Karoli Mundus I.

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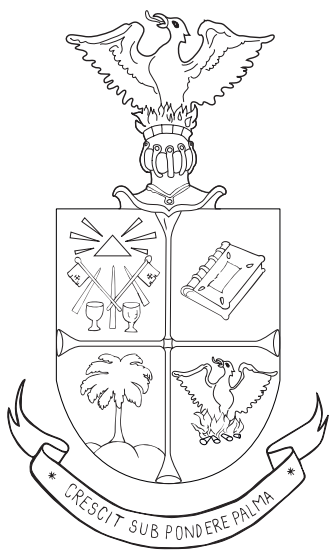
edited by:
Osztovits, András



Budapest, 2021
Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar

ISSN 2786-2127

Kiadja a Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara
Felelős kiadó: Prof. Dr. Miskolczi-Bodnár Péter dékán

A kiadvány nyomdai munkálatait előkészítette:
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Foreword

The year 2020 will probably be remembered most as a year struck by a global common phenomenon, namely the coronavirus pandemic. We have been forced to learn and apply new methods in our daily routines and during our work, while we have also sought to preserve the traditional values. One of such values is to be revived by the academics of the Faculty of Law of the Károli Gáspár University of the Reformed Church through publishing their current researches and the results thereof in English. This publication has a twofold purpose of connecting to the international legal literature as well as inviting the academics and researchers of the foreign partner institutions to launch a joint brainstorming process.

This year's studies cover a wide range of topics which, for reasons of clarity, are classified based on the fields of law concerned. The papers vary not only in their theme but also in their chronology: they address a number of historical and current legal issues as well as some future challenges, in particular, the impact of information technology on legal systems and law enforcement. Given that Hungary has been a Member State of the European Union for more than a decade and a half, it is obvious that almost each and every study is of EU law relevance or includes an EU law-based analysis.

We hope that this bunch of publications will achieve the purposes set out above and will contribute to 2020 being marked not only by the difficulties of the coronavirus pandemic but also by the beauty of legal literature.

Budapest, Advent 2020

Prof. Dr. Osztovits, András
editor

Public Law

Tóth, J. Zoltán[1]

The principles of the rule of law and democracy: Mutually exclusive or mutually reinforcing categories?[2]

I. Introduction

The term "democracy" has basically two main meanings, or two possible contents, despite the growing number of adjectives attached to it. From among them, the practical importance of "direct democracy", deriving from the ancient Hellas, has been gradually declining (even in its official form), and, as a main rule, democracy is present these days as "representative democracy" (wherever it exists at all). However, whichever form is mentioned, it cannot be enforced exclusively and the need to implement it cannot be made absolute; the majority cannot go entirely against the interests of minority members of the political community just because they are greater in number. Enforcing the decisions and the will of the majority is limited by what is called the requirements of the rule of law; however, the term "rule of law" is just as diffuse and complex as that of democracy itself.

In fact, the term "rule of law" has become by now the ace of trumps in political philosophical thinking - besides democracy - and has turned from being the subject matter of scientific analysis into a part of the political discourse, and its implementation (or the lack thereof) may serve as the basis for the legal, political and even moral evaluation of a political system. However, it is used so often and for so many things that it takes significant efforts to free this term from the non-immanent meanings superimposed on it over the past decades and to separate the latter ones from the former meaning. These efforts are made even more difficult by the fact that the content of this phrase is not constant at all but gains new and appropriate meanings, with special regard to substantive considerations beyond the formal aspects. For this reason, it is not possible to enumerate the contents of this term either; the researcher can only try to detect its "core", the range of meanings without which the rule of law does not exist today, in the 21st century.

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1 Associate Professor, Department of Constitutional Law

2 The present paper was written and the underlying research was carried out with the support of the Bolyai János Scholarship of the Hungarian Academy of Sciences and the Bolyai+ Scholarship within the framework of the New National Excellence Program of the Ministry of Human Capacities of Hungary.

