Széchenyi István Egyetem
Postgraduate Doctoral School of Law and Political Sciences

Head of Doctoral School: Prof. Dr. Péter Szigeti J. D., university professor

THESIS (SUMMARY)
OF DISSERTATION TITLED

THE NATURE OF „EASY CASE-HARD CASE" DISTINCTION IN JUDICIAL DECISION-MAKING – A LEGAL THEORETICAL APPROACH

BY LEA PŐDÖR J.D.

Consultants:

Prof. Dr. Péter Szigeti J. D.
university professor

Dr. Katalin Egresi J. D.
associate professor with habilitation

Győr
2021

TABLE OF CONTENTS

I. Aim and focal points of the research

Analysing judicial decision-making is a classic topic of legal theory. The dissertation focuses on two concepts which can help to make balance between the theory and practice of application of law. In a way, these concepts (namely: „easy case-hard case"-issue) are argued and challenged a lot. There are theorists and experts who can not identify themselves with this special viewpoint located on the edge of theory and practice, while there are others who think this distinction beneficial and useful. How and why could theory of law play a leading role in this dissertation and why do not we have chosen an other aspect (a technical one, for example criminal law)? The answer is: theory of law has a relevant and awarded role in studying judicial decision-making as theory is the only device to highlight the cases' practical side and to methodize their legal nature. So, the easy case-hard case distinction's starting point is the *nature of cases* because in this way, theory of law can discover really deep and important issues and their consistencies as well.

Legal professions are related to practical cases (legal cases) and this fact is more eye-catching when judges are coming into question because judges solve many cases day by day. Definitely, judges usually experience something important: some cases are clear and unambiguous, while others are on the opposite side and unfortunately, because of these kind of difficult cases, judges „can not sleep quietly".[1] We can take a risk: judges among themselves do not say phrases like „I have easy cases / hard cases in my practice", because their practical perspective systematizes the cases according to fields (for example there are criminal cases, civil law cases, employment disputes, etc.). Our two dilemmas, easy case and hard case are relevant from the viewpoint of legal dogmatics; of course, judges can meet them but they do not use the proper terminology to label these type of cases. Judicial work's natural characteristics is the obligation to decide every case – so, in judicial practice, category of easiness or hardness is not so essential, because judges concentrate on *solving* the cases. They *must* solve legal disputes because *non liquet* is not welcomed.

The subject of the dissertation is to examine precisely the nature of this special distinction: what does easy case and hard case mean from the perspective of legal theory? We can presume that „easy" and „hard" adjectives (besides their common and ordinary names)

[1] Bencze, Mátyás: *„Nincs füst, ahol nincsen tűz." Az ártatlanság vélelmének érvényesülése a magyar büntetőbíróságok gyakorlatában.* Gondolat Kiadó, Budapest, 2016. 39-42.

indicate very complex dilemmas which can generate intense disputes among the representatives of jurisprudence. We have to point out that the concepts are located in legal dogmatics and moreover legal dogmatics can prepare judges and every lawyer to solve difficult (so not routine) cases. Here, in advance, we should give short definitions to easy and hard cases, but the dissertation's 3rd chapter deeply deals with various concepts created by famous legal theorists.

First of all: we should accept and should not challenge the distinction easy cases-hard cases. Whether it is proceeded from the terminus made by ancient Roman lawyers „casus normalis", or from the most relevant theories (of Hart and Dworkin), one thing is clearly common: easy case means a situation where the judge can be sure in the conclusion thanks to a written rule – as this rule's content is unambiguous and unequivocal. The solution can be found in the field of *ius* which is articulated in an undisupted way. Furthermore, something is also needed: the factual situation and the written rule should match to and the judge simply „put" the rule to the case. From this viewpoint, easy case can be invoked as rule-based decision as well: the judge do not have to use discretion or do not have to find values and aims behind the written rule; the decision is simply born like a result of a mathematical problem comes to an end.

The question is much more complex at hard cases where written rules do no play a traditional role in decision-making. There are a lot of cases which prove that we can not solve every legal case with written rules. In addition to that, judicial application of law should not be restricted to a mechanical process! Hence, our task is to emphasize what does hard case mean – briefly, the problem has many interesting sides, and hardness of a case can come from various sources. Hardness can arise from the law itself and there are cases when factors over law come to the front. The adjective „hard" expresses: there are disputes which challenge the most prepared judges, and even theorists solve them in different ways – accordingly, hard cases have different solutions and all of them could be right even if these solutions are opposing. Accepting Bix's idea: „Hard cases are those in which competently trained and thoughtful lawyers or judges might come to different conclusions about the result. In a sense, the difficulty or easiness of a case could be seen along a few variables: the extent to which all (competently trained) people would agree about the outcome, and, for any given evaluator, the quickness with which the conclusion is reached and the confidence or certainty with which the conclusion is maintained."[2]

[2] Bix, Brian H.: *A Dictionary of Legal Theory*. Oxford University Press, 2009. 81-82.

The aim of the research consist of three interrelated questions calling for solution. Either of them is *to explain the easy case-hard case problem in a complex way, according to the aspect of legal theory*. Our ambition is to clarify the concepts and to help their acceptance among theorists and professionals. The dissertation aims to ground the distinction from more resources and to prove: the dilemma is living and appropriate – and with this, we are trying to synthesize the introduced various explanations. Implicitly, this groundwork brings us to the field of legal dogmatics (chapter 1), then we turn to an other side, legal methodology[3] (chapter 2). Searching for easy case-hard case concepts in history of ideas is an exciting task, because it increases our knowledge (chapter 3). Theoretical and practical analysis, generalization and systematization are legal theory's main missions. All we have to do is to highlight and emphasize the practical cases' unfailing richness. In addition to that, we have to provide an explanation to the nature of the phenomena.

