

# Brexit – a Tragic Continuity of Europe’s Daily Operation

## Introduction

The British vote to leave the European Union came as a surprise and a shock. It has been understood as an aberration, as a triumph of populism and nationalism, in conflict with the ethos of the Union. But Brexit should not be understood as a mere aberration, but instead as one position on continuum of exhausted thinking about EU and (transnational) law in general. From the perspective of "pure" legal theory, Brexit is self-referential, resulting from the internal dynamics of the system. It is a result of the general lack of legal and economic imagination as to how the EU should be reordered and reimagined.

European collaboration is both necessary and inevitable. It is one of the guarantors of peace and overall economic growth on the continent. The European Union is a remarkable achievement in numerous respects, but one that has since its inception slowly calcified. It has ceased to animate and inspire Europeans. The European Union project has already lost some of its appeal, both because of the ongoing Euro crisis and a long-term power shift to East Asia. The idea that the “European way of Law” serves as a model for the rest of the world has been undermined.

Europe needs radical change in thinking about governance. But Brexit is not a radical change, it is defeatism based on the existing spectrum of thinking. The discourse surrounding Brexit and the act of leaving the Union itself reproduces the daily European discourse: a discourse too focused on disaggregated sovereignty, border controls and participation in the system. This often misrepresents power relationships, arrests legal re-imagination, and contributes to the reproduction of existing hierarchies in Europe. Brexit thus reveals a lack of analytical clarity and a lack of vision to restart and reimagine the European project.

## European Union as a New Legal Order

The European Union was a transformative strategy for peace among the states of Western Europe, an antidote to the negative features of the state and statal intercourse and credited with having developed a model of governance not based on power and strength, but self-limitation.<sup>1</sup> The Union has been credited with constituting a sui

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<sup>1</sup> Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE. L. J. 2403, 2478-2479 (1990).

generis new legal order<sup>2</sup>, based on a distinct ethos of taking into account the interests of others.

Joseph Weiler construed two competing visions of the “Promised Land” to which the European Union is being led, the *unity* vision and the *community* vision. Both try to address the mischief embodied in the excess of the modern nation-state and the traditional model of statal intercourse that was premised on full sovereignty, autonomy, independence and a relentless defence of the national interest.<sup>3</sup>

The *unity* vision is a progressive step of establishing a common market and approximating economic policies through ever tighter economic integration resulting in full political union, in some version of federal United States of Europe, finally and decisively replacing the hitherto warring Member States.<sup>4</sup>

The *community* vision, Europe’s “Sonderweg”, a distinct mode of governance, sees as its "ideal type" a political union in which Community and Member State continue their uneasy co-existence, although with an ever-increasing embrace. It is premised on limiting or sharing, sovereignty in a select albeit growing number of fields, on recognizing and even celebrating the reality of interdependence in a community of states and people sharing overlapping, but somewhat distinct values and aspirations. The latter vision does not involve a negation of the state. The tension among state actors and between each state actor and the community is central to this vision.

While, according to Weiler, the ethos of unity is strength and power, the ethos of the community is self-limitation. In this vision, many policies in the public realm can no longer be adopted without examining their consonance with the interest of others and the interest of “Europe<sup>5</sup>.” On the other hand, in the ethos of unity, the value of the Union is measured ultimately and exclusively with the coin of national utility and not community solidarity.<sup>6</sup> The unity and the community visions are thus portrayed as incompatible with one another and as being distinct and in a sharp contrast.

The two visions, however, can be understood as different positions on a single spectrum of legal thought, representing different positions on a single continuum between autonomy/self-interest on the one end of the spectrum and altruism/interdependence on the other.<sup>7</sup> Weiler’s unity vision presents the two opposite

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<sup>2</sup> Case C-26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 3.

<sup>3</sup> Weiler, *supra* n. 1. at 2478.

<sup>4</sup> Weiler, *supra* n. 1 at 2479-480.

<sup>5</sup> Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe’s Sonderweg*, (Harv. Jean Monnet Working Paper, 10/00 1991), 13.

