

**University Doctoral (PhD) Dissertation Abstract**

**Fundamental problems and regulatory issues of artists' resale right (droit de suite)**

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„A man who knows the price of everything and the value of nothing”

/Oscar Wilde: Lady Windermere’s Fan/

## **I. Research issues and hypotheses of the thesis**

Artist’s resale right (*droit de suite*) is an inalienable right or interest provided for the author of an original work of art in case of any sale of the work (falling within the scope of the law) subsequent to the first transfer by the author of the work.

Resale right is a quite new legal institution of copyright law, it has only a hundred years of history. However, even during this relatively short period, it has become a rather *controversial legal institution*. Despite its many obvious advantages and ‘raison d’être’, it is still not applied globally, its need is still debated outside the continental legal system, and where lengthy debates lead to recognition of the importance of regulation, the specific content of *legislation* leads to new *dilemmas*, professional and political debates.

In my dissertation, I explore how the resale right, which is often considered as a stranger in the copyright law system, can still *fit into the* more or less uniform *organism of copyright law*. The challenge for resale right is quite great in this respect, as it is difficult to meet the needs of both continental and Anglo-Saxon copyright regimes and at the same time to constantly adapt to social and economic needs. The location of resale right in copyright law is also an important issue because the demarcation of the boundaries of this legal institution is closely related to the always sensitive issue of the scope of copyright, of its fragile balance.

The aim of my research is to provide a *complex overview* of the legal, economic, and artistic aspects of resale right. However, this is not a self-serving journey; I examine the ways of the global fulfillment and practical implementation of the resale right, the proven or to be developed national rules, and on the basis of these, I intend to contribute to the further development of the legal institution with proposals. However, it is not an aim to collect solutions from all countries applying the resale right on a “best practice” basis.

*My first hypothesis is that despite all the controversial and disputed circumstances, resale right is a necessary legal institution, and it is capable of remedying the anomalies in the art market.* I wish to prove this by the systematic location of resale right and studying its practical operation under current rules, and by analyzing the characteristics and anomalies of the art market and the response of the resale right given to them.

*My second hypothesis is that, as in the course of its hundred-year history, the resale right is able to innovate continuously, to adapt to changing needs, while preserving the essence of its original image.* To prove this, I analyze in detail the international, European Union and some national expectations towards the conceptual elements of the resale right, and also the corresponding development of the legal institution.

*My third hypothesis is that the resale right is not currently effective enough, but with further changes in some of its elements and with the full globalization of the legal institution, significant progress could be made in this area.* In this context, I pay special attention to the topic of collective rights management and to the answers worth giving to conflict-of-laws problems, especially with regard to the issues of territoriality. I identify the critical points in the practical application of the resale right where a more detailed regulation or a wider international agreement would be needed.

## **I. The Structure of the Thesis**

In the chapter entitled '*Emergence and Historical Development of Resale Right*', I have first examined the international development history of the situation of artists. I took a review of the relationship between society and art from antiquity, in broad terms, and from the arrival to the immediate background of the resale right, in detail. This overview led me to the emergence of the concept of the resale right through the illustration of the social situation of artists. Next, I have presented the main points of the first legal regulation of the droit de suite (established in France), and then of the internationalization process of this legal institution. In this chapter, I have followed the international and European history of resale right until the adoption of Directive 2001/84/EC on resale right. Subsequent events have been included in Chapter V about recent developments of resale right. In the historical part, of course, I dealt in detail with the development of the resale right in Hungary, with the stages of the legislative process, with special regard to

the historical situation in which resale right was introduced in Hungary. In connection with the Hungarian legislation, I have followed the history of the resale right until the implementation of the Resale Right Directive. Subsequent amendments are described in the substantive law chapter of the dissertation.

In the chapter entitled '*Dogmatic Premises*', I tried to shed light on the legal nature of the resale right from several points of view, its place in the legal system and within the copyright system. The legal nature of resale right is very difficult to grasp. Many have attempted to define it, both on a theoretical and practical (case law) level. The question arises as to whether the *droit de suite* has any place in copyright law at all. If we anticipate that it has, then another question arises whether it is a moral or a property (economic) right. To what extent does it correspond to the character of property rights? According to the modern concept, the *droit de suite* is a part of copyright law. This is supported by the fact that European countries today mostly regulate the resale right in their copyright act. However, this was not so obvious in the beginning.