The dissertation's other but totally equivalent aim is *to achieve a new easy case-hard case typology* (chapter 4). This aim requires lots of research which are written in the first three chapters, because important statements are located there which help to discover a new and unbeaten path – we hope this explanation might be a useful reading of the dilemma. In advance, we formulate the important pre-questions. Through history of ideas, we will see that theorists have something in common: *case-problem is in connection with the concept of law*. Besides forming a case-typology, the author of the dissertation tries to connect the analysed phenomena with a classical theoretical problem: with the concept of law.[4] In this way, the topic of the research leads us to a question related to the basic nature of law („what is law" – it is a traditional and eternal question, and „what is law from the viewpoint of a judge" – which is a practical question, we can also say, the question of workdays). The relation with the concept of law and the question in connection with the natue of law shades the picture of the author's case-tipology. In advance, we want to mention that this typology involves three main sources of hardness. These are the following: hardness coming from the establishing of law, hardness coming from the statements of facts, and moral hardness. What is more, the authorial position aims *to bring out the common points of common law and continental case-readings as well*. By the help of this effort, our scheme could be non-legal system-specific, which is completely all right – if we

[3] The dissertation's title uses the expression „decision-making" process, so we may need to add something important to this. The research does not want to focus on different theories of decision-making (of course, the palette is quite large, for example let's see game-theory, hermeneutical approach, deliberative model, etc.). Of course, the topic could be more interesting with these theories, but this would be the aim of an other research.

[4] There are a lot of other (not easy case-hard case-related) theories in which the connection between the concept of law and the application of law is drawn well, see for example Holmes' writings.

search for the legal systems' common points, the typology elaborated in chapter 4 of the dissertation could be competent and could be a proper sheme, no matter in which legal system we are. Perharps common law and civil law systems handle judicial cases (easy or hard) in the same way.

II. Methods and approaches of the research

The scientific method can be interpreted as a system of rules and principles that help the effectiveness of the research. The validity of the methods should cover the whole research. During elaborating the dissertation we used research methods typical of jurisprudence. These include the historical-genetic method, the system-theory method and the comparative method, and the conceptual-logical and dogmatic methods can be considered as special research methods. We come close to the case problem with the help of all these methods, but it is also important to emphasize that the subject and the aim of the research determined which methods we should use in each chapter. As this is primarily a theoretical work, each chapter is interlaced with the overview, systematization, collision and commentation of the Hungarian and foreign language literature related to these group of questions. Besides this, there is an other important method that embraces the whole dissertation and determines the characteristics of the research: the legal case analysis. Since the easy case-hard case distinction is on the edge of practice and theory, it is natural that the research also requires testing theories through legal cases.

Thereinafter, we briefly discuss the structure of the dissertation and the methods required in each chapter. We point out that the perspective of the dissertation is outlined by analytical studies, but of course it should not be forgotten that an even broader perspective may reveal even more about judicial decision-making, and thus the nature of the resulting easy and hard cases. Many authors (eg. Péter Szigeti, Csaba Varga, Mátyás Bencze) rightly perceive that the problems of law (and thus, of course, the application of law) must be explained in its sociological context, as law is a social institution. The analytical, conceptual framework of the dissertation does not cover legal sociological contexts, but it is known that this aspect may open new research perspectives in the examination of "easy" and "hard cases". We also indicate in advance that the dissertation strives to synthesize at the end of each chapter, i.e. it filters the lessons learned from the studies performed and searches for their connection points.

Chapter 1 deals with the dogmatic background of the issue, creates a kind of basis for the research, as the examined distinction is best known in this field (but the important aim of the dissertation is to prove that the concept pair is a lively phenomenon of legal practice, as is legal dogmatics itself). Legal dogmatics *(ars iuris)* can be understood as a conceptual network that helps the orientation between practical cases, but perhaps it would be better to refer to it as an activity, thus emphasizing that practice definitely needs such theoretical knowledge to solve cases. Walking in the world of dogmatics, the question is justified: is it worth looking for a

dogmatic paradigmatic case and an ideal judge? It is important to provide a dogmatic framework for the subject so that it can be seen with certainty: legal dogmatics is a kind of bridge, as it mediates between theory and practice.

Chapter 2 looks at the field of legal methodology, so it deals with methods namely the usual methods of judicial application of law. As it is well known, two basic methods can be considered for the legal systems of the world: the deductive (legal syllogism) and the case method, which well reflect the classical readings of scientific methods (on which Descartes and Bacon also focused), i.e. the deductive and the inductive method. Through these, the process of judicial decision-making can be analyzed, and thus a number of theoretical and practical problems become clearer. In addition to the two traditional schemes, a third, intermediate path is given, too; it is called argumentation method, which is actually an integral complement to the other two. The chapter also pays special attention to the application of the comparative method, since, according to one of the research objectives, it must be proved that the two dominant legal systems, the continental and the common law legal system, cannot be sharply separated, they have several connection points, which can be seen in how the two dominant legal systems handle easy and hard cases.

Chapter 3 concentrates on the history of ideas, although chapter 1 already contains historical perspectives and methods (cf. searching for the origin of the problem area). The aim of the application of the historical method is always to help the emergence, development and representation of the examined legal phenomena as a process. This is also the case with our topic: we present the three classical theorists of the issue (Leibniz, Hart, Dworkin) in chronological order, and we also analyze the problem in the present through the theories of contemporary international and Hungarian theorists. In the case of classical authors, emphasis is also placed on a brief presentation of the given historical age, since legal policy and legal attitude prevailing in the historical time have an impact on what (ie. judicial decision-making) and how our authors think about.