<sup>6</sup> Weiler, *supra* n. 1 at 2478.

<sup>7</sup>For the interplay of individualist and altruist considerations in legal thought see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685 (1976).

extremes of the spectrum. Exit from the Union would be a result of the ultimate self-interest. A complete federation, a "super state", a state of complete interdependence, is at the opposite side of the spectrum.

The community vision is the middle position between the two extremes. It is neither premised on national self-interest, nor does it form a complete federation, a super state. The two visions can thus be understood as positions on the same continuum of disaggregated sovereignty, a staple of contemporary global legal thought.<sup>8</sup> In this understanding, there is no separate ethos of a "community vision", no novel ethos that defines the European Union. Rather, the building of the Union can be understood as irreducibly torn between selfish self-interest and altruist interdependence, between apology and utopia<sup>9</sup>, as any other form of governance in the world.

## The Lost Vision

The idea of a distinct ethos of a "community", the position of institutional centrism and economic interdependence provided a vision of European integration in the era of the post-war and post-cold war European reconstruction. It offered a unique model for reshaping transnational discourse among states, peoples and individuals who emerged from the nadir of Western civilization, serving as a model for other regions of the world<sup>10</sup> and promising an embrace of the Eastern side of the Continent, ravaged by decades of repression and mismanagement.

The position of institutional centrism and economic interdependence that had fuelled European collaboration is no longer a mobilizing force for the polity. Lawyers and other policy-makers have been falsely substituting legal tools such as stages of integration or the "new legal order" supported by the "community" ethos for the population's reality. Once the belief of the population in the existence of a novel ethos has waned through the decades of the EU's existence, people were left only with their daily reality. The population started to realize the impossibility of the professed ideal of "inclusion of the other" within the European Union.<sup>11</sup> In everyday life, the lofty ideals are felt as a hierarchical struggle determined by irreducible exclusion. Thus, European Union's institutions now present just one of several factors of governance, no longer enjoying the halo of a "higher" ethos.

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<sup>8</sup> For the argument that disaggregated sovereignty is one of central features of contemporary legal thought see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* (D. Trubek & A. Santos eds., 2006).

<sup>9</sup> MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005).

<sup>10</sup> Weiler, *supra* n. 1 at 2483.

<sup>11</sup> Damjan Kukovec, *Hierarchies as Law*, 21.1 COLUM. J. EUR. L 131, 170-174 (2014).

Today, people's daily reality is not a traumatic memory or a fear of war. Likewise, interdependence is not a vision of social change – it is a reality. People feel and see the interdependence of global politics and global economy on the daily basis, in stores, at workplace, on television and the internet, and do not crave for more of it in their daily lives. Calls for increased institutional and economic interdependence thus have little mobilizing value.

If the European Union is to continue to be visionary, it must address people's daily reality. Particularly, it must address its own contribution to the reproduction of the unjust hierarchical reality that prevents self-realization and stifles the lives of the masses across the European continent and the world in general. Hierarchical structures of power without an implicit element of merit are reproducing themselves throughout the United Kingdom, Europe, and the world.<sup>12</sup> The daily operation of power, however, is not adequately addressed by the legal profession.

The community vision is presented as one of self-limitation, as opposed to the ethos of power and strength of the unity vision. One of the aims of the community vision is making sure that states and individuals are equal under the frame of interdependence. However, the operation of power cannot be eliminated by any mode of governance. Hierarchical reality can only be reimagined, resisted and adjusted.

Some people's dilemmas in the British referendum on the EU are well portrayed by a CNN's report about why people in Hull, a peripheral English city that has been in decline for years, voted for Brexit. One man vividly portrayed the situation: "Nowt [nothing] to lose have we. I don't think so... we ain't got nowt [nothing] anyway."<sup>13</sup>

Certainly, there have been elements of false consciousness in voting in the British referendum. Those who actually benefit from the EU budget may have voted for leaving the Union. However, the budgetary transfers alone fail to address the daily hierarchical struggle – the unidentified and unaddressed injuries and losses through the daily operation of the legal structure.<sup>14</sup>

The daily hierarchical struggle has not been seriously addressed by lawyers and policy-makers. Lawyers, regardless of their pursuit of the unity or community vision, have learned to daily use the theory of integration from a free trade agreement, to a

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<sup>12</sup> For the unjust hierarchical reality and its reproduction see *Id.* and Damjan Kukovec, *Economic Law, Inequality and Hidden Hierarchies on the European Internal Market*, 38(1) MICH. J. INT'L L. (2016).

