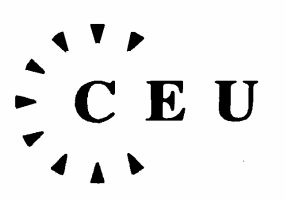

REVISION OF THE CONTRACT BY THE JUDGE
COMPARISON BETWEEN ENGLISH AND HUNGARIAN LAW

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Abstract

The main aim of this thesis is to analyze how the legal systems implement the notion of contractual freedom and what restrictions they are able to support through not written but judge made law to it. The present research will focus on contractual freedom and how its predominance is transmitted through the discretion power of the judge in two different legal systems as Hungarian and English.

Finally the present paper poses the question and tries to find an answer which legal system is more efficient, better to be abided by the people and if any further conclusions maybe drawn from the present comparative analysis.

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Introduction

As the starting point when commencing to read this paper I kindly invite the reader to consider the following words of Saint Thomas Aquinas: "…justice is such a virtue which requires you to give everyone what is due to him and to refrain from illegality."[1]

The methodology what used in this thesis will be comparative analysis. The comparative analysis leads the reader first of all through the historical background in order to emphasise the development and origin of the particularities of both legal systems. Then it presents the two states' court system in the light of the way of an appeal against a judgement made by lower courts. As the body of the thesis the concrete approach of the courts is presented by two pairs of case studies followed by a comparative evaluation. Furthermore critics on the court system from contemporary press are compared in order to gain up to date information about the practice.

[1] Hörcher Ferenc – Péteri Zoltán – Takács Péter: Állam-és Jogbölcselet, Kezdetektől a felvilágosodásig. Budapest, 1997, pg 64

1. Historical comparison of the civil procedure and the law in force

In order to better understand the system of jurisdiction the parallel historical development is an important element to be examined. It is well known not only for lawyers that although thanks to the European harmonisation of laws a general common approach can be detected, the legal principles which govern the civil procedure in the continental Europe are somewhat different from the ones in the territory of common law. This is to advise the reader that when using English system, the governing law of England and Wales shall be understood.[2] The English system was established upon the so called "adversary system" or "contradictory system"[3]. Both expressions demonstrate the significant difference between them and the continental civil procedure mainstream which has been named after a terminus technicus from criminal law; "inquisitorial" procedure and regulates the relationship between the parties and court mores strictly, respectively it gives much more authority leading the flow of the procedure for the judge.

1.1. Hungary

1.1.1. Evolution of the Hungarian civil procedure

Although there aren't that many sources regarding Hungarian laws from the early medieval ages, based on the writings of Gardezi we can state that purchase agreements were a common contract in the 9th century. From the remained sources it can be stated that the procedures on civil matters were started upon private request although the criminal and civil procedure wasn't divided at that time. The parties were entitled to conclude an agreement during the procedure anytime. After the

[2] http://en.wikipedia.org/wiki/English_law, 11th March 2008

regnum of consuetudo (customs based law) in the 15th – 16th century the common heritage of Europe, the reception of Roman law has been extended in Hungary too. [4]

At the end of the 15th century thanks to the endeavours for a legal order of the Hungarian fair-minded King Matthias the sections of the litigation procedure have been separated and the oral hearing became common. The formal evidence has gradually lost its proving force. The reception of the Roman law has called forth the national aim to collect the particular customs. In these circumstances has Werbőczi István summarized the consuetudo municipalis, the followed customs, in his main work, Tripartitum which however never become statute as the king has never given his consent to it. The Tripartitum has firstly mentioned the possibility of appeal in court cases to the higher court. A legal particularity was that an agreement could have been reached after the verdict has been delivered by the court too. Later in the 17th century the so called Corpus Juris Hungarici integrated the customs regarding governing laws and procedure. In the Habsburg times the written and oral, respectively criminal and civil litigation has been definitely divided, but it was of course still pressed by feudalistic features like that exclusively nobles had the right to file an appeal with the Curia, the King's Highest Court. One of the headstones of the modern civil procedure law was the Act nr. 54 from 1868 which winded up the customs based procedural laws and codified the most important provisions e.g. the rules of appearance before the court and the rules of venue.[5]

The first Hungarian Civil Procedure Code was issued in 1911 and entered into force in 1915 thanks to the amplifying challenges of modern social and political environment and the development of independent Hungarian language jurisprudence, especially thanks to the work of Plósz Sándor. The reform was based on taking references from modern European codes like German, French and Belgian. Hungarian lawyers were eager on making comparison between the

[3] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben. Osiris Kiadó, Budapest, 2003; pg. 75

[4] http://www.ajk.elte.hu/Tanszekek/Majt/Magyar%20JogtorteNET/index.htm, 17th March 2008

new code with products of developed European countries and to take from those legal acts the provisions and solutions which were the most tailor made for the domestic legal views. Naturally the principle of oral hearing and free considering of evidence got place in the wording of that legislation. In the lack of any agreement between the parties the court was delivered the verdict. Three different types of revision were defined in the law.[6]

1.1.2 Act III from 1952 on civil procedure

The present law in force, Act III from 1952 on civil procedure (hereinafter called as "PP") has been enacted during the soviet era; however despite the strong unimportant communist view of contract and low protection of private ownership it fulfilled the requirements of the modern society at that time.

The PP declares in §1 that its objective is to secure the unprejudiced decision and fair trial of the disputes lead before the court in accordance with the main principles defined herein. In the §2 when listing the court's tasks during litigation it says that the court shall protect the parties' rights to have their case fairly decided within a reasonable time. [7] Furthermore through the amendment of 2003 it also says that none of the parties may refer to the undue protraction of the process who has contributed to that protraction with his or her actions or declarations. This might sound unfitting right at the second paragraph of the code within the tasks of the court, but it has been included because of factual grounds. The ground was namely that a high percentage of the cases brought before the court did not terminate even after seven-eight years. The law prescribes that in case of lack of a judgement within a reasonable time the party or parties are entitled to a remedy. Further basic principles are defined in the following paragraphs, as: the constitutional

[5] http://www.ajk.elte.hu/Tanszekek/Majt/Magyar%20JogtorteNET/index.htm, 17th March 2008
[6] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben. Osiris Kiadó, Budapest, 2003; pg. 148 - 188

right to party autonomy, thus a procedure is launched upon petition of a party concerned; that the statements of the parties' shall be evaluated upon their content and not upon their form and free consideration of evidence.[8] § 3 (6) declares the principle of arms that the court shall warrant to the parties that they have learnt about all relevant documentation and had the opportunity to make any statement within the prescribed deadline. In §8 the PP stipulates that the court shall warrant the right of the parties and all participants involved that they can fulfil their obligations connected to litigation and exercise their rights according to the rule of law. Also the court is obliged to prevent any conduct which would be contrary to litigation in good faith. § 8 (2) also highlights that the court shall warn the parties to litigate in good faith.[9]

In order to keep the proceedings in a reasonable time limit the PP uses time limits to be abided by both the judges and the parties involved.