To mention the most important peculiarity of chapter 4, it tries to form a system theory, an own authorial point of view, the birth of which was, of course, helped and shaped by the experiences and conclusions gained through the previous chapters. In terms of the methods used, this chapter is really heterogeneous, as it re-introduces all the methods used so far to give the author’s position a concrete content. Dogmatic considerations play a role again, when the author of the dissertation analyzes the problems of the concept of law and the dilemma of rules. This is an essential step, as one of the hypotheses is that the case dilemma is directly related to

the authors' legal concepts. Supporting this requires not only a dogmatic but also a historical perspective. The author's point of view rests on two pillars: on the author's own concept of law, which then sketches how easy case and hard case distinction can be outlined. This is the most important novelty and result of the dissertation, which is given a systematic foundation in chapter 4. The case typology also synthesizes case readings of the anglo-saxon and continental legal systems, and can be understood as their common ground.

III. Summary of the scientific results

The research and the formulation of the author's position required the interpretation of three preliminary research stations (chapters 1-3.). It is therefore necessary to briefly describe the most important conclusions of each chapter, followed by a detailed and in-depth outline of the author's position.

1.

The question of the origin of the easy case-hard case distinction deserves special attention. According to the so-called traditional reading, legal positivism has finalized the thesis, but if this is true, then a specific legal positivism concept and position is needed, as it does not matter at all who (which theorist) handles it and what does legal positivism mean. In fact, the hard case-question is most vividly seen in the work of Hart and Dworkin, and in the debates between these two. The other two versions of origin discussed in the dissertation go back much further. In agreement with Szabó, it can be said that there were already numerous difficult cases in Roman law, as Roman lawyers sought to ensure that the decision corresponded to the universal aim of law, aequitas. The third answer is an intermediate stage between Roman law and legal positivism: Leibniz. He, as he also wrote his doctoral dissertation on the problem of the *casus perplexus*, is innovative because he dealt with logical puzzles, hence a kind of variant of hard cases. He highlighted these cases from the pure logical-linguistic area and made them legally relevant, associating a legal solution with them. He thought that all cases can be solved, and this follows from his natural law-attitude. Leibniz was also a reformer in assuming that the subjects of law were not ordinary cases.

2.

The dogmatic detour confirmes that in dogmatic work there is no sharp line between the judge and the theorist. Of course, the discourse on the need for legal dogmatics can also be linked to the dilemma of whether law itself is a theory or a practice, or perhaps a mixture of the two. The dissertation presents several conceptions of legal dogmatics, from which two well-marked directions were outlined: one point of view sees a complex web of concepts in legal dogmatics, a system that helps the application of law (Pokol), and the other is the route represented by Miklós Szabó, according to which legal dogmatics is in line with jurists' legal activity, since it means the activity in which and through which the lawyer reaches the solution. Legal dogmatics

can be presented as a discourse, in which theory and practice are intertwined, and also the reflections on them (Paksy). It is a fact that the dogmatic toolkit proves to be indispensable for solving a hard case (but in general all cases). It often happens that the high degree of generalization of the legislature and the endless variation of individual cases in life produce cases that even the most prepared judge finds very difficult to deal with. We can say that legal dogmatics also serves understanding and explanation, thus satisfies the needs of both external and internal observers of law.

The question may arise: whether legal dogmatics has any "register" of paradigmatic (hard) cases? Of course not, as certain authors (and maybe legal systems) may draw the line between easy and hard cases elsewhere. Agreeing with Paksy's position, we emphasize that asking for the priority of the easy or the hard case does not advance the debates either, as the two categories really make sense in relation to each other. Of course, it is perhaps wiser to consider the hard case as a starting point, because if we turn our attention to the hard case, we emphasize the importance of legal thinking, and also that judicial work is not automation. Nevertheless, the dissertation attempts to look for some hard cases that can be said to be paradigmatic, which are also discussed many times and in many ways in the literature.

The case-selection criteria is justified as follows. *Leibniz and his antique puzzle* are an important pillar of the dissertation, and the novelty is that the philosopher-jurist associated the issue with a legal solution; Leibniz was the first who did it and in a unique way. Although the much-cited case of criminal lawyers, *Regina v. Dudley & Stephens*, may have criminal relevance, it is interesting from the perspective of legal theory because a relatively clear factual situation results in a seemingly unsolvable dilemma. Although the cases about *speluncean explorers of Fuller and Suber*, are fictional cases, they serve a noble purpose: all the authors draw attention to the diversity of legal thinking and to the fact that certain problems go back to the nature of law. Finally, it could not fail to touch on the deservedly most famous hard case known to the world in Dworkin's interpretation, the *Riggs vs Palmer case*. It is clear that there are elements of law in addition to the written rules, just as principles are to be regarded as such, and according to Dworkin, it is precisely a principle that can provide a solution to a hard case.

The last important question in dogmatic „investigations" was whether the research is brought forward by the search for the ideal judge. Can an ideal judge cope with hard cases? There are many such forms of judges in the cultural-historical tradition (King Solomon, Magnaud, paragraph-automatic judge of Weber, Dworkin's Hercules or Győrfi's post-Hercules, and of course, anti-ideals are also known that demonstrate the greatest possible

judicial errors – see Fuller's king called Rex). More recently, virtue jurisprudence has examined this issue, but it is worth addressing with critical reservations. While it is to be welcomed that attention is drawn to the various qualities of the judiciary, and virtues can certainly help to recognize and resolve cases, the hard case phenomenon will not be resolved eternal validly with virtue jurisprudence. Rather, such approaches are merely theoretical reflections on the "good judge" question.

3.

The „investigations" in chapter 2 bring us closer to the process of judicial decision-making, as it takes into account the specifics of the methods used. Even through dogmatic considerations, the practical relevance of the easy case-hard case problem may have become certain, but the legal methodological detour made this an even more definite impression.