II. Meanings of the rule of law

The term rule of law is used by many people today but it is difficult to clarify its contents. Like all other "fashionable" terms, the rule of law also becomes devaluated; it is constantly given new meanings (and sheds old ones), so it is impossible to define its content accurately (just as it is hard to decide objectively on conceptual problems in general). However, as this term exists and is in frequent use, we should somehow try to define the meaning of the rule of law and explore the possible differences in the current word usage by ensuring that its meaning is not too wide, i.e. there should be a truly specific range of meanings that enables us to talk about it sensibly, making it different from other, similarly diffuse meanings.[3] Below, we make an attempt at this.

3 Many times, constitutionality is used as a synonym for the rule of law. Accordingly, constitutionality is a requirement towards states in terms of form and content. In reality, constitutionality is partly a narrower and partly a wider term than the rule of law, and these two expressions should not be interchanged or used as synonyms. Hungarian public law science divides the criteria for the contents of constitutionality along three major lines. One line says that the "principles of constitutionality" are the principle of democracy, the principle of pluralism, the principle of the rule of law and the principle of the separation of powers {cf. Trócsányi, László: Grounds. [Alaptanok], pp. 67-75. In: Trócsányi, László – Schanda, Balázs (ed.) Introduction to the constitutional law. [Bevezetés az alkotmányjogba]. HVG-ORAC, 2012. pp. 19-75.}: according to the second line, "the requirements of constitutionality" are the principle of popular sovereignty and popular representation, the principle of separating and balancing the branches of powers, the rule of laws, establishing the state of the rule of law, the principle of equal rights and the declaration of human rights {cf. Kukorelli, István (ed.): Constitutional theory I. Basic concepts, constitutional institutions [Alkotmánytan I. Alapfogalmak, alkotmányos intézmények]. Budapest, Osiris, 2007. pp. 29-31.]: and according to the third line, the "the principles of constitution" are the principle of state sovereignty, the principle of democracy, the principle of the rule of law (also including the separation of powers and legal security) and the principle of the market economy (cf. Petrétei, József: Hungarian constitutional law I. [Magyar alkotmányjog I.] Dialog Campus, 2002. pp. 85-106.; basically, the division is the same in the later works of József Petrétei, following the enactment of the Fundamental Law, with the difference that he generally talks about "the principles of economic order" instead of the principle of the market economy, also including other second-generation rights and state purposes in addition to the principle of the market economy, which is not specified in the Fundamental Law *expressis verbis* but it is actually included implicitly – cf. Petrétei, József: Hungary's constitutional law I. Grounding, constitutional institutions [Magyarország alkotmányjoga I. Alapvetés, alkotmányos intézmények]. Pécs, Kodifikátor Foundation, 2013. pp. 71-98., and Petrétei, József – Tilk, Péter: Bases of Hungary's constitutional law [Magyarország alkotmányjogának alapjai]. Pécs, Kodifikátor Foundation, 2013. pp. 31-35.) However, despite the fact that there can be different ways of classification, basically each case specifies the need to enforce the same content-related aspects in practice.

Historically, the *rule of law*[4] (*Rechtsstaat*)[5] meant two basic things. When first used, at the end of the 18th century and in the 19th century, it covered the *formal rule of law*. Once the requirements of the Enlightenment became clear, it became a *de facto* necessity for the upcoming nation-states and for the developing capitalist economy to terminate the injustices of absolutism (too) in the given country and to ensure that people can match their actions to laws, i.e. to legal expectations. The main requirement for this was to introduce a predictable legal order, with rules streamlined for consistency, that everyone could learn, follow and rely on once implemented. This purely formal system of criteria contained expectations, such as the chance to learn the legal regulations, i.e. their publication (which did not exist everywhere, even in the 18th century),[6] to avoid possibly too quick changes, clear and easy-to-understand legal regulations and their actual enforcement (observed by all addressees and caused to be observed by the addressees) etc. The formal rule of law meant that state bodies could not proceed either against the laws (*contra legem*) or without the laws, i.e. without a statutory basis (*praeter legem*). As such, the key point was predictability, i.e. that clear and unambiguous laws should be enforced in a manner that can be pre-planned.

