STRUGGLE OF VALUES, INTERESTS AND RIGHTS: THE PRIVATE INTERNATIONAL LAW ASPECTS OF CULTURAL PROPERTY DISPUTES

Abstract of Doctoral Thesis

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Budapest

2021

I. Subject and Research Objective of the Thesis

The protection of cultural property is in the common interest of humankind. Elements of these goods, which can be described as a special type of movables, are in much greater and more direct danger in today's globalized world than at any time in history.[1] The artefacts market generates enormous turnover. Sales move about 45 billion dollars a year; and this number grows year by year.[2] The huge demand for art treasures also threatens their integrity. The exact dimensions of the illegal art trade are difficult to determine.[3] The European Commission estimates that 8,000 crimes are committed against national heritage each year, and about 40,000 cultural goods are smuggled out of states – in addition, UN statistics show that smuggling of cultural objects ranks third on the list, followed by drugs and weapons.[4]

In view of the above, it is not surprising that the protection of cultural objects is also receiving increased attention from the legislator. Legislation on cultural goods now forms a special field of law, consisting of a mixture of norms of both external and internal origins, which can be classified into different branches of law. This is necessarily the case, as this phenomenon can only be successfully overcome if the fight is taken up against it from several directions.

On the one hand, states encourage the return of illegally taken cultural goods by various instruments of public law. In this context, mention should be made of the international conventions that have now been widely ratified, such as *the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of*

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[1] According to a 2013 estimate, *hundreds of objects* leave Hungary illegally every year. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Fourth report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. Brussels, 2013. 7.

[2] Renold, Marc-André: The Legal and Illegal Trade in Cultural Property to and Throughout Europe: Facts, Findings and Legal Analysis. Joint European Commission-UNESCO Project: Engaging the European Art Market in the fight against the illicit trafficking of cultural property. The Art-Law Centre, University of Geneva, 2018. 3.

[3] More about the reasons: Szabó Annamária Eszter: Az ingó kulturális javak védelme, különös tekintettel az illegális műtárgy-kereskedelemre. *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, 2006. 435-436.

[4] Plachta, Michael: European Parliament Approves New Directive on the Return of Cultural Objects Among Member States. *International Enforcement Law Reporter*, vol. 30., no. 4. (2014) 129-130.

Cultural Property,[5] or *the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*.[6]

However, the protection of cultural property by the instruments of public international law has had limited success. This is partly due to the fact that some states have long been reluctant to implementing them due to their involvement, economic or otherwise. Ratification of the new conventions can still be described as an extremely slow process. On the other hand, the process of creating these sources of law is surrounded by strong compromises, which is felt especially in the norms affecting their scope.[7] It follows from the foregoing that their provisions may have limited effect. *Per exemplum*, *Directive 2014/60 /EU*,[8] which coordinates the return of cultural goods within the European Union, covers only States' claims for the return of cultural goods unlawfully removed from their territories on or after 1 January 1993. Its provisions are complemented by *Regulation (EU) 2019/880*,[9] which applies to cultural goods created or found outside the customs territory of the European Union. However, its purpose is to serve as a compass for assessing the legality of exports, so the assessment of property claims is beyond its scope.

As far as the rules for the protection of cultural property of internal origin are concerned, these norms appear across the branches of law and can mostly be found sporadically in the given legal system. It has now become clear that public law instruments alone are not sufficient to address the issue of cultural goods. That is because property claims related to illegally taken cultural property raise specific private law issues, too.

Like the shape, appearance and value of goods, the legal environment around them is variable. Each legal system is consistent in that cultural goods require special treatment, but the

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[5] Implemented in the Hungarian legal order by the act of „1979. évi 2. törvényerejű rendelet a kulturális javak jogtalan behozatalának, kivitelének és tulajdona jogtalan átruházásának megakadályozását és megelőzését szolgáló eszközökről szóló, az Egyesült Nemzetek Nevelésügyi, Tudományos és Kulturális Szervezetének Közgyűlése által Párizsban az 1970. évi november hó 14. napján elfogadott Egyezmény kihirdetéséről".

