene if a civil war broke out in a neighbouring state. The only exception was Prussia, which thanks only to this potential, could lead German unification. Russia and France were isolated and too weak to intervene. The US government tried to reconstruct the nation, while the Habsburgs finally realised that, without Hungary's participation, the realm was far too weak. Canada therefore had a real opportunity and time to form a federation; moreover, owing to the historic and geopolitical environment, she could even have declared independence, apart from the unlikely consequence that the US and the British could have united their forces against the colony.

Nonetheless, these conditions did not create a hostile environment. The countries turned to internal renewal, though the influence of nationalism cannot be forgotten.³ The methods of all these reforms, restorations and compromises were constitutional, although sometimes preceded by civil wars. The aim of this paper is to reveal both the external and, more commonly, the internal evolution of the constitutional institutions of each of the countries and to show that the world was not the same after 1867–1868 as before. Institutionally, the relevance of 1867–1868 as a whole is that all the regimes lasted at least until World War I. Furthermore, the pieces of the word order, i.e. the countries, underwent only reformatory changes; none declared themselves to be revolutionary, yet regarding the whole globe, 1867 was a year of revolution for constitutional institutions.

² See Majoros István, 'Nemzetközi kapcsolatok 1789–1914' in Vadász Sándor (ed), *19. századi egyetemes történelem 1789–1914* (Osiris 2011, Budapest) 43–58; Ormos Mária, Majoros István, *Európa a nemzetközi küzdőtéren* (Osiris 1999, Budapest) 97–106, 117–145; Kincses László, *Diplomáciatörténet* (HVG-Orac 2005, Budapest) 95–108; Henry Kissinger, *Világrend* (Antall József Tudásközpont 2016, Budapest) 67–89.

³ For the development of nationalism and citizenship and their connection in Europe and Hungary see further Károly Kisteleki, *Az állampolgárság fogalmának és jogi szabályozásának történeti fejlődése – Konceptiók és alapmodellek Európában és Magyarországon* (Martin Opitz 2011, Budapest) 27–50; Kisteleki Károly, 'Magyar nemzet – magyar állampolgárság' in Máthé Gábor, Menyhárd Attila, Mezey Barna (eds), *A kettős monarchia. Die Doppelmonarchie* (ELTE Eötvös 2018, Budapest) 79–114; E. J. Hobsbawm, *A birodalmak kora 1875–1914* (Pannonica 2004, Budapest) 147–169.

III Changes in Central Europe. The Compromise of 1867 between Austria and Hungary

1 Neo-absolutism in Hungary

The Revolution and War of Independence in 1848–49 ended with the Russian intervention that maintained the Habsburg rule over Hungary. Though several social changes were kept, such as the abolition of serfdom, the core of the legal reforms (mostly the ‘April Laws’ of 1848) was overruled in favour of the Austrian law.⁴ Hungary even lost her sovereignty under the so called ‘forced’ imperial ‘Constitution of Olmütz’ in 1849. The ‘*Silvesterpatent*’ went even further introducing open neo-absolutism. This document preserved the principle of equal justice before the law and the abolition of serfdom only. The ‘October Diploma’ in 1860 purported to ease the level of centralisation, and was open to introduce federalist elements into the imperial settlement. It even differentiated between imperial and provincial affairs, thus the fields of internal administration, jurisdiction, religion and education were declared Hungarian affairs. However, the territorial integrity of the country was not restored; Transylvania, Croatia and the Croatian Military Frontier were treated as separate territories of the Austrian Empire.⁵ Furthermore, the foreign and the military affairs belonged to the power of the Emperor, while in finance, banking, tax and customs, trade etc. the imperial government could act only in agreement with the *Reichsrat* (Imperial Council).⁶ However, the council did not gain legislative powers at this time. The ‘February Patent’ in 1861 was the last document that intended some consolidation. Though the Patent introduced constitutionalism, it aimed for a much centralised state in comparison with the federalised vision of the ‘October Diploma’. After that, the Hungarian statesmen rejected the Patent unanimously, and the Emperor reinstated the absolutistic regime in Hungary provisionally.⁷

2 The Compromise of 1867

After the overwhelming Prussian victory at Königgrätz in 1866 and the economic crisis, both the political elite of Austria and Hungary and the Emperor were willing to make the

⁴ See further Ruszoly József, ‘Egy új alkotmány Magyarországnak.’ Az 1848:III. tc. létrejötte’ in Ruszoly József, *Újabb magyar alkotmánytörténet 1848–1949* (Püski 2002, Budapest) 7–25. Idem: ‘„Évenkénti országgyűlést Pesten”. Az 1848:IV. tc. létrejötte’ in *ibid* 26–37. Idem: ‘Az országgyűlési népképviselő bevezetése Magyarországon. Az 1848:V. tc. létrejötte’ in *ibid*. 38–66. Képegy Imre, ‘1848 alkotmányos forradalma – előzmények és kontextus’ in Fazekas Marianna (ed), *Jogi Tanulmányok, Jogtudományi előadások az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskoláinak konferenciáján* (ELTE ÁJK 2016, Budapest) 242–253.

⁵ See ‘A magyar országgyűlés képviselőházának válaszfelirata a legmagasb trónbeszédre’ (1865) I (2) Képviselőházi irományok (see: Válaszfelirat) 33.

⁶ See Válaszfelirat 36.

⁷ See Révész T. Mihály, ‘Felemás polgárosodás: A neoabszolutizmus éve’ in Mezey Barna (ed), *Magyar alkotmánytörténet* (Osiris 2003, Budapest) 254–259.

compromise. Bismarck urged it as well, because he needed a defeated Empire, yet one that was not sullen but strong at Prussia's back against the Russians.

Based on the legal framework created by the Pragmatica Sanctio,⁸ the Compromise established the dual monarchy of Austria–Hungary which is generally regarded as a real union of two monarchies, where the head of state was the Emperor (*Kaiser*) of Austria and the King (*König*) of Hungary in one person.⁹ Afterwards, this *K. und K.* nomination was in effect reflecting the equal realms of the Monarchy. The Hungarian Kingdom re-acquired its sovereignty. The most significant powers were in the hands of the Emperor-King; for example, he was the commander in chief of the armed forces.

The Compromise joined three fields of interests. These were the interests of the ruling elites of both Austria and Hungary and the Emperor as the representative of the dynastic aims of the Habsburgs. Austria had a much more industrial and developed bourgeois society and economy as well as a modern legal system; meanwhile Hungary intended to re-establish the liberal legislation of the Revolution. Besides regaining the traditional status of the country upon the natural development of the 'historic constitution',¹⁰ which was identical to the 'ancient constitution' in the English development. In 1848, the question arose particularly by the Viennese Government, whether the enactment of the April Laws was equalled to the adoption of a new constitution for Hungary.¹¹ It was argued, that with the promulgation of the act on the responsible government, the ancient constitution was abolished. From the Hungarian statesmen's point of view, the changes enacted in 1848 meant only an evolutionary step in the Hungarian constitutional settlement.¹² Furthermore, the April Laws were treated as inseparable parts of the 'historic constitution' by the 1860s.¹³ Moreover, the Habsburgs had just been expelled from the unification of Germany, so their ambitions towards the Balkans needed a strong hinterland.

The settlement of Austria–Hungary established parliamentarianism with elected representatives by the people,¹⁴ the executive responsible to the parliament and finally a modern legal system and administration. It introduced some fundamental rights as well, like equality before the law, burden sharing in taxation, right to property, habeas corpus etc.

⁸ Hanák Péter, *1867 európai térben és időben* (MTA Történettudományi Intézete 2001, Budapest) 87.

⁹ The question whether this legal relationship should be based on personal or real union of the states created high tensions. The political sentiments of the question is represented in the preliminary debates of the Compromise where even Kálmán Ghyczy a member of the opposition argued heavily that the reaction to this question should be taken and presented in the response to the so called Franz Joseph's speech from the throne. See Képviselőházi napló, 1865, Volume I, national session XXVII, 259, in 20 February 1866.

¹⁰ Hanák quotes: HHStA, Deák Franz. August's report of 28 February 1865.

¹¹ See Ruszoly József, 'Parlamentarizmus és népképviselő 1848-ban' Rubicon Online, http://www.rubicon.hu/magyar/nyomtathato_verzio/parlamentarizmus_es_nepkepviselo_1848_ban/ accessed 05 July 2018; Pölöskei Ferenc, *A magyar parlamentarizmus a századfordulón* (MTA Történettudományi Intézete 2001, Budapest) 141–142.

¹² See Egyed István, *A mi alkotmányunk* (Magyar Szemle Társaság 1943, Budapest) 44.

¹³ See Képviselőházi napló, 1865, Volume I, national session XXIV, 180, 187.

¹⁴ The suffrage cannot be regarded general, though it was a broad one in contemporary Europe.

This latter and the compromise itself were based upon the theory of legal continuity, which was the natural constitutional development of the historic constitution of Hungary. This theory created the grounds and legitimacy for the Compromise.

As for the legal structure of the realms, the monarch was the emperor and the king in one person. There were common affairs of the realms, the military (defence) and foreign affairs, with each having a common ministry (department). The third one was finance; however, it only covered those financial aspects that supported the two others. A common ministry was created as the main executive, with the Emperor-King and with the common ministers as members. The authority of the two separate parliaments of Austria and Hungary did not affect this common ministry. A delegation, constituted from each of the two parliaments, was the only representative body of the interests of the people. A common parliament of the whole empire was never formed, though it would have meant a real balance to and control of and over the common ministry. On the other hand, such institution would have reduced the Hungarian Parliament to a provincial legislative body.¹⁵ Furthermore, this delegation became increasingly powerless while the emperor regained his influence and power. Hence, the control of the parliaments and the delegations turned into a formality.¹⁶

After the Hungarian–Austrian Compromise, Hungary made another with Croatia in 1868. Croatia, Dalmatia and Slavonia delegated 40+3 members (representatives and peers) to the Hungarian parliament and that body had authority over the military, finance, legislation and administration. The head of state was the Hungarian King; the Crown, the boundary and citizenship remained common, i.e. due to earlier Hungarian settlement. Common affairs were under Hungarian authority as they affected the whole country of the Holy Crown. These were the Hungarian Royal Court, foreign affairs, finance, customs and trade, the railway, post offices and shipping. Internal affairs, religion and education, and jurisdiction belonged to the Croatian authority.¹⁷

¹⁵ See Válaszfelirat 36–37.

¹⁶ See Máthé Gábor, Mezey Barna, Révész T. Mihály, 'A parlamentáris monarchia' in Mezey (n 7) 260–266; and Csorba László, 'A dualizmus rendszerének kiépülése és konszolidált időszaka (1867–1890)' in Gergely András (ed), *Magyarország története a 19. században* (Osiris 2005, Budapest) 360–362. See further Képešy Imre, 'Az út a Kiegyezéshez' in (ACTA FORVM 2018, Szeged) [manuscript, under being published]. The most recent work on the anniversary of the Compromise is. Máthé Gábor, Menyhárd Attila, Mezey Barna (eds), *A kettős monarchia. Die Doppelmonarchie* (ELTE Eötvös 2018, Budapest), for this chapter see especially Máthé Gábor, 'Deák Ferenc közjogi dogmatikai remeke' (39–64) and Stipta István, 'A közös elvek szerint kezelt ügyek és a közigazgatási bíráskodás' (65–78). Sente Zoltán, *Kormányzás a dualizmus korában* (Atlantisz 2011, Budapest) 171–314.

¹⁷ See Mezey (n 7) 266; and Heka László, *A magyar–horvát államközösség alkotmány- és jogtörténete* (Bába kiadó 2004, Szeged) 155–166.

IV The Reform of Parliament in the United Kingdom

1 The Reform Bill of 1832

Until 1832, Parliament was still summoned according to the old customs. The constituencies originated in the Middle Ages. There were even uninhabited districts or some that were in the private possession of landowners. These constituencies could not represent any public interest but their owners, who obviously intended to maintain their property and their MP status as well. These were the so-called rotten boroughs. Moreover, there were large towns without any representation at all, for example Birmingham, Manchester, Leeds and Sheffield, so both the population and the territory of the constituencies were disproportionate.¹⁸

Apart from the unequal distribution of parliamentary seats, the right to vote was in the hands of a few because it demanded having an amount of property that was quite rare to possess. However, these qualifications were not strict measures for one to be entitled to vote. These were only qualifications to be on the register of electors. Furthermore, the rules regulating the right to vote altered from borough to borough. The main old qualifications were to have a forty-shilling freehold or an estate worth £10 a year. These requirements of enfranchisement and the economic and demographic changes, accompanied by an internal political crisis, led to the introduction of the Reform Bill in 1832.

The new qualifications broadened the number of voters, since the Act created a uniform franchise in the boroughs and enfranchised all householders who paid a yearly rental of £10 or more. It also extended the franchise's property qualification in the counties to include small landowners, tenant farmers and shopkeepers. The number of constituencies also changed and there were several where the number of MPs was reduced.¹⁹ 45 boroughs lost both their members and 30 more lost one. 42 new constituencies were created in London and the large towns and 65 new members were given to the counties.²⁰

The significance of the Reform Bill of 1832 was to give a uniform franchise and power was therefore transferred from the agricultural to the manufacturing districts. The equal franchise gave the main power to house-holders and destroyed to a great extent the influence of the aristocracy in the boroughs.²¹ The number of eligible voters increased only from 220,000 to 670,000, though in another aspect, it tripled. The other consequence was for unskilled workers. Being excluded from all the benefits of the Reform Act 'and the Poor Law Act of 1834 convinced them that the Whigs were at least as indifferent to their interests as the Tories had been'.²²

¹⁸ See Cyril Ransome, *A Short History of England from the Earliest Times to the Death of Queen Victoria* (Longmans, Green & Co. 1905, London – New York – Bombay) 425; and S. B. Chrimes, *English Constitutional History* (Oxford University Press 1967, London – New York – Toronto) 128.

¹⁹ See F.W. Maitland, *The Constitutional History of England* (Cambridge 1961, Cambridge) 355–360.

²⁰ See A.L. Morton, *A People's History of England* (Lawrence & Wishart 1979, London) 390.

²¹ See Ransome (n 18) 425.

²² See Morton (n 20) 392–393.

The fall of the rotten boroughs involved the fall of the Municipal rotten boroughs in the field of local government. ‘The Municipal Corporations Act of 1835 was more democratic than the Reform Bill, for it gave all ratepayers the right to vote for the new Municipalities. At last the ice-age English institutional and corporate life had come to an end, and the life of the community began to be remodelled according to the actual needs of the new economic society.’²³

2 The Reform Bill of 1867

The United Kingdom survived the turmoil of the revolutions of 1848 intact apart from a rebellion in Ireland, but that was put down without any difficulty due to the Great Famine. Even the Catholic Church was against the rebellion.²⁴ Though, the constitutional settlement faced the challenges of the Chartists, there were no reforms as a result, not to mention a lack of any revolutionary movements. However, the demand for the extension of the franchise became stronger. Still, ‘the governing and conservative classes had grown accustomed to change as a normal condition of political life.’²⁵

After the death of Lord Palmerston in 1865, the Liberals were in crisis, though they had a majority in the House of Commons. In 1866, the Liberal leader Gladstone introduced a Bill which only reduced the £10 qualifications in the boroughs to £7. This Bill had its opponents even among the Liberals, and the so-called ‘Adullamites’, who were collaborating with the Conservatives, left the Liberal Party, and this way the Liberal Party escaped from their own faction of internal opposition, the so-called Radicals, the overlap between the two groups is great and they are common in that they were the opposition inside the Liberal Party.²⁶ Yet, later, most of the Adullamites returned to the Liberal Party.

However, the Parliament accepted Disraeli’s Bill in 1867. He was the leader of the Conservative Party, though the Conservatives were in a minority in the House of Commons under Lord Derby’s third Ministry in that year. Disraeli’s Bill extended the franchise to those with property worth £5, more than the previous Bill intended (£10).²⁷ ‘At the same time, the franchise in the counties was given to all £12 householders, and a partial redistribution of seats was effected, by which, following the method of 1832, many members were taken from ancient but small boroughs and given to rising towns or to populous counties’²⁸ However, ‘the agricultural labourer and the miner in country constituencies were indeed still left without a franchise, but household suffrage in the boroughs was in effect the principle of the Second Reform Act. Being the measure of a Conservative government it easily passed the Lords’.²⁹

²³ See G.M. Trevelyan, *A Shortened History of England* (15th edn, Penguin Books 1981, New York) 476.

²⁴ See David Ross, *Ireland. History of a Nation* (Geddes & Crosset 2009, New Lanark) 228–229.

²⁵ See Trevelyan (n 23) 490.

²⁶ See Morton (n 20) 415.

²⁷ See Maitland (n 19) 360.

²⁸ See Ransome (n 18) 446–447.

²⁹ See Trevelyan (n 23) 490.

The significance of the Act was that 'a million new voters were enfranchised and nearly doubled the size of the electorate'³⁰ up to 2 million; thus while the demand for universal male suffrage was not introduced, the working men of the towns basically, gained a parliamentary franchise. Nevertheless, the consequence of this doubling in size was that the House of Commons began to act like the forum of political parties, where the party is responsible to its electorate for carrying out its programme and its members should act like the delegates of their constituencies.³¹ Although the Conservative objective and belief was that the new electorate would vote for them, Disraeli and the Conservative Party lost the general election of 1868.

Gladstone's first Ministry (1868–1874) was the term when 'the universities were opened to men of all creeds, a national system of Primary Education was established, Army Reform was initiated, the throwing open of the Civil Service was completed.'³² As a continuation of the reform acts, the Act of 1873 introduced the secret ballot, and finally, Gladstone's Act of 1884 (the Third Reform Bill) 'reduced the occupation of premises qualification almost but not quite to vanishing point, increased the electorate by nearly a further 70 per cent bringing it up to rather more than four and a quarter millions'³³ so agricultural workers and miners could also vote.

Britain had another significant issue that initiated constitutional changes in the settlement of the Empire, though the final result partially arrived in the 20th century. That was the Home Rule for Ireland. In 1867, there was a notorious criminal trial where three people were sentenced to death. They were the 'Manchester Martyrs' for the Irish, and bandits for the British. Nonetheless, the Fenian movement, in whose name they were fighting for Home Rule, was strong and had a significant base in North America near the Canadian border.³⁴ The British Government and the North American British had great fears that, although the Fenians had been defeated in Britain, they would take revenge in America. The cause of the fear was that the Fenians had discovered two weapons against the government, 'the terror tactics in Britain, and the cult of the sacrificial hero in Ireland.'³⁵

³⁰ See Chrimes (n 18) 128.

³¹ Ibid.

³² See Trevelyan (n 23) 513.

³³ See Chrimes (n 18) 129.

³⁴ See Paul Rose, *A manchesteri mártírok* (Kossuth 1975, Budapest) 110–142.

³⁵ See Ross (n 24) 236.

V Changes in North America

1 Canada

a) *Canada's Road to Dominion*

In 1763, after the Seven Years' War, which is called the French-Indian War in North America, the former French colony named New France was ceded to the United Kingdom. This territory was renamed as the British Province of Quebec by the Royal Proclamation of 1763. This provided representative assemblies and the introduction of English law, which was very unjust for the Catholic French. The Quebec Act of 1774 gave a compromise and annulled the former proclamation. It recognised the Roman Catholic religion, and except for English criminal law, it restored the French law and custom. The Act was an expedient to save Canada for the British. Meanwhile, it offended the sensitive Americans, mostly in New England, but it could not gain the help of French-Canadians who remained sullenly neutral in the American war of independence.³⁶

Though, the Americans counted on an uprising in Canada, they were mistaken. Furthermore, about seven thousand British Loyalists entered Canada via the Upper St Lawrence River as refugee immigrants.³⁷ Due to the conflicts between the newcomers and the French settlers on questions of religion, self-government and customs, the Quebec Act of 1774 'was to be recognised as the bastion of French-Canadian liberties and the foundation of French-Canadian nationalism.'³⁸

In 1791 the British divided the territory into Lower and Upper Canada and granted them a 'model' of the English constitution. The head was the governor with subordinate lieutenant-governors in each province. Similarly to the House of Lords, there were two small legislative councils appointed for life by the crown, and, similarly to the House of Commons, there were two legislative assemblies elected every four years.³⁹

Nonetheless, the power was in the hands of the executive authority, and it was guarded against the hazards of popular intervention. The demand was therefore to give political control to the assembly and in this way the government would be responsible for the representatives of the people. This issue was of course how to reconcile self-government with imperial supremacy, besides the obvious economic grievances. The War of 1812, which purported to defend American agricultural interests and at the same time occupy the British

³⁶ See Gerald S. Graham, *A Concise History of the British Empire* (Thames and Hudson 1970, London) 99–103. For the very details in Hungarian see the most recent monography about the events, Molnár István János, *Kanada története – A kezdetektől a konföderációig* (Patrocinium 2017, Budapest). However, the publication of Molnár's work was after the deadline of the manuscript, so here we can refer only to the existence of that work.

³⁷ Contrary to Graham, Morton claims a number of 40 000. Morton (n 20) 470.

³⁸ See Graham (n 36) 104.

³⁹ *Ibid.*

territories in Canada, was a complete failure for the United States and ended with no changes to the boundaries.⁴⁰

In 1837, rebellions broke out against the British colonial government in both Upper and Lower Canada. The British Parliament sent Lord Durham, who was both an imperialist and a democrat at a time when hardly any other person in the Cabinet rank was either the one or the other,⁴¹ to examine the state of the colonies. ‘He had the peculiar merit of regarding freedom as the means of preserving the Imperial connection, and not as a step towards separation, which most Whig and Conservative statesmen in that era believed to be inevitable.’⁴² However, it was an inappropriate time to discuss the mother country’s obligations to her colonies. The Durham Report of 1839 recommended that some colonies were mature enough for self-government; moreover, it would be more effective than governing the colonies from the opposite shore of the ocean. It also advised that ‘the Cabinet be made responsible to the majority in the assembly on issues of colonial concern, and it insisted on the compatibility of this notion with the imperial connection’⁴³ The Report therefore left the regulation of trade and foreign affairs in British hands; likewise, the form of government, the disposal of public lands and the determination of immigration policy. Nonetheless, ‘the Report presented the alternative to revolution, namely, evolution towards dominion status through the grant of internal self-government.’⁴⁴ Durham’s other ‘bold’ proposal was the union of Upper and Lower Canada under ‘a single Assembly with full power over the executive, which thus be in the hands of the English-speaking majority.’⁴⁵ This came true in 1840 by an Act of Union, and the responsible government was realised in 1848. Although 1848 was the year of revolutions in Europe, in Canada self-government was established without any disorder, ‘because Canadian leaders, disdaining republican models, turned towards British parliamentary procedures.’⁴⁶

b) The Dominion of Canada and the Constitution of 1867

After the Civil War in the United States and the belligerent military rule over the Southern states, the British realised finally and unequivocally that they could neither defend Canada nor hinder US hegemony and dominance of the continent.⁴⁷ Graham emphasizes that the British fear was doubled after the American acquisition of Alaska and the demand for the territory between them. Furthermore, a united federative Canada was more likely to resist to the piecemeal consumption by the US.⁴⁸

⁴⁰ See Charles Sellers, Henry May, Neil R. McMillen, *Az Egyesült Államok története* (Maecenas 1996, Budapest) 100–106.

⁴¹ See Trevelyan (n 23) 49.

⁴² Ibid.

⁴³ See Graham (n 36) 152.

⁴⁴ See Graham (n 36) 153.

⁴⁵ See Trevelyan (n 23) 494.

⁴⁶ See Graham (n 36) 155.

⁴⁷ See Trevelyan (n 23) 494 and 498.

⁴⁸ See Graham (n 36) 168–170.

The British North American Act of 1867 (also called Constitution Act of 1867) created the Dominion of Canada with a constitution similar in principles to the constitutional principles of the United Kingdom. The dominion consisted of the Province of Canada (Upper and Lower Canada) and New Brunswick and Nova Scotia.⁴⁹ The dominion became a federation under the single name of Canada⁵⁰ and remained a part of the British Empire, so the Head of State was the Queen (Victoria). The Queen held the executive powers, but was represented by the governor general or an administrator of the government.⁵¹ Furthermore, the executive was supported with the help of the Queen's Privy Council for Canada.⁵² The executive branches of the provinces continued to exist and their power was exercised through the lieutenant governors. The federal government exercised its powers through the governor general, either with the advice of the privy council or alone.⁵³ The Parliament of Canada was composed of the Queen and the House of Commons of Canada and the Canadian Senate.⁵⁴ Although the powers and privileges of the parliament were no greater than those of the British parliament,⁵⁵ the Parliament of Canada had the right to 'make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.'⁵⁶ Parliament also created the Supreme Court as general court of appeal for Canada and lower federal courts.⁵⁷

The Act fulfilled its political role, namely to protect Canada from an American invasion and safeguard British interests as well.⁵⁸ Nonetheless, constitutionally and politico-culturally, the brightest diamond of the British Empire was Canada and not India. The origin of this assessment was that the Canadians gave their loyalty to the British in exchange for their autonomy and self-governance. As such, the Atlantic Ocean did not just protect the English but the Canadians as well; in other words, the ocean can protect England, but it can also insulate her colonies. Thus, the legal frame between Britain and Canada constituted a role model for other dominions, and maintained the integrity of the Empire by its liberal principle, i.e. self-governance versus oppression. Therefore, the legal role of the Act was fulfilled similarly.

⁴⁹ Preamble. The Source and all citations are from <http://www.legislation.gov.uk/ukpga/Vict/30-31/3/contents> accessed 14 June 2017.

⁵⁰ Section 4.

⁵¹ Sections 9–10.

⁵² Section 11.

⁵³ Section 12.

⁵⁴ Section 17.

⁵⁵ Section 18.

⁵⁶ Section 91.

⁵⁷ Section 101.

⁵⁸ See Trevelyan (n 23) 498–499.

2 Constitutional Challenges in the United States in the Reconstruction Era

a) *The Reconstruction Era*

After the convulsion of the American civil war (1861–1865), the main objective was to reunite the states and the nation, though the Southern states wanted to retain the old socio-economic order by enacting the Black Codes. These laws meant to maintain the former slaves in a sort of disenfranchised status and under white supremacy; in other words to put them outside the law.⁵⁹ This legislation of the Reconstruction Era was the legal manifestation of the Civil War.⁶⁰ The response to such regulation was the establishment of the Freedmen's Bureau in 1865, the Civil Rights Act of 1866 and the 13th, 14th and 15th Amendments to the constitution which were just as decisive as the victory at Gettysburg.⁶¹

After the election of 1866, the South was placed under military administration by the Reconstruction Acts and this rule was not withdrawn until 1877. We have to emphasise that Congress enacted these Reconstruction Acts just in order to ratify the Amendments, i.e. until the Northern States ratified the Amendments, the South would be under military rule. As such, the North altered the Constitution under the impetus of the Civil Rights Act, by the 14th and 15th Amendments while the South was under military administration by the North.⁶²

This military rule over civil authorities even led to the first impeachment against the presidents in US history, because President Johnson debated the right of the Congress to enact and enforce such regulation and administration. Finally, he was acquitted by only one vote in the Senate.⁶³ Nevertheless, legal race discrimination continued as a crucial issue after 1877 with the Jim Crow laws, which enforced racial segregation in the Southern states until the 1960's.⁶⁴ This election had other significant consequences. The Republican Party, which was formed in 1854, mainly by anti-slavery activists, won a 2/3 majority in Congress and even overruled president Johnson's veto on the Civil Rights Act. In this way, the Northern Republican radicals gained the key positions both in legislation and the in reconstruction.⁶⁵

US foreign affairs in 1867 were of little importance, since all attention was paid to reconstruction. However, the Russian Empire, attempting to eliminate its fiscal deficit, sold Russian America (Alaska) to the US in that year. The other objective of the Russians, besides the increase in national revenue, was to weaken the British Empire with the threat of the annexation of British Columbia. This thought was not far even from the public sentiment of

⁵⁹ See Carl N. Degler, *Az élő múlt. Milyen erők formálták Amerika mai képét?* (Európa 1993, Budapest) 220–222.

⁶⁰ See Fred W. Friendly, Martha J.H. Elliott, *The Constitution: That Delicate Balance. Landmark Cases that Shaped the Constitution* (McGraw-Hill 1984, New York) 22–23.

⁶¹ See Nagyné Szegvári Katalin, *Fejezetek az Amerikai Alkotmány történetéből* (HVG-Orac 2002, Budapest) 61–63.

⁶² See Michael K. Curtis: *The Fourteenth Amendment and the Bill of Rights* (Duke University Press 1986, Durham) 152–153.

⁶³ See Howard Cincotta (ed), *Amerika rövid történelme* (Egyesült Államok Információs Hivatala, Amerikai Nagykövetség, Vienna) 171–175.

⁶⁴ See Degler (n 59) 238–245.

⁶⁵ See Sellers, May, McMillen (n 40) 192–194.

the US. Furthermore, Russia could easily have lost Alaska if there had been war with the British later, and could have never been able to reacquire it, but with the purchase she gained 7.2 million dollars. Moreover, it was very unlikely that the US and the British would have waged war for the possession of Alaska, though the future status of British Columbia was not so evident.⁶⁶

On the Southern border, the US demand for the withdrawal of the French intervention from Mexico in 1866 led to the collapse of the French regime, and in 1867 Emperor Maximilian from the Habsburg dynasty was executed and the Republic was restored under the third presidency of Benito Juarez. Mexico's secular reforms were continued and the power of the Church was curtailed. The legislature as a branch of power became more important, and although land reform and ending debt slavery were not resolved, Mexico stepped onto the path of being a modern constitutional state.⁶⁷

b) The Civil Rights Act of 1866 and the 13th, 14th and 15th Amendments

The aim of the 13th Amendment was to clarify the post-war status of former slaves because Lincoln's Emancipation Proclamation of 1863 was issued during the Civil War and therefore it was legally dubious. The Amendment abolished slavery in the US and the Three-fifth Compromise at the same time.

Though the Civil Rights Act of 1866⁶⁸ wanted to overrule the legislation of the Southern states that claimed white supremacy, it created constitutional controversy. However, President Johnson's veto was overridden. The first article guaranteed the same rights and declared the same citizenship for the freed Afro-Americans 'as the white persons without regard any previous condition of slavery or involuntary servitude' in every State and Territory in the United States.

The act also purported that former slaves had right 'to make and enforce contracts, to sue, be parties, and give evidence, to inherit, and purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.'⁶⁹

The controversy and the cause of Johnson's veto⁷⁰ was that the act 'does not purport to give these classes of persons any status as citizens of States, except that which may result from their status as citizens of the United States. The power to confer the right of State citizenship is just as exclusively with the several States as the power to confer the right of Federal

⁶⁶ For either the American or the Russian primary sources see: <<http://www.loc.gov/rr/program/bibourdocs/Alaska.html>> accessed 08 June 2017.

⁶⁷ Lynn V. Foster, *Mexikó története* (Pannonica 1999, Budapest) 123–126.

⁶⁸ Source: <<http://legisworks.org/sal/14/stats/STATUTE-14-Pg27.pdf>> accessed 09 June 2017.

⁶⁹ *Ibid.*

⁷⁰ Source: <https://en.wikisource.org/wiki/Civil_Rights_Act_of_1866> accessed 09 June 2017.

citizenship is with Congress. [...] Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. They all relate to the internal police and economy of the respective States. They are matters which in each State concern the domestic condition of its people, varying in each according to its own peculiar circumstances and the safety and well-being of its own citizens.⁷¹

Johnson's most important argument was self-evidently that the norms of the act 'interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State – an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government.'⁷²

However, both the Senate and the House of Representatives overrode the veto by the majority of 2/3, so it became law. Congress also wanted to place this act at the constitutional level so, as we have seen, they forced through the 14th Amendment, which guaranteed privileges and immunities of citizenship, due process and equal protection, with the help of the military administration. Article 1 of the Amendment claimed the fundamental guarantees. 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

In the second article, the Amendment protects the citizens' right to vote, because, if it were to be limited in any way, the basis of representation, i.e. the size of the population according to the Great Compromise (by which three-fifths of the former slave population were added to the white population), would be reduced by the proportion of the population deprived of their rights to vote. In this way, the Southern states either denied the freed male population of their right to vote and lost representatives in Congress, or provided that right and could outnumber the Northern states.

This increase in the population and therefore in the number of seats created a relevant threat to radical and moderate Republicans as well, and was another cause for Johnson's veto. However, in 1868 the Republicans won a strong majority in the elections and Ulysses S. Grant became the president.

Though the Civil Rights Act and the 14th Amendment overruled the Supreme Court's decision in the Dred Scott case (1857), which had held that slaves could not 'become a member of the political community'⁷³ i.e. citizens of the United States, the various Republican factions were discontented.⁷⁴ Hence, they forced the 15th Amendment, which

⁷¹ Ibid.

⁷² Ibid.

⁷³ See Friendly, Elliott (n 60) 21.

⁷⁴ See Curtis (n 62) 91.

declared that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.

Though the primary objective of the 14th Amendment and the Republicans was to protect and guarantee the rights of freed slaves, its legacy was even more revolutionary than its contemporary effect. ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.’ The sentence created not just a debate over interpretation but it also had political, constitutional and jurisdictional consequences.

The new idea was that, beyond setting up the federal government and protecting citizens from the abuses of the central government, the federal government could scrutinise the activities of state governments. For many people, the intention of granting the above mentioned protections against the states was absolutely clear. More precisely, the Amendment was to give the federal government the power to apply the Bill of Rights to the states.⁷⁵

The experience of slavery and public opinion against it shaped the 14th Amendment. As such, the opponents of slavery advocated that the guarantees in the Bill of Rights limited both the states and the federal government. However, it took about a century that the Supreme Court obliged the states to apply the Bill of Rights.⁷⁶ The other conclusion we can draw is that Congress had the power to overrule the constitution by amending it without the Southern states, so basically against the rules of the constitution itself, or at least questionably. The more serious experience was that even the constitution could not defend the Southern states against military administration.

VI Changes in Asia – The Meiji Restoration and Modernisation

1) Towards 1867 in Japan

In the eyes of the Western empires, Japan’s role in the mid-19th century was to be forced to become the same semi-colonial settlement as China had after the Opium Wars (1839–1842, 1856–1860). One of the earliest foreign attempts was a letter from the Dutch king, William II (1840–1849), who tried to make the government of the shogunate⁷⁷ (*bakufu*) open its ports for the Western countries.⁷⁸ However, it was only commodore of the US. Navy Matthew C. Perry’s (1794–1858), visits with his ‘black ships’ in 1853 and 1854 and the Convention of Kanagawa that opened Japan to world trade.

⁷⁵ See Friendly, Elliott (n 60) 26–29.

⁷⁶ See Curtis (n 62) 25.

⁷⁷ The shogun, the main military leader who was resident in Yedo (now Tokyo) had the real power as a dictator over the country, while the formal ruler was the Emperor, who was without any mentionable power, settled in Kyoto.

⁷⁸ See Yamaji Masanori, *Japán: Történelem és hagyományok* (Gondolat 1989, Budapest) 247.

The most significant phase towards the Meiji restoration was the Treaty of Amity and Commerce (Harris Treaty) which Townsend Harris, a merchant and Consul General to Japan, negotiated to secure trade between the US and Japan. The Treaty gave US residents extra-territoriality from Japanese jurisdiction and fixed low import-export duties subject to international control; moreover, it granted ‘most favoured nation’ status to the US. Shortly after, the Netherlands, the United Kingdom, France, Russia and Prussia made the same treaties (*Ansei Treaties*) with Japan, and the last contracted party was the Austro-Hungarian Monarchy in 1869.⁷⁹

After this mercantile intervention into Japanese politics, the discontented warriors (*bushi* or *samurai*), in order to ‘honour the Emperor, and expel the foreigners,’ tried to rout out the strangers. However, that was a complete failure, and so they turned their hatred and dissatisfaction towards the shogunate. The main warrior families were from Choushuu and Satsuma, and they were supported by the British; however, the shogunate was given a loan of 6 million dollars by the French. After their inevitable defeat, the Choushuu and Satsuma opposition gathered around the Court of the Emperor.⁸⁰

Finally, after economic crises and peasant revolts and victorious battles, the 15th and last shogun, Tokugawa Yoshinobu (1837–1913), gave back his power (*taisei houkan*) to the Emperor in 1867. The power of the Emperor, Mutsuhito (1868–1912) with the name Meiji, ‘Enlightened Rule,’ was re-established. The Court declared the restoration and modernization of the Empire, and the abolishment of the regent-counsellor (*sesshou-kampaku*) offices and the other institutions of the shogunate, such as prerogatives and the so-called Japanese feudal system. Japan thus began its journey to westernisation.⁸¹

2) The Early Constitutional Documents of the Meiji Restoration

The main objective of the restoration was to abolish the unequal mercantile treaties and for Japan to be a full member of the world order. This was reflected in the political slogans such as ‘be out of Asia, and to be European’ (*datsu a nyuu ou*)⁸² or ‘Japanese spirit, Western learning’ (*wakon yousai*).⁸³ The core of these changes and the new regime was the Charter Oath of Five Articles in 1868 (*Gokajou no Goseimon*). The oath was written by the leading members of the new regime, and the emperor presented it to the people, so these changes were performed from above without any organic legal development.⁸⁴

⁷⁹ See Tamás Csaba Gergely, *A „Jelképes” császárság alkotmánya. Fejezetek a japán alkotmánytörténet köréből* (Pázmány Press 2013, Budapest) 39–41.

⁸⁰ See Kenneth Henshall, *A History of Japan, from the Stone Age to Superpower* (Palgrave Macmillan 2004, New York) 67–70.

⁸¹ See R.H.P. Mason, J.G. Caiger, *Japán története* (Püski 2004, Budapest) 182–186.

⁸² See Szerdahelyi István, ‘Japán és a környező világ az újkorban – Gondolatok Japán geopolitikai helyzetéről’ in Yamaji Masanori (ed), *Irodalom, kultúra és társadalom a közép- és kora újkori Japánban* (ELTE Japán-tanulmányok 1997, Budapest) 72.

⁸³ See Henshall (n 80) 75.

⁸⁴ See Tamás (n 79) 42.

The preamble of the oath even declares that ‘By this oath we set up as our aim the establishment of the national weal on a broad basis and the framing of a constitution and laws.’

The articles were the following: ‘1. Deliberative assemblies shall be widely established and all matters decided by public discussion. 2. All classes, high and low, shall unite in vigorously carrying out the administration of affairs of state. 3. The common people, no less than the civil and military officials, shall each be allowed to pursue his own calling so that there may be no discontent. 4. Evil customs of the past shall be broken off and everything based upon the just laws of Nature. 5. Knowledge shall be sought throughout the world so as to strengthen the foundations of imperial rule.’⁸⁵

Though, these articles can be regarded only as a political programme or intent,⁸⁶ their significance is beyond any debate. The argument for this is that the wording reflects the need for the abolition of the restrictive feudal class system, i.e. the hierarchy of the warrior, peasant, artisan and merchant classes, which reflected Confucian ethics and values.⁸⁷ The oath proclaims the reason of state, i.e. basically the motive of the governmental actions or the justification of the interest and requirement of the political state, with the state’s supremacy, meanwhile it argues for the individual pursuit of careers, as well as for there being just and natural laws. The last article highlights what became a very typical Japanese characteristic, namely the adoption of any efficient political, legal, economic, educational etc. system in order to improve the country, although it might be adjusted to the local environment later. All articles make an attempt to breach the strict order of life, in which social mobility was seen as a threat that could destroy the whole regime.

Since both its contemporaries and the scholars of the present day regard the oath as a message, declaration, programme, indication or statement of willingness⁸⁸ toward the Western countries, its content had to be put into precise legal terms.⁸⁹ The Emperor therefore issued the ‘Document on the Government System’ (*Seitaisho*) two months after the Oath. This Document of 1868 is hardly known in the literature and ‘was a surprisingly low-profile affair.’⁹⁰

However, this Document is also called the Constitution of 1868, which is not identical to the Meiji Constitution that was issued on 11 February 1889 and was overshadowed by the later one. Even so, the Document ‘did provide in theory for a national assembly, public ballot, and a Grand Council of State [*Dajoukan*]. The Grand Council was the only item to be put into

⁸⁵ Source and translation: Ryusaku Tsunoda, William Theodore de Bary and Donald Keene, *Sources of Japanese Tradition*, Volume II (Columbia University Press 1958, New York) 137.

⁸⁶ See Wilhelm Röhl, ‘Public Law: Constitutional Law’ in Wilhelm Röhl (ed), *History of Law in Japan since 1868* (Brill 2005, Leiden–Boston) 31.

⁸⁷ See Farkas Ildikó, ‘Állandóság és változás: A japán történelem vázlata’ in Farkas Ildikó (ed), *Ismerjük meg Japánt! Bevezetés a japanisztika alapjaiba* (ELTE Eötvös 2009, Budapest) 20.

⁸⁸ See Tamás (n 79) 42.

⁸⁹ See Röhl (n 86) 31.