1.2. England

1.2.1. Evolution of the English civil procedure and historical legal frames

Although the roots of common law stretch further before in time, the altering of the English system from civil law systems in general maybe also reasoned by the geographical semi isolation of the "foggy Albion" and the fought independence from the medieval Roman Catholic Church by King Henry the VIII founding the independent Christian Anglican church. Kengyel refers to Sir Jacob who ascertained the following when trying to explain the origin of this different aspect: "It was not the creation of statute nor was it implanted as the result of a doctrinal choice of other

[7] 1952. évi III törvény a polgári perrendtartásról, CompLex DVD Jogtár
[8] Kommentár a 1952. évi III törvény a polgári perrendtartásról szóló törvényhez, CompLex DVD Jogtár
[9] Kommentár a 1952. évi III törvény a polgári perrendtartásról szóló törvényhez, CompLex DVD Jogtár

methods of procedure but rather it grew and developed out of the soil, responding in a practical way to the social, political and cultural needs of the people."[10]

When examining the English system we have to bear in mind some historical statements - highlighted by one of the most visited internet sources, wikipedia - as the essence of English common law is that it is made by judges sitting in courts, applying their common sense and knowledge of legal precedent, respectively the legal notion: stare decisis to the disputes brought before them. Historically, the Norman Conquest of 1189 influenced entirely the development of law in England. Nevertheless some legal concepts of Islamic law can be discovered in the common law too. The legal transfers were well known on the island and trade was well developed in the medieval ages also. The judiciary responsible for the resolving of legal disputes had to operate within the writ system.[11] In 1253 when an act of the Parliament prevented the judges to invite more writs the equity system, referring to common sense and common understanding came into foreground.[12]

The English common law system as there was no major codification of the law, it functioned as a system of binding judicial precedents, binding writs and applying common sense- thus equity.[13] Nevertheless it has to be mentioned that there were several endeavours for summarising the law in England, amongst them, William Blackstone and his work "Commentaries on the Laws of England" from the late 18th century was one of the most comprehensive writings.[14]

In English law we don't find that many acts, regulations or other Parliament or government made legislative tools as in Hungary. However it is interesting to mention that the ones the Parliament once enacted are more respected, a good example for this is that three sections of Magna Charta,

[10] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben. Osiris Kiadó, Budapest, 2003; pg. 82
[11] http://en.wikipedia.org/wiki/English_law, 11th March 2008
[12] http://en.wikipedia.org/wiki/Equity_(law), 25th March 2008
[13] http://en.wikipedia.org/wiki/English_law, 11th March 2008

originally signed in 1215 and a landmark in the development of English law are still existent. As the Parliament developed in strength with time and subject to the doctrine of separation of powers, legislation gradually overtook judicial law making so that, today, judges are only able to innovate in certain very narrowly defined areas through equity. Contrary to the civil law system where the predictability of the decisions was objected by casualistic provisions of laws and detailed codex, in common law the standardised procedure emerged from the precedent system in which frames cases with the same ratio decidendi which will bind all future cases, respectively courts both horizontally and vertically. The system of appellate courts improved already quite eraly and the highest appellate court in the UK became the House of Lords which decisions are binding on every other court in the hierarchy which are obliged to apply its rulings as the law of the land.[15]

1.2.2. The Civil Procedure Rules of 1998

The English civil procedural law has gone through a significant change connected with the reforms made by Lord Woolf, the Master of Rolls in the late 1990's mainly in order to avoid the protraction of civil proceedings.[16] The Civil Procedure Rules 1998 currently in force (hereinafter called as "CPR") are the rules of Court governing civil cases in the Court of Appeal, High Court and County Court in England and Wales. The CPR were designed to improve access to justice by making legal proceedings cheaper, quicker, and easier to understand for non-lawyers. Unlike the previous rules of Civil procedure, the CPR commence with a statement of their Overriding Objective, both to aid in the application of specific provisions and to guide behaviour where no specific rule applies.[17]

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[14] http://en.wikipedia.org/wiki/William_Blackstone, 25th March 2008
[15] http://en.wikipedia.org/wiki/English_law, 12th March 2008
[16] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben. Osiris Kiadó, Budapest, 2003; pg. 305-306
[17] http://en.wikipedia.org/wiki/Civil_Procedure_Rules_1998, 10th March 2008

As Lord Woolf, the father of CPR stated in his Access to Justice Report 1996 in which he identified a number of principles which the civil justice system should meet in order to ensure access to justice: be just in the results it delivers, be fair in the way it treats litigants; offer appropriate procedures at a reasonable cost; deal with cases with reasonable speed; be understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of particular cases allows; and be effective: adequately resourced and organised. Lord Woolf also viewed the litigation procedure from a more economic and market conform aspect, he listed two of the requirements of case management as: "...fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence". The second thread of the report was to control the cost of litigation, both in time and money, by focussing on key issues and limiting the amount of work that has to be done on the case.[18], [19]

The CPR introduces and describes in its first paragraphs, its innovation the "Overriding Objective" and states the following: "1.1. (1) The new CPR enables with the overriding objective the court to deal with cases justly. (2) Dealing with a case justly includes, so far as is practicable – (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."[20]

Furthermore the CPR also states that the parties shall "help the court to further the overriding objective". Additionally in § 1.4 under title Court's duty to manage cases CPR states that "The court must further the overriding objective by actively managing cases. Active case management

[18] http://en.wikipedia.org/wiki/Civil_Procedure_Rules_1998 , 10th March 2008
[19] Access to Justice Report 1996, Lord Woolf, Section I: Overview, Paragraph 1, source from http://en.wikipedia.org/wiki/Civil_Procedure_Rules_1998 , 10th March 2008

includes – (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;(d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.[21]

However is has to be remarked that the reforms didn't stop at this point and according to the Constitutional Reform Act 2005 the judicial functions of the House of Lords are to be transferred to a new Supreme Court of the United Kingdom which is planned to start in 2009.[22]

1.3. Evaluation of the similarities and differences of the two civil procedure laws

1.3.1. Historical background

The obvious basic difference between the Hungarian and English legal system is well known for almost every educated person. Briefly – because the present paper does not wish to analyse the evolution of the entire legal background - the English development through mixing writ system,

[20] http://www.justice.gov.uk/civil/ procrules_fin/contents/parts/part01.htm#rule1_3, 10th March 2008
[21] http://www.justice.gov.uk/civil/ procrules_fin/contents/parts/part01.htm#rule1_3, 10th March 2008
[22] The Law Quarterly Review, Volume 123 October 2007, Thomson, Sweet&Maxwell, pg 571-572

statutory law and equity went on its own way when the Hungarian development after the Habsburg conquest was influenced mostly by German basics and continued codifications. Nevertheless the Hungarian legal system borrowed some legal concepts from the French codification and also viewed at the alternate English way respectfully too. In the second half of the 20th century it was utmost influenced by soviet effects.