[6] Implemented in the Hungarian legal order by the act of „2001. évi XXVIII. törvény a lopott vagy jogellenesen külföldre vitt kulturális javak nemzetközi visszaadásáról szóló, Rómában, 1995. év június hó 24. napján aláírt UNIDROIT Egyezmény kihirdetéséről".

[7] More on this topic: WELLER, Matthias: Study on the European Added Value of Legislative Action on Cross-border Restitution Claims of Works of Art and Cultural Goods Looted in Armed Conflicts and Wars with Special Regard to Aspects of Private Law, Private International Law and Civil Procedure. In: WELLER, Matthias (ed.): *Rethinking EU Cultural Property Law: Towards Private Enforcement*. Baden-Baden, Nomos Verlag, 2018. 25–27.

[8] Az Európai Parlament és a Tanács 2014/60/EU irányelve a tagállamok területéről jogellenesen kivitt kulturális javak visszaszolgáltatásáról és az 1024/2012/EU rendelet módosításáról.

[9] Az Európai Parlament és a Tanács (EU) 2019/880 rendelete a kulturális javak bejuttatásáról és behozataláról.

concrete implementation of this shows a varied picture. This phenomenon contributes to increasing the complexity of disputes over cultural goods.

The complexity of the problem is exacerbated by the specialty of restitution proceedings: the international element appears in most of them. This is due to the characteristics of the trade in cultural goods. Due to the goods' enormous value and mobility, and the unprecedented boom in international trade, these goods typically move on a cross-border route. This route, in turn, leads in some cases to a dispute centred on the determination of the rightful owner of the property. The mechanism of the different legal systems is extremely divided on the question of acquiring ownership of stolen goods. And that division, as we shall see, works against the protection of cultural property.

As a result, private international law plays a prominent role in the field of protection of cultural property. Private international law deals with facts involving a substantial foreign element. In keeping with the trend of the 20th century, each state created its own private international law rules. This process has countered the unification of private international law, making the area increasingly complex.[10] With regard to restitution cases, the lack of uniformity reinforces the forum shopping phenomenon and works against the predictability of decisions.

The processing of private international law aspects of restitution proceedings is still embryonic, despite their predominant nature. However, the need to build a coherent system is growing day by day.[11]

The aim of this dissertation is to comprehensively explore the manifold range of problems that return procedures raise from a private international law perspective in a unified structure. Due to the lively dogmatic debates and the regulatory immaturity that characterize this field of law, the main goal of the dissertation is to help the legislator and practitioners by conceptually clarifying and presenting the problem in the system. The proposals made in connection with the current regulations have also been made in the service of this goal.

[10] REDDY, Vinay: Common Law Conflict of Laws Rules and the Protection of Cultural Heritage: A Conflict Between the Two? *Flinders Journal of Law Reform,* vol. 5., no. 2. (2001) 199.
[11] See: European Parliament resolution of 17 January 2019 on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (2017/2023(INI)) I.

II. METHODOLOGY

The issue of the return of cultural goods has come to the forefront of academic research in recent decades.[12] There are various reasons behind this phenomenon: the need for specialized norms emerged and so did the number of corresponding sources of law. Documents promoting origin research have become widely available,[13] and the number of restitution lawsuits is also increasing.[14] The perspective of this dissertation is the peculiarities of private international law on restitution proceedings, which, despite the excellent studies on some aspects of the topic, have not yet been the subject of comprehensive analyses in the Hungarian legal literature.

In the course of the research, we examined the sources of law of international, European Union and domestic origin, which are intended for the protection of cultural property. This activity required special attention for the reason that the private law aspects of restitution lawsuits are usually not covered by a specific source of law, but by a provision of sources dealing with other aspects of the problem.

Where the investigation required it, we used the methods of comparative law. We compared the solutions of the sample states selected on the basis of the defined criteria and the practical consequences arising from them. In the course of the research, we also relied on the findings of the domestic and national legal literature, as well as on the lessons learned from the widely processed case law of the restitution procedures.[15]

Our point of view during the study was multidirectional. It is a feature of return proceedings that it represents a wide range of interests, not necessarily strictly legal ones, the presentation of which requires the exploration of international trends. On the other hand, our ambitions regarding the shaping of the Hungarian legal environment required us to pay special attention to the domestic legal solutions, and to place a strong emphasis on the analytical examination of these solutions at every point of the dissertation.