The following concepts belonged, and still belong to the formal rule of law:

1. rejecting the open inequality of rights and a sovereign legislator above the laws and *recognising the state that is bound by law*: the state, i.e. the legislator, is also bound by law, the legal norms also cover the legislator, i.e. the state itself, after creating the laws, is subject to the laws, just like any other entity;
2. *legal security, which means that the laws*
   2/A. *are proclaimed publicly and can be accessed* by anyone in advance *and in due course, and*
   2/B. *must be clear and easy to understand* for the addressees ("clear norms"): the legislator must create norms that are clear to people and have accurate content

4 The term *rule of law* is attached to the name of Charles I (Cf. Szigeti, Péter – Takács, Péter: The theory of the rule of law [A jogállamiság jogelmélete]. Budapest, Napvilág Kiadó, 2004. p. 230.)

5 The term *Rechtsstaat* was (probably) first used by Robert von Mohl. [Cf. Neumann, Franz: Rule of law and sovereignty [Jogállamiság és szuverenitás]. In: Takács, Péter (ed.): An anthology from the literature of the *Rule of Law* and the *Rechtsstaat* [Joguralom és jogállam. Antológia a *Rule of Law* és a *Rechtsstaat* irodalmának köréből]. ELTE, 1995. p. 232. Originally: Neumann, Franz: The Rule of Law. Political Theory and the Legal System in Modern Society. Berg Publishers, 1986] For the formal concept of the term see also: Kis, János: Constitutional democracy [Alkotmányos demokrácia]. Indok, 2000. p. 108.

6 For example, judges in the Italian city-states were instructed through secret decrees, or France ran the legal institute of the *lettre de cachet*, which also covered the French absolute monarchy's subsequent legislative right depending on individual considerations and aimed at specific matters. This latter, for instance, included the possibility for the monarch "to terminate a prosecution or, without relying on the judges, convict or imprison an individual without a trial and without even an offence having been committed". (Elliott, Catherine: French Criminal Law. Routledge, New York, 2011, p. 5.)

if possible, whereby the addressees (the obligors and obligees of the provisions of law) can learn with relative accuracy when the state law enforcement bodies recognise their conduct as lawful;
2/C. *they should not change quickly* (the changes can be followed), as well as
2/D. *legislation with a retroactive effect should be prohibited:*[7] with some exceptions: the state cannot regulate life events that have already occured or were already fulfilled upon the introduction of the law [i.e. legislation is permitted if it does not prescribe more adverse conditions than the current ones for any involved legal subject, except for the state (thus, Section 2 (1) of Act CXXX of 2010 on law-making says that "laws may not establish obligations, make obligations more onerous, withdraw or restrict right, or declare any conduct to be illegal with respect to the period prior to their entry into force", i.e. retroactive legislation is permitted if it only provides rights to all persons involved, or exempts them from obligations or liabilities and this does not make the situation of another natural or legal person more onerous);
2/E. *the requirement of sufficient preparation time*: the legal subjects not only need to learn the relevant rules in time but sufficient time must be provided to them for adapting to these rules and for providing the conditions of law-abiding conduct;
2/F. *protection of the acquired rights*: legal relationships that are fulfilled and finally closed shall be left untouched;
2/G. *protection of confidence*: rights arising in the future but permanently prevailing also in the present can only be limited with regard to the future, with regard to the fact that the legislator shall respect the reasons for establishing that legal regulation (e.g. concluding a permanent contract); furthermore, that the rights arising in this manner shall not be emptied in the future either;[8]

