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**Embarrassing stories.  
Legal Storytelling and  
Sociology of Law**

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## EMBARRASSING STORIES.

### Legal Storytelling and Sociology of Law\*\*

*In memoriam Tamás Nagy\*\*\**

Abstract. ‘Legal storytelling’ is one of the most contested area of the interdisciplinary research field of ‘law and literature’, which has taken shape in the political and legal context of the United States originally. The proponents of ‘legal storytelling’ endeavour to ‘give voice’ to groups and minorities of disadvantageous social position by ‘telling’ – by hearing and publicizing, in fact – their stories unheard by law. However, many lawyers doubt that these everyday life, often trivial, stories carry any legally relevant content, while literati question their aesthetical value. The essay argues against these doubts leaning on the material of focus group interviews recorded in a recent research on the Hungarians’ legal consciousness. It aims to expose the important role that these everyday life stories play in legal culture on the one hand, and, on the other hand, that the analysis of these uncanonised, not-belletristic texts could be fruitful indeed. For this, the first part of the essay offers a survey on how the concept of ‘legal culture’ emerged in Hungarian legal theoretical thinking, and how the sociological researches, in which the presented ordinary stories were recorded, connected to that. After analysing several story-bits taken from two focus group participants’ narrations, the attention turns to stories told by the ‘greats’, that is by writers, and here enters Franz Kafka in the scope. The last part of the essay seeks to determine what relates the two kinds – the ordinary and the literary – of narratives and what are the differences between them. For a conclusion, it emphasizes that this essay can be seen only as an intuitive theoretical experience for using aesthetic notions in analysing empirical sociological data rather than a methodologically well-founded application of that. The basic idea of this experiment is that both law and aesthetics are permeated by moral, and social psychological constituents.

Keywords: law and literature, legal storytelling, Hungarian legal culture, qualitative empirical research methods.

## 1. Introduction

The headline of this study is slightly misleading perhaps. For we would associate it with Karel Čapek’s work,<sup>1</sup> although we shall bring into play one of his compatriot’s<sup>2</sup> – highly ranked in the canon of ‘law and literature’ –, Franz Kafka’s aesthetics in the following analysis.

As for ‘legal storytelling’, it is one of the most contested area of the interdisciplinary research field of ‘law and literature’, and has taken shape in the political and legal context of

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\*\*\* Tamás Nagy (1971–2018), path-breaker in Hungarian ‘law and literature’ studies, founding member of the Hungarian Association for Law and Literature. Cf.: István H. SZILÁGYI: Law and Literature in Hungary – An Introduction. 53 *Acta Juridica Hungarica*, (2012) 1, 1–6.

<sup>1</sup> Karel ČAPEK: *Embarrassing Stories* (1921). Hungarian translation: Karel ČAPEK: *Kínos történetek*. Budapest, Európa Zsebkönyvek, 1980. 125–241. Čapek, belonging to the generation of the Czech ‘national awakening’, was seven years younger than Kafka. He was nominated for the Nobel Prize seven times and never won it. See Thomas ORT: *Art and Life in Modernist Prague. Karel Čapek and His Generation, 1911–1938*. London, Palgrave Macmillan, 2013.

<sup>2</sup> If we can consider Kafka – who belonged to the Jewish community in Prague and wrote in German – as Čapek’s ‘compatriot’. This problem probably intrigued Kafka himself the most.

the United States originally. The proponents of ‘legal storytelling’ endeavour to ‘give voice’ to groups and minorities of disadvantageous social position by ‘telling’ – by hearing and publicizing, in fact – their stories unheard by law.<sup>3</sup> However, many lawyers doubt that these everyday life, often trivial, stories carry any legally relevant content,<sup>4</sup> while literati question their aesthetical value.<sup>5</sup>

The present essay argues against these doubts leaning on the material of focus group interviews recorded in a recent research on the Hungarians’ legal consciousness. It aims to expose the important role that these everyday life stories play in legal culture on the one hand, and, on the other hand, that the analysis of these uncanonised, not-belletristic texts could be fruitful indeed. Mainly here, in Hungary, southeast from Kafka.

For this, the first part of the essay offers a survey on how the concept of ‘legal culture’ emerged in Hungarian legal theoretical thinking, and how the sociological researches, in which the presented ordinary stories recorded, connected to that. After analysing several story-bits taken from two focus group participants’ narrations, the attention turns on stories told by the ‘greats’, that is by writers, and here enters Kafka in the scope, of course. The last part of the study seeks to determine what relates the two kinds – the ordinary and the belletristic – of narratives and what are the differences between them.

## 2. Aspects of legal culture and research in legal consciousness

The concept of ‘legal culture’ has appeared on the horizon of Hungarian theoretical legal thinking in the 1990s, first in legal history then in comparative law,<sup>6</sup> though the cultural approach to law had been already present more than a century before in legal ethnology and anthropology on the international scholarly scene.<sup>7</sup> The cause of this delay should be sought, of course, in the five-decade-long enforced dominance of Marxism over Hungarian social sciences. With respect to the legal consciousness researches that have begun in the middle of 1960s,<sup>8</sup> this meant that – fitting in the peculiar theoretical framework of ‘socialist jurisprudence’ – the notions of ‘social level legal consciousness’ or ‘social legal consciousness’ took over the

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<sup>3</sup> For a program-setting article, see Richard DELGADO: Storytelling for Oppositionists and Others. A Plea for Narrative. *Michigan Law Review* 87 (1989) 8, 2411–2441. For a critical introduction of the trend to the Hungarian legal scholarship, see Tamás NAGY: Narratív tematika a kortárs amerikai jogelméletben. [Narrative thematic in the contemporary American legal theory]. In Tamás NAGY: *Josef K. nyomában. Jogról és irodalomról* [In the trail of Josef K. About law and literature] Máribesnyő-Gödöllő, Attraktor, 2010. 125–160.

<sup>4</sup> As Richard Posner observes on the radical feminist Cathrine MacKinnon’s anti-pornographic writings: ‘MacKinnon is a magnet for the unhappy stories of prostitutes, rape victims, and pornographic models and actresses. Even if all these stories are true (though how many are exaggerated? Does MacKinnon know?), their frequency is an essential issue in deciding what if anything the law should try to do about the sufferings that the stories narrate.’ Richard POSNER: Legal Narratology. 64 *University of Chicago Law Review* (1997) 2, 737–747, 744.