It is a general finding that the application of law on the continent can best be described by legal syllogism (deduction), while in the Anglo-Saxon legal system it can be described by the case method. It is wrong, however, that if this differentiation is strictly justified. Legal systems and legal cultures are far from separable, they have a lot in common, and a lot of institutions have their own special version in the other legal system as well. The dissertation also takes this into account, but first it examines the methods separately, and also includes a third method, the argumentation method, which can be a transition between the other two. An important benefit of this method is that it calls attention to the importance of reasoning and warns that a decision is never made, but must be found. Just to refer to some of the components that are relevant in both main methods: the role of previous court judgments in the application of law, *verba* vs *ratio*, the formalism-problem, usage of analogy, the nature of universalism and particularism, the search for the idea of law, casuistry or the Roman legal roots of the two dominant legal systems. This chapter and its findings play an important role in the author's typology, where the goal is not to achieve a system-specific case-scheme, but a typology that may be relevant in both the continental and common law legal systems.

4.

In our view, there are three classical theorists "behind" the easy case-hard case problem: Leibniz, Hart, and Dworkin. Thus, the first step in the analysis of the history of ideas is to get to know the views of the "triumvirate" of the case theorem, and finally to look for their points of connection and their tense statements. These three traditional interpretations are

complemented by other authors in the international literature (Marmor, MacCormick, Schauer) and the "Hungarian triumvirate" of the topic (Szabó, Bencze, Paksy). The dissertation presents the case approaches of a total of nine authors; we will make a brief summary of these now.

Focusing on the "triumvirate" of the case-question, it is clear that Leibniz can be considered a somewhat special author compared to Hart and Dworkin, so his theory should be viewed with this reservation. In Leibniz's system, all cases can be solved *ex mero jure* (this is due to his natural law attitude); regarding easy cases this is almost natural, and for hard cases it is reassuring. So there are no unsolvable, impossible cases, and he also considers hard cases to be puzzles – the response to these is aided by logic, which is rooted in natural law. At Leibniz, logic is also important for modeling, explanation, and understanding, and what he writes about the relationship between logic and law has remained a rather fruitful thought on the continent and in the Anglo-Saxon world. Throughout his life, Leibniz tried to introduce rationality into the world of law through logic – a great accomplishment as he sought to bring order and system into the true "legal cacophony" that prevailed in his day.[5] His paradigmatically hard case, the *Protagoras-case*, is also special because he declared this puzzle to be legally relevant by associating a legal solution with it, thus making it fit to reinforce his commitment to logic, the close connection between law and logic. As Paksy writes: Leibniz „(…) makes full use of the logical paradox potential inherent in the terms of contracts of an aleatoric nature, which is in fact the result of a combination of a contingent factual truth (ie. the contractual term) and a perpetual reasoning (ie. the obligation to keep the promise in the contract)."[6] What we may have a sense of lack of, although Leibniz might have expected because of his genius, is an incomplete interpretation of the range of hard cases because of the focus on a particular type of hardness. Ben-Menahem also thinks that in addition to logical puzzles, Leibniz did not focus on further decision-making dilemmas such as interpretation. And one last aspect is the further positive result of his theory; the philosopher-jurist rejects the boundless enforcement of

[5] In addition to these thoughts, Brewer's excellent study also points out that the famous Leibniz view that law is an axiomatic system is far from far away from the common law world – as many have previously thought. Axiomatic certainties need to be known to provide a clear method for deciding whether a particular argument is justified according to the rules of the axiomatic system. The axiomatic system supports the exclusion of judicial arbitrariness and expects justified and reasoned decisions to be made. At Leibniz, axioms have two sources: on the one hand, rationality, reason, reasons as principles of natural law, and, on the other hand, specific judicial judgments given by judges under a particular law of a given state. (Of course, Leibniz was not the only one to idealize axiomatic systems, there are other authors, e.g. Savigny, Austin, or Blackstone, but it's different who sees what as the source of the axioms of law.) Vö. Brewer, Scott: Law, Logic and Leibniz. A Contemporary Perspective. In Artosi, Alberto – Pieri, Bernardo – Sartor, Giovanni (eds.): *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law.* Springer, 2013. 199-226.

[6] Paksy, Máté: A jog barokk birodalma. A jogtudomány helye Leibniz életművében. *Különbség*. No. 1. 2017. 247-281., 271.

discretion, which can be a hotbed of arbitrariness. This is discretion in the broadest sense, but he does not run counter to discretion in the narrow sense, examples of which can also be found in *Digesta*. This is an important distinction, although it does not really get into the focus of his hard case. It is likely that the concept of Leibniz's legal system will once again be as important as it once was, and this is because the rapid development of technology again requires a legal system that works like a mathematical system, and the idea of Leibniz's judgment machine may become interesting again. It is therefore conceivable that artificial intelligence will be able to relieve the burden of law enforcement by the fact that many so called mechanical actions, which do not necessarily require thinking, will be performed by machines, so they will „make decisions."

Regarding Hart and Dworkin, the very fortunate situation is that it is not particularly necessary to prove why their work is essentially relevant – there is a very strong consensus in jurisprudence because a large part of the legal theory-community acknowledges that they laid the groundwork for the case-problem. Many have already criticized Hart, and the weaknesses of his theory are also pointed out in the dissertation (eg. he did not make good use of the Waissmann-Wittgenstein foundations and drew from them superficially), and we know his reformer thoughts (focus on the linguistic aspect, the duality of the core of meaning and the core of penumbra and their effect on the application of law). Dworkin's entire legacy is imbued with an interest in hard cases. He criticizes Hart's legal positivism and his colleague's case-explanations, but at the same time he reconsiders and revises his own views throughout his life. His greatest invention: to value the principles and strengthen their role in resolving hard cases. When the dissertation took stock of the differences between principles and rules, the source was the theory of the young Dworkin. This should be complemented by the important statement that while emphasizing the contrasts of rules and principles are indeed very important, it is best to look at the principles as follows: the mature Dworkin has already clearly described them as having a direct connection with the morality that underpins the law, more precisely with the political morality of the given community. This is why we can say that the hard case of Dworkin completely leaves the path illuminated by Leibniz (logic) or Hart (linguistic issues, judicial discretion) and enters a new path where moral-political dilemmas lie. This is also why it is clear that at Dworkin, the political morality of a given community provides the only correct solution to cases.