1.3.2. The law in force

In general it can be stated that although the Hungarian PP goes through amendment every year in order to comply with the challenging needs of society the English CPR is much modern and seems to be more tailor made in order to serve an efficient procedure, the prevailing of equal rights in practice and the termination of a court case quickly and relatively cheap.

Contrary to the PP which does not even mention the possibility of out of court procedure, as a novelty the CPR declares that the court may suggest to the parties to turn to alternative dispute settlement.

The CPR mentions that the parties shall also further the overriding objective and herewith it involves the parties much more into the procedure, they can feel that their actions and declarations constitute the body of the procedure and not provisions which are mostly only known by lawyers and almost independent from them. The PP works with the typical continental aspect namely that the court has to warrant the fair rights of the parties within the procedure and leaving them small autonomy. The court is even obliged to enlighten the incorrectly behaving party how to proceed in good faith. Comparing the two solutions one can state that the English way treats people more adult in a certain way and requires responsible behaviour, obeisance of law voluntarily.

Although the CPR starts to treat litigation as a business run by the judicative which has to be kept for the benefit of the people and may make one to see some parallelism between this and efficient private corporate governance. Some development toward practicality and in order to keep the time frame can be discovered in the PP too through the introducing of the remedy for the unjust protraction of a procedure.

2. System of jurisdiction

Both in Hungary and in the United Kingdom the separation of powers thus judicative, legislative and executive has been implemented. The roots of the classical doctrine of separation of powers go back in the modern European era to two scientists, one from common law and the other one from civil law territory. First it has been formulated by John Locke in his "Second Treatise of Civil Government" in 1690 that the legislative and executive powers shall be separated and secondly Montesquieu draw up in his writing "The Spirit of Laws" in 1748 explaining the separation of an additional; the judicative power too. Here it is relevant that it is a basic requirement for a democratic state that judicature is independent from the two other powers and it is also one of the constitutional warranties of the independence of the judge.[23]

2.1. Jurisdiction in Hungary on statutory grounds

It is obvious that as in other has been socialist countries in Central-Eastern Europe the real and not only formal steps towards a democratic society and system could have only been implemented after the changes in 1989/90. One of the challenges of a pluralist democratic society is the separation of the powers according to the doctrine of enlightenment, relevant here the establishment of an independently operating court system, better to say cutting off the ties which bind the socialist judicative to the government.

The tenth chapter of the Hungarian Constitution, the Act XX of 1949 is named "The organization of judicative". It lays down the ground principles to follow by other enactments of

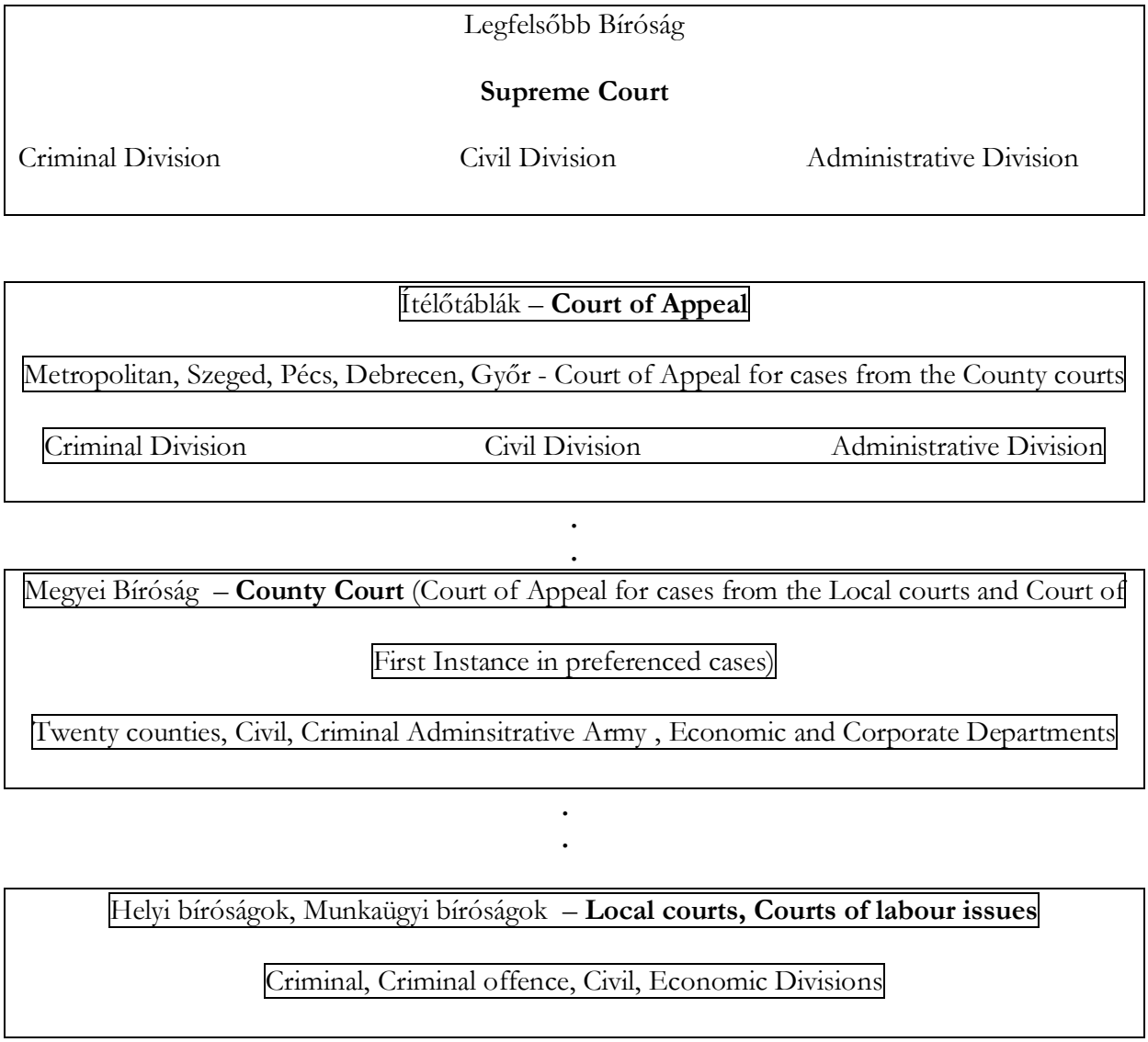
[23] Colin Turpin: British Government and the Constitution, Text, Cases and Materials. Butterworths, London, Edinburgh, Dublin 1999, pg. 40