<sup>5</sup> Tamás Nagy – agreeing with Posner – points out that the narrated ‘legal stories’ often lack the cathartic effect needed to overcome the prejudices of the audience. As Posner a bit coarsely puts it: ‘The question is the audience for this scholarship and the sensitive issue of narrative skills of the stories’ authors. You need considerable literary skill to write a story that will effectively challenge a reader’s preconceptions. People read junk that does not challenge their preconceptions; they do not read junk that does challenge them.’ POSNER: *ibid*, 743.

<sup>6</sup> István H. SZILÁGYI: Adalékok a jogi kultúra fogalmához. [Further thoughts on the concept of legal culture] In: Teodóra NAGY-JANKA (ed.): *A jogi kultúrtörténet és a jogi néprajz új forrásai*. [New sources of legal cultural history and legal ethnography] I. Szekszárd, Pécsi Tudományegyetem Kultúrtörténeti, Pedagógusképző és Vidékfejlesztési Kar, 2018. 109–124.

<sup>7</sup> Cf. István H. SZILÁGYI: Let Us Invent the Hungarian Legal Anthropology. 33 *Rechtstheorie* (2002) 2–4, 187–196.

<sup>8</sup> About the history of the Hungarian legal consciousness studies in the socialist area, see Balázs FEKETE – István H. SZILÁGYI: *Knowledge and Opinion about Law (KOL) Research in Hungary*. 58 *Acta Juridica Hungarica. Hungarian Journal of Legal Studies*, (2017) 3, 326–358.

place of 'legal culture'. Since the concept and theoretical perspective of 'socialist jurisprudence' stayed alive more or less without any critical reflection in the last decade of the past century, so they still have influence on the contemporary legal sociology.<sup>9</sup> The critical review of this intellectual heritage has begun only recently<sup>10</sup> parallel with the increasing interest in the cultural approach to the legal phenomena.

The most trivial argument – although it has far-reaching methodological consequences – for replacing 'social legal consciousness' with 'legal culture', a more suitable concept for operationalisation in socio-legal studies, is that the former presuppose a kind of 'collective personality' (like Marxist 'class consciousness'), which is pointless from an empirical point of view. For only an individual person has consciousness in proper psychological terms, and all those socially given (and sensually ungraspable) 'thoughts' or 'ideas' appearing to her externally in a more or less objectified form belong to the realm of culture.

For our present purposes, the concept of legal culture can be defined as a set of values, norms, symbols, narratives, and patterns of social practices. Legal culture is related to political culture through the concept of legitimacy, and it is organically woven into the texture of the entire culture without sharp contours anyway.

Furthermore, we have to divide the sphere of 'laic' and 'professional' culture within the realm of legal culture. The maintenance of the latter is the function – and monopoly, in fact – of legal profession attending to the normative layer of legal culture, and working out the adhering doctrinal-dogmatic layer. The 'professional legal culture' has evidently the determining importance in the formation of legal culture as whole. Although it is also clear that the 'laic culture' – that is the vision of law in the sight of non-lawyers – can be utterly different from the picture lawyers would like to project inward (toward other lawyers) and outward (toward the outside social environment).

For demonstrating the concept, let us present here a conceptual analysis of a constituent of 'professional legal culture', the attorneys' professional self-image, used in a recent empirical study.<sup>11</sup>

To begin with, self-image is interpreted as a cultural phenomenon. It refers to more or less objectivised content, which regarding its ontological nature, differs from individual or social psychological processes that determine its object of motifs and, therefore, influence individual or group behaviour. Consequently, the discourse about attorneys' self-image must be placed into the one about legal culture. In this sense, the self-image of the attorney's profession is viewed as one of the elements of professional legal culture as opposed to lay (non-lawyer) citizens' legal culture. The self-image of the profession, however, can be interpreted as an ensemble of intellectual elements and content, a tapestry of values, norms, prescriptive cultural patterns, narratives, symbols and the sociological patterns can be read out from the conduct of the representatives of the profession.

Values characteristic of the self-image of the attorney's profession, such as professional preparedness (a high level of legal knowledge), a sense of justice, impartiality and the unconditional respect for the interests of the client, belong to the more general values of the

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<sup>9</sup> We ought to note here that scholars belonging to the *Critical Legal Studies* movement – which is inspired partly by neo-Marxian ideas, and has a great influence on the contemporary socio-legal studies – also use the concept of legal consciousness on 'ideological' phenomena of group, class or social level (and on individual psychological ones, too) nowadays.

<sup>10</sup> József SZABADFALVI: Reevaluation of Hungarian Legal Philosophical Tradition. 89 *Archiv für Rechts- und Sozialphilosophie*, (2003) 2, 159–170.; István H. SZILÁGYI: A marxista társadalomtudományi fogalmak használhatatlansága. [Uselessness of Marxist social scientific concepts] In: Ferenc PÉNZES – Sándor RÁCZ – László TÓTH-MATOLCSI (ed.): *A szabadság felelőssége. Írások a 65. éves Dénes Iván Zoltán tiszteletére*. [Responsibility of freedom. Festschrift to Iván Zoltán Dénes 65<sup>th</sup> birthday] Debrecen: DUP, 2011, 324–337.

<sup>11</sup> István H. SZILÁGYI – Andrea JANKÓ\_BADÓ: „Further Thoughts on the Self-image of the Hungarian Attorneys”. 1 *International Journal of Law and Society* (2018) 4, 137–149.

broader legal profession and they are embedded in the even more comprehensive values of political culture such as liberty, equality and social solidarity.

One of the layers of self-image is found closer to the level of social activities and comprises the rules of the profession. Part of these rules are “written”, such as the binding rules of Act No. XI of 1998 on attorneys or other rules of legal nature such as the codes of conduct of the Hungarian Bar Association (hereafter the Bar). The profession has unwritten rules as well, including the “courtesy” rules on the interactions with colleagues or lay citizens which also form part the profession’s self-image.

Descriptive cultural patterns do not prescribe what ought to be done in a particular situation, but they set out the positions and competences of the participants. They also designate the place and the scope of activities that take place within the society or in the legal sphere. In this case, it can be interpreted to include the rules on pleadings and trial organisation laid down in the act on civil procedure the recipients of which are primarily judges. They also set forth attorneys’ positions and their options to influence the course of an ongoing trial.