In the same chapter, I have examined the inherent characteristics of the *droit de suite*, the inalienability and the relationship of the legal institution to the principle of exhaustion. After that, I set out the theories supporting the necessity and justification of the legal institution. Another major unit is the exploration of the economic implications of resale right. In this context, I first reviewed the basic operating principles of the art market and then the characteristics of works of art as products, as economic goods. This was studied in detail by the pricing mechanisms of works of art, by the factors that make up the market value, and by the value-adding factors that form the basis of the resale right. Finally, I addressed the market failures inherent in the art market, examining the extent to which the resale right is convenient to their remedy. A certain level of scrutiny of the art market is justified by the fact that it constitutes the economic environment of the resale right.

In the unit entitled '*Some Conceptual Elements of Resale Right*', I have listed the conceptual components of resale right as a legal institution and these were examined through the international (rules of the Berne Convention), European Union (Directive 2001/84/EC), some relevant EU Member States (France, Germany, United Kingdom) and the domestic regulations. Relevant aspects of the case law have been included in the

chapter by reviewing the relevant court decisions.

Among the conceptual elements, I have traced the triple of classically accepted subject-object-content in the ordinary discussion of legal institutions. As for the object, I have examined the indirect and direct object of resale right, the issue of rightholders and obligated people among the subjects, and in the context of content, the problems related to the basis and amount of the royalty, the operation of collective management, the questions of the term of protection, the obligation to inform (the right to information) and the body of rules related to sanctions.

In the first part of the chapter entitled '*Issues of International and European Union Regulation of Resale Right*', I have comprehensively presented the process of copyright law harmonization in the European Union, and then I have positioned the harmonization of resale right in this process. I have outlined the scope of the EU legislator's power, the objectives of the Resale Right Directive and the efforts related to these objectives. I have looked upon the developments, trends and challenges faced by EU since the entry into force of the Directive. In the second major unit of the chapter, I have dealt with the international developments of resale right. Significant attention has been paid to the concept of an international resale right convention and the analysis of international trends. In the third part, I have studied in detail the countries that play a significant role in the global art market but do not apply resale right. I have looked for motives for their attitude of opposition or reluctance to *droit de suite*, and I have argued that it would be worthwhile for these countries to introduce resale right as well - in order to meet global interests on the one hand, and to maintain their own market position on the other hand.

In continental legal systems and at its international and EU level, that is, where resale right already exists, current issues concern the future of resale right. An important issue in the EU is the analysis of the effects of Brexit on the art market, on resale right and copyright law in general. In addition, resale right has to face several other challenges, at national, EU and international levels. At the international level, a resale right convention is slowly being outlined. Within its framework, the shortcomings and the myriad of open questions of the Berne Convention, will be perhaps resolved reassuringly. The prospective agreement will definitely have an impact on the harmonization process in the European Union, and it will be necessary to re-evaluate and modernize the now 20-year-old Directive based on the experience of the convention and the Directive. In this chapter,

I have also dealt with this experience, with the resale right regulations of the Member States and with the effects of the Directive on art market.

The states of the world can be divided into two groups in terms of my topic: for a group of States applying and for those not applying the resale right. The dilemmas are also different for the two groups. In the states applying the resale right, similar continental dilemmas arise: the future of the resale right, its more efficient operation, the tendencies of the art market in the light of the resale right. In non-applying states, they are discussing issues that have long gone beyond the legislative process in continental legal systems: the need for a resale right or (the example of Anglo-Saxon states already using a resale right has been somewhat eliminated this issue) the questions of inserting the resale right into the legal system of the given state.

In the chapter *'Determining the Applicable Law in Relation to the Acts of Resale'*, I attempted to resolve one of the key problems in the practical application of the resale right, the conflict that arises in the case of cross-border art market transactions. Due to the silence of the Berne Convention and the Directive 2001/84/EC, I primarily relied on the solutions offered by the case law, and also presented the relevant concepts elaborated by the literature, in order to find a way in one of the most complex dilemmas of the practical application of resale right.