Parliament, other decrees and regulations issued by the government. In § 47 it declares that the Supreme Court is responsible for the unified jurisdiction.[24]

Regarding the appointment of judges Act LXVII From 1997 on the legal status and remuneration of judges gives the relevant provisions. Already §48 of the Constitution stipulates that the judges are appointed by the State President, the aforementioned law gives the details of eligibility criteria and process.[25]

One main step was in 1997 that according to the law enacted by the Parliament the rights and entitlements of the Ministry of Justice have been abolished and the Országos Igazságszolgáltatási Tanács (Federal Judicative Council, hereinafter called as "OIT") has been set up. Thus it is the OIT which is liable for the proper operation of the Hungarian judicature system. The following are the members of the OIT: 9 judges, the Ministry of Justice, the public prosecutor, the president of the Hungarian Bar Association, the Judicative committee of the Parliament, one MP, additionally the president of the institution is the president of the Supreme Court.[26] The below spreadsheet will show a brief overview about the Hungarian court system.

[24] A Magyar Köztársaság Alkotmánya, 1949. évi XX. törvény, CompLex DVD Jogtár
[25] 1997. évi LXVI. törvény a bírák jogállásáról és javadalmazásáról, CompLex DVD Jogtár
[26] http://www.irm.gov.hu/download/eoitkerdesek.doc/eoitkerdesek.doc, 20th march 2008



2.2. The rule of law regarding civil procedure in the United Kingdom

In the past tens and hundreds of years the United Kingdom, in spite of Hungary, didn't have to face those radical changes in its statehood. As a particularity for the English system regarding its basic legal frames is that there is no formal document as constitution which would provide a fundamental written proof for the independence and fairness of the court as a part of one

particular document. The British constitution is a historic[27], continual constitution which means that the legal rules which make up the constitution are either statutory or rules of common law.[28] The rules which provide for the division of powers are not stated in any statutory document, nevertheless the rules are not only followed by civil servants and judges but they also make sure that those rules are obeyed by the people. [29]

However, there are certainly statutory laws which ensure the fair and just operation of the court system. The most important of those acts are: Act of Settlement of 1701, The Appellate Jurisdiction Act from 1876 and the Supreme Court Act of 1981. Those acts provide the rules of the appointment of judges too; respecting the essential requirement of political impartiality. However in order to provide a frank introduction one should bear in mind that even in the United Kingdom, especially before the Second World War appointment of judges as a reward of political services was made. An implied guarantee for a wise and impartial decision-making in England is held the fact that experienced lawyers become judges, after certain years of practical experience.[30]

Regarding the ties which bound or do not bound a jurisdiction system to the executive power, in the United Kingdom judges are appointed similarly as in Hungary by the Queen, but on the recommendation of the Lord Chancellor who is a member of the government. [31]

The organ which is responsible for the administrative tasks of the court system is Her Majesty's Courts Service (hereinafter called as "HMCS"). HMCS's principles of functioning are to provide

[27] Class notes from Professor Péteri Zoltán, Pázmány Péter Catholic University, 2003
[28] Colin Turpin: British Government and the Constitution, Text, Cases and Materials. Butterworths, London, Edinburgh, Dublin 1999, pg. 3-7
[29] Colin Turpin: British Government and the Constitution, Text, Cases and Materials. Butterworths, London, Edinburgh, Dublin 1999, pg. 43
[30] Colin Turpin: British Government and the Constitution, Text, Cases and Materials. Butterworths, London, Edinburgh, Dublin 1999, pg. 48-50

access to justice for citizens. The main aims are to ensure that access is provided as quickly as possible and at the lowest cost consistent with open justice and that citizens have greater confidence in, and respect for, the system of justice. The HMCS provides administration and support for the Court of Appeal, the High Court, the Crown Court, the magistrates' courts, the county courts and the Probate Service. [32]

The below diagram will illustrate the Court Structure of Her Majesty's Courts Service, taken from the official website of Her Majesty's Courts Service.[33]

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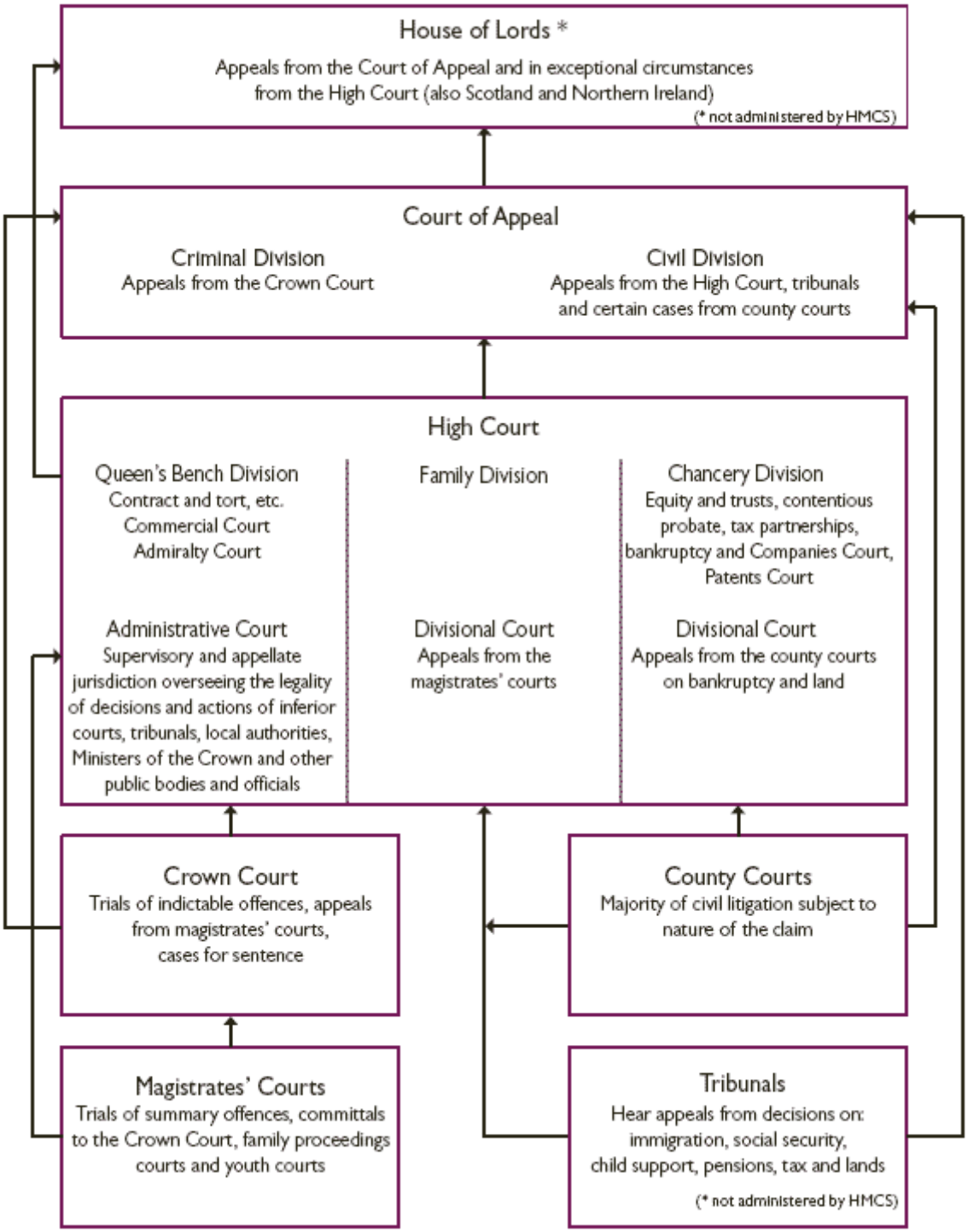
[31] Colin Turpin: British Government and the Constitution, Text, Cases and Materials. Butterworths, London, Edinburgh, Dublin 1999, pg. 49