In addition to the three authors we call classics, many theorists pay attention to the case-dilemma. Apparently, the framework of the dissertation would have been stretched if it had set

itself the difficult goal to include all the other authors, so the theories of three other international jurists were included in the chapter. All three authors contributed to the further explanation of the great theories, or perhaps further thoughts about their strengths, or just synthesized the most useful aspects. Marmor's theorem was necessary to shed light on what was read at Hart as well as the Hart-Fuller debate. MacCormick's analyzed works can also be described as a kind of synthesis of the main problems of the dissertation. He discusses the case-dilemma in today's modern rule of law framework (thus a kind of follower of the Dworkin tradition) – culminating in such a direction is an increasingly burning task, and we can say MacCormick was well on his way. The Scottish jurist acknowledges the indispensable role of legal syllogism in the judicial application of law, but at the same time (compared to our other authors) explores the potential of argumentation in an innovative way. In chapter 2, we also tried to shade the statement that the argumentation method is a middle ground between the deductive and case methods, a toolbox that is present in both the two dominant legal systems and whose role should not be obscured. Schauer is also a key author and the term "*aurea mediocritas"* is also correct in relation to his theory. Like Hart, Schauer considers the existence of rules to be necessary, but recognizes that the rigid application of the rules (in judicial application this is a rule-based decision, discussed in more detail in chapter 4) should be reduced, as the judge must become sensitive to take into account the individual characteristics of the cases and judge them accordingly. This is why he calls his theory presumptive positivism, and therefore supports case-sensitive decision-making that is also sensitive to rules. The author of the dissertation believes that with this Schauer-position the tensions (that were also perceptible in the theories of the main triumvirate) can be resolved.

In Hungary, too, several jurists have dealt with easy and hard cases. A very valuable result of the three Hungarian jurists presented in the dissertation is that they tried to develop a kind of case typology. Szabó's theorem deserves the title of "case theory". Bencze's typology is unique because it innovatively wedges the category of difficult case between easy and hard cases, with which he answers many questions and through which it can solve many problems (which his predecessors did not know in the absence of such an intermediate category). Paksy's case theory is truly unique because of the Leibniz line, as he is one of the Hungarian authors who recognizes the genius inventions of the philosopher-jurist and reintroduces the *casus perplexus* phenomenon into the public consciousness.

5.

The aims of the dissertation were realized in chapter 4 of the dissertation. First and foremost, the question is: what do the authorial positions have in common? Through the analyzed theories, the boundary between the notion of the easy case and the notion of the hard case can be delineated by looking at whether there is a *"rule"* that would decide the case; if there is and it has a clear connection with the case, the judge is dealing with an easy case. Of course, this question is much more complex than it seems at first glance, because it does not matter at all who and what means *"rule"*. Following the presentation of the works of the "triumvirate" discussing the case problem, it was proved that all three of them used an exact *„rule"*-concept. (Leibniz: *ius humanum*, natural law and *ex mero jure* thesis; Hart: rule as a general pattern of behavior; Dworkin: a rule that operates on an "all or nothing"-basis and provides a bivalent assessment of legal situations). These canonical rules clearly answer the question raised by the easy case, but, as has been seen, do not provide clear information for solving the hard case; the theories of our authors also branch out where they arrive at hard cases, as we all see such cases as somewhat differently remediable. A lay person would explain the difference between easy and hard cases in much the same way as we have just formulated, and she also knows that the court has a duty to decide on the basis of normative rules. However, the legal theory perspective adds to this fact that the examined question goes beyond the system of strictly normative rules, and in a sense, draws attention to informal sources of law and many other issues: rule-based and case-based decision-making, and the need to balance the theoretical tension between classical law enforcement models. Our intention is to find a "common key" for the question thus goes back to a classic, constantly recurring question: *what is law?* It is striking that this was also a central issue in the work of Leibniz, Hart, and Dworkin, and thus it can be concluded that the easy case-hard case distinction is a remarkable task of legal theory because it traces the researcher back to asking questions about the fundamental nature of law.

6.

Since the common problem of the authors could be read from the rule-question, a detailed normative examination was also needed. What are the components of law that can be calculated? The dissertation examines the concepts of the following elements and the boundaries between the concepts: rule, norm, case norm, principles and its various types (legal principles, general principles, general clauses). The study helps to return to the authors' concepts of law and to prove the presumption that: the route of resolving cases is determined

by who defines what is the concept of law, and the concept of law sheds light on the concepts, relations and possible conflicts of the rule / norm / principle. So going back to our authors, we illustrate the connection here through some examples.

Leibniz's concept of law encompassed positive state law and natural law principles. According to him, all cases can be solved *ex mero jure,* both easy and hard. In connection with the solutions, combinatorics and logic play a very important role at Leibniz. If written law fails, it is there that natural law helps, which is God's creation. The most important principle of natural law is the principle of natural rationality, which is related to mathematics and logic. If he had denied the admissibility of the cases, he would have questioned the divine legislation. Hart's concept of law consists of rules (and does not go any further) – with which easy cases can be solved without any doubt. In this sense, the existence of easy cases is necessary. Hart saw a conflict between the core of meaning and the core of penumbra, which results in the following scenario: the judge should exercise discretion in hard cases – of course, he cannot do so arbitrarily, as the decision must be justified. Dworkin's conception of law is very broad, which he also refers to by referring to it as a *"law as integrity"*. Easy cases, he says, can also be solved through legal syllogism, they are practically a kind of *"textbook cases"*. His innovation is that he highlights the hard case from the traditional legal-dogmatic and normative environment and indicates that the problem is also a problem of political morality, and that principles can provide a solution in such matters.

