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ATTEMPTS OF THE GOOD STATE IN HUNGARY – NEW CONTENTS OF NORMS CREATED AND MAINTAINED BY THE STATE[1]

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1. Introduction

In my paper I would like to speak about ideas related to the notion of the so called good state based on the current Hungarian legal system. When we define the notion and the content of a good state and good governance science usually presents different traditional aspects, basic approaches (procedural, liberal, etc.), dimensions (political, economic, social) and goals (economic or political development, renewal of human resources, etc.) which may be differentiated upon the 'spheres of existence'. This paper chooses the simplifying and "naive" starting point according to which changes and significant shifts in the Hungarian legal system may be considered as specific realisations of ideas related to the good state. In this paper I would like to present some elements of the transformation of the legal system, or the broader legal environment in general, as new principles (legal or operational fundamental principles) which reflect the "self-picture" of the state, as well as its approach to society and to law.

As a starting point it is worth analysing the traditional basic principles of public administration which may be observed also in scientific definition attempts and legal norms: Lajos Lőrincz, the most well-known scientist of the past period of the science of public administration, who died not long ago, mentions two principles: *democracy* and *efficiency*. One of the frameworks, constantly renewed and "updated" basis of the ideas of the government established in 2010 about good state – exceeding public administration itself – is the Magyary Zoltán Administration Development

[1] This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

Programme,[2] which emphasizes that the national character of public administration must be as important as efficiency, and these two principles that is efficiency and the *national feature of public administration* are mentioned repeatedly in the Programme.

Professor Lajos Lőrincz academician said once at a meeting that the greatest value of Hungarian public administration, and of public administration in general was stability, and he also added that leaving some stable institutions unchanged always – or almost always – proves the justness of self-control later. Naturally, the virtue is not permanency – in itself – but reliability, preventability and finely tuned functioning built on it. Eventually this line of thought confirms the principle of *stability*; and as we will see the handling of this as new principle with growing significance is very much reasonable.

Based on the intensity of legislation and on other measurable features the Hungarian legal system provides rather surprising, or even impressive data: between the summers of 2010 and 2011 legislation was extremely "revolutionary" in Hungary, as the 266 approved acts (from which 95 were brand-new, while 171 were modifications of previous acts) and 172 decisions of the Parliament significantly exceed the annual statistics of the first years of previous governmental cycles (before and after the change of the political system in 1990). In the previous cycle between 2006 and 2010 these numbers in total are 263 (new) and 328 (modification).

Almost one-third (!) of the acts enacted in 2011 were modified in the same year: in December 63 of the 213 acts approved in 2011 – which was a new record – were modified. In the normal course of work modifications of acts are usual parts of the tasks of the Parliament, but it definitely does not fulfil the requirement of legal certainty if a newly approved act is modified several times in the same month, especially, if such modification often affects a whole „network" of laws. Such quick and comprehensive flow of acts and their modifications brings uncertainty to all players, as these are not easy to interpret in the first place, and often it is impossible to prepare for them.[3]

It is also worth mentioning that in December 2011 during one month 18 acts were modified which were enacted in the same month, 5 of them were modified several times. For example the act about the modification of acts serving as basis for the budget was rewritten six times by the legislator in this period. The acts on taxation, on personal income tax and on duties were each modified eleven times in the last month of the year. The act on education was affected by ten acts enacted in December, the one on higher education was modified eight times. The acts on public employees and civil servants were changed eight times, each, while the act on civil procedure was modified nine times.

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2 *Magyary Zoltán Administration Development Programme*. Publication of the Ministry of Public Administration and Justice, Budapest, 2012.

3 Tax laws rewritten in every four days. *Index* 18 January 2012, www.index.hu (2012. 04. 30.)

The modification of tax laws shall be announced thirty days in advance, according the valid regulations, thus the announcement of the modification of the act on certain tax regulations and some other related acts was made on 29 November, just to „rethink what they exactly want during December and modify it seven times by the end of the year".[4]

Regarding the outlined phenomenon we shall definitely state that this – in international comparison – cannot be viewed as exceptional, maybe its degree and intensity are extraordinary.

