# THE INSTITUTIONAL FRAMEWORKS OF LEGAL DEBATES IN THE FIELD OF INDUSTRIAL LAW, ESPECIALLY THE SOLUTIONS DURING THE AGE OF DUALISM AND THE HORTHY ERA[1]

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The acquisition of patent rights depended solely on the mercy of the ruler up to the 18th Century, and by the 19th Century, it shifted into a process of the authorities. Due to this process, by the end of the 19th Century, the winning of this protection no longer depended on the king's discretionality, but the possession of objective conditions, which was institutionalized in an administrative process.

## I.

It was obvious at the creation of the 37th Act of 1895 on the patent rights of inventions, that the protection of patents is a subjective right based on objective conditions, and in connection to this, the discretionality of both the monarch and any other state organizations.[2] This point of view was expressed in the spirit of the law that by tying the granting of this protection to objective criteria, the value of the patents which will be granted are going to grow.[3] However, this viewpoint can only be victorious if the process is not given to any departments of the ministry of trade, but to a whole new office.

All this forced the lawmaker to break free of the previous practice, and create a new authority to judge patent rights, which are the patent office and the patent counsel. To decide whether these new patent authorities were able to realize the objectives mentioned above, we should take a closer look at the operating and jurisdiction of these two offices.

The patent office was built up of presidents, vice presidents, constant judicial and technical, and non-constant judicial and technical members. In the jurisdiction of the patent office, there was the granting of patents and all administrative businesses in connection with this. The office carried out these tasks in the notification and judicial departments. The notification department only proceeded as an authority on the first instance in connection to the "administrative" matters concerning patents. So the law

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[2] Zsigmond KÓSA: Bevezetés a szabadalmi jog tanába, *Iparjogi Szemle* 6 (1914) 64.

[3] A találmányi szabadalmakról szóló 1895. évi XXXVII. tc. miniszteri indokolása, *Országgyűlési Könyvtár, Képviselőházi Irományok* 23 (1892) 741, 108.

dealt with the matters of jurisdiction between these two classes by making the notification department the forum on the first instance, and with general jurisdiction, so the judicial department could only acted on the first degree, if the law separately specified this. Because of this, the separate jurisdictions of the notification department contained the examination, publication, and denial of patent announcements, the granting or denial of patents, the arrangement of statements, the cataloguing of trustees, the announcement of the deletion of overdue patents, and the collection of patent fees.

The judicial department was an authority with mixed entreaties. On the first degree, it only acted in legal cases concerning the examination of the denial, destruction or quantity of patents, which it took to a council meeting.[4] As an appellate forum, it also dealt with the remarks on the second degree during a council meeting.

The law organized a patent council as an appellate forum above the patent office, which dealt with the first degree cases of the judicial department on the second degree.

From all these, it is visible that our patent law created a "hybrid" organization built up of both technical and judicial members, with judicial and economical jurisdictions. This organization realized the general aims of the law – which was aimed at consolidating the basic institutions of contemporary patent rights. At the same time, this new official organization could not live up to the strict expectations which were set up to the patent offices and mentioned above. It did not and could not achieve these goals, yet it established an excellent starting point to reach the next level of organized development, which was characterized as the category of "*patent legal service*". Actually this category was only realized after the patent authorities were endowed with the fully comprehensive nature of courts having special jurisdictions, and to this, the fulfilment of two conditions was necessary.

## II.

*First,* the same degree of judicial independence of any other judges of different courts had to be secured for judges working in patent courts. *Second*, with the deletion of the "hybrid" legal status, there had to be a clear statement in the question of organizational affiliations.

Three questions had to be re-modulated to completely fulfil the first condition. On the one hand, the connection of the notification and judicial departments had to be redefined.[5] According to the 35th Act of 1920, *"the judicial department decides over the petitions handed against the regulations of the notification department via a council of five members, which, including the head of the council, must be a combination of two judges with legal and three judges with technical qualifications."*[6]So, the law, instead of strictly separating the two departments, rather chose to change the council form of the judicial department's jurisdiction of appellation, which was proved to be efficient in

[4] Henrik FENYŐ: Szabadalmi intézményünk jelen állapota, *Magyar Mérnök és Építész Egylet Közlönye* (1914) 139.

[5] The question rose because of the practice of the judges, who worked in two departments were switched between these two departments on a yearly basis by the chairman of the office. So it could easily happen that the judges on the first and second degree rotated every year. For further information, see Rezső DELL'ADÁMI: A szabadalmi jog szabályozásának alapelvei, *Jogtudományi Közlöny* 19 (1885) 149; Oszkár FAZEKAS: A szabadalmi hatóságok szervezeti reformja, *Jogtudományi Közlöny* 31 (1904) 252.