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[12] MAGNUS, Ulrich – MANKOWSKI, Peter: *European Commentaries on Private International Law. Volume 1 Brussels Ibis Regulation – Commentary.* Köln, Verlag Dr. Otto Schmidt KG. 2016. 345.
[13] See: WELLER, op. cit. 8.
[14] SZABÓ Sarolta: A kulturális javak (és a lopott dolgok) speciális védelme az új Nemzetközi magánjogi törvényben. In: BERKE Barna – NEMESSÁNYI Zoltán (szerk.): Az új Nemzetközi magánjogi törvény alapjai. Kodifikációs előtanulmányok. Budapest. HVG-Orac, 2016. 160.
[15] The online case law database of the Art-Law Centre of University of Geneva was particularly helpful. Available: plone.unige.ch/art-adr.

III. BRIEF SUMMARY OF THE THESIS AND THE RESEARCH

A number of conclusions can be drawn from a review of the characteristics of disputes over illegally confiscated cultural property. On the one hand, despite the fact that we have examined the issue only from a specific perspective – from the point of view of the issues of private international law they raise – the issues presented in each chapter require different dogmatic attitudes. They are affected and determined by different slices of the legal system – not to mention the alternating nature of the dominance of factors beyond the law. On the other hand, the other specialty of this field of law is clear, according to which disputes are handled in an uncoordinated manner, on a case-by-case basis. Namely, those are based on different national laws, which have the most divergent solutions in rights in rem.

One of the main neuralgic points of this field of law - which, of course, is also decisive from the point of view of private international law - is the ambiguity of the most important concepts. The *first chapter* of the writing is thus intended to provide a basic clarification of concepts. The central theme of unity is the conceptual definition of the cultural goods themselves, because "whatever the legal issues involved, it is always the particular nature of the item of cultural heritage involved that lies at the heart of litigation."[16]

There is no universal, unified answer to the question of what we mean by the concept of cultural property. The growing number of international instruments governing the issue only adds to the diversity in this respect. Realistically, it can be stated that, despite the efforts to do so, standardization of the main definitions of the field is still not expected. The possible compromise is influenced by such strong "individual" interests as the different size and weight of the national cultural heritage of each state and the unique development of their art market. The conflict between the interests of countries with a "national" and those with an "international" approach to the right to cultural goods,[17] as well as the differences of source states and market states seems irreconcilable and works against consensus.[18]

[16] CHECHI, Alessandro: *The Settlement of International Cultural Heritage Disputes*. Oxford, Oxford University Press, 2014. 134.

[17] In terms of the abstract approach to procedures, these two kinds of narratives have been dominant since *Merryman*'s epoch-making work. See: MERRYMAN, John Henry: Two Ways of Thinking about Cultural Property. *American Journal of International Law*, vol. 80, issue 4. (1986)

[18] Also based on Merryman's grouping, states can be divided into two groups. On the one hand, there are the "source states", by which we mean countries rich in art treasures such as Egypt, Greece, or India. In these states, the number of artefacts goes far beyond "local use", so exporting them would make economic sense. Another group of countries are "market states", such as France, Germany, or the United States. In these states, demand exceeds supply. Market states, being generally rich states, would encourage exports in this area as well. However, source states, marking objects as part of their cultural heritage, are reluctant to do so. MERRYMAN op. cit. 832.

As for the Hungarian conceptual system in the field of cultural goods, it can best be described with the word "inconsistency". Administrative law uses and defines the concept of cultural property, which serves as a starting point for other branches of law as well. Although the in-depth analysis of this regulation was not the subject of the research, it should be emphasized that the need to clarify these categories has already been indicated by the case law.[19] As for the other branches of the legal system, the existence and depth of special regulation is strongly divided. It can be stated that it is necessary to review and systematize the current fragmented rules for these goods, and it also would be useful to create guidelines to help practitioners.