The values and the layers of prescriptive and descriptive cultural patterns analytically separated above are in this case entwined by narratives, stories known and narrated by attorneys. They also create the “normative universe” coined by Robert Cover, in which these patterns acquire their meaning.<sup>12</sup> Every profession has its “great stories”, such as the development of the Hungarian attorney’s profession, compactly summarized in the introduction, which is to be elaborated and lectured at universities to future attorneys within the discipline of legal history. These narratives are coiled around major turning points and outstanding figures of the profession as a corporate group and form the basis of the entire professional group. Into these narratives are woven the fabric of local “urban legends” and personal stories which inherently relate to other cultural fields.<sup>13</sup>

Symbols expressing self-image are not to be construed in their own physical realities such as luxury cars, expensive watches, powdered wigs, gowns, the latest version mobile phones or state-of-the-art laptops. They are to be interpreted as signs with multiple meanings. Symbols can signal the fact of belonging to the in-group and, at the same time, they are able to animate complex emotion and knowledge content in outsiders. As for attorneys, status symbols bear a major significance, which do not only signal their belonging to the middle class, but they also create an impression of success with clients (such as the luxury car or the expensive watch). However, other symbols (as it used to be the case with attorney briefcases) distinctly signal their owner’s profession.

One must also mention the pattern layers inferred from the behaviour of those practising the profession which are grouped under *tacit* knowledge and which are acquired by professionals entering the profession through observation of their colleagues’ not so obvious activities. These are the tricks of the trade, which can only be mastered in practice and which are more often than not markedly different from the idealised values and rules of the profession’s manifest self-image.

What is important to note here is that contradictions and internal tensions generally arise among the above-mentioned elements and layers of self-image in spite of the basic tendency to strive for intellectual unity and internal coherence during the formation of the professional self-image. Presumably, the more coherent and clear the self-image is, the more it can ensure cohesion among those practising the profession, which may handsomely contribute to the

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<sup>12</sup> Cf. Robert M. COVER: The Supreme Court, 1982 Term – Foreword: Nomos and Narrative. 97 *Harvard Law Review* 4 (1983).

<sup>13</sup> This is how the honest attorney, Petrocelli, the protagonist of an American TV show who defends the rights of his clients to the very end will be the pun for a sarcastic moniker for the Hungarian attorney representing Roma rights, Putricelli (the first part of the name, “putri” stands for an unclean gypsy hut). Cf. István H. SZILÁGYI: There Is No Mercy. 56 *Acta Juridica Hungarica*, (2015) 1, 86–107.

assertion of interests within professional circles. Conversely, the more contradictory, fragmented and vague the self-image of the profession is, the less it will be able to integrate its members and the more vulnerable it will become in the face of adversities. The role of a solid and clear professional self-image from the point of view of how it has evolved socially is always an empirical question: the overly strong corporate spirit may also become a hindrance to react adequately to social change.

Finally, one must acknowledge the dynamic relation between the self-image of the profession and the image created of the profession by lay citizens. The two are mutually conversant to set a playing field, which is indispensable for the adjustment to social change or the actual inducement thereof.

What matters from all the above said in furthering our analysis? First, it is important to see that the structure of laic legal culture is similar to the professional, although its normative layer is much thinner, and it is rather more fragmented and loaded with more logical contradictions. The presence of these two characteristics – the relatively low level of knowledge,<sup>14</sup> and the existence of logical contradictions in lay views about law<sup>15</sup> – was detected by the latest legal sociological studies of the Hungarian population, too. However, these differences are only gradual – even if they are important –, and they do not touch the basic congeniality of these two aspects of legal culture in regard of their constituents, structure and fine connective tissue. Consequently, the stories about law are also important in understanding laic legal culture. These narratives do not only connect and order the elements of legal culture – values, norms, symbols and patterns of social practices –, but also weave the legal culture in the texture of the whole culture.

So the research program, in which the following tiny stories were recorded, aimed to examine the Hungarian population's legal consciousness.<sup>16</sup> In the last period of the project, in the autumn of 2016, four focus group interviews were made,<sup>17</sup> from which two were recorded in Salgótarján and two in Budapest. The material with which we shall work is taken from one of the latter two. The interview in question was recorded by video camera in a windowless, meeting-room-like premise. It lasted approximately one and a half hours with eight participants who were sitting around a long table. The moderator sat at the head of the table with her back toward the camera. The script of the interviews ran as follows: after the introduction, the moderator asked the participants' opinion about fare dodgers on public transport; then about buying goods of suspicious origin (e.g. goods 'fallen from a truck', probably fake or possibly stolen); she prompted them to recall their childhood experiences and parental models in relation with these; finally, she questioned them about a failed barter deal (somebody asks for the maintenance of his new motorcycle by a mechanic in exchange for a good bike). Our research group had rather explicit hypotheses about the plausible outcomes of the interviews in this phase of the project: nothing good.

The inquiries led by Kálmán Kulcsár and András Sajó in the 1970s and '80s already revealed a peculiar schizophrenia in the Hungarians' legal mind. This was expressed by the following maxim: 'The law ought to be rigorous, and has to be enforced against everybody – except me'.<sup>18</sup> Sajó characterized the Hungarians' relation to law with the 'hypocrite-parasitic'

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<sup>14</sup> Balázs FEKETE – György GAJDUSCHEK: Changes in Knowledge About Law in Hungary in the Past Half Century. 57 *Sociologija* (2015) 4, 620–636. Available at SSRN: <https://ssrn.com/abstract=2794812>

<sup>15</sup> Mihály BERKICS: Laikusok és jogászok nézetei a jogról; Rendszer és jogrendszer percepciói Magyarországon [Laymen's and Lawyers' Views on Law; Perception of Order and Legal System in Hungary]. In: György HUNYADY and Mihály BERKICS (eds): *A jog szociálpszichológiája. A hiányzó láncszem* [Social Psychology of Law: The Missing Link]. Budapest, ELTE Eötvös Kiadó 2015. 141–160, 337–364.

<sup>16</sup> The interviews were conducted within the frame of the *Hungarian Population's Legal Consciousness – A Theoretical and Empirical Analysis* (OTKA no. 105552).

<sup>17</sup> The interviews were recorded by Königsberg Consulting Ltd. at September 2016.

