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SUMMA

A LAUDATIONES EDICTI JELENTŐSÉGE ÉS AZ ULPIANUS ÁLTAL AZ EDICTUM DE PACTISHOZ FŰZÖTT KOMMENTÁR

EL-BEHEIRI NADJA

A jogászok által a praetori *edictumhoz* készített kommentárokban gyakran azt olvashatjuk, hogy egy edictum megfelel az *aequitas*-nak. E megjegyzések jelentősége a modern irodalomban igen vitatott. Egyes szerzők (pl. Wolfgang Waldstein) azt a nézetet képviselik, hogy az *aequitasra* való hivatkozás mércét állít a pozitív rendelkezések számára, mások (pl. Dieter Nörr) úgy gondolják, hogy a jogot megelőző tényezőkre való hivatkozások elsősorban retorikai célokat szolgáltak. Jelen tanulmány a jogász által megfogalmazott fordulatból kiindulva az *aequitas* szerepét a középkori jogfejlődés tükrében vizsgálja meg. Eredményként a mellett a nézet mellett foglalunk állást, mely szerint Ulpianus az *aequitasra* való hivatkozás révén azon általános jogelvre hívja fel a figyelmet, hogy *pacta servanda sunt,* tehát a megállapodásokat a peresíthetőségüktől függetlenül be kell tartani.

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CONFLICT OF ILLEGITIMACY AND "DANGER TO SOCIETY"

ERVIN BELOVICS

The concept of illegitimacy was used by foreign and Hungarian criminal jurisprudence when defining the substantial peculiarities of crime for a long period of time, only in a formal sense. In accordance with criminal law-thinking determined by Jehring's objective illegitimacy theory and considered as prevailing in Western-Europe, illegitimacy is originated from the act and the causal process induced by the act, in which causality is independent of doer's criminal capacity and content of consciousness. A pure formal illegitimacy concept, which evokes the *nullum crimen sine lege* principle and expresses opposition to the law, has appeared in the Hungarian legal literature, in particular in Angyal's and Vámbéry's works. Later on an opinion came into the limelight, according to which illegitimacy without content elements represents only that act is illegitimate when infringes the law, therefore such a definition is meaningless. So, the examination of these theories focused on material illegitimacy. However, new problems arose with the codification of 'danger to society' as one of the conceptual elements of crime, which divide legal literature up to now. Legal dispute focuses on

the question, whether the judicature may establish the conduct which is factual and infringing the law – without the existence of any concrete grounds for the preclusion of punishability – lacks entirely for 'danger to society' as one of the basic elements of the crime concept, which may have one consequence, namely that kind of conduct does not realize a delict. Sentencing practice – which considers the scientific concept of legal and material illegitimacy of 'danger to society' as equivalent – has decided on this question affirmatively. However, lots of representatives of jurisprudence criticized this practice of judicature, moreover an opinion was drawn up that the defect of current legislation which infringes due process of law may launch the thinking process which may connect the concrete act to the general concept of crime.

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A MAGYAR POLGÁRI ELJÁRÁSJOG PERORVOSLATI RENDSZERÉNEK FEJLŐDÉSE A RENDSZERVÁLTÁST KÖVETŐEN

HARSÁGI VIKTÓRIA

A tanulmány célja annak áttekintése, hogy a perorvoslati rendszer a rendszerváltozást követően milyen hatások következtében, egészében és egyes részleteit tekintve miként alakult át és igazodott a jogállamiság követelményeihez és miként nyerte el mai formáját. A '90-es évek elején a magyar perorvoslati rendszer átalakításának az első nagy lendületet az Alkotmánybíróság egyik döntése adta, így a reform tulajdonképpen 1992-ben, a felülvizsgálati eljárás újbóli bevezetésével indult el. Az 1997. évi, majd az 1999. évi átfogó Pp. módosítások a fellebbviteli rendszer bizonyos mértékű változását hozták magukkal. Ám az ítélőtáblák felállításának elhalasztása következtében ennek a folyamatnak a lezárására már csak az ezredforduló után kerülhetett sor. Az elmúlt másfél évtizedben a legtöbb módosítás a felülvizsgálat intézményét érintette, mely változásokra több esetben az Alkotmánybíróság határozatainak nyomán került sor. Az így született megoldások nem bizonyultak tartósnak, a felülvizsgálat intézményét a '90-es években és az ezredfordulón az útkeresés jellemezte. Mindezeken felül áttekintést nyújt a tanulmány a jogorvoslatok korlátait és a jogorvoslati eljárásokban a bizonyítás kérdését érintő változásokról.