Cross-border trade of works of art raises important questions about applicable law, and currently seems to be more questions than one clear answer. Among other regulatory differences, differences in the range of rightholders or different types of obligated people raise a wide range of issues that can lead to legal disputes in many cases. The prevention of such disputes is (or would be) served by a definition of the applicable law that excludes all disputes and by a clear demarcation of the applicable connecting factors at national, EU and international level.

In the same chapter, I have dealt specifically with the issue of territoriality, a much debated issue within copyright law. However, I started out from the premise that territoriality should not be considered as an obstacle but as an opportunity. It is the task of private international law to offer bridging solutions to the phenomenon of territoriality. As for resale right, such bridging solutions are needed in order to properly regulate the increasingly global art market.

### III. The Methods and Sources of the Thesis

During the research and elaboration of the topic I used several methods - *descriptive, analytical, comparative, systematizing* -, these are mostly combined in the chapters of the dissertation.

During the historical review, I typically used the *descriptive method*.

In the elaboration of the dogmatic premises, I mostly used *systematizing-analytical methods* to explore the legal nature of resale right, to position it in copyright law, and to review certain theories related to resale right, but the *descriptive method* also appears in the chapter. In the second part of the chapter, I specifically sought an *interdisciplinary overview*, which aspect justifies a thorough mapping of certain aspects of art theory and cultural economics. These aspects broadened my horizons on the topic and reinforced my assumption that resale right is a necessary legal institution of copyright law.

I have described the conceptual elements of resale right on the basis of the triple of subject-object-content of civil law, using *comparative and analytical methods*. I compared the selected relevant legal regulations in the field of resale right and I evaluated those regulatory solutions.

When studying the European Union and international regulations of resale right, I reviewed the resale right harmonization process of the European Union, the most important developments of the 20 years since the establishment of the Resale Right Directive, the current challenges of resale right and international developments and expectations in relation to the resale right with the *analytical method*. Using the *comparative method*, I compared the motivation of the so-called reluctant states they use to argue against the introduction of resale right.

As for the questions related to the determination of the applicable law, I reviewed the relevant international, European Union and national regulatory solutions and answers in a *descriptive and analytical way*, and then I tried to find my way among them and give a correct and practical answer to the problem.

In addition to the many *international sources* available in English, I have made a special effort to process the *national literature of the relevant states* (available in their own language or in English) for the sake of authenticity and accuracy.

From the extremely extensive global literature on resale right, I primarily have used the literature of countries whose national regulations I consider relevant to the examination of the legal institution. Thus, I examined the legal regulations in detail of France and Germany, due to the fact that they are giving an example for many other countries' legal regulation, and the United Kingdom, which owns a prominent place in the global art market. Among the Anglo-Saxon areas outside Europe, I have tried to process the relevant literature in the USA. In addition to all this, of course, the Hungarian legal regulation and literature also received a great emphasis.

The dissertation as a whole is characterized by *alternating short and distant perspectives*, which are justified by the need of complexity: a detailed analysis of the essence, legal nature and conceptual elements of resale right required a very close approach; examining the economic background, the overview of the historical development, the international aspects and conflict-of-law options required a few steps further away. In addition to striving for complexity, the alternation of perspectives was determined by the logical arc of the dissertation, which I hope forms a dynamic system. Like walking among the images in an exhibition: sometimes stepping closer to be able to observe even the smallest details of the painting, and then stepping backwards to make the whole composition clear to us.

## **I. Conclusions**

### **The result of examining the first hypothesis**

During this century of operation and development of the resale right, *the existence of the legal institution in copyright law system has been verified*. Although the initial theoretic concepts may seem too romantic today, and since then, much more practical theories and arguments have been developed to justify the resale right, we still often refer to the original considerations. The importance of the legal institution is demonstrated by the fact that it is being introduced and applied in more and more countries, making it a globally recognized part of copyright law. Although, the need for resale right is still not universally accepted, there has been tremendous progress in this regard if we look back to 1920. In Europe, the need for resale right is no longer a question, and non-European states relevant to the art market are also getting closer to adopting resale right. The

legitimacy of the legal institution is not called into question by the fact that its exact dogmatic position is so controversial that there is no consensus even in the continental Europe. However, there are common denominators: resale right is considered everywhere as *an atypical copyright law institution*. This is confirmed on the one hand by the literature and on the other hand, by the legal-technical position of the resale right. Among the countries examined, France can be considered exceptional in this respect, as resale right is clearly classified as an economic right at the level of French legislation. Elsewhere, however, it is regulated under other rights in copyright law (Germany) or under specific provisions for each genre (Hungary).