As regards the nature of the claim for restitution, it is based on a conflict of interest between the original owner, from whose possession the cultural property was unlawfully removed and the subsequent possessor – the *bona fide* purchaser. The regulatory differentiation between the position of the original owner and the good faith purchaser is presented in the *second chapter*, which serves as the basis for most of the issues raised by private international law in restitution proceedings. The fact that the internal rules ensuring the substantive settlement of the dispute differ from one country to another ultimately means that the same dispute can be settled with different results, depending on the collision rule of the forum. This phenomenon stems from the tensions between *common law* and *continental* legal systems: their radically different approaches to the issue of the acquisition of stolen goods, and their enforcement mechanisms. The chapter uses the method of comparative analysis to point out the peculiarities of the solutions of these legal systems and the resulting problems with restitution procedures. The dissertation highlights the German regulation creating a new level of protection of cultural property: the adoption of the rules on due diligence requirements and the nullity of transactions involving lost, unlawfully excavated, or unlawfully imported cultural property should be considered.

If the relevant substantive legislation were to be approximated, the resulting conflict-of-law problem could logically be eliminated. However, we must not forget that "[t]he direct regulation of private international law facts [...] has never been comprehensive and cannot be practically complete"[20] – there is therefore a need for a conflict of law response. This "answer" is dealt with in the *third chapter* of the dissertation, which examines the general institutions in

[19] See, for example the decision of the Capital Court in Budapest (Fővárosi Bíróság 18.K.34.206/2009/12.).
[20] MÁDL Ferenc – VÉKÁS Lajos: *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga*. Budapest, ELTE Eötvös Kiadó, 2018. 36.

separate sections – the dynamics of the connecting factors are strongly influenced by the general institutions as well, so it is worth examining the system as a whole – and the special rules.

As regards the connecting factors applied in disputes concerning the return of cultural property, the *lex situs* has traditionally been applied. More recently, the exclusive or mixed application of the *lex originis* has appeared. A special role is also given to the application of general clause-type rules such as *the closest connection principle*. If we look at the order in which the principles emerge, the legislative need for an *equitable solution* to the problem becomes clear.

The starting point for determining the law applicable to disputes concerning the return of cultural goods is the application of the traditional *in rem* connecting factor, the *lex situs*. The peculiarities of restitution lawsuits, and the responsibility for how the resolution of these procedures affects the underlying chain of phenomena in the black trade, including the destruction and damage to art treasures, have led legal thinkers to look for new ways to refine this traditional solution. The manipulability of the *lex situs* can, in its view, be eliminated by the application of the *lex originis*, which, in general, puts the original owner in a more favourable position. The spirit of the connecting factor is also in line with the purpose of international conventions for the protection of cultural property – that cultural goods must be returned to their original owner. The connecting factor thus becomes a value carrier; however, this choice may at the same time counteract predictability. Reviewing the case law, it is also difficult to deny that the application of the connecting factor has not yet matured and significant evidentiary difficulties may arise.

The application of "interest-based" connecting factors is the most flexible way to resolve disputes. This solution is most common in American legal development. For the Continental observer, this kind of flexibility already feeds a frustrating degree of legal uncertainty – with which many Anglo-Saxon critics of case law agree.

As far as the *Hungarian conflict-of-laws rules* are concerned, the Code[21] has joined the international codification trend by introducing the relevant special rules, creating an advanced solution. It seeks to strike a delicate balance between the interests of the original owner and the bona fide buyer by combining the principles of the *lex situs* and the *lex originis*. It also provides limited choice of law to facilitate a fair decision. However, some details need to be reconsidered.

[21] XXVIII of 2017 Act on Private International Law. Entry into force: 1 of January 2018.

For example, the practical applicability of the general escape clause for exceptional cases, which further increases flexibility, is highly questionable, as the legal literature has repeatedly pointed out.[22] It is also worth rethinking the composition of the hypothesis of Section 46, given the lack of private international law relevance of the public law issues it imports. The relevant question here is not whether the public law rules of the State in question protect its own cultural property, but rather whether it is to be regarded as the country of origin. In this respect, it would also be useful to name some guiding factors in order to facilitate the identification of the country of origin.[23] The merging of the two paragraphs is also worth considering: this would create a clearer situation from a dogmatic point of view. Based on the abovementioned, the conflict rule we propose could be:

(1) If the thing of significant cultural value has been unlawfully removed from the possession of the original owner, the law of the state of which the thing of significant cultural value was at the time of its disappearance or excavation, or the law of the state of which the given thing is located at the time of the assessment of the ownership claim shall govern the ownership claim subject to the choice of the the original owner.