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7 With regard to retroactive effect, the legal regulation shall also be applied to the legal facts and legal relationships arising before promulgating the legal regulation. The retroactive effect can be A) *full retroactive effect*: if the legal regulation must also be applied to facts that already took place and legal relationships closed upon the promulgation; B) *partial retroactive effect*: if the legal regulation must also be applied – in the period preceding its promulgation – for legal relationships arising before the promulgation and still in progress upon the promulgation. It is *not* a retroactive effect if the legal regulation must be applied for legal relationships arising before the promulgation, still in progress upon the promulgation but only for the period after the promulgation.

8 In the interpretation of the Constitutional Court: "The requirement of confidence protection attached to legal security may set a limit to […] intervention by the legislator into the existing, permanent legal regulations. Confidence protection is a well-founded expectation – protected by law – towards the unchanged survival of a legal regulation (i.e. it should remain in effect). The Constitutional Court considers, from case to case, the borderline between the freedom of the legislator and the addressees' interest in the permanence and the predictability of the legal regulations, examining whether the disadvantage suffered by the legal subjects as a result of change in the laws justifies establishing that it is contrary to the Fundamental Law based on the violation of legal security." {3061/2017. (III. 31.) resolution of the Constitutional Court, Statement of Reasons [13]}

3. legitimacy, i.e. that
3/A. *the right is proclaimed in legal sources issued in an appropriate form*[9] and
3/B. *these should cover all addressees specified in a normative manner*.

However, this formal rule of law – achieved through the theory of Hans Kelsen, who was widely acknowledged at that time – already received a lot of criticism in the 19th century and especially between the two world wars, and later – after World War II – it became evident to everyone that it could not be maintained in itself because, for instance, even Nazi Germany could be treated as a state governed by the "rule of law", at least in its merely formal sense: life and death were controlled by norms that were created in a proper procedural order and with proper authorisation and that were (more or less) known to the public; Jews, Gypsies and homosexuals were closed in camps and later killed, and insane people were sterilised etc. based on publicly proclaimed and clear norms. Thus, in this sense, Nazi brutalities were committed under the predictable circumstances of the "rule of law".[10] For this reason, there was already a clear consensus after World War II that the term "rule of law" had to be filled with proper content, even regardless of Radbruch's well-known formula.[11]

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9 In this sense, "legitimacy" is a guarantee not only in terms of form but *also* in terms of content, as constitutional rules are in place for statutory content, which *also* serve the rule of law in terms of content.

10 Stalin's communist (state socialist, Bolshevist) system was not even a "rule of law" in this formal sense, as their state bodies also violated their own norms. Although the text of Stalin's (Bukharin's) constitution of 1936 was regarded as very modern at that time and contained all the rights that were thought necessary to be guaranteed in the developed world, none of these declared norms was enforced. Constitutionality was only a Potemkin phenomenon and the system ignored it day by day. (For the Stalinist Bukharin Constitution of 1936, see: Kriza, Elisa: From utopia to dystopia? Bukharin and the Soviet Constitution of 1936. In: Simonsen, Karen-Margrethe –Kjærgård, Jonas Ross (eds.): Discursive Framings of Human Rights: Negotiating agency and victimhood. Routledge, New York, 2017, pp. 79-93.)

11 Radbruch, Gustav: Gesetzliches Unrecht und übergesetzliches Recht. Süddeutsche Juristen-Zeitung, Jahrg. 1, Nr. 5 (August 1946), pp. 105-108. The formula is as follows (in the original language, that is, German): "*Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als >>unrichtiges Recht<< der Gerechtigkeit zu weichen hat.*" In English: "The conflict between justice and the reliability of the law should be solved in favour of positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered >>erroneous law<<." (See, e.g: Hage, Jaap: Philosophy of Law, p. 376. In: Hage, Jaap – Waltermann, Antonia – Akkermans, Bram (eds.): Introduction to Law. Second Edition. Springer, 2017, pp. 359-382.)