It has become clear that resale right has an indisputable role in the financial recognition of artists and in this context, for a wider cultural consideration, as well. However, the need for a resale right is justified not only by this noble cause but also by the fact that the legal institution *is an excellent tool for resolving the anomalies and market failures of the art market*. At the same time, it is also necessary to state that state intervention in the form of copyright law and resale right regulation is not enough in itself, but it is also necessary to regulate the art market more elaborately. The art market operates with several self-regulatory mechanisms, but not any better solution has been found to eliminate or at least reduce the unwritten rules and the from this resulting lack of information than the state's role in supporting the arts and the resulting copyright regulation. Of course, the unwritten rules do work, and also do the contractual relations, but based on these, the operation of the art market is still far from optimal.

### **The result of examining the second hypothesis**

In my dissertation, it is proved that *the great advantage of the resale right is that it is very flexible, it is able to adapt to the changing environment, both in time and geographically, as well as economically*. And this advantage is perhaps due to its controversial and versatile nature, precisely the characteristic which is most often mentioned as its fault, as well. Critics prefer to point out that the legal institution has moved significantly away from its original concept. Rather, however, I would point out that, in fact, the resale right has always been the point of connection with both personal and property rights. Throughout its history, one side or the other has become more dominant, in line with changing needs. However, *the original features of the legal institution are still*

*recognizable*, despite the fact that it now has a much more elaborate, more detailed regulation, and nowadays a more functional approach dominates, bringing the resale right closer to property rights. The changes necessitated the practical ensurance of the legal institution and its adaptation to the current social and economic conditions.

### **The result of examining the third hypothesis**

The third hypothesis of my dissertation is related to the effective operation of the resale right. After elaborating the complex topic of resale right, I found that *resale right works effectively in one part, but needs a significant development in the other part*. It must be acknowledged that there are successful elements of the Directive and the national regulations based on it. Examples are, in the case of the Directive, the determination of transactions subject to resale right or the determination of royalties in a sufficiently detailed manner. I also consider successful those national regulations that contain sufficiently precise, detailed provisions on collective management, the right to obtain informatin and the sanctions. Basically, the resale right is a positive legal institution, certainly suitable for supporting a certain part of the artists. But the regulation could be even better, even more modern. Even in states that apply resale right, the legal institution does not work ideally everywhere. The reasons for shortcomings in the effective practice are multifaceted. These reasons could be divided into two groups. In one group, anomalies resulting from the specific operation of the art market and the territoriality of copyright law - these could be called external causes. The other group would include problems closely related to resale right, such as the lack or unsatisfactory level of collective management, the complete lack of sanctions or the lack of a firm resolution on the applicable law, which could be identified as internal reasons.

As a result of my research, I have concluded that the resale right regulation in its current form cannot be assessed as ideal in many countries or at the EU and international level. However, I have identified areas where further results could be achieved through development.

One of the areas to be developed is the shift in international regulation towards globalization, which is becoming increasingly global. In order to enforce resale right more effectively, it is worthwhile to transfer the “best practices” achieved anywhere in

the world and to develop a special international regulation from them, given that it would be acceptable to as many countries as possible.

Another topic to be developed is the issue of collective rights management. It has become clear that there are big differences in this field, even within the European Union, although collective rights management is nowhere unknown within the EU. However, its application in the field of fine arts is brought much into question. I have emphasized that the best, most effective way of enforcing rights is through compulsory collective management, but I have shown it is not the only factor efficiency depends on. The detailed elaboration of the substantive rules of resale right, such as the obligation to provide information, which is closely related to the collective rights management activity, or the range of applicable sanctions is as important, as well. Thus, the detailed elaboration of the information obligation, the existence and amount of the sanction in case of non-disclosure or refusal to provide information, and the appointment of a professional representative or art dealer as an optional obligated person - these factors can ideally guarantee the author's final royalties. These are the areas that should be standardized at first, in order to achieve the aim of the Directive, which is to provide artists with a financial reward for the success of their work. At the key points, it would be important to better approximate the regulations of the individual Member States. The main tool for this would be to amend the Directive. It is clear that this is not an easy task for political reasons, but it is absolutely justified from a professional point of view, because if we want to treat the EU art market as a whole, and preserve and increase the EU's competitiveness, a much higher degree of transparency and traceability within the EU should be achieved. A more stable resale right regulation, and in particular a collective management system, would also be more successful in meeting the challenges facing the EU.