[32] http://www.hmcourts-service.gov.uk/cms/aboutus.htm, 20th March 2008

[33] http://www.hmcourts-service.gov.uk/aboutus/structure/index.htm, 20th March 2008



2.3. Summary on the court system

Although it is possible to gain a general overview about the functioning of a country's jurisdiction through examining its court system and gain information about its efficiency, it is almost

impossible compare without prejudice and to evaluate the two systems and make clear statements regarding their fairness. In the following rows a general impression will be summarised.

However the English structure is concerned with relatively lineal reforms, the Hungarian model is amended step by step with reintroducing of old institutions (e.g. the additional level of Court of Appeal, Ítélőtábla) which was abolished in the past sixty years and trying to merge abandoned legal solutions with institutions required by the improving market economy based society.[34] The constitutional bastions of entitlements connected to a fair trial and other procedural rights are differently formulated in the two countries given the main difference of a written and a historical constitution. Still one can detect an utmost general rule of law in the English system where rules are abided by citizens voluntarily. The reliance on general principles of law is not that strong in Hungary as in England the legislator is attempting to codify every likely situation in order to avoid loopholes and malfunction.

Regarding the structure, both appeal systems have two levels plus as an extraordinary remedy the House of Lords, respectively the Supreme Court is responsible for providing the highest remedy.

As a generic difference between civil law and common law countries the courts in England rather establish a frame for resolving the parties' disagreement whereas in Hungary the judge is in a higher position as the parties watching down to the dispute having extra tools to keep the flow of the procedure in the prescribed bed.[35]

[34] Kommentár a1952. évi III törvény a polgári perrendtartásról szóló törvényhez , CompLex DVD Jogtár
[35] Kengyel Miklós: A bírói hatalom és a felek önrendelkezési joga a polgári perben. Osiris Kiadó, Budapest, 2003, pg. 81, 90

3. Case studies

As a preliminary remark it has to be stated what has been mentioned in the present paper above also that according to Hungarian law contrary to the English system precedents are persuasive only and not obligatory to follow by the courts. Nevertheless in the English system unless in a case it hasn't been proved that a different ratio decidendi is in question the earlier decision will bind all future cases. Due to this fact it is not rare in Hungary that in cases with similar facts and about equivalent rights and obligations, different lower courts may come to slightly different judgements.

However generally speaking it can be said that through the Supreme Court's task safeguarding of the unified application of law and with the so called "kollégium" an institution made up from judges set up at every court in order to scrutinise decisions, formulate opinions and control the jurisdiction of the judges in similar fields (e.g. family law, criminal law) there is an order of precedents. But because of the lack of binding precedent system, there is not such a provision of statute which would establish a clear obligation to follow prior rulings as in England.[36]

During acquainting the reader with the below cases this paper will analyse them from an aspect which shows the attitude of the courts towards revision of the contract of the parties and will not analyse material legal questions prescribed by a statutory act or civil code, however naturally a reference to the governing legal prescription will be made.

3.1. Creation of contract, respectively contractual obligation by the court

Through the following cases; one taken from English and the other one taken from Hungarian law the different approaches of the judges to the interpretation of the intention of the parties will be shown.

3.1.1. BH 1998. 377. The measures of providing services and counter-services shall be judged upon the time of the conclusion of the contract and regarding the stipulated services therein. [37](Hungary)

Upon the below summary one can face the power of the court to uphold or to rescind a purchase agreement within the frames provided by the Hungarian Civil Code (hereinafter called as "PTK").

The holding is the following: three brothers are the successors of their mother (hereinafter called as "Devisor") who passed away without any will, thus the rules regarding inheritance of the PTK shall be applied. Before her death the Devisor concluded a real estate sales agreement with the relevant municipality regarding the purchase of the flat which she has been using as a tenant with very advantageous conditions, amongst a low purchase price. However the Devisor paid the first instalment of the purchase price from the loan taken from one of her sons, the claimant. The loan agreement concluded between the Devisor and the claimant stated that in case the Devisor does not pay back the loan; the apartment shall be transferred to the claimant. The probate execution listed the apartment as an element of the heritage and so it was to be divided between the three brothers.[38]

[36] 1997.évi törvény a bíróságok szervezetéről és igazgatásáról, CompLex DVD Jogtár
[37] CompLex DVD Jogtár, Döntések Tára

The claimant brought an action before the court in order that the court states that the apartment in question is not part of the heritage as it has been transferred to his property through the loan agreement which terms are to be regarded as a purchase agreement.[39]

The court of first instance dismissed the appeal. The court of second instance amended the court of first instance's verdict declaring that the loan agreement concluded between Devisor and claimant shall be regarded as a valid real estate purchase agreement. However the court of second instance also highlighted the fact that the first instalment purchase price paid by the claimant was almost 1% of the estimated market value of the flat and revised the court of first instance for repeated procedure. Within the repeated procedure the court of first instance stated that the agreement between the parties shall be regarded as a contract securing option right to claimant and not as a sales agreement furthermore according to the PTK an option right for indefinite time is valid only for 6 month and not longer. It also stated that as the six month is expired the purchase agreement per se is repudiated and obliged the parties for restitution. After the appeal the court of second instance stated in its verdict that the court of first instance was not entitled to interpret the written intentions of the parties in a different way as it was and the agreement could only be examined as a sales agreement.[40]