<sup>18</sup> See FEKETE – H. SZILÁGYI, *supra* note 8.

attributive in one of his essays after the democratic changes.<sup>19</sup> Moreover, György Gajdusчек, in another study examining the sanction application practice of public administration, drew attention to the fact that the message of the authorities' observed practice was 'Whoever abides the law is stupid'.<sup>20</sup> A natural accompany of this schizophrenia was the above-mentioned logical inconsistency of views spectacularly exposed by Mihály Berkics's survey: 73 percent of the representative sample simultaneously agreed with the statement 'Rights are due to only those who fulfil their obligations' and with 'Certain freedom rights are equally due to everyone', too.<sup>21</sup> As György Gajdusчек put this in an essay:

All these mirror the citizens' 'schizophrenic legal mind'. They do not trust the state and law (what they see as a product of the state), but they expect the resolution of all their problems from the state. They demand thorough regulations, sanctioning even the least of digressions from the rules, strict punishments, however when they have to face the law then they may outflank it or require bonitarian treatment. All of this is embedded in an unusually pessimistic, cynical and anomic cultural environment.<sup>22</sup>

In fact, our expectations have been proved true.

### 3. Niki, Gabi and the others

Meet Gabi and Niki now!

*I'm Gabi, thirty seven years old. I have been living in Pest for twelve years, and now I'm just serving my notice period after quitting my job. And I do massage, outing and biking anyway. That's all.'*

*I'm Niki, thirty five. I live with my son. I have been working as a credit evaluator for two months, but was in banking before. I love doing everything in my spare-time. The range is quite wide. I like reading, but also hiking, going to concerts, frolicking, theatre. I try everything that's available.'*

Two young ladies, in light summer clothes – we are in the first days of September –, sitting side by side on the moderator's left. Had not we know that they were randomly selected into the panel, we would think that they are friends. As the conversation begins warming up after getting through the introduction and the topic of fare-dodging, the moderator turns to the problem of the 'fallen off goods':

*'[...] Suppose that an acquaintance of yours gets a new coat, or a perfume, a mobile phone or something else very cheap. So cheap that you may think that this coat or perfume fell off a truck, that is, it's stolen. What do you think about this? Is it acceptable? This is an example.'* Whereupon childhood memories descend on Niki:

*'We grew up near Ferencváros transfer station. This meant that all kinds of things quite often fell off and everybody living in the housing project worked at the MÁV [Hungarian State Railways] or had some relatives there given that the project was built for railway workers. Things very often fell off. And quite good things sometimes. At that time [when everybody wanted to buy] Hi-fi sets, Tvs, jogging suits, specifically everything. And the MÁV workers too*

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<sup>19</sup> András SAJÓ: Az állam működési zavarainak újratermelése [The reproduction of state malfunctions]. *Közgazdasági Szemle*, 2008/7–8. 690–711.

<sup>20</sup> György GAJDUSЧEK: *Rendnek lennie kellene. Tények és elemzések a közigazgatás ellenőrzési és bírságolási tevékenységéről* [There should be order. Facts and essays on administrative control and amercement practice]. Budapest, KSZK – MKI, 2008.

<sup>21</sup> Cf. BERKICS, *supra* note 15.

<sup>22</sup> György GAJDUSЧEK: A jogtudat és a jogi kultúra hatása a magyar jogrendszerre. In: István H. SZILÁGYI (ed.): *Jogtudat-kutatások Magyarországon 1967–2017* [Researches on legal consciousness in Hungary 1967–2017]. Budapest, Pázmány Press, 2018. 145–169. 169.

*thought, of course, that they were working for very little money, so something fell off at every stop, but there is no steady demand for railway transportation anymore today either, it's been considerably fading away. A lot of things fell off at every stop, and then some people got in trouble with the police. But, really, why would one pay ten, twenty or no matter how many grands for something that could be bought for two. And it is original or good.'*

A round later in the conversation, the moderator questions about the influence of social environment.

*'If acquaintances or friends buy these kinds of goods, to your mind, does it influence one's decision in this case?'* – the question throws Niki back into memories again.

*'It just worked that way for us then and the products kept coming, and specifically everybody did that way. Thus, nobody thought of buying a Hi-fi set in the shop when it was delivered for half or three quarter of the price. And this was quite normal. Shouldn't think on extreme poverty anyway for we had cars and spent our holyday by the seaside. We weren't so lowlifes. But this was the normal, the accepted and everybody lived this way there. That if there was something then from there. The Hi-fi set wasn't vital, of course, we simply bought it there and that was it.'*

Then in the finish of the interview, just before leaving, when the moderator questions what has been the most interesting for each of the participants – *We've arrived at the end of this conversation more or less, nevertheless I would like to ask another round to summarise your opinion about what you've found the most interesting.* – Niki suddenly 'comes out' (as popular media calls this kind of announcements nowadays):

*I'm ashamed now, because I feel a bit that everybody tries to be very honest. [...] I don't know, but it seems to me that way from the conversation, yet I used to grab these possibilities, let's call them that, even in administration for example. I've a lot of connections everywhere, so that's my way to use them and this is the most natural thing for me, and I used to wag too when I need to do it. Obviously not when I'm in a new job and rolling in money, for I buy it [the ticket] then. And I too teach my child to be honest, and he never wags fare-dodging anyway, because he's a bit of square, so he seems to be a bit too stiff with these regulations to me. I like that a bit in him, but I'm not so honest. And I tell you that I feel ashamed of myself anyway.'*

One question only before we turn to Gabi's story, setting aside any kind of popular psychology: how much might Niki really feel ashamed of herself?

Let us hear, however, Gabi's story now which is a reflection of Niki's from many points of view. Interestingly, it begins at the end, with an adolescence memory called forth by the following question of the moderator: *'Let's move to the next topic now. Did it occur in your childhood that somebody in your environment or you yourself or anybody else lifted a roll, chocolate, bun or something else in a shop. What happened to her? Was she caught and accounted for or what?'* To which Gabi: *'It happened every day that the others stole. The college. Doesn't matter. I said ok, I ought to do it too. I went in the shop for a [box of] milk, I was so much of a looser. And it didn't come from inside, but from the need to belong somewhere, doing the same as them, so I tried to steal one, but they caught me, of course. I felt it bloody embarrassing because I didn't really want to do it. But it didn't matter, they said that I shouldn't come there ever again behaving like this. I said OK, and I thought through this "follow the others" thing again. Moderator: 'Did the shopkeeper grab you then? Gabi: There was no visible sign of what we were talking about. She just accosted me, I told her that it was OK, she was right, I gave it back to her and went off, she went aside. There was no humiliation in the story.'*

However, after several comments, the moderator's next question – *And how was it within your family – I asked this already, you just haven't answered yet.* – pushes Gabi further who gets a kind of sincerity attack: *'Bloody good question! I saw my parents stealing. So we went to the shop, I was only a kid and saw them put something away and I felt awful. I don't know why I have become so different or how it's working. For I simply saw in my mind that it*

would be fucking sticky if they were nabbed. They weren't caught, of course. I just learned from this, from that I felt uneasy seeing this. That it's no course for me.'