⁹⁰ See Henshall (n 80) 76.

effect at the time, and its various ministries and offices further conferred legitimacy upon the young leaders of the government,' as Kenneth Henshall put it.⁹¹

Since the Document is generally regarded as the first Constitution of Eastern legal culture, and it is either forgotten or not even widely known, we ought to cite and examine it. Furthermore, it gave the impetus for the further constitutional changes.⁹² Another reason for citing the terms is that we can see the development from a feudal state towards a modern one, in a phase where the first phase is the adapting of the forms of Western legal institutions officially. We can see similarities between the new Japanese structures and even with the early European one, namely the British constitutional system of the late 17th century, when the Cabinet was being formed, and the executive and legislative branches of power and the party system were in their embryonic state.⁹³

Kevin Doak questions the relevance of the Document, and argues that the 'Seitaishou is best considered a working memorandum for several competing groups with de facto power over how their authority would be allocated in the immediate future. Japan was still far from having a state, and the Seitaishou did not carry anything like the legal or public authority of a modern national constitution.' However, he himself continues that 'even in name, the document itself echoed the 'debates over a government based on public consultation', and indeed it tried to incorporate these arguments for a broader 'public' form of government. [...] The Seitaishou moved government closer towards a pluralistic political system than the earlier system of Departments and Offices. It invested this pluralism in the Dajoukan, the political structure that would survive as the governing apparatus of Japan until 1885. The Seitaishou reflected a growing consensus among those who held power that modern Japan could not survive as a government of courtiers who served only the Court, and it even secured imperial legitimacy for the demands to open the corridors of power to new talent outside traditional channels of authority and hierarchy. In this limited sense, the Seitaishou worked as a solution to the national tensions opened up by the Restoration.'⁹⁴

Nonetheless, considering Kevin Doak's critiques of Japanese legal development until June 1868 and the very short period in which the Document was in effect, we still underline the importance of this document as a peculiar one of the transitional period between feudalism and the modern age. Since the Document is not so known, but because of the reasons mentioned above, we intend to cite it in details, article by article.

The Document⁹⁵ restated the Charter Oath in its first article. The following ten articles established the new administration that was a structure of a central government. 'All power

⁹¹ Ibid.

⁹² The analysis of the Meiji Constitution of 1889 is out of our scope and does not belong to the topic and the period of this paper. However, it has a great quantity of literature, so the reader may easily find information about it.

⁹³ Kontler László, 'Királyság, rendiség és alkotmányosság: korona, tanácsok, bíróságok, parlamentek Angliában és Nagy-Britanniában' in Poór János (ed), *A kora újkor története* (Osiris 2009, Budapest) 211–234.

⁹⁴ See Kevin Doak, *A History of Nationalism in Modern Japan: Placing the People* (Brill 2007, Leiden) 51.

⁹⁵ Source and translation from William Theodore de Bary (ed), *Sources of East Asian Tradition: The modern period* Volume 2, (Columbia University Press 2008, New York) 474.

and authority in the empire shall be vested in a Council of the State, thus the grievances of divided government shall be done away with. The power and the authority of the Council of State shall be threefold; legislative, executive, and judicial. Thus, the imbalance of authority between the different branches of the government shall be avoided.' Contrary to this centralised government mentioned in article 2, the division of powers by the separation of functions and tasks is emphasized in article 3. 'The legislative organ shall not be permitted to perform executive functions, nor shall the executive organ be permitted to perform legislative functions. However, on extraordinary occasions, the legislative organ may still perform such functions as tours of inspection of cities and the conduct of foreign affairs.' As such, the division of the branches of power is ambiguous, because it is in the context of the Grand Council of State, yet the roots of it can be detected.

Articles 4 and 6 describe the human policy of the administration. 'Attainment of offices of the first rank shall be limited to princes of the blood, court nobles, and territorial lords, and shall be by virtue of [the sovereign's] intimate trust in the great ministers of state. A law governing ministers summoned from the provinces shall be adopted; clan officials of whatever status may attain offices of the second rank on the basis of worth and talent.' [...] 'A system of official ranks shall be instituted so that each [official] may know the importance of his office and not dare to hold it in contempt.' These articles contain both the feudal type of acquisition of positions and meritocracy for ordinary offices. This can be understood easily if we consider that, in the early modern age or even in the feudal age, administration was carried out by the nobility, because social rank assumed the person's capability for such offices. Moreover, at the ordinary level, the regulations overruled the former restrictive class system.

However, article 7 maintains some feudal elements since 'princes of the blood, court nobles, and territorial lords shall be accompanied by [no more than] two-sworded men and one commoner, so that the appearance of pomp and grandeur may be done away with and the evils of class barriers may be avoided.'

According to article 5 'each great city, clan, and imperial prefecture shall furnish qualified men to be members of the assembly. A deliberative body shall be instituted so that the views of the people may be discussed openly.' The importance of this article is the relationship between open debate and the legislature. Open debate and the legislature are complemented by the right to petition as in article 8. 'Officers shall not discuss the affairs of the government in their own houses with persons without office. If any persons desire interviews with them in order to give expression to their own opinions, they shall be sent to the office of the appropriate department and the matter shall be discussed openly.'

Article 9 combines the election of the members of the official bodies with professionalism, so that no hiatus in the competency shall occur. 'All officials shall be changed after four years' service. They shall be selected by means of public balloting. However, upon the first expiration of terms hereafter, half of the officials shall retain office for two additional years, after which their terms shall expire, so that [the government] may be caused to continue without interruption. Those whose relief is undesirable because they enjoy the approval of the people may be retained for an additional period of years.'

The last two articles are about establishing ‘a system for levying taxes on territorial lords, farmers, artisans, and merchants, so that government revenue may be supplemented, military installations strengthened, and public security maintained. For this purpose, even persons with rank or office shall have taxes levied upon them equivalent to one thirtieth of their income or salaries.’ Feudal privileges were therefore overruled in taxation as well.

Finally, ‘each large city, clan, and imperial prefecture shall promulgate regulations, and these shall comply with the Charter Oath. The laws peculiar to one locality shall not be generalised to apply to other localities. There shall be no private conferral of titles or rank, no private coinage, no private employment of foreigners, and no conclusion of alliances with neighbouring clans or with foreign countries, lest inferior authorities be confounded with superior ones and the government be thrown into confusion.’ In this way, both the local autonomy and centralisation, with the monopolies of coinage, employment etc., are stated.

In conclusion although the Document is not a developed modern constitution, it has some main elements of one, at least in its form. Nevertheless the Dajoukan, the executive branch of powers that was established by this Document, enabled the modernisation of Japan and had significantly strong authority. This organ abolished the feudal privileges of the warriors, the feudal class system, and settled the national army, a modern bureaucracy and jurisdiction.⁹⁶ As a result, the slogan ‘rich country, strong army’ (*bunmei kaika*) and Meiji’s own name came true.

VII The Characteristics of the Changes

Regarding the form of the legal instruments of the changes, in every region the legislative bodies passed acts to realise them. It was the case in the relation between Austria and Hungary, Croatia and Hungary as well as within Japan. While the Acts passed by the British Parliament were also important, the literature emphasises the process of the legislature and the debates over the proposals; therefore the expression ‘Reform Bills’, reflecting the level of contemporary English democracy, are used instead of the Reform Acts of 1867. In the US the Civil Rights Act and the three amendments to the constitution were enacted. Even in Canada, the instrument was an act, the British North America Act. Moreover, in the cases of Austria–Hungary and Canada, these acts became part of their constitutions. In Hungary, which had a historic (ancient) constitution, the political theorists even incorporated the act of 1867 into the frame of the ancient constitution by a very creative and broad interpretation of the extension of the ancient constitution and the ‘April Laws’ of 1848, thereby legitimising the act of 1867 and maintaining the continuity of legality at the same time. In Canada and in the USA which both had codified constitutions, the amendments and the Act of 1867 are still in effect, though the Canadian one was patriated in 1982 (transferring ultimate authority from the

⁹⁶ See Jany János, *Jogi kultúrák Ázsiában: Kultúrtörténet, jogtudomány, mindennapok* (Typotex–PPKE 2016, Budapest) 505–506.

British Parliament to Canada's federal and provincial legislatures) and a new act was formally issued. As we have seen, the Meiji constitution of 1867 is merely a document regarding the constitutional settlement, and does not fit the criteria of a modern constitution.

The terminology describing these changes is also relevant. Compromise was used because there was an agreement by mutual concessions from Austria, Hungary and the Emperor. In England it was Reform, because it altered the settlement and, contrary to the revolutions on the continent, it occurred in the Parliament and not in the streets. Canada declared the British North America Act as a Constitution, because it established the Federation of Canada. In the US, the instrument of the changes were the Amendments, while finally, in Japan the Emperor was restored to power in the Restoration. The peculiarity is that since monarchs and the ruling elite were all afraid of the experiences of 1848 in continental Europe, the terminology was nowhere one of revolution, though the extent of the changes would have vindicated it.

The role of the emperor was described precisely in the acts and as head of the executive power; they had strong authority in Austria–Hungary and Japan. According to the Compromise of 1867, Franz Joseph became the legitimate Hungarian sovereign upon his enthronement and coronation. In the Restoration, Meiji was restored to the throne after the defeat of the shogunate. The common feature and consequence in both cases was that the executive branch acquired (also *de lege lata*) the strongest, even overwhelming power, yet Meiji could not participate in the real governance and rule, while Franz Joseph could even somewhat strengthen his power. The acts were settled in Japan in Meiji's name, but without his actual influence, while Franz Joseph personally enforced acts and took measures during the Dual Monarchy (1867–1916).

The changes in North America and in the United Kingdom broadened the entitlement to civil and natural rights, especially the right to vote and the equality before the law. The role of popular sovereignty and legislation hence became stronger and as a consequence, it entailed the enlargement and deepening of the responsibility of the executive power. Even the president of the United States was impeached during the changes. Evidently, the role of the parties and, in the long term, even the party system changed in the US, while in the Hungarian and Japanese regimes the party systems remained basically intact and were placed under the control of the executive power. In these two parliamentary settlements, the parliamentary parties were relevant but the question of who was the ruling party was beyond doubt, which also made the executive more powerful.

As for the external relationships of the parties, Hungary became equal to Austria and independent after the years of so-called neo-absolutism (1849–1867). Croatia and Canada gained autonomy, but the former had only relative autonomy while the latter's was almost entire. The Confederacy of southern states in the US lost their independence while Japan succeeded in maintaining it. Canada became a federation while the US strengthened federation by readmitting the separatist Southern States. In all cases, the political system was characterised by the constant presence of a strong and a weak party, though the strong had to refrain from intervention and war. Of course the Northern United States was an exception, as we have seen.

As it is habitual in history, aggression was the key initiator of the changes. Austria was defeated by Prussia, and the Hungarians were indignant, which forced Franz Joseph, the emperor and Ferenc Deák, the leader of the Hungarian opposition, to compromise. As such, the changes were mainly carried out from above with a relevant external impetus. The existence of the Austro-Hungarian Compromise made the Croatian-Hungarian Compromise possible. In this case, we can observe a kind of derivation in terms of comparative law. In the United Kingdom there was a threat of internal uprisings due to the Fenians and the Chartists. Russia, as an enemy to Britain's colonial interests, was out of the spheres of changes. Hence, the changes emerged from the society, i.e. from below. In Canada and therefore for British rule, there was the threat of invasion from the US and a constant quarrel between the French and the English part of the colony. In this way, the changes outlined above were carried out on the one hand by external influence and on the other hand by influence from above. In the US there was no external threat of aggression but the Americans fought a bloody civil war lasting for 5 years and that placed the South under military rule until 1877. The course of the changes was thus in the hands of the Congress. In Japan, the whole restoration began with the foreign invasion of merchants and diplomats; however, the shogunate and the opposition waged a short civil war with some battles against each other, but later Japan was relieved from foreign invasion. Implementing the changes was in the hands of the opposition and the emperor. Comparing these developments, we can ascertain that it was only the English Reform Bill which emerged from internal elements, i.e. from the dissatisfaction of the people. Globally examining, the main characteristics of the changes were that all the countries faced the external threat of each other, as well as of wars, and yet they turned towards internal reforms. The only country that had already made her reforms in the period in question, and was therefore the engine of the international relationships for the whole period, was Germany.

VIII Conclusions

We have seen how international relationships and especially wars could accelerate changes of regimes, whether civil wars (Japan, US), or foreign defeats (Austria–Hungary, Croatia). We also uncovered the net of mutual dependency between countries that could lead to constitutional changes (Britain, US, Canada). It has also become apparent that, although the changes relied upon entirely different direct internal developments (the Chartist Movement has nothing in common with the historic constitution of Hungary or with the Japanese Emperor), the world order as a whole was dependent on internal events having external effects to and from its members, so it depended on the indirect external threats to the neighbouring countries.

Due to the complexity of international relations in 1867, the coloniser states were therefore in stalemate and keen to take any opportunity if there was any internal crisis in their enemies. Hence, any internal change could be regarded as a chance for the external expansion of opponent states. The inverse of that is also true. Any stalemates in the international field

of politics were to be regarded as a chance for internal changes. That is why there were constitutional changes in North America, Asia and the European continent as well. These stalemates of the great powers created the vacuum of either internal or external political power and thus made the opposite field moving respectively. Thus, the political vacuum in foreign affairs made the internal affairs moving in homeland, and vice versa, the political vacuum of the internal affairs made the foreign policy and the international relationship acting. So a constant and mutual action and reaction occurred in the foreign and internal politics.

Furthermore the changes, ranging from issuing reform bills, making compromises, restoring the emperor back to its power, to transferring a colony into federation etc., dramatically altered the world order and the political settlements as living and moving entities in a revolutionary way. These constitutional changes finished the turmoil of 1848 and preserved the power of social elites but undeniably eliminated the chances of any revolutions. So, constitutionally speaking, 1867 was the year of the revolutions rather than 1848, because the former was the determining constitutional milestone in the world order and not 1848, which was the year of social changes, marking the end of feudalism in Central Europe and the start of the modern age.

The peculiarity of the settlements is that, although the alliances in World War I were formed by separate political events, accidents and incidents, if we inspect the main belligerents, we find that the countries of the Triple Alliance and Japan, that did not take part in World War I though, had a strong executive power, while the Allied Forces had a strong representative body (Russia was the great exception, as it was an alliance based on military and political interests). To some degree, though it is very difficult to prove and requires more research, the core and the formation of the alliances can be traced back to the socio-political systems and even to the legal-constitutional institutions. As we are all aware that autocratic regimes tend to find solace in each other's company, we can give a historic answer to the conference's question, 'What can Eastern-Central Europe learn from the Canadian Constitution?' If a nation is a colony, it would have been better to be one in the British or French Empire (especially in the age of Victoria) rather than under the Habsburgs, Hohenzollerns or Romanovs. Moreover, we can state that the legal guarantee provided by constitutional institutions can be safer and more reliable for the people than the divine will of an emperor. The other conclusion having edifying purpose lies in the logic of solving internal problems. Namely, in 1867 the countries solved them by turning into legal-constitutional methods, so the internal affairs and constitutional law overruled the temptation of acting by foreign affairs i.e. waging war. However, the countries forgot that lesson in 1914.

The Canadian Approach to Fundamental Rights Disputes

Methodological Exceptionalism in Constitutional Interpretation and Proportionality Reasoning

I The Purpose and Structure of the Paper

This paper aims at giving an overview of the unique methods of constitutional interpretation used by Canadian courts and their special relevance in fundamental rights disputes, especially those examined based on the principle of proportionality. As the Canadian literature and the practice of the Supreme Court of Canada demonstrates, the well-founded, consistently and transparently used methods of legal interpretation and legal argumentation can strengthen each other and lead to justified and acceptable decisions. In the long run, methodological clarity and certainty supports the more effective protection of fundamental rights.

The approach of this paper is descriptive. First I will present the origins and particularities of the most influential methods of constitutional interpretation used by Canadian courts, the *progressive*, the *purposive*, and the *generous interpretation*. In the second step, I will present the *Canadian form of the proportionality analysis*, which, despite its relatively short history, has a significant impact on Comparative Constitutional Law. The hypothesis of this paper is that constitutional interpretation and proportionality reasoning are intertwined. Accordingly, the appropriate and transparent use of these methods in a common framework enhances the convincing nature and justification of judicial decisions. To test this assumption, I will include a *case study analysis* in this paper by presenting a classic decision, the *Alberta v Hutterian Brethren* case.¹ No doubt many more cases could be examined; however, the author hopes that this model-analysis convinces the reader that the ‘Canadian approach’ to fundamental rights disputes is worth following.

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¹ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567

II Constitutional Interpretation in Canada

Constitutional interpretation is inevitable when courts decide on fundamental rights disputes. The fundamental right affected in the particular legal dispute is codified in the constitution, as well as the limitation clause² which prescribes the possible purpose and extent of the limitation of fundamental rights. The constitution therefore needs to be interpreted in order to identify whether a particular fundamental right has been infringed and to examine whether the limitation in question is acceptable or not. Proportionality analysis offers a framework for this examination, as well as for the reasoning of the court, while constitutional interpretation is the starting point and context of this operation. In the case of Canada, this assessment refers in particular to the interpretation of the Canadian Charter of Fundamental Rights and Freedoms (Charter)³, ‘a nation-building instrument’⁴. However, the origin of the most influential methods of constitutional interpretation used by Canadian courts dates back to times when constitutional adjudication – in the absence of a codified charter of fundamental rights – was based on other parts of the constitution.

The challenges related to constitutional interpretation are well-known. According to the summary of Jeffrey Goldsworthy, ‘the provisions of national constitutions, like other laws, are often ambiguous, vague, contradictory, insufficiently explicit, or even silent as to constitutional disputes that judges must decide.’ Moreover, in the case of constitutions (compared to other laws) ‘the stakes are much higher’⁵, when it comes to the responsibility of the interpreter. Due to the fact that there are many justifications and classifications of the methods of constitutional interpretation, both in Constitutional Law scholarship and in the practice of courts, it is useless to search for ‘the right method’ of interpretation. The benefit of the debates between the proponents of the different methods⁶ is not the possible hegemonic position of a particular approach, but rather a better understanding of the particularities of the concurring methods – therefore offering a set of more sophisticated methodological tools for judges.

Particular methods of interpretation in most of the cases are favoured by individual judges, based on the legal culture from which they come and their social experiences or

² This is not the case of implicit limitation clauses. However, the meaning of implicit limitation clauses can be also derived from their context, the text of the constitution. Aharon Barak uses the term of ‘implied limitation clauses’. See: Aharon Barak, *Proportionality. Constitutional rights and their limitations* (Cambridge University Press 2013, New York) 134–141.

³ Included in Constitution Act, 1982, effective from April 17 1982.

⁴ Joanna Harrington, ‘Interpreting the Charter’ in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2015, Oxford) 23, 2.

⁵ Jeffrey Goldsworthy, ‘Introduction’ in Jeffrey Goldsworthy (ed), *Interpreting Constitutions. A Comparative Study* (Oxford University Press 2007, Oxford) 1.

⁶ The debates were particularly intensive in the American literature. See e.g. William H. Rehnquist, ‘The Notion of a Living Constitution’ (1977) 54 *Texas Law Review*; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977, Cambridge, MA); Antonin Scalia, *A Matter of Interpretation. Federal Courts and the Law* (Princeton University Press 1998, Princeton, NJ); Richard Posner, *How Judges Think* (Harvard University Press 2008, Cambridge, MA).

personal professional beliefs. It is rare when particular interpretive methods can be associated at the general level, explicitly with the activity of certain judicial organs or jurisdictions – the Canadian legal tradition is exceptional in this regard as well.

The reasons behind this ‘*methodological exceptionalism*’⁷ can presumably be found in the particularities of the Canadian legal culture. (a) The structure of the constitution is special, which affects its interpretation as well. The constitution is not a single document;⁸ the parts of it (Constitution Act 1867 and Constitution Act 1982) were enacted in very different times and social circumstances and none of these is comprehensive, regulating every relevant constitutional question.⁹ However, the supreme judicial organs of the country had to support their decisions by referring to the text of the constitution; as such, there was a more pressing need to elaborate the ‘unwritten’ parts¹⁰ of it by constitutional interpretation. (b) Another two particularities relate to the multicultural character of the country. At present, Quebec, as a French-speaking province, and ‘French Canada’ ‘is an important part of Canadians’ self-image’¹¹, while the rights of aboriginal people and their communities have enjoyed constitutional protection since the enactment of the Charter.¹² Due to the fact that Canadian society experienced significant political, legal and social conflicts in the past related to these aspects, which were later solved by social compromises, a forward-looking and consent-oriented approach dominates judicial (constitutional) interpretation as well.¹³ (c) One can also mention that the Canadian legal system is a mixed jurisdiction, in which common law and civil law are concurrently present, therefore the traditions of both legal systems have an impact on the activity of the courts (eg. the special role of precedents) and pushes those to follow unique approaches or methods when interpreting legal texts. (d) The Supreme Court of Canada has reference power, according to which the federal government (or in the second step the governments of provinces) can address the Court for an advisory (preliminary) opinion related to proposals or policies which could be questionable from the point of view of constitutionality. The exercise of this competence promotes a living constitutional dialogue with the legislatures.¹⁴

⁷ The notion of exceptionalism is often associated with the jurisdiction related to the US Constitution. See: Lorraine E. Weinrib, ‘Postwar Paradigm and American Exceptionalism’ in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006, New York) 86–87.

⁸ See: Peter W. Hogg: ‘Canada: From Privy Council to Supreme Court’ in Jeffrey Goldsworthy (ed), *Interpreting Constitutions. A Comparative Study* (Oxford University Press 2007, Oxford) 55.

⁹ E.g. the 1867 Constitution Act did not contain any provisions on the protection of fundamental rights, while the 1982 Constitution Act did not proclaim the judicial independence.

¹⁰ Peter W. Hogg refers to ‘democracy, responsible government, the rule of law, the independence of the judiciary, the protection of civil liberties and federalism’ as unwritten principles. See: Hogg (n 8) 91.

¹¹ Hogg (n 8) 95.

¹² Hogg (n 8) 96.

¹³ Hogg (n 8) 93–96. One can also add that the ‘consensus model’ of government, which ‘includes rather than excludes’ and ‘tries to maximize the size of the ruling majority’ can be associated in general with ‘deeply divided’ and even ‘less divided’ societies. See: Arendt Lijphart, *Patterns of democracy. Government Forms and Performance in Thirty-Six Countries* (Yale University Press 2012, New Haven, CT) 32.

¹⁴ Hogg (n 8) 96–100.

Canadian scholars usually refer to three interpretive techniques as typical to Canadian courts:¹⁵ the progressive, the purposive, and the generous interpretation. Two of these, the progressive and the purposive interpretation, can be considered as primary approaches, while the generous interpretation is used supplementarily. Needless to say, these typical methods of interpretation do not exclude the use of other techniques.

The *progressive interpretation* – the evolutive approach – derives from the famous historical ‘*living tree*’ doctrine. According to this ‘powerful metaphor’¹⁶ created by the Judicial Committee of the United Kingdom’s Privy Council, the constitution (at that time the British North America Act of 1867) ‘planted in Canada a living tree capable of growth and development within its natural limits.’¹⁷ The doctrine had a significant influence in Canada over the decades¹⁸ and was explicitly reconfirmed by the Supreme Court after the enactment of the Charter¹⁹ as well. Justice Dickson expressed that the interpretation of the Charter shall be ‘capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers.’²⁰ According to another Canadian scholar, Peter W. Hogg, ‘the principle of progressive (...) interpretation (...) has become the dominant theory of interpretation in Canada.’ He also emphasises that, according to this theory, the Constitution is always applied to ‘contemporary conditions.’²¹

One can note that the progressive (evolutive) interpretation is theoretically in conflict with the American-style, classic originalist approach²² which looks for an interpretation which is in accordance with the original understanding of the framers. Peter W. Hogg calls to our attention that there are ‘relatively scanty records of the legislative history of the Constitution Act 1867’²³ – possibly why ‘originalism has never enjoyed any significant support in Canada’²⁴. In addition, with regard to fundamental rights disputes, it is also relevant that the Charter (the legislative history of which is well-documented) was enacted decades after the formulation of the living tree doctrine, which was already applied by Canadian courts. One can also add that, in fundamental rights dispute cases, the progressive interpretation promotes the more precise identification of the conflict between fundamental rights by the relevant social circumstances taking into consideration.

¹⁵ See: Hogg (n 8) 82–93; Harrington (n 4) 23, 5. There are also slight differences in the theoretical approaches: Peter W. Hogg highlights the *originalist approach* as well (at the same time stating that it has less significance) and the reference to *unwritten principles* (one can note that from the methodological point of view this is not a technique, rather a source of interpretation), while Joanna Harrington emphasises the significance of the *contextual interpretation* as well, which – with regard to fundamental rights disputes – is a more ‘sensitive case-oriented’ approach when determining the scope and content of Charter rights.

¹⁶ W. J. Waluchow, ‘The Living Tree’ in Oliver, Macklem, Des Rosiers (n 4) 22, 1.

¹⁷ *Edwards v Attorney-General for Canada* [1930] AC 124, 136

¹⁸ For a general overview analysing the evolution the doctrine see Waluchow (n 16).

¹⁹ *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

²⁰ *Hunter v Southam* [1984] 2 SCR 145, 155.

²¹ Hogg (n 8) 87.

²² For the critics of this contrast see: Waluchow (n 16) 22, 14–16.

²³ Hogg (n 8) 78.

²⁴ Hogg (n 8) 83.

The *purposive interpretation* probably fits the best with the examination of fundamental rights disputes. As Joanna Harrington emphasises, in the Supreme Court's view, 'this approach requires the interpreter to determine the underlying purpose of each Charter guarantee, taking also into account «the nature of the interests it is meant to protect»'.²⁵ Among these interests and purposes, there can be highlighted 'cultural values as respect for equality and the inherent dignity of human person' and other 'individual and collective goals', as well as 'Canada's international human rights obligations'.²⁶ At the general level, this approach aims at 'fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection'.²⁷ One can add that this purposive approach allows the interpreter to define the function of fundamental rights affected in the legal dispute in question, and so the examination of the conflict of fundamental rights can be performed more precisely.

Peter W. Hogg points to the fact that 'the original purpose of a right (...) is usually unknown', therefore it is up to the courts to identify the purpose and to determine the level of generality of it. At the same time, Hogg warns the courts that 'the widest possible (...), the most generous interpretation (...) can overshoot the [real] purpose of the right',²⁸ therefore a careful investigation is needed in this regard. It can be added that the purposive approach also supports the appropriate use of the proportionality reasoning. The precise identification and assessment of the purpose of the constitutional value (another fundamental right or public interest) which is in conflict with the right in question is the first subtest and a premise for other subtests of proportionality.

The *generous interpretation*²⁹ refers to a 'generosity requiring the absence of rigid and pedantic formalism so as to give individuals the full measure of their rights'.³⁰ However, the generous interpretation on its own does not lead to convincing conclusions: as Peter W. Hogg demonstrates, if the scope of a right is taken too broadly (based on generous interpretation) the standard of justification of its limitation will be inevitably more relaxed.³¹ According to his conclusion, 'generosity is a helpful idea only if it is subordinate to purpose'.³² Joanna Harrington adds to this that generous interpretation should also be subordinate to progressive interpretation, as the purpose itself needs to be interpreted in an evolutive manner.³³

The generous interpretation can be also understood as 'large and liberal' interpretation in contrast with 'narrow and technical' approaches.³⁴ The large and liberal approach accords

²⁵ Harrington (n 4) 23, 7.

²⁶ Harrington (n 4) 23, 7.

²⁷ Stéphane Beaulac, 'Constitutional Interpretation: On Issues of Ontology and of Interlegality' in Oliver, Macklem, Des Rosiers (n 4) 29, 44.

²⁸ Hogg (n 8) 89–90.

²⁹ Articulated in the decisions *Hunter v Southam Inc.* and *R. v Big M Drug Mart Ltd.*, cited above (n 20 and 19).

³⁰ Harrington (n 4) 23, 8.

³¹ Peter W. Hogg, 'Interpreting the Charter of Rights: Generosity and Justification' (1990) 28 (4) *Osgoode Hall Law Journal* 817–838, 819.

³² Hogg (n 31) 821.

³³ Harrington (n 4) 23, 8.

³⁴ Hogg (n 8) 87.

wide amplitude for the exercise of the legislative powers, as well as for individuals to exercise their fundamental rights. One can add that this approach offers more effective protection for fundamental rights, as the possible infringement of them can be detected in more cases, which will be followed by an in-depth examination of the acceptability of the limitation.

The application of these methods of interpretation is general and consistent in the practice of Canadian courts. One reason for the balanced practice could be the fact that none of these techniques requires the acceptance of any special justification theory. The most common justifications of judicial review³⁵ do not require and do not exclude the use of any of the above described interpretation techniques, which is why judges can apply them regardless of their personal and professional beliefs related to judicial review.

The classic theoretical debate on whether constitutional interpretation differs from statutory interpretation³⁶ is not crucial in the practice of Canadian courts related to the Charter. Stéphane Beaulac emphasises that there is convergence between statutory and constitutional interpretation methods.³⁷ As a reason for that, he refers to the strong impact of Elmer Driedger's 'modern principle' of statutory interpretation³⁸ on the practice of the Supreme Court.³⁹ According to this principle, acts shall be interpreted in their context, harmoniously with their object and the intention of the legislator⁴⁰ – contrary to the strict and restrictive interpretation of the legislation (the plain meaning rule).⁴¹ One can note that these particularities are closely connected with the purposive interpretation presented above, as well as the negation of formalism related to the generous interpretation. Alongside Driedger's approach, the living tree doctrine presumably also had a powerful effect on the practice of Canadian courts in the case of statutory interpretation as well.

Despite the point of view taken in the debate on the differences or convergence of constitutional interpretation and statutory interpretation, one can add that, in fundamental rights disputes, both are present. When analysing the content of the challenged law or another legal instrument, the court's task is statutory interpretation, while when examining its con-

³⁵ According to a Canadian scholar, David M. Beatty, *the contract theory, the process theory and the moral theory* are the most significant theories in this regard. See: David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2010, Oxford) 1–35. However, it is worth mentioning that the contract theory is in close connection with the originalist method of interpretation that did not become a dominant technique in Canada.

³⁶ Those scholars who are of the position that the difference is relevant usually emphasise that the language of constitutional acts is inevitably vague and abstract and contains many principles and few imperative rules, therefore the identification and explanation of the meaning of these is a more difficult task, which calls for special methods and interpretive techniques. Conversely, proponents of the convergence between statutory and constitutional interpretation highlight that, despite the difference in subject, the methods used by interpreters (courts) are essentially identical.

³⁷ Beaulac (n 27) 29, 5.

³⁸ Elmer A. Driedger, *The Construction of Statutes* (Butterworths 1974, Oxford) 67.

³⁹ Cited for the first time: *Stuart Investments Ltd. v The Queen* [1984] S.C.R. 417.

⁴⁰ Stéphane Beaulac, Pierre André Coté, 'Driedger's „Modern Principle” at the Supreme Court of Canada: Interpretation, Justification, Legitimization' (2006) 40 *Revue juridique Thémis* 135.

⁴¹ Beaulac (n 27) 29, 6.

formity with the provisions of the Charter, constitutional interpretation takes place. When considering the coherence and persuasiveness of the reasoning, it is a better option to use identical or similar methods in statutory and constitutional interpretation when examining the same legal dispute – from the structural point of view, the proportionality analysis offers a common framework for both. One can also note that the above-presented particularities of constitutional interpretation also affect the proportionality analysis and its possible outcomes.

III The Principle of Proportionality in Canada

The practice related to the principle of proportionality has a relatively short but considerable history in Canada: the first decision of the Supreme Court referring to this method dates back to 1986. However, in the three succeeding decades, proportionality analysis became a constant element of the reasoning of judicial decisions examining fundamental rights disputes. Moreover, – like many other judicial organs – the Supreme Court restructured the proportionality test, creating its special, Canadian form – a point of reference for many other jurisdictions and a subject of analysis in Comparative Constitutional Law.

The enactment of the Charter (1982) was a milestone not only from the point of view of Canadian constitutional history but also from the perspective of the migration⁴² of the proportionality principle from Europe to the American continent.⁴³ In this regard, Article 1 of the Charter, the limitation clause, is the most significant as it set boundaries to limitations of fundamental rights but at the same time called for a method to assess those boundaries in particular fundamental rights disputes:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Scholarly works and especially the above-cited Peter W. Hogg⁴⁴ made a significant contribution to the recognition of proportionality analysis as an appropriate method for examining the justifiability of limitations on fundamental rights based on Article 1. He argued that Canadian courts will have to follow a reasoning process similar to that used by the European Court of Human Rights (ECtHR), especially in the *Sunday Times* case.⁴⁵ It can be added that the

⁴² The phenomenon of migration of legal principles and institutions was first analyzed in the comprehensive volume edited by Sujit Choudry. See: Sujit Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006).

⁴³ For a comprehensive overview of the historical origins and migration of proportionality see Barak (n 2) 175–210.

⁴⁴ See: P. W. Hogg, *Constitutional Law of Canada* (2nd edn, Carswell 1985, Toronto) 687; B. Hovius, 'The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?' (1985) 17 *Ottawa Law Review* 213, cited by Aharon Barak (n 2) 189.

⁴⁵ *Sunday Times v the United Kingdom* (Application no. 6538/74), Judgment of 26 April 1979.

ECtHR was influenced by the practice of the Federal Constitutional Court of Germany related to proportionality and elaborated its own proportionality analysis in the '70s⁴⁶ – with a special focus on the notion of ‘democratic society’⁴⁷ which explicitly appears in the text of the Charter.

The Supreme Court issued the first decision applying proportionality analysis in 1986, in the famous *Oakes* decision⁴⁸ – after whom the test was named. The reasoning of the decision – based on *purposive interpretation* – declares that Article 1 of the Charter has two functions: safeguarding the rights and freedoms included in the Charter and stating explicitly ‘the exclusive justificatory criteria against which limitations on those rights and freedoms may be measured.’⁴⁹ These justificatory criteria – according to the wording of Chief Justice Dickson – are the following: ‘the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom’⁵⁰ and the means limiting the right have to be ‘reasonable and demonstrably justified.’⁵¹ According to the second criteria, the *Oakes* decision explicitly refers to a proportionality test with three components:

To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.⁵²

This test was regularly cited in future decisions and became a stable part of court reasonings dealing with fundamental rights issues. The test itself was also the subject of reconsideration and correction, while the practice of the Supreme Court was in the focus of scholarly works and critiques.⁵³ It is probably a speciality of the Canadian constitutional culture that the Court itself answered some of these in its reasonings – a good example is the *Alberta v Hutterian Brethren* case, presented later in this paper. It is not the task of this paper to analyse the theoretical and methodological debates related to the *Oakes* test and so the test will be presented based on a descriptive approach, focusing on those considerations which are accepted by consensus in legal scholarship.

⁴⁶ Barak (n 2) 184.

⁴⁷ See Yutaka Arai, ‘The System of Restrictions’ in Pieter Van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006, Cambridge) 340, and Robin C. White, Clara Ovey, *The European Convention on Human Rights* (Oxford University Press 2010, Oxford) 325.

⁴⁸ *R v Oakes* [1986] 1 SCR 103.

⁴⁹ *R v Oakes* [1986] 1 SCR 105.

⁵⁰ *R v Oakes* [1986] 1 SCR 105.

⁵¹ *R v Oakes* [1986] 1 SCR 106.

⁵² *R v Oakes* [1986] 1 SCR 106.

⁵³ For an overview of the evolution of the test see: Sujit Choudry, ‘So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1’ (2006) 34 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference*.

The identification of the infringement of a fundamental right precedes the application of the proportionality test. The test takes place only if there is a limitation, and no other rule excludes⁵⁴ the examination of it based on the test. The *progressive* and the *generous interpretation* of the Constitution support the court in that identification by interpreting the conflicts related to the affected right in a dynamic way, reflecting the changing social circumstances and by identifying the protected scope of the right over a wide range.⁵⁵

Probably the most significant feature of the Canadian understanding of the proportionality test is the dominant role of the examination of the *purpose*.⁵⁶ According to the Oakes test, the substantive part of the analysis begins with examining whether the objectives to be served by the measures limiting a Charter right are sufficiently important to justify overriding the right in question. The theoretical version of the proportionality analysis sets, as a general criterion related to the purpose, for it to have a legitimate aim, a proper purpose⁵⁷ – typically the protection of a concurring fundamental right or another constitutional value (related in most of the cases to a public interest). In theory, in this stage of examination, there is no need for an assessment of the relation between the purpose and the limitation of the right in question – the existence of a legitimate aim is a satisfying condition on its own (further questions can be answered in later stages of the test). However, according to the Canadian understanding of the examination of the purpose, the ‘sufficient importance’ of the purpose shall be examined in light of the limitation of the fundamental right in question. The importance of the purpose can be also described by its ‘pressing and substantial’ nature in order to promote the values of a ‘free and democratic’ society.⁵⁸ This approach is a kind of ‘preliminary balancing,’ which accords much more weight to the first stage of the test.

Purposive interpretation (with regard to both constitutional and statutory interpretation) obviously supports the precise identification of the legislative purpose, the appropriate assessment of it and of the relevant substantive subquestions. However, as the importance of the purpose of the legal act in question will be assessed in the light of the particularities of the affected fundamental right, the *generous* (and related to that the *contextual*) *interpretation* also supports the ‘sensitive case-oriented’⁵⁹ assessment of the context of the conflict.

⁵⁴ In theory, in the case of absolute rights there is no possibility for limitations, therefore there is no room for the application of the proportionality test. In the Canadian context, Section 33 of the Charter, the ‘override clause’ is also relevant, as it empowers the legislative power to declare that a piece of legislation shall operate, notwithstanding the provisions of the Charter (for a period of five years). Accordingly, if a legislative act contains a ‘notwithstanding’ clause, proportionality analysis has no place, even if the legislative act contains possible limitations on fundamental rights. See in detail: Hogg (n 8) 69–70.

⁵⁵ There are also critical views on the application of generous interpretation in this stage. In Aharon Barak’s view, constitutional rights ‘should receive neither narrow nor broad interpretation’; he calls for purposive interpretation. See: Barak (n 2) 72.

⁵⁶ Dieter Grimm, ‘Proportionality in Canadian and German Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383–397, 387–388.

⁵⁷ Barak (n 2) 251.

⁵⁸ Choudry (n 53) 505.

⁵⁹ See Harrington (n 15).

When turning to the evaluation of the relation between the purpose and the measures taken in the challenged legal act, the classic version of the proportionality test focuses on *suitability*, namely on whether the means are capable to promote the aim which was identified in the previous stage of the test. This examination is, in most of the cases, fact-based, as the relation in question can be assessed based on practical experience or common knowledge.⁶⁰ The Canadian understanding of suitability has these considerations at its core, as courts refer to the existence of the rational connection between the purpose and the means used. However, the original version of the Oakes test also requires that the measures taken shall be ‘fair and not arbitrary’, and ‘carefully designed to achieve the objective’. All these are substantive requirements that shall be also taken into consideration alongside the rational connection (suitability) itself between the purpose and the measures taken. As a consequence, this stage of the test offers supplementary aspects for the examination.

As in the subtest of suitability the courts examine factual questions (on the relation between the purpose and the means used), the methods of interpretation are less significant in this stage. However, as the courts also assess substantive elements (the ‘fair’ and ‘carefully designed’ nature of the measures) at this stage, the reference to ‘*unwritten principles*’ as sources of constitutional interpretation⁶¹ can be significant. In other cases, when factual relations are uncertain, courts can also take a deferential view.⁶²

The next subtest of proportionality relates to the assessment of the measures taken (*necessity*). According to the theoretical form of the test, the purpose shall be accomplished by choosing the least restrictive means. In the Oakes decision, the Supreme Court prescribed a slightly different requirement, saying that the ‘means should impair the right in question as little as possible’ – shifting slightly the focus from the measurement of the means by comparison with alternative means to the assessment of the effects of the measure taken on the right. Later, the Court examined the minimal impairment requirement between those (alternative) means that could reasonably be taken into consideration.⁶³ As a result, the strictness of this stage of the test lowered but, on the other hand, the evaluation of the context gained more significance.

Similarly to the subtest of suitability, when comparing the measures taken with alternative measures which are also suitable for supporting the purpose, the court examines factual questions and assesses factual relations. However, as the court has to assess possible negative effects of the alternative measures on the right in question as well, *contextual interpretation* also becomes relevant.⁶⁴

In theory, the last subtest, ‘proportionality in the strict sense’ is the most important part of the examination when courts are dealing with fundamental rights disputes. According to

⁶⁰ One can also note that in some cases ‘factual uncertainty’ can also occur. See Barak (n 2) 308.

⁶¹ See Hogg (n 10).

⁶² Grimm (n 56) 391.

⁶³ See Choudry (n 53) 507.

⁶⁴ See Harrington (n 15).

this subtest, the importance of purpose shall be balanced against the degree of infringement of the right in question.⁶⁵ As this balancing necessarily requires the comparison of two notions with different particularities, it is no surprise that this step of the examination is at the heart of the most theoretical and methodological debates.⁶⁶ However, in the Canadian practice, this subtest has less significance: because the previous steps can lead to a precise and sophisticated examination (even ‘preliminary balancing’ with regard to the examination of the purpose), the Court rarely reaches this stage.⁶⁷ In most cases, the dispute can be resolved based on the findings of the previous stages of examination. Nevertheless, the practice related to this subtest also has an important feature: as indicated in the original version of the Oakes test, the deleterious effects of the measure (affecting the right in question) should be examined separately, which later is to be followed by the examination of the salutary effects (from the point of view of the purpose). As will be highlighted later in this paper, this distinction offers a clear structure for the reasoning of the court.