7.

All of these findings led the research to an additional issue: rule-based and case-based decision-making. The main question is: is the easy case necessarily rule-based, and what is not rule-based, is it certainly a hard case? Schauer deals with the issue the most, and is himself a representative of the position between the two, but at the same time considers the rules necessary. In the dissertation, we took everything as a basis we established through the normative outlook.

If we take rule-based decision-making strictly and, so to speak, somewhat "dryly," it can be said that this law enforcement scheme mostly depicts the process in easy cases. The judge bases the judgment on rules laid down in advance in a canonized form, and even derives the decision logically from the rule (subsumption). If she go beyond this "paragraph-automaton" role, that is, by focusing on the rules, she does not forget to take into account the specifics of the case, and if she apply this back and forth in the hermeneutic circle, the judgment may be as

described in case law-thesis (or Schauer's rule-sensitive particularism). If, on the basis of the mutual interpretation of the rule and the case, the coveted case norm crystallizes out and it coincides perfectly with the applied norm, then the judge had to solve an easy case.

If we imagine case-based decision-making in the classical (some say it is Solomon's) form, then the judicial application of law always requires exceptional wisdom and aptitude – qualities that only an ideal judge (endowed with superhuman abilities) can have. If the judgment always requires this kind of focus, then these particular decisions will be real hard cases that will require many, many wise Solomons or wise philosopher kings. The existence of a rule and its use in a judicial decision does not necessarily mean that it is certainly an easy case. Following Győrfi, it is important to emphasize that it is not correct to believe that the judge "(…) could not use or use rules at all in his decision-making process using the non-rule-based method. The two decision-making methods (ie. rule-based and non-rule-based) will not differ in that one applies rules while the other does not, but in what the status of the rules is in the one or in the other procedure, ie. do the rules have an independent normative force, do the rules bind the decision-maker, or can they deviate from them at will."[7] If the case-based model is recognized in a moderated form, in which the rules are in a canonized form and the unique characteristics of the case come to the fore, and possibly precedents, we can approach the field of hard cases from many sides. In other words, if there is a rule, and also a specific, individual case, and the case norm developed through their continuous, mutual interpretation does not fully correspond to the applied norm, it can also result in more and more hard cases. The hard cases presented in the dissertation are good examples of the hard cases that can be classified in this category.

8.

Statements written above also serve as a research result, but the most important result of the dissertation is the development of our own authorial typology. In formulating this, the most important thing was to develop an (as yet) unfamiliar path using the lessons, advantages and disadvantages of the outlook, and it was necessary to calculate with questions that the authors examined may not have covered. The own case-typology attempts to create a kind of synthesis of common law and continental case readings; we strive to develop a concept that holds its place in both Anglo-Saxon and civil law legal culture. As a preliminary point, it should perhaps also be noted that an important cornerstone of the theorem is the following conclusion: the easy

[7] Győrfi, Tamás: A szabályalapú döntéshozatal melletti érvek. In Szabó, Miklós (ed.): *A Hart utáni jogelmélet alapproblémái.* Bíbor Kiadó, Miskolc, 2006. 99-128., 114.

case-hard case question leads to discourses about the nature of law – and if we agree with this, it should be taken into account when developing the case typology, and a concept of law should be used that is compatible with this statement.

As chapter 3 of the dissertation connected the case theories with the legal concept of the authors, the construction of the own system of criteria should be started with this as well. The *unitas multiplex* nature of law is indisputable, and it is not in vain that it is on the imaginary list of eternal questions. When outlining the concept of law, we cannot be satisfied with a so-called minimum concept, which contains only rules in the strict sense (rules formalized, ie. canonised) – this would presumably be too little, or at least poor, without further explanation. We can not push the question into infinity, because if it is not determined where the boundaries between *ius-non ius* are, and from what can be law and under what conditions, our system will be impossibly open, and the hard case will lose its weight. The optimal point between the two extremes must be found, where the proper articulation of social needs takes place, which can realistically decide what will become law. It was also perceptible through the analysis that the neuralgic point of the concept of law is the principles, we also paid attention to this issue, mainly due to the contrasts between the common law and continental legal culture. The author of the dissertation does not dispute (since she herself lives in the continental legal system) that if the principles appear in a canonized form, they are certainly part of the law; at the same time, it must not be forgotten that judicial practice and jurisprudence can broaden the framework, as they play a vital role in developing and recognizing further principles over time. Accordingly, the author's easy case concept is also problem-free, as are the authors' concepts presented; the case that the judge almost routinely solves is easy, as it does not mean a real decision-making situation, as it does not involve any intellectual challenge. It is clear to decide the case because the legal background is unambiguous, the rule (canonized) provides undoubted guidance; the rule (or, if the Anglo-Saxon legal system is also attached, the earlier case decision) is exactly goes well with the case at hand. In such cases, the judge confidently draws her conclusion with the help of legal syllogism, bearing in mind, of course, that she also satisfies the justification of the decision.