I also consider the issue of determining the applicable law to be an underdeveloped area, which is (would be) the most important guarantee for the practical enforcement of resale right, in addition to collective management - in the case of an ideal regulation.

What we can confidently state is that the linking factor of *lex loci protectionis* is an appropriate starting point for determining the applicable law, but, due to the special features of resale right, it does not provide a sufficient guidance in itself. It is therefore necessary to take into account the specific resale transactions and to find the relevant

element in them. To focus on the act of resale but also on acts more closely connected with the seller, seem to be the most universal solution, and it would also meet the spirit of the Directive. This may be the common ground between the points of view of the various legal systems, whether the German Trennungsprinzip or the French transfer of ownership based on the conclusion of a contract.

This element, therefore, together with the application of the principle of *lex loci protectionis*, can serve as a real linking factor in determining the applicable law, and it would also serve the interests of artists, the essence of resale right, to the fullest extent.

An additional solution may be the linking factor of *lex rei sitae*, which is also not a suitable linking factor in itself, but if the law applicable to the seller does not clearly determine the applicable law, the principle of the *lex rei sitae* may be invoked.

Practice also seems to recognize the path paved by actions related to the seller. However, we still have to wait for a guiding and uniform practice to emerge. However, there is a great need for this; an entity with such a significant economic position like EU cannot afford to tolerate such a diversity of applicable laws. Not only would the development of such a rule be essential within the EU, but it would also be at least as important for relations outside the EU, as the nature of resale right regulated in third countries differs even more from one Member State to another.

It is welcomed, however, that the Hungarian resale right regulation is extremely thoroughly elaborated in relation to the European Union, it is detailed and it tries to cover everything. In many respects, it already preceded the Directive when it was born. It is still really modern among the Member States. Hungary's resale right regulation can be said to be very progressive among the EU member states by operating the mandatory collective rights management system, and it is suitable for ensuring the effective enforcement of the resale right.

## **Summary**

In my dissertation, I have tried to study resale right as an extremely important but much-disputed legal institution of copyright law in a complex way. I have dealt with the nature of the legal institution and, in this context, with the issue of how to integrate it into the scope of copyright law. I have reviewed the theories developed to justify resale right. In

the broader context of economic analysis, in light of specific mechanisms of the art market, I sought the answer to which factors influence the market value of a work of art - an issue closely related to resale right, in relation to specific selling prices and value added.

In the course of my research, it has become apparent that resale right is a true *multi-faceted legal institution*, which causes dilemmas related to its classification. Its purpose, its original concept approximates it to personal rights, but its function makes it similar to property rights. It is disputed that it moves away from the rights attached to a person, but at the same time its practical enforcement is better ensured by its placement among the property rights. This is why in continental legal systems today it is considered to be closer to property rights, although it appears from the literature of the studied countries and the legal technical placement of resale right that *it is an atypical legal institution separate from property rights*.

In my dissertation, I reviewed the stages of the development of resale right, covering the changes in the character of the legal institution and the role of these changes in the efficient operation of the legal institution. From the point of view of the development of the resale right, it was inevitable to review how the perception of the artist in society developed over the centuries of art prior to the development of the resale right. This history of development explains the emergence of a need for an artistic right similar to resale right, both in terms of its time and its geographical determinism.

Then, I have divided resale right into “atoms” and examined these conceptual elements in depth, researching the points that need to be developed for the practical implementation of the legal institution, or at least for which a broader international consensus would be desirable.

Studying recent developments in resale right, I have reviewed the context in which the Directive was born, the objectives along which it was based, and the extent to which it has been able to meet them throughout its twenty-year history. I have identified the challenges facing resale right and addressed possible solutions to them, in particular the emerging international convention. I presented the aspirations and dilemmas of the still reluctant but significant states in terms of art market in connection with the introduction of resale right.