As in the latest subtest the court has to balance the importance of the legal act (concurring fundamental right or other constitutional value or interest) against the harm caused by the limitation of the fundamental right in question, this complex assessment calls for the repeated use of all the relevant methods of (constitutional and statutory) interpretation. The *purposive interpretation* supports the precise identification of the concurring constitutional interest and the *generous* (and the *contextual*) interpretation helps to assess the relevant circumstances of the case, while the *progressive* and the *purposive* interpretation together support the overall evaluation of the effects of limitation of the affected fundamental right.

The above-described particularities will be highlighted in the following during the analysis of the *Alberta v Hutterian Brethren* case.

IV Case Study Analysis

The *Alberta v Hutterian Brethren* case related the regulation of the province of Alberta which required all persons who drive motor vehicles on highways to hold a driver’s licence. The former regulation allowed religious objectors to hold non-photo licences; however, the new regulation (2003) made the photo requirement universal. At the time of the enactment of the new regulation, 450 non-photo licences had been issued in Alberta, 56 percent of which were held by the members of the Hutterian Brethren colonies. The members of the colonies believe that the Second Commandment prohibits them from having their photograph willingly taken. They objected to having their photographs taken on religious grounds and challenged the

⁶⁵ Barak (n 2) 340.

⁶⁶ See e.g. Niels Petersen, ‘How to Compare the Lengths of Lines to the Weight of Stones. Balancing and the Resolution of Value Conflicts in Constitutional Law’ (2013) 14 German Law Journal 1387; Kai Möller ‘Proportionality: Challenging the critics’ (2012) 10 International Journal of Constitutional Law 709.

⁶⁷ Grimm (n 56) 394.

constitutionality of the new regulation, referring to the limitation of their religious freedom, as set out in Article 2(a) of the Charter. The Province of Alberta claimed that the universal photo-requirement was connected to a new system aimed at minimizing identity theft associated with driver's licences. The Court of Appeal of Alberta held that the infringement of the freedom of religion was not justified according to the limitation clause of the Charter.

The substantive reasoning of the majority opinion of the Court (by the Chief Justice) begins with a structure of the questions to examine related to the limitation of the freedom of religion.⁶⁸ The reasoning begins with (1) the analysis of the nature of the limit on the freedom of religion and continues with (2) the analysis of the justification of the limitation, in the following path: (2a) the limitation prescribed by law, (2b) the pressing and substantive purpose of the limitation, (2c) the analysis of proportionality. The last question is divided into three subquestions (i) the rational connection between the limit and the purpose, (ii) the minimal impairment of the right, and (iii) the proportionate effect of the limitation. The analysis ends with (2d) the conclusion on justification.

In section (1), when analysing the possible infringements of the freedom of religion, there is an explicit reference to the purpose of the provision of the Charter which ensures this freedom: 'the purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being'.⁶⁹ Accordingly, the *purposive interpretation* takes place right at the beginning of the reasoning, when identifying what is at stake in the legal dispute.

Section (2) continues with a general explanation of the analysis of the justification of the limitation. The Court states that the government must be accorded a measure of leeway in determining limits on certain rights when regulating social and commercial interactions.⁷⁰ On the other hand, the Court declares that the Charter guarantees (from the point of view of the freedom of religion) shall be taken into consideration on a broad scope.⁷¹ Both statements reflect the *generous interpretation* of the Charter. The Court also expressly recognises that the issue of identity theft is a social problem that has grown exponentially – even if in this regard there is no explicit reference to any constitutional provision, the way the Court interprets the sphere of action of the government in regulating this social field is strongly related to the *progressive interpretation*.

Subsection (2a) refers to a formal question, whether the limitation of the fundamental right is prescribed by law – the court accepts the form of the regulation in this regard.

In subsection (2b) the Court examines the purpose for which the limit was imposed – the first subtest of the proportionality analysis. The Court expresses that in this case, the government's primary goal behind the regulation is traffic safety – that is why the government

⁶⁸ The reasoning also continues with questions related to equality – for the purposes of this analysis there is no need to refer to these separately.

⁶⁹ *Alberta v Hutterian Brethren* 32.

⁷⁰ *Alberta v Hutterian Brethren* 35.

⁷¹ *Alberta v Hutterian Brethren* 36.

introduced a system of licensing drivers. The Court accepts that this general purpose can serve collateral effects as well, such as maintaining a system capable for general identification. However, these collateral effects can cause collateral problems as well, for example identity theft.⁷² In this regard, the Court states that ‘maintaining the integrity of the driver’s licensing system in a way that minimises the risk of identity theft is *a goal of pressing and substantial importance*.’⁷³ The Court’s primary task in this regard is assessing the supporting arguments provided by the government – these were expressly presented in the previous part (‘Facts’) of the reasoning. Accordingly, identity theft is a serious and growing problem in Alberta; the photo requirement is essential to ensure the efficacy of the software-based facial recognition data bank, and the government offered options for the Colony members to have no direct contact with the photos.⁷⁴ The Court has accepted the ‘sufficient importance’ of the purpose based on the data presented by the government of Alberta in light of the limitation of the freedom of religion, therefore the examination continued.

In subsection (2c) the Court examines the subtests of proportionality. (i) Related to the question of whether the limit is rationally connected to the purpose, the Court recalls Alberta’s evidence which ‘demonstrates the ways in which the existence of exemption from the photo requirement would increase the vulnerability of the licensing system and the risk of identity-related fraud.’ Related to the exemption, the Court also refers to the possible frauds based on one-to-one correspondence between individuals, as well as to the fact that a ‘non-photo licence can be obtained and used to obtain credit or enter into other commercial relationships to the detriment of the other parties to the transactions.’⁷⁵ All these data supporting the rational connection were provided by the province of Alberta, however; it was the Court’s task to assess explicitly whether these facts are in rational connection with the purpose of the legislation. As in this subtest the Court examined factual questions, it did not apply any special methods of interpretation.

In the (ii) second subtest the Court focused on the minimal impairment of the religious freedom. The Court starts its reasoning in this regard with a detailed explanation of this subtest. As the minimum impairment test requires the government to choose the least drastic means of achieving its objective, the Court points to the fact that the alternative, less drastic means shall achieve the objective in a ‘real and substantive manner.’⁷⁶ On the other hand, the Court ‘should not accept an unrealistically precise formulation of the government’s objective which would effectively immunise the law from scrutiny.’⁷⁷ After the detailed interpretation of the method, the Court turns to the assessment of the possible alternative measures, capable for achieving the purpose. The Court emphasises that ‘the

⁷² *Alberta v Hutterian Brethren* 45.

⁷³ *Alberta v Hutterian Brethren* 42.

⁷⁴ *Alberta v Hutterian Brethren* 10–12.

⁷⁵ *Alberta v Hutterian Brethren* 50.

⁷⁶ *Alberta v Hutterian Brethren* 55.

⁷⁷ *Alberta v Hutterian Brethren* 55.

Province's proposed alternatives which maintain the universal photo requirement but minimize its impact on Colony members. In the Court's view, as the claimants rejected these proposals, the Province's goal was compromised. However, the goal must be taken 'as it is.' While the Court accepted that the freedom of religion in many cases leads to 'all or nothing' dilemmas, in this case the Court concluded that the universal photo requirement minimally impairs the freedom of religion. There were offered a range of reasonable (alternative) options for the claimants which preserved the integrity of the driver's license system, but these were not accepted by them.⁷⁸ On the other hand, in the Court's view, other options would not promote in a 'real and substantive' manner the government's objective. By this assessment, the Court evaluated (and *interpreted*) *the context* of the conflict.

In the (iii) third subtest, the Court examined proportionality in the strict sense, whether 'the overall effects of the law on the claimants [were] disproportionate to the government's objective'.⁷⁹ Before analysing the case in this regard, the Court summarised the method of examination based on two sources: the Oakes decision, which formulated the test, and also academic writings, especially the works of the above-cited Peter W. Hogg. Based on Oakes, the Court summarised that 'the more severe the deleterious effects of the measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society'.⁸⁰ As the Court recalls it, in Hogg's view the proportionality analysis in the strict sense is redundant in the practice of the Supreme Court, as 'finding a law's objective »pressing and substantial« at the first stage of Oakes will always produce a conclusion that its effects are proportionate'.⁸¹ As a response, in the majority opinion, Chief Justice McLaughlin argues that (a) proportionality analysis in the strict sense has a distinct role, namely, to assess 'in light of the practical and contextual details' (...) whether 'the benefits which accrue from the limitation are proportional to its deleterious effects'.⁸² (b) Furthermore, she also refers to analytical clarity and transparency that support distinguishing between the different stages of examination.⁸³ At this point it is worth noting another particularity of the interpretation techniques of the Court: *academic writings* are recognised as *legitimate sources of constitutional interpretation*. By citing and entering into dialogue with these, the Court offers a better understanding of the provisions of the Constitution (the Charter) and the methods of examination following from these.

The reasoning of the subtest is divided into three parts: (a) assessing the salutary effects of the legislative goal, (b) assessing the deleterious effects of the legislation on the fundamental right in question and (c) weighing the salutary and deleterious effects.

As to the salutary effects, the Court recalls the evidence provided by the province of Alberta: 'enhancing the security of the driver's licensing scheme, assisting in roadside safety

⁷⁸ *Alberta v Hutterian Brethren* 57–60.

⁷⁹ *Alberta v Hutterian Brethren* 73.

⁸⁰ *Alberta v Hutterian Brethren* 74.

⁸¹ *Alberta v Hutterian Brethren* 75.

⁸² *Alberta v Hutterian Brethren* 77.

⁸³ *Alberta v Hutterian Brethren* 76.

and identification and eventually harmonising Alberta's licensing scheme with those in other jurisdictions.⁸⁴ The Court emphasises that 'it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, (however), the internal integrity of the system would be compromised.'⁸⁵ The Court cites other cases related to the 'security concern' and concludes that 'the salutary effects of the universal photo requirement for driver's licences are sufficient, subject to final weighing against the negative impact on the right.'⁸⁶ The sufficient nature of the salutary effects are in close connection with the purpose of the regulation, which was found 'of pressing and substantial importance' (based on *purposive interpretation*).

According to the deleterious effects, the Court focused on the seriousness of the effects of the limit on the Colony member's freedom of religion. By doing this, the Court *interprets the freedom of religion in a dynamic (progressive) way*: 'religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, such as prayers and the basic sacraments, may be so sacred that any significant limit verged on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to adherents than to others.'⁸⁷ The Court cites Canadian and US cases, as well as cases of the ECtHR, when examining the possible conflicts with the freedom of religion. After this, the Court highlights the core question of the limitations on the freedom of religion in general: whether the affected persons still have a *meaningful choice* about their religious practice. Turning to the case in question, the majority opinion of the Court concludes that 'it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion'⁸⁸, as they can make alternative arrangements for highway transport. The Court also recognises that these arrangements will be different from the community's tradition of being self-sufficient in terms of transport and will impose a financial cost on the community.⁸⁹ At this point, another particularity of the interpretation of the Court can be highlighted: *cases of other jurisdictions* are also recognised *as sources of interpretation* when defining the protected scope of the right.

When weighing the salutary and deleterious effects, the Court focused on the whether 'the overall impact of the law is proportionate.'⁹⁰ According to the conclusion of the majority opinion, 'the positive effects associated with the limit are significant, while the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious

⁸⁴ *Alberta v Hutterian Brethren* 79.

⁸⁵ *Alberta v Hutterian Brethren* 81.

⁸⁶ *Alberta v Hutterian Brethren* 85.

⁸⁷ *Alberta v Hutterian Brethren* 89.

⁸⁸ *Alberta v Hutterian Brethren* 98.

⁸⁹ *Alberta v Hutterian Brethren* 99.

⁹⁰ *Alberta v Hutterian Brethren* 100.

convictions'.⁹¹ As a consequence, the Court found the limitation proportionate and justified. One can note that, based on the previously presented arguments related of the salutary and deleterious effects, the result of the last, balancing question is not surprising. However, this particularity has mostly positive effects. As the previous steps of examination were structured exhaustively and precisely, they therefore transformed balancing into a sophisticated and simple question. One can also recall that balancing in this narrow sense is in the focus of the most harsh critiques – claiming that balancing operates with incommensurable values.⁹² If the previous questions are structured and answered with convincing arguments, balancing could be a simpler task and its results could be more acceptable.

As noted earlier, the complex assessment of balancing calls for the repeated use of all the relevant methods of interpretation. In this regard (at the very general level), the *generous*, *progressive* and *purposive* interpretations together support the overall evaluation of the effects of the limitation of the freedom of religion – these were found justified in this case.

The reasoning part of the decision continues with the examination of claims based on other provisions of the Charter, as well as with the concurring opinions – however, there is no need to present these for the purposes of this paper. Nevertheless, comparing the argumentation of these with the arguments expressed in the majority opinion is an easy task, as concurring opinions have the same structure of reasoning. This assessment leads us the most important feature of the reasoning based on proportionality in the practice of the Supreme Court: the *consistent use of structured reasoning*, which enhances the *transparency* and the *verifiability* of the argumentation. All these particularities support the justification of the judicial decisions on a substantive basis.⁹³

V Conclusions

Why is the approach of Canadian courts (especially the Supreme Court) to constitutional interpretation and reasoning in fundamental rights disputes exceptional? First, it is important to emphasise that this assessment does not follow from the fact that Canadian courts apply unique methods of constitutional interpretation or a special version of the proportionality test. Unique and special methods of interpretation and reasoning are present in the practice of many jurisdictions, and even individual judges can have personal preferences in this regard.

According to my understanding, the Canadian *methodological exceptionalism* is rooted in three key factors. (a) The first of these is the *transparency of the reasoning*. As demonstrated above, the structure of the reasoning of the court follows a fixed path, especially regarding proportionality analysis. The chain of arguments is therefore traceable and the

⁹¹ *Alberta v Hutterian Brethren* 104.

⁹² See (n 66).

⁹³ See Zoltán Pozsár-Szentmiklósy, 'The formal and substantive functions of the principle of proportionality' (2015) 56 (2–3) *Acta Juridica Hungarica*.

coherence and completeness of the arguments is verifiable. This particularity also promotes the precise comparison of the majority opinion with concurring opinions. (b) The second factor is the *general and consistent use* of these *methods* by the judicial fora. As academic writings emphasise, the application of the above-presented methods of constitutional interpretation, as well of the Canadian form of proportionality analysis, is a general trend in Canadian jurisprudence. Moreover, there is a living dialogue related to these methods between courts and academia. One can conclude that this engagement to methodological clarity belongs to the Canadian constitutional culture, the 'culture of justification'.⁹⁴ (c) The third particularity lies in the fact that *methods of interpretation and structures of reasoning are intertwined* and together support the foundation of the judicial decisions. In scholarly works, the traditional approach to constitutional interpretation and reasoning methods in fundamental rights disputes is distinct; the analyses focus on the related methodological questions separately. However, in judicial practice these methods are simultaneously present when analysing legal questions. As the practice of the Supreme Court of Canada demonstrates, interpretation and reasoning can be applied consciously in a common framework: reasoning methods (especially proportionality analysis) form the structure for the chain of arguments, while interpretation methods support answering the substantive questions.

Needless to say, all of these factors can be present in the practice of other jurisdictions as well. As the Canadian example demonstrates, this type of *methodological exceptionalism* is worth following.

⁹⁴ See Moshe Cohen-Eliya, Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013, New York) 111.

Reform of the Electoral System in Canada and in Hungary

Towards a More Proportional Electoral System?

I Introduction

Reform of the electoral system is and has been a timely topic in both Canada and Hungary. In Canada, the reform was part of Justin Trudeau's election manifesto and, as his party won the majority of the seats in 2015, a reform process began.¹ However, as we explain later, it was abandoned in February 2017.² In Hungary, although the system was reformed in 2011, the electoral system is subject to heated debate for reasons discussed later in this paper. In autumn 2017, eight opposition political parties took part in a deliberation process aiming to propose a new electoral system.³

To assess the chances, impact, and democratic consequences of a possible reform, many factors need to be taken into consideration. First, the current electoral and party systems need to be examined in order to gain a full understanding of the mechanisms and shortcomings of the current systems. Deficiencies emerged in both Canada and Hungary with respect to the distribution of seats compared to the percentage of votes, which, according to the reformist voices, require the reform of the current majoritarian systems towards more proportional ones.

Second, the rules regarding reform and the main institutional actors play an important role as well. These include who has the power to amend the system and whether the amendment of the constitution is needed. It also covers the reform procedure, and whether

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¹ As a consequence, a special parliamentary committee, the Special Committee on Electoral Reform (Special Committee) was formed. The Special Committee published its comprehensive final report (hereinafter: Final Report) in December, 2016. The Final Report is available at: <<http://www.ourcommons.ca/Content/Committee/421/ERRE/Reports/RP8655791/errerp03/errerp03-e.pdf>> accessed 25 September 2017.

² Reuters: Canada abandons electoral reform in reversal of Trudeau's pledge – available at <<https://www.reuters.com/article/us-canada-politics-reform/canada-abandons-electoral-reform-in-reversal-of-trudeau-pledge-idUSKBN15G5AD?il=0>> accessed 25 September 2017.

³ The Budapest Beacon: 'Eight opposition parties sign joint declaration on election reform at Agóra' <<https://budapestbeacon.com/eight-opposition-parties-sign-joint-declaration-election-reform-agera/>> accessed 25 September 2017.

the reforming political powers (politicians, citizens' initiatives, etc.) have referendum as a tool to force the change. As we show below, in the case of Canada it is not easy to assess whether any amendment of the constitution is needed, and what procedure should be applied, whereas in Hungary the constitutional background seems to be more clear-cut.

Third, the possible alternative systems need to be reviewed, in order to assess the ways in which reform may take place in future. As the paper intends to assess the institutional environment of a reform towards greater proportionality, in this part we discuss proportional representation (PR), single-transferable vote (STV) and mixed-member-proportionality (MMP) systems as alternatives.

Finally, we give a brief overview on the possible future of reforms; what chances reforms have, and what is the likelihood of a new and more proportional system to be adopted, with regard to the recent events in both countries.

II The Canadian and Hungarian Electoral and Party Systems

A party system is an enduring pattern of electoral competition between parties for public offices.⁴ A party system may be described from many aspects; one is the number of parties, or the *effective number of parties* in the system.⁵ With regard to the subject of this paper, party systems are of great importance as they 'fill' the electoral legislation; from the legal framework alone the outcome of elections cannot be predicted as the same electoral system may produce completely different results with different party systems.⁶ High disproportionality occurs usually when a multiparty system coincides with a majoritarian electoral system, as it is shown later in this paper. Hence, to understand the effective mechanism and outcomes of elections, and thus to decide whether reform is needed, two components, the electoral system (the legal framework) and the party system (the political reality), should be taken into consideration.⁷

⁴ Pradeep Chhibber, Ken Kollman, *The formation of National Party Systems* (Princeton University Press 2011, Princeton) 4.

⁵ In the formula of effective electoral party number, the parties are weighted with regard their share of votes, whereas effective number of parliamentary parties is weighted by the share of mandates. See Markku Laakso, Rein Taagepera, 'Effective Number of Parties: A Measure with Application to West Europe' (1979) 12 *Comparative Political Studies* 3–27. In this paper we use effective electoral party number. This gives a more accurate insight to the party system, as opposed to the mere number of parties. The effective party number is the inverse of the sum of the squared proportions of the vote share.

⁶ The Hungarian electoral system, for example, with regard to the legislative background was mostly untouched from 1989 to 2010; however, it produced different outcomes with respect to proportionality.

⁷ It is an accepted and evident concept in the Hungarian literature on electoral systems as well, that the examination of electoral system may not be conceived without the examination of the broader context. See, for example: Dezső Márta, 'Választási rendszerek' in Máthé Gábor (ed), *Választójog* (Változó Világ 50 – Press Publica 2004, Budapest) 58.

1 Canada

Canada is a federal state consisting of ten provinces and three territories.⁸ The electoral system of the country therefore may be scrutinised on two levels, at the provincial and on the national level. At the national level, Canada has a traditional ‘first-past-the-post’ (FPTP) electoral system, in which the country is divided into 338 constituencies (called ridings). In each riding, the candidate garnering the most votes becomes a member of the House of Commons. In the country with a population of nearly 37 million, voters have one categorical – i.e. not preferential – vote. As such, the share of seats in the House of Commons is the aggregation of the individual contests of the ridings – no compensational procedure exists. Although in many provinces there have been examples of reforming the electoral system at province level, at the federal level the electoral system – or at least its basic FPTP logic – has been unchanged, if not uncontested, since 1867.

The history of Canada’s party system can be divided into three main themes. The first, 1867–1921, can be labelled as a two party system as two main parties – the conservatives and the liberals – contested for the seats. The second, 1921–1993 is a ‘two and a half party system’⁹, as, besides the two main parties, other smaller parties emerged. The third theme started with the elections in 1993, when the Conservatives went from the position of a majority party to a party with only three seats.¹⁰ Since then, the Canadian party system qualifies as a multi-party system. Since the latest elections, held in 2015, five parties have been represented in the House of Commons; the liberals, led by Justin Trudeau, won 184, the conservatives 99, the New Democrats 44, Bloc Québécois 10 and the greens one seat. The effective party number based on the results of the latest elections is 334,¹¹ which shows that the country has a multi-party system.

Canada is an example of a so-called ‘non-Duvergian’ equilibrium.¹² According to the famous political scientist Maurice Duverger, ‘the simple majority single ballot system favours the two party system’¹³.

This means that – among other factors, as was admitted by Duverger himself¹⁴ – electoral systems shape party systems, and a system like that used in Canada favours a two

⁸ The ten provinces are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island. The three territories are Yukon, Northwest Territories, and Nunavut.

⁹ Nagy Levente, *Arányossági számítások Kanada választási rendszerében* (2015) 24 (1) Politikatudományi Szemle 145.

¹⁰ Chhibber, Kollman (n 4) 2.

¹¹ The results (share of votes): Liberal Party – 39,5 percent; Conservative Party – 31,9 percent; New Democratic Party – 19,7 percent; Bloc Québécois – 4,7 percent; Green Party – 3,4 percent. See: <<https://lop.parl.ca/ParlInfo/compilations/ElectionsAndRidings/ResultsParty.aspx>> accessed 09 October 2017.

¹² Bernard Grofman, Shaun Bowler, André Blais, ‘Introduction’ in Bernard Grofman, Shaun Bowler, André Blais (eds), *Duverger’s Law of Plurality Voting – The Logic of Party Competition in Canada, India, the United Kingdom and the United States* (Springer 2009, New York) 2–3.

¹³ Maurice Duverger, *Political Parties, Their Organization and Activity in the Modern State* (Wiley 1954, New York) 217.

¹⁴ Duverger (n 13) 228.

party system.¹⁵ However, as we may see above, the Canadian example does not follow this rule, which means that not only the electoral system shapes the party system, but other factors as well.¹⁶ Thus, the coexistence of a multi-party system and simple-majority single ballot system produces highly disproportional results.

2 Hungary

Hungary is a unitary state, where the electoral system is a mixed member proportionality (MMP) system, in which the Parliament, consisting of 199 members, is elected through an FPTP branch (106 seats) and a party list branch (93 seats). The voters therefore cast two ballots,¹⁷ one to the single constituency candidate, and one to the party list. Both votes are categorical; there is no possibility of preferential voting, or to determine directly the party list order. In the FPTP branch the candidate garnering most votes wins the seat; this branch is thus the same as the Canadian electoral system. In Hungary, however, there is a compensation mechanism: the votes cast for the candidates not winning the seat are transferred to the list branch. As a consequence of the reforms in 2010, the winner surplus vote has been introduced; the difference between the winner and the second candidate (minus one vote) qualifies as a surplus vote as well and these votes are therefore transferred to the party list.¹⁸ The votes cast to the party lists and the surplus votes then are divided by a proportional formula (*d'Hondt*) among those parties reaching the 5 percent threshold.

It is to be noted that the Hungarian electoral system has not been unchanged since the democratic transition of 1989–1990. After the winning coalition gained a majority of two thirds in 2010, the system was reformed. Although the new system described above preserved the MMP nature and the immanent logic of the previous one, significant changes were applied: the number of members of parliament was reduced from 386 to 199; in the FPTP branch the two-round vote was changed to a one-round vote, the winner surplus vote was

¹⁵ Duverger explains it by two mechanisms; the mechanical effect means that ‘small parties will tend to be squeezed out mechanically, simply because the operation of electoral system denies them seats’ whereas ‘psychological effects are centred in the reaction of instrumentally minded voters and elites to the expected working of the electoral system’. Grofman, Bowler, Blais (n 12) 2.

¹⁶ It exceeds the boundaries of this paper to find a conclusive answer or to detail the relevant scientific findings further. For further information see: André Blais, Eugénie Dostie-Goulet, Marc André Bodet, ‘Voting strategically in Canada and Britain’ in Grofman, Bowler, Blais (n 12) 13–26; and Richard Johnston, Fred Cutler, ‘Canada: The Puzzle of Local Three-Party Competition’ in Grofman, Bowler, Blais (n 12) 83–96.

¹⁷ Except for the voters without Hungarian residence; they may vote only for party lists.

¹⁸ Thus, if the winner garners 10,000 votes and the second candidate 5000, then the second candidate has 5000 surplus votes, and the winner 4999, i.e. the votes ‘not needed to win’ – as the first candidate could have won with only 5001 votes. – For a critical review of this approach and winner surplus vote see: János Mécs, ‘A győztes-kompenzáció alkotmányosságáról – a pozitív töredékszavazatok megítélése az egyenlő választójog tükrében’ in Kálmán Bence, Tar Adrienn (eds), *Tudományos Diákköri Dolgozatok* (ELTE Bibó István Szakkollégium 2015, Budapest) 45–84; Halmai Gábor, ‘Két (egyetlen) választás Magyarországon – Az AB a parlamenti és fővárosi önkormányzati választási rendszeréről’ (2014) 4 *Fundamentum* 83–88.

introduced, and the proportion of FPTP branch was increased in relative terms so the weight of party list branch therefore declined.¹⁹

Ever since the democratic transition, the Hungarian party system has been a multi-party system. As a consequence of the highly disproportionate electoral system from the end of the 1990s to 2010 two main political blocks emerged. The situation changed with the landslide victory of the right wing and the collapse of left wing, and, as a consequence, new parties have emerged. A party system with three main powers thus emerged: the right wing Fidesz-KDNP coalition, which formed the government, the far right Jobbik, and the remains of the left side, accompanied by new parties. The party system may be labelled a dominant party system.²⁰ In the elections in 2014, eight political powers won seats in the Parliament: Fidesz-KDNP with 133 seats, MSZP (29), Jobbik (24), LMP (5), Együtt (3), DK (4), and PM (1). The effective party number is 3.2.²¹ As such, as in Canada, a highly disproportional system coexists with a multi-party system in Hungary.

III Necessity of Reforms

The reform of the Canadian electoral system has been demanded since 1921²² and in Hungary reform was urged by political parties and also by scholars right from the transition in 1989-90.²³ As mentioned above, the main reason in both cases is the discrepancy between the party system and the electoral system. The deficiency of the system may be approached from many aspects; just as there is no single and widely accepted function an electoral system has to fulfil, there is no widely and single accepted electoral system either. There are advantages and disadvantages to the proportional and to the disproportional systems as well. However, based on the Final Report and the Hungarian debates, we can identify two aspects; on the one hand disproportionality; the distribution of seats does not follow the proportion of votes [see points 1. and 2. below]. According to the critical opinions this results in a legitimization deficiency.

On the other hand, in these systems the political party forming the government often does not enjoy the support of the absolute majority, but only a relative majority of voters.

¹⁹ For a more detailed description in English of the change of electoral laws in Hungary see: János Mécs, 'Development of the electoral system in Hungary since 1991' in Márta Dezső, Zoltán Pozsár-Szentmiklós (eds), *Development of electoral systems in Central and Eastern Europe since 1991* (Association of European Election Officials 2016, Budapest) 134–137.

²⁰ Horváth Attila, Soós Gábor, 'Pártok és pártrendszer' in Körösenyi András (ed), *A magyar politikai rendszer negyedszázad után* (Osiris – MTA Társadalomtudományi Kutatóközpont Politikatudományi Intézet 2015, Budapest) 273–274.

²¹ The results (share of votes): Fidesz-KDNP – 44,87 percent; MSZP-EGYÜTT-DK-PM-MLP – 25,57 percent; Jobbik – 20,22 percent; LMP – 5,34 percent. See: <http://www.valasztas.hu/hu/ogvy2014/861/861_0_index.html> accessed 9 October 2017.

²² Final Report (n 1) 23.

²³ For the arguments and speculations on the change in 2010 see (2010) 4 *Fundamentum* available at: <<http://fundamentum.hu/sites/default/files/10-4-04.pdf>> accessed 9 October 2017.

Finally, as no preferential vote is allowed, this may lead to a situation in which the least preferred candidate may win [see C) below].

1 Proportional and Majoritarian Systems – Proportionality in General

Proportionality shows how accurately the system transforms voters' preferences into seats, in other words, compared to their proportion of votes, the proportion of seats that are allocated to each party.²⁴ If the two proportions are equal then the electoral system had a proportional result, i.e. the parties received seats according to their share of the vote.

Proportionality may be measured by different methods and formulas. It may be expressed with regard to one party at a certain election; the *advantage ratio* is the quotient of the percent of seats and percent of votes. For example, in 1993 the Conservatives in Canada garnered 18.84 percent of the total votes whereas they won 0.67 percent of the seats, thus the advantage ratio is 0.04. A more important quota is the Loosemore-Handby index (L-H index), which shows that, compared to a perfectly proportionate result, the percentage of the seats that are distributed to a different party.²⁵ If A received 40 percent of votes and 60 percent of seats, B received 35 percent of votes and 30 percent of seats while C has 25 percent of votes and 10 percent of seats, then the L-H index is 20.²⁶ In this paper we use the L-H index to express disproportionality of elections in Canada and in Hungary.²⁷ We accept the classification according to which an election with a 0-5 L-H is proportionate, with 5-10 is moderately proportionate, and above 15 is disproportionate.²⁸

2 Disproportionality in Canada and in Hungary

FPTP systems without compensation usually give disproportional results. As we mentioned before, the effective mechanisms of electoral systems cannot be examined without the examination of the political environment, especially the party system, as these factors fill the rules of the system. As the Final Report reiterates, from 1867 until 1921, the Canadian FPTP

²⁴ Douglas W. Rae 'A választási rendszer változó elemei' in Fábán György (ed), *Választási rendszerek* (Osiris Kiadó 1997, Budapest) 55.

²⁵ We add the absolute difference between percentage of votes cast and mandates obtained in case of each party up, then divide the number by two.

²⁶ As A has 20 percent more seats, and B and C have fewer seats (by 5 and 15 percent respectively) compared what was due based on proportional distribution. The sum is 40, which should be divided by 2, because it is a zero sum game, thus what qualifies for A as overrepresentation is at the same time underrepresentation in the case of B and C, so by adding up the absolute differences we counted every difference twice.

²⁷ The Final Report, however, refers to the Gallagher index when referring to disproportionality. On the Gallagher index. see: Michael Gallagher, 'Proportionality, Disproportionality, and Electoral Systems' (1991) 10 (1) *Electoral Studies* 33–51.

²⁸ Fábán György, 'Választási rendszerek az Európai Unió Tagállamaiban' in Szoboszlai György (ed), *A közjogi választások egyes elméleti és gyakorlati kérdései. Közigazgatási továbbképzési jegyzet* (Magyar Közigazgatási Intézet 2004, Budapest) 59–96.

system worked well, ‘there was a pretty good match between the distribution of seats in the House of Commons and the popular vote for political parties’.²⁹ Since 1921, however, when the Progressive party emerged, with the multi-party system, the FPTP system produced disproportionality.

In the recent elections, held between 2004 and 2015 the system produced rather high L-H indexes (see *Table 1*). According to the classification mentioned above, all these elections qualify as moderately disproportional.

*Table 1*³⁰

	2004	2006	2008	2011	2015
L-H index	11.65	10.67	11.06	14.86	14.45

The Hungarian MMP system produced disproportional results as well. It is to be noted that no conclusion may be drawn with regard to the proportionality just from the mixed nature of a system, as it depends greatly upon how effectively the PR branch can balance the FPTP branch. Both the German and Hungarian systems are MMP, for example, but while the former gives proportional results, as disproportionality is balanced at the level of the party list, it does not prevail in the Hungarian system. In the former Hungarian electoral system (from 1989 to 2010) the slightly disproportional territorial lists and the national list could not balance the single constituencies.³¹ Although the territorial lists disappeared in 2010, as a consequence of the winner surplus votes and the higher number of single constituencies, the new electoral system is more majoritarian than its predecessor.³² *Table 2* contains the L-H index of elections from 1990: six elections (2010 and beforehand) were held with the former, and one election (2014) was held with the new system.

Table 2

	1990	1994	1998	2002	2006	2010	2014
L-H index	20.18	21.15	12.28	11.7	6.47	13.8	22.0

As we mentioned before, from 1998 the party system consisted of two blocks. It can be seen in the results of 2002 and 2006 that in this party system the electoral system produced more

²⁹ Final Report (n 1) 22.

³⁰ Nagy (n 9) 150.

³¹ Tóth Csaba, ‘A magyar választási rendszer működése’ in Garai Borbála, Takács Péter (eds), *Multa, rogare, rogata tenere, retentere docere – Tudományos Diákköri Dolgozatok 2001*. (ELTE ÁJK 2002, Budapest) 127–145.

³² Tóth Csaba, ‘Választási rendszer’ in Körösenyi (n 20) 243.

proportional results. With the return of the multi-party environment after 2010, however, it was disproportional again, and as proof of the more majoritarian inclination of the present system, in 2014 produced the higher L-H index in the history of democratic elections after the transition.

As we mentioned before, although we agree with Duverger that majoritarian electoral systems tend to form the party system that two block emerge, it is clear both from the Canadian and the Hungarian example, that other factors play important role in the determination of the party system. When these factors are stronger than the institutional factor, the party system becomes ‘incompatible’ with the electoral system, which means, that a multi-party environment develops in the framework of a majoritarian system, what leads to high disproportionality.

3 Absolute Majority Versus Relative Majority and the Question of Preference Ranking

Besides proportionality, another critical point is the question of the majority needed to obtain a majority of the seats. This question arises in two aspects. On the one hand, does the party or coalition obtaining a majority of the seats garner a majority of the votes as well? On the other hand, does the electoral system give the possibility of preferential voting, thus enabling the so-called ‘Condorcet winner’ to win the election?

As to the first point, it has been a serious complaint against the Canadian system since 1921 that the winner does not need to receive an absolute majority, but only a relative majority of the votes. This is the consequence of the co-occurrence of the multi-party system and FPTP system, where the candidate may win the seat with a relative majority. In Hungary the disproportionality of the system also enables a government to be formed without having an absolute majority of votes cast.³³ We may state that, as far as the system is not proportional, there is always a chance that the coalition governs without the majority of votes.

The second point raises a more complex question. In categorical voting systems, voters cannot express their second, third, etc. preferences. With preferential voting, however, they can order their preferences, and it may lead to the avoidance of the so called ‘Condorcet paradox’, which can be illustrated with the following example.³⁴ Suppose that there are three candidates, A, B, and C. Forty percent of the voters have the preferential ranking of A-B-C, which means that they prefer A to B and C, and B to C. 35 percent have a ranking of C-B-A, and 25 percent have a ranking of B-C-A (see *Table 3*)

³³ In 2014 the winner parties gained two-third-majority in the legislation with less than 50 percent of votes (45 percent).

³⁴ The following example was showed to the Special Committee by political scientist Eric Mascin. See Final Report (n 1) 62–63.

Table 3

Proportion of voters	Candidate preferred in first place	Candidate preferred in second place	Candidate preferred in third place
40 percent	A	B	C
35 percent	C	B	A
25 percent	B	C	A

In a simple FPTP system without a preferential vote A wins, as she garners the most votes. But, as a matter of fact, A is the ‘Condorcet loser’, as she is defeated by both B and C if we consider how many voters preferred B or C to A, 60 percent (35 plus 25 as can be seen in the third and fourth rows) of the voters preferred B to A, while only 40 percent of the voters preferred A to B. It is the same with C. In this case, B is the Condorcet winner, as 65 percent of voters preferred her to C, while only 35 percent preferred C to B.

This example shows that, without preferential voting, it may occur that that candidate whose opponents were the least preferred wins the seat. This may cause disturbances in both the Canadian and Hungarian system.³⁵ As to the latter, it is to be noted that before the reforms in 2010, with the two-round voting system in the single constituencies, voters could express their second preferences, and this could lessen the chance of the emergence of a situation like that described above.³⁶ In the new system, however, with the one-round voting there is no chance that second preferences could prevail in this way.

IV The Constitutional and Institutional Background of Reforms

To estimate the likely success of a potential reform the constitutional background is needed to be taken into consideration, namely, whether an amendment of the constitution is needed and, if the answer is positive, what procedure is required. With respect to this we may distinguish between two types of constitutional restrictions regarding electoral reforms; formal ones, on the one hand, determine the procedure needed (majority, the co-decision of different bodies, time restrictions, etc.), and substantive ones, on the other hand, determine what standards need to be respected by the system for the reforms to be adopted (equal suffrage, guarantee of expression of will of voters, etc.). Moreover, other institutional factors may play an important role as well, for example whether reformers may initiate a referendum, or other factors that may make it easier or harder to accomplish the reform.

³⁵ The Final Report addresses – or at least mentions – this issue: See Final Report (n 1) 62–63.

³⁶ In our example, in the second round C or B could step back and thus by using voters’ second preferences it may be avoided that the least preferred candidate won.

1 Canadian Framework

In Canada, the electoral system is not determined specifically by the Constitution Act of 1982 nor the Constitution Act of 1867.³⁷ That means that the specific method of voting and the transformation of votes into seats are decided by the legislator when adopting the electoral system, in our case, most importantly the Canada Elections Act and proclamations issued under the Electoral Boundaries Act.³⁸ Both constitutional acts, however, contain provisions that have to be respected if the reform is to be carried out without needing constitutional amendment. Constitution Act 1867 determines the number of House of Commons seats allocated to each province and territory, the procedure and rules of this allocation, the ‘senatorial clause’ and proportional representation of the provinces (see below).³⁹ Constitution Act 1982 contains provisions on the right to vote and on the amendment procedures.⁴⁰

Related to this, it is important to describe the rules of the constitutional amendment, which is regulated by part V of Constitution Act 1982. Under part V, four different procedures may be distinguished,⁴¹ first, the general ‘7/50’ procedure, in which the resolution of the House of Commons and Senate and at least two-thirds of the legislative assemblies of the provinces are needed; furthermore, these provinces need to represent at least fifty percent of the population.⁴² Proportional representation of the provinces in the House of Commons, for example, may be abolished by this procedure.⁴³ Second, the unanimous consent of the provinces is needed on certain matters. Such a procedure would be required, for example, for the amendment of the so-called *senatorial clause*, under which each province may elect

³⁷ It is to be noted that under section 52 paragraph (2) of Constitution Act 1982, the Constitution of Canada includes the Constitution Act, 1982, and acts and orders referred to in the schedules. The most important act this latter includes is Constitution Act 1867, which contains the basic structural and organisational provisions.

³⁸ Emmett Macfarlane also mentions Parliament of Canada Act, which contains provisions on the qualification and disqualification of members of the House of Commons. Emmett Macfarlane, ‘Constitutional Constraints on Electoral Reform in Canada: Why Parliament is Mostly Free to Implement a New Voting System’ (2016) 76 *Supreme Court Law Review* 402.

³⁹ Section 37, 51, 51A and 52 of Constitution Act 1867.

⁴⁰ Right to vote is stipulated by section 3 of the Canadian Charter of Rights (hereinafter: Charter), which is part of Constitution Act 1982.

⁴¹ The literature often mentions five procedures, counting the unilateral provincial and House of Commons procedure as two. See, for example Richard Albert, ‘The Difficulty of Constitutional Amendment in Canada’ (2015) 53 (1) *Alberta Law Review* 86. In this paper we follow the Supreme Court of Canada, which, in its *Reference re Senate Reform*, distinguished between four procedures: ‘Part V reflects the political consensus that the provinces must have a say in constitutional changes that engage their interests. It contains four categories of amending procedures.’ *Reference re Senate Reform*, [2014] 1 *SCR* 704, [2014] 2 *SSC* 23.

⁴² Section 38 of Constitution Act 1982. In the ‘7/50’ abbreviation seven stands for the number of provinces and 50 for the percentage of population needed.