The process of judicial application of law is characterized from the point of view of practice as a decision in matters of facts and law. Therefore, it is logical to categorize the difficulties of the decision and conclude the following, mainly sympathetic to the position of Dworkin, Szabó and Paksy, but considering the theories of all other authors presented in this dissertation (Leibniz, Hart, MacCormick, Schauer, Marmor, Bencze). There are three main

sources of hardness (from which additional subcategories can be developed): the hardness of establishing the facts (the evidence itself); the hardness of determining (interpreting) the applicable law; or the moral rightness or wrongness of the decision as a factor of hardness. We have argued that the easy case-hard case dilemma is fundamentally determined by what concept of law we use, what we consider to be a source of law, and which phenomenon beyond positive law should be the element of law as well. This statement also stands when we discuss the three sources of hardness that we consider crucial. Moreover, this typology illuminates the legal positivist attitude of the author of the dissertation, which we have already nuanced with her conception of law above; by taking into account the moral aspect of the hardness, the author of the dissertation makes it clear that she is on the ground of legal positivism. (For example, Dworkin could not have had a moral difficulty, as moral principles are also part of the law, and the political morality of a given political community also helps to decide cases.)

As it is not possible to fully analyze all the subcategories belonging to the main sources, the dissertation sought to highlight the relevant aspects with the help of case examples. Findings that received less emphasis at the authors' works but were significant for both Anglo-Saxon and continental legal culture also play an important role in the typology. It is relevant to consider: the hard case concept outlined above, which includes three major categories, is in line with the previously stated theorem that the case dilemma is an issue related to the nature of the law. This is quite clear when we refer to the moral difficulties and the difficulties of establishing the law, but the argument for difficulties in the fact-finding process needs further explanation – of course, this dilemma must also be disserted in such a way that it has a logical connection with the problem of the nature of the factual problem. We now emphasize some of the specific character traits of hard case-types that are also highlighted by the author.

The decision based on principle is significant because it has been explicitly brought to the fore since Dworkin. There is a great tension between the rule and the principles, this was also clear from the normative examination. In the common law legal system, there was less promotion of the principles to a normative level, all the more so in continental law – but this does not mean that in Hungary, for example, all principles can be found in codes. The decision in the case of the lack of norms is a very divisive issue, and the theories presented did not even touch it, although it is a classic topic of legal theory. Legal theorists can also be divided into two groups, as many deny the existence of a legal loophole, while others acknowledge it. It is also difficult to give an example of a loophole, only because judges cannot deny their obligation to decide every single case – even if there is a loophole, the phenomenon remains hidden. The

difficulties centered around legal interpretation are widely known, as interpretation interweaves the entire decision-making process.

Hardness in the fact-finding process may be the most controversial question; in relation to the question of fact, it is rightly argued that it has no connection with the nature of the law. The dissertation first looked at the facts from two perspectives: general epistemological and sociological-psychological perspectives, but these did not certainly support the author's position. The thing opens up more in the fact that in judicial decision-making the decision on the question of fact and law is closely intertwined. The nature of law is indeed linked to the obligation to choose the legally relevant facts and, in the same way, to the discretion of the judiciary. Both the establishment of the relevant facts and the difficult questions and dilemmas that require interpretation in relation to the classification of judicial discretion arise, so we regard it sustainable to consider the problems of fact-finding as one of the typical bases of the range of hard cases. Not only because the general wording of judicial discretion in many cases does not facilitate the work of judges and therefore can lead to the formation of a hard case, but also because the legal inclusion of relevant facts requires the resolution of dogmatic conflicts and interpretations.

Moral difficulty can rightly be one of the hardest cases, as deciding legal cases and their moral justification is one of the most complex and controversial issue. This is because the relationship between law and morals is not clear either, there is no eternal answer that is valid everywhere and at all times. The problem is thus diverse, so that the dissertation also presents only a moral difficulty in a particular aspect through a specific legal case, where the moral principles of law are at the center in a case becoming a precedent. This is most often the case when human life and dignity as an absolute value are at stake.

Finally, we confirm that this typology, and the easy case-hard case types included in it, may be relevant to both the continental and common law legal systems. Obviously, there are legal system-specific applications of law-techniques and perspectives, but along many sub-issues, it emerges that they have an equivalent in the other legal system as well. Belonging to a legal culture has less impact on the judge on how to decide easy and hard cases, and in fact, representatives of legal systems do not have a specific strategy for solving these. It is more correct to say that the nature of the case determines how the case at hand should be decided. Moreover, presumably, taking into account the examples of legal cases mentioned in the dissertation, almost the same cases are considered easy or hard by a continental and an Anglo-Saxon judge. In the common law and the continental legal system, the hard cases are similar,

the only difference is in the reasoning – this statement is also supported by the case examples cited in the dissertation.

9.

The dissertation focuses on a topic that is relevant to representatives of both theory and practice. The focus is on judicial activity, and even if we deprive what has been described of the legal theory aspect, its practice-oriented side is still clearly visible. The research concentrates on the greatest challenge of judicial work, hard cases, and each chapter of the dissertation developed aspects that highlighted the practical importance of the analysis. Through legal cases, it has become even clearer that it is always advisable to analyze theory through practice, and that theoretical generalizations formulate many exciting practical questions. Therefore, there is reason to assume that the research topic is eternal and actual for theorists and lawyers as well, so hopefully it can have a fruitful impact on legal discourses.

IV. Selected scientific publications of the author

„Trolleyology" and autonomous vehicles – Moral and legal questions on the application of the doctrine of double effect. *Central European Papers*. No. 1. 2021. (forthcoming)

The role of rules and principles in judicial adjudication. In Erdős Csaba (szerk.): *Doktori Műhelytanulmányok 2020*. Győr, 2020. (forthcoming)

„Jog és opera" – Az igazságszolgáltatás szatirikus ábrázolása egy viktoriánus vígoperában. *[„Law and opera" – A satirical representation of jurisdiction in a Victorian dramatic cantata.]* In Takács Péter (szerk.): *A jog megjelenítése, épített környezete és szimbólumai. A jogi kultúra látható világa. [Visualisation of law, its built environment and its symbols. The visible world of legal culture.]* Gondolat Kiadó, Budapest, 2020. 760-772.