Moreover, if we analyse the valid Hungarian legal regulations in line with the aspects offered by this paper – thus along the fundamental „forms of movement" of the state – we may observe a *twofold tendency*:

1) on the one hand we witness that the state undertakes new roles (for example the so called nationalisation of public education),[5]
2) on the other hand the intentions of the more active state are quasi supplemented, counterbalanced, or partly supported by an other tendency, which is presented by the more precise and *more exact definition of responsibilities and obligations at both the individual and the society level*. Recent legislation obviously aims not only to handle the individual phenomena separately: as a framework of different – for the first sight individual – *rules of responsibility* the new concept of *public interest* emerges in front of us (public interest which – according to the intentions of the legislator – will be defined less and less as the uncertain sum of individual aspects).

Based on the previous welfare concepts the government financed a wide scope of welfare services, but it often assigned the actual activities to for-profit or non-profit organisations (we usually call it outsourcing). This is how the expansion of social care was possible without the extension of bureaucracy.6 Nowadays the Hungarian state – partly exceeding the New Public Management Approach – is able to maintain its performance of obligations or sometimes even increase its level – despite the reduced resources due to the economic crisis -, if in some areas of the greater care

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4 Ibid.

5 After 2010 the area of movement for the state was expanded also because human service institutions – mainly health care and educational ones – previously owned by local governments were (mainly) transferred (or soon will be transferred) into the maintenance of the state upon the regulations of the law. In parallel with this the centralisation of the earlier divided, uncoordinated system of the special fields of administration; several institutions which were independent before were integrated into the metropolitan and county government offices operating as the regional organ of the Government. Another important – future – change is that the administrative tasks of local governments will be slowly transferred to the organs which are still to be established; on 1 January 2013 approximately 80 types of administrative cases will be transferred to the local governments' notaries to the new district offices.

6 Lester M. Salamon – Helmut K. Anheier: *Szektor születik II.* [The emerging sector II] Budapest, Non-profit Research Group, 1995. 137.

systems it regulates the relations with the paradigms of self-care and new type of responsibility taking.7

With some simplification the key issue of conservative and neoconservative paradigm is responsibility, moreover, the revolution of responsibility, contrary to other – previously dominant – concepts absolutising freedom.[8] In this new approach the citizen does not appear primarily as the addressee of rights and exemptions or as consumer, but mainly as responsible citizen (also in the expectations of laws), which is reflected in the new laws by the more thorough, more precise and sanctioned definition of different responsibilities.

Furthermore, it shall be inseparable from the issue of responsibility that in Hungary "the all-time present stands out by the strong and unreasonable delegitimizing of the all-time past, instead of putting forward its own performance".[9] In this field of force even the changes in the governmental course have "disastrous" features. This is one of the reasons why in Hungary the last phase of public politics is traditionally missing; the processes of public politics begin but they often do not "run out", they do not have an evaluation and closing phase.[10]

Therefore, the main question today, therefore – with regard to the functioning of Hungarian public administration, or of the state in general – is not what the contents of the valid regulations are, but rather how these programs and legally defined goals may be maintained, stabilised and realised. Therefore, the main question is not the *material analysis of rules reflecting valid, legitimate ideas*, but rather how these may be considered permanent (at least on the surface), how these may wear the cover of stability.

2. About the relationship of law and other norms

It shall be stated herein that not only our public administration science, but also our public administration has legal features, thus the need for the realisation (and description) of certain principles is performed (primarily and often exclusively) in legislation: the need for and the establishment of influencing through other

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7 The feature of the regulation is that it aims at appearing at all possible levels an in all forms, moreover, it increases expectations everywhere and in each relations: e.g. in the scope of state responsibility in addition to increasing the role of the state in the performance of public tasks it introduces the notion of damage caused with legislation. Even though public finances prohibitions are interpretable mainly in relation with state organisations, so-called extra taxes introduced in 2010 for market organisations, in the financial sector, in the energy sector and in the telecommunication sector may be mentioned here as well. This new legal concept clarifies the responsibility of the individual from many aspects, beyond the motivation for self-care; it clarifies the contents of parental responsibility.