The material rule of law covers the following:

1. *all requirements of the formal rule of law* as a basic condition;
2. *considering the violation of any right on the merits, by judges* – who are independent, impartial and unbiased, both in their status and in their adjudication work and who are only subject to the laws – also including the judicial review of the unlawful acts of public administrative bodies, i.e. public administrative adjudication;[12]
3. *protecting human rights;*
4. *equality of rights*;[13]
5. *pluralism*:
   5/A. in a narrower sense, the mere existence of pluralism (the functioning of competing parties operating under equal public law conditions),
   5/B. in a wider sense, the existence of free elections held in regular periods, based on a general and equal, active and passive voting right and on previously defined rules providing a result representing the citizens' will;
6. *the division of powers;*
7. *democracy (and democratic legitimacy)*, i.e. basic decisions shall be made by the majority of the legislative body elected by the people as a whole or operating with the participation of the people as a whole, and all decisions by the public power can be traced back (directly or indirectly) to the people's majority will. (This latter relationship will be dealt with later.)

12 The existence of public administrative justice is independent from the existence of separate public administrative courts; it is also implemented if this rule-of-law function is performed by ordinary (e.g. civil) courts.

13 The material requirement of equal rights is more than the purely formal requirement that the laws must cover all normatively specified addressees; namely because the latter still allows the laws to give different treatment to people whose relevant attributes are identical, which means discrimination (i.e. it only requires that the law shall not make any difference between the addressees but it does not expect that everybody with similar, relevant attributes to be an addressee of the law), while equal rights already prohibit the laws from making selections among the addressees, if such a selection has no reasonable cause that can morally be defended. (It is to be noted that some opinions in the legal literature say that human rights arise from the principle of equal rights in itself, so these human rights do not have to be considered as a separate part of the material rule of law; thus, according to János Kis, "several other classic human rights derive from the principle of equality before the law, thus the political equality of religions, the prohibition of attaching the holding of office to birth or financial position etc.". (Kis, János: Do we have human rights? [Vannak-e emberi jogaink?] Paris, Dialogues Européens, 1988. pp. 158-159.)

III. The definition and the content of democracy

Democracy is a Greek word and it means the power (*kratos*) of people (*demos*).[14] However, the expression "people's power" actually says very little about the form of state organisation and about the manner in which power is practiced in the political system. Another problem is that the established democracies are very different, and numerous states call themselves "democratic" although the true enforcement of the people's interests can be questioned, or it is actually missing from these systems. (*The term "democracy" has become the jolly joker of political self-reflection by now,* as basically all existing states lay a claim to the description "democracy". It can also be said that there is a political consensus claiming that democracy is something good;[15] therefore, some regimes also try to define themselves as a democracy but are, in fact, very far from its content requirements.) Of the three questions related to the *substantive* problem of democracy, the first is what the content requirements are that make a regime democratic. The second and third essential questions (which are related to each other) are whether the *actual* (truly existing) attributes of "implemented democracies" lead to anything with regard to the democracy's normative, i.e. *prescriptive* concept (i.e. what *should* be the features of the political systems that have the grounds to call themselves "democratic") and vice versa: to what extent can the existing democracies be held accountable for such normative requirements.

These questions are much more difficult to answer than what would follow from the literal interpretation of the term ("people's power"). It is certain that *all democratic systems must be recognised by the people, and the political groups that are currently in power must be authorised by the people to exercise this power.* (It can also be said that *the legitimacy of exercising power in a democratic way comes from the people*.)