(2) Where it is clear from all the circumstances of the case that the case is manifestly more closely connected with a country other than that indicated in paragraphs 1, the law of that other country shall apply.

(3) If the law of the state of which territory the thing of significant cultural value was at the time of its disappearance or excavation does not provide protection to the possessor who is acting in good faith, the possessor acting in good faith may request protection in accordance with the law of the state of which territory the given thing is located at the time of the assessment of the ownership claim.

[22] SZABÓ Sarolta: Az új nemzetközi magánjogi törvény egyes általános részi kérdéseiről. *Jogtudományi Közlöny*, 2018/11. 456-457.; BURIÁN László: A hazafelé törekvés a régi és az új nemzetközi magánjogi kódexben. In: BOÓC Ádám – SÁNDOR István (szerk.): *Studia in honorem Gábor Hamza: Ünnepi tanulmányok Hamza Gábor 70. születésnapja tiszteletére.* Budapest, Közjegyzői Akadémiai Kiadó, 2019. 47.

[23] The solution of the Code by including substantive legal considerations for a bona fide buyer may be criticized, but in our analysis we have come to the conclusion that it is still justified in the field of "private international cultural property law" (*Anton*). ANTON, Michael: *Handbuch Kulturgüterschutz und Kunstrestitutionsrecht. Band 3: Internationales Kulturgüterprivat- und Zivilverfahrensrecht*. De Gruyter, Berlin, 2011. 426.

As far as the frontiers of private international law are concerned, the work on restitution disputes must not lack an analysis of the issue of state immunity. Immunity provisions can influence the outcome of proceedings at several points: they are a significant problem, an obstacle in the way of initiating the procedure, and even in the process of enforcement. The *fourth chapter* is accordingly divided into two major parts.

As for the initiation of proceedings, it is a striking feature that judicial proceedings are concentrated in the United States; nor can the huge differences between the case law of the European Union and the United States of America be left out. An explanation can be found in the specifics of the functioning of legal systems: while in Europe today, the legislator is trying to give jurisdiction to courts that did not previously have similar powers; in the United States, the activity of the courts operates in different ways but in the same direction. A dominant factor among the reasons for the concentration of disputes in the United States (beyond the specifics of the artefacts market) is the effort of United States forums to establish their widest possible procedural capacity in relation to foreign sovereigns. As a phenomenon fuelling *forum shopping*, their activities do not contribute to a balanced treatment of restitution disputes. Based on the latest decisions, it may not be too bold to conclude that this trend is slowing down. This is a welcome development, as it would give way to the increasingly sensitive rules of the European Union (which is also a reputable player in the art market).

On the enforcement side, another major issue related to state immunity is the *immunity from seizure* of cultural property on loan. The immunity of works of art from seizure arises in connection with the cross-border movement of goods, which is in the fundamental interest of all states. This interest appears to be in conflict with the interest in settling cultural property claims: the effectiveness of the restitution procedure initiated or carried out may be hindered by the granting of immunity from seizure (which is nowadays a basic condition for the mobility of collections).

However, it should not be overlooked that, as the immunity from seizure only covers a shorter period, it may even support the settlement of restitution proceedings. Creating a secure atmosphere for lenders allows original owners to discover their lost property. Coordinating the unhindered lending of cultural goods and the undisturbed settlement of restitution claims depends solely on creating a clear legal environment.

A complete picture of the operation of restitution proceedings can only be obtained if we are aware of the characteristics of the organizational framework for dispute resolution, which is discussed in *Chapter Five*. There can be no question that matters relating to the return

of cultural goods have unique characteristics that require a nuanced approach and solutions.[24] A significant part of the proceedings for the return of cultural property is therefore settled, bypassing the traditional judicial route, before alternative dispute resolution forums.

This phenomenon can be explained by the feature of alternative dispute resolution that the political, economic, etc. considerations can be more freely reflected. This is strongly required by restitution procedures. The court proceedings, on the other hand, are conducted from a purely legal point of view. In addition, as in all cases with an international dimension, the free designation of judges and the choice of venue are in line with the nature of the proceedings. This way of resolving disputes is also able to satisfy the field's need for alternative solutions. Ideally, it will be possible to reconcile the interests of the parties and avoid the typical "loser/winner" outcome of the traditional judicial process.