Let us take a closer look into the two stories once again! How should we understand that the two stories are the reflections of each other? Niki's narrative begins in the past and ends in the present: fencing is not a problem to me, since I grew up in such circumstances in which this was common, and I make use of every sensible opportunity even nowadays, indeed, I try to guide my son in this direction. Gabi's story starts in the present and moves toward the past: I am honest, because I was already caught on a petty mischief once in my adolescence since I was a loser then. For I had seen my parents stealing in my childhood, and the fear of being nabbed had already been fixated in my mind.

Niki and shame: I am not afraid to tell that I am not honest, because honesty is not enough for 'surviving' – street smart is what is needed. In fact, I am not ashamed of not being honest; indeed, I wish that my son were not too much either. Gabi and shame: actually, I am ashamed because being honest is lame. I am honest, in fact, only because I am scared of being caught. I was scared already in my childhood when I saw my parents stealing at the shop.

Niki and sincerity: I'm not sincere, of course – I do not feel ashamed at all for breaching stupid regulations when I need to. Do not think about me, however, that I do not consider honesty important while you play innocent. Gabi and sincerity: I am really afraid of breaching the rules therefore I am really honest, although I know it is lame.

The acceptance of honesty – the virtue of following the rules (be them moral or ethical ones) for their own value – driven by feigned shame or fear meant its subordination in both cases. In the former case, to the hypocritically ashamed (self-consciously taken, in fact) 'common sense', while in the latter, to the sincerely ashamed 'irrational fear'.

However, if we emerge from the thermal bath of academic moralism – what Richard Posner may highly approve<sup>23</sup> – and step on the dry land of Hungarian socio-legal studies, then we could see that the researchers have picked up on another common denominator of Gabi's and Niki's stories already in the middle of the 1970s. Namely the influence of social environment (and practice), that is, the influence of 'others'. This effect has been named 'normalisation' – forgetting or setting aside the well-known Roman law concept of *desuetudo* –, when the normative effect of social practice derogates law's normativity. For example, only 43 percent of the Hungarian population were inclined to punish minor theft at workplace, while 11 percent did not express any kind of disapproval at that time.

#### 4. Legal storytelling as literature

If we are looking for legal stories, then we can see that Hungarian jurisprudence has not paid much attention yet to narratives told about law. The underlying cause of this might not be the late and fragmented reception of 'law and literature' formed in Anglo-American jurisprudence. For the delay is not long, only two decades, and as for the fragmentation – and the actual lack of dealing with legal narratives –, it is rather the result of a deeper theoretical current defining Hungarian legal thinking. Namely, the legal positivism taken shape in the first part of the 20<sup>th</sup> century<sup>24</sup> which primarily sees rules in the law's phenomenon, eminently the positive legal rules

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<sup>23</sup> Considering Posner describes academic moralism as 'A lot of it strikes me as prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, too far Left or too far Right, and despite its frequent political extremism, rather insipid.' Richard A. POSNER: The Problematics of Moral and Legal Theory. 111 *Harvard Law Review* (1998) 7 1637–1717. 1640.

<sup>24</sup> About how positivism formed and gained hegemony in Hungarian legal thinking in the first part of the 20<sup>th</sup> century see József SZABADFALVI: [Hungarian Legal Philosophical Thinking: From the Beginnings to the mid-20th Century](#) In: Shemshushenko, U S; Boshycky, U L; Denysov, V N; Chernecka, O V; Levkivska, G P (eds.) IV Науков читання присвячені пам'яті Володомира Михайловича Корецького: Збірник наукових праць. Київ,

issued and enforced by the state. This peculiar narrowed perspective prevented, for example, Hungarian legal ethnology to study everyday life stories about law though ethnographers probably met regiments of this kind of stories on the field.<sup>25</sup> Instead of that they tried to reconstruct – using the term ‘construct’ may be more adequate here – the rules of custom and folk law leaning on carefully prepared questionnaires.<sup>26</sup>

So we have to cast our watchful eyes on literature! This is true even if the recent high-impact legal story – raising attention both among lawyers and (film) critics – has been published by Elemér Magyar, an attorney in Eger. However, considering the fact that Magyar, who had written a drama on the basis of the files of Dénes Pusoma’s criminal case, retired to be a fulltime writer soon after the premier of the film adaptation, Magyar’s case hardly questions the above statement.<sup>27</sup>

Hungarian classic literature abounds in legal stories, of course, beginning with János Arany’s ballads to the novels of Dezső Kosztolányi and Géza Csáth, which have been analysed by the scholars interested in ‘law and literature’ for an antidote to the dryness of legal curriculum. Anna Kiss’s work has been ground-breaking in this respect whose first book’s, used also in legal education, title is quite eloquent: *Literary Heroes Who Committed Crimes*.<sup>28</sup> Yet even more so is of the legal instruments chrestomathy, serving as material for complex practical training in criminal law and for preparation on the bar exam, which she edited, coordinating the work of a populous scholarly community: *Crimes from the Library-room*.<sup>29</sup> This latter title especially hints at the Hungarian lawyers’ attitude expressing that they prefer to turn to literature rather than to ordinary people when they are seeking legal stories.

However, this may not necessarily be true only for Hungarian lawyers: on the one hand, we have seen the scruples formulated in American jurisprudence against ‘legal storytelling’ and, on the other hand, like their overseas – or over-Elbe – colleagues, the Hungarians too incline to look beyond their own national literature, and select stories from the inexhaustible storage of world literature. At this point we arrive at Franz Kafka’s works that have a key importance in our inquiries. Partly because they thematically join together the Hungarian and the international ‘law and literature’ studies, and partly for Kafka’s aesthetics can help us – as we hope – to shed light on certain features of Hungarian legal culture.