8 Barát, Tamás: Felelősség – társadalmi felelősségvállalás. [Responsibility – social responsibility.] In: *Társadalom, gazdaság, jog, politika. XXI. Század – Tudományos Közlemények,* April 2012 (27.), 47.

9 Szigeti, Péter: *A magyar köztársaság jogrendszerének állapota 1989–2006.* [The state of the legal system of the Hungarian Republic 1989-2006] Budapest, Akadémiai Kiadó, 2008. 17.

10 Pesti, Sándor: *Közpolitika szöveggyűjtemény.* [Public politics anthology] Budapest, Rejtjel, 2001. 206.

norm systems may be considered rather poor. It results from this feature that less consequent and sometimes rather inconsistent regulations regarding certain fields confirm the lack of long term plans. Some fields "traditionally" belong to a group in which the uncertainty of short term principles is confirmed by the permanent changes of law (e.g. human resources policy) or by keeping the regulation at a "lower level of the hierarchy of laws" (e.g. exclusion of any material external control). A good example for the latter is the content and features of legal regulations related to different suggestion making, counselling or consultative organisations.

2.1. Attempts to approximate law and reality

A specific phenomenon must also be mentioned, which by mixing reality and law is able to establish changes also in fields where no material social-economic changes happen. In parallel with this, however, the approximation of law and reality, their more harmonious relationship is one of the answers of the legislator to the new social and economic challenges: e.g. according to Act XC of 2010 on the enactment and modification of certain acts regarding economy and finances some household jobs[11] are taken outside of the tax system,[12] as reaction to the fact that no tax has been paid after these; the supervision of these activities is (traditionally) very difficult, and the fact of taxation was unfair in some aspects as well. Therefore, the modification of the law only establishes reasonable relationship with (adjustment to) reality, with significance which goes beyond the fact of deregulation.

The next aspect regarding *approximation of law and reality is that it* was especially important for the Hungarian government after 2010 to base its own lawmaking, including the Constitution, on a solid, "irrefutable" and *moral* foundation *at least partially* because of the extraordinary extent of legal changes. In relation to this handling the examination of certain (professional) administration fields (politics) as solely regulation questions of legal nature would be a mistake. In social fields regulated by law the presence of other type (level) of normativity is also important; from the rules of everyday social coexistence to the questions of more special responsibility relations settled by political etiquette. The well-developed law does not eliminate the raison d'etre (necessity) of individual norms, community norms and organisational norms,[13] as the generality of law can only be realised with the "intervention" of

[11] According to the law household works are the following activities ensuring the everyday living conditions of the natural person and persons living in his/her household, as well as his/her close relatives: cleaning of the house, cooking, laundry, ironing, supervision of children, their home education, home care, house management, gardening.

[12] Income outside of the tax system is a benefit which is given by the employer to the household employee as remuneration for the household works. In relation with this payment neither tax declaration nor tax payment obligation burden the employer or the household employee.

[13] Especially not the mixture of morality and politics, the convention (see Szigeti, Péter – Takács, Péter: *A jogállamiság jogelmélete.* [Legal theory of the rule of law] Budapest, Napvilág Kiadó, 1998. 117.).

these.[14] Moreover, it was the unsuccessfulness of the previous Act on lobbying[15] that showed that in some fields the state cannot enter with its own additional regulations even in the case of the absence of self-regulation: in certain social spheres a lasting result can be achieved only through the permanent stimulation of self-regulating mechanisms, which is a slow and difficult solution but without any alternatives. That is why the new lobby regulation – partly – chooses the solution that it only creates mandatory regulations for the public servant that welcomes the lobbyist, and otherwise it is satisfied with creating samples through its own evolving practice on the one hand, and it relies on the existing criminal law limits (e.g. bribery). This results in that when we examine the nature of law, we have to measure how the above mentioned types of norms differ from law, what interaction they have with law, and to what extent does the practical use of law depend on the existence and structure of other regulation systems.[16]

One of the real difficulties in this case, however, is *that in the past several times the legislator missed to observe properly whether the given situation shall be influenced by legal norm, or a social norm or system of norms would be more suitable to settle the given field.* Thus, the selection of the most appropriate form of norm meant and means also today the most problematic issue of legislation. *The failure of the previous legal instruments was especially obvious in the fields influencing financial, economic relationships: e.g. criminal law measures applicable for legal persons,*[17] *the previous act on lobbying or the act on volunteer work which aimed at repressing black work*[18] *may be mentioned as deterrent examples. Even though these are (were) formally part of the legal system, they have never been really used.*[19]