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MONKS AND MONASTERIES IN THE SOURCES OF THE JUSTINIANEAN LAW

PÁL SÁRY

Emperor Justinian (527–565) considered monasticism as an institution of public utility, consequently he regulated the legal position of monks and monasteries in great detail. According to his constitutions no one was allowed to found a new monastery without episcopal licence, and the monks were to be placed under episcopal control. Monasteries of monks and nuns were to be separated. Abbots were to be chosen not

by seniority but by merit, and the result of the election was to be confirmed by the local bishop. Parents were prohibited from preventing their children from choosing monastic life. When a husband or a wife wanted to enter a monastery, the marriage could be dissolved without any legal disadvantage. In lack of repudiation, when one of the married couple was clothed in the monastic habit, the marriage ceased *ipso facto*, like in the case of death. Before entering a monastery everyone could dispose of his property, in lack of this the property was acquired by the monastery. If a monk abandoned his vocation, his properties were to remain in the monastery. The period of the noviciate was fixed at three years. The aspirants could be clothed in the monastic habit only after this term of probation. Slaves were liberated by this ceremony. Justinian regulated the way of monastic life, too. Monks were to do some physical work in addition to meditation. They were to eat together in a common refectory and sleep in a common dormitory. Monasteries were to be surrounded with walls, and no one could go in or out without abbatial licence. The guilty monks were to be punished proportionally; in the most serious cases they were to be expelled from the monastery. The emperor disapproved of monks who wandered from one monastery to another. The properties of these wandering monks were to remain in their original residences. The emperor secured immunity for monks from the duties of guardians and trustees, and from the jurisdiction of the civil courts. The civil authorities were prohibited from breaking the peace of the monasteries. Every monastery was to have administrators (*apocrisiarii*) to manage its business and legal affairs. Alienation of the real properties of the monasteries was prohibited. The monasteries were used as prisons in many cases. According to the Justinianean constitutions the punishment for raping a nun was death. Those who ridiculed monastic life were to be punished rigorously, as well.

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DIE STAATSEINRICHTUNG DER MITGLIEDSTAATEN IN ÖSTERRICH NACH DEM ERSTEN WELTKRIEG

István Szabó

Das Grundkonzept der österreichischen Verfassung von 1920 war – neben der republikanischen Rechtsstaatlickeit und der demokratischen Willensbildung – der föderale Staatsaufbau. Die Kompetenz in Justizangelegenheiten lag ausschlieâlich beim Bund. Die Zuständigkeit der Länder war auf Gesetzgebung und Vollziehung beschränkt.

In ihren Grundsätzen für die Landesverfassung schrieb die Bundesverfassung für die Landesgesetzgebung das Einkammersystem vor. Das allein zugelassene Organ zur Landesvolksvertretung war der Landtag. Die Zusemmensetzung der Landtage, aber insbesondere die Zahl die Abgerodneten (bis zu der Verwessungsnovelle von 1929) ist durch die Bundesverfassung den Länder übergelassen hat. Der Landtag übte die Gesetzgebung sowie Kontrolle über die Amtsführung der Landesregierung aus. Die Wahl des Landtags geschah aufgrund des allgemeinen, gleichen, unmittelbaren, und geheimen Verhältniswahlrechts. Die Auflösung erfolgte entweder durch Beschluss des Landtags oder durch den Bundespräsidenten auf Antrag der Bundesregierung mit Zustimmung des Bundesrates.

Die Vollziehung des Landes übte die Landesregierung aus, die aus dem Landeshauptmann, seinen Stellvertretern sowie den Landesräten bestand. Die Landesregierungen wurden durch die Landtage nach dem Verhältiswahlrecht gewählt. Durch das Misstaruensvotum konnte der Landtag den Rücktritt der Landesregierung herbeiführen.