The notoriously most renowned ‘Kafka-logist’ in Hungarian ‘law in literature’, Tamás Nagy, identifies three interpretations of Kafka’s works.<sup>30</sup> Two out of them closely linked, embedded into the same polemics – the so-called ‘Posner-debate’<sup>31</sup> –, while the third one is

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Ukrajna: Kyiv University of Law (Київський Університет права), 2011. 49–75. József SZABADFALVI: The Role of Bódog Somló in the Revival of Hungarian Legal Philosophy. 93 *Archiv für Rechts- und Sozialphilosophie* (2007) 4, 540-550.

<sup>25</sup> There are always exceptions, e.g. see Zsuzsanna LANCZENDORFER: Gyilkosságból népköltészet. Helyi népballadák a jogtörténet szolgálatában [Folk poetry from murder. Local ballads in service of legal history]. In: Balázs FEKETE, István H. SZILÁGYI, Anna KISS, Zsolt ZÓDI (eds.): *Iustitia körülnéz.* Budapest, Szent István Társulat, 2017. 117–129.

<sup>26</sup> Cf. Szabina BOGNÁR: *A népi jogélet kutatása Magyarországon* [Legal ethnography in Hungary]. Budapest, Magyar Néprajzi Társaság, 2016.

<sup>27</sup> See István H. SZILÁGYI: There Is No Mercy. 56 *Acta Juridica Hungarica*, (2015) 1, 86–107.

<sup>28</sup> Anna KISS: *Bűnbe esett irodalmi hősök* [Literary heroes who committed crimes]. Budapest, Publicitás–ArtMédia Kft., 2009.

<sup>29</sup> Kiss Anna (szerk.): *Bűntények a könyvtárszobából* [Crimes from the library-room]. Budapest, CompLex, 2010.

<sup>30</sup> Cf. Tamás NAGY: Néhány eljárás: Kafka-olvasatok a jogirodalomban [Several processes: Kafka-readings in legal literature]. In: NAGY, *supra* note 3. 85–123.

<sup>31</sup> The heated debate, which sometimes did not go without personal insults, lasted for years and certainly has made up an autonomous chapter in the history of ‘law and literature’. Nearly all the leading scholars of the field took part in it including the challenged Posner himself. Just to mention here several names and contributions in chronological order for an illustration: Robin WEST: Authority, Autonomy and Choice. The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner. 99 *Harvard Law Review* (1985) 384, 385–

only loosely related to that context. Robin West's keynote thesis is that the picture drawn about human condition by liberal economics – the *homo economicus* – is too simplistic. Thus, it too easily identifies the nature of consent based on free choice – which morally justifies the free market and the liberal legal order – with the motive of wealth-maximisation leaning on rational deliberation. West uses Kafka's novels to reveal that the consent of a party sometimes arises from the 'freedom of submission', which can be destructive in both a moral and a material sense however.<sup>32</sup>

Posner's aim is not simply to refute West's Kafka interpretation then again, but to question Kafka's works' – and thereby generally literature's – legal relevancy. In order to do this, he emphasises primarily that Kafka's ideas about human nature and his feeling of life is nothing but the projection of his own neurosis and personal historical position that has nothing to do with the modern American life.<sup>33</sup> From this point of view, *The Trial* is not more either than merely a 'sick Kafkaesque joke'.<sup>34</sup>

Theodor Ziolkowski, whom Posner mentions in a note, but otherwise leaves him out of consideration in fact, elaborates the third interpretation.<sup>35</sup> This omission is no wonder, for Ziolkowski – unlike West and Posner who rather use Kafka's short stories such as *In the Penal Colony*, *The Judgement* or *A Hunger Artist* – concentrates on the analysis of *The Trial*. According to Ziolkowski, the novel can be read in the context of the professional discussion on the contemporary reform of Austrian penal law in which Kafka himself was an interested participant. More precisely, the novel can be seen as a critical reflection on the current penal regime tending towards an absurd burlesque. This aspect of the text might be evident to Kafka's contemporaries. As Tamás Nagy points out evoking a biographical anecdote '[...] according to which, when Kafka first read out the first chapter of the novel in his companionship – among whom not one of them was a lawyer like his friend, for example, Max Brod – he had to stop from time to time since he could not continue the reading for the big laugh'.<sup>36</sup>

Each of these above presented, partly contradictory, interpretations contains elements that are worth considering. West is probably right about that the 'freedom of submission', apprehended by Kafka, is indeed a real psychological factor that can affect the work of law. Ziolkowski, in turn, rightly sees that Kafka's feeling of life has more direct relation to the reality of law's life than this abstract, psychological circumstantiality. We must not brush aside Posner's insight either, which may seem to be superfluous at first sight: it is possible that the

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428. Richard A. POSNER: *Law and Literature. A Misunderstood Relation*. Cambridge MA, Harvard University Press, 1988. Richard H. WEISBERG: Entering with a Vengeance: Posner on Law and Literature. 41 *Stanford Law Review* (1989) 6, 1597–1626. Stanley FISH: Don't Know Much About the Middle Ages. 97 *Yale Law Journal* (1988) 5, 777–793. Jack M. BALKIN: The Domestication of Law and Literature. 14 *Law and Social Inquiry* (1989) 4, 787–822. Anthony D'AMATO: As Gregor Samsa Awoke One Morning from Uneasy Dreams Found Himself Transformed into an Economic Analyst of Law. 83 *Northwestern Law Review* (1989) 4, 1012–1021. Richard A. POSNER: Gregor Samsa Replies. 83 *Northwestern Law Review* (1989) 4, 1022–1024. Richard A. POSNER: Remarks on Law and Literature. 23 *Loyola University Law Journal* (1991) 181–195. Martha C. NUSSBAUM: Scepticism about Practical Reason in Literature and the Law. 107 *Harvard Law Review* (1993) 714–744. Richard H. WEISBERG: Three Lessons from Law and Literature. 27 *Loyola of Los Angeles Law Review* (1993) 285–303. Richard A. POSNER: *Law and Literature. A Misunderstood Relation (2<sup>nd</sup> Revised and Enlarged Edition)*. Cambridge MA, Harvard University Press, 1998. James SEATON: Law and Literature: Works, Criticism and Theory. 11 *Yale Journal of Law and Humanities* (1999) 2, 479–507. A survey of the debate presented to the Hungarian readers by Tamás Nagy, see *supra* note 3 and 30.