[6] 35th Act of 1920 5th §, Paragraph (2).

filtering out anomalies, according to evidences which will be elaborated later. On the other hand, the institution of an outside member, so the adaptation of such judges who have other honest jobs, so they only work "part-time" to the patent office, also had to be re-modulated. The drawbacks of the institution of an outside member had already been recognized in the layout of 1905,[7] but its final deletion did not take place until 1920, via the 35th Act. Thirdly, to ensure the exquisite judicial independence, it was necessary to re-regulate the disciplinary responsibilities, which was shaped after the manners of responsibilities of judges working for other courts.[8] Compared to the previous points, the settling of the question of disciplinary responsibilities proved to be much more difficult. Although the 35th Act of 1920 declared in a hidden disposition that *"all dispositions which provide the independence, immovability, payment, leave of absence, and retirement age for court judges are valid for the president, vice president and judges of the patent court,"*[9]however, the real solution for this responsibility was only provided via the 20th Act of 1933.

The combined fulfilment of the aforementioned three conditions succeeded in the provision of complete judicial independence, and with this, the fulfilment of one of the conditions, which was set up on to achieve the state of court with special jurisdiction. It is important to point out that next to this, the "Hybrid" legal status also had to be annulled, which resulted in a statement on the question of organization. The study deals with this matter in the following chapter.

## III.

It was obvious even at the creation of the patent law that the patent processes taking place before the patent authorities differ from the known processes, and next to this, the process has a characteristic that has organization consequences. I see this particular nature and the difference from the contemporary legal service that the patent cases – including the authorization process and the legal debates that come with it – cannot be dealt with without a statement in technical questions. However, this statement cannot be made by the judge, for he lacked the proper technical knowledge, so it was a necessary consequence for the patent legal service to include a person with technical expertise into the legal service. The inclusion of a technical expert was inevitable, because at the first sight even an invention as simple as, for example, a soap holder, can have a technical description or necessities which could be difficult to understand for a judge with only legal expertise.[10] This deduction puts our understanding of the institutionalized system into a whole new perspective.

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[7] The draft of the law has been published: Manó István KELEMEN: *A találmányi szabadalmakról szóló 1895. évi XXXVII. törvénycikk revisiója.* Hungária Könyvnyomda, Budapest, 1905, 104-159.

[8] The 8th Act of 1871 dealt with the responsibilities of the judges and the court officials, to which the responsibilities of the patent judges had to be adjusted.

[9] 35th Act of 1920 4th §.

[10] „Patent points of demand:

1. The soap holder is characterised by the fact that its holding area is built up of two or more serrated (a) holding arms, which are adjustable, movable in a straight line, or could be rotated around a pivot.
2. The soap holders protected in point 1. are characterised by that the (a) holding arms are over a (b) tray.
3. The soap holders protected in points 1 and 2. are characterised by that the (a) holding arms are mounted to a (b) tray's vertical (c) side.

At the same time, it is also true that the patent legal service is not the only one where such an expertise was necessary to conclude a legal debate which the judge did not possess. From a mental illness, which could be a reason a person cannot be punished to the determination of the value of a certain estate, we could bring up several examples, where specific knowledge was required to decide the questions of a legal question during a trial. But in these cases, it was not up for debate whether to establish a court having specific jurisdiction. However, the question of expertise arises quite differently, both in quality and depth, in the field of patent legal services. And with this, we arrive to the roots of the circle of problems of the whole organization, which is embodied in the participation of a technical expert in the field of jurisdiction. This can be summed up in one simple question, namely *should a technical element participate in the judicial matters as an expert or as a technical judge?* Dozens of reasons of principals could be mentioned for and against both the solution of expert and technical judge, so, to really decide in this question, we need the assistance of the practice of judgement. Even the conditions before patent tend to focus on technical questions – *the nature of the invention, industrial saleability, novelty,* or even *points of demand*.