Finally, I outlined the problems of resale right in private international law and sought an answer to the principles of determining the law applicable to cross-border transactions, in the absence of conflict-of-law rules.

Exploring and studying in detail the conditions and regulatory anomalies that run counter to efficiency might not give enough reason for optimism, but in my dissertation, I try to emphasize that seeing the development so far, the formation of the legal institution in its current form, it will serve its purpose better and more effectively: to improve the conditions of living artists, to give financial recognition to their work, and to encourage them to work further.

After a detailed review of the regulation of resale right, it can be stated that the EU regulation in its current form is not modern enough. It strives to meet today's needs and, on some issues, sets out very up-to-date solutions, but on other issues it is somewhat timid and – probably also due to the active lobbying of art dealers' organizations – it rather fixes conformist solutions.

I emphasized that the quality and the operation of the collective rights management system is extremely important. However, it is also clear from the dissertation that, although the existence of a mandatory or voluntary collective management system in a given Member State is extremely important, it also depends on the details of the regulation, how effectively the resale right royalty can be enforced within the framework of collective management.

Exploring the reasons behind the reluctance of states in leading positions in the global art market leads to the conclusion that the opposition of these states to resale right can be partly explained by professional reasons (difficulties in integrating it in the legal system, complete absence or underdevelopment of collective management), the main reasons that they refrain from introducing resale right are economic policy reasons, namely to preserve their market position.

I examined the territoriality characteristic of copyright law as a starting point in determining the applicable law in relation to cross-border transactions. This is often seen as an obstacle, but it is private international law that can offer bridging solutions and thus turn the obstacles into opportunities in the field of copyright law, and thus resale right.

Resale right has developed significantly since its establishment, partially adapting to the challenges of different ages, nevertheless, it can be felt (both internationally and domestically) that instead of fulfilling its function more fully, the focus is often on justifying the legitimacy of the legal institution, still nowadays. It is a fact that the awareness and recognition of the legal institution is still much lower than that of other, older copyright law institutions, copyright property rights, and copyright royalties. The legal institution is far from over previous dilemmas. However, it is encouraging that at international level, the problems and issues of resale right are still on the agenda, and they are receiving considerable attention among many other relevant topics of copyright law. There is definitely much work to be done in this area.



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### List of publications related to the dissertation

#### Articles, studies (5)

- Tomasovszky, E.:** Fenntarthatósági szempontok érvényesülése a szerzői jogban.  
*Pro futuro.* 11 (1), 1-19, 2021. ISSN: 2063-1987.  
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Level of HAS Committee on Legal and Political Sciences: A
- Tomasovszky, E.:** Szellemi tulajdon - vagy mégsem?  
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*Casopis Kyevsckogo Universitetu Prava.* 2, 377-380, 2015. ISSN: 2219-5521.
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In: Civil Law Issues in Intellectual Property Rights and Consumer Protection. Ed.: Veronika Szikora, Éva Török, Debreceni Egyetemi Kiadó, Debrecen, 23-39, 2014. ISBN: 9789634737278
- Tomasovszky, E.:** A követő jog alapproblémái, szabályozási kérdései.  
*De iurisprudencia et iure publico.* 7 (2), 2013. EISSN: 1789-0446.  
Level of HAS Committee on Legal and Political Sciences: C





## List of other publications

### Articles, studies (3)

6. **Tomasovszky, E.:** A vélemény-nyilvánítás szabadság megítélése a szerzői jogban - Az egeb gyakorlat alapján.  
In: Doktoranduszok fóruma : Miskolc, 2013. november 7. : Állam- és Jogtudományi Kar szekciókiadványa. Szerk.: Stipta István, ME Tudományszervezési és Nk. Oszt., Miskolc, 275-278, 2013.
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8. **Tomasovszky, E.:** Az Európai Bíróság ítélete egy dán munkavállaló ügyében: kielégítő-e a végkielégítés?  
*Jogesetek magyarázata. Hallgatói különszám,* 2 (1), 41-46, 2011. ISSN: 2061-4837.  
Level of HAS Committee on Legal and Political Sciences: A

**By the directives of HAS Committee on Legal and Political Sciences:  
Publications in periodicals level „A”: 3, related to the dissertation: 2.  
Publications in periodicals level „C”: 1, related to the dissertation: 1.**

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