However, this still does not get us closer to differentiating real democracies from "false democracies" since both public speech and the political philosophical literature mention numerous types of democracies, and it is hard to select from the multitude of definitions which ones feature the true content of the people's power and which only camouflage and hide the non-democratic features of exercising power. Thus, in addition

14 See, e.g.: Laopodis, Vassilios: DEMOS: Democratic evaluation of multiple options in society, p. 319. In: Berleur J., Whitehouse D. (eds.): An Ethical Global Information Society. IFIP — The International Federation for Information Processing. Springer, Boston, 1997, pp. 318-329. This term was first used by Herodotus, who was amongst those, according to most scholars, who praised Athenian democracy. (Davie, John N.: Herodotus and Aristophanes on Monarchy, p. 162. In: Greece & Rome, Vol. 26, 1979, pp 160-168. For the opposite view, see, eg.: Stadter, Philip A.: Herodotus and the Athenian "arche", p. 784. note 7. In: Annali della Scuola Normale Superiore di Pisa. Classe di Lettere e Filosofia, Serie III, Vol. 22, No. 3, 1992, pp. 781-809.)

15 Cf.: Schedler, Andreas – Sarsfield, Rodolfo: Democrats with adjectives: Linking direct and indirect measures of democratic support, p. 639. In: European Journal of Political Research Vol. 46, 2007, pp. 637–659.

to the term "democracy" without adjectives, the following expressions are also used: direct democracy, electoral democracy, representative democracy, indirect democracy, participation democracy, self-governing democracy, assembly democracy, referendum democracy, electronic democracy, constitutional democracy, liberal democracy, social democracy, Christian democracy, egalitarian democracy, consensus democracy, majority democracy, limited democracy, deliberative democracy and consociational democracy; moreover, "people's democracy"[16] or „illiberal democracy".[17] These dimensions partly exclude each other and are partly orthogonal, i.e. overlap each other and co-exist (and in some cases they concretely reject the essence of democracy, where the qualifying adjective is actually a "privative suffix"); as, it is difficult to negotiate through this chaos of terms.

One of the most essential problems with *defining* democracy is what the term "people" means. Fortunately, there is already a consensus today in this regard; thus, *people* are – in terms of democratic decision-making – the *same as the political nation, i.e. the community of citizens who also have the right to vote* [except for the natural reasons for exclusion (minor age, incapacity for other reasons), persons imprisoned through a final court decision for committing a crime and/or prohibited from public affairs)].

IV. The content elements of democracy

However, *people are not a simple tool for legitimacy,* which one can nominally refer to, but they are a community of citizens who can actually enforce their will. As the people's will is not given once and for all, *an institutional guarantee must be provided for people to be able change their will*, i.e. to express (and enforce) their intention to think differently about public affairs or about the representatives of public affairs than before. Only those states, political regimes or political interest-articulation mechanisms where *people have a real opportunity to enforce their prevailing will* can

16 In the state socialist era, in fact, democracy did not exist at all. For instance, in Hungary, until 1985 citizens could vote for only one candidate [only a state-run social organisation named the Patriotic People's Front (Hazafias Népfront] could nominate), so there was no real active or passive suffrage.

17 This term was invented by Fareed Zakaria who used this expression for semi-democratic countries, mainly and originally for those in Latin America, Central Asia and for Russia. (See: Zakaria, Fareed: The Future of Freedom. Illiberal Democracy at Home and Abroad. W. W. Norton & Company, New York – London, 2007. See particularly pages 23 and 89-118.) 'Illiberal', virtually, is a privative suffix and a democracy cannot be 'illiberal'. (In fact, the Hungarian government no longer uses this word; it uses the term 'Christian democracy' instead.) As Francis Fukuyama pointed out, in an 'illiberal' system, "democratic majorities do not necessarily feel themselves bound to respect universal human rights" (Fukuyama, Francis: 30 Years of World Politics: What Has Changed? p. 13. In: Journal of Democracy, Volume 31, Number 1, January 2020, pp. 11-21.) – therefore, a genuine democracy, either in Eastern Europe or anywhere else, cannot be illiberal. (For the relationship between the rule of law – and, within it, human rights protection – and democracy, see below.)

be called a democracy. This is served by *regular assemblies, votes* and – in the case of a representative democracy – *regular elections* as public affairs. (Thus, in this regard, the requirements of the rule of law and democracy coincide.) There is no "people's power" in terms of content, hence the concept of democracy cannot be implemented where – after the first election –citizens waived their right to have a say in public matters and to control (or change periodically) the political stakeholders or where this was prevented by those who gained power on this first occasion.