A bírósági terek és a „falak nélküli" igazságszolgáltatás. *[Courtrooms and „jurisdiction without walls".]* In Takács Péter (szerk.): *A jog megjelenítése, épített környezete és szimbólumai. A jogi kultúra látható világa*. Gondolat Kiadó, Budapest, 2020. 296-307.

Az önvezető járművek, a trolley probléma és az emberi élet védelme – Széljegyzetek egy jogi-erkölcsi dilemma margójára. *[Autonomous vehicles, the trolley problem and the protection of human life. Notes on the margin of a legal-moral dilemma.]* Alkotmánybírósági Szemle. 2020/1. szám, 11-22.

Homo faber, robo sapiens – A robotok és az önvezető járművek „jogalanyiságával" kapcsolatos elméleti problémák. *[Homo faber, robo sapiens - Theoretical problems related to the "legal entity" of robots and self-driving cars.]* In Lévayné Fazekas Judit – Kecskés Gábor (szerk.): *Az autonóm járművek és intelligens rendszerek jogi vonatkozásai. Universitas-Győr Nonprofit Kft.,* Győr, 2020. 255-277.

Szabályok és elvek, könnyű eset és nehéz eset. Néhány releváns normatani kiegészítés egy jogalkalmazási problémához. *[Rules and principles, easy case and hard case. Some relevant normative additions to the problem of judicial application of law.]* In Szigeti Péter (szerk.): *Ordo et connexio idearum. Ünnepi kötet Takács Péter 65. születésnapjára*. Gondolat Kiadó, Budapest-Győr, 2020. 216-233.

Easy cases and hard cases – A general overview of and eternal question of legal theory. *Jog Állam Politika.* 2020/1. szám, 55-67.

Az igazságszolgáltatás működése: Az igazságszolgáltatás és a tisztességes eljáráshoz való jog. A jogászi hivatások. *[How jurisdiction works: Jurisdiction and the right to a fair trial. The legal professions.]* In Pődör Lea – Szigeti Péter – Szoboszlai-Kiss Katalin – Takács Péter: *Az igazságszolgáltatás etikája. Tansegédlet az igazságügyi igazgatás szak hallgatói részére.* Universitas-Győr Nonprofit Kft., Győr, 2019. 26-46.

Robotok és jogalanyiság – problémák és megoldási javaslatok. *[Robots and legal entity - problems and solutions.]* In Homicskó Árpád Olivér – Lóth László – Kovács Róbert (szerk.):

Ipar 4.0: jogi-társadalmi-gazdasági kihívások és válaszok. Károli Gáspár Református Egyetem Állam-és Jogtudományi Kar, Budapest, 2019. 203-218.

Mátyás Bencze, Gar Yein Ng (eds.): How to Measure the Quality of Judicial Reasoning. Springer, 2018. *Hungarian Journal of Legal Studies*. 2019/1. szám, 119-126.

Jogelméleti szempontú elméletek és magyarázó sémák a „könnyű eset-nehéz eset" jogalkalmazási dilemmáról. *[Theories and explanatory schemas on the "easy case-hard case" dilemma.]* In Szabó Csaba (szerk.): *Tavaszi Szél 2018. Spring Wind 2018. Tanulmánykötet*. Doktoranduszok Országos Szövetsége, Budapest, 2018. 224-235.

Agatha Christie nehéz esete. Az emlékezés és a felejtés szerepe a ténymegállapítási folyamatban. *[Agatha Christie's hard case. The role of memory and oblivion in the fact-finding process.]* In Fekete Balázs – Bodnár Kriszta (szerk.): *Iustitia meghallgat. Tanulmányok a „jog és irodalom" köréből*. MTA Társadalomtudományi Kutatóközpont Jogtudományi Intézet, Budapest, 2018. 114-123.

Adalékok a joghézag-problematika elmélettörténetéhez. *[Additions to the theoretical history of the legal gap-problem.]* In Keserű Barna Arnold (szerk.): *Doktori Műhelytanulmányok 2017*. Győr, 2017. 245-258.

A jogelmélet főnixmadara: a joghézag. *[The phoenix of legal theory: the legal gap.]* In Takács Péter (szerk.): *Unitas multiplex. Ünnepi tanulmányok Szigeti Péter 65. születésnapjára*. Gondolat Kiadó – SZE DFK, Budapest-Győr, 2017. 281-290.

Az angol jogi kultúra sajátosságai Horváth Barna műveiben. A precedensek szerepe és jelentősége. *[Peculiarities of English legal culture in the works of Barna Horváth. The role and significance of precedents.]* In Révész Béla (szerk.): *A szegedi jogbölcseleti iskola alapítója. Horváth Barna emlékkönyv*. Iurisperitus Bt., Szeged, 2017. 150-162.

Gondolatok a közfoglalkoztatási jogviszony munkajogi összefüggéseiről. *[Thoughts on the labor law context of public employment.]* ART-PR., Győr, 2016.

A Genfi Egyezmény 1d cikkének és a Kvalifikációs Irányelv 12. cikk (1) bekezdés a) pontjának értelmezése a palesztin menekültek, mint ipso facto jogosultak vonatkozásában a luxemburgi és a magyar bírósági gyakorlatban. *[Interpretation of Article 1d of the Geneva Convention and Article 12 (1) (a) of the Qualification Directive in relation to Palestinian refugees as ipso facto beneficiaries in Luxembourg and Hungarian case law.] Diskurzus. Batthyány Lajos Szakkollégium Tudományos Folyóirata*. 2015/2. szám, 34-35.