In the centre of the judgement of *the nature of the invention*, there is the question of the inventor's activities, which has been widely analysed by the professional literature, which has never been separately understood in the judicial practice, but always stemmed from its effects.[11] Based on this, during the judicial process, the inventor's activities have always been included with the technical effects. This is the technical effect which is in the focus of several judicial regulations, and more to this, in connection to the nature of the invention. Although the invention could not have been given a generally understood definition, yet the court had the obligation by the law to examine the nature on the invention.[12] This obligation was fulfilled by the court by examining the technical effects, which meant the analysation of the technical orientation and its manifestation. The examination of the technical orientation always meant the analysation of the invention's specific technical task. And by this, the court could determine the technical effect, if *"...in the invention of the applicant, the part were combined in such a way that it executed the appointed technical function in a new and perfected fashion."*[13] To sum it up, the specific evaluation of the fulfilment of a technical task meant the assessment of technical orientation, and this made it possible that those reports which were focused on the same outcome, yet via a different technical manner (for example, those concerning stoves) could be approved separately.[14]

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The soap holders protected in points 1 to 3 are characterised by that the vertical (d) side of the tray, there is a (f) guiding slit, and one of the (a) arms is out through this." Hungarian National Archives – referred to as HNA from here on out – Government Official Archives from the Citizenship Era, Section K – referred to as K from here on out – Archives of Industrial Ministry – referred to as 603- 583. cs. G. 6755/1929.

[11] On the contemporary understanding on the nature of inventions, see Izidór DEUTSCH: A szabadalomból folyó jogviszonyok, *Magyar Jogászegyleti Értekezések* 101/11/1 (1894) 252-253; Tibor SCHÖN: *A szabadalmi joggyakorlat kézikönyve,* Budapest, 1934, 11; Árpád SZAKOLCZAI: A szabadalmi törvény 3. §-ának 3. pontja, *Jogtudományi Közlöny* 43 (1899) 5-6; Sándor TÚRY: *A magyar szabadalmi jog kézikönyve,* Budapest, 1911, 25; László TÖRÖK: *A Találmányi szabadalom,* Budapest, 1913, 66.

[12] 37th Act of 1895 32-35th §.

[13] HNA K 603 2126. W. 5223/1926.

[14] HNA K 603 573. cs. G. 6083/1926; 264. cs. D. 4059/1930; 1722. cs. S. 13483/1930; 1985. cs. T. 4694/1931; 437. cs. F. 6755/1932; 1438. cs. P. 7904/1933; 2150. cs. W. 6465/1935; 114. cs. B. 13731/1937; 1468. cs. P. 8947/1937; 996. cs. K. 14547/1938; 1302. cs. M 12214/1942; 162. cs. B 15343/1942; 423. cs. E. 5910/1943.

Speaking of technical manifestation, one should not look for any novelties in connection to this, only the formation of a technical effect. It is almost an impossible task to list all the different orientations of technical manifestation, for it can be presented in many different ways. For example, the price, safe usage, plain design; simple, convenient function, or shortened production time, and with this, the reduction of production cost.[15]

The technical matters were present in the condition of novelty. According to the 3rd § of patent law, *"An invention cannot be considered a novelty if, because of sheets published at the time of its introduction, or any other form of reproduction, it became so well-known that it was available to use for the experts;"* The published sheets was considered novelty-destroying if, by reading it, it can be presumed that by reading it thoroughly and thoughtfully, it provides a complete description to replicate the invention.[16] In the judicial understanding, "complete description" meant that the sheet provided by the disruptor of the factor of novelty is, without a doubt, the same as the reported invention. In most cases, it could only be decided if the court evaluated the publication in question from the point of view whether the points of demand are clearly stated. If this has been established, then we could talk about novelty disruption.[17] However, if the publication was not perfectly clear, or it merely used similar elements as the invention in question, then the inventor had to take a stand on the relevance or the irrelevance of the publication and the point of demand. So the court provided the protection to the statement of *"intended to solve the remote control of assistant switches via a change in the flow of current, so, a commutator. The publication referred as disruptor of novelty referred to a main switch, and the introduced invention was referring to a commutator, but, according to the court's reasoning, this difference was irrelevant in the point of view of technical solution, so the patent had to be denied"*[18] So, it can be deduced from the understanding of "relevant differences" according to the judicial practice that if a sheet of novelty disruption did not fully and undeniably contain all the characteristics of points of demand, then it was not understood as disruptor of novelty.

There is a technical matter not only in matters of the conditions of patent, but also in *the understanding of specific protection*. According to the judicial practice, the *"...patent protection originates from the point of demand itself,"*[19] which meant that only a technical solution founded in points of demand could get protection, so the specific invention had to be translated to the technical language of the law. The meaning of this has been specified in the description of the previously mentioned soap holder. It is visible that it is not only an editorial trivia, but a problem with extremely deep roots, for with the fact that the patent rights originate from the point of demand, this demand also establishes the circle of protection. It is obvious that this definition means the translation of technical contents to the language of law.

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[15] HNA K 603 262. cs. D. 3931/1931; 1916. cs. Sch. 4915/1933; 2027. cs. T. 6326/1939; 1358. cs. N. 3388/1939.