<sup>13</sup> Happy in Hull? Why this British town backed Brexit, available at <http://edition.cnn.com/2016/06/27/europe/happy-brexit-hull/>

<sup>14</sup> Damjan Kukovec, *Law and the Periphery*, 21(3) EUR. L. J. 406 (2015).

customs union and to the internal market and common currency, and understand it as a story of a successive dismantling of trade obstacles set up by state borders and lack of cooperation.<sup>15</sup> Disaggregating sovereignty by a progressive demolition of border controls and related measures is, just as integration through the institutional structure, premised on the continuum between individualism/self-interest, on the one end of the spectrum, and altruism/interdependence on the other.

Much of the discussion on the development of EU change is thus premised on the axes of more or less free trade, more or less common standards, more or less border obstacles and more and less Europe. Such accounts feed the discussion of deeper integration and greater economic interdependence as opposed to disintegration that reflects the thinking about law and policy of European and international leadership today.

Consequently, revolt against the hierarchical structures is articulated in terms of a rejection of interdependence. People's dissatisfaction is channelled in reinstatement of borders, rejecting common rules and limiting competence of European institutions. However, these are a continuation, not a break from the current thinking about EU and governance. It is a mirror image of progressive pooling of sovereignty - of institutional cooperation, demolition of borders and setting up of common standards. Euroscepticism - and Brexit - are a brainchild of the existing thinking about the Union.

The three broad options for the future British involvement with the Union - joining the existing EEA (European Economic Area) Agreement, which Norway, Lichtenstein and Iceland had concluded with the EU, a specific bilateral agreement with the EU (like Switzerland) or a fall-back option to WTO rules of trade - are all on the same continuum of partial (dis)integration.

When demolition of borders is set as the main goal of a political project, their reinstatement becomes the major defence. When the encroachment of powers of the EU institutions upon the national powers is seen as the central problem of European governance, "taking your country back"<sup>16</sup> becomes the central opposition to the project. Likewise, when the central problem of governance is depicted as "over-integration"<sup>17</sup>, the defence is limiting the integration or leaving the project of integration altogether - leading to the Brexit.

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<sup>15</sup>Contra Weiler, *supra* n.1 at 2479-2480.

<sup>16</sup> See e.g. <http://www.express.co.uk/news/politics/664333/We-want-our-country-back-Farage-rallies-troops-ahead-of-Independence-Day-Brexit>.

<sup>17</sup> On the costs of "over-integration" see for example Fritz Scharph, *After the Crash. A Perspective on Multilevel European Democracy*, 21 EUR. L. J. 384-405 (2015).

The tragedy is that one of the EU Member States most receptive of new ideas, most open to intellectual, social and democratic experimentation and by far most welcoming of foreign intelligentsia decided to continue its course of action on the existing spectrum of thinking and exit the Union. United Kingdom has been able to draw talent from throughout Europe and the world, contributing to the affirmation of its position firmly in the center of the European Union. Parisians, academics, Polish plumbers, Romanian roofers and intellectuals from across the Continent have been seeking vocational and intellectual refuge in the UK.

On the other hand, these movements and immigration concerns importantly, if not decidedly, contributed to the Brexit vote. Historians will surely debate the impact of Eastern enlargement in 2004, 2007 and 2014 on Brexit for years to come. While the flow of people was probably one of the most important factors in the vote to leave, the openness to new ideas still remains relatively conservative and the British discourse about the Union and governance has remained largely on the existing spectrum of legal thought about disaggregating, pooling or reinstating sovereignty.