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THE RIGHT TO RESPECT FAMILY LIFE IN THE MIGRATION RELATED DECISIONS OF THE ECJ IN THE LIGHT OF THE ECTHR'S JURISPRUDENCE

LAURA GYENEY

The relationship between the ECtHR and the ECJ is a complex one. There is a general respect for established ECtHR jurisprudence, but a reluctance to admit any obligation to follow it. The present article highlights the ambigious relationship of the two "competing" courts in the field of family reunification. In particular, it focuses on the right to family life in Article 8 ECHR. The attitude of the ECJ to the interpretation of this article is also addressed with a brief overview of the compelling reasons for abandoning the ECtHR's approach and developing an autonomous Community law interpretation. While the ECtHR until now has been reluctant to accept that there has been a violation of Article 8 of the Convention if the family can reasonably be expected to set up home or continue living together elsewhere, the Community law stands on the opposite assumption. The freedom of choice is the cornerstone of the internal market law and thus it assumes that an EU citizen intending a change of residence should as far as possible be able to choose freely whether to remain in one state, or to migrate accross the Community's internal borders. However, it needs to be stressed that there is slight change regarding the recent ECtHR jurisprudence on the application of "the other country principle", which leads to a convergence of the two counter-approaches.

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THE VICTIMS OF THE CRIMES UNDER THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT. SOME ASPECTS OF LEGAL RESPONSIBILITY

APREOTESEI IOANA-ALINA

The article analyses the status of the victims of the crimes under the jurisdiction of the International Criminal Court. A short introduction of the Court, then an analyse of the victims' protection, participation and reparation is provided. In the history of international law, the victim was often seen as a witness. The ICC managed to change that fact and for the first time in the history of international law, the victim can participate in a criminal trial in his or her own name. The victim became more than a witness. Who is responsible for paying his or her reparation, monetary compensation or restitution? The perpetrator in his or her personal capacity, the State or some combination of these? Can the State responsibility be taken into account?

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INTERNATIONALE RECHTLICHE VERANTWORTLICHKEIT, MIT BESONDERER HINSICHT AN DEN VERTRAGSENTWURF DES AUSSCHUSSES FÜR INTERNATINALES RECHT DER UNO

BALÁZS BOROS

Diese Arbeit hat sich die Präsentation der völkerrechtlichen Haftung zum Ziel gesetzt im Bewusstsein, daß die vollständige Bekanntmachung dieses Objektes im Rahmen dieser Studie unmöglich ist. Demgemäß kann sich diese Arbeit nur auf die Demonstration der, aus dem Völkerrecht stammenden Eigenheiten der Haftung wagen, einen separaten Teil der universellen Regelung der Institution der Haftung auf Abkommenebene widmend.

Das erste Teil der Arbeit versucht dementsprechend durch die Illustration der einzelnen relevanten Kennzeichen die Natur der völkerrechtlichen Haftung zu ergreifen, ihre Position in den internationalen Beziehungen bekanntgebend. Im zweiten Teil wird dann die Entstehung, Entwicklung der völkerrechtlichen Haftung vorgeführt, den bezogenen Kodifikationsversuchen mitbeinhaltend. Dabei wird die Anschauungsänderung der Rechtslehre, der internationalen Beziehungen, und die Sysiphusarbeit veranschaulicht, welche zur Anerkennung eines universellen Vertrages führt, oder führen kann.

Und diese Arbeit scheint sich heutzutage im Vertragsentwurf der Internationalrechtskomission der UNO zu kristallisieren, welches im dritten Teil geörtert wird.

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ISSUES OF LIABILITY FOR ENVIRONMENTAL DAMAGES IN THE EUROPEAN UNION

ORSOLYA CSAPÓ

This paper aims to present a brief summary of the circumstances and systems of liability for environmental damages in the widest sense. An outline of the worsening state of the environment is followed by a study of the activities of the European Union in this field, then its role, responsibility and liability with regard to international environmental relations is discussed including both inward and outward relationships such as toward member states and legal persons. Proceeding from the general to the more particular, a survey of the environmental liability and responsibility relations of the member states is given: in their international relations toward EU member and non-member states; toward the European Union for implementing legislation; toward single national legal persons. It is a special case if a member state causes some damage while it adopts community norms. Besides the description of the liability situation of the single national legal persons, it seems necessary to expand the list of victims with the environment itself, future generations, and humanity. Finally, the paper touches upon the rules of environmental liability present in EU legislation. It outlines the development of the paragraphs on liability of the various pieces of legislation, most typically directives,

and briefly introduces to us the two so far created liability norms: the 2004/35/CE directive and the since annulled 2003/80/JHA framework decision. The study intends to give an outlined account of the complexity of the relationships, the vividity of rules to be applied, the importance of participants and factors outside the realm of law, and the essentially unclarified issues, thus urging and promoting the development of a lawful environment and judicature as required by the principles of precaution and prevention.