Furthermore, the term *democracy* implies the *decision* itself. *Political democracy means the democracy of decision-making* in all of its existing forms, i.e. direct choice between alternative action models, rules and programmes (e.g. via referendum) or indirect choice between competing political forces (parties, politicians) that are to make the relevant decisions. Whether the members of a political community vote directly on a proposal or indirectly on the politicians who will make and judge future proposals (representatives), *they always make a decision: they select from the available choices* and decide which model or rule should be implemented (in a direct democracy) or who should later vote on the same questions (indirect democracy). People have different interests and values, i.e. they have different opinions on certain social problems to be solved or political questions to be decided because of their life situation or selected moral views (as well as due to their other values, prejudices, preferences, attitudes, education or world view), therefore, they have different views on what is good, correct or expedient with regard to certain issues. As a result, *there is always a conflict of interests or values between the members of political communities* and they have to find a political solution in this situation of conflicting interests or values. As such, a decision always has to be made regarding the dilemmas that arise in society, which means that a certain standpoint will win after the decision (the given rule will be introduced and the given programme will be implemented) and the alternative solutions will not be realised.

Of course, it is also theoretically possible that there are no interest or value conflicts in a society and that the members of society always think the same about certain issues. However, apart from the fact that such a political society has never existed anywhere in the world so far, it is also to be noted that if there were such a community, there would be no need for decision-making at all as there would be no dilemmas to decide on. We *can talk about* a choice between options, i.e. about a *decision only if such options exist* and there are people who support or favour them; *if views, opinions and wills were in perfect harmony in a society, there would be no need for politics and for a political system* and, within this, there would be no need for any (not even democratic) articulation of interests or decision-making mechanism. However, a perfect harmony of interests and values has not been realised anywhere; it is not even possible and therefore there is a need for choice between different wills. If this is true then *all democracies can only be majority democracies* (i.e. the decision is ultimately made by the majority, or by the majority of representatives elected by the majority);[18] therefore, in the following we always talk about democracy in this sense.

18 Sartori draws the attention to the fact that the majority principle is a modern invention,

This is how the term consensus-based democracy becomes contentless, as it says that anything can only be accepted if there is consensus between the members of society. Deliberative democracy is partly emptied in the same way (at least its term definitions, which intend to continue deliberation until the supporters of one standpoint are won over) through logical arguments.[19] (*Deliberation* is a process thought to be ideal by the supporters of this type of democracy, whereby the representatives of originally different standpoints try to convince each other through logical arguments and they make a compromise that is ultimately acceptable to everybody.) If the only acceptable result of deliberation is the jointly worked out, discussed and compromise-based solution, it already complies with the concept of consensus-based democracy (and what was said about it losing its content will also apply to deliberative democracy); if, on the other hand, deliberation (i.e. rational debate over the proposals) can also come to an end without specifying the objectively appropriate standpoint that is accepted uniformly by everybody and, ultimately, voting is still held in order to solve the problem,[20] it (i.e. this type of deliberative democracy) does not differ from the majority interpretation of democracy (namely because some kind of debate also precedes the decision in the classic approaches of majority decision-making), as the dilemma is solved in the same way through a majority decision. [The term *deliberative democracy* was developed by Joseph M. Bessette for negotiation- and argument-based political decision-making in 1980;[21] he still accepted that deliberation can be closed without a result (then it has to be started again or votes have to be cast); however, some of the later theories already tried to devise mechanisms that allow the only, objectively right solution to be found.]