Such a discourse caters to the alienated and aggrieved citizens who are, just as the elites, unable to articulate the grievances in other terms than ideologies of anti-European Union or, as in the context of global governance, of anti-neoliberalism. When those on the downside of European governance embrace this very ideology and rhetoric and hang on to it to articulate their grievances, this should be understood as a testament to European democracy, not its negation. It should be understood as a call for change of the existing thinking and course of action.

### **Reproduction of the Status Quo**

The daily hierarchical structure is not adequately addressed in the institutional discourse or in the spectrum of progressive stages of integration and disintegration. The institutional reimagination and emphasis on the relationship between Union institutions and Member States and equal citizens tends to misrepresent power relationships. It regulates relationships between legal orders and equal citizens without sufficiently accounting for the hierarchical structure at play.

Neither states nor individuals are equal. The global society is hierarchical. The obstacles to trade are articulated in terms of discrimination, in terms of non-discriminatory ability to cross the border. Abolishment of these obstacles, however, will not affect all people in the Union in the same way. Each reduction of obstacles will affect them differently, based on their structural position and based on the circumstance they will find themselves invoking it.

Building (or disintegrating) an internal market, a free trade regime, or a political union, reveals relatively little about the society that is being constructed. This debate reduces an order to its character and governance is thus debated in terms of more or less public and private legal orders.<sup>18</sup> A “real” internal market free from barriers to trade, however, is an illusion. Once, the hierarchical structure of society is set as a starting point of analysis, it becomes clear that the EU internal market is not a constant advancement of free movement considerations over social considerations, as EU lawyers from both political poles would like to see it. Rather, it is a complex set of entitlements allocated differently between different actors in the Union. It is a single market in which some obstacles to some movements are sporadically reduced and some obstacles to some movements or autonomies sporadically added.<sup>19</sup>

In the existing discussion about more or less positive and negative integration, people misread their position in the legal hierarchy. The main qualms of United Kingdom leaders who were considering an exit from the Union centered on the little power that the United Kingdom exerts over European law and decision-making. The principle of subsidiarity, introduced into the Amsterdam Treaty in order to placate the somewhat Euroskeptic Tory party, seems not to have played its intended role of decentralization. These frames of argument are structured with the EU institutions as the center and Member States as the periphery, or the reverse.

When institutions in Brussels are characterized as the center and those in Berlin, Paris, or Athens as the periphery, the question of “who decides” frames the discussion about power relationships. Taking Brussels as the center and Member States as the periphery, and centering on the division of material competences as in Joseph Weiler’s portrayal of the Union, demands for greater regulatory autonomy and subsidiarity in light of competence building by EU institutions seems like a natural reflex. In this debate, the United Kingdom sees itself as peripheral in the Union and strives for an empowering exit.

Control over law-making and on cross-border movements and consequently participation in a system or leaving the system takes central stage in thinking about governance. A retreat to sovereign powers, however, like desire for a full participation in a system, can prove to be an illusion. In an interconnected world, the idea of an “independent” UK is an illusion.<sup>20</sup> The exit from the European Union cannot be total, it is necessarily selective. EU institutions form an important cluster of regulatory power,

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<sup>18</sup>Kukovec, *supra* n. 11 at 164-66.

<sup>19</sup>Kukovec, *supra* n. 11 at 166-68.

<sup>20</sup>Kukovec, *supra* n. 11 at 168.

so the British objection that their Parliament merely ratifies whatever is sent from Brussels might be the experience of those who are not Member States just as well. The regulatory power of the Union inevitably extends both formally and informally far beyond the borders of the European Union in competition law and in countless other legal domains. In other words, the United Kingdom, even after having left the Union, might inevitably find itself under the influence of the regulatory machinery of the Union.<sup>21</sup>

Moreover, the intellectual focus on “control” or agency based on equality misses the hierarchical structure. United Kingdom’s position is firmly in the hierarchical center of the European Union. United Kingdom has significant clusters of hierarchically privileged actors who find themselves, what could in many respects be interpreted as higher in the hierarchies of production in the global structure of nearly any human activity – production of goods, services, dreams, and intellectual activity – than actors from another peripheral country. CEOs, lawyers, bankers, professors, pop stars, and athletes are part of these.<sup>22</sup>

Despite some of the inevitable negative consequences of Brexit on some sections of the population from both sides of the Channel, the UK will stay in the center of the European Union in economic, cultural, intellectual, military and political sense. While the UK may occasionally be harmed by not sitting at the table of decision-making, the relevance of the structure, which is beyond the control of a single agent, and contributes to the reproduction of hierarchies, is missed in the discussion on Brexit and in the reform of the European Union in general.