⁴³ Section 42 paragraph (1) point a) of Constitution Act 1982. This provision refers to the proportionate representation of the provinces, which should not be confused with the proportionality of electoral system. The former refers to the fact, that each province should represent itself in proportion with its population, while the latter refers to the proportionate distribution of seats with regard to party preferences among voters.

at least as many members to the House of Commons as it delegates to the Senate.⁴⁴ Third, in matters affecting not all but some provinces, the consent of all provinces affected is needed.⁴⁵ Fourth, unilateral amendment by provinces or the House of Commons is possible when purely provincial or federal interests are involved.⁴⁶ In our case article 44 is paramount, under which the Parliament may unilaterally amend the constitution in relation to the executive government of Canada or the Senate and House of Commons. These formal procedures, with extra-textual amendment rules, make the Canadian Constitution one of the most difficult constitutions to amend in the world.⁴⁷

With regard to electoral reform towards proportionality, it is not clear whether amendment of the constitution is needed and, if so, under which procedure, the 7/50 or the unilateral procedure. Most experts heard by the Special Committee were of the opinion that if certain fundamental provisions are respected, the reform does not require the cooperation of the provinces, which means that either the unilateral amendment procedure is applicable, or no amendment is needed at all.⁴⁸ This approach is strengthened by the case law on the relationship of the right to vote as declared in article 3 of the Charter and the FPTP system as well; in *Figueroa v Canada* the Supreme Court held that according to the Charter no specific electoral system is determined.⁴⁹

The answer became more ambiguous, however, with the decision of the Supreme Court in 2014 on the reform of the Senate (*Reference re Senate Reform*).⁵⁰ In this case the Supreme Court had to answer more questions regarding the constitutional amendment consequences of the reform of the Senate, diverging from changing the term for Senators to abolishing the Senate. The Supreme Court stated that ‘the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure’. From this remark the conclusion may be drawn that changes in matters that are not regulated textually by the Constitution, but belong to its ‘basic architecture’ require the amendment of the Constitution. The Canadian Supreme Court therefore adopted the *basic structure doctrine*, most commonly associated with the Indian Supreme Court.⁵¹ This reduces the predictability of a Supreme Court decision on whether or not a certain matter requires constitutional amendment to a significant degree. There is a chance that, adopting this view, a proportional

⁴⁴ Section 41 paragraph (1) point b) of Constitution Act 1982. – Voters in Prince Edward Island are entitled to elect four members as a result of this provision, though the population of the Island would imply fewer members.

⁴⁵ Section 43 of Constitution Act 1982.

⁴⁶ Sections 44 and 45 of Constitution Act 1982.

⁴⁷ Albert (n 41) 112.

⁴⁸ Final Report (n 1) 11.

⁴⁹ *Figueroa v Canada* (Attorney General), [2003] 1 S.C.R. 912, 2003 SCC 37, para 37: ‘After all, the Charter is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.’

⁵⁰ *Reference re Senate Reform*, [2014] 1 SCR 704.

⁵¹ Albert (n 41) 87.

reform would affect the basic structure of the constitution, thus an amendment would be needed, even if the textual provisions mentioned above had not been affected.⁵²

Moreover, with regard to the amending procedures, the Court emphasised the exceptional and limited nature of unilateral amendment as laid down in article 44, and the general nature of the 7/50 procedure. What amendment procedure a reform introducing an STV, MMP or PR system would require is thus not certain. It makes the success of a possible reform at least questionable.⁵³ The question is paramount, as the general 7/50 procedure is far less likely to be successful, as the cooperation of the provinces is needed, let alone the fact that some provinces introduced legislation under which the consent of the province may be given only after a referendum thereon in the given province.⁵⁴

Some scholars came to the conclusion that *Reference re Senate Reform* creates uncertainty and may imply that the general amending formula should be applied, as a reform moving from FPTP to some more proportional formula would alter Canadian politics to a great extent and hence would affect provincial interests.⁵⁵ The Final Report noted, however, that ‘most experts suggested that the types of reforms contemplated by the Committee would not necessitate provincial support, provided certain requirements are met.’⁵⁶ Emmett Macfarlane gives a convincing argument that if the proportional representation of the provinces is not affected then, as the House of Commons and the Senate are ‘functionally different’, ‘with the lower house emphasising representation of the national will by population and the upper house representation by state, province or region’, there is no reason for presuming that provincial interests would be affected to an extent that requires provincial consent.⁵⁷

The Canadian example shows that, in a federal state, the possible participation of the provinces in the reform of the national electoral system may significantly change the chances of success of any reforms. In a unitary state such as Hungary, this factor obviously cannot play a role in electoral reform processes.

Apart from constitutional amendment, the narratives in which the reforms take place are also worth mentioning. In his recent study, Michael Pal describes three main narratives of Canadian election law and its change, and argues that an ‘institutional’ approach may be held up, which puts emphasis on the partisan interests of those having the power to amend the

⁵² Emmett Macfarlane came to the conclusion that ‘It is clear from the Court’s articulation of the constitutional architecture concept that electoral reform could be regarded as a change of a constitutional nature.’ Macfarlane (n 38) 405.

⁵³ Richard Albert argues that ‘major constitutional amendment to the Constitution of Canada may today be so difficult as to render it impossible’. By major constitutional amendment he understands the 7/50 and the unanimity formula. Albert (n 41) 87–88.

⁵⁴ Richard Albert mentions Alberta as an example, and argues that this kind of provincial legislation is problematic, as presents extra-textual requirements to a possible amendment. Albert (n 41) 98–100.

⁵⁵ See, for example Michael Pal, ‘Constitutional Amendment After the Senate Reference and the Prospects of Electoral Reform’ (2016) 76 *Supreme Court Law Review* 377–398.

⁵⁶ Final Report (n 1) 11.

⁵⁷ Macfarlane (n 38) 408–409.

system.⁵⁸ He sees this narrative supported by the example of the failed Canadian reform in 2015. It is not the aim of this paper to identify the possible motivations of actors, but it is safe to say that, in the case of electoral system reform, partisan interests always play a prominent role. This may underline the functions of constitutional law in electoral system reforms, as there is a clear conflict of interests with regard to the fact that those who change the rules of the game are those who play according to the said rules.⁵⁹

2 The Hungarian Framework

In the sense of the applicable amendment and adoption procedure, the Hungarian legislation is far less ambiguous than the Canadian. The Fundamental Law, enacted in 2011, provides itself that the electoral system is laid down by a cardinal act (i.e. requiring the votes of at least two-thirds of the members of the Parliament who are present); furthermore, no referendum may be held on this matter and so the adoption of a different electoral system is the exclusive competence of the Parliament.⁶⁰

Within the framework of the Fundamental Law, the Parliament enjoys wide margin of appreciation, as it was upheld in numerous cases by the Constitutional Court.⁶¹ As the Hungarian Fundamental Law – similarly to the Canadian Constitution – does not specify the rules of the electoral system, the Parliament may reform the system to a great extent without the need to amend the Fundamental Law. However, it is to be noted that the amendment procedure of the Fundamental Law and a cardinal law differs only in the fact that for the former two-thirds of all members,⁶² while to the latter two-thirds of the members who are present is needed. With an organised and disciplined opposition, there is no effective difference between the two procedures with regard to the number of MPs needed. This means that the framework of the Fundamental Law may be changed with almost the same conditions as needed for electoral reform. This greatly reduces the effectivity of the constitutional framework.

Regarding the formal restrictions, besides the majority needed, it should be added that, in the case law of the Constitutional Court, the opinion appeared – however only in a dissenting opinion – that a time restriction could be derived from the Fundamental Law.⁶³ This appears in the Venice Commission's Code of Good Practice in Electoral Matters as well,

⁵⁸ Apart from the institutional approach, Michael Pal describes historical and theoretical narratives. First, the historical narrative emphasises the historical 'development' towards a more inclusive right to vote. Second, according to the theoretical approach, it adopts an egalitarian model, according to which the campaign finance regulation aims to level the playing field. – Michael Pal, 'Three Narratives About Canadian Election Law' (2017) 2 *Election Law Journal* 255–262.

⁵⁹ *Ibid* 260.

⁶⁰ Article 2 paragraph (1) and article 8 paragraph (3) point c) of Fundamental Law.

⁶¹ See for example: Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary section [10]; and Decision 63/B/1995 AB of the Constitutional Court of Hungary, ABH 1996, 509, 513.

⁶² Article S) paragraph (2) of the Fundamental Law.

⁶³ See Judge István Stumpf's dissenting opinion to a decision, which examined the constitutionality of a change of the local government electoral system, which took place just months before the elections. From the fact that this

which states that the fundamental elements of electoral law should not be open to amendment less than one year before an election.⁶⁴ As the Fundamental Law does not contain this restriction textually, and neither was it applied by the Constitutional Court (although it had the opportunity to do so), the application of this restriction is far from obvious. We think, however, that it clearly follows from the standards of rule of law, and should be followed by both the legislator and the Court.

The substantive restrictions of a reform are the provisions on the right to vote and on the principles of elections.⁶⁵ With regard to the electoral system in the narrow sense, principles of elections are of greater importance; under article 2 paragraph (1) of the Fundamental Law, elections shall be based on universal and equal suffrage and the ballot shall be direct and secret. To these four principles (universality, equal suffrage, direct ballot and secret ballot) a new one was added when the Fundamental Law was adopted in 2011, the principle of the guarantee of free expression of the will of the voters.

From these principles, equal suffrage and the guarantee of free expression of the will of voters could be important with regard to an electoral reform affecting the transformation of votes to seats. Under the case law of the Hungarian Constitutional Court, however, proportionality falls out of the scope of equal suffrage. The Court, in its previous case law, made a distinction between equal suffrage and proportionality as well – however not without the criticism of scholars⁶⁶ – but in its decision on winner compensation it expressly held that ‘a majoritarian, proportionate, or a mixed system in itself does not raise the violation of equal suffrage. Consequently, a purely majoritarian system could be constitutional as well [...]’⁶⁷ This means on the one hand that the current system, may it be as disproportionate as it is, qualifies as constitutional, and that the reforms would most probably not be affected by the constitutional background, even if an FPTP system were introduced.⁶⁸

Consequently, in Hungary, the amendment of the constitution is not needed for a proportional reform, and so the Parliament may adopt such a new system with the votes of two-thirds of the MPs present. The chances of reform, however, are lowered by the fact that no referendum may be held on the matter and therefore the opposition – which may have an absolute majority of the votes – cannot enforce the change.

opinion appeared in a dissenting opinion we may not draw the conclusion that the Court rejected this argument, as this was not on the merits of the case. See Decision 26/2014. (VIII. 23.) AB of the Constitutional Court of Hungary sections [61]–[69].

⁶⁴ European Commission For Democracy Through Law (Venice Commission) ‘Code of Good Practice in Electoral Matters’ Point II. 2., available at: <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e)> accessed> 9 October 2017.

⁶⁵ Article XXIII and article 2 paragraph (1) of Fundamental Law.

⁶⁶ Varsányi Benedek, ‘Egyenlő választójog – arányos választási rendszer’ (2006) 3 *Fundamentum* 107–114, and Mécs (n 19).

⁶⁷ Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary section [39].

⁶⁸ This, fortunately, has not been articulated by anyone as a desirable way of reform.

V Effects of Reform

Apart from the possible constitutional textual changes following a potential reform, the change of the electoral system may trigger changes in the underlying democratic and constitutional mechanisms in a given state. Switching from an FPTP or majoritarian MMP system to a more proportional system brings about changes not only in the transformation of votes and electoral process, but in the structure of constitutional institutions as well. Choosing between a proportional or majoritarian system is basically choosing from two types of democracy described by Arend Lijphart as between the majoritarian (or Westminster) model and the consensus model.⁶⁹

This distinction may be summarised as follows: in the consensus model, a proportional electoral system prevails, multi-party coalitions emerge, the legislative and executive branch are not so tightly connected, the party system is a multi-party system and the concentration of power is lower, which means that there may be judicial reviews of legislation, federal-province division, etc. As opposed to this, in the Westminster model, a majoritarian electoral system prevails, the need to form a coalition is much lower, the party system often consists of two blocks, the legislative and the executive branches are more tightly connected and the concentration of power is higher.⁷⁰

Although it may seem that the electoral system is only one component among many, it is to be noted that these components are interrelated, and the electoral system determines other factors. As we mentioned, the electoral system affects the party system; furthermore, it affects the possibility of coalition governments, thus the connection between the legislative and executive branches. It follows that, with any reform proposal, we make a proposal for a model of democracy as well. The consensus model gives more legitimation and involves more agents in the decision-making process, while the Westminster model may provide stable governmental power and thus governmental crises may be avoided.

VI Possible Ways of Change – Alternative Systems

For both Canada and Hungary, different types of system are open as options. These options differ greatly both in complexity and in how widespread they are among democratic states. In this part we examine proportional representation (PR), single transferable vote (STV), and mixed member proportionality (MMP) systems.⁷¹ As part of the last of these, we examine how the FPTP branch could be amended with preferential voting.

⁶⁹ Arend Lijphart, *Patterns of democracy: Government forms and Performance in Thirty Six Countries* (Yale University Press 1999, New Haven) 9–48.

⁷⁰ *Ibid* 3–4.

⁷¹ In IDEA Handbook on Electoral System Design (hereinafter 'IDEA Handbook') PR and STV systems are categorised as proportional systems. Following this categorisation a possible reform towards a more proportional system could take the form of one of these systems. MMP systems are categorised as mixed systems, and in the

1 PR Systems

In PR systems, the mandates are distributed in districts that are big enough to allow proportional representation. In the Netherlands and in Israel, for example, the whole country is an electoral district; the voters cast their ballot to lists, and then the seats are distributed using a proportional formula.⁷² The larger the district size (the so called *district magnitude*), the more proportionate the system.⁷³ PR systems thus may provide near full proportionality.⁷⁴

The trade-off for proportionality is the greater distance between the elected and voters, in that it provides no local representation. In Canada, local representation was laid down as an important value of reform,⁷⁵ and in Hungary it forms part of the electoral tradition as well, although not with the same force as in Canada. Moreover, in Canada the representation of provinces is laid down in the constitution. The amendment of the constitution would therefore be required if the whole country constituted a single district.⁷⁶ Another trade-off is the stability of the government. The more proportional a system is, the more likely a coalitional government forms, instead of a single-party government. If social and political cleavages are deep enough to make coalitions impossible or fragile, a pure PR system may give less stability.

As a consequence of disappearing local representation, we may conclude that a purely PR system will not be and maybe should not be introduced in Canada or in Hungary.

2 STV

In STV systems the given state is divided usually into districts with 3-8 mandates. The voters cast their ballot according to their preferential order, marking the candidate in the first place, second, and so on. The distribution of seats is rather difficult: first, a quota is determined and any candidate reaching this quota wins a mandate. The preferential votes for the winning mandates are distributed among the remaining candidates. If somebody reaches the quota

case of Canada it would be a step forward in terms of proportionality as well. For the categorisation and description of these systems see: Institute for Democracy and Electoral Assistance 'Electoral System Design: The New IDEA Handbook' 27–129, available at: <<https://www.idea.int/sites/default/files/publications/electoral-system-design-the-new-international-idea-handbook.pdf>> accessed 9 October 2017.

⁷² Ibid 57.

⁷³ For further information on district magnitude see: Rae (n 24) 49–51.

⁷⁴ I.e. producing L-H index less than 5 percent.

⁷⁵ Final Report (n 1) 42.

⁷⁶ Under section 41 point (b) of Constitution Act 1982, the resolution of each province is needed if the senatorial clause is affected, under which each province is entitled to 'a number of members in the House of Commons not less than the number of Senators by which the province is entitled [...]'. However, if the whole country were a single district then this article would certainly be affected, as no province would be entitled to a specific number of mandates in the House of Commons. For the same reason, section 41 point (a) would be triggered as well, which stipulates the proportionate representation of the provinces in the House of Commons. This section triggers the general ('7/50') amending formula.

then she wins the mandate or, if nobody reaches it, the candidate with the least votes is dropped out, and her preferential votes are distributed. This process runs until every mandate is distributed.⁷⁷ The most notable example of an STV system is Ireland.

This system provides higher proportionality, while it does not abandon local representation, as the districts have 3-8 mandates. Furthermore, voters may express their preferential order, which reduces the necessity of strategic voting (i.e. abandoning the candidate preferred in the first place as the candidate does not have a chance to win). An apparent drawback is the complexity of the system; the distribution process is hard to understand. Another effect – may it be an advantage or disadvantage – is that candidates from the same parties run against each other; this, however, as political scientist Michael Gallagher said in his testimony before the Special Committee, does not really damage party cohesion.⁷⁸

As STV preserves local representation while giving more proportionality then, apart from its complexity, it is hard to raise any objections to this system with regard to Canada or Hungary. However, in case of Hungary the general objections related to instability caused by proportionality may be brought up.

3 MMP

In an MMP system a proportional branch balances the disproportional effects of the FPTP branch. As I mentioned before, there are many variants and they differ on the proportionality they provide. The advantage of these systems is that they provide both local – through the FPTP branch – and proportional representation. It is interesting, that in Canada one of the greatest objections to an MMP system was the fear that it creates two kinds of MPs; it creates a distinction between those elected in single districts and from the lists. According to the experiences with the Hungarian MMP system, however, this has not been found to be the case, as in the media and public discussion it is not widely known whether an MP was elected for a district or from a party list.

It is to be added that the FPTP branch may be amended in a way that enables preferential voting. In an alternative vote (AV) system, for example, the voters cast their ballot according to their preferential order. If a candidate garners an absolute majority according to the first preferences, she wins the seat. If not, the candidate with the least votes is eliminated, and her votes are distributed according to the second preferred candidate on her ballot papers. This method may not increase proportionality, but it may solve the Condorcet paradox described above.

⁷⁷ For further explanation of the STV system see: IDEA Handbook (n 71) 71–77.

⁷⁸ Final Report (n 1) 79.

VII The Future of Electoral Reforms in Canada and Hungary

Finally, we need to mention the possible future prospects of reforms in Canada and in Hungary. As we mentioned above, in Canada the electoral reform was a major campaign promise, but it was abandoned in early 2017. The abandonment draws attention to the paradox that only those in power can change the electoral system, but they are clearly benefiting from it, as they realise their power; once the Liberals won the elections, reform became more of a burden.⁷⁹ It is rare that the governmental political forces have an incentive to reduce the majoritarian nature of the current system. An example for the exception comes from France; where before the elections held in 1985 the socialists introduced a more proportionate system to mitigate their electoral defeat.⁸⁰ This, however, is not an example for change motivated by commitment to electoral policy, but by sheer political interests.

In Hungary, as we mentioned above, the system has changed, but not in a proportionate direction. Although it is discussed in public, as the reform requires the majority of two-thirds, it is hardly conceivable that, prior to the elections held in 2018 or even in the term from 2018 to 2022, the system would be reformed. Maybe the most probable scenario for a reform would be a situation similar to that in France in 1985 described above; if a political party won the next election by two-thirds and at the end of the term the polls suggest a great defeat, a possible strategy for mitigating defeat could be to introduce a more proportional system.

VIII Conclusions

We have seen that the coexistence of disproportional FPTP and MMP electoral systems and multi-party systems cause high disproportionality in both Canada and in Hungary, which may be the most important reason for reforming the systems. As we pointed out, the reform could provide a chance that preferential voting could be introduced, which gives an opportunity to have results displaying the actual preferences of voters.

In Canada, the constitutional background does not give a clear answer whether amendment of the constitution is needed, and if the answer is positive, then what procedure may apply. As we argued, the constitutional framework greatly affects the chances of successful reform, especially where constitutional amendment is as difficult as in Canada. The Hungarian constitutional background is more clear-cut; however, the required votes of two-thirds of MPs is rather hard to fulfil, especially if we take into consideration that any party or coalition with such a majority does not have the incentive to reform the system. In Hungary, the fact that no referendum may be held on the subject makes reform more difficult.

⁷⁹ For the description of the process of the failure of reform in 2015–2017 see: Henry Milner, 'Electoral System Reform, the Canadian Experience' (2017) 16 (3) *Election Law Journal* 349–356.; see also: Pal (n 58).

⁸⁰ Alan Renwick, *The politics of electoral reform* (Cambridge University Press 2010, Cambridge) 89–111.

We listed the possible ways of changes, through PR, STV and MMP systems. PR systems may be ruled out as they do not promote a personal connection between voters and the elected, which is traditionally a feature of electoral systems in both countries. STV systems couple the advantages of voter-elected connection and proportionality; the disadvantage of these systems, however, is their complexity and the general objections against proportionality (i.e. less stable governments, especially in young democracies). MMP systems may be a solution in both countries, as they may be fully or partly proportional, and the coexistence of lists and single candidates ensures the voter-elected connection as well.

Finally, we pointed out the paradox of electoral reforms, namely that those elected usually do not have any incentive to reform the system towards more proportionality, as they themselves have been elected under the rules of it. As in both countries the system may be reformed by the national assembly (House of Commons in Canada, Parliament in Hungary), this questions whether in the near future any successful reform could take place.

The Selection of Supreme Court Judges

What Can the World Learn from Canada, What Can Canada Learn from the World?***

The judges of the Supreme Court of Canada, the highest court of the country dealing also with constitutional matters, are appointed by the executive power. However, in October 2016, a new process was applied for the first time. It was not incorporated into the Supreme Court Act but remained rather a policy. It contained new elements including an independent and non-partisan advisory board preparing for the Prime Minister a shortlist of candidates, and two public hearings: one of the Minister of Justice and the Chair of the Advisory Board to explain the selection process for the MPs, and one of the candidates to answer questions of parliamentarians. The Government's communicated intent was to ensure a more transparent, inclusive, and accountable process. However, the new process was criticized by several authors because of its redundancies.

This paper aims to examine the Canadian selection process from multiple points of view. First, it gives a theoretical background of the constitutional principles that are relevant to the selection of supreme court judges and identifies the relevant international (soft law) requirements. Second, it analyses the current Canadian process and its realization taking also the historical aspects into account. Third, it gives a comparative constitutional law analysis: it compares the Canadian system with regulation and practice of the United States of America and several European countries. Finally, the paper seeks an answer to the question of what elements can optimise the process of selecting supreme court judges in a constitutional democracy.

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I Theoretical Background and International Requirements

As with all institutions that exercise public power, members of the constitutional courts should be democratically legitimized.¹ This is the basic constitutional principle that influences the selection systems of constitutional court justices. The countermajoritarian dilemma usually refers to the fact that courts are not directly legitimized. However, it is important to emphasize that also courts are democratically legitimized, but indirectly. Direct legitimation does not mean a higher quality.² The legitimacy of the constitutional review can be regarded as dependent on the selection process of the judges.³

Another basic constitutional principle that should be taken into consideration when deciding on a selection model is the separation of power. While the constitutional courts protect and enforce the constitution, they necessarily control (and conflict with) the other governmental branches. This control function makes it necessary to ensure the independence of constitutional review institutions. Even in states where the constitutional courts do not form part of the ordinary judicial system, their independence is a fundamental part of their constitutional role. The selection criteria and the process should ensure this independence.

However, as regards constitutional judges, it may be more accurate to talk about 'becoming independent' rather than 'being independent', since most of them are appointed thanks to the support of one or more political parties.⁴ The principal aim in the appointment procedure is not that of appointing persons of unknown political beliefs but ensuring that, once a person is appointed, he or she can work without any pressure or influence from political or other external actors.⁵

There are no international legal obligations concerning the selection of constitutional court justices. The reason for that is that international organisations and agreements leave a wide margin of appreciation for the states to create their own constitutional system, including whether they institute a constitutional review organ or not and, if yes, with what characteristics.

However, indirectly, there are some international requirements that should be fulfilled here. If the constitutional review body deals with individual cases and not only abstract

¹ This paper deals with institutions that carry out constitutional review independently of how they are called or the exact competences. As a result, when it uses the word 'constitutional courts' in general, it also includes constitutional review organs other than constitutional courts (supreme courts and constitutional councils). About the difficulties of defining constitutional courts see Katalin Kelemen, 'Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model for Hungary' (2013) 54 (1) *Acta Juridica Hungarica* 6.

² Ernst Benda, Eckart Klein, Oliver Klein, *Verfassungsprozessrecht* (C.F. Müller 2012, Heidelberg) Rn. 15.

³ Christine Landfried, 'The Selection Process of Constitutional Court Judges in Germany' in Kate Malleson, Peter H. Russell (ed), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006, Toronto) 197.

⁴ However, some authors argue that judges will never become really independent; their judicial activity is bound to the ideology of the nominating parties. Zoltán Szenté, 'The political orientation of the members of the Hungarian Constitutional Court between 2010 and 2014' (2016) 1 (1) *Constitutional Studies*; Landfried (n 3).

⁵ Kelemen (n 1) 6.

constitutional problems, it must follow the guarantees of a fair trial, including the right to an independent and impartial court.⁶

In the field of soft law, there are more guidelines concerning the selection of constitutional court judges. The UN Basic Principles on the Independence of the Judiciary rule only briefly on the selection of judges (not specifically constitutional or supreme court judges). According to the document, persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement for a candidate for judicial office to be a national of the country concerned shall not be considered discriminatory.⁷

The Council of Europe's advisory body on constitutional matters, the European Commission for Democracy through Law (better known as the Venice Commission) issued several documents on this topic.⁸ In its report of 1997 on the composition of constitutional courts, it examined the regulation and practice of 40 constitutional courts of its member states and observer states. According to the report, the direct appointment system is the most common among the supreme courts.⁹ The appointment procedure of common law supreme courts, which does not distribute the power of appointment among the different public authorities, must be viewed in the context of the constitutional tradition and the personality of the constitutional judge in these systems. The elective system appears to be aimed at ensuring a more democratic representation. However, this system is reliant on a political agreement, which may endanger the stability of the institution if the system does not provide safeguards in the event of vacant positions.¹⁰

The Venice Commission identifies three main fields of concern; balance, independence, and effectiveness. Constitutional courts must, by their composition, guarantee independence from different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. A balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions. A minimum guarantee of independence is that a ruling party should not be in a position to have all judges

⁶ E.g. Article 10 of the Universal Declaration of Human Rights; Article 14 (1) of the International Covenant on Civil and Political Rights; Article 6 (1) of the European Convention on Human Rights; Article 8 (5) of the American Convention on Human Rights.

⁷ Basic Principles on the Independence of the Judiciary. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁸ All of the examined countries below are members of the Venice Commission (France, Germany, Hungary, United States of America) or have an observer status (Canada). See more about the institution in Rudolf Dürr, 'The Venice Commission' in Tanja E.J. Kleinsorge (ed), *Council of Europe* (Wolters Kluwer 2013, The Netherlands).

⁹ See a detailed description of the models below, in the comparative part.

¹⁰ The composition of constitutional courts, CDL-STD(1997)020. <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e)> accessed 23 May 2018. 7.

appointed to its liking. Long terms of office and a ban on reappointment (or only one possible reappointment) may be a solution. Furthermore, special provisions might be necessary in order to maintain the effective functioning of the court when vacancies arise. Rules on appointment should foresee the possibility of inaction by the nomination authority and provide for an extension of the term of office of a judge until the appointment of his/her successor.¹¹

The opinions that the Venice Commission has issued when examining the draft legislation of its member states also serve as guidelines. According to the Commission, the changing of the composition of a constitutional court and the procedure for appointing judges to the constitutional court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the constitutional court and the involvement of different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one political force or another.¹²

In the opinions, the Commission is very positive about the mixed system, in which the three main branches of power elect and appoint the members together, because it has more democratic legitimacy than a direct appointment system¹³ and an elective system that involves the parliament, because it results in the society's trust in the court as a neutral arbiter.¹⁴

The qualified majority requirement is favoured by the Commission. It is designed to ensure that at least part of the opposition agrees on any candidate for the position of a judge at the Constitutional Court. It is advisable to provide for the inclusion of a broad political spectrum in the nominating procedure.¹⁵

The Commission also supports regulations that enhance a balanced composition, because such criteria for a pluralistic composition can be an important factor in attributing the court with the necessary legitimacy for striking down legislation adopted by parliament as the representative of the sovereign people.¹⁶ Diversity is also desirable concerning the legal background and age of the judges.¹⁷

¹¹ The composition of constitutional courts, CDL-STD(1997)020. <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e)> accessed 23 May 2018, 21–22.

¹² CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court) para. 18.

¹³ CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, para 19.

¹⁴ CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para 13.

¹⁵ CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), para 18, 19.

¹⁶ CDL-AD(2005)039 Opinion on proposed voting rules for the constitutional court of Bosnia and Herzegovina, para 3.

¹⁷ CDL-AD(2006)006 Opinion on the Two Draft Laws amending Law NO. 47/1992 on the organisation and functioning of the constitutional court of Romania, para 17. CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, para 18, 25.

The decision on a violation of the procedure for appointing a judge should be taken by the Court itself.¹⁸ Finally, we should examine the aims of the selection procedure, which are, in general, to ensure that the members of the constitutional court are the best persons for the post. During the procedure, it should be examined whether the candidates fulfil the statutory requirements and are well-qualified. In addition, the selection procedure also aims to ensure the independence of the court from political influence. Besides, one aim may be to ensure a higher legitimacy, especially at those institutions that have a broad range of competences, and where the court has a strong control function above the legislative, executive, and sometimes also judicial branch.¹⁹ Appointment mechanisms are also designed to insulate judges from short-term political pressures yet to ensure some accountability.²⁰ In addition, it can also be important to ensure the diversity of the members of the court. That requirement includes the balance of genders, members from different geographic regions, representation of various legal professions, jurisdictions, and fields of law. To sum up, the most important aim is to have independent, competent, and experienced judges, and a balanced and legitimate composition.²¹

II Selection of Supreme Court Justices in Canada

Canada follows the decentralised model of constitutional review, which means that it has no separate constitutional court and Canadian courts are generally capable of addressing judicial review and constitutional issues. The Canadian Supreme Court serves as the final court over constitutional matters.

The British North America Act of 1867, which serves as one of Canada's most important constitutional documents,²² did not create a supreme court as this power fell within the competence of the British Judicial Committee of the Privy Council, which originally had ultimate judicial authority over all the off-island parts of the British Empire. This subordinated role also remained after the establishment of the Canadian Supreme Court in 1875, as far as until 1949.²³ The significance of the Court grew when the Canadian Charter of Rights was

¹⁸ CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia, para 20.

¹⁹ Epstein et al. set two goals: creating and sustaining an intellectually and legally distinguished and a politically independent bench. Lee Epstein, Jack Knight, Olga Shvetsova, 'Comparing Judicial Selection Systems' (2001) 10 (1) William & Mary Bill of Rights Journal 10.

²⁰ Tom Ginsburg, *Judicial review in new democracies: constitutional courts in Asian cases* (Cambridge University Press 2003, Cambridge) 42.

²¹ The composition of constitutional courts, CDL-STD(1997)020. <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e)> accessed 23 May 2018, 6.

²² Now referred to as the Constitution Act, 1867. See especially Part VII 'Judicature', ss. 96–101.

²³ Adam Dodek, Rosemary Cairns Way, 'The Supreme Court of Canada and Appointment of Judges in Canada' in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (ed), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017, Oxford) 213.

adopted in 1982 and the Supreme Court became responsible for its enforcement. This development represented a shift from the traditional values of parliamentary supremacy to the new values of constitutional supremacy.²⁴

Today, the Supreme Court of Canada, which decides 70-85 constitutional issues each year, is one of the most well-known constitutional bodies of the world.²⁵ Its decisions are regularly cited by other national constitutional courts and even by international human rights fora.²⁶

According to the Supreme Court Act, the Court consists of a chief justice and eight puisne (ordinary) judges. The judges are appointed by the Governor in Council (representative of the monarch) by letters patent under the Great Seal.²⁷ In practice, the 'Governor in Council' does not actually mean the Governor-General, but rather the federal cabinet giving the Governor-General advice that to all intents and purposes cannot be refused. In practice, it is generally the prime minister who makes the proposal.²⁸ Different Prime Ministers may have relied on the advice of their Ministers of Justice to varying degrees, but the choice lay wholly within the Prime Minister's discretion.²⁹

This system was inherited from England at the time of Confederation. However, in the meantime, England changed the same system by introducing institutional and political limits, which were not observed by Canada. The roots of the system can be found in the Middle Ages when all governmental powers came from the Crown, and concepts of accountability and participatory democracy were an oxymoron.³⁰

The Supreme Court Act contains just a few provisions on eligibility: any person who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province may be appointed as a judge. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.³¹ According to the Supreme Court, this requirement has a dual purpose. First, it aims to ensure that the Court has civil law expertise because while the other provinces of Canada have a common-law system, Quebec follows the civil law model. Second, according to the Court, this provision makes it possible for Quebec's legal traditions and social values to be represented on the

²⁴ Peter McCormick, 'Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada' (2005) 7 (1) J. App. Prac. & Process 6–12.

²⁵ Statistics 2006–2017. <<https://www.scc-csc.ca/case-dossier/stat/sum-som-eng.aspx>> accessed 23 May 2018.

²⁶ Ran Hirschl, 'Going Global? Canada as Importer and Exporter of Constitutional Thought' in Richard Albert, David R. Cameron (ed), *Canada in the world. Comparative perspectives on the Canadian constitution* (Cambridge University Press 2017, Cambridge).

²⁷ Supreme Court Act, R.S.C., 1985, c. S-26, Section 4.

²⁸ McCormick (n 24) 13.

²⁹ Dodek and others (n 23) 217.

³⁰ Jacob S. Ziegel, 'Appointments to the Supreme Court of Canada: the time is right for change. The disarmingly simple Canadian procedure has come under increasing criticism... because it lacks accountability and transparency' (Spring 2000) *Canadian Issues* 22.

³¹ Supreme Court Act, Section 5–6.

Court and for Quebec's confidence in the Court to be maintained.³² This can enforce the legitimacy of the Court.

A connected issue is that, through several recent appointments, it was an intention to have bilingual candidates. The Supreme Court is exempt from the requirements of the Official Languages Act because of the above-mentioned Quebec-quota requirement. However, the judges of the Supreme Court are called on to interpret both civil and common law, as well as to make rulings on cases that were argued in the lower courts in French and English. That is why the Rules of the Supreme Court of Canada state that the parties may use either language in any oral or written communication with the Court, and that simultaneous interpretation services must be provided during the hearing of all proceedings. In the last decade, seven bills were submitted to make bilingualism of the judges obligatory but none of them was successful.³³ The requirement of bilingualism is followed by harsh criticism as, according to some opinions, it would not help in choosing the best-qualified candidates.³⁴

In addition, according to a long-established, unwritten constitutional convention, a territorial division is also applied. Beside the Quebec judges, the remaining six seats are also held on a regional basis: three seats to Ontario, two to the west (one to the prairie provinces and one to British Columbia), and one to the maritime provinces.³⁵

Over time, other characteristics besides regionalism have become notable: examples are the appointment of the first judge from neither of the two so-called 'founding peoples' of Canada, that is not English or French, notable immigrant communities, and the first female judge.³⁶

The selection process of the supreme court judges was not an issue for a long time, thanks to the humble role of the court in the early days. The only recommendation raised was about the obligation to consult with the provincial ministers of justice but that would have put the right to select the judge in the executive branch.³⁷

In 2004, the Minister of Justice talked publicly for the first time at a committee hearing about the process of selecting supreme court justices behind closed doors. He named it an 'unknown but not a secret process' and explained which public officials and other stakeholders they consult with and what kind of aspects they consider.³⁸ In the legal scholarship, several

³² Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, para 18.

³³ Marie-Eve Hudon, 'Bilingualism in the Federal Courts' (parliamentary report) <http://publications.gc.ca/collections/collection_2011/bdp-lop/bp/2011-40-eng.pdf> accessed 23 May 2018.

³⁴ Richard Albert, 'Bilingualism on the Supreme Court of Canada' <www.iconnectblog.com/2010/04/bilingualism-on-the-supreme-court-of-canada/> accessed 23 May 2018.

³⁵ 'Two new Supreme Court of Canada Justices nominated' <www.iconnectblog.com/2011/10/two-new-supreme-court-of-canada-justices-nominated/> accessed 23 May 2018.

³⁶ Dodek and others (n 23) 212.

³⁷ Erin Crandall, 'Defeat and Ambiguity: The Pursuit of Judicial Selection Reform for the Supreme Court of Canada' (2014) 41 (1) *Queen's Law Journal* 81–85.

³⁸ Irwin Cotler, 'An unknown but not a secret process: Appointment of Supreme Court Justice' (Summer 2004) 27 (2) *Canadian Parliamentary Review* 13–15.

criticisms appeared, which urged the participation of parliament in the process, the establishment of an independent advisory body, and the ensuring of transparency but some time had to pass until the political decision on the changes was taken.³⁹

In 2003, the newly elected prime minister raised for the first time that the selection process suffers from a 'democratic deficit' and a more transparent and more accountable process should be introduced.⁴⁰ The new process, which required the parliamentary hearing of the candidates, was introduced in 2006. However, this new procedure was not followed in all of the cases when filling a vacancy, and in 2014, it was announced that it would no longer be observed at all.⁴¹

In August 2016, the Government of Canada announced that the vacant mandate in the Supreme Court will be filled according to a new process that is 'transparent, inclusive, and accountable to Canadians'.⁴²

The procedure started with a public call for application, where everyone who fulfilled the requirements could apply. To apply, one had to fill in a 22-page questionnaire that asked about the professional career, personal qualities (including also the state of health) and the candidate's opinion on the constitutional role of the judicial branch and the judges.⁴³ In addition, the candidate also had to submit five decisions, legal documents or publications of her,⁴⁴ and to give consent to a background check.⁴⁵

The content of the questionnaire was in harmony with the requirements that were set by the Government for the candidates, beside the statutory requirements. These were personal skills and experience (demonstrated superior knowledge of the law; superior analytical skills; ability to resolve complex legal problems; awareness of and ability to synthesise information about the social context in which legal disputes arise; clarity of thought, particularly as demonstrated through written expression; ability to work under significant time pressures requiring diligent review of voluminous materials in any area of law; commitment to public service), personal qualities (irreproachable personal and professional integrity; respect and consideration for others; ability to appreciate a diversity of views, perspectives and life experiences, including those relating to groups historically disadvantaged in Canadian society; moral courage; discretion; open-mindedness), and the institutional needs of the Court

³⁹ Ziegel (n 30) 22. Adam M. Dodek, 'Reforming the Supreme Court Appointment Process, 2004–2014: A 10-Year Democratic Audit' (2014) 67 *Supreme Court Law Review* (2nd Series) 111.

⁴⁰ McCormick (n 24) 1.

⁴¹ See a detailed report of the history of the appointments in Erin Crandall, Andrea Lawlor, 'Courting Controversy: The House of Commons' Ad Hoc Process to Review Supreme Court Candidates' (2015, Winter) *Canadian Parliamentary Review* 35–43.

⁴² New process for judicial appointments to the Supreme Court of Canada. August 2, 2016. pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada.

⁴³ Questionnaire <<http://www.fja-cmf.gc.ca/scc-csc/Questionnaire-SCC-Judicial-Appointment-Process.pdf>> accessed 23 May 2018.

⁴⁴ How to Apply and Instructions <www.fja-cmf.gc.ca/scc-csc/form-formulaire-eng.html> accessed 23 May 2018.

⁴⁵ Background check form <www.fja-cmf.gc.ca/appointments-nominations/forms-formulaires/bc-va/bc-va.pdf> accessed 23 May 2018.

(ensuring a reasonable balance between public and private law expertise, bearing in mind the historic patterns of distribution between those areas in Supreme Court appeals; expertise in any specific subject matter that regularly features in appeals and is currently underrepresented on the Court; ensuring that members of the Supreme Court are reasonably reflective of the diversity of Canadian society).⁴⁶ In the case of the candidate appointed by the Prime Minister, the substantive parts of the questionnaire would be disclosed to the public after their appointment.⁴⁷

The Office of the Commissioner for Federal Judicial Affairs checked whether the applications had fulfilled the formal criteria then forwarded them to the independent Advisory Body. The members of the Advisory Body received their mandate in different forms. Three members, at least two of whom were not advocates or barristers in a province or territory, were nominated by the Minister of Justice. A practicing member of the bar of a province or territory was nominated by the Canadian Bar Association. A practicing member of the bar of a province or territory was nominated by the Federation of Law Societies of Canada. A retired superior court judge was nominated by the Canadian Judicial Council, and a legal scholar was nominated by the Council of Canadian Law Deans. The Advisory Board had to submit to the Prime Minister the names of at least three but up to five candidates, assessing how the candidates met the statutory requirements and the criteria established by the Prime Minister.⁴⁸ The Advisory Board consulted also with the Chief Justice of the Supreme Court and had also the obligation to seek out qualified candidates and actively encourage them to apply for the post.

The Minister of Justice consulted on the shortlist of candidates with the Chief Justice of Canada, relevant provincial and territorial attorneys general, relevant cabinet ministers and opposition Justice Critics, as well as members of the House of Commons Standing Committee on Justice and Human Rights, and the Standing Senate Committee on Legal and Constitutional Affairs. Following the consultations, the Minister of Justice presented recommendations to the Prime Minister who chose the nominee.⁴⁹

Hereupon, two hearings took place. During the first hearing, the Minister of Justice and the Chair of the Advisory Board had to appear before the House of Commons Standing Committee on Justice and Human Rights to explain how the chosen nominee met the statutory requirements and the criteria set by the Government and any additional reasons in support of the candidacy. In the second hearing, the nominee had to meet the members of

⁴⁶ Qualifications and Assessment Criteria <www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html> accessed 23 May 2018.

⁴⁷ How to Apply and Instructions <www.fja-cmf.gc.ca/scc-csc/form-formulaire-eng.html> accessed 23 May 2018.

⁴⁸ Terms of Reference of the Advisory Board <www.fja-cmf.gc.ca/scc-csc/mandate-mandat-eng.html> accessed 23 May 2018.