Respondents have filed an appeal with the Supreme Court for revision. The Supreme Court accepted the appeal and issued the following reasoned verdict: the main issue of the present case is whether the invalid agreement can be declared to valid by the court and when doing so the disproportionate terms of service and counter service can be disregarded or not. The Supreme Court stated that the court of first instance was right; the agreement in question could not been

[38] CompLex DVD Jogtár, Döntések Tára
[39] CompLex DVD Jogtár, Döntések Tára
[40] CompLex DVD Jogtár, Döntések Tára

treated as valid sales agreement because of the disproportionate services provided thus the restitution was ordered.[41]

3.2.1. Kleinworth Benson Ltd v Malaysia Mining Corpn Bhd {1989} 1 All ER 785, Court of Appeal[42] (England)

In this case one can see the court's attitude towards the evaluation of the parties' agreement additionally the manner and distance how the court interferes with the contractual freedom of the parties.

The defendants' wholly owned subsidiary, Metals, had been set up to operate as a ring-dealing member of the London Metal Exchange. This required large sums of money and the plaintiffs granted Metals an acceptance of loan facility to a maximum of 5 million Pounds. During negotiations the plaintiffs sought a guarantee of the loan from the defendants, but the defendants refused. Instead defendants furnished to the plaintiffs two "letters of comfort". The letters contained a statement of policy to pay the loan back additionally that defendants would not reduce their financial interest in Metal until the loan has been paid back. Before the full repayment of the loan the tin market collapsed and Metals went into liquidation. [43]

Plaintiffs launched a law suit in order to recover the remaining sum of the loan. The court of first instance upheld the plaintiffs' claim upon the letters of comfort which the court estimated as warranties for the contractual obligation of defendants.[44]

[41] CompLex DVD Jogtár, Döntések Tára
[42] H.G. Beale, W.D. Bishop&M.P. Furmston: Contract Cases & Materials, Oxford University Press, 2005, pg. 17
[43] H.G. Beale, W.D. Bishop&M.P. Furmston: Contract Cases & Materials, Oxford University Press, 2005, pg. 17
[44] H.G. Beale, W.D. Bishop&M.P. Furmston: Contract Cases & Materials, Oxford University Press, 2005, pg. 18

The Court of Appeal allowed the appeal of the defendants on the following grounds: the crucial question in this case is whether the terms stipulated by the defendants in the letters of comfort are to be treated as a warranty or a contractual promise. The court found that the content of the letter of comfort inter alia was to establish a moral liability to pay back the loan and it cannot be interpreted as a contractual promise.[45]

3.2.3. Case summary

As one might see the grounds of the two verdicts are relying on different legal reasoning; namely in the Hungarian case it is the validity and proportionality of the terms of the agreement according to the PTK; in the English case the doctrine of unconscionability, the intention to conclude a binding agreement, thus the intent of the defendants was the ground on which the final decision was based. However one might also discover that in both cases the court decided in favour of the defendants. This might be reasoned by the phenomenon as Ádám György said that in civil litigation the interest of the state is mainly that the social system doesn't change and remains stabile, so the courts decide in favour of the defendant.[46]

In the above decision, there was a lack of using the so called "bargain principle" in English law which can be defined as the following: in the absence of traditional defence relating to the quality of the consent the court will enforce a bargain according to its terms.[47] This is in order to simplify trade connections and keep confidence in the enforcement of commercial relationships. The utilization of this principle simplifies the interpretation of cases, however the court, here pursued the concept of unconscionability. Contrary to family issues, in English law there is presumption

[45] H.G. Beale, W.D. Bishop&M.P. Furmston: Contract Cases & Materials. Oxford University Press, 2005, pg. 18
[46] Ádám György: A polgári peres eljárás önellentmondásai. Logod Bt., Budapest 2002, Chapter. Az igazság szolgáltatása
[47] H.G. Beale, W.D. Bishop&M.P. Furmston: Contract Cases & Materials. Oxford University Press, 2005, pg. 811

of an intention to create legal relations in commercial agreements.[48] In the Hungarian case there is an additional element which makes the decision of the matter more colourful, namely that the transaction concerned family members. According both Hungarian and English law simple agreements between family members are not regulated by law. However here it was more than simple reliance from the side of the successor, but a signed written contract which was alleged to bind the parties.

In the English case the court applied the exemption when it rather relied on the intention, background of the defendant. In my opinion this proves that regarding the contractual freedom the English court estimated the common understanding of behaviour and declarations. In the Hungarian case the courts on different levels came to completely different outcomes, however the decision of the Supreme Court shepherded the legal transaction to golden middle-way.

3.2. The relevance of misrepresentation

Both of the following cases will deal with a purchase agreement of a vehicle where hidden defects were detected by the buyer after the purchase. The following examples will demonstrate how differently the two jurisdictions treat the nearly similar cases.

3.2.1. BH 1975.22 A contract may not be contested validly upon mistake in not essential circumstances[49]

[48] Jill Poole: Casebook on Contract Law. Oxford University Press 2006, pg 185
[49] Döntések Tára, CompLex DVD Jogtár

This case is about the purchase of a used tangible item and the court will examine whether it had any defect furthermore if this could have been known by the buyer at the time of conclusion thus if it is misrepresentation or not.

Claimant purchased defendant's used vehicle with a purchase agreement along with the payment of the first, larger amount of the purchase price. The car was very dirty at the inspection; additionally the defendant said that the car never had a crash and the kilometre distance which is shown by the meters is correct. Six days after conclusion, the claimant notified the defendant that he wishes to withdraw from the sales agreement as after having washed the car he discovered that the car–body was corroded, the dynamo was not the original and it was more than likely that the car run more than the kilometres according to the meters. The expert hired ascertained that signs of a car crash could have been discovered on the car – body, however due to the age of the car it is in good condition. The expert estimated the value of the car 15% lower as the agreed purchase price.

The court of first instance declared the contract void upon misrepresentation by the defendant on essential terms of the contract and obliged the defendant to pay back the purchase price. The court of second instance upheld the judgement.

Upon appeal the Supreme Court highlighted the relevant provision of the Hungarian Civil Code (§ 210 (1),(4)) and stated that a contract may be rescinded only upon misrepresentation in an essential term. As the subject of the present case was a used vehicle where it is natural that the item has certain failures, it was not brand new. Thus the Supreme Court declared the legal transfer valid and instructed the lower court to apply the conclusions of defective performance, namely reducing the purchase price according to the expert opinion.