European Union does not need just any reform. Reform has been the driving force of the EU since its beginnings and has been in fact its “raison d’etre”. The reformism of the EU, however, has been anti-structural – contributing to the reproduction of the existing distribution of wealth, power and authority in the Union – including to the reproduction of the hierarchical positions of outsiders, such as those in Britain or Switzerland.<sup>23</sup> The way we, European lawyers, speak and think about Europe reproduces the existing hierarchies and entrenches the center’s domination over the EU’s periphery.<sup>24</sup> Furthermore, there is constant decision-making in society that takes place outside institutions. Those in a hierarchically privileged position have more

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<sup>21</sup> For the argument of EU’s regulatory power beyond its border in merger control, see Damjan Kukovec, *International Antitrust, What Law in Action?* 15 *IND. INT’L & COMP. L. REV.* 1 (2004). For an argument about EU’s regulatory power in several legal domains, see Anu Bradford, *The Brussels Effect*, 107 *NW. U. L. REV.* 1 (2013).

<sup>22</sup> Kukovec, *supra* n. 11 at 169.

<sup>23</sup> Kukovec, *supra* n. 11 at 168-70.

<sup>24</sup> Kukovec, *supra* n. 14.; Damjan Kukovec, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo in EUROPE’S JUSTICE DEFICIT*, 319, 324-330 (Kochenov, de Burca and Williams eds. 2015).

privileges with which to abuse the subordinate and are thus consenting to the structure that generally perpetuates their superiority.

One does not fully lose its capacity to participate in the daily legal construction by formally leaving a legal order. They are only able to use a limited set of tools differently and in different social settings. Likewise, people of countries joining the EU do not obtain general political or legal capacity by joining the Union. Actual political capacity depends on the position in the hierarchical structure of society that one finds themselves in. UK actors, just as Swiss actors will remain in a similar legal relationship to other central actors of the Union, despite the fact that they are outsiders.<sup>25</sup> Thus, just like the EU will keep exerting influence on the UK, the UK will keep exerting influence on the EU, though these channels of influence will now be understood as "informal".

While Brexit is understood as a change of epic proportions, the tragedy is that European and British hierarchical reality is bound to remain largely untouched. Just as the UK will remain central in the European hierarchical structure after Brexit, Albania will stay peripheral, no matter whether it joins the EU or not. And the man in the town of Hull who vividly portrayed his situation and position on Brexit will remain where he is in the hierarchical structure - no matter whether the leave or remain camp would have won.

Brexit is understood as the nationalist rhetoric par excellence, as the ultimate demon premised on selfish nationalist rhetoric, or as a rejection of the vision of community - of a new legal order of shared values and aspirations. From the angle of reproduction of the status quo, Brexit is far less extreme, extraordinary and epic. Rather, it is a mere position on the spectrum of existing thinking and reflects daily operation that contributes to the reproduction of the existing hierarchies.

### **Democracy as a Remedy to Europe's troubles**

Nor does an effort for "more democracy" offer an avenue for addressing the existing hierarchical structure. Lack of democracy is a constant lament of Europhiles and Eurosceptics alike. However, European legal system is not just rhetoric of continuing democratization, the European Union *is* a democracy, albeit without a single demos, informed by and built on the pillars of most sophisticated democratic and

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<sup>25</sup> Kukovec, *supra* n. 11 at 168-70.

constitutional theory we have ever known. The problem is that the EU is a victim of its own democratic success.