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REMARKS ON THE CONCEPT OF THE LEAGAL RESPONSIBILITY

GERGELY DELI

The present essay 'Remarks on the Concept of the Legal Responsibility', as already its subtitle shows, is aimed to underline the similarities and parallelisms between the modern legal concept of responsibility and the antique censorial moral correction mechanisms. At the beginning some basic theoretical questions, like the aims and the traps of this comparison and the general problem of comparableness, are also being addressed. According to the author the emerging doubts (the chronological gap between the phenomena and the miscellaneous primer sources) are to be combated by a strict functional approach.

Distinguished from the mainstream literature the idea of the prevention is considered to be the main motivation force behind the censorial activity. The almost inexhaustible considerations of the modern legal responsibility will be presented as an inevitable process of the scientific research. From this point of view of the modern scientific theory-making is derived one of the main theses of the essay: the eroded concept of legal responsibility should be replaced by a new paradigm, which is historically and semantically not overshadowed by the theory of the subjective culpability.

Following that, the *regimen morum* will be fittingly placed into the elements of the modern system: the insult of the pre-existing obligation, the motive of adscription, the question-answer scheme, the concurrence of the alternative responsibilities, the sanctions. These are all similarities of both systems, which, on the ground of the prevention, are shuttling between the private and social interests stabilised by judicial corrective mechanisms.

In conclusion, the different tools of correction used by a society could not be handled separately. The actual interaction of law and moral may differ from time to time and may distinguish seemingly similar institutions from each other. This phenomenon is called by the author 'system relativity'.

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INFORMED CONSENT AND LIABILITY: A PRAGMATIC VIEW

ZOLTÁN LOMNICI, JR.

The author highlights some pragmatic aspects of informed consent, express consent and implied consent – by the cases of the Data Protection Commissioner of Hungary – that could help to bridge the gap between the currently valid legal requirements and the practi-

cal realities of providing medical information in Hungarian health-care settings. One of the crucial point of informed consent is whether the patient properly understood the provided medical information. Consequently, effective communication becomes an inevitable condition of providing informed consent. The author argues as well for creating more concrete and practically oriented guidelines concerning informed consent and liability that would also help to increase the quality of medical information giving. These might help us approach the medical ideal that was conceptualized in the doctrine of informed consent.

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DIE HAFTUNGSVERJÄHRUNG DES HANDELSGESELLSCHAFTS MITGLIEDES UND DES BÜRGES

ANDRÁS JÓZSEF POMEISL

Die Studie beschäftigt sich mit der Haftungsverjährung des Handelsgesellschaftsmitgliedes für die Schulden der Handelsgesellschaft (Hinterhaftung). Für das leichtere Verständnis prüft die Studie die Hinterhaftung paralell mit der Haftung des Bürgen. Im ersten Teil wird von der Definition des Schuldverhältnisses ausgehend festgestellt, dass die Forderung des Berechtigten gegen Hauptschuldner und gegen den Bürge (oder gegen das Mitglied) ungleich sind, so kann man deren Verjährung einzeln untersuchen. Das zweite Teil beschäftigt sich mit der Institution der Verjährung. Erstens klärt es den rechtspolitischen Zweck der Verjährung, dann wird die Regel des ZGB/Ptk. § 325 über die Verbindung der Verjährung der Haupt- und der Nebenforderung interpretiert. Im dritten Teil wird die Verjährung des Bürgschaftschulds geprüft und festgestellt, dass die Verjährung der Forderung gegen den Bürge im Zeitpunkt der Fälligkeit der gegenüber dem Hauptschuldner bestehenden Forderung beginnt, weil die Uneinbringlichkeit auch im Falle der einfachen Bürgschaft keine Bedingung der Fälligkeit bildet, so soll der Bürge für die Erfüllung jedensfall aufgerufen sein. Im vierten Teil wird die Verjährung der Hinterhaftung geprüft und festgestellt, dass die Uneinbringlichkeit eine deren Bedingungen ist, so beginnt die Verjährung der Forderung gegen das Mitglied im Zeitpunkt der Feststellung des Deckungsmangels.