3.2.2. Long v Lloyd {1958} 2 All ER 402, Court of Appeal[50]

This case is also about the purchase of a used vehicle and the relevance of hidden defects, respectively misrepresentation.

The defendant, the seller, advertised a lorry for sale and indicated that it was in "exceptional condition". The plaintiff, the buyer, tried out the vehicle and found among several other defects a problem with the top gear and that although allegedly the lorry could run with 40 miles per hour the speedometer was not working to control it. The seller also said that the vehicle runs eleven miles a gallon. Thereupon the claimant purchased the lorry for a lower price than advertised. Afterwards when the claimant went on a journey with the lorry many technical defects occurred, amongst the dynamo ceasing to work, crack in a wheel and he also discovered that it had used almost eight gallons for forty miles. When claimant notified the defendant about the unfortunate defects, they agreed to divide the costs by 50-50%, however the defendant did denied the knowledge about the defects occurred. At the next trip with the lorry when it has broken down the claimant asked the defendant to rescind the contract and pay him back the purchase price. The expert who examined the lorry ascertained that the vehicle was not in a roadworthy condition.

The court of first instance dismissed claimant's claim based on the ground that although all the alleged defects were existent; the defendant's representation alleging that the lorry is in exceptionally good condition were truth and as such innocently made.

The court of appeal when dismissing the appeal pointed out that in such cases the examination and the acceptance followed by this is of main importance. The claimant could have examined

[50] H.G. Beale, W.D. Bishop&M.P. Furmston: Contract Cases & Materials. Oxford University Press, 2005, pg.

the vehicle by an expert at the time of the trial too. However the court also stated that regarding the consumption of fuel, the claimant had a certain time to test it. Nevertheless claimant did not repudiate the contract after having learned about this fact. Additionally the court also highlighted that since the claimant notified the defendant about the dynamo and other defects of the car, with the acceptance of the offer to divide the expenses to half–half he withdrawn from his right to rescind the contract. The court declared that with undertaking the second journey with the lorry, claimant definitely withdraw from his right to rescind.

3.2.3. Case summary

Comparing the outcome of the two cases, first watching at the results one can remark that upon quite similar facts the Hungarian court revised the parties' agreement, although it did not rescind it and the English court didn't amend it at all. In both cases the purchaser had an opportunity to inspect the vehicle. Not sharing every information does not constitute misrepresentation unless the non- disclosure of such a defect is fraudulent. Misrepresentation occurs when the change of circumstances is not disclosed.[51]

In the Hungarian case the lower courts rescinded the contract based on misrepresentation, however if one scrutinises such a case it is obvious, as mentioned above that all the likely defects cannot be taxatively listed. The Supreme Court drew the attention to this fact and let space to the freedom of contract of the parties' which also includes the careful examination of the item to be purchased.

[51] Jill Poole: Casebook on Contract Law. Oxford University Press 2006, pg. 181

According to the Hungarian Civil Code the restricted power of the court to amend the parties' agreement is only possible in case of long-term agreements where a circumstance arisen after the conclusion infringes one of the parties' essential right or interest. However the Hungarian doctrine has to be interpreted in the light of clausula rebus sic stantibus – well known from public international law – and the responsibility regime: culpa in contrahendo thus that one must not refer to his negligence or intentional behaviour when petitioning for the amendment of a legal relationship by the court in his favour.[52]

In the English case despite that the lorry had significant defects; the claimant's behaviour reaching first a settlement regarding the division of the expenses with the claimant and then using the vehicle was enough for the courts to consider the contract as valid. Thus the general knowledge and the principle of caveat emptor governed that case. However caveat emptor is more or less overruled nowadays as modern economy requires that statements made by the seller are conveying relevant information, it is clear that the purchaser has to act with the necessary carefulness too.[53]

The Hungarian courts interfered much more with the freedom of contract - even if the Supreme Court ordered the reduction of the purchase price only and not the rescission of the whole contract - in order to avoid unfair position of the concerned party. This interference shows one of the sharp marked paternalistic landmarks of the continental jurisdiction.

[52] Bíró György. A kötelmi jog és a szerződéstan közös szabályai. Novotni Kiadó, Miskolc 2000, pg. 367-369
[53] Jill Poole: Casebook on Contract Law. Oxford University Press 2006, pg. 181

4. Critics on the jurisdiction in practice

4.1. Hungary

It is interesting to mention that with the amendment from 1999 of the PP the term to provide fair and just dispute resolution has been deleted and instead the term to have the right to have the procedure finished in reasonable time has been included. According to a study on the controversies of Hungarian litigation by Ádám György the question has been raised by lawyers and social scientists how far the government is interfering or may interfere with the results of jurisdiction. He confers that one of the attributes which gives space for undue interference are the exaggerated formal powers of the judge to lead the procedure and to govern litigation compared with common law countries.[54] An article in the famous Hungarian weekly gazette "Élet és Irodalom" (Life and Literature) by Nehéz–Posony István raises the topic indignant on allegedly unjust verdicts involving governmental organs that the Hungarian judicature ruins the people's belief in the rule of law. He highlights the tasks of the courts in warranting the people's security in order that their rights and legal interests and the people themselves are protected from undue offends and guaranteeing a fair trial for the other party in the meantime. He makes reference to the English jury system as the embodied independent third party made jurisdiction which has been established in the 13th century far before the doctrine of separation of powers was drafted. Nehéz–Posony however also mentions that a big step towards the grounding of the modern democratic system and towards the independence of judges was the amendment of the career system for judges and the increase of their salaries in Hungary. [55]

[54] Ádám György: A polgári peres eljárás önellentmondásai. Logod Bt., Budapest 2002, Chapter. Az igazság szolgáltatása

[55] Nehéz–Posony István: Az igazság szolgáltatása. Élet és Irodalom, 2003, see also: http://www.es.hu/pd/display.asp?channel=PUBLICISZTIKA0203&article=2003-0102-2355-28MIJD

It seems that the overall belief in the spotless jurisdiction in the United Kingdom is stronger than in Hungary. This phenomenon may be reasoned by many facts from which three main will be mentioned herein. The first is the fact that in common law countries experienced lawyers become a judge after many years of legal practice unlike in Hungary where lawyers start working at the court after finishing university and become responsible to decide about cases after being tribunal notaries and secretaries for 7 years. [56] The second reason is the decreasing trust in the judges' independence. Nehéz–Posony highlights that the recent is a very sensitive issue and difficult to prove from the party alleging any corruption. However, he stipulates that one thing can be stated, namely that neither the statutory nor the personal conditions warrant the entire and proper independence of judges.[57] The third reason why citizens lose confidence in Hungarian court litigation is that a civil procedure may last seven–eight or more years until final decision is issued. This triggers the likeliness that e.g. the party which has been obliged by the court to pay damages winds up without successor or disappears. Therefore the execution of court's decision is not secured.[58]