⁴⁹ New process for judicial appointments to the Supreme Court of Canada. August 2, 2016. <pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada> accessed 23 May 2018.

the same committee, as well as the Standing Senate Committee on Legal and Constitutional Affairs, and representatives from the two opposition parties that had no parliamentary group. This second meeting did not take place in the Parliament but at the University of Ottawa.⁵⁰ The question and answer session were moderated by McGill University law professor Daniel Jutras.⁵¹ The session was public; one could also follow it via the Internet. The MPs asked the nominee mainly about his French, his opinion on the role of judges, and his attitude towards diversity.⁵² After this, he was formally appointed and sworn in.

The Advisory Board had to submit a report within a month of the judge being appointed, which outlined how it fulfilled its mandate, including costs related to its activities and statistics related to the applications received. In the public report, the Advisory Board could also make recommendations for improving the process.⁵³ In its recommendations on improvements to the appointment process and work of the Advisory Board, the Board made recommendations primarily concerning the timing of the process (not in the summer months), the strict timeframe and the format of the application materials and forms.⁵⁴

The same process was applied for a second time in December 2017.⁵⁵ One difference was that it was directly indicated in the call that only candidates from Western Canada or Northern Canada could apply to ensure a geographic balance.

The public hearing of the nominee was moderated by François Larocque, interim dean for the University of Ottawa Faculty of Law's common law section, where the nominated Sheilah Martin 'voiced support for better sexual assault education for judges, acknowledged the taut balancing act of competing Charter rights, and touted existing supports for jury members (...), but steered away from any queries that could touch upon future cases or controversial issues.'⁵⁶

⁵⁰ Maxime St-Hilaire, 'The New Selection Process for the Supreme Court of Canada: A Global Constitutionalism Perspective' (2016) *Int'l J. Const. L. Blog*, Oct. 20, <www.iconnectblog.com/2016/10/canada-new-selection-process> accessed 23 May 2018.

⁵¹ Prime Minister of Canada announces appointment of Mr. Justice Malcolm Rowe to Supreme Court of Canada. <pm.gc.ca/eng/news/2016/10/28/prime-minister-canada-announces-appointment-mr-justice-malcolm-rowe-supreme-court> accessed 23 May 2018.

⁵² John Paul Tasker, 'Supreme Court nominee Malcolm Rowe grilled on French, diversity and Aboriginal rights' October 25, 2016. <www.cbc.ca/news/politics/malcolm-rowe-committee-questions-1.3820318> accessed 23 May 2018.

⁵³ New process for judicial appointments to the Supreme Court of Canada. August 2, 2016. <pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada> accessed 23 May 2018. The report is available here: <[www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-\(November2016\)_en.pdf](http://www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-(November2016)_en.pdf)> accessed 23 May 2018.

⁵⁴ Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August–September 2016) <[www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-\(November2016\)_en.pdf](http://www.fja-cmf.gc.ca/scc-csc/Report-Independent-Advisory-Board-for-the-Supreme-Court-of-Canada-Judicial-Appointments-(November2016)_en.pdf)> accessed 23 May 2018.

⁵⁵ Supreme Court of Canada Appointment Process – 2017 (Appointment of the Honourable Sheilah Martin) <<http://www.fja-cmf.gc.ca/scc-csc/index-eng.html>> accessed 23 May 2018.

⁵⁶ Marco Viglotti, 'Supreme Court nominee Sheilah Martin veers from the controversial during questioning from MPs', *The Hill Times*, December 5, 2017. <<http://www.hilltimes.com/2017/12/05/supreme-court-nominee-sheilah-martin-veers-controversial-questioning-parliamentarians/127931>> accessed 23 May 2018.

After the end of the appointment process, the Advisory Board again submitted a report. The recommendations dealt with the timeframe for applications (to give more time for the applications and for the board to decide), the advisory board deliberations (to have an early consultation with the Chief Justice), and format of the application materials.⁵⁷

Even if the Canadian selection process has various strengths, it was criticised on several points. The first is that the process can be unilaterally amended or the development can be reversed at any time because it forms only a policy and not a legal requirement. The reason for that is that although the Supreme Court is not formally included in the constitution, according to the decision of the Supreme Court, Sections 5 and 6 of the Supreme Court Act, dealing with the composition of the Court, are constitutionalised (i.e. they form part of the constitution so can be amended only by a very strict amendment procedure).⁵⁸ So the Government did not attempt to change the formal rules of the Act but adopted rather a policy that complements the statutory requirements.

Critics also queried the 2016 nomination because a white male again became a member of the Court, which worsened the gender balance. The representation of the First Nations was not an aim of the appointing authority, because this is just a criterion to consider but not an obligatory requirement.⁵⁹ The bilingual criteria set by the Government also posed a barrier to indigenous judges.⁶⁰ The 2017 appointment took the gender balance into consideration but failed again to appoint the first Indigenous judge of the court.⁶¹

Some points of the process were not so clear. For example, the role of the Chief Justice is quite unclear: she is consulted twice during the process, and for the second time about a shortlist that may not contain the person who she recommended. The parliament also has the opportunity to participate in the process on two occasions; however, the second time it gets only an explanation but not information about the decision. One does not know anything about any possible difference of opinion between the Minister of Justice and the Prime Minister.⁶²

⁵⁷ Independent Advisory Board for Supreme Court of Canada Judicial Appointments – Report on 2017 Process <<http://www.fja-cmf.gc.ca/scc-csc/smartin-report-rapport-eng.html#bm08>> accessed 23 May 2018.

⁵⁸ Robert Leckey, 'Constitutionalizing Canada's Supreme Court', (2014) Int'l J. Const. L. Blog, Mar. 25, <www.iconnectblog.com/2014/03/constitutionalizing-canadas-supreme-court> accessed 23 May 2018. Crandall (n 37) 91.

⁵⁹ John Paul Tasker, 'Supreme Court nominee Malcolm Rowe grilled on French, diversity and Aboriginal rights' October 25, 2016, <www.cbc.ca/news/politics/malcolm-rowe-committee-questions-1.3820318> accessed 23 May 2018.

⁶⁰ Kristy Kirkup, 'Top court's bilingual rule a barrier to indigenous judges: Sinclair, Bellegarde' The Globe and Mail, 22 September 2016. <www.theglobeandmail.com/news/national/supreme-courts-bilingual-requirement-unfair-sinclair-bellegarde/article32011596/> accessed 23 May 2018.

⁶¹ Kathleen Harris, 'Extraordinary jurist': Sheilah Martin named new justice to the Supreme Court of Canada' CBC News, November 29, 2017. <<http://www.cbc.ca/news/politics/supreme-court-justice-sheilah-martin-1.4424318>> accessed 23 May 2018. Sean Fine, 'Trudeau's Supreme Court pick tangled in race, gender politics, Globe and Mail' November 16, 2017. <https://www.theglobeandmail.com/news/national/trudeaus-decision-on-supreme-court-appointment-tangled-in-race-gender-politics/article36999295/?click=sf_globe> accessed 23 May 2018.

⁶² St-Hilaire (n 50).

In its report on the new process for judicial appointments to the Supreme Court of Canada, the Standing Committee on Justice and Human Rights proposed that the advisory board should be permanent and more diversified.⁶³

It also complained that the hearing was not an official parliamentary hearing, so parliamentary privilege did not apply to protect both the members posing questions and the nominee answering them.⁶⁴

Finally, the Advisory Board, in the report on the 2017 nomination, expressed its concerns about making a part of the application form public. It received feedback from candidates that, in order to respect the integrity of the process, they fully and candidly answered all the questions on the application form, including being forthcoming with respect to details about their personal lives. Concern was expressed about the necessity of making all these details public, should they be chosen as the Prime Minister's nominee. In the view of the Advisory Board, attention should be paid to this requirement, in case it discourages potential candidates from applying.⁶⁵

III Comparative Overview

The selection of constitutional court justices and supreme court justices (if they have the power of judicial review) may be grouped into three main models.⁶⁶ The first is the direct appointment system, which does not involve any voting procedure. In this group are the countries that follow a decentralised model (mainly common law systems), where the supreme court has the power of constitutional review, but also some countries with a separate constitutional court. The appointment can be uni-channel, meaning that all of the appointments come from the same branch of government (e.g. in Canada, Supreme Court judges are appointed by the Government) or multi-channel, where the appointments come from different state organs or different branches (e.g. at the Constitutional Council of France, the appointments are divided among the presidents of the two chambers of the parliament and

⁶³ The new process for judicial appointments to the Supreme Court of Canada. Report of the Standing Committee on Justice and Human Rights, February 2017. <http://publications.gc.ca/collections/collection_2017/parl/x66-1/XC66-1-1-421-9-eng.pdf> accessed 23 May 2018, 6.

⁶⁴ *Ibid* 8.

⁶⁵ Independent Advisory Board for Supreme Court of Canada Judicial Appointments – Report on 2017 Process <<http://www.fja-cmf.gc.ca/scc-csc/smartin-report-rapport-eng.html#bm08>> accessed 23 May 2018.

⁶⁶ Ginsburg identifies four methods of judicial appointment: (i) single-body appointment mechanisms; (ii) professional appointments; (iii) co-operative appointment mechanisms; and (iv) representative appointment mechanisms. Ginsburg (n 20) 43. Katalin Kelemen, following Wojciech Sadurski, uses another classification: the Split model is where several bodies share the power of appointment; the collaborative model means cooperation between the executive and the legislative branches: the different bodies involved in the appointment procedure do not act independently, but they have to collaborate; and in the parliamentary model the members are elected by the Parliament. Kelemen (n 1) 12–17.

the President of the Republic). The second form is the elective system, which tends towards greater democratic legitimacy. Here the electing authority can be the sole chamber of the parliament (e.g. Hungary, Portugal), the lower house of parliament (e.g. Croatia, Poland), both houses of parliament (e.g. Germany), or a joint sitting of the two (Switzerland). There are also differences concerning the nominations. The nominations may come from the President of the Republic, from a committee of the parliament, from the Government or from the judiciary. The hybrid or mixed system contains elements of the appointment and elective systems and has many variations. Usually, the elective element dominates (e.g. Belgium, Spain) but, in some countries, the elective and appointing elements have the same weight.⁶⁷

In the following section, the paper will present the solution of four countries and focus on the transparency of the selection of constitutional court or supreme court judges in them. Among them, France has an appointing system, Germany and Hungary an elective system, and the United States of America a hybrid system. A comparison can, therefore, be made between the different models.

1 Selection of the Members of the Constitutional Council of France

France uses the appointment system but, unlike Canada, a multi-channel appointment system.

The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One-third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate.⁶⁸

To become a member of the Constitutional Council, one should fulfil only one requirement: enjoying full civil and political rights – there are no professional qualifications for membership and a degree in Law is not a requirement. However, according to the empirical data, in the practice since 1959, more than 90% of the members had a legal or public administration degree.⁶⁹

Originally, the appointment was totally discretionary, which was harshly criticised by the scholarship because of politicisation and the nomination of personal or political friends. It is important to add that, in these decades, the activity of the Council was rather not judicial.⁷⁰

⁶⁷ The composition of constitutional courts, CDL-STD(1997)020. <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e)> accessed 23 May 2018, 4–5.

⁶⁸ Constitution Article 56. In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council. This paper does not deal with this question as it is irrelevant to our topic, although a very problematic one. See for example Pierre Pactet, Ferdinand Mélin-Soucramanien, *Droit constitutionnel* (Daloz 2012, Paris) 499. Dominique Rousseau, *Droit du contentieux constitutionnel* (LGDJ 2013, Paris) Rn 60.

⁶⁹ Thierry S. Renoux, Michel de Villiers, *Code Constitutionnel* (LexisNexis 2013, Paris) 695.

⁷⁰ Rousseau (n 68) Rn 56–58.

This unrestricted nomination resulted in a situation that experienced politicians became members of the Council, which might account for a fine-tuned political sensitivity.⁷¹

The constitutional amendment of 2008, which made the Council a real judicial body by introducing the priority preliminary ruling on the issue of *constitutionality* (*question prioritaire de constitutionnalité, QPC*), also changed the appointment procedure. Since then, appointments coming from all appointing authorities are subjected to the opinion of the Constitutional Law Committee of each House. The appointment of a candidate presented by the appointing authority may be blocked by a three-fifths majority vote.⁷² The appointment decision cannot be contested before the Council of the State.⁷³

The parliamentary opinion also serves as a guarantee, because the appointing authorities are more pressed to nominate persons who are respected because of their legal qualifications and moral qualities. The parliamentary hearing is public and open to the press, so it is a guarantee of a more transparent process.⁷⁴ Candidates should answer questions and the process is usually televised so this can deter nominations only purely political grounds. As in the United States, a parliamentary opinion can stop the President's candidate. However, there is also a voice that considers this step only symbolic as, because of the bipolar logic and the voting rigor of parties, it is quite impossible to reach the blocking three-fifth of the votes.⁷⁵

The multi-channel system is also criticized. The selection of members of the Council is a matter of high politics.⁷⁶ It cannot be excluded that all the three presidents appoint someone who is close to their own political orientation. If the President of the Republic and the parliamentary majority (therefore, as a consequence, the President of the National Assembly) have the same political orientation, then two of the three newly appointed members will enforce the majority in the Council, even when they must decide on the constitutionality of a bill adopted by this political majority. If their orientation is different, the Council will change but only with a delay and partially. There will be a phase shift and division based on politics when it should be decided only on legal grounds.⁷⁷ This was the case in 2010, when all three nominees were selected on political grounds and, from the eleven members, seven had a political background and only four a legal one. In addition, it happened at the same time as the Council first started to deal with QPCs.⁷⁸

Other opinions hold that the fear of pure political decisions has no basis, as the nomination process is always more complex. First, the fact that there are nominations every

⁷¹ Marie-Claire Ponthoreau, Fabrice Hourquebie, 'The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice' (2008) 2 *The Journal of Comparative Law* 273.

⁷² Renoux, de Villiers (n 69) 694.

⁷³ Jean Gicquel, Jean-Éric Gicquel, *Droit constitutionnel et institutions politiques* (Montchrestien 2010, Paris) 733.

⁷⁴ Pierre Avril, Jean Gicquel, *Le Conseil constitutionnel* (Montchrestien 2011, Paris) 63.

⁷⁵ Rousseau (n 68) Rn 59.

⁷⁶ Doris Marie Provine, Antoine Garapon, 'The Selection of Judges in France: Searching for a New Legitimacy' in Kate Maleson, Peter H. Russell (ed), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006, Toronto) 181.

⁷⁷ Pactet, Mélin-Soucramanien (n 68) 498.

⁷⁸ Avril, Gicquel (n 74) 66.

three years can ensure some political balance on its own.⁷⁹ Second, the practice tends to combine the competence and the experience of political persons. This complexity is undoubtedly rewarding, regarding the necessary conciliation between legal conformity and political opportunity.⁸⁰

In most cases, the Council does not hesitate to control the political power, even if the majority of members received their mandates from this power. The key to their independence is this ‘duty of ingratitude’. The authority of the members is due to their independence, preparedness, and their resolute mission.⁸¹

2 Selection of the Members of the Constitutional Court of Hungary

The Hungarian Constitutional Court was established during the democratic transition in 1989 and started its operation in 1990. The Constitutional Court is the principal organ for the protection of the Fundamental Law.⁸² The Constitutional Court is a body of fifteen members, each elected for twelve years by a two-thirds majority of the Members of Parliament.⁸³ Members of the Constitutional Court may not be re-elected.⁸⁴

Any Hungarian citizen who has no criminal record and has the right to stand as a candidate in parliamentary elections shall be eligible to become a Member of the Constitutional Court, if they have a law degree; have reached 45 years of age, but have not reached 70 years of age; and are theoretical lawyers of outstanding knowledge (university professor or doctor of the Hungarian Academy of Sciences) or have at least twenty years of professional work experience in the field of law.⁸⁵

Members of the Constitutional Court are proposed by a Nominating Committee, made up of at least nine and at most fifteen members, appointed by the parliamentary fractions of the parties represented in the parliament. The Committee contains at least one member from each of the parliamentary fractions. Candidates are heard by the Parliament’s standing committee dealing with constitutional matters. The Parliament then elects the members.⁸⁶

The public usually does not know much about the candidates, their qualifications or the requirements for their selection. The CVs of the candidates are usually attached to the draft resolution, but these are opaque and have a non-uniform structure; it is even hard to check their fulfilment of the statutory requirements.⁸⁷

⁷⁹ Renoux, de Villiers (n 69) 694.

⁸⁰ Gicquel, Gicquel (n 73) 733.

⁸¹ Pactet, Mélin-Soucramanien (n 68) 499.

⁸² *Magyarország Alaptörvénye* (Fundamental Law of Hungary) Article 24 (1).

⁸³ *Magyarország Alaptörvénye* (Fundamental Law of Hungary) Article 24 (8).

⁸⁴ Act CLI of 2011 on the Constitutional Court Section 6 (3).

⁸⁵ Act CLI of 2011 on the Constitutional Court Section 6 (1).

⁸⁶ Act CLI of 2011 on the Constitutional Court Section 7–8.

⁸⁷ See for example the attachments of the last resolution on the election of members of Constitutional Court: <www.parlament.hu/irom40/12970/12970.pdf> accessed 23 May 2018. The same is criticized by Attila Vincze,

In 2011, non-governmental organisations prepared a report in which they outlined the careers of the candidates, using the publicly available data that were not included in the candidacy documents. They also made recommendations for the Members of Parliament on what kind of questions they should ask during the committee hearing of each candidate.⁸⁸

The sittings of the Nominating Committee are closed at the decision of the committee, as there is no statutory obligation to make them public. It means that the public hearing before the standing committee dealing with constitutional matters is the first time when the public can have access to some information about the candidates and the selection criteria.

However, the public hearings before the standing committee cannot fulfil their functions at this late phase of the selection process. The public can hardly know what happened at the hearing (only a few camera shots in the media informs them), and the opinion of the committee is made after the same pattern. It contains only the fact that the committee heard the candidate and supported him or her unanimously.⁸⁹ Upon a great number of occasions, the public hearing occurred without a real discussion of the merits, without questions, so making it impossible to have public access to any relevant information about the candidates. Before 2010, the cause for that was that the parliamentary groups usually made an agreement on the candidate before the hearing, a closed session held by the Nominating Committee or even before that, in informal meetings. As such, the public hearing tended to be a compulsory 'theatre play'. After 2010, the Government had a two-thirds majority in the parliament. They modified the Constitution and the Constitutional Court Act and changed the composition of the Nominating Committee. Instead of the former solution, where all the parliamentary groups could send one member to the Committee, the new rule prescribed a composition that mirrored the proportion of the parliamentary groups.⁹⁰ It means that the government majority was able to make proposals for the mandates of the Constitutional Court justices. Consequently, the opposition parties refused to take part in several public hearings of candidates proposed by the governmental majority.⁹¹

Since 1989, there were several occasions when the necessity and opportunity of a model change came up. These ideas were partly about establishing an external, independent body that could make proposals for the Parliament, partly about the introduction of the multi-channel electoral system, where one part of the mandates comes from the President of the Republic and one part from the representatives of the judiciary.⁹²

Péter Csupány, Pál Sonnevend, András Jakab, '32/A. § [Az Alkotmánybíróság]' in András Jakab, *Az Alkotmány kommentárja* (Századvég Kiadó 2009, Budapest) para 240.

⁸⁸ Jelenítés a kormánypártok alkotmánybíró-jelöltjeiről. ekint.org/lib/documents/1479662414-nyilv%C3%A1nos_jelent%C3%A9s_ekint_tasz_final.pdf.

⁸⁹ Vincze and others (n 87) para 240.

⁹⁰ *Az Alkotmány 2010. július 5-i módosítása; az Alkotmánybíróságról szóló 1989. évi XXXII. törvény módosításáról szóló 2010. évi LXXV. törvény.*

⁹¹ See for example: Paródiának tünt az alkotmánybíró-jelöltek meghallgatása. <index.hu/belfold/2014/09/22/alkotmanybirok_meghallgatasa/> accessed 23 May 2018.

⁹² András Holló, *Az alkotmányjognak asztalánál* (HVG-Orac 2015, Budapest) 29, 100, 105, 112, 129.

Changes were also proposed by László Sólyom, former President of the Constitutional Court, while he was the President of the Republic. In his veto, where he sent back to the Parliament the above-mentioned amendment on the composition of the Nominating Committee for further consideration, he wrote '[t]he current election system of the members of the Constitutional Court in the Constitution did not work. It would be necessary to have new rules that better serve the independence and high professional quality of the justices, and at the same time enable the quick fulfilment of the vacant mandates by ensuring constitutional guarantees.' He proposed the introduction of a multi-channel, mixed model. According to him, this would ensure the Court's operations also in the long term, decrease the possibility of direct political party influence and, at the same time, it is in harmony with the regulations that are generally used in Western Europe and in the Central and Eastern European region. He proposed the division of the selection among the parliament, the President of the Supreme Court and the President of the Republic.⁹³

The Venice Commission also proposed a change of model in its opinion on the Act on the Constitutional Court. According to it, while the 'Parliament-only' model provides high democratic legitimacy, a mixed composition has the advantage of shielding the appointment of some of the members from political actors. Taking into account the situation at that time, the Commission recommended a mixed composition to avoid the risk of the Constitutional Court becoming politicised.⁹⁴ However, these ideas never became real, and both the new Constitution and the new Act on the Constitutional Court adopted in 2011 maintained the former solution.

3 Selection of the Members of the Constitutional Court of Germany

As in Hungary, Germany also elects the members of the Federal Constitutional Court. Half of the members of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat.⁹⁵

The Constitutional Court consists of two Senates, each composed of eight Justices. Three Justices of each Senate are elected from among the judges of the Supreme Federal Courts. Only judges who have served at least three years with one of the Supreme Federal Courts should be elected.⁹⁶

⁹³ *Elnöki levél a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény módosításáról szóló törvény (T/189. számú törvényjavaslat) visszaküldéséről*, 2010. június 21. 5–7. <www.solyomlaszlo.hu/archiv/admin/data/file/6939_20100621_visszakuldo_level_alkotmanybirok_cimerrel.pdf> accessed 23 May 2018.

⁹⁴ Opinion on Act CLI OF 2011 on the Constitutional Court of Hungary. Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15–16 June 2012) point 8. <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)009-e)> accessed 23 May 2018.

⁹⁵ Basic Law of Germany, Article 94.

⁹⁶ Federal Constitutional Court Act § 2.

The Justices must be at least 40 years of age, be eligible for election to the Bundestag, must have stated in writing that they are willing to become a member of the Federal Constitutional Court, and must be eligible for judicial office.⁹⁷ Originally, it was also an eligibility requirement that the judges had to be distinguished by a special knowledge of public law and must be experienced in public life. After the deletion of this provision, it is the responsibility of the electoral boards to fully appreciate the professional competence and overall personality of the nominees.⁹⁸

Most of the justices come from the ordinary courts. Lawyers, former members of the Bundestag and former members of the federal or state governments are also represented. Political parties usually strive after having a certain number of law professors in the Court.⁹⁹

The Justices who are to be elected by the Bundestag shall, without prior debate, be elected by secret ballot and upon a proposal by the Electoral Committee. This Electoral Committee consists of twelve members of the Bundestag and is elected pursuant to the principles of proportional representation. A proposal shall require at least eight votes in the Electoral Committee to pass.¹⁰⁰

The Bundestag elects the members not directly but via its Electoral Committee. The Constitutional Court held this delegation constitutional,¹⁰¹ even if there are critical opinions in the legal scholarship.¹⁰² From a constitutional political point of view, the aim of the indirect election is to be able to examine exhaustively the professional quality of the candidates. This is easier if the elective body is smaller. However, the discussion on the candidates and their qualities is not public.¹⁰³ In addition, the members of the Electoral Committee are obliged to maintain confidentiality concerning the candidates' personal circumstances that become known to them as a result of their work in the Committee, as well as about the Committee's discussions on this issue and the casting of votes.¹⁰⁴ This confidentiality also covers information on the candidates' private contacts and political beliefs, i.e. all information discussed in the meeting. However, it does not cover the data that the committee members obtained from a different source. On the other hand, there is no sanction in the event of the breach of confidentiality. As arguments for the secrecy, the following are cited: protection of the justice candidate, avoidance of misguided considerations during the election, and guarantee of the

⁹⁷ Federal Constitutional Court Act § 3 (1) and (2).

⁹⁸ Benda and others (n 2) Rn 124.

⁹⁹ Klaus Schlaich, Stefan Koriath, *Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidung* (C. H. Beck 2012, München) Rn 41.

¹⁰⁰ Federal Constitutional Court Act § 6.

¹⁰¹ BVerfGE 131, 230.

¹⁰² Volker Epping, Christian Hilgruber, *Grundgesetz Kommentar* (C. H. Beck 2013, München) Artikel 94, Rn. 5; Dieter Wiefelspütz, Berlin, *Die Bundesverfassungsrichter werden vom Deutschen Bundestag direkt gewählt!* (2012) 65 (24) *Die Öffentliche Verwaltung*.

¹⁰³ Benda and others (n 2) Rn 133–134.

¹⁰⁴ Federal Constitutional Court Act § 6 (4).

independence of the committee member.¹⁰⁵ Critics propose the introduction of public hearings to give an opportunity for all participants (judges and politicians) to debate the scope and nature of constitutional review in a democracy. Media coverage of the hearings would allow the public to be better informed on these issues, and learn about the educational, professional, societal, and political experiences of candidates.¹⁰⁶

The Justices who are to be elected by the Bundesrat shall be elected by two-thirds of the votes of the Bundesrat.¹⁰⁷ Finally, the Federal President shall appoint the elected Justices.¹⁰⁸ He can refuse the appointment only if he is convinced that the eligibility requirements are not met, that the election procedure has been violated or the appointment of the person concerned has caused damage to the interests of Germany. If there is a dispute between the Bundestag/Bundesrat and the Federal President, the Constitutional Court can decide on the matter.¹⁰⁹

The multi-channel election system (partly Bundestag, partly Bundesrat) ensures, on one hand, the democratic legitimacy through the attachment to the political majority and, on the other hand, the federal-state principle, represented by the Bundesrat in the procedure.¹¹⁰

According to certain critics, in reality, Constitutional Court judges in Germany are selected by a very small group of leading members of political parties.¹¹¹ The two-thirds majority should prevent the parliamentary majority from choosing close friends, associates or otherwise favourable judges by itself. Because the participation of the opposition is practically necessary due to the majority requirements, a broad basis of trust should be secured for the members of the Constitutional Court.¹¹²

In the practice, however, the selection process has become a 'collaborative exercise between the ruling coalition and the main opposition parties in both houses.'¹¹³ Very similar to the situation in Hungary before 2010, the political parties in Germany do not seek consensus but elect their own candidate alternately or use a 'candidate package' and wait until two mandates are vacant and they can share the places. It means also that neutrality becomes merely a formal requirement of non-membership of one of the two parties. The actual selection does not happen in the committee but by the two biggest parties each naming one

¹⁰⁵ Dieter C Umbach, Thomas Clemens, Franz-Wilhelm Dollinger, *Bundesverfassungsgerichtsgesetz. Mitarbeiterkommentar und Handbuch* (C.F. Müller 2005, Heidelberg) § 6, Rn 20; Brigitte Zypries, 'The Basic Law at 60 – Politics and the Federal Constitutional Court' (2010) 11 (1) German Law Journal 97.

¹⁰⁶ Landfried (n 3) 208.

¹⁰⁷ Federal Constitutional Court Act § 7.

¹⁰⁸ Federal Constitutional Court Act § 10.

¹⁰⁹ Benda and others (n 2) Rn 138.

¹¹⁰ Epping, Hilgruber (n 102) Artikel 94, Rn. 3.

¹¹¹ Ulrich K. Preuß, 'Die Wahl der Mitglieder des BVerfG als verfassungsrechtliches und -politisches Problem' (Oktober 1988) *Zeitschrift für Rechtspolitik* 392.

¹¹² Benda and others (n 2) Rn 128.

¹¹³ Donald P. Kommers, 'Autonomy versus Accountability. The German Judiciary' in Peter H. Russell, David M. O'Brien (ed), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press 2001) 149.

candidate. Sometimes the candidate of the other party is totally unacceptable, and the party makes it public. As such, this process does help to avoid candidates with extreme convictions,¹¹⁴ while purely political candidates who might not be sufficiently qualified tend to be vetoed by the other party.¹¹⁵

4 Selection of the Members of the Supreme Court of the United States

The United States of America uses the hybrid model for the selection of Supreme Court justices. The Constitution does not regulate the selection process; it only establishes the Supreme Court and gives the justices a lifelong mandate, ‘during good behavior.’¹¹⁶

The power to nominate the Supreme Court justices is vested in the President of the United States, and appointments are made with the advice and consent of the Senate. This is the procedure that is followed in the case of all federal judges. This selection system promotes the greatest degree of judicial independence,¹¹⁷ especially compared to the state judges’ selection systems, which usually promote judicial accountability.

Historically, vacancies have occurred every two or three years, so presidents having two full terms can have a serious impact on the composition of the Court. The recent advances in life expectancy resulted in justices tending to serve longer today, and vacancies occur irregularly and unpredictably, which is why the president’s choice is more crucial.¹¹⁸

While the Framers of the Constitution inserted qualifications for all elected offices, they were notably silent when it came to requirements for the federal judiciary. Nominees for the bench need not have even read the law, much less hold a law degree. There are recommendations in the legal scholarship to specify qualifications for the office.¹¹⁹

However, presidents use a variety of criteria when selecting their candidates. The first set of criteria includes the qualifications of the potential nominee, namely competence, experience, judicial temperament, and ethical standards. The second set of concerns is mostly ideological and concerns the political and ideological belief of the candidate. The third aspect can be rewarding those who have been active in the president’s party. The fourth category involves the pursuit of political support from a societal group, such as Latino voters. Finally, the symbolic representativity of the Court can be also relevant. The best example for that is the nomination of the first Afro-American justice.¹²⁰

The way the executive branch handles the nomination process varies depending on the president’s political interest in judicial appointments. The task of evaluating potential

¹¹⁴ Umbach and others (n 105) § 6, Rn 23–24.

¹¹⁵ Uwe Kranenpohl, ‘Bewährt oder reformbedürftig? Für und Wider das aktuelle Verfahren der Richterauswahl zum Bundesverfassungsgericht’ (2011) 9 (1) *Zeitschrift für Staats- und Europawissenschaften* 82.

¹¹⁶ Constitution Article III, Section 1.

¹¹⁷ Mark C. Miller, *Judicial Politics in the United States* (Westview Press 2015, Boulder) 55.

¹¹⁸ Ralph A. Rossum, G. Alan Tarr, *American Constitutional Law* (Westview Press 2014, Boulder) 26.

¹¹⁹ Epstein and others (n 19) 17, 36.

¹²⁰ Miller (n 117) 69.

nominees is divided between the Department of Justice and the Executive Office of the President. The first tends to concentrate its attention on nominees' qualifications, including the nominees' judicial philosophy, while the White House tends to focus on the political dimensions of the appointment.¹²¹

The Senate has never exercised its power to advise the president on judicial appointments in any formal way, although informal advice is common. During the last nomination process, a constitutional debate was sparked on whether the Senate has a constitutional obligation to advise on and consent to the president's nominee in a timely manner. Although in practice the Senate refused to hold confirmation hearings for the nominees of President Obama, there are critical voices that insist on the constitutional duty of the Senate to advise and consent in a timely manner to preserve the integrity of the Court and to maintain the political morality of democracy in the process.¹²²

Today, one of the most important elements of the U.S. appointment procedure is its high publicity. The 'advice and consent' requirement contained in Article III of the federal Constitution resulted in a practice in which the Judiciary Committee of the Senate, created for the purpose of nominating judges, hears all the candidates before making its decision. These hearings receive high media attention and are usually broadcasted by national television.¹²³ Although the Judiciary Committee could end the nominee's chances prior to the Senate's vote by deciding not to report a nomination, the Committee's practice is to report all nominees to the full Senate, including those who it opposes.¹²⁴

The politics of the appointment process have changed over time, particularly in the Senate. Until the 1920's, Senate deliberations on prospective justices were secret. The nominees did not testify, and they were confirmed or rejected without a roll call vote. It was impossible to know how individual senators had voted.

Today, instead, nominees testify before the Senate Judiciary Committee in public hearings, as do groups and individuals supporting or opposing the nominees. Since 1982, these hearings have been televised. This opened up the process and made it easier for groups to mobilise opinion for and against nominees and to influence votes on confirmation by threatening to hold senators electorally accountable. Yet whether groups mobilise depends on the character and views of the nominee.¹²⁵

According to empirical research, these hearings are not always informative. Because Supreme Court confirmations now attract enormous media attention, they increasingly afford senators an attractive opportunity to perform for their constituents. The result is that nominees now repeatedly confront the same 'tough' questions and give unresponsive answers.¹²⁶

¹²¹ Mark Tushnet, *The Constitution of the United States of America* (Hart 2015, Oxford and Portland) 125.

¹²² Vincent J. Samar, 'Politicizing the Supreme Court' (2016) 41 *Southern Illinois University Law Journal* 2–3.

¹²³ Kelemen (n 1) 20.

¹²⁴ Samar (n 122) 19.

¹²⁵ Rossum, Tarr (n 118) 28.

¹²⁶ Geoffrey R. Stone, 'Understanding Supreme Court confirmations' (2010) 9 *Supreme Court Review* 439.

IV What Can the World Learn from Canada; What Can Canada Learn from the World?

As in our age most of the political questions have become judicial ones, the selection of constitutional court judges is a crucial part of the regulation of constitutional adjudication.

This paper seeks an answer to the question of what elements can make the selection process of supreme court judges ideal in a constitutional democracy.

As it seems from our comparative overview above, the selection of judges is a matter of politics. To demand a non-political selection process would be unrealistic. However, we accept that the basic aim of the selection process is to have independent, competent and experienced judges and a balanced and legitimate composition. In the following, I will examine what choices should be made to devise regulations and practices that could ensure these aims.

The first point is the choice of the model. There is a presumption that the elective model is ideal as it provides high democratic legitimacy. Even if it cannot stop parliamentary groups from electing candidates who share their political views, it is able to guarantee the diversity of the composition. In the parliamentary debate, the personal and professional characteristics of the candidates are under scrutiny, which can eliminate extreme or incompetent candidates. Another advantage is that, as politicisation is inevitable, it can ensure at least the representation of current legal and political opinions.¹²⁷

A supermajority requirement for judicial selection will tend to protect the minority from losing in both the courts and the legislature and by extension will tend to produce more moderate and acceptable judicial candidates.¹²⁸

A disadvantage is that, if such consensus is lacking, the mandates will remain vacant, and that may hinder the operation of the court.¹²⁹ This happened several times in Hungary and Germany. Such a delay can be considered a violation of the right to a lawful judge.¹³⁰

If several parties must make an agreement on the candidates, they usually do it in informal meetings; the selection procedure and the selection criteria are not transparent for the public and the public hearing may become simple theatre play'. It is even more problematic if one party has a two-thirds majority and can elect the justices alone.

In addition, as the political parties have to make a consensus or at least accept each other's candidate, this may exclude those, otherwise qualified, candidates, who are not connected with a political party or have no expressed party preference.¹³¹

The international soft law requirements prefer the mixed model instead. This can decrease the possibility of direct political party influence, as the appointments are coming from different appointment bodies and there is a lower risk that they all have the same political

¹²⁷ Rousseau (n 68) Rn 59.

¹²⁸ Dennis C. Mueller, *Constitutional democracy* (Oxford University Press 1996, Oxford) 281.

¹²⁹ Péter Tilk, *Az Alkotmánybíróság hatásköre és működése* (PTE ÁJK 2003, Pécs) 32.

¹³⁰ Benda and others (n 2) 139.

¹³¹ *Ibid.*

affiliation. This system can shield the appointment of some of its members from political actors and avoid the risk of politicisation of the constitutional court.

The Canadian system made a step in this direction by involving the parliament in the process as well. However, it would be advisable to give the legislative power not only a right to discuss but also to really participate. Solutions could be to require the support of the parliament (as in the United States) or a veto right (as in France). It is even better if the selection is shared between different state organs and the elective and appointment system is mixed.

If there is no political intention and support to change the selection model, which usually demands the amendment of the constitution or a qualified majority of supporters in the parliament, there is also a way to reform the process without a model change, as we saw with the Canadian example. This paper does not deal with them, but that was the case also with the selection of the members of two international courts, the European Court of Human Rights and the Court of Justice of the European Union.¹³²

Making the decision-making process and the selection criteria more transparent can help to enhance the authority and legitimacy of the court and public trust in its operation.

One way is to make public the selection criteria that are above and beyond the statutory requirements. The Canadian solution may be regarded as best practice in this field. The Government set criteria above the statutory requirements and made them public. Hence, the intentions, such as ensuring the diversity of the Court, could be discovered and were open to democratic criticism. It also meant that the Government imposed a restriction on itself, of finding a candidate that fulfils all of these requirements.

One additional point is making public the application documents of the candidates (or at least one part of it). Not only the Members of Parliament can prepare for the public hearing from these data and information, but the public can also become acquainted with the personal and professional qualities of the judge and his or her opinion on the role of the judiciary and constitutional justices.

The other element that can enhance the transparency of the process is the introduction of a public hearing. This plays a more important role in the common law systems, where a judgment is a personal decision that expresses the opinion of the judge and is linked to his person.¹³³ However, it can be also useful in the European systems, especially where judges are allowed to express a dissenting opinion.

When the public and the media watch and comment on the selection process with critical attention, this can also lead to a control function and prevent false decisions.¹³⁴ One of the main arguments against public hearings is that the qualities that characterise a good judge are hardly recognisable in a public hearing. In such a situation, the candidate may even be forced to rule on hypothetical issues on which he really has to decide later. As such, according to certain opinions, the confidentiality of the procedure is more important than the desire for

¹³² Armin von Bogdandy, Christoph Krenn, 'Zur demokratischen Legitimation von Europas Richtern' (2014) 69 (11) *Juristen Zeitung* 529–537.

¹³³ Kelemen (n 1) 21.

¹³⁴ Benda and others (n 2) Rn. 140.

transparency.¹³⁵ However, in our view, the advantages of a hearing, if it is regulated and practiced inappropriately, are greater than the disadvantages.

Civil society organisations can play a crucial role in the process. In the United States, they participate very actively in the selection procedure. Two preconditions: a strong civil society and an open process. The lack of civil society is problematic also regarding political deadlocks because it is not perturbed by other channels, for example by citizens' pressure on relevant institutional actors. With the strengthening of civil society, the publicity of appointments can also increase.¹³⁶ On the other hand, their participation can be encouraged by making the process more transparent. One way is to involve them directly in the process, as is the case with regard to federal judges in the United States.¹³⁷ Nevertheless, it might also be helpful when there is communication on the candidates well in advance so that civil society can express its opinion before the decision.¹³⁸

Finally, it should be essential to provide an opportunity for the court itself to be able to annul the selection if the eligibility requirements are not met or the rules of the election procedure have been violated. In Canada, this happened once¹³⁹ but in Hungary, for example, the Constitutional Court has no such competence.¹⁴⁰

In conclusion, the proposed system mixes the professional and political elements and involves the public as a guarantee. The selection criteria are transparent and can be easily discovered; the application process is open, comprehensive and capable of really establishing the candidate's fitness for the role. The candidates are ranked according to their qualities and the nomination is negotiated with several political and civil society stakeholders. However, the final decisions come from a political actor who can take political responsibility for the decision. As referred to in the part on the theoretical background, the candidates do not have to be independent but rather 'become independent.' This model is able to enforce the independence of later constitutional judges.

The ideal selection process does not exist. However, we can identify the elements that help to reach the above-mentioned aims of the procedure and contribute to the composition of an independent, highly respected and diverse institution..

¹³⁵ Ibid, Rn. 134.

¹³⁶ Kelemen (n 1) 21.

¹³⁷ Tushnet (n 121) 126.

¹³⁸ As it happened in Hungary in 2011. Jelentés a kormánypartok alkotmánybíró-jelöltjeiről. <ekint.org/lib/documents/1479662414-nyilv%C3%A1nos_jelent%C3%A9s_ekint_tasz_final.pdf> accessed 23 May 2018 At the later elections the time was so short between the nomination and the election that they could hardly react.

¹³⁹ Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21.

¹⁴⁰ According to Section 16 (4), (5) of the Act on the Constitutional Court, the mandate of a Member of the Constitutional Court may be terminated by exclusion if the Member fails to perform his or her duties for reasons imputable to him or her, or has become unworthy of his or her office, has intentionally committed a publicly prosecutable crime according to a final court judgement, has not participated in the work of the Constitutional Court for one year for reasons imputable to him or her, or has intentionally failed to meet his or her obligation to make a declaration of assets or intentionally made a false declaration on important data or facts in his or her declaration of assets.

Dragan Dakić*

The Scope of Reproductive Choice and Ectogenesis

A Comparison of European Regional Frameworks and Canadian Constitutional Standards

Abstract: The purpose of this paper is to contribute to the theoretical understanding of the possible effects on the scope of reproductive choice that the emergence and introduction of artificial wombs into the health care system might produce, considering the ordinary meanings of the right to private life under the European Convention, on the one hand, and Canadian constitutional standards, on the other. The aim of the research is to demonstrate how such a technical possibility could have different effects on the same core value in different democratic jurisdictions.