Naturally, law shall not be "shy" and "reserved" in the social sphere and in its interactions with other norms: the law shall continuously offer its own results which clearly communicate the values accepted by the majority, because „no solid foundations can be laid for the safe functioning of the constitutional order without [...g making a clear distinction between democracy and dictatorship, right and

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14 Tamás, András: *A közigazgatási jog elmélete.* [Theory of public administration law] Budapest, Szent István Társulat, 2001. 145.

15 Act XLIX of 2000 on lobbying, annulled in December 2010.

16 „The Nature of Law" /article/ Stanford Encyclopedia of Philosophy, January 4, 2007 http://www.google.hu/searchsourceid=navclient&hl=hu&ie=UTF&rlz=1T4PCTC_huHU374HU375&q=An+Outline+of+Contemporary+Legal+Thought (2012. 02. 01.)

17 Act CIV of 2001 about criminal measures applicable against legal persons.

18 Act LXXXVIII of 2005 on volunteer public service

19 According to the statistics of the Office of the Parliament for example the number of events held formally announced by the act on lobbying was about 20-25 (!) in each quarter of a year, which is just fragment of that activity which was probably realised as lobbying. The fate of rules prescribing the registration of volunteers was similar, the number of registrations may be measured in thousandths in comparison with the actual volunteer activities [according to Article 11 paragraph (1) of the act the receiving organisation shall register it in advance at the minister for the development of social and civil relationships on the Registration form annexed to the act].

wrong, good and evil" (Preamble of the Transitional Provisions to the Fundamental Law of Hungary).

2.1.1. Perception of reality

Now let's move to the following principle. If we had to define the core idea of the features of „good state" we could say that it is the ability to reflect on real social problems. In an ideal world we could also add that the fact and content of the material answer given at real questions shall not depend on the possible short term political consequences it may have on the decision-maker…

Undoubtedly in Hungary the Roma-issue is one of the most urgent and most neglected problems. The latter statement is also underlined by the fact that in public spheres the legitimate and constructive terminology and wording issues of raising this problem have not been clarified yet.

It is an important connection from the aspects of our topic that the paradigm changes mentioned so often in relation with Roma policy shall not mean only the improvement of numbers related to the institutions of participating democracy: in order to make the Roma minority active, initiative members of this legal society in Hungary the democracy concept of legal procedural stability shall be reconsidered, and its scope and horizon shall be extended also with value based factors.

In addition, the protection of the interests of future generations requires us to "limit the enforcement of the empirical majority with reference to an actually non-existing population – eventually to a principle valid regardless of the opinion of the actual majority – let it be at political elections or through the market game of demand and supply".[20] And it will have a *growing significance because based on the current demographic trends we can expect growth in the number and in the proportion of Hungarian Roma people within the society in the near future. It also contributes to the fact that* the traditional principles of democratic representation and decision making shall be supplemented[21], therefore new institutionalised solutions are / will be needed.

It may be a constitutional basis for this concept that the new Fundamental Law is a constitution „open from upwards". This openness from upwards means that under the force of the new Fundamental Law it becomes the responsibility of the state (and its organisations) to proceed during the enactment of any normative or individual act or the interpretation of Hungary's Fundamental Law by paying attention to the interests of future generations.[22]

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[20] Lányi, András: Az ökológia mint politikai filozófia. [Ecology as political philosophy.] *Politikatudományi Szemle* 1/2012. 118.

[21] Ibid.