<sup>32</sup> WEST: *ibid.*

<sup>33</sup> POSNER: *Law and Literature* (1998), 199.

<sup>34</sup> POSNER: *ibid.* 135.

<sup>35</sup> Theodor ZIOLKOWSKI: Franz Kafka: The Trial. In: Theodor ZIOLKOWSKI: *Dimensions of the Modern Novels: German Texts and European Contexts*. Princeton NJ, Princeton University Press, 1967. 37–67. Theodor Ziolkowski: *The Mirror of Justice: Literary Reflections of Legal Crisis*. Princeton NJ, Princeton University Press, 1997.

<sup>36</sup> NAGY: *ibid.* 114.

whole Kafkaesque ‘sick joking’ somehow belongs to the spirit of the place and age in fact. Ziolkowski would keenly agree: this spirit is not American, nor modern (or ‘post-modern’ or whatever we call the contemporary *Zeitgeist*). However, for digging deeper, it is inevitable to look into the nature of the Kafkaesque ‘sick joking’, that is into the aesthetic program on which Kafka’s oeuvre is built, which can be best grasped by the concept of ‘absurd’ in turn.

If we are to understand the aesthetic working of ‘absurd’, it is enough to take Kafka’s *Metamorphosis* for an example. It is evidently impossible that one awakes on a morning finding himself transformed into a bug. However, this nonsense does not seem to embarrass anybody, including the protagonist of the story, except for the reader. Nevertheless, the absurd does not work only with effects drawn from tensions of cognitive contradictions. Then this would not be more exciting for the reader than a well-formulated logical trap<sup>37</sup> or paradox, for example: what happens when the irresistible force meets an unsurmountable obstacle? Absurd calls forth ambivalent emotions too. For example, the reader of the *Metamorphosis* may be adrift between empathy, commiseration and compassion on the one hand, and disgust, despite and rejection on the other hand. In the centre of the aesthetic impact stands the precipitation of the feeling of incapacity in fact. The reader is unable to understand the story and identify himself with the protagonist, yet he cannot reject him either. What the reader experiences is nothing but this inability. Géza Páskándi accurately expresses this in one of his essays writing that we could glimpse in the heroes of the absurd literature ‘[...] the people who are standing unarmed in face of the situation, not capable to choose or make a decision’.<sup>38</sup>

The feeling of incapacity, in turn, stands only a step away from the ‘freedom of submission’, the acquiescence in moral and physical destruction. As Páskándi aptly phrases this in another writing: ‘Thus for the man, absurd is that carries its own ineluctability in its contingency: it is law and necessity in its fortuitousness. It is such a “coincidence” which has smuggled itself in the Pantheon of necessities to show itself as real god. The essence of absurd phenomenon is the chance that camouflages itself as ineluctability and law to our mind. Therefore the prototype and the source of absurd is: the death.’<sup>39</sup>

Casting a glance on the history of literature is enough to see that Posner is right in that the ‘sick joking’ and the ‘freedom of submission’ are not American inventions at all. For the homeland and primary hotbed of absurd lays in Middle Europe. That is why Kafka and the outstanding writers of the following generations – Różewicz, Mrožek, Hrabal, Okudzsava – ‘[...] flirt with *absurd* and make the conditions of the region look like a living nonsense. After all, people live, are born, love, and die here too, yet as if this place would be an enchanted garden in which everything stands on its head, and the inhabitants hardly notice this’.<sup>40</sup>

## 5. Embarrassing stories and the absurdity of everyday life

Now, we have arrived at the last of our problems indicated in the introduction. What are the similarities between Kafka’s writings and our story scraps, and what are the differences? The essence of their similarity is easily recognisable already in the light of the above said: it lays in their absurdity. The more intriguing part of the question is to reveal their differences. Looking for an answer, we should consider the circumstances of the writings’ birth first, that is, cast a glance on the author’s social position.

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<sup>37</sup> See e.g. Joseph Heller’s *Catch-22*.

<sup>38</sup> Géza PÁSKÁNDI: Gondolatok az abszurd fogalmáról [Thoughts about the concept of absurd]. *Korunk*, 1967/6. 834–839.

<sup>39</sup> Géza PÁSKÁNDI: Az „abszurd jelenség” és a halál [The ‘absurd phenomenon’ and the death]. *Korunk*, 1969/2. 167–171. 171.

<sup>40</sup> Miklós ALMÁSI: *Anti-esztétika. Séták a művészetfilozófiák labirintusában* [Anti-aesthetics. Walks in the labyrinth of art-philosophies]. Budapest, T-Twins – Lukács archívum, 1992. 224. [Italics in the original.]

Kafka, as a middle-class offspring, graduated in law and worked as a lawyer until the end of his life. He had moderately radical – anti-clerical, pacifist – political views, and, well, had some problems with the fair sex (to be fair: who has not had any problem with some kind of sex?). After he had been diagnosed with tuberculosis, he took his illness seriously and tried to spend more time in fresh air. All in all, he lived a normal ‘bourgeois’ life – except that he obsessively wrote at nights. However, the questions of who was doing what in their night-time solitude was not counted among the criteria of normality to Kafka’s contemporaries.

Why is this interesting? For it is evident that – notwithstanding the tensions salient from his insecure political and sexual identity and his spiritual sensibility – Kafka needed a great deal of artistic creativity to write his stories. On the other hand, our contemporary legal storytellers are the protagonists of their own stories. In other words: what was fiction by Kafka is reality today. In more lengthy wordings: it seems that Kafka’s absurd nightmares slowly became reality during the past hundred years. What does this mean and how could it happen? Let us see a ‘literary’ example first! Read carefully this text below dated 3 November 1959!