An analysis has been conducted, first through the allocation of new circumstances arising from the process of artificial gestation, which were recognised as legally relevant either in the case law or in the national statutes, and then through an examination of how they could affect settled determinants of the scope of the reproductive choice. In the analysis, I took into consideration the interpretative strategies applied by the institutions of the European Convention when defining who is the bearer of legal protection and whose interests are at stake in the sphere of reproductive choice. Following that, I compared them to that of the Supreme Court of Canada. The whole analysis rests on two main presumptions. First, I presumed that relevant judicial instances will maintain a coherent interpretation of the guarantees covered by the right to private life, in compliance to their ordinary meaning. The second presumption is a twofold construct. The first element assumes that there is no specific legislation regulating new technology. The second element of the construct reflects the persuasion that, even if the introduction of new technology is followed by specific national legislation, supremacy shall be given to regional/constitutional standards when interpreting legal subjecthood and the reproductive powers of the progenitors.

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The inquiry resulted with conclusions that (1) as far as the European regional frameworks are concerned, the obtainment of viability and the exclusion of the conflict between competitive rights 1-a) provides the state with a wide margin of appreciation to restrict the scope of reproductive choice on the basis of the public interest, 1-b) disconnects the demand of progenitors to end the process of ectogenesis from the guarantees safeguarded through the European Convention, and 1-c) requires autonomous recognition of the artificially gestated human entity under the European Convention; (2) as far as Canada is concerned 2-a) the obtainment of viability is just one of three cumulative requirements for the legal protection and as such it cannot reduce the scope of reproductive choice, and 2-b) neither the unborn nor the state have their interests recognised in the sphere of reproductive choice.

The inquiry in this paper is limited to the examination of the effects that full artificial gestation (which commences with an artificial equivalent to the natural implantation of *in vitro* created embryos into an ectogenetic machine) is expected to have to the precisely one among numerous human rights issues that would be affected. Another limitation of the research is imposed by focusing only on the effects that new technology would have with respect to the scope of the reproductive choice of all progenitors, regardless of their sex or gender orientation. A significant question when discussing new reproductive technologies is, of course, the distribution of decision-making powers between the progenitors themselves. And the last but not the least is the limitation with respect to the physical/genetic features of the artificially gestated agent. The analysis was limited to the examination of the subject of the research in the event that an able-bodied agent was implanted and gestated. The above conclusions could significantly and unjustly differ if there were a disabled agent.

The intention was to provide a contribution with dual benefits. First, as far as I am aware, legal (not just moral) analysis of the effects of ectogenesis on the scope of reproductive choice that is centred on the guarantees of the European Convention is still missing. Accordingly, there is no adequate comparison between European regional frameworks and Canadian constitutional standards.

I Introduction

In the last several decades, we have been witnessing a technological revolution designed to facilitate reproductive choice, firstly enabling progenitors to have genetically related offspring by means of different methods of artificial fertilisation and now enabling progenitors to have a genetically preferred child using various techniques of prenatal genetic testing. However, progress in developing reproductive technologies might not always have extensive effects on the scope of reproductive choice. This could be well displayed on the example of expected development of artificial wombs (ectogenesis) that entirely substitutes natural gestation. The process of ectogenesis is actually a two-stage artificially administered process. First, it involves artificial creation of *in vitro* embryos. The second stage begins with implantation of *in vitro*

embryos into an artificial device as a replacement for a womb.¹ This stage ends with delivery of a fully developed foetus. The technology started to develop in order to increase the survival chances of premature babies. Now, it is developing toward full substitution for natural gestation. Different research centres periodically announce the development of artificial wombs,² as well as the successful culturing of embryos within *in vitro* systems³ and without maternal tissue.⁴ Currently, new technology appears to be easier to achieve than to regulate. Many legal and ethical questions are preceding it.

According to one approach to the issue, ectogenesis could be regarded as a means of eliminating the present inequality in the division of reproductive labour.⁵ The mother–child relationship was considered by Shulamith Firestone as an aspect of female inequality and therefore something to be done away with if at all possible.⁶ Kendal argues that the ideals of equal opportunity demand continued research into ectogenesis, since it is expected to liberate future women from unjust physical, social and financial burdens imposed upon them by the current necessity for biological gestation and childbirth.⁷

A different view is taken by Bard, who maintains that the invention of a method to gestate a baby outside the human womb would have enormous implications for how the courts, ethicists and society at large currently view the right of a foetus to be born.⁸ In this line, Boonin thinks that, if there is someone (or something in the context of present discussion) who (or that) would have taken the embryo and brought it to term, they would probably have acquired a duty to keep it alive.⁹ At that point, Karnein argues, birth may no longer have even normative significance, and conception may take its place.¹⁰ Recently, some authors have made a claim that the right to protection of life would radically change if there were an

¹ Marion Abecassis, 'Artificial Wombs: "The Third Era of Human Reproduction" and the Likely Impact on French and U.S. Law' (2016) 27 (1) *Hastings Women's Law Journal* 3–28, 12.

² A. Emily Partridge and others, 'An extra-uterine system to physiologically support the extreme premature lamb' [2017] *Nature Communications* DOI: 10.1038/ncomms15112.

³ Sara Reardon, 'Human embryos grown in lab for longer than ever before' (2016) *Nature* (04 May 2016, corrected: 06 May 2016). Retrieved from: <<https://www.nature.com/news/human-embryos-grown-in-lab-for-longer-than-ever-before-1.19847>> accessed 20 May 2017.

⁴ N. Marta Shahbazi, 'Self-organization of the human embryo in the absence of maternal tissues' (2016) 18 *Nature Cell Biology* 700–708, doi:10.1038/ncb3347.

⁵ Peter Singer, Deane Wells, *The reproduction revolution: New ways of making babies* (Oxford University Press 1984, Melbourne) 135.

⁶ *Ibid.*

⁷ Evie Kendal, *Equal Opportunity and the Case for State Sponsored Ectogenesis* (Palgrave Macmillan 2015, Basingstoke) doi: 10.1057/9781137549877.0003.

⁸ Jennifer S. Bard, 'Immaculate Gestation? How will ectogenesis change current paradigms of social relationships and Values?' in Scott Gelfand, John R. Shook (eds), *Ectogenesis: Artificial Womb Technology and the Future of Human Reproduction* (Rodopi 2006, Amsterdam – New York) 149–157.

⁹ See John Martin Fischer, 'Abortion and Ownership' (2013) 17 *Ethics* 275–304, 284 and 294, doi 10.1007/s10892-013-9152-z.

¹⁰ Anja Karnein, *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (Oxford University Press 2012, Oxford) 24.

artificial replacement for the unborn's connection to a woman's body. Substantively, the objection that such prenatal life is not a proper object for the right to protection of life due to its 'structural (dis)position',¹¹ cannot be sustained. Alghrani recognises that, from this stage on, the prenatal life that is gestated through ectogenesis (ectogenetic agent or EA) can be protected independently without violating a woman's bodily autonomy,¹² and proposes the irrevocability of the process from the stage that is equivalent to natural gestation.¹³ In this light Bard wonders 'If technology advances to a point that every foetus was viable at every stage of development how can society permit abortion?'¹⁴

There are two main arguments based on which the latter group of authors make their claims. First, it is reaching viability from the moment that is equivalent to commencement of natural gestation, which could confer the right to life protection on the prenatal human life. The second argument is conflict exclusion. Namely, from the moment that is equivalent to natural implantation, the prenatal life is in the position where no one could invoke his/her competitive interests in order to challenge its interests. Therefore, the scope of reproductive choice was tested against the viability and structural position of just-implanted prenatal life.

The discussion about the element of viability starts with a description of two different sorts of viability and the determination of which of them is relevant for the present topic and why. The investigation further proceeds with an analysis of the legal reflections of this element in precedents of the US Supreme Court, national legislations in Europe and an indication of the margin of appreciation that was recognised to the Member States of the Council of Europe (the States, State). Through such efforts, I have set out to provide a picture of the possible implications that the introduction of ectogenesis might have for the scope of reproductive choice in the systems that accept viability as a determinant of the legal status. In contrast to that, I have emphasised two distinctive refuters of the Canadian judicial doctrine when interpreting the subjects of the legal protection, the criteria of personhood, and the resulting list of the relevant parties in the sphere of reproductive choice.

As for conflict exclusion, in this analysis I focused onto the scope of reproductive choice as it is recognised through the case law of the former Commission of Human Rights (Commission) and the European Court of Human Rights (the Court). Given that the case law of the Supreme Court of Canada gave no recognition to the interests of pre-persons, the effects of this element on the scope of reproductive choice could not be discussed. The relation between this element and the scope of reproductive choice has been observed in regard to its reflections on the private life from the ambit of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention, Convention), and the autonomy of the relevant parties in the sphere of reproductive choice.

¹¹ Ibid, 39.

¹² Amel Alghrani, 'Regulating the Reproductive Revolution: Ectogenesis – A Regulatory Minefield?' in Michael Freeman (ed), *Law and Bioethics: Current Legal Issues* (Oxford Scholarship Online 2009) DOI: 10.1093/acprof:oso/9780199545520.001.0001.

¹³ Ibid.

¹⁴ Bard (n 8).

II Viability

Along with the capability of feeling pain, a theory proposed viability (the stage at which the unborn becomes capable of surviving outside the womb, with or without medical assistance) as the determinant of personhood.¹⁵ Kewon finds that it is ethically defensible to attach moral significance to this criterion.¹⁶ Thomson agrees that the foetus has already become a human person well before birth,¹⁷ referring to the stage no later than viability. It should be noted herein that viability could be understood in a narrow or a broader sense. The narrow approach defines viability as the point at which the unborn can survive independently outside the womb.¹⁸ Such a position is strongly suggested by Wicks, due to the fact that, from this point, the functions of the human organism are integrated.¹⁹ In this regard, Wicks maintains that ‘the key requirement for an individual to qualify for the special legal and ethical protection given to the human life was said to be an integrative function of a human organism. Such an integrative function will be governed by the brain and will require sufficiently developed lungs to supply oxygen to the major bodily organs.’²⁰ She further concludes that a human organism has the potential to function in a required manner from viability to brain death and thus should enjoy the special protection accorded to the human species during that period, regardless of considerations of birth or consciousness.²¹ Contrariwise, Boonin defines the viability criterion in a broad sense. He considers ‘that a foetus is viable if the technological means of keeping it alive outside of the womb are in principle available somewhere, even if not to this particular foetus.’²²

For the purpose of this topic, viability should be discussed in the broader sense of the term, because analysis refers to an entirely artificial process which implies *medical assistance* during the whole course of development and there is no reason to insist on natural parameters that emerge at an indeterminable point on the path. The narrow approach refers to natural viability, which is of course relevant when gestation occurs naturally. Also, the operation of this approach is not deprived of practical difficulties. Namely, natural viability is not a temporarily fixed point in the developmental path.²³ It is a potential result, which depends on various factors, clinical and social, and which can be

¹⁵ See Anne Mary Warren, ‘The Moral Significance of Birth’ (1989) 4 (3) *Hypatia*.

¹⁶ John Kewon, *The scope of the offense of child destruction in The Law and Ethics of Medicine: Essays on the Inviolability of Human Life* (Oxford University Press 2012, Oxford).

¹⁷ J. Judith Thomson, ‘A Defence of Abortion’ (1971) 1 (1) *Philosophy and Public Affairs* 46.

¹⁸ Rani Pillay, ‘The beginning of human personhood: is South African law outdated?’ (2010) 21 (2) *Stellenbosch Law Review = Stellenbosch Regstrydskrif* 230–238.

¹⁹ Elizabeth Wicks, *The right to Life and Conflicting Rights of objection is the Others* (Oxford University Press 2010, Oxford) 19, 20.

²⁰ Wicks (n 19) 239.

²¹ *Ibid.*

²² David Boonin, *A Defense Of Abortion* (Cambridge University Press 2003, Cambridge) 131–132.

²³ Camilla Pickles, ‘Personhood: Proving Significance of the Born Alive Rule with Reference to Medical Knowledge of Fetal Viability’ (2013) 24 (1) *Stellenbosch Law Review* 146–164.

verified only upon birth.²⁴ As such, it is not a reliable criterion for determining when the right to life begins. Under this approach, we might not know if the particular unborn was viable or not, regardless of the gestation. We can only presume. However, presumptions are not a suitable basis on which to claim fundamental rights. In legally disputable situations, presumptions imply an operation of the benefit-of-the-doubt or detriment-of-the-doubt approach, which is not an acceptable way for settling disputes on highly sensitive issues. Unlike that, the operation of the broader approach provides a temporarily defined point of viability and as such it is a reliable determinant for moral and legal status. The practical problems with the broad understanding of viability (as described by Wicks, who says that there ‘seems to be something absurd about a moving boundary, so that we might say “last year this foetus would not have been a person at this stage, but since they re-equipped the intensive care unit, it is one”’;²⁵) are not applicable to the present situation, where whole gestation occurs artificially. Same applies to the objections described by Kornegay.²⁶

The legal relevance of viability in the field of the right to life protection has been reflected in some common law jurisdictions.²⁷ In the United States, the decisive criterion for the beginning of the right to life protection is viability.²⁸ In the *Colautti v Franklin* case, the United States Supreme Court defined ‘viable’ to mean capable of prolonged life outside the mother’s womb, ‘with or without artificial support’²⁹. The foetal-viability standard was re-evaluated by the same court in *Stenehjem*.³⁰ It was considered that this standard ‘has proven unsatisfactory because it gives too little consideration to the “substantial state interest in potential life throughout pregnancy”’. The United States Supreme Court considered that this standard disregards the states’ ability to account for ‘advances in medical and scientific technology [that] have greatly expanded our knowledge of prenatal life’³¹. This consideration is in line with the technical possibility of prenatal life becoming viable from the very moment of *syngamy*. As to national legislations in Europe, abortion is temporally limited with the child’s viability regardless of indications (in Norway,³² Portugal³³ and Sweden,³⁴ for example).

²⁴ Ibid.

²⁵ Wicks (n 19) 125.

²⁶ R. Jo Kornegay, *Hursthouse’s Virtue Ethics and Abortion: Abortion Ethics without Metaphysics?* (2011) 14 (1) *Ethic Theory Moral Practice* 51–71, doi 10.1007/s10677-010-9230-2.

²⁷ Pickles (n 23) 151–153.

²⁸ *Stenberg v Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000); *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); and *Roe v Wade*, 410 U.S. 113, 93 S.Ct.705, 35 L.Ed.2d 147(1973).

²⁹ *Colautti v Franklin*, 439 U.S. 379, 388 (1979).

³⁰ *MKB Management Corp. v Stenehjem*, 795 F.3d 768 (8th Cir. 2015), cert. denied, 2016 WL 280836 (U.S. Jan. 25, 2016).

³¹ Ibid.

³² Article 2, para. 6. Lov om svangerskapsavbrudd [abortloven] Lov No. 50 of June 13, 1975, *as amended*, <<https://lovdata.no/dokument/NL/lov/1975-06-13-50?q=abortlov>> accessed 13 March 2016.

³³ Código Penal, Decreto-Lei No. 48/1995, de 15 de Março, <http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?tabela=leis&artigo_id=&nid=109&ficha=101&pagina=&nverso> accessed 13 March 2016.

³⁴ Article 3 § 2. Sweden, Lag om abort [Abortlagen] (Svensk Författningssamling [SFS] 1974:595), <<http://www.notisum.se/rnp/SLS/lag/19740595.htm>> accessed 13 March 2016.

Viability is an abortion limit in Denmark,³⁵ and the Netherlands,³⁶ but it is not preclusive. If the abortion is permitted after the child reaches viability, then every appropriate measure to save the life of the child must be taken (Italy,³⁷ Ireland,³⁸). Because, from the aspect of the scope of reproductive choice, Alghrani fairly maintains that, after ectogenesis becomes a safe alternative to human gestation, '(...) countries around the world that use viability as the point at which the foetus deserves protection will be forced to reconsider their legislation on abortion'³⁹. In this sense, the Convention's institutions recognised 'public interest'⁴⁰ as a legitimate ground for intruding into women's private sphere, which requires a fair balance to be maintained. The Commission for Human Rights stated that 'pregnancy and its termination do not, as a matter of principle, pertain uniquely to the sphere of the mother's private life'⁴¹. This position was already open to review as it might potentially cast doubt upon the private life nature of pregnancy itself.⁴² Recognition of the state's 'interest in protecting unborn children'⁴³ was an inducement for Bard to maintain that 'even if the mother and father agree on an abortion, the existence of ectogenesis may give the state grounds to override their decision'⁴⁴.

However, even if it might be relevant in respect to European legislation(s), Warren's consideration that artificially moving boundaries would force us to 'make a hazardous leap from the technologically possible to the morally mandatory'⁴⁵ does not sound so convincing as far as Canada is concerned. Unlike the case law of the European region, where the Commission and the ECtHR separated personhood from the right to life protection,⁴⁶ the Supreme Court of Canada made the right to life protection of the unborn with (missing)

³⁵ Article 94 § 3.Sundhedsloven, LBK nr. 1202 af 14/11/2014, <<https://www.retsinformation.dk/forms/r0710.aspx?id=152710#Kap25>> accessed 13 March 2016.

³⁶ *Late zwangerschapsafbreking en levensbeëindiging bij pasgeborenen* [*Late Abortion and Euthanasia in Newborns*], Rijksoverheid [Government of The Netherlands], <<http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/late-zwangerschapsafbreking-en-levensbeëindiging-bij-pasgeborenen>> accessed 13 March 2016.

³⁷ Article 7 § 3.Legge 22 maggio 1978, n. 194, *Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza* [Law No. 194 of May 22, 1978, Provisions on the Social Protection of Maternity and the Voluntary Interruption of Pregnancy], *Gazzetta Ufficiale della Repubblica Italiana* [G. U.] [Official Gazette] No. 140 (May 22, 1978), <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1978-05-22194.>> accessed 13 March 2016.

³⁸ Department of Health, Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals 1.2 (2014), <http://health.gov.ie/wp-content/uploads/2014/09/Guidance-Document-Final-September-2014.pdf>. March 2016.

³⁹ Amel Alghrani, 'The Legal and Ethical Ramifications of Ectogenesis' (2007) 2 *Asian Journal of World Trade Organization & International Health Law and Policy* 189–211, 200.

⁴⁰ See, for example *Boso v Italy*, no. 50490/99, 5 September 2002.

⁴¹ See *Brüggenmann and Scheuten v Germany*, No. 6959/75, Commission's report of 12 July 1977, DR 10, 100.

⁴² Elizabeth Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 5 (2) *Human Rights Law Review* 556–566, 560.

⁴³ *MKB Management Corp. v Stenehjem*, 795 F.3d 768 (8th Cir. 2015), cert. denied, 2016 WL 280836 (U.S. Jan. 25, 2016).

⁴⁴ Bard (n 8).

⁴⁵ Warren (n 15) 46–64.

⁴⁶ Wicks (n 42) 209.

personhood conditional.⁴⁷ Furthermore, personhood in Canada is not conferred based on a single criterion. Along with viability, two additional requirements of common law must be cumulatively met; hence personhood in Canada is determined based on the ‘born, alive and viable’ rule.⁴⁸ It could be considered that this rule was clearly defined through the case law addressing opaque circumstances. In *R. V. Sullivan* (1991),⁴⁹ the Supreme Court of Canada was faced with the question of the legal status of the foetus when coming through the birth canal. The case evoked before the Supreme Court of Canada originally concerned the criminal law liability of midwives for causing bodily harm to a pregnant mother, and causing death to the child during childbirth.⁵⁰ Even though the child was viable, it was not ‘born, alive and viable’ and it was not eligible for personhood and the associated protection.

Also, due to the lack of personhood, the relevant case law made no reference to the ‘public interest’ in the same way as European case law, when balancing the obligations of established person and the eventual demand for the protection of prenatal life. The mother cannot be held responsible for causing damage to the child before it meets personhood requirements, because, according to the case-law, insisting on a duty of care ‘would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women’⁵¹. It is so even if the established person was not competent and suffered addiction that was proven to be hazardous to the prenatal life.⁵² In *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997), the Supreme Court of Canada considered that the lack of the personhood of the prenatal life prevents a social services agency from detaining a pregnant woman until her child is born, because such a measure would require the exercise of *parens patriae* jurisdiction.⁵³

III Conflict Exclusion

When we consider the scope of the reproductive choice, the discussion in the European regional frameworks is typically centred on a fair balance between the demands for the protection of the unborn life and conflicting rights and interests of others. Through the abortion case law, the Conventional institutions intended to determine what could be considered as fair balance between the woman’s interests and ‘the need to ensure protection of the unborn child’,⁵⁴ under the European Convention. A crucially important determinant for the judicial

⁴⁷ *R. V. Sullivan* (1991) the Supreme Court of Canada; *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997) the Supreme Court of Canada.

⁴⁸ *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997) the Supreme Court of Canada.

⁴⁹ *R. V. Sullivan* (1991) the Supreme Court of Canada.

⁵⁰ See Dave Snow, ‘Reproductive Autonomy and the Evolving Family in the Supreme Court of Canada: Implications for Assisted Reproductive Technologies’ (2014) 48 (1) *Journal of Canadian Studies* 153–189.

⁵¹ *Dobson (Litigation Guardian of) v Dobson* (1999), paras 22–23 the Supreme Court of Canada.

⁵² *Ibid.*, 162.

⁵³ *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997) para 11, the Supreme Court of Canada.

⁵⁴ *Boso v Italy*, no. 50490/99, 5 September 2002.

interpretation of fairness in the concerning conflict arose from woman's irreplaceable role in reproduction, i.e. the ability to gestate. Unique gestational interconnection between the woman and the unborn conferred greater control upon her over reproduction as compared to man,⁵⁵ as she is the person 'primarily concerned by the pregnancy and its continuation or termination,'⁵⁶ and made it impossible to isolate the life of the unborn from that of the mother.⁵⁷ The institutions of the Convention granted that gestational connection imposes limitations to unborn life protection when it is in conflict with the mother's interests.⁵⁸ It was considered that 'if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests'⁵⁹.

Within such a framework, it appears reasonable to consider that, according to the European case law, the scope of reproductive choice would be affected significantly if we could eliminate the conflict of the competing rights of the mother and those of the unborn. The situation in Canada is quite different. Namely, a human pre-person has no legal status and it is entirely precluded from legal protection. The case law of the Canadian Supreme Court gave no reason to consider the interests of prenatal human life under any scope. Furthermore, according to the reasoning from *Tremblay v Daigle* (1989), 'a foetus is not included within the term "human being".⁶⁰ For this reason, the following discussion almost exclusively refers to the situation that might arise under European frameworks.

1 Private Life and Conflict Exclusion

Bearing in mind that the finalisation of ectogenesis results in genetic offspring out there in the world and in accordance with the European case law,⁶¹ it is necessary to examine this fact from the aspect of the Article 8 of the Convention, which safeguards the right to respect for private and family life. The notion of private life from the ambit of Article 8 has a broad meaning and, along with personal autonomy, it provides the right to psychological integrity.⁶² As for personal autonomy in terms of physical-bodily integrity, it is not possible to make an incontestable claim of its infringement without gestational interconnection. Contrary to this, it is possible to claim that the existence of the offspring in the world could be disturbing to progenitors and consequently could infringe upon their psychological integrity. Namely, the existence of psychosocial indications is a widely accepted ground for abortion across Europe. It might appear that the 'psycho' component of the phrase implies a quest for the psychological

⁵⁵ See Sally Sheldon, 'Gender Equality and Reproductive Decision-Making' (2004) 12 *Feminist Legal Studies* 303–316, 312.

⁵⁶ *Boso*, para. 4.

⁵⁷ *Ibid.*, § 19.

⁵⁸ *R.H. v Norway*, no. 17004/90, Commission decision of 19 May 1992.

⁵⁹ *Vo v France*, no. 17004/90, 8 July 2004, § 12.

⁶⁰ *Tremblay v Daigle* (1989).

⁶¹ *Evans v the United Kingdom*, No. 6339/05, 10 April 2007, § 72.

⁶² *A, B and C v Ireland*, no. 25579/05, 16 December 2010, § 216.

emergency to engage. In fact, however, this component does not require a specific illness neither to occur nor to threaten. Otherwise, it would be expressly stated, as it is for instance in Denmark's Health Act.⁶³ In this way, it rather refers to any circumstance which might be burdensome or distressful⁶⁴ to the mother, such as living conditions, marital status, employment, education, etc. For instance, in Germany, which is considered a restrictive regime by some,⁶⁵ the law tolerates abortion on medical grounds when a combination of economic and family hardships can justify it, even if the condition is not pathological in the sense of classical psychiatry.⁶⁶ In the US, the psychological factors were classified under the well-being grounds for abortion.⁶⁷ For the reasons of such a broad concept of private life and a broad understanding of psycho-indications, it is reasonable to consider that the inability to bring the ultimate request (to demand the death of the ectogenetic agent) could amount to interference with the right to respect the private life of progenitors.⁶⁸ Furthermore, the preclusion of biological conflicts cannot neutralise the social conflicts that are inherent in parenting obligations. According to the Court, preventing an infertile woman from using her only chance to become a genetic mother struck a fair balance between her interests and those of a fertile man,⁶⁹ due to his inability to discard the legal and social parenting obligations.⁷⁰ Referring to the present standing of the Court, Prialux observes that the choice to avoid reproduction is 'more worthy of respect than decisions to reproduce (...)'⁷¹. From this aspect, it is even easier to insist on the compelling necessity to respect the ultimate request of progenitors who seek to discard their future legal and social parenting obligations.

In the light of the above, the ectogenetic agent is not immune from the conflicting interests of the progenitors, which are safeguarded through Article 8. This is because the claim for conflict exclusion is not absolute. However, the mere existence of the conflict concerned does not necessarily preclude the right to life entitlement of the ectogenetic agent. The outcome of the related conflict in Europe could be significantly affected by the public

⁶³ Sundhedsloven, LBK nr. 1202 af 14/11/2014, <<https://www.retsinformation.dk/forms/r0710.aspx?id=152710#Kap25>> accessed March 2016.

⁶⁴ 'Distress' as abortion ground is applicable in the Belgium. See *Sénat et Chambre des représentants de Belgique* [Senate and Chamber of Representatives of Belgium], *Rapport de la Commission nationale d'évaluation de la loi du 3 avril 1990 relative à l'interruption de grossesse* [Report of the National Commission for the Evaluation of the Law of April 3, 1990, Regarding Pregnancy Interruption] 60 (Aug. 27, 2012), <<http://www.lachambre.be/FLWB/PDF/53/2399/53K2399001.pdf>> accessed 13 March 2016.

⁶⁵ Karnein (n 10).

⁶⁶ Eser Albin, 'Reform of German Abortion Law: First Experiences' (1986) 34 (2) *The American Journal of Comparative Law* 369–383.

⁶⁷ See *Doe v Bolton*, 410 U.S. 179 (1973), § 192.

⁶⁸ *A, B and C*, § 216.

⁶⁹ *Evans*, § 92.

⁷⁰ See Caroline Morris, 'Evans v The United Kingdom: Paradigms of Parenting' (2007) 70 (6) *The Modern Law Review* 979–1007, 997–999.

⁷¹ Nicolette Prialux, 'Why Reproductive Autonomy Matters' (2008) 16 *Medical Law Review* 169–200 doi: 10.1093/medlaw/fwn009.

interest in protecting the unborn/ ectogenetic agent. From the aspect of the Convention, it is required that State interference on behalf of the public interest must be (a) ‘in accordance with the law’ (which requires that legislation is accessible and foreseeable),⁷² for one of the (b) ‘legitimate aims’ (conferred upon the State authorities to determine the necessity of the restrictions intended, in order to meet the requirements of profound values in the Country),⁷³ and (c) ‘necessary in a democratic society’ (which refers to fair balancing between the relevant competing interests) specified in Article 8 (2) of the Convention. Further discussion will be limited to the situation where requirements (a) and (b) are met.

With regard to the (c) requirement, fair balancing should be maintained between the right to respect the decision of the progenitors not to have a child or to become parents,⁷⁴ on the one hand, and the profound moral values of the State concerned ‘to the nature of life and consequently as to the need to protect the life of the’ ...⁷⁵ [ectogenetic agent], on the other. I consider that the reasoning from the *Evans* case in regard to the right to family life is not applicable herein because, unlike in that case, we are discussing the situation following the completed conception (implantation). Bearing this in mind, infringement refers to the right of unwilling progenitors to psychological integrity, which places their ultimate request in symmetry with the demand to access abortion for health and well-being reasons. In *A, B, and C v Ireland*,⁷⁶ the Court found that the symmetric prohibition to access abortion for health and well-being reasons struck a fair balance between the right to respect private lives and the rights invoked by the State on behalf of the unborn.⁷⁷ As such, the infringement of psychological integrity cannot guarantee the prevalence of the interests of progenitors. At this point, we can grant that it is up to the State to decide which of the conflicting interests are favoured based on its own profound values regardless of the eventual existence,⁷⁸ or nonexistence of the relevant consensus within the States.⁷⁹ Contrariwise, Canadian public policies and case law of the Supreme Court are instead directed toward the expansion of reproductive autonomy, according to which the decision of the woman is decisively important. Considerations of public interest in the sphere of reproduction are observed as a legal anachronism of the former conservative policies.⁸⁰

⁷² *A, B and C*, § 221.

⁷³ *Ibid.*, § 223–228.

⁷⁴ *Evans* § 71.

⁷⁵ *A, B and C*, § 230.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, § 241.

⁷⁸ *Ibid.*, § 234.

⁷⁹ *Evans*, § 54.

⁸⁰ Snow (n 50) 166.

2 Autonomy and Conflict Exclusion

The claim for autonomy could be invoked on behalf of progenitors, referring to their reproductive sphere, and on behalf of ectogenetic agents, referring to their autonomous existence. As to progenitors, autonomy in the reproductive sphere has been interpreted as if it conferred the right to control their bodies upon women, implying abortion as a necessary means to that end. Considering that the reproductive autonomy has been safeguarded through Article 8, it is accepted that it incorporates the right to respect both the decisions to become and not to become a parent.⁸¹ This extensive interpretation of the content of the reproductive autonomy implies extensive interpretation of its scope and it might appear as if it conferred unlimited control of parenthood. Consequently, it precludes autonomy to human pre-persons. However, it is not clear if abortion could be legitimately purposed to facilitate an unlimited scope of reproductive choice. European standards are broadly framed through the case law, which only noted that the woman's right to respect for her private life in this context must be weighed against other competing rights and freedoms invoked, including those of the unborn child.⁸² In her article,⁸³ Abecassis points to the intensifying legal importance of the question concerned, which will gain its practical relevance with the appearance of artificial wombs. She distinguishes between the definitions of abortion as 'a right of evacuation ("the right not to be pregnant") or a right of termination ("the right not to procreate")'⁸⁴. Scholarship generally agrees that it is not easy to argue for the latter definition, which implies the intentional killing of a human being who is capable of remaining alive and being cared for by others. Nevertheless, there is no unique interpretation of the scope of reproductive autonomy in terms of the reproductive choice that is conferred on women. In this regard, it is possible to allocate the 'only own body control' approach and 'motherhood control' approach in defining the purpose of abortion and the scope of reproductive choice. Similarly to the 'motherhood control' approach, some could claim that the power to 'decide if continued life when removed from the womb is in the best interests of the foetus' should be conferred on women.⁸⁵ However, this perception of the best interest appears to be absurd because it designates a woman who is demanding the death of her unborn 'for comparatively trivial reasons',⁸⁶ as 'an appropriate person to safeguard its interest.'⁸⁷

⁸¹ Ibid, § 71.

⁸² *Tysiāc v Poland*, No. 5410/03, 20 March 2007, § 106; and *Vo*, §§ 76, 80 and 82.

⁸³ Abecassis (n 1).

⁸⁴ Ibid, 12.

⁸⁵ See Amel Alghrani, Margaret Brazier, 'Re-positioning the Fetus in the Context of Research?' (2011) 70 (1) *The Cambridge Law Journal* 51–82, doi:10.1017/S0008197311000171.

⁸⁶ Paul Ramsey, *The Ethics of Fetal Research* (New Haven 1975), 89. Reference from Alghrani and Brazier, Re-positioning the Fetus in the Context of Research? (n 85).

⁸⁷ See John Keown, 'The Polkinghorne Report on Fetal Research; nice recommendations, shame about the reasoning' (1993) 19 *Journal of Medical Ethics* 114–120, 116. Reference from Alghrani and Brazier, Re-positioning the Fetus in the Context of Research? (n 85).

Scholars who consider that reproductive choice does not imply the entitlement of a woman to ensure the death of her foetus ground their position on the ‘only own body control’ approach. This approach accepts that woman can deny her assistance to the foetus developing inside her but not more than that.⁸⁸ Death of the unborn is the most frequent, but side- or unintended effect of the medical intervention. According to Thompson, if death is not the result of abortion, then the woman cannot secure the death of the foetus by some other means.⁸⁹ A similar position is shared by Boonin.⁹⁰ Singer and Wells say that the ‘Freedom to choose what is to happen to one’s body is one thing; freedom to insist on the death of a being that is capable of living outside one’s body is another.’⁹¹ Kaczor maintains that if reproductive choice implies the ‘only own body control’, then the woman is entitled just to decide whether or not she wishes to pursue pregnancy.⁹² The destiny of the foetus is outside the scope of reproductive choice.⁹³ According to Harris, who argues that the *in vivo* foetus has no status, the woman has no claim, not even over her dead foetus that she had aborted.⁹⁴ Dworkin’s understanding of autonomy as if it were ‘a right to control their own role in procreation unless the state has a compelling reason for denying them that control’⁹⁵ also represents an ‘only own body control’ approach to the issue.

Contrary to this approach, there is the ‘motherhood control’ approach, according to which reproductive choice entitles the woman not only to abort her pregnancy but also to terminate a foetus. Abortion was not intended only to disconnect the woman from the foetus, but to also prevent motherhood.⁹⁶ In this line, Langford argues that ‘abortion cannot be reduced to a matter of removing foetal and child dependency upon a woman; otherwise adoption would have brought an end to abortion centuries ago.’⁹⁷ Her main argument is that women undergo an abortion procedure exclusively because they are refusing to become mothers.⁹⁸ The crux of this argument, as well as of the whole approach, is the recognition of the social burden of motherhood ‘within patriarchy’⁹⁹ as legitimising the request to ensure the death of the foetus (ultimate request). It should be noted herein that abortions performed for wellbeing reasons are mostly designed to meet the intention of women to escape motherhood.

⁸⁸ See Sheila McLean ‘Women’s Rights and Reproduction’ in S.A.M. McLean (ed), *Legal Issues in Human Reproduction* (Aldershot 1989, Gower), 213–232. Reference from Alghrani and Brazier, Re-positioning the Fetus in the Context of Research? (n 85).

⁸⁹ Thomson (n 17) 47–66, 66.

⁹⁰ Boonin (n 22) 254–260.

⁹¹ Singer, Wells (n 5) 135.

⁹² Christopher Kaczor, *The Ethics of Abortion: Women’s Rights, Human Life, and the Question of Justice* (Routledge 2011, New York) 245.

⁹³ *Ibid.*

⁹⁴ John Harris, *The Value of Life* (Routledge & Kegan Paul 1985, London) 122.

⁹⁵ Ronald Dworkin, *Life’s Dominion* (Harper Collins 1993, London) 148.

⁹⁶ Alghrani (n 39) 190–211.

⁹⁷ Sarah Langford, ‘An end to abortion? A feminist critique of the ‘ectogenetic solution’ to abortion’ (2008) 31 *Women’s Studies International Forum* 263–269.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, 267.

However, escaping motherhood for wellbeing reasons is only one aspect of a far more complex issue. It would therefore, not be tenable to define the whole phenomenon of abortion based on only one of its aspects. A firm objection to a suchlike generalisation with regard to Europe arises from abortion laws. Every European legislation,¹⁰⁰ along with wellbeing reasons, simultaneously introduces strict temporal limits on access to abortion on that ground. Typically, temporal permissibility to access abortion on that ground is narrower, compared to other grounds. In the previous discussion, we saw that viability is a preclusive constraint on accessing abortion in almost every State. The purpose of that temporal constraint is either to avoid intentional killing or to maintain a fair balance between the woman's interests and the need to ensure the protection of the unborn child.¹⁰¹ In any event, it arises from societal interest in the foetus.¹⁰² Apparently, it is considered that after the point of viability, the interests of the unborn become stronger.

The above discussion elucidated that the logic of the 'motherhood control' approach against the EA recognition under Article 2 concerns balancing the right to respect for the decision of the progenitors not to have a child by *ensuring the death* of the ectogenetic agent on the one hand, and the *autonomy* of the ectogenetic agent, on the other. The starting point could be the recognition that the conflict concerns disputable means of accepted right versus an opaque feature and the right that is inextricably associated to it. Hence, the question might be which of those two, if either, could be backed up by the case law of the ECtHR. Such a question could not be evoked with regard to Canada where, as we have seen, no considerations were given to prenatal life.

As to the ultimate request of progenitors, we saw that it could be legitimately restricted on the basis of the public interest if the State concerned decides to do so. Also, in the case law of the ECtHR, reproductive choice has never been interpreted more broadly than as self-determination, which enables a woman control of the use of their own body.¹⁰³ Such an understanding of reproductive choice has been consistently held by the Court in the case law referring to new reproductive technologies and the capacity of the participants.¹⁰⁴ The right to reproductive autonomy in the sense of physical self-determination is the core argument for the recognition of reproductive rights. The request to ensure the death of another human being could hardly be grounded on the Convention, which confers the diametrically opposite right, namely the right to life. In this context, it is not surprising that the Court underlined on several occasions that Article 8 cannot be interpreted as conferring a right to abortion.¹⁰⁵

¹⁰⁰ But see *Zakon o uslovima i postupku za prekid trudnoće Republike Srpske* (Law on the Conditions and Proceedings for Pregnancy Termination) Official Gazette of Republic of Srpska No. 34/08.

¹⁰¹ See *Boso v Italy*.

¹⁰² Alghrani, Brazier (n 85) 58.

¹⁰³ See Chiara Cosentino, 'Safe and Legal Abortion: European Convention on Human Rights Jurisprudence' (2015) 15 *Human Rights Law Review* 569–589, doi: 10.1093/hrlr/ngv013.

¹⁰⁴ *Evans*.

¹⁰⁵ *Maria do Céu Silva Monteiro Martins Ribeiro v Portugal*. No. 16471/02, 26 October 2004 and *A, B and C v Ireland* § 214.

Recently, several judges of the Court¹⁰⁶ have criticised gestational surrogacy as if it were incompatible with human dignity, since it treats both the child and the surrogate mother not as ends in themselves, but as means to satisfy the desires of other persons. According to them, satisfying parental desires, even those that were beneficial for the child,¹⁰⁷ 'is not compatible with the values underlying the Convention.'¹⁰⁸ In this light, it is hardly imaginable that satisfying parental desires through the death of the child could be qualified as compatible with the values of the Convention. Also, the present question cannot be extracted from the context of the Convention as whole, which prohibits the death penalty as a form of intentional killing.¹⁰⁹ It appears that the means discussed cannot find grounds in the Convention or any relevant case law.

Undoubtedly, an ectogenetic agent is physically autonomous with respect to its progenitors. The claim for the autonomy of the ectogenetic agent could partly be observed by analogy with that of the unborn. Even though it was in the physically-dependant position with regard to the woman, the case law indicates that prenatal life enjoys autonomous recognition under the Convention. For instance, the unborn was granted victim standing and the Commission and ECtHR examined in each case if the present violation of the right to life could be justified under the Convention. According to them, the inseparability of the prenatal life from that of the mother due to physical interconnection was a barrier to recognise the absolute 'right to life' of the foetus.¹¹⁰ In *Paton v United Kingdom*,¹¹¹ the Commission stated that conferring the absolute right to life protection on the unborn would preclude the interests of the expectant mother 'even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman.'¹¹² This argument does not apply in the case of an ectogenetic agent. The autonomy of the unborn and rights associated to it were instead subrogated to those of the expectant mother due to the then-existing physical bond, rather than denial.¹¹³ Furthermore, there are no grounds to preclude autonomy and the consequent entitlement to right to life of the ectogenetic agent who has a separate existence. After a comprehensive analysis of the parental powers of the woman and the status of the foetus that was partly gestated by her, Alghrani and Brazier are even insistent that 'once removed from

¹⁰⁶ *Paradiso and Campanelli v Italy*, No. 25358/1224, Merits: 24 January 2017, see joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek and Dedov.

¹⁰⁷ *Paradiso*, § 25.

¹⁰⁸ *Paradiso*, see joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek and Dedov.

¹⁰⁹ *Soering v The United Kingdom*, no. 14038/88, 07 July 1989.

¹¹⁰ *Paton v The United Kingdom*, no. 8416/78, Decision of the Commission 1980.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, § 19.