Immense efforts have been made to make the work of European institutions transparent, and to observe equality and the rule of law at every instance of decision making. The European Parliament and national parliaments have been gradually given an increased role in decision-making. Moreover, citizens have, in principle, so many rights as never before in history and unprecedented avenues for lawsuits, complaints, petitions, initiatives, voting, and forums to express their concerns or disagreement. But existing constellations of judicial review, judicial powers of both the European Court of Justice and national courts, institutional representation by both national parliaments and the European Parliament, by Committees and so on attest to the fact that the European Union is a stellar example of a liberal democracy and of liberal governance.<sup>26</sup>

Rather than addressing the social hierarchical structure, democratic theory can become a substitute for the vision of transformation of Europe. There are important limits as to how to transform society with the existing toolbox of democracy. Every layer of democratic governance, committee, requirement of a report, and inclusion of stakeholders we add to European government risks adding to a citizen's sentiment that he does not know where to turn and that every move he makes is a wrong one. The European Union is so inclusive of everyone's opinion in its law-making and decision-making and generally aims at such transparency that this visibly complex system feels oppressive. Democratic theory is, as any other, ridden by contradiction and in itself cannot be understood as a panacea for Europe's troubles.

### **Lack of Analytical Clarity and Vision as a Global Phenomenon**

To be fair, lack of analytical clarity and lack of vision are not just problems of European governance. The overtly political left-right discussion based on the contradiction between individualism and altruism<sup>27</sup> and guided by ideological abstractions is a part of the problem of global governance. Rather than addressing the unmeritorious (reproduction of) hierarchical reality, the central ills of today's global society are too often articulated in terms of ideological abstractions - as a result of "neoliberalism" - of demolition of border controls and of setting up common standards, as opposed to protectionism. In this understanding, one legal regime yields more free trade than the other. In the EU setting, the European periphery gets caught up in ideological abstractions of left and right,

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<sup>26</sup> Kukovec, *supra* n. 11 at 170-74.

<sup>27</sup> The conceptual nature of the altruist - individualist spectrum is widely overseen. Kukovec, *supra* n.11 at 141-45 and Kukovec, *supra* n. 14 at 415-19.

foreclosing the concerns of the periphery from operating powerfully in the ideologically charged debate about more or less social and free movement considerations.<sup>28</sup>

Ideological frameworks appear to be articulating the hierarchical reality to us already. However, justice and injustice are not theories, "isms" or concepts. "Injustice" is the hierarchical reality and its reproduction by our daily work that we need to constantly construct and reconstruct, in order to address it.<sup>29</sup> Proposals for a healthy left-right debate in the EU legal discourse and for resistance of legal technocracy by reclaiming the primacy of politics over law<sup>30</sup> can thus just as well disable us from building new tools to reconstruct society,<sup>31</sup> preventing an intellectual debate leading to thicker social and discursive dialectics.

## Conclusion

Building a (transnational) legal order without an account of the (reproduction of the) daily social ills can all too quickly become a self-congratulatory enterprise dissociated from hierarchical reality. Constant articulation and rearticulating of the daily hierarchical reality, and construction of tools to combat it, appears unnecessary.

Failure to structurally re-imagine and re-shape Europe or "domestic" societies is present on both sides of the Channel, in the existing course of action, as well as in the revolt to it. More or less integration, more or less federalism, more or less common market, more or less neoliberalism, more or less border control, without the identification of reproduction of hierarchies are all on the continuum of thinking in terms of Brexit and arrest social re imagination and social change. Moreover, when there is a lack of analytical clarity or a lack of vision to change the project, the best way to address one's disagreement with the existing state of affairs appears to be to abandon the project and leave. Brexit should not be understood as an aberration, but as a tragic continuation of Europe's daily operation.

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<sup>28</sup> Kukovec, *supra* n. 14 at 415-19,

<sup>29</sup> Kukovec, *supra* n. 11, Kukovec, *supra* n. 24.

<sup>30</sup> Kukovec, *supra* n.11 at 180.

<sup>31</sup> Kukovec, *supra* n.11 at 180-191 and Kukovec, *supra* n. 12.