[22] See e.g. Article P) of Hungary's Fundamental Law: "*All natural resources, especially agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.*"

2.2. The effect of crises on legal norm systems and their analysis

Until recently, most of the papers – connected to the various fields of social sciences – took the concepts of predictability, continuous expansion, growth and prosperity for granted – even without expressed mention – as the defining elements of the external environment. The same applies to the various fields of legal science as well. However, the expansion of the catalogue and tool system of rights made the lawmaker and the practicing lawyer less careful: as the erosion of compulsory verification seemes to have started with the persistence of peace. In the frames of this relativism, neutralism and value pluralism that was feeding on individualism overcame our law, and responsibilities seemed to have become residual items besides rights. Moreover simultaneously "the model – appearing of economic nature on the surface – believed to be the condition of our [economic] prosperity [also] failed".[23]

It may be generally stated that in the era of crisis, when everyday experience confutes our previous expectations, legal and political theory is radicalised as well: it has to examine and rethink the validity of its presumptions that were considered stable. The attention of legal science, besides others, also turns more and more to the question of moral principles penetrating – more – into the world of law, also in fields in which this has been a long urged necessity, but actual incorporation has not or just partially happened (see e.g. the issue of moral responsibility of the majority society towards Roma minority in the valid Hungarian legal instruments). One certain sign of the extension of the horizon of legal sciences is that the forefronts of "traditional" legal positivism create their own criteria systems one after another, which may allow this incorporation to happen justifiably.[24]

This paper, therefore, may not avoid dealing with the natural law transformation of the legal system, that is with the new tendencies of legal approach focusing more on background values and interests than on the specific expectations expressed in rules which may be directly transformed into actions; such as specific tools for the extension of governmental capacity.

However the natural law direction of legal concept outlined today stands before us as a basically *relative natural law* argument that is strongly bound both in time and space, because its point of reference is often nothing else than the direct pressure created by crisis, meaning the financial and other crises (such as terrorism and natural disasters) going on since 2008.

However we should not think that the penetration of various natural law principles and ways of thinking into Hungarian law/legal life happened in the recent years only; this is a phenomenon that is presumable as a process, only the "strong thickening" of which can be observed in the recent period examined by us. Even the Hungarian

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[23] Miszlivetz, Ferenc: Válság és demokrácia – 1989 öröksége. [Crisis and democracy – the heritage of 1989.] In: Simon, János (ed.): *Húsz éve szabadon Közép-Európában. Demokrácia, politika, jog.* [Twenty years free in Central-Europe. Democracy, politics, law.] Budapest, Konrad Adenauer Stiftung, 2011. 134.

[24] Matthew H. Kramer: *Where Law and Morality Meet*. Cambridge University Press, 2008. 17.

compensation process after the system change was born from the "actualisation" of certain natural law principles,[25] for as much as the partial correction of the previous legitimate decisions could take place only because they were unfair and realised "arbitrary deprivation" in a legitimate way.

Despite process-like, gradual and „periodic" realisation there is also a possible positive law – relative natural law – Christian natural law course in the newest Hungarian legal and norm development. The newest natural law – optionally with Christian foundation and content – is new in a way that it does not trace the provisions of the positive law back to the creator of the legal material or the principles strengthened in "legal history" etc. but accepts the general principles and itemised expectations of the – worked out – system of belief, that has a wide social embeddedness – typically the Bible in our culture – as a direct justification and a necessary resultant of a certain regulation.

My presumption is that for credible and further applicable analysis regarding the specific subject of this subchapter needs a method that applies some sort of inter- or multidisciplinarity; meaning that in the examined topic it is worth creating such strong academic and material frame from other social studies like political science, public administration, Christian social ethics and economic ethics (!) in which and compared to which the legal science arguments in the narrow sense and text level examinations can earn their real place and value.

A priori in order to create a dialogue between law and other forms of knowledge a strongly interdisciplinary starting point is necessary.[26] Today this means more than using the methods of sociology or discussion analysis to our help for the better understanding and overview of legal processes. Much rather the need for opening towards other new (science) fields that had none or only some connection with legal studies (cultural anthropology,[27] theology,[28] religion studies,[29] social psychology, etc.). Moreover, today the relation of these cannot even be restricted to "mutual

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[25] In details see: Prugberger, Tamás – Szalma, József: A természetjog és polgári jogi kodifikáció. [Natural law and civil law codification.] *Magyar Jog,* 2003/3. 129–139.

[26] Richard Sherwin: *Intersections of Law and Culture*. [A cross-disciplinary conference hosted by the Department of Comparative Literary and Cultural Studies, Lugano, Franklin College Switzerland, October 2, 2009.]