¹¹³ Dragan Dakić, 'Introduction into principles of unborn life protection under the European Convention on Human Rights' UDC 341 231 14:347.158 at: Dragana Kolarić (ed), et al. *Archibald Reiss Days: International Scientific Conference, Belgrade, 3-4 March 2014: Thematic Conference Proceedings of International Significance. Vol. 3.* Belgrade: Academy of Criminalistic and Police Studies; Bonn: German Foundation for International Legal Cooperation (2014) 3 IRZ 343–352.

the woman and in transit to or in an ectogenic chamber, the foetus crosses the law's bright line and thus acquires independent legal personality'.¹¹⁴

Therefore, the ultimate request of the progenitors cannot be claimed on the grounds of the Convention while the right to life of the ectogenetic agent incontestably can. Because of that, I think that ectogenesis cannot be considered as if it were a solely reproductive medical treatment. From the stage that is technically equivalent to natural implantation, ectogenesis does not concern only progenitors who are, up until that point, freely entitled to decide to proceed with it or to withdraw from it. Since it concerns a human being that is biologically autonomous with regard to other humans, ectogenesis could be defined instead as *medical life-sustaining treatment*. The latter is firm inducement for the application of the Conventional standards introduced in the field of life-sustaining treatment, including its withdrawal, which makes ultimate the request of progenitors to be even more unsuitable to be subsumed under the Convention.¹¹⁵

IV Conclusion

The conflict between the demands for the right to life protection and competitive rights and interests of others is at the core of academic discussions worldwide and judicial reasoning in Europe. Academia proposed a great number of theories on how to resolve the conflict concerned in a fair manner. The European judicial response to the arguments and the shortcomings of those theories could be reduced to the distinction between (graded) right to life protection and the legal status recognition in respect to pre-persons. In Europe, a decisively important determinant for the regional judicial interpretation of the fairness in resolving the conflict concerned arose from the woman's role in reproduction, i.e. the ability to gestate, which had no replacement and conferred greater control over reproduction on her as compared to man. Also, gestational connection imposed limitations to the unborn life protection when it is in conflict with the mother's interests. Even though it was subrogated to that of the mother, the recognition of the interests to the unborn presents an important feature of the European discourse.

Bearing in mind that, on the one hand, institutions under the Convention introduced that the woman's competing rights and interests must be weighed against those of the unborn child, and on the other, judicial recognition of the 'public interest' as a legitimate ground for intruding into the women's private sphere, the emergence of technological innovation which could eliminate the conflict between competing rights, as well as relativise the boundaries of viability, could also eliminate the European cornerstones of reproductive autonomy.

Under the national statutes in Europe, viability is the threshold for the commencement of abortion constraints. After reaching the stage of viability, the rights and interests of the

¹¹⁴ Alghrani, Brazier (n 85) 72.

¹¹⁵ See *Lambert and others v France*, Application no. 46043/14. Merits from 5 June 2015 §§ 156–161.

unborn are strictly protected and the list of legitimising grounds for their infringement narrows down. In some jurisdictions, even the interests of the pregnant woman in life and health are not privileged as compared to the interests of the viable unborn. If the technology enables the elimination of the conflict between comparable rights, it would be hard to argue for the broad understanding of the scope of reproductive choice on the basis of the settled standards of the right to respect for private life under European law. Both of these elements, viability and conflict exclusion, provide a wide margin of appreciation to the State when imposing constraints on reproductive choice based on 'public interest'. Also, due to the conflict exclusion, the claim for autonomy disconnects the ultimate demands of the progenitors from the Convention, but simultaneously it confers the entitlement to right to life on the ectogenetic agent, which is yet another restriction to the scope of reproductive choice.

Unlike that, the case law of the Supreme Court of Canada established that protection cannot be conferred before meeting the cumulative requirements of the 'born, alive and viable' rule. This entirely precluded both the interests of the unborn and public interest from intruding into the women's private sphere. For this reason, neither technologically induced viability nor artificial conflict exclusion could affect the scope of the reproductive choice in Canada. The progenitors would be free to demand the interruption of the process in order to avoid parenthood.

Freedom of Artistic Expression

Constitutional Lessons from Canada

I Introductory Remarks

Recent challenges to freedom of artistic expression in Hungary and Poland result in a growing need to refer to international and foreign case-law in order to make legal reasoning more profound and persuasive. While the Constitutional Court in Poland upheld the protection of ‘religious feelings’ as acceptable grounds for limiting freedom of expression¹ and the government of Hungary endorsed the media law, which apparently creates a threat to free speech,² lawyers from both states may learn from the Canadian constitutional experience. Although it is not immune to criticism regarding the protection of freedom of expression,³ the Canadian experience is indeed unique and grows in a specific soil, constituting the foundation of the Canadian constitutional system.⁴

Based on the Canadian Charter of Rights and Freedoms, the practice of the Canadian Supreme Court is inspiring; it includes some controversial cases, such as *R. v Butler*, *Little Sisters Book and Art Emporium v Canada*, *Sharpe*, *Zundel* and *Keegstra*. The Canadian constitutional case law is marked by a wise assumption that judicial practice must abstain from imposing ambiguous and moralising rules in law. As noted by Paul Kearns, ‘art’s freedom appears to be guarded most vigilantly not in the USA or in Strasbourg but, rather, in Canada’⁵.

This essay shall focus on exploring what constitutes ‘artistic expression’ in the view of the Canadian Supreme Court and what are the limits of exercising that freedom. The practice of

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¹ Judgment of the [Polish] Constitutional Tribunal of 6 October 2015 *on offence to religious feelings*, case SK 54/13.

² See: Mérték Media Monitor, ‘Hungarian Media Law’, Volume 1, Budapest 2015; see also: Venice Commission’s ‘Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19–20 June 2015); CDL-AD(2015)015.

³ See e.g. Jamie Cameron, Nathalie Des Rosiers, ‘The Right to Protest, Freedom of Expression, and Freedom of Association’ in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017, Oxford) 740–741.

⁴ See Ian Greene, *The Charter of Rights* (James Lorimer & Company Publishers 1989, Toronto) 8–17.

⁵ Paul Kearns, *Freedom of Artistic Expression. Essays on culture and legal censure* (Oxford University Press 2013, Oxford) 180.

Polish and Hungarian judiciary shall then be presented and assessed critically against this background.

As a starting point, one should note that the notion of artistic expression (although it is common ground in the jurisprudence that it enjoys a ‘privileged status’⁶) is normally employed in the case-law in a somewhat assumptive way – ambitions to define it are rare and tentative. In Farida Shaheed’s Report on *The right to freedom of artistic expression and creativity*,⁷ one reads that there is no intention to provide the definition of art. Commenting on Article 10 ECHR, Schabas confirms the protection of freedom of expression afforded by this provision; however, he abstains from defining the very concept.⁸ Nor did the US Supreme Court ever define the scope of protection guaranteed by the First Amendment to the creation and performance of art.⁹ It seems that the Canadian experience is quite inspiring in this respect.

II Canada

1 The Charter

The constitutional law of Canada is composed of written and unwritten documents, which reflects the traces of British constitutionalism.¹⁰ The Canadian Charter of Rights and Freedoms constitutes one of the elements of the Canadian constitutional law. Its Article 2 (b) reads that ‘everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication’. Article 1 constitutes a limitation clause, reading that ‘the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Unlike the constitutions of some other states (e.g. Austria, Bulgaria, Czech Republic, Germany, Hungary, Italy, Poland, Portugal, Romania, Russian Federation, Serbia, Spain, Sweden and Switzerland), the Canadian Charter does not include a specific provision dedicated to freedom of artistic expression.

⁶ See e.g. BVerfG, Beschluss des Ersten Senats vom 13. Juni 2007 – 1 BvR 1783/05 – Rn. (1–151), in § 62, ruling of the US Supreme Court of 7 June 1971, 403 U.S. 15 *Cohen v California* (No. 299), ruling of the US Supreme Court, *Bleistein v Donaldson Lithographing Co.*, 188 US 239, 251 (1903), ruling of I/A Court H.R., *Case of ‘The Last Temptation of Christ’ (Olmedo-Bustos et al.) v Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73, or judgment of the ECtHR of 20 September 1994, *Otto-Preminger-Institut przeciwko Austrii*, appl. No. 13470/87.

⁷ *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. The right to freedom of artistic expression and creativity*, A/HRC/23/34, 14 March 2013: <http://www.cdc-ccd.org/IMG/pdf/The_right_to_freedom_of_artistic_expression_and_creativity.pdf>, in § I.4, accessed 19 November 2017.

⁸ William A. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015, Oxford) 463–464.

⁹ Robert M. O’Neil, ‘Artistic Freedom and Academic Freedom’ (1990) 53 (3) *Law and Contemporary Problems* 178.

¹⁰ Oliver, Macklem, Des Rosiers (n 3) 1–2.

2 Case-law

a) *R. v Butler*¹¹

Mr. Donald Victor Butler was accused of possessing, exposing, selling and renting hard core pornographic material in his shop which was contrary to Section 163 of the Criminal Code. Section 163(8) of the *Code* provides that ‘any publication, a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of (...) crime, horror, cruelty and violence, shall be deemed to be obscene’. The court concluded that the material in question was protected by freedom of expression and that only those materials which contained scenes involving violence or cruelty intermingled with sexual activity or depicted lack of consent to sexual contact or otherwise could be said to dehumanise men or women in a sexual context were legitimately proscribed. The accused was therefore convicted on eight counts relating to eight films and acquittals were entered on the remaining charges. The Crown appealed the acquittals. The Court of Appeal, in a majority decision, allowed the appeal and entered convictions with respect to all the counts. The majority concluded that the materials in question fell outside the protection of the Charter, since they constituted purely physical activity and involved the undue exploitation of sex and the degradation of human sexuality.

The Supreme Court held¹² that ‘the portrayal of sex must then be viewed in context to determine whether undue exploitation of sex is the main object of the work or whether the portrayal of sex is essential to a wider artistic, literary or other similar purpose. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole’ and stressed that ‘*any doubt in this regard must be resolved in favour of freedom of expression*’. It further held that ‘the overriding objective of Section 163 (of the Criminal Code) is not moral disapprobation but the avoidance of harm to society, and this is a sufficiently pressing and substantial concern to warrant a restriction on freedom of expression’. According to the Supreme Court, ‘*materials which have scientific, artistic or literary merit are not caught by the provision*’. Judges L’Heureux-Dubé and Gonthier put in their concurring remarks that ‘the avoidance of harm to society is but one instance of a fundamental conception of morality. In order to warrant an override of Charter rights the moral claims must be grounded; they must involve concrete problems such as life, harm and well-being, and *not merely differences of opinion or taste*’.

¹¹ Ruling of the Supreme Court of Canada of 27 February 1992, *R. v Butler* [1993] 1 SCR 452. All short descriptions of cases of the Canada’s Supreme Court include direct quotations from the rulings.

¹² The appeal was successful i.e. the Supreme Court confirmed that obscenity laws violated constitutionally guaranteed freedom of expression.

b) *R. v Zundel*¹³

The accused was charged with spreading false news contrary to s. 181 of the Criminal Code, which provides that '[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment...'. Although the prohibition against distributing false news was considered a 'reasonable limit' to freedom of expression, the consequence of the decision was that Section 181 of the Criminal Code was struck down. The charge arose out of the accused's publication of a pamphlet entitled *Did Six Million Really Die?* The accused had added a preface and afterword to an original document, which had previously been published by others in the United States and England. The pamphlet, part of a genre of literature known as 'revisionist history', suggests, *inter alia*, that it has not been established that six million Jews were killed before and during World War II and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy. Although the 'artistic merit' defence was not invoked in this case, the Supreme Court held *inter alia* that '*an artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's Satanic Verses, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet. Zundel was one of a series of the Supreme Court of Canada's cases concerning hate speech.*'¹⁴

c) *Aubry v Éditions Vice-Versa inc.*¹⁵

The respondent in this case brought an action in civil liability against the appellants, a photographer and the publisher of a magazine, for taking and publishing, in a magazine dedicated to the arts, a photograph showing the respondent, then aged 17, sitting on the steps of a building. The photograph, which was taken in a public place, was published without the respondent's consent.

The majority opinion in this case held that 'the right to respect for one's private life comes into conflict here with the right to freedom of expression protected by s. 3 of the Quebec Charter. *Freedom of expression includes freedom of artistic expression, and it is unnecessary to create special categories of expression.*'¹⁶

¹³ Ruling of the Supreme Court of Canada of 27 August 1992, *R. v Zundel*, [2] SCR 731.

¹⁴ See also rulings of the Supreme Court of Canada: of 13 December 1990, *R. v Keegstra*, [1990] 3 S.C.R. 697 (concerning anti-Semitic hate speech) or of 24 February 2005, *R. v Krymkowski*, [2005] 1 SCR 101, 2005 SCC 7, 249 DLR (4th) 28, 193 CCC (3d) 129, 26 CR (6th) 207, 195 OAC 341 (concerning anti-Roma hate speech).

¹⁵ Ruling of the Supreme Court of Canada of 9 April 1998, *Aubry v Éditions Vice-Versa inc.* [1998] 1 SCR 591.

¹⁶ The Supreme Court's decision was that although a photographer is entitled to take photographs in public places (catching also private individuals) he or she must nevertheless not publish the photograph without prior permission from the individual depicted in the photograph.

d) *Little Sisters Book*¹⁷

Since its establishment in 1983, Little Sisters has imported 80 to 90 percent of its erotica from the United States. For the last 15 years it has been a reluctant participant in a running battle with Canada Customs. Its foreign suppliers typically insisted on payment within 30 days, yet administrative delays at Customs frequently held up shipments until months after they were paid for, and then, not infrequently, materials were seized or ordered returned to sender. In the usual course, the appellants were given no reason for the seizure or return. Some of the suppliers refused to make further shipments. The bookstore carried a specialized inventory catering to the gay and lesbian community, which consisted largely of books that included gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe-sex advisory material and gay and lesbian erotica. The Supreme Court stressed that ‘freedom of expression is *central to our identity* as individuals and to our collective well-being as a society. *Doubt about justification should be resolved in its favour*’.

e) *R. v Sharpe*¹⁸

The accused in this case was charged with two counts of possession of child pornography under Section 163.1(4) of the Criminal Code and two counts of possession of child pornography for the purposes of distribution or sale under Section 163.1(3). ‘Child pornography’, as defined in s. 163.1(1) of the *Code*, includes visual representations that show a person who is or is depicted as under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years. ‘Child pornography’ also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the Code. The accused challenged the constitutionality of legislation on child pornography invoking *inter alia* the ‘artistic merit’ defence. Section 163.1(6)¹⁹ provides a defence for a representation or written material that constitutes child pornography if it has ‘artistic merit’. Chief Justice McLachlin presented the reasoning (§§ 61–67) starting with the assumption that three issues must be addressed regarding the ambit of the ‘artistic merit’ defence, namely the meaning of this notion, the question whether artistic works must conform to ‘community standards’ in order to gain the protection of the defence and the procedure for considering the defence. The initial assumption of Mme Chief Justice was that the defence must be construed broadly. As for the first question she proposed that ‘*artistic merit*’ should be interpreted as including any expression that may reasonably be viewed as art since ‘it would be discriminatory and irrational to permit a good artist to escape criminality, while

¹⁷ Ruling of the Supreme Court of Canada of 15 December 2000, *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120.

¹⁸ Ruling of the Supreme Court of Canada of 26 January 2001, *R. v Sharpe*, [2001] 1 SCR 45.

¹⁹ The legislative framework applicable to child pornography was later amended – see: ruling of the Supreme Court of Canada of 20 October 2011, *R. v Kagibak*, 2011 SCC 48.

criminalising less fashionable, less able or less conventional artists.’ Having said that, Mme Chief Justice proposed that:

What may reasonably be viewed as art is admittedly a difficult question – one that philosophers have pondered through the ages. Although it is generally accepted that ‘art’ includes the production, according to aesthetic principles, of works of the imagination, imitation or design (New Shorter Oxford English Dictionary on Historical Principles [1993], vol. 1, p. 120), the question of whether a particular drawing, film or text is art must be left to the trial judge to determine on the basis of a variety of factors. The subjective intention of the creator will be relevant, although it is unlikely to be conclusive. The form and content of the work may provide evidence as to whether it is art. Its connections with artistic conventions, traditions or styles may also be a factor. The opinion of experts on the subject may be helpful. Other factors, like the mode of production, display and distribution, may shed light on whether the depiction or writing possesses artistic value. It may be, as the case law develops, that the factors to be considered will be refined.

As for the second issue, namely the applicability of the so-called ‘community standard’ (i.e. whether the defence incorporates a community tolerance standard²⁰), Mme Chief Justice suggested that ‘reading in the qualification of conformity with community standards would run counter to the logic of the defence, namely that artistic merit outweighs any harm that might result from the sexual representations of children in the work.’ Finally, as regards the third problem i.e. the procedure leading to application of the ‘artistic merit’ defence she proposed that ‘the accused raises the defence by pointing to facts capable of supporting it (generally something more than a bare assertion that the creator subjectively intended to create art), at which point the Crown must disprove the defence beyond a reasonable doubt.’

The Chief Justice provided in fact for a list of factors to be taken into consideration while assessing whether a given work constitutes ‘art’; however, she stressed that the catalogue is an open one. The factors primarily to be taken into account are:

- 1) intention of the creator,
- 2) the form and content of the work,
- 3) connections with artistic conventions, traditions and styles,
- 4) opinion of experts,
- 5) mode of production, display and distribution,
- 6) other factors – depending on the circumstances of the case.

This list seems to be one of few definitions of ‘art’ in universal case-law.²¹

²⁰ Some supreme or constitutional courts assume that freedom of artistic expression is essentially limited by community tolerance standards – see e.g. ruling of the Supreme Court of India of 14 May 2015 *Devidas Ramachandra Tuljapurkar v State of Maharashtra & Ors.*, Criminal Appeal No. 1179 of 2010; rulings of the US Supreme Court of 21st June 1973, *Kaplan v California*, 413 U.S. 115; ruling of the Constitutional Court of the Russian Federation of 23 October 2014 r. on the *constitutional complaint of Maria Alekhina*, case 2521-O/2014; ruling of the Constitutional Court of Romania of 2 November 1995, *Bala Istvan* case 108/1995.

²¹ Alongside the *landmark case* of the German Federal Constitutional Court *Mephisto*, BVerfG, Beschluß des Ersten Senats vom 24. Februar 1971, 1 BvR 435/68.

III Standard of the European Convention

The ECtHR assumes that artistic expression falls within the scope of Article 10, in that it affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create or distribute a work, for example of a literary nature, contribute to the exchange of ideas and opinions, which is essential for a democratic society. The restrictions on the freedom of artistic expression are perceived to be allowed only to a relatively limited extent since this form of expression ‘appeals generally to a relatively narrow public’.²² However, the ECtHR *has not managed so far to develop a consistent case-law defining the notion of ‘artistic expression’* or to define coherently the standard of interpretation of the limitation clause provided for in Article 10 § 2 ECHR in ‘artistic expression’ cases. Simply put, there is not a single case in which the ECtHR would propose a definition of ‘artistic expression’. The ECtHR failed to develop this standard in spite of the relative variety of cases including *Müller*,²³ *Otto-Preminger-Institut*,²⁴ *Karataş*,²⁵ *Alinak*,²⁶ *Vereinigung Bildender Künstler*,²⁷ *Nikowitz*,²⁸ *Kar*,²⁹ *Lindon, Otchakovsky-Laurens and July*,³⁰ *EON*,³¹ *Instytut Ekonomichnykh Reform TOV*,³² *Ziemiński (No. 2)*,³³ *Sousa Goucha*,³⁴ *Alves da Silva*,³⁵ *Welsh and Silva Canha*³⁶ and *Leroy*.³⁷ The number of cases concerning freedom of artistic expression in Strasbourg, albeit growing, is still rather limited.³⁸ The Convention forms part of normative framework in both Hungary and Poland.

²² *Lindon, Otchakovsky-Laurens and July v France*, nos. 21279/02 and 36448/02, § 47, 22 October 2007.

²³ *Müller et al. v Switzerland*, no. 10737/84, 24 May 1988.

²⁴ *Otto-Preminger-Institut v Austria*, no. 13470/87, 20 September 1994.

²⁵ *Karataş v Turkey*, no. 23168/94, 8 July 1999.

²⁶ *Alinak v Turkey*, no. 40287/98, 29 March 2005.

²⁷ *Vereinigung Bildender Künstler v Austria*, no. 68354/01, 25 January 2007.

²⁸ *Nikowitz and Verlagsgruppe News GmbH v Austria*, no. 5266/03, 22 February 2007.

²⁹ *Kar et al. v Turkey*, no. 58756/00, 3 May 2007.

³⁰ *Lindon, Otchakovsky-Laurens and July v France*, nos. 21279/02 and 36448/02, 22 October 2007.

³¹ *EON v France*, no. 26118/10, 14 March 2013.

³² *Instytut Ekonomichnykh Reform TOV v Ukraine*, no. 61561/08, 2 June 2016.

³³ *Ziemiński v Poland (nr 2)*, no. 1799/07, 5 July 2016.

³⁴ *Sousa Goucha v Portugal*, no. 70434/12, 22 March 2016.

³⁵ *Alves da Silva v Portugal*, no. 42665/07, 20 October 2009.

³⁶ *Welsh and Silva Canha v Portugal*, no. 16812/11, 17 September 2013.

³⁷ *Leroy v France*, no. 36109/03, 2 October 2008.

³⁸ See: Eleni Polymenopoulou, ‘Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights’ (2016) 16 (3) Human Rights Law Review 512.

IV Situation in Poland and Hungary

1 Normative Framework

Article 73 of the Polish Constitution provides that ‘freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone’. This provision does not contain a limitation clause; however, Article 31 (3) of the Constitution reads that ‘any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights’.

In Hungary, Article X (1) of the Fundamental Law of 2011 reads that ‘Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge, and the freedom of teaching within the framework determined by law’. Article I (3) provides for a limitation clause (‘a fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of that fundamental right’).

2 Interpretation

There was not a single decision of the Polish Constitutional Court concerning freedom of artistic expression. It is worth noting though that there are variety of statutory provisions challenging the constitutional freedom of artistic expression, such as Article 196 of the Penal Code, penalising conduct ‘offending religious feelings of others’³⁹, Article 18 (2) of the 1992 Broadcasting Act, reading that “programmes and other transmissions shall respect the religious convictions of viewers and listeners, especially the Christian system of values’ or Article 200b of the Penal Code penalising ‘public popularisation or approving of conduct of a paedophilic nature’ – which could easily be applied to some re-editions of ancient Greek works.

The case-law of Polish common courts is not well-developed as regards the freedom of artistic expression. The landmark case in this respect was the decision concerning the famous

³⁹ However, the Constitutional Court delivered one judgment concerning this provision but it was focused on the issue of compatibility of that provision with Article 54 of the Constitution protecting freedom of expression (in general). The Constitutional Court found the provision to be compatible with Article 54 of the Constitution (see judgment of the Constitutional Court of Poland of 6 October 2015, case SK 54/13). The proceedings were commenced by Ms Dorota Rabczewska, a Polish pop singer, who declared in a press interview that she was more persuaded by scientific research than by ‘something written by somebody who was boozed with wine and stoned on some weed’ and clarified that the latter were ‘those who had written all these incredible stories’ [namely the Holy Bible]. She was prosecuted and found guilty of offending religious feelings of Roman Catholics. Dorota Rabczewska filed an application with the ECtHR and it was notified to the Polish Government on 7 September 2017.

artist Ms Dorota Nieznalska, who was accused of offending the religious feelings of others⁴⁰ (Article 196 of the Penal Code) and finally acquitted after 7 years of lawsuit.⁴¹ The charges concerned the public exhibition of the work 'Passion' comprising a picture of male genitals integrated in a shape of a crucifix hanging on an iron chain and a video showing an elderly man working out in a gym.

The District Court for Gdańsk-South in Gdańsk found the defendant not guilty⁴² and held that the defendant had no intention (in the form of *dolus directus*) of offending religious feelings of others and therefore her conduct lay outside of the scope of application of Article 196 of the Penal Code.⁴³ The court did not however consider a more fundamental issue, namely whether the Penal Code's section 196 was actually consistent with the constitutionally guaranteed freedom of artistic expression especially, since it undoubtedly has, as a corollary, a chilling effect on the freedom of artistic expression.

Another artistic expression case in Poland which was both interesting and publicly debated concerned a civil dispute between Mr. Adam Darski, a famous black metal singer and Mr. Ryszard Nowak, a Catholic activist known for frequent notifications of crimes penalised by Article 196 of the Penal Code. Mr. Nowak gave an interview accusing Mr. Darski of committing the a crime of offending the religious feelings of others by publicly tearing-up the Holy Bible during a musical concert and calling it 'shit'. Mr. Darski felt defamed by Mr. Nowak's allegations and requested the court to order apologies in a newspaper and some minor amount of just satisfaction. The court dismissed the claims of Mr. Darski and ruled that

[...] one cannot assume that the illegality of the plaintiff's conduct was excluded by the fact that it was a part of an artistic activity and the concert was a 'closed' event dedicated to adult persons acquainted with this type of art and prepared for the controversial behaviour of the musical group's members, especially of its leader. Invoking the defence based on the so-called 'counter-type of art' cannot be effective due to the extremely offensive conduct of the plaintiff. The 'artistic expression' defence is not, in this case, sufficient to exclude the offensive character of the plaintiff's behaviour because of its form [...] It is accepted by the legal scholarship that artistic expression cannot be, without justified reasons, offensive to others, since it does not then contribute to any public debate.⁴⁴

⁴⁰ We deliberately do not employ the term 'blasphemy' as it concerns an act of insulting or showing contempt or lack of reverence to a certain deity, whereas Article 196 of the Penal Code protects the 'feelings' of others and not any deity as such.

⁴¹ To be precise, the defendant was initially found guilty but later the judgment was set aside by the appellate court and she was ultimately acquitted.

⁴² Judgment of the District Court for Gdańsk-South of 4th June 2009, case II K 290/05. See also A. Płoszka, 'Wolność artystyczna vs swoboda sumienia i wyznania. O sądowym wazeniu wartości konstytucyjnych na przykładzie sprawy Doroty Nieznalskiej' in D. Bychawska-Siniarska, D. Głowacka (eds), *Swoboda wypowiedzi w działalności artystycznej* (Helsinki Fundacja Praw Człowieka 2014, Warsaw) 113–124.

⁴³ Interestingly enough, three years later the Supreme Court adopted the resolution interpreting Article 196 of the Penal Code, in which it ruled that the crime penalised by Article 196 can be committed both in the form of *dolus directus* and in the form of *dolus eventualis* (resolution of the Supreme Court of 29 October 2012, case I KZP 12/12).

⁴⁴ Judgment of the Regional Court in Gdańsk of 22 December 2015, case I C 279/12.

,Once again the opportunity to actually define what is protected under the realm of Article 73 of the Constitution (the ‘artistic expression’ clause) was missed.

Hungarian scholars’ views and the case-law in Hungary seem to be similar to the Polish experience. According to Cseporán, the notion of ‘artistic creation’ referred to in Article X.1. of the Hungarian Fundamental Law is difficult to construe, since ‘art covers the subjective side of human creativity as it seeks to capture the *beauty*’⁴⁵. Koltay argues that artistic expression, although undoubtedly free, nevertheless does not require a specifically dedicated fundamental rights protection.⁴⁶ Török, to the contrary, argues that the distinction between freedom of expression *sensu largo* and freedom of artistic expression plays an important theoretical role⁴⁷.

As for the ECtHR case-law in Hungarian cases concerning freedom of artistic expression, the record seems to be limited to one case only, namely *Tatár and Fáber*⁴⁸. This case concerned the imposition of an administrative penalty for the abuse of the right to peaceful assembly by two Hungarian nationals who organised a ‘political performance’ close to the Parliament, during which they publically wore some dirty pieces of clothing (to ‘hang out the nation’s dirty laundry’) and answered some questions from journalists. The ECtHR ruled that ‘the imposition of an administrative sanction, however mild, on the authors of such expressions which qualify as artistic and political at the same time can have an undesirable chilling effect on public speech’ (§ 41).

V Conclusions

The Canadian case-law made the attempt to define the normative content of the term ‘artistic merit,’ which is essential to determine the boundaries of freedom of artistic expression. The definitional criteria or ‘artistic merit’ provided in *R. v Sharpe* seem to be very useful if one attempts to apply the constitutional clauses securing freedom of art. Let us assume for a moment that the Gdańsk District Court applied the *Sharpe* doctrine to the *Nieznalska* case.

It is undisputable that Ms Nieznalska, being a renowned visual artist and sculptor, had a subjective intention of creating art and expressing her sphere of personal feelings. The work in question was exhibited in an art gallery specialising in modern art (as a part of an exhibition entitled ‘New Works’). Before presenting the disputed work, Nieznalska created a number of works focused on the issues of, on one hand, spirituality and religion and, on the other hand, male domination, masculinity and machismo. The form and content of the disputed work, comprising a video and an installation, fall into the strand of visual arts. The word ‘passion’

⁴⁵ Cseporán Zsolt, ‘A művészet szabadságának mozgásteret az Alaptörvény keretei között’ (2014) 1 *Scriptura* 156.

⁴⁶ Koltay András, ‘A művészet szabadsága: a nem létező alapjog’, (2016) Pázmány Law Working Papers 4, 1–25.

⁴⁷ Török Bernát, ‘A közügyek vitájának körvonalai a véleményszabadság magyar doktrínájában’ in Koltay András, Török Bernát (eds), *Sajtószabadság és médiajog a 21. század elején* (Complex 2014, Budapest) 440–445.

⁴⁸ *Tatár and Fáber v Hungary*, nos. 26005/08 and 26160/08, 12 June 2012.

in the Polish language has two meanings: it refers to a certain affection, inclination or predilection, but also to the Passion of Jesus Christ. The interconnections and interfusions between the spheres of *sacrum* and *profanum* are traditionally addressed by artists. One should stress that not only was Ms Nieznalska present in the art gallery during the display of her installation but she was also – somewhat unusually – explaining the significance of the work to the public. According to experts on visual arts, the work had a significant artistic value, provoking discussions on the romanticising of the symbols of masculinity,⁴⁹ the sanctification of the temples of consumerism⁵⁰ and the feminist approach to the oppressive impact of culture on femininity.⁵¹

Viewed through the lenses of the *Sharpe* doctrine of *artistic merit defence*, the work of Dorota Nieznalska perfectly fitted what one should view as ‘art’. Harnessing the *Sharpe* criteria leads to a much more convincing and persuasive outcome than the reasoning of the Polish courts, which concentrated on the issue of whether the artist had the intention of offending the religious feelings of others.

⁴⁹ Piotr Piotrowski, *Sztuka według polityki: od Melancholii do Pasji* (Universitas 2007, Cracow) 234.

⁵⁰ Izabela Kowalczyk, *Matki-Polki, Chłopcy i Cyborgi...: sztuka i feminizm w Polsce* (Galeria Miejska Arsenal 2010, Poznań) 124.

⁵¹ See M. Romanska, ‘The Anatomy of Blasphemy: Passion and the Trial of Dorota Nieznalska’ (2007) 51 (2) *The Drama Review* 179.

Articles

Development of the Regulation of Lien in Hungary, and the Factors Affecting Regulation**

I Relationship Between Securities In Rem and the Economy

1 Economic Background

Economic research has shown that there is a close relationship between securities in rem and the economy. Securities in rem are of particular importance for the functioning of lending.¹

The core economic function of securities is to strengthen keeping contractual promises. Securities seek to reduce the risks arising from legal transactions. As such, there is a close correlation between risk aversion and the provision of securities.

Entering into an agreement on the application of securities can be considered as a secondary, accessory transaction, which presupposes a main transaction i.e. a credit agreement.² The security transaction remains in the background until the transaction containing the credit element is properly completed. However, should any defect occur in the course of fulfilling the primary transaction, especially if the fulfillment by the debtor fails to come about, securities then come to the fore. In that case, the security transaction will supersede the primary transaction.³

Securities also play an important role in making a decision on lending. The existence and value of securities affect the primary service itself, which is the provision of a loan in the majority of the cases. Accordingly, non-existent or incomplete securities may even preclude lending in reality, or make it extremely difficult and expensive.⁴

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¹ Josef Duttler, *Ökonomische Analyse dinglicher Sicherheiten* (Marchal und Matzenbacher Wissenschaftsverlag 1986, Krefeld) 9–150; Bernd Rudolph, 'Zur Funktionsanalyse von Kreditsicherheiten' (1985) 10 *Die Bank – Zeitschrift für Bankpolitik und Bankpraxis* 503–507; Eberhard Dorndorf, *Kreditsicherungsrecht und Wirtschaftsordnung* (C.F. Müller Verlag 1986, Heidelberg) 75.

² In legal terminology, it is called 'ancillary principle'. See the details of ancillary principle in Dieter Medicus, 'Die Akzessorietät im Zivilrecht' (1971) 10 *Juristische Schulung* (JuS) 497–504.

³ Peter Bülow, *Recht der Kreditsicherheiten* (C.F. Müller Verlag 1984, Heidelberg) 1.

⁴ Ulrich Drobnig, *Empfehlen sich gesetzliche Maßnahmen zur Reform des Mobiliarsicherheiten?* (Verhandlungen des 51. Deutschen Juristentages. Band I [Gutachten], Teil F, C.H. Beck'sche Verlagsbuchhandlung 1976, München) 15.

From an economic perspective, besides the decision to provide a loan, securities also have an important role in determining the conditions of lending. There is a link between the securities applied, and the price of the loan and the rate of interest. This close connection is also demonstrated by the fact that the loans covered by security (secured loans) and unsecured loans have different rates of interest. The level of interest depends on several factors but the size of the risk of the debtor's insolvency to be taken into account by the creditor has an important role in determining the interest rate. Because of that risk, creditors charge a risk premium.⁵

2 Regulation of Lien and the Various Forms of Lending

A distinction should be made also at the legislative level between business (commercial) loans and the cases of lending outside that scope. This dichotomy is also reflected in the regulation of liens. However, all this does not mean that loans for consumers would have provided a regulatory template for the civil codes of Europe.

As regards the regulation of liens, the main priority is to secure the loans or credits provided by banks (credit institutions). Commodity loans have substantially different characteristics. The economic role of commodity loans is also significant but they require other types of securities. Retention of title is a form of security that is typical for commodity loans, while lien is linked to money loans. Hence, the form of the security to be applied depends not only on the nature of the loan concerned, but also on the creditor providing it.

Since the 1850s, the regulation of lien in Hungary has always focused on commercial and business lending, where the typical creditor is a bank. However, in addition to that, legal regulations must also cover non-business loans.

II The Role of Agriculture

Agriculture should be highlighted in the economic background of the regulation of lien. Agriculture continues to play a key role in Hungary; therefore, agriculture also has a key role in lending.

Because of the dominant role of agriculture, proposals for economic reform at the beginning of the 19th century were also primarily connected to agriculture. In his work published in 1829, *János Balásházy* analyzed the problems arising from the scarcity of credit. Moreover, *István Széchenyi* gave the title 'Credit' to his book published in 1830. The latter work is of great importance because it was the first modernization program in Hungary to encompass the whole of society and the economy. He was the first to provide a comprehensive economic and legal program, and to recognize correlations between the economy and law.⁶

⁵ Hans-Bernd Schäfer, Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th edn, Springer Verlag 2005, Berlin–Heidelberg) 591.

⁶ Horváth Attila, 'Széchenyi István modernizációs programjának hiteljogi vonatkozásai' (1991) 7 *Jogtudományi Közlöny* 35.

The decisive role of agriculture also appears in the explanations accompanying the drafts of the Civil Code worked out at the beginning of the 20th century. However, in addition to creating investment opportunities attracting capital to agriculture, the protection of the interest of landowners of the time was also an important factor. In addition, it precluded the renewal of rules of lien for several decades.

It took World War I and the subsequent economic collapse to urge Hungarian legislators to give a completely different answer to the issue of agricultural reform than before. Act XXXV of 1927 on Lien (hereinafter referred to as 'Lien Act') incorporated all the lien instruments that the draft civil codes had been reluctant to accept. In the economic environment of the 1920s, Hungarian legislators aimed at creating legislation that promotes lending. Boosting lending in agriculture was an especially important aim. The legal regulations of the time relating to lien were adopted in order to satisfy that economic need.

The Lien Act, aimed at improving the conditions of lending. The ministerial explanatory memorandum for the Lien Act explicitly stressed that, after World War I, loans were scarce and economic transactions were lacking the money that would have been necessary for creating a healthy crediting environment. Hungary made efforts to remedy that situation through measures accelerating the circulation of money. By doing so, they were able to achieve the same economic results with a relatively smaller amount of money. One of the main goals of the Lien Act was to facilitate capital flows also with regard to loans provided for the purchase of real estate. To this end, security lien was provided on a wider scale; it was also made transferable, and the legal institutions of land debt and land debenture bond were also established.⁷

In the early days of the political changeover after 1989, when the two-tier banking system was established, lending in agriculture came to the fore again. The transformation of the banking system and capital shortages had a particularly strong impact on agriculture. The collapse of the markets of the former socialist countries, as well as compensation for land taken into state ownership under socialism, led to a sharp decline in agricultural production as a consequence of the newly-fragmented structure of agricultural land.⁸ The establishment of an independent agricultural bank was also suggested. All the above could mainly be justified by the characteristics of agricultural production and financing. No independent agricultural bank was established after all; however, traditional commercial banks could not respond adequately to the specificities of agriculture. In order to cover the increasing risk attributable to price volatility, financial institutions asked for additional securities from producers, e.g. by obliging their family members to undertake a guarantee, too.

⁷ Nizsalovszky Endre, *A jelzálogjog jogszabályainak magyarázata* (Grill Károly Könyvkiadóvállalata 1929, Budapest) 2–5.

⁸ According to the data of the Hungarian Central Statistical Office (KSH), agricultural production in Hungary decreased by more than 30 % between 1989 and 1993. *Magyarország 1989–2009. A változások tükrében* (KSH 2010, Budapest) 39–40.

According to a study published in 2010, as a result of the above, a large part of agricultural investments had not resulted in any improvement in efficiency. Traditional financial institutions give credit to agricultural companies only under strict conditions; because of the characteristics of agricultural production they consider it very risky to grant loans, and for this reason the majority of the loan applications submitted are rejected upon assessment.⁹

Due to the role of agriculture in the Hungarian economy and the characteristics of agricultural production, closer attention is paid to agriculture in the course of regulating securities.

III Reforms of the Regulation of Lien in Hungary after the Political Changeover

1 Background: Ownership and Economy in the Socialist Era

After 1945, Hungarian private law changed radically. Compared to the previous era, state control covering society and the entire economy made a substantial difference, entailing the infiltration of public law elements into private law. The change in the system of property ownership after 1945 had far-reaching consequences up to nowadays.¹⁰

The Civil Code that was specific to the socialist circumstances was adopted in 1959. Though Act IV of 1959 on the Civil Code kept a few provisions on lien, it only remained a relic of the past in socialist civil law for several decades.

In the 1959 Civil Code, the regulation of lien was not adapted to economic needs; rather, it reflected the respect of the legislators for the old Hungarian private law when drafting the Code. However, such a decline can be observed not only regarding securities in rem but also in the case of personal securities. Guarantee was also rarely used; in reality, it was connected almost exclusively to the consumer credits of private individuals.

Change took place only in the 1980s. On the one hand, this is closely related to the fact that the first forms of enterprise appeared in Hungary in that decade and, on the other hand, the monopoly of state ownership and the planned economy loosened.

2 Changes in the Economic Conditions in the 1990s

Dismantling state ownership and establishing a social structure based on private property had already started in the 1980s. The former socialist system of property ownership was fundamentally changed by a few factors:

⁹ Górn Arnold, *Miért van szükség egy magyar agrárbankra?* (2012. augusztus) Hítelinézeteti Szemle (Különszám) 5.

¹⁰ Harmathy Attila, 'Jogpolitika – polgári jog' (2010) 12 Magyar Jog 709.

- dismantling state ownership i.e. privatization;
- restitution a part of the nationalized property or the countervalue thereof i.e. compensation;
- offering state property to local governments, churches, civil society organizations and political parties.

As a result of the fundamental transformation of the property system, the share of the private sector increased from 15-20% of GDP to 40-45% between 1989 and 1993. The number of private enterprises increased from 393,000 (1990) to 745,000 (1996). Following the adoption of the first Act on Business Organizations in 1988, partnerships and business associations were established across the country. The number of private companies increased from 45,770 (1990) to more than 280,000 (1997). In parallel, the number of state-owned companies decreased; while in 1990 there were 1859 state-owned companies operating in Hungary, by 1997 their number had fallen to three. Simultaneously with the increase in the number of private companies, the number of insolvency proceedings increased as well.¹¹

As regards the credit environment, the most important change was that the value of foreign investments increased significantly. In 1988, the value of foreign investments amounted to USD 23 million. By 1998, this value had exceeded USD 8.1 billion. Due to the capital shortage in the country, foreign investments were of utmost importance.¹²

In parallel with the inflow of foreign capital, the banking system was also reorganized. The restructuring of the banking system began as early as 1984 but the most important milestone was 1987. The so-called two-tier banking system was established in that year, i.e. commercial banks appeared at that time (since the socialist era began there had been only one retail bank in Hungary). Thereafter, the National Bank of Hungary no longer financed enterprises directly; this task was taken over by commercial banks. In 1987 there were already nine commercial banks operating in Hungary. In the 1990s, specialized credit institutions also appeared on the market and the first mortgage credit institutions started to operate in 1997.

3 Amendments on Lien

The transition to private property and capital shortage forced the legislators in all the former socialist countries to reregulate the legal instruments of corporate financing.¹³

After 1989-1990, the comprehensive reform of the laws on security interest was driven primarily by changes in the system of property ownership and the transformation covering the banking sector as well. In addition, lending was also hindered by incomplete and outdated

¹¹ Harmathy Attila, 'Das Recht der Mobiliarsicherheiten – Kontinuität und Entwicklung in Ungarn' in Karl F. Kreuzer (Hrsg.), *Mobiliarsicherheiten – Vielfalt oder Einheit?* (Nomos 1999, Baden-Baden) 84.