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A BRIEF SURVEY ABOUT THE DEVELOPMENT OF DELICTUAL LIABILITY IN LOUISIANA

PETER STAVICZKY

The paper is highlighting the dual roots of the delictual liability in Louisiana the general principle (*neminem laedere*) bought form the French Code civil on the one hand and the common law tort-based system on the other. A brief analysis is given concerning the characteristics and main features of the mixed legal systems. Following the general background detailed information can be read about the development of

the private law in Louisiana and its three phases. As the development of the legal system in the mixed legal systems cannot be fully demonstrated by concentrating on the written sources of law the paper is also representing the role of precedents and judicial decisions in Louisiana as well and shows how scholars from Louisiana think about the *'stare decisis'* principle. Detailed analysis is given related to the development of the Louisiana civil Code's rules governing the delictual liability. It discusses the process of how common law oriented judges have gone against and altered the meaning of the civil law principle in past one and a half century and how tried to limit the legislation the freedom of the judiciary. This development is highlighted through the questions of master-servant liability, wrongful death, pure economic loss and emotional distress cases. To sum up the paper demonstrates that due to the judicial power and the ever growing influence of the US practice the delictual liability is a French seed, which has become an English tree in the soil of Louisiana despite the movement of the so-called "civilian revival" in the 70's of the last century.

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UNE NOTICE DU DÉVELOPMENT DA LE RÉSPONSABILITÉ DÉLICTUELLE EN LOUISIANA

PETER STAVICZKY

Cet article éclaire la racine duale de la responsabilité délicutelle en Louisiana : le principle général (neminem laedere) pris du Code civil français et le common law system basé sur les torts. Il contient une analyse courte concernant des charactéristiques ét spécificités des jurisdictions mixtes. Aprés avoir vu le fond general, l'article donne des informations détaillées sur le développement du droit privé et ses trois phases en Louisiana. Comme ce développement existant dans les jurisdictions mixtes ne peut pas être totalement présenté en concentrant seulemet sur les sources du droit écrits, il se trouve aussi une sommaire sur le role des précédents et les décisions judicielles en Louisisna. En même temps l'atricle précise comment les répresentents de la littérature légale en Louisiana pensent du principle de stare decisis. Il s'occuppe profondement du développement des roules de la résponsabilité délictuelle dans la Code civil de la Louisiana. Parallèlement il intérprète aussi le procés au cours, les juges orientés vers le common law sont allés contre le principle et ont modifié son teneur pendant le derniér un et demi siècle et présente comment la législation essaiait de limiter la liberté jurisdictionelle. Ce développement est interpreté par les cas de responsabilité master-servant, wrongful death, pure economic loss et emotional distress. L'article tire la conclusion : bien qu' il y ait un movement de " relevement civil " pendant les années 70 de la dernière siècle, en raison du pouvoir judiciaire et l'influence montant des États-Unis, la responsabilité délictuelle est une graine française qui devenait un arbe anglais dans la terrain de Louisiana.

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THE UTILIZATION OF THE POLLUTER PAYS PRINCIPLE

SZILVIA SZILÁGYI

„The Polluter-Pays Principle, as defined by the Guiding Principles concerning International Economic Aspects of Environmental Policies, [...] means that the Polluter should bear the expenses of carrrying out the measures, [...] to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption." (OECD: The Implementation of the Polluter-Pays Principle. (Recommendation adopted on 14th November, 1974). C(74)223.)
The utilisation of the Polluter Pays Principle (initially an economical concept noted as negative externality) differs from country to country. Thanks to the continuous efforts of OECD nearly all of the member countries have put them into practice by now and have applied its regulations as the foundation of their environmental policy. Although the tools of the so called 'proper' PPP is widely accepted in the above mentioned states, the PPP in a wider sense; such as the environmental taxes is still waiting to be thoroughly implemented in certain governances.

After becoming a part of the Founding Documents, the Principle has accounted as the basis of the European Union's relevant policies. It also gradually appeared to seize existence in the member countries environmental politics.

With the guiding principle of 21st of April 2004 (2004/35/EK) has put a period to a rather long task in order to put the important and remarkable Polluter Pays Principle into practice.