[27] See details e.g. Michael Freeman – David Napier (ed.): Law and Anthropology. *Current Legal Issues,* Volume 12, 2009. 47.

[28] According to the most popular approach, theology is not more than a back and forth movement between two endpoints where the two endpoints are the eternal truth and the momentary situation in which the eternal truth has to be discovered. E.g. Paul Tillich: Systematic Theology. Reason and Revelation, *Being and God*, 1951/1. 3.

[29] If a religious study is a synthetic and according to the nature a describing study, the main goal of which is to take into account the religious phenomena; then besides the sectoral professional sciences traditionally classified in this circle, the involvement of characteristic methods and presumptions of legal theory and branches of legal science that rely on positive law in the analysis possibilities of certain dimensions of religious reality may seem possible and necessary, especially if it has an effect on law itself.

introduction" on the level of generalities, rather the creation of such previously constructed interdisciplinary procedures and connecting coherent and systematic methods is necessary, that are able to provide the stable frames of substantive comparative analyses/researches and at the same time they are committed to necessary flexibility and openness as well.[30]

3. The new principle of cooperation

It also has to be mentioned here that in the modernisation of the Hungarian public administration – on the measure of Western reform trends – the deficiencies of the balance of state and market are continuous;[31] and in the Hungarian model of public politics decision making – as it was already mentioned – the "top-down" approach is dominant, for as much as the institutional mechanisms of the involvement of advocacy-integrative organisations operate formally only.[32]

Among the tools of integrating society, or at least the concerned groups into decision making the government established in 2012 prefers the non-legal ones (therefore those which do not constitute direct obligations for the government), despite the two new acts on legislation and the inclusion of society into legislation; moreover, those solutions are in focus which are out of the legal system or are located at the border of the legal system. Therefore the so-called *national consultation*, which – among others, such as sectoral, professional and other negotiating forums[33] – introduced in Hungary a previously unknown political technique: within two years – in ordinary mail – each citizen received two surveys with possible answers to choose from,[34] furthermore, – as a method not really used before in Hungary – an information booklet was sent to all citizens with the right to vote which presented the newest pieces of legislation.[35] The political framework of different consultations is the political declaration about the National Cooperation made in 2010, which established the System of National

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30 Jonathan Rothchild,: Law, Religion, and Culture: The Function of System in Niklas Luhmann and Kathryn Tanner. *Journal of Law and Religion* (2008–2009), Vol. XXIV., 476.

31 Jenei, György: Adalékok az állami szerepvállalás közpolitika-elméleti hátteréről. [Supplements about the public politics-theoretical background of the state's participation] In: Hosszú, Hortenzia – Gellén, Márton (eds.): *Államszerep válság idején*. [State role during crisis] Budapest, COMPLEX Kiadó, 2010. 94.

32 Jenei op. cit. 95.

33 We may consider as such the National Cooperation Forum of Local Governments, which is a body performing official negotiations between the Government and local governments.

34 For example the 16th question of the "National Consultation 2012" survey was the following: "There are some people according to whom the government shall protect the purchasing force of pensions also in times of crisis. In the opinion of others this is not possible. What do you think?" For the question an answer had to be chosen from the following three options:
– The government shall further protect the purchasing force of pensions;
– During crisis it is not possible to maintain the purchasing force of pensions;
– I don't know.

35 Such information was provided by the "Job protection action 2012" letter sent to each citizen in the summer of 2012.

Cooperation. Looking beyond political slogans and pathetic forms *it may be well observed that the government expects from the method of crowdsourcing* – which may be considered traditional in other countries – as well as from different *online consultations* and the introduction of new means (surfaces) of information the establishment and deepening of discussion (cooperation) with society.

4. Summary

The paper repeatedly highlights that the fact of the crisis and the urgency of solutions needed originating from it increase the significance of requirements towards a good state and stresses their necessity, as well. In summary it may also be stated that the transformation of the Hungarian legal system has been greatly affected by the need for stability and a shift to natural law supported by the incorporated new norms and types of norms. This means that the public policy and legal system are not only receivers of new values and principles, but these make and may make the operation of the state and mainly of public administration much more fluid than before.