[16] Alfréd PERLMUTTER: A nyomtatott szöveg újdonságrontó voltáról, *Szabadalmi Közlöny* 7 (1925) 44.

[17] HNA K 603 926. cs. K 11146/1932; 1220. cs. M. 9454/1932.

[18] HNA K 603 2071. cs V. 2060 /1926.

[19] HNA K 603 568. cs. G. 5180/1925; 192. cs. C. 3621/1926; 1059. cs. L. 5306/1926; 411. cs. F. 5179/1928; 354. cs. E. 4552/1935; 114. cs. B. 13713/1938.

It can be deduced from the fact described above that the technical questions are rooted so deeply in the field of patent law services, that the technical and legal questions cannot be completely separated from one another.

This is not a characteristic of any other field of law, which results in the experience that a statement in a technical question does not add to the establishment of a statement, and with this, to the verdict, but the decision in a technical question is the verdict itself. According to the understanding in the Age of Dualism and the years between the two Worlds Wars, a verdict can only be made by a judge, so the hiring of a technical judge was proved to be the most satisfying and efficient method during the patent rights' services.

At the same time, it is also obvious that one person is not able to possess the expertise to decide in both a legal and a technical question, so not a judge, but a judicial council has to possess those special characteristics which separate everyday legal matters from patent rights' problems. According to this, during a patent legal trial such a council has to be assembled which consists of judges and expert judges, the latter referring to members with technical expertise. *Which means that the special characteristic that differentiates patent legal services from "regular" legal services should not be possessed by the judge, but by the judicial court.* It is also specific to the systemic mentality at the beginning of the 20th Century that a council made up of such specific people could only be carried out within a system of courts having special jurisdictions. This was explained by the lawmakers that with the assembly of a council, and the establishment of the ratio of technical and legal elements, the nature and importance of the process also had to be taken into account.

## IV.

All in all, we can make the following conclusions. The function of the patent services can be described as the organizations which deal with authorizations and legal matters concerning a given patent's judgement. The two cases are closely intertwined, one could not be understood without the other, for the decision in the legal process must be in the jurisdiction of the judge, so the patent offices had to be organized according to the pattern of courthouses. Because of these, the general experience was that the cases in these courts were either purely legal, purely technical, or mixed. During patent legal proceedings, only the first or the third emerged, which also had to be expressed within the organization. So, with the presence of both the legal and technical member, their observable ratio will be decided by the nature of the jurisdiction.

Because of this, in cases of authorization, which were mainly technical, the technical element had to be the dominant one, while in cases of legal debates concerning a certain patent – next to the presence of the technical element, of course –, the legal element had to be present in stronger numbers. With the projection of this information to the actual organization, we can conclude that in case an authorization case, as an "administrative case", was presented to the announcement department, then the technical element had to be the dominant one, which means that the verdict was made by a council built up of 1 legal and 2 technical members. The same patter was valid in cases of appellate in connection to authorization, so the judicial department as an appellate forum (destruction, assessment, denial), where it can be observed that although there is a

technical question, but the manner of the case mainly revolves around a legal question, so the legal element must be dominant. Taking into account that there has been a specific focus on the first degree, the law orders an assembly of council members with the ratio of 1 legal and 2 technical members. Despite this, the same formation for the judicial department's appellate forum, which was the Patent Supreme Court, could not be valid, for more to creating an unnecessary duality in the organization, in this level, the legal matter became the more important one, so in spite of the fact that the legal matter remained unchanged during the appellate, so the council of the Patent Supreme Court consisted of 3 legal and 2 technical members.

In my opinion, this was the logical inference which allowed the further development of patent authorities and their acceptance as courts with specific jurisdictions. This development reached its peak with the 35$^{th}$ Act of 1920, which transformed the system of patent authorities.[20] Apart from its name-changing effect, this Act gave the attribute of judicial independence to the patent authorities, and with the re-evaluation of the council formations, it did not only supported it with dogmatically, but also established the most modern and efficient patent legal service of the era (based on the German pattern), making it obvious that the organization – not only in name, but also in legal status – was, indeed, a court with specific jurisdictions.[21]

[20] It must be remarked that even the law draft of 1916 contained similar dispositions, but these proved to be impossible to carry through because of the prompting of the lawyer's faculty and the fact that the country was at war.

[21] Oszkár FAZEKAS: Kuriózumok a szabadalmi jog köréből VI, *Ügyvédek Lapja* 22 (1917) 7; István EGYED: A külön-bíróságok, *Ügyvédek Lapja* 26 (1917) 6; Jakab KOHN: A szabadalmi törvénytervezet mint szervezeti reform, *Ügyvédek Lapja* 47 (1916) 2.