This is the reason why international and European Union sources increasingly recommend the use of this method of dispute settlement. Many call for the establishment of an alternative dispute resolution forum on the return of cultural property cases with general powers. Also inspiring is the Milan example of setting up a mediation centre specializing in cultural property disputes.[25] In addition to the judicial process, the creation of a similar forum would provide an alternative for which practice is definitely in need of.

The last part of the work, the *sixth chapter*, is intended to summarize the peculiarities of private international law procedures for the return of illegally taken cultural property, the responses given to them by legislators and practitioners, and our own views on further development opportunities in the area. In the field of restitution claims, it can be seen that it is impossible to create a sudden order – the battle for values, interests and rights continues. However, in order to mitigate this struggle, it is worth refining the available tools and further researching the optimal solution both in our internal legal environment and through international cooperation.

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[24] In details: BYRNE-SUTTON, Quentin: Resolution Methods for Art-Related Disputes Art-Law Centre, Geneva (October 17, 1997). *International Journal of Cultural Property*, vol 7., no. 1. (1998)
[25] In 2015, a mediation centre specializing in cultural property disputes was set up within the national framework of the *Milan Chamber of Commerce* (*Mediation Art Center*). The initiative can be said to be extremely successful, given that it closed more than forty cases between 2015 and 2019.

IV. List of Publications on the Topic of the Dissertation

1. VADÁSZ, Vanda: A kulturális javak visszaszolgáltatása alternatív vitarendezés keretében. *Magyar Jog* 2021/7-8.

2. VADÁSZ, Vanda: Joghatóság és állami immunitás a kulturális javak visszaszolgáltatásával kapcsolatos perekben. *Állam- és Jogtudomány* 2021/1.

3. VADÁSZ, Vanda: A kulturális javak jogi fogalma. *Polgári Jog* 2020/11-12.

4. VADÁSZ, Vanda: A kulturális javak lefoglalás alóli mentessége. *Jogtudományi Közlöny* 2020/12.

5. VADÁSZ, Vanda: Új szakasz a magyar nemzetközi magánjogban. A Kódex mint a kollíziós jog reagálóképességének mérőeszköze. *MTA Law Working Papers* 2020/28.

6. VADÁSZ, Vanda: Az eredeti tulajdonos és a jóhiszemű vevő helyzete a kulturális javak visszaszolgáltatását célzó perekben. *Iustum Aequum Salutare* 2020/2.

7. VADÁSZ, Vanda: A kulturális javakkal kapcsolatos jogvitákra irányadó jog a magyar jogrendszerben. *Külgazdaság Jogi Melléklete* 2020/3-4.

8. ZIEGLER, Tamas Dezso – VADASZ, Vanda – SZABÓ, Sarolta: The New Hungarian Private International Law Code – A Mixture of Modern and Traditional Solutions. In: Andrea, Bonomi; Gian, Paulo Romano (eds.): *Yearbook of Private International Law 2017/2018*. Köln, Verlag Dr. Otto Schmidt KG, 2018.

9. VADÁSZ, Vanda: Lessons of Sevso Case - Restitution Challenges of the Illegally Exported Cultural Property. In: Marcel, Szabó; Petra, Lea Láncos; Réka, Varga (szerk.): *Hungarian Yearbook of International Law and European Law 2016.* The Hague, Eleven International Publishing, 2017.

10. VADÁSZ, Vanda: A Seuso eset tanulságai a jogellenesen külföldre vitt kulturális javak visszaszolgáltatása kapcsán. *Magyar Jog* 2017/12.

11. VADÁSZ, Vanda: A jogellenesen külföldre vitt kulturális javak visszaszolgáltatása Nagy-Britanniában. In: Pogácsás, Anett; Szilágyi, Pál; Láncos, Petra Lea; Kovács, Krisztián (szerk.): ‘De lege ferenda’: *Válogatott tanulmányok joghallgatók tollából*. Budapest, Pázmány Press, 2016.