¹² Harmathy (n 11) 85.

¹³ Pistor Katharina, 'Aktien und Kredite als Mittel der Unternehmensfinanzierung und Unternehmenskontrolle in Transformationsländer' in Ulrich Drobning, Klaus J. Hopt, Hein Kötz, Ernst-Joachim Mesmäcker, *Systemtransformation in Mittel- und Osteuropa und ihre Folgen für Banken, Börsen und Kreditsicherheiten*. (Mohr Siebeck 1998, Tübingen) 109–134.

insolvency rules. The harmonization of the rules on lien and insolvency proceedings was also needed. It is no coincidence that the main reason underlying the 1993 draft to amend the rules on lien as set out in the Civil Code was in order to boost the economy.¹⁴

Act XXVI of 1996 (the first amendment on lien) was intended to adapt the regulation of lien to the conditions of a market economy based on private property. The main objective of the amendment was to promote obtaining credit through new solutions, both for consumers and for the business sector so that lien instruments would provide both effective cover and security for creditors.

The most important new features of the amendment were the following:

- establishing the instrument of mortgage on movable property;
- mortgage on assets;
- enlargement of the scope of application of general collateral mortgage;
- legal instruments related to ranking;
- expanding the rules of lien on rights or claims;
- independent lien (non-accessory lien);
- amending the rules of judicial enforcement.

The new legal instruments – mainly lien on movable property – served the purpose of facilitating access to capital, primarily for small and medium-sized enterprises. A wider scope of lien on rights or claims also made it possible to establish a lien on holdings in companies.

The economic arguments for lien on movable property had already appeared in the legal literature at the beginning of the 20th century. It means that possessory lien alone was not sufficient to respond to economic needs. It seemed appropriate to legitimate the interests of debtors who only had their movables to pledge in order to secure the loan they applied for. However, encumbering movables with possessory lien prevented the owners of pledged property from carrying out their gainful activities. They could not obtain a loan on security because it would have prevented them from using their movables. Another argument was that someone who has already encumbered their movables – contrary to the owner of real estate – was only allowed to take out any further loan secured on the same pledged property from the same creditor.¹⁵

The idea of establishing lien on movable property was put into practice 80 years later. An authentic public register for that purpose was also established then; the Notarial Chamber undertook to maintain a register of liens on movable property as well as liens on assets.¹⁶

In spite of several new features introduced by the first amendment on lien, it did not provide an adequate solution to a number of issues. One such issue was that legal practice failed to incorporate the 1996 amendment on lien entirely, and that regulation was rather vague.

¹⁴ The 1993 draft was signed into Act XXVI of 1996 (the first amendment on lien).

¹⁵ Bozóky Géza, 'Ingó jelzálogjog' in *Emlékkönyv Grosschmid Béni jogtanári működésének harminczadik évfordulójára* (Rényi Károly Bizománya 1912, Budapest) 88, 95.

¹⁶ Harmathy Attila, 'Kreditsicherheiten im sozialistischen System' in Drobning, Hopt, Kötz, Mesmäcker (n 13) 314.

That is why the legislature amended the rules of lien set out in the Civil Code again, in 2000. Act CXXXVII of 2000 on amending the Acts related to lien (the second amendment on lien) aimed at addressing the issues arising in the meantime. No new instruments were introduced by the second amendment on lien; it only clarified and detailed the amendments adopted in 1996.

IV Provisions of the Civil Code of 2013 relating to Lien

Act V of 2013 on the Civil Code (hereinafter referred to as the ‘Civil Code’) introduced a further reform on lien, which was the third one in two decades.

The new Code considered it as an important legal policy objective to make lien as the primary security in rem while putting the prohibition of *lex commissoria* into the focus of regulation.¹⁷ Closely relating to that the prohibition of fiduciary securities was declared (Section 6:99 of the Civil Code).¹⁸

One of the most controversial new features of the Civil Code was – relating to the nullity of fiduciary securities – the cancellation of independent lien. Instead, the new Civil Code regulated the instrument of seceded lien (Section 5:100 of the Civil Code). However, the legal instrument of seceded lien was heavily criticized by the banking sector. According to critics, that new legal instrument was not suitable for use in connection with more complex banking refinancing techniques.

The regulatory concept of the Civil Code concerning securities in rem, which was based on new grounds, is logical and reasonable in doctrinal terms. However, the main problem was that the Civil Code was adopted at a time when the Hungarian economy still experienced the negative impact of the lending crisis that started to become increasingly severe in 2008. Borrowing from a bank became more and more difficult, especially for small and medium-sized enterprises. However, the whole Hungarian economy was affected by the credit crunch and the dramatic fall in the lending activity of domestic financial institutions. The Civil Code was adopted in that economic-financial environment, canceling well-established legal instruments, hitherto widely used in domestic corporate lending (fiduciary securities, independent lien, lien on assets).

In the light of all the foregoing, it is important to explain in detail the developments that have taken place in the Hungarian economy, and in the sector of financial intermediaries in particular, in the last few years, and the expectations of the legislative bodies created thereby.

¹⁷ Menyhárd Attila, ‘A dologi jog szabályozásának sarokpontjai a Polgári Törvénykönyvben’ (2013) 1 Jogtudományi Közlöny 527.

¹⁸ That ban was mitigated by legislative bodies in 2016.

V The Hungarian Economy and Banking Sector after 2008

We should start our analysis by stating that the Hungarian economy and financial system have remained bank-centred (or, rather, financial institution-centred) to date. Capital markets play second fiddle in financing Hungarian businesses. Therefore, the lending activity of the financial institution system is pivotal to the development and growth of the Hungarian economy.¹⁹ In particular, lending to small and medium sized enterprises (hereinafter the SME sector) is critical. Dysfunctions in the financial mediation system are to a great extent manifested in shrinking domestic corporate lending, which harms the SME sector first of all.

Bank lending practically collapsed in Hungary after 2008. This meant that corporate and retail lending equally faced several years of depression. Private sector loans continued to decrease even in 2013.²⁰ The credit crunch resulted in declining investments, with many companies forced to delay their capital expenditure projects due to lack of credit. National Bank of Hungary (hereinafter 'NBH') figures suggest that all this stymied Hungary's economic growth by 1% on average.²¹

Tightening lending restrictions did not, however, affect the Hungarian corporate sector to the same degree. Large – overwhelmingly foreign-owned – companies had easier access to loans provided by foreign banks or their own foreign owners. By contrast, Hungarian-owned enterprises having to rely on domestic bank financing were far more adversely affected by the credit crunch, which often made their operations impossible.²²

Large domestic enterprises increasingly sought foreign loans and domestic borrowing by this sector significantly decreased. At present, large undertakings borrow either from foreign banks or from their own foreign parent companies, and hardly if at all from domestic banks. As a result, the total volume of Hungarian corporate loaning from domestic banks had fallen to EUR 19 billion by the end of July 2016 (the low point last recorded in 2005).²³

At the same time, the overall debt of domestic companies did not decrease. Hungarian companies merely shifted from domestic bank loans to – increasingly and to a significant degree – borrowing from foreign banks or their own foreign parents. According to NBH figures, the total volume of Hungarian corporate debt amounted to EUR 93 billion in March 2016. In other words, the share of domestic bank loans in corporate borrowing shrunk to 20%. Having said that, corporate borrowing from other (overwhelmingly foreign-owned) companies now totals EUR 27 billion, while the volume of Hungarian companies' foreign

¹⁹ Balog Ádám, Matolcsy György, Nagy Márton, Vonnák Balázs, 'Credit crunch Magyarországon 2009–2013 között: egy hiteltelen korszak vége?' [Credit crunch in Hungary between 2009 and 2013 – End of an Era without Credit?] (2014) 4 *Hitelintézeti Szemle* 4, 15.

²⁰ Balog, Matolcsy, Nagy, Vonnák (n 19) 15–16.

²¹ Balog, Matolcsy, Nagy, Vonnák (n 19) 16.

²² Balog, Matolcsy, Nagy, Vonnák (n 19) 19, 22.

²³ <<http://www.vg.hu/penzugy/hitel/tobb-kolcsont-vesznek-fel-a-cegek-kulfoldrol-mint-magyarorszagrol-475012>> accessed 7 September 2016.

bank debt reached EUR 39 billion.²⁴ Accordingly, over 40% of domestic corporate debt is now made up by foreign bank loans. In total, the share of foreign debt in overall Hungarian corporate borrowing has grown to 65%. As a consequence, the balance sheet structure of the Hungarian banking sector has changed drastically since 2008.

At the same time, the amount of EUR-denominated loans taken out by Hungarian enterprises grew to some extent. NBH figures suggest Hungarian companies borrowed EUR 1.4 billion in EUR-denominated loans between January and August of 2016, representing a year on year increase of 14%.²⁵ Foreign currency-denominated loans are primarily extended to large enterprises and mostly by foreign banks. The amount of foreign currency-denominated loans provided by foreign banks far outweighs those provided by domestic banks.²⁶

This picture becomes somewhat more refined when we look at small or medium-sized enterprises without considering large undertakings. That is because the share of loans offered by foreign banks to SMEs is significantly smaller, even if the volume of foreign currency-denominated borrowing by the SME sector has increased in the recent period. However, in the first half of 2016, the aggregate value of SME debt decreased by about 4%. In July 2016, total SME borrowing stood at EUR 11.6 billion, reflecting a decrease of EUR 300 million since March 2016.²⁷ As a consequence, the lending gap has widened between large undertakings and SMEs.²⁸

As opposed to corporate lending, the decrease in retail (consumer) lending halted in the meantime and growth in foreign currency-denominated retail borrowing, especially the volume of mortgage loans,²⁹ picked up again following the conversion of foreign currency-denominated consumer loans into HUF³⁰. This indicates a growing housing loan portfolio primarily driven, for the time being, by significantly increased demand for used housing. The main reason for this is low interest rates bound to stimulate further significant volume growth in housing loans.

The low interest rate environment is an unprecedented challenge for the Hungarian banking system. The Hungarian banking sector incurs a loss of EUR 65-100 million annually

²⁴ <<http://www.vg.hu/penzugy/hitel/tobb-kolcsont-vesznek-fel-a-cegek-kulfoldrol-mint-magyarorszagrol-475012>> accessed 7 September 2016.

²⁵ <<http://www.vg.hu/penzugy/hitel/viszik-az-eurohitelt-476200>> accessed 4 October 2016.

²⁶ <<http://www.vg.hu/penzugy/hitel/viszik-az-eurohitelt-476200>> accessed 4 October 2016.

²⁷ <<http://www.vg.hu/penzugy/hitel/tobb-kolcsont-vesznek-fel-a-cegek-kulfoldrol-mint-magyarorszagrol-475012>> accessed 7 September 2016.

²⁸ For more details see: MNB Hitelezési folyamatok [National Bank of Hungary Lending Processes], May 2016, <<http://www.NBH.hu/letoltes/hitelezesi-folyamatok-2016-majus-hu.pdf>> accessed 11 August 2016.

²⁹ Act LXXVII of Act LXXVII of 2014 on the settlement of matters relating to the currency conversion of certain consumer loan agreements and to interest rate rules set forth the provisions about the conversion of foreign currency-denominated consumer loans to HUF.

³⁰ <http://www.portfolio.hu/finanszirozas/hitel/uj_orulet_magyarorszagon_mindenki_szemelyi_kolcsont_akar_235426.html> accessed 29 July 2016.

due to low interest rates alone.³¹ The low interest rate environment rendered the former business model untenable, as it depended heavily on net interest income (which poses a very serious problem to the savings cooperative sector in particular).

Low interest rates cause also a serious headache for clients seeking lucrative investment opportunities. Even so, retail savings rose by 25% in 2015.

As regards bank lending, the concurrent steady decline of amounts deposited by commercial banks with the National Bank of Hungary is another overarching factor. However, the government security portfolio is simultaneously increasing.

Also linked to low interest rates are banks' diminishing short-term external resources, well-illustrated by changes in the loan-to-deposit ratio, which shows a falling trend from 160% in recent years to 85% by 2016. The situation is even worse in the savings cooperative sector, which plays a key role in agricultural lending, where the same ratio is barely 40%.³² This is a very low level, clearly pointing to the need to increase lending, which, however, cannot be financed from ever-decreasing bank deposits. As such, financial institutions must seek long-term resources (including, for example, mortgage bonds).

Bear in mind that the continued tightening of domestic and EU banking supervision rules forces banks to exercise increasing prudence in their operations. An indication of that is the banks' obligation to reach a capital adequacy ratio of 16% in the future. In addition, the rules of consumer lending have also become stricter.³³

As a result, the Hungarian banking system has been facing several challenges in recent years. In addition to having to adjust to the low interest rates mentioned above, the growing volume of non-performing loans presents an increasingly serious issue. These bad loans should be purged from banks' balance sheets as soon as possible, along with concurrently improving domestic banks' profitability.

The amendment of the Civil Code in respect of lien has been most influenced by economic policies designed to stimulate the mortgage bond market. It was to this end that the National Bank of Hungary issued Decree No. 20/2015 (VI. 29) on the forint maturity match of credit institutions. Consistent with this is the fact that, in 2016, three new actors appeared in the domestic mortgage banking market.³⁴

³¹ It has been said at the conference 'Lending 2017' on 25 April 2017 in Budapest.

³² Source: National Bank of Hungary (MNB).

³³ Act LXXVIII of 2014 amending Act CLXII of 2009 on consumer loans and certain related Acts.

³⁴ <<http://www.vg.hu/penzugy/harom-jelzalogbank-johet-455693>> accessed 16 August 2015.

VI Reregulated Independent Lien

1 Circumstances Determining the Reregulation of Independent Lien

Two important items of legislation need to be highlighted separately in connection with the reregulation of independent lien:

- Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (hereinafter ‘CRR Regulation’); and
- Decree No. 20/2015 (VI. 29) by the National Bank of Hungary on the forint maturity match of credit institutions.

In relation to minimising exposure resulting from mortgage lending, Article 402 (3) of the CRR Regulation, which is directly applicable in EU member states, specifies non-accessory independent mortgage liens. This fact alone encouraged Hungarian legislators to reregulate independent lien.

However, an even more compelling argument was the uncertainty arising under the CRR Regulation as regards the assessment of separated lien, created by the Civil Code, since it was unclear whether or not domestic mortgage lenders could invoke the CRR Regulation’s clause on exemptions from ‘limits to large exposures’³⁵ in applying separated lien. Invoking the exemption clause of the CRR Regulation for the purposes of providing mortgage loans to financial institutions for which they refinance securities is an important competitive advantage for mortgage banks. The CRR Regulation does not recognise the concept and institution of separated lien, which used to be an accessory mortgage arrangement. Accordingly, mortgage banks applying separated lien in their refinancing activities were running the risk of violating the ‘limits to large exposures’.

The need to introduce the other item of legislation, namely Decree No. 20/2015 (VI. 29.) of the National Bank of Hungary, arose after the compulsory conversion of long-term foreign currency-denominated consumer mortgage loans into HUF,³⁶ which resulted in the Hungarian banking sector’s need to secure stable long-term HUF resources. Since the term to maturity of the overwhelming majority of consumer mortgage loans converted to HUF was over 10 years, a maturity mismatch between mortgage loans and deposits gave rise to a systemic risk, due to deposit-financed lending. That was because banks had no other choice after HUF conversion than to finance their existing mortgage exposures from deposits placed with them. The National Bank of Hungary intended to manage the resulting liquidity risk by requiring banks to secure stable funding in HUF.

³⁵ Based on this, the exposure of an institution falling under the CRR Regulation to another institution must not exceed 25% of its eligible capital.

³⁶ Mandatory conversion to HUF was laid down by Act LXXVII of Act LXXVII of 2014 on the settlement of matters relating to the currency conversion of certain consumer loan agreements and to interest rate rules.

Decree 20/2015 (VI. 29.) of the National Bank of Hungary provides that banks are required to secure stable HUF funds of up to 15% relative to their total mortgage exposures. They are also obliged by the Decree to comply with this requirement in respect of existing mortgage loans. The Decree thereby prescribes the duty to engage adequately stable funds to cover the financing of long-term retail mortgage loans.

The NBH Decree seeks to strengthen the Hungarian banking system by ordering banks to cover long-term assets with long-term liabilities. Reducing the mismatch between maturities in this manner encourages banks to finance their exposures by issuing mortgage bonds or from refinancing loans secured by mortgage bonds rather than from deposits, as the former two are recognised as long-term liabilities. That is because the criteria laid down in the Decree are at present only met by mortgage bonds and refinancing resources obtained from mortgage banks. All this can also reduce the costs of domestic credit institutions, since the interest on mortgage bonds and refinancing loans tends to be lower than the costs of the funds used at present. In this way, price competition in the mortgage loan market can intensify, which can in turn improve the availability of funds and increase lending volumes.

Since separated lien was not an adequate form of security in relation to the transactions that the NBH Decree identified as desirable, the need to reregulate independent lien appeared.

2 Major Hallmarks of the Reregulated Non-Accessory Lien

It was justified by economic needs that, in 2016, Hungarian legislators amended the rules on lien laid down in the Civil Code. Those amendments were made in Act LXXVII of 2016 on amending Act V of 2013 on the Civil Code.

The most significant new feature of the 2016 amendment is the reregulation of independent lien.³⁷ It is important to emphasize that it is not identical to the independent lien regulated by Section 269 of the Civil Code of 1959. In the course of the reregulation, the instruments contributing to the protection of the pledger owner (e.g. limitation of the restriction of objection, codification of the collateral agreement) while maintaining the advantages of independent lien (transferability, flexibility) again came to the fore. It is an important guarantee rule that an independent lien may only be established by financial institutions, and it can be transferred only to financial institutions. It is also a substantial change compared to the rules of the 1959 Civil Code that an independent lien may only be established in the form of a real estate mortgage. It corresponds to foreign models (*Grundschuld* in Germany, *Schuldbrief* in Switzerland), and also to the traditions of Hungarian legal history (land debt).

The amendment of the Civil Code also allowed financial institutions to transform their existing accessory liens into non-accessory liens. Special rules apply to non-accessory lien

³⁷ For more details on the reregulated non-accessory lien see Balázs Bodzási, 'Reregulated Non-accessory Lien in the New Hungarian Civil Code' (2017) 58 (2) Hungarian Journal of Legal Studies – Acta Juridica Hungarica 206–223.

created by transformation, which is not identical to the independent lien created by conversion as regulated in Section 5:100 (9) of the Civil Code. First, it may not be used subsequently for any purpose other than the original purpose of the security.

The independent lien reregulated by the 2016 amendment of the Civil Code differs from the former independent lien in several aspects. The major differences are summarized as follows:

- only financial institutions may be holders of a reregulated non-accessory lien;
- only real estate may be the subject of a reregulated non-accessory lien;
- the non-accessory lien encumbers the real estate up to a specific sum in any event, but does not extend to the associated costs in excess of that amount;
- no limitation of objection may be applied i.e. the pledger may enforce his objections also against the *bona fide* buyer of the non-accessory lien;
- the new provisions protect personal debtors as well;
- the parties entering into a security agreement, the mandatory substantive elements of which are laid down by the Civil Code, is a precondition of exercising the right to obtain satisfaction associated with the non-accessory lien ;
- the owner's non-accessory lien is also recognized by the Civil Code as a valid instrument.

In our opinion, the reregulated independent lien is an appropriate legal instrument to promote lending, aiming at responding to economic needs for boosting the domestic market of mortgage bonds. However, the application of non-accessory lien has greater potential, e.g. in combination with the instrument of trust and, as a result of that, in offering new refinancing techniques to the Hungarian banking sector.

VII Summary

Overall, when examining the regulation of lien in its entirety, analyzing the economic background and taking economic needs into account are unavoidable.

Business and commercial lending has been the regulatory model for the modern regulation of lien for 150 years, though credits provided to consumers have also been taken into account.

However, a distinction should be made – even within corporate lending – between credits provided to large international companies, to the domestic small and medium-sized enterprises and to farmers. The types of credit belonging to various groups differ significantly, and thus require different securities.

One of the most important differences between business and non-business credits is the extent to which the legal system allows the marketability of the securities associated with them. Consequently, the two main legal policy objectives are to increase the marketability of lien, and to protect the owner of the pledged property.

It is an important economic expectation in the field of business and commercial lending to make it as easy as possible to transfer the claims secured by lien. Furthermore, the legal

instruments serving the purpose of increasing the marketability of lien should be established. By contrast, as regards the retail and consumer loans, the interests of the owner providing the security come to the fore, consistently with the increased protection of personal debtors qualifying as consumers.

Legislators should aim to facilitate the conditions of obtaining credit i.e. to make lending cheaper and faster. Hungarian legislators have been guided by that economic policy objective since the second half of the 19th century. It is closely associated with the fact that, traditionally, the Hungarian economy requires capital. However, this legal policy objective also takes into account the general economic experience that a 1percent corporate credit growth results in a GDP increase of between 0.5 and 2 percent.³⁸

³⁸ Kovács Levente, 'A bankszektor helyzete és kihívásai 2013-ban' in Kerekes György (főszerk.), *Magyar Pénzügyi és Tőzsdei Almanach 2013–2014* (XXIII. évfolyam, TAS-11 Kft. 2013, Budapest) 72.

Elizabeth Hirst*

The International Rail Registry and the Luxembourg Rail Protocol

How Global Registration Helps Governments, Financiers and the Rail Industry**

In this paper I will talk about the operation of the International Rail Registry, the global need for transportation finance and the benefits that flow from the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock ('the Rail Protocol')¹.

Because the concept of registration is intrinsic to the Cape Town Convention, the International Rail Registry is a fundamental element of the Rail Protocol. As the architects of the Cape Town Convention recognized, a single global registry open to search on the internet helps to bring both certainty and transparency to this new system of rights for financing mobile assets.

In 2014, Regulis SA, a subsidiary of SITA,² was established in Luxembourg with the sole purpose of developing and operating the Rail Registry pursuant to the Convention and the Rail Protocol. An important consideration in awarding the contract to operate the Registry for an initial term of 10 years once the Protocol enters into force was SITA's track record in establishing the International Aircraft Registry. This has been run by another SITA subsidiary, Aviareto, for over ten years.³ By any measure, the Aircraft Protocol and its Registry has been a phenomenal achievement. Over a twenty-year period, the Aviation Working Group

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¹ The Rail Protocol is available on UNIDROIT's website at: <www.unidroit.org/instruments/security-interests/rail-protocol> accessed 23 August 2018.

² Aviareto Ltd, the operator of the International Registry of Interests in Aircraft Equipment, is a member of the SITA group of companies <<https://www.sita.aero/>> accessed 23 August 2017.

³ Arts. 16–26 of the Convention; Arts. XII–XVII of the Rail Protocol.

estimates it will save the air transport industry USD 161 billion. Take-up is still growing, and since the International Aircraft Registry first started work in 2006 it has recorded over 750,000 registrations in total.⁴

As the Rail Protocol advances, the International Rail Registry is fortunate in being able to draw on the Aircraft Registry's experience to establish a global, online record of security interests⁵ which, in turn, helps to improve the availability of capital for rail rolling stock and the efficiency of the rail market around the world.

Like its counterpart in aircraft finance, the new International Rail Registry will be accessible through the internet 24 hours a day, 7 days a week, allowing potential creditors to check any rival claims to the railway equipment being financed.⁶ When the Rail Protocol enters into force, creditors' international interests registered in the International Rail Registry will have priority, in almost all cases, over any and all unregistered or subsequently registered *in rem* interests.⁷

As Howard Rosen and Benjamin von Bodungen have noted 'The novel registration system will be particularly helpful in respect of railway rolling stock which operates in more than one jurisdiction because it resolves the present cross-border legal issues which arise in the case of security interests created under one law being challenged in the courts of another jurisdiction where the asset is physically located.'⁸

The aim of the Rail Protocol and the International Rail Registry is to create a more favourable climate for train finance by reducing risk, leading to improved private credit for railways worldwide.

I Demand for Transportation Finance – Bridging the Investment Gap

The need for the Rail Protocol and Registry is reflected in a wider pattern of unmet demand for transportation finance around the world.

In the case of railways, networks and operators face two issues. The first is that railways are moving away from being subsidy-dependent national services, with many are developing cross-border international operations that have commercial potential. The second is that there is a gap between demand and supply of funds, which infrastructure generally is facing around the world.

⁴ *International Registry of Interests in Aircraft Equipment, Eleventh Annual Statistical Report*, 1 January 2016 – 31 December 2016 (published February 2018).

⁵ Registerable 'international interests' are defined as being security interests in relation to the legal positions of a conditional seller under a title retention agreement, a lessor under a leasing agreement or a chargee taking security in an item of railway rolling stock under a finance agreement.

⁶ The International Aircraft Registry is discussed in John Atwood, 'The Cape Town Convention: The New Dublin International Registration System in Practice' (2011) 43 (2) *Uniform Commercial Code Law Journal* 637–653.

⁷ Art. 29 (1) of the Cape Town Convention.

⁸ (2015 November) 46 *Uniform Commercial Code Law Journal*. It should also be noted that it is not a requirement under the Cape Town Treaty for the creation and registration of an international interest in railway rolling stock that such equipment moves cross-border.

In setting up the International Rail Registry to support the Luxembourg Rail Protocol, the aim is to help bridge the gap between what the world needs in terms of transportation, and what governments can afford to fund directly at the moment.

Over the next 15 years, the Global Commission on the Economy and Climate reckons that the investment gap – the difference between current demands for infrastructure and projected spending – will amount to between 39 and 51 trillion US dollars.⁹ This analysis comes from McKinsey, which was asked to investigate how to mobilise private-sector financing for sustainable infrastructure. The higher of their two estimates forecasts what would happen if China reduced its investment in infrastructure to that of the rest of the world over the period in question. The result is a gap of roughly 3.4 trillion US dollars a year. The more optimistic of the two estimates is based on a global increase in investment of 4.3%. This is called the ‘aggressive investment-growth scenario’ and, if you look beyond the average investment rate, you will see why. In order to achieve this average, the authors note that China would have continue increasing investment at 13% a year for fifteen more years, which would still leave an investment gap of around 2.6 trillion US dollars a year.

II Growing Demand for Rail

Transport accounts for about a third of the demand for investment, with rail projects representing quite a sizable share – for fairly obvious reasons.

Rising international trade has inevitably resulted in an increasing number of international rail projects; either to join up the existing trade routes of one nation with another or to forge entirely new routes to transport people and goods across continents. China’s railway, for example, will be five times its 1950 size by 2020.¹⁰

The impact of rapid urbanisation is also putting pressure on passenger transportation. Many countries now need to improve their metro and train services within and between cities. Already, cities account for more than half the world’s population and, by the middle of the century, we can expect another 2.5 billion people to move in from the countryside, creating greater demand for inter-urban rail and metros.

All this transport must be more sustainable than ever. The popularity of railways reflects a growing need for mobility to have a less damaging impact on the environment. If you count the number of railcars and locomotives in the world now, it adds up to somewhere between 4 million and 6 million units of rolling stock.¹¹ Even with the constraints on investment, the overall market for new trains is growing by about 2% to 2.5% a year.

⁹ McKinsey & Company (2016). Financing change: How to mobilize private-sector financing for sustainable infrastructure.

¹⁰ Reuters, 9 Januar 2014.

¹¹ Roland Berger for UINIFE the Association of the European Rail Industry; Worldwide Rail Market Study – status quo and outlook 2017.

III Positive Return on Investment in Rail

We know that the world needs more railways. And we know that well-planned extra transport capacity has proven and positive economic benefits. As the authors of a joint International Bank of Reconstruction and Development and World Bank report noted, ‘well-run railways do the “heavy lifting” of economic development, offering capacity at a cost much lower than road transport’¹². Standard and Poor’s analysts believe that their estimates are on the low side – even so, they calculate that the multiplier effect of infrastructure overall is a ratio of 2.5 for every 1% of GDP invested.¹³

This potential growth is being constrained by the availability of resources, however. Governments cannot fund everything, and the European Investment Bank says that public infrastructure investment has declined by half over the past 50 years. Europe’s governments spent about 5% of GDP in the 1970s. Now it’s about 2.5%.¹⁴

Inefficient use of capital is a stumbling block in any market, let alone one so fundamental to improving a nation’s infrastructure and so capital-intensive as rail. So, could some further investment come from the private sector? Now, private investors spend around 1 trillion to 1.5 trillion US dollars a year. McKinsey thinks that this contribution can be expanded. In their work for the Global Commission on the Economy and Climate, they looked at current projects and at the additional demand. In their evaluation, private institutional investors could fill up to half the financing gap if they can identify projects that are bankable and sustainable.

The Luxembourg Protocol and the International Rail Registry acts as an economic stimulator that does not tie up public funds. Being able to diversify the source of funds, offering investors a means of reducing risk, or supporting a leasing market for capital equipment all represent major advantages. Financiers, train manufacturers, railway operators, and national governments, all would benefit from greater market transparency and a more ready supply of capital, which the Rail Protocol and International Rail Registry supports.

For Hungary there are benefits both in relation to domestic financing of railway equipment, by reducing risk and cost, as well as from protecting rolling stock operating outside of Hungary where the debtor is based here.

¹² *International Bank of Reconstruction and Development/World Bank*. Freight Transport for Development Toolkit – rail freight (2009).

¹³ Standard and Poor’s, Jan 2015, Economic Research: Global Infrastructure Investment: Timing Is Everything (And Now Is The Time) <[http://www.tfreview.com/sites/default/files/SP_Economic%20Research_Global%20Infrastructure%20Investment%20\(2\).pdf](http://www.tfreview.com/sites/default/files/SP_Economic%20Research_Global%20Infrastructure%20Investment%20(2).pdf)> accessed 15 October 2017.

¹⁴ European Investment Bank, ‘Private Infrastructure Finance and Investment in Europe’ (2013) EIB Working Papers 2, <<http://www.eib.org/infocentre/publications/all/economics-working-paper-2013-02.htm>> accessed 15 October 2017.

IV Defining and Identifying ‘Rolling Stock’ – a Broad Potential Market

The definition of ‘rolling stock’ under the Rail Protocol is a broad one. It covers conventional trainsets, locomotives, multiple units and railcars. Globally, that is already a 57 billion US dollar business each year, just for new rail equipment alone. But the Rail Protocol also covers any vehicle which moves ‘on a fixed railway track or directly on, above or below a guideway’. So metro and urban light rail vehicles are covered. Mining equipment which runs on rails is covered. Even rail-mounted crane gantries at a port are covered, and given that the unit price of each of these may be between \$5 and \$10 million US dollars, there is also scope for attracting additional investment in this market.

Partly because the Rail Protocol covers such a broad range of equipment, and partly because (unlike aviation) there is no common global standard for numbering railway rolling stock, the Registry will issue a completely unique, permanent number for each unit financed and registered under the Protocol.

The new system will bring the rail industry into line with other markets for the first time. Cars, telephones, computers and aircraft all work under a dual numbering system – a unique asset identifier which never changes, as well as a non-permanent name or number. A car will have a registration or number plate and a chassis number; the number plate may change but the chassis number never does. An aircraft will have a permanent MSN Serial number, but its tail number changes. The rail industry, however, has tended to use numbering systems which relate to the operation of the train. Generally known as a ‘running number’, this is like the registration number for a car, and can be changed if the rolling stock is leased or sold, for example, to another operator, making it unsuitable as a basis for registration. Furthermore, the broad definition of mobile equipment within the scope of the Rail Protocol goes beyond heavy rail trains to include rolling stock for metros, monorails, ports, mines and all sorts of light rail systems.

There is currently no permanent unique asset numbering system in this market, hence the need to establish the Unique Rail Vehicle Identification System (URVIS). URVIS numbers will be issued by the Rail Registry, either individually or in blocks for manufacturers, and will then be attached to each unit of rail rolling stock and used to register international interests.

Rail manufacturers say that this new system would be beneficial in its own right, as an aid to tracking assets, and would certainly be helpful in allowing financing to be registered before a new train enters operational service.

V Purpose of the International Rail Registry

An International Registry is essential to each and every Protocol of the Cape Town Convention¹⁵. As Sir Roy Goode elegantly put it,

the central features of the Cape Town Convention are the easy creation of an international interest, by security or title retention, with a set of basic default remedies and the ability to secure fast provisional relief; the establishment of an international public register to record these interests, operated by a Registrar under the supervision of a Supervisory Authority; and a simple set of priority rules based on the principle that a registered interest has priority over a subsequently registered interest or an unregistered interest and is protected from the general body of creditors in the debtor's insolvency.¹⁶

Under the Rail Protocol, creditors will be able to register their international interests in the International Rail Registry and such interests will then, in almost all cases, take precedence over any and all unregistered or subsequently registered *in rem* interests.¹⁷

The centrality of the Registry to the Rail Protocol is significant at a time when advanced economies are re-learning how valuable documenting assets and transactions are to the creation of credit. The banking crisis of recent years has revealed to investors and governments, or rather reminded them, of the importance of registration. Undermining the reliability of the records that guarantee or make credit trustworthy can put a market in jeopardy because it is precisely these records that establish who holds the risks. As many financial institutions and their debtors have discovered, not having reliable information and clear priorities reduces confidence, which in turn leads to a contraction in credit, fewer or smaller transactions, and a decline in demand.

VI Regulations Relating to the Registry

Having carefully defined the remit of the International Rail Registry and the role of the Registrar, the Cape Town Convention also establishes the legal basis for creating Regulations, which then set out the main requirements for the Registry itself.¹⁸ The provisional Supervisory Authority¹⁹ has an important role during the next stage of the Rail Protocol's

¹⁵ Currently there are Protocols for Aircraft, Railway Rolling Stock, Space and Agricultural, Construction and Mining Equipment (known as 'MAC').

¹⁶ Roy Goode, 'Contract and Commercial Law: The Logic and Limits of Harmonisation' (November 2003) 7.4 Electronic Journal of Comparative Law.

¹⁷ Art. 29 (1) of the Convention.

¹⁸ Regulations for the International Registry pursuant to the Luxembourg Rail Protocol – Article 17(2)(d) of the Cape Town Convention.

¹⁹ The Preparatory Commission for the Rail Protocol is the provisional Supervisory Authority at this stage.

entry into force in revising and clarifying detailed Regulations so that the Rail Registry can become operational and maintain parity with the Aircraft Registry in the most effective way possible. Whilst the Rail Registry Regulations set out the broad requirements, these also allow for a further level of detail and definition to be established for significant functions. This will include the Registry's own detailed operating procedures and risk management systems; drawing on best practice and the experience of the Aircraft Registry to put these into effect.

Currently the Regulations governing the International Rail Registry are in draft form.²⁰ These will be modified and adapted further as ratification of the Rail Protocol advances, and entry into force is anticipated. This is helpful to the development of the Registry, as it allows rules and procedures to adapt as system development takes place.

VII Role of the International Rail Registry

The role of the International Rail Registry is to provide investors with certainty that their interests are visibly recorded, which allows, in almost all cases, that they have priority over interests filed at a later date. The Rail Protocol covers;

1. Lessors under a lease,
2. Creditors under a secured loan, and
3. Vendor's rights under a conditional sale where title to the rolling stock is retained.

The International Rail Registry allows verified registry users to make, amend and discharge registrations as required by the Regulations. It is a single global registry, so there is only one place of record. It operates entirely online, without paper, and the electronic record is definitive. And each item of rolling stock is identified uniquely using a global numbering system issued by the Registrar.

Within the Registry, the onus is on the applicant to ensure that information being registered is accurate. The Registry is then open to public inspection so that other parties can check and, if appropriate, challenge any notices that are recorded. Back in 1999, Ronald Cuming outlined how this principle means that the Registrar is not expected to review or assess the legal adequacy of registrations, nor to police parties' rights:

While the registrar has the obligation to ensure that the registry regulations are followed, he or she should have no obligation to verify registration information submitted by a registrant or confirm the source of that information. In any event, when the international registry provides for electronic remote access facilities...there is no opportunity for human intervention between the submission of registration data and their entry in the registry database.²¹

²⁰ UNIDROIT <<https://www.unidroit.org/english/conventions/mobile-equipment/registry-rail/draft-regulations-20160222.pdf>> accessed 10 October 2017.

²¹ Ronald Cuming, 'Considerations in the Design of an International Registry for Interests in Mobile Equipment' (1999) 4 Uniform Law Review 275, 280.

VIII Access to the Registry

Under the Protocol, the role of the Registrar is to provide a secure and reliable system, and to control access to the registry for account holders, but not to assess the legal adequacy of registrations, or to police parties' rights.

Before access is granted, therefore, Users are individually identified, authorized and verified when they apply to hold an account with the Registry. Each User of the Registry is then responsible for making sure that their registrations are accurate.

Users are enrolled electronically and, once they have access to the Register, registrations are made online. We anticipate two types of users, namely;

1. Transacting Users – who are the parties to the financing.
2. Professional Users – typically their legal advisers.

The Rail Registry must strike a balance between accessibility and security in order to provide its core function of being a reliable system of record available 24 hours a day, seven days a week over the internet. In the event of any change to the Registry, it is vital that the User's identity has been verified and that the consent of the named parties to the transaction has been given under authorization. Controls are necessary even for users who are simply searching for information, and particularly so for those who are making or amending registrations or those who are consenting to a registration.

Access to the Registry recognises that parties to transactions may wish to use intermediaries to undertake registrations. This structure gives rise to more than one possible route for notices of international interests to be recorded in the Registry, most typically either:

1. Directly, by one of the 'named parties' to the transaction. In this case a company verified as a Transacting User Entity (TUE) by the Registrar authorizes an administrator who then may enter the registration or authorize another employee to do so, or;
2. Via a professional adviser, such as a law firm. In this case the firm becomes a verified Professional User Entity (PUE) and its administrator and authorized Users make registrations on behalf of one or more Transacting User Entity, having being authorized to do so, on an object-by-object basis, by that Transaction User Entity or Entities.

Whatever the starting point of the registration, it only takes effect once all the relevant information is entered and the consent of all named parties is given under authorization. Users are responsible for making sure that claims have been properly registered with the correct details, and for generating a priority search certificate. Once a registration has been made and confirmed, it appears on the Register where it is open to search by anybody.

IX The Role of the Administrator

In order for a person to make, or change, registrations in the Rail Registry each User must be individually identified, authorized and verified beforehand. Whether they are a Transacting User Entity or Professional User Entity, each organisation must identify an Administrator,

whose role and responsibilities includes approving and authorising any further individuals as Users, and removing Users from the account, if they no longer work for the firm, for example.

X The Registration Process

Once Users are verified, they can make, amend and discharge registrations.

The process is a simple one;

1. Step one is that information is entered into the system.
2. It then needs the consent of all named parties to a transaction for the registration to take effect; this is done electronically through the Registry by authorized Users of the respective organisations.
3. Users are responsible for making sure that claims have been properly registered with the correct details, and for generating a Priority Search Certificate once registration has taken place. This is date stamped and is an important last step.
4. As well as a Priority Search, an informational search can also be made at any time.

The Aircraft Registry has been providing a broadly similar role for a number of years now. This experience shows that Priority Searches and Registrations tend to go hand-in-hand, and that the numbers of both have been rising steadily over time.

XI Regulations – Keeping Pace with Technology

In her study of what has made the Aircraft Registry such a success, Professor Jane K. Winn notes

The drafters of the Convention wanted the International Registry to be built on the foundation of current electronic commerce best practices. As a result, the use of information technology has evolved organically within the Convention's framework.²²

This will continue to be the case, and nowhere more so than in the areas of Registry security and the verification of users. Changes to browser technology, to the type of devices that we all use to access the internet, and to the way we make secure transactions in banking, shopping and other spheres will affect both the technology available to the Registry and the expectations of its users. It is to be expected that advances in technology in future may require a change in the Regulations in order for these new developments to be best used by the Registry. Equally, to meet a change in the rules, the Registrar may need to draw on alternative technology. It is helpful in this regard that the Registrar and the Supervisory Authority are

²² Jane K Winn, 'The Cape Town Convention's International Registry: Decoding the Secrets of Success in Global Electronic Commerce' Cape Town Convention Journal, Forthcoming University of Washington School of Law Research Paper No. 2012-11.

both under an obligation to keep the Regulations under review, and that there is a means of making urgent changes should these be necessary. With a wholly electronic registry, the relationship between rules, procedures and technology will always be closely coupled, and the evolutionary approach first spotted by Professor Winn will continue.

XII Next Steps

As well as promoting ratification in key countries such as Hungary, work is continuing to make sure that governments, the legal profession and the rail industry are briefed, and to seek their feedback. Clear benefits derive from implementing the Rail Protocol in developing and established economies alike. As Howard Rosen has said ‘This is a major step forward for the rail sector which traditionally – and unlike the aviation sector – has not benefitted from the opportunity of publicising creditors’ security interests in national railway rolling stock registries’²³. We look forward to establishing an International Rail Registry which can encompass the registration of international interests and the voluntary registration of sales transactions, as well as evolving to provide additional ancillary services in this important market.

²³ Howard Rosen, ‘The Luxembourg Rail Protocol: a Major Advance for the Railway Industry’ (2007) 12 (3) Uniform Law Review 427–428.

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