*István Örkény has belonged to the group of right-wing writers within the Writers’ Association since 1953. He was elected as a member of the Writers’ Association’s presidency, and the editorial committee of the Literary Paper in the autumn of 1956. He has agreed with the counter-revolutionary line of action of these organisations. He looked with favour on the movement started at 23<sup>th</sup> October 1956, and, for supporting it, he wrote and read out the ‘Obsecration for Budapest’ in the Radio, and published it in the newspaper titled ‘Truth’. He also wrote the infamous counter-revolutionary calumny titled “We lied at day, we lied at night” as the introduction to the Free Kossuth Radio’s broadcastings. After 4 November 1956, he has actively taken part in the ‘Revolutionary Committee’ of Writers’ Association, and he has approved its working. In the company of Tibor Déry, Géza Képes and Áron Tamási, he took part in the informative meeting with Krishna Mennon, Indian ambassador in December 1956. He actively took part in the preparatory works of the Writers’ Association meeting at 28 December 1956, and of the resolutions issued by it. After suspending the autonomy of Writers’ Association, he has continued his inimical activity: he has been among the organisers of the writers’ strike, and the boycott of the Literary Committee at the time of its formation. Örkény’s opinion and behaviour has not changed until recently. He has not been capable, and has not wanted to face and admit his faults; consequently, he has excluded himself from Hungarian literature. On grounds of the above said, we do not propose to issue a driving licence to István Örkény.*<sup>41</sup>

If we take a ‘scientific’ approach to the problem now, via the above presented contemporary socio-legal studies on legal consciousness of Hungarian population and legal culture, then we may again refer to György Gajduscek’s insights on the underlying causes of Hungarian legal culture’s chaotic and confused character:

Six different political regimes have dominated in Hungary in the past century [...]. There are some similarities among most of these regimes. The most obvious, though paradoxical, similarity is that their legitimizing ideology was always founded on the harsh denial of the previous one. [...] Most of these regimes, except for the 1990–2010 period, had authoritarian features or had a totalitarian nature. The legitimacy of each regimes was mostly not based on free elections, on a democratic arrangement, or on high level of welfare for the people. Instead, these regimes relied on actively spread ideologies that proclaimed the superiority of the given regime in various respects and served as major legitimizing forces. [...] The end-result of this that the footprints of

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<sup>41</sup> Jelentés Örkény István gépkocsivezetői engedélyéről [Report on István Örkény’s driving licence]. *Rubicon* 15/8–9. (2004) 76. Quoted by NAGY: *supra*, 183. Nagy aptly notices that had we not known that this is a police document, we would think it is one of Örkény’s own ‘one-minute’ stories.

official ideologies have continuously present in citizens' mind. However, these ideologies have been inherently contradicting. As they were inculcated in an unconscious and unreflective manner, the contradictions do not cause mental problems in everyday life.<sup>42</sup>

Well, this confused mind-set may be mentally manageable on the outset except that it easily makes everyday life absurd and anathematizes contemporary Hungarians to taste its bitterness constantly.

Finally, sinking again in the warm thermal bath of academic moralism, let us wave farewell to the Dear Reader quoting István Bibó, the greatest Hungarian political and moral philosopher of the past century:

Evil, paltriness, and cowardice consist not in any free and dauntingly devilish choice but in the very fact that we wretchedly, unconsciously, and without free choice do and only do what our social, community, educational and personal characteristics, warped and warping experiences, ingrained biases, meaningless platitudes, and comfortable and foolish formulas dispose us to do. [...] It is in this context that we have to raise the issue of our own, our nation's, and our society's responsibility. If Hungarian society is indeed a serf-minded and herd-wise one that dumps the issues of responsibility on its masters and occupiers, there is no point in raising the question; it will reject it. But I do not believe Hungarian society was or is so deeply lost in this herd-mindedness and in being downtrodden.<sup>43</sup>

He wrote this in 1948.

## 6. Conclusions

In the introduction, we have seen the doubts concerning the genre of 'legal storytelling' raised by both lawyers and literati. This essay argues against these scruples using the material of focus group interviews taken from a recent research on Hungarians' legal consciousness revealing the important role these everyday life stories play in legal culture.

It takes the analysis of the attorneys' professional self-image as a starting point to explore the elements, structure and the dynamics of legal culture emphasising that narratives do not only connect and order the elements of legal culture – values, norms, symbols and patterns of social practices –, but weave the legal culture in the texture of the whole culture. The discussion progresses from this general level to highlighting more specific characteristics of Hungarian legal culture. The alarming symptoms of legal alienation and norm-confusions set the background for the empirical studies from which some everyday legal stories have been assorted.

The stories of Gabi and Niki have accurately reflected these problems. The acceptance of honesty – the virtue of following the rules (be them moral or ethical ones) for their own value – driven by feigned shame or fear meant its subordination in both cases. In the former case, to

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<sup>42</sup> György GAJDUSCHEK: 'The Opposite Is True ...as Well' Inconsistent Values and Attitudes in Hungarian Legal Culture: Empirical Evidence from and Speculation over Hungarian Survey Data. In: Balázs FEKETE – Fruzsina GÁRDOS-OROSZ (eds.): *Central and Eastern European Socio-Political and Legal Transition Revisited*. Frankfurt am Main, Peter Lang GmbH, 2017. 41–55. 49–51.

<sup>43</sup> István Bibó: The Jewish Predicament in Post-1944 Hungary (translated by Péter PÁSZTOR). In: Iván Zoltán DÉNES (ed): *The Art of Peacemaking. Political Essays by István Bibó*. New Haven & London, Yale University Press, 2015. 233–354. 258–259.

the hypocritically ashamed (self-consciously taken, in fact) ‘common sense’, while in the latter, to the sincerely ashamed ‘irrational fear’.

At this point, Franz Kafka’s works were introduced for understanding more deeply the overall cultural context in which Hungarian legal culture is embedded. From the synthesis of three different readings of Kafka – Robin West’s, Richard Posner’s and Theodore Ziolkowski’s – the aesthetical concept of ‘absurd’ has emerged as a key notion clipping together everyday life and the literary narrations.

Seeking the differences between everyday life and literary stories has led us to consider the historical process that has turned absurd fiction into reality in Middle Europe and more particularly in Hungary. An official police document and some scholarly notes have been used to shed light on the nature of this phenomenon.

In conclusion, we have to point out that this essay can be seen as an intuitive theoretical experiment for using aesthetic notions in analysing empirical sociological data rather than a methodologically well-founded application of that. The basic idea of this experiment is that both law and aesthetics are permeated and cross-infected by moral, and social-psychological constituents. This is why the phenomena of these two cultural fields permanently resonate to each other. A great deal of philosophical, aesthetical research and qualitative empirical data is needed to ground this method sufficiently. Nevertheless, we hope that this attempt can stand as a demonstration of the possibility.

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