4.2. Great Britain

The critics regarding common law judicative do not ruin the good reputation of the English court system. Even to the contrary, according to the famous British gazette, The Times, judges are strongly opposed to any attempt by politicians to interfere with their discretion. Although judges have to respect the Parliament's sovereignty it is not a recent occurrence that judges have been prepared to find Government's actions illegal and do not rely on the in their decisions, even

[56] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben. Osiris Kiadó, Budapest, 2003; pg. 82
[57] Nehéz–Posony István: Az igazság szolgáltatása. Élet és Irodalom, 2003, see also: http://www.es.hu/pd/display.asp?channel=PUBLICISZTIKA0203&article=2003-0102-2355-28MIJD
[58] Nehéz – Posony István: Az igazság szolgáltatása. Élet és Irodalom, 2003, see also: http://www.es.hu/pd/display.asp?channel=PUBLICISZTIKA0203&article=2003-0102-2355-28MIJD

though they are not in contravention of any statute. However it is factual that not only contemporary do judges issue decisions which are contrary to government policies.[59]

Contrary to the mainstream of the critics in Hungary, English rather emphasise that the judicial activism furthers the untying better to say the building of obstacles against the government to influence the independent operation of judges. The possibility of the judges to do that may lie in the structure of common law jurisdiction where the personal eligibility of the judges is relevant, namely in the fact the decisions may be based on both statutory and equity law.[60]

In order that the high importance laid on the proper functioning of independent and just judicative is safeguarded, The Times in its article called "How well behaved are Britain's judges?" reported also that a new body has been charged with monitoring the judges which is called the Office for Judicial Complaints so that no improper way of behaviour by a judge is left uninvestigated.[61]

The Times is praising the English meriocratic system of appointment of judges which is held to be one of the landmarks securing impartial judgement. The complaints are rather against the conservative nature of legal professions where more space for women and people from minority groups should be left. The Times also resists that making the appointment of judges transparent and accountable would clearly politicise the judiciary. Nevertheless it says the judiciary's role is, and has always been, to safeguard the rights of the citizens from incursions by government. It is part of the judiciary's task to identify the boundary between legitimate and illegitimate use of power by the government and to its best in order to prevent undue interference. There is

[59] http://business.timesonline.co.uk/tol/business/law/public_law/article459903.ece?token=null&offset=132, 26th March 2008
[60] http://business.timesonline.co.uk/tol/business/law/public_law/article459903.ece?token=null&offset=132, 26th March 2008
[61] http://business.timesonline.co.uk/tol/business/law/article2208414.ece, 26th March 2008

perpetual tension between the ambition of government to increase its power over the lives and property of its citizens and the ideas of judges on the limits of that power.[62]

4.3. Summary on critics

The partiality of judges has always been a crucial point of jurisdiction. Even in the most democratic order there are rumours about likely corruption or duress. Nevertheless one shall not disregard from the fact that there an amount of critics not to be neglected towards the Hungarian system, much more than against the English system. When judging upon this one shall also bear in mind that the transmission to a capital market economic system confused a little bit the sense of legal order of the countries in Central-Eastern Europe.

Although both systems provide for effective remedy against alleged impartiality of judges, it is neither system easy to remove a judge from its post.

When relying on the extended formal power of the judge during the civil procedure in Hungary one shall bear in mind the well known honourable position of a judge in the common law system. When complaining about procedural formalities, everyone may make up its mind and think about films picturing an old fashioned procedure where even nowadays the English lawyers are also wearing a wig.

However regarding the malfunction of judicative, people everywhere in the world who cannot solve their dispute out of court are turning to the court to have their right proven often expect from judges that they operate like automat machines. As Hans Kelsen stated in his study on

[62] http://business.timesonline.co.uk/tol/business/law/public_law/article459903.ece?token=null&offset=132, 26th March 2008

"What is justice?" that every verdict is relative, because although the parties expect an absolute fair decision by the judge, the justice is strained through the judge's subjective.[63]

[63] Ádám György: A polgári peres eljárás önellentmondásai. Logod Bt., Budapest 2002, Chapter. Az igazság szolgáltatása

Conclusion

It can be easily stated that in both countries the main principle to be followed by the contracting parties and the court which task is to resolve the dispute brought before it is: pacta sunt servanda. However in these modern times contractual freedom has to be kept within restricted frames because the safeguarding of fundamental freedoms requires circumscription of the extent of exercising people their rights so that the society doesn't turn to libertinism.

"Pacta sunt servanda" was central to classical common law, however recently this does not cover that courts have to enforce every contract. However, arising from the modern application of this doctrine, two sorts of reasons may be invoked not to enforce the contract by the court. There must be either a proof of defect during the formation of the contract, or in narrow limit there must be some incompetence of the party against whom the contract is to be executed. The common law judges apply the doctrine of unconscionability in order to verify the undercutting of a private right if it does more social harm than good.[64]

In Hungarian law "pacta sunt servanda" is also a general rule; however the principle of good faith, cooperation and the exercising rights according to the laws is also part of the entire package which has to be examined at a case.

Contrary as one would expect although in England judges seem to have more discretional power and the rules they base their decision are less detailed as in Hungary the justice does not get lost

[64] H.G. Beale, W.D. Bishop&M.P. Furmston: Contract Cases & Materials. Oxford University Press, 2005, pg. 806

in the small channels of the judicative either. However this does not mean that the Hungarian system is not sufficiently fair and just despite the offences against it, fighting against likely loopholes are big challenges for the judges.

When weighting the advantages and disadvantages of both systems one is often asked which legal order it more ideal, in which of them is it better and easier to abide laws. One can state that the generally party's freedom is more important in England than in Hungary, however this does not mean that in common law countries the laws would protect unfair provisions of agreements only on the basis of a formally valid contract. One may see that the basis of the different approach used to find the fair and just decision by the court lies in the opportunity of the common law judges to base their judgement on equity law. The legal institution applied in Hungary, general principles of law refer somewhat to the equity system, but their application is significantly weaker and the court does not base decisions solely on them. In my opinion as a conclusion from the above the English system suits better for independent individual undertaking citizens because of its dynamism where the Hungarian system shows more stability and protects the existing stagnant relations. Also, from my aspect the obeisance of laws is generally interpreted differently in the two systems as in England under this term the rule of law, in Hungary in the practice the abiding of written statutes is understood. From the current situation one could say that the English jurisdiction is more efficient; however due to geographical and social divergences as a result comes out that both judicative systems are fitting for the respective environment and serve the prevailing of justice.

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