The majority concept of democracy, however, does not exclude that the will of the majority

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and it does not date back to the Greeks but only to Locke (based on the precedence of monk communities) – similarly to secret voting or to the principle of representation. (Cf. Sartori, Giovanni: Democracy [Demokrácia]. Osiris, 1999. p. 80. Originally: Democrazia: cosa è. Rizzoli, Milano, 1993)

19 According to Jon Elster, deliberation is decision-making based on the debate of free and equal citizens. (Elster, Jon: *Introduction*. In: Deliberative Democracy. Cambridge, Cambridge University Press, 1998. p. 1.) Deliberation simultaneously refers to the discussion itself and to the exchange of information that is required for it, thus implying the necessity to share rational considerations with each other and to take them into account upon the final decision.

20 Thus, e.g. Joshua Cohen says that the goal of deliberation is consensus (therefore, we have to be open to convincing counter-arguments against our own standpoint); nevertheless, it may happen that no arguments will be accepted based on a consensus – and finally voting must be held (based on some majority principle). [Cohen, Joshua: *Deliberation and Democratic Legitimacy*. In: Bohman, James – Rehg, William (eds.): Deliberative Democray. Essays on Reason and Politics. Cambridge (Massachusetts) – London (England), MIT Press, 1997. p. 75.]

21 Cf. Bessette, Joseph M.: Deliberative Democracy: The Majority Principle in Republican Government. In: Goldwin, Robert A. – Schambra, William A.: How democratic is the constitution? Washington, American Enterprise Institute for Public Policy Research, 1980. pp. 102-116.

should not be enforced without any limits; the majority will can, of course, be limited if it does not satisfy a value aspect important to society (thus specifically some criterion of the rule of law). This issue will be covered later in detail; now it is only mentioned that *these limits are laid down in all political (and legal) systems in advance and they prevent the unlimited enforcement of the majority will based on objective aspects* and simultaneously ensure that the democratic decision-making system is maintained in the long run. [In this sense, democracy and the rule of law do not (necessarily) contradict but the two are in fact similar categories that supplement, presuppose and strengthen each other.] This also means that *today's modern democracies are necessarily constitutional democracies*, i.e. decision-making is based on constitutional rules previously laid down, that serve people's real interests, as opposed to some short-term interests [thus, as a basic condition, constitutional democracies *do not allow people to surrender power permanently, to terminate the limits to power, to ignore basic human rights or to introduce (openly discriminatory) regulations contradicting the minimalist, formal concept of equal rights*]. *Constitutional democracies are also liberal democracies,* as the requirement of recognising human rights, limiting power and providing equal rights (as well as free elections based on the general voting right) is an achievement of the liberal ideology.[22] This is also true if some theories also emphasise other aspects in addition to interiorising classical liberal values; for example, similarly, social democracy is nothing else but the demand – within the institutional framework deriving from liberalism – that the state should lay greater emphasis on material equality and on social rights. [We do not deal with the various adjectives of democracy (liberal democracy, social democracy, Christian democracy etc.) – that are used unfortunately more and more frequently as a swear word in public life, on a party political basis, in order to slander and stigmatise the opposing political power deliberately – as this does not have any scientific/professional aspect.]

V. Democracy and the rule of law; democracy and the constitutional court practice

The criteria for the material rule of law are ultimately enforced in most legal systems by the constitutional court (or by another body with similar functions), which also means that the purely majority concept of democracy cannot be enforced without limits. The question is what legitimates this body to overrule the decisions of the parliament that was elected by the majority of the people (or, which is the same, to overrule the people's will) and to annul parliamentary laws (or simply "not to apply them" without annulment, as in the United States, for example). To put it in another way: how far does democracy stretch and from when can it be limited with reference to the material principles and values of the rule of law?

The starting point is *that enforcing the people's will is the main rule in democracy*. Of course, the "will" of the whole people (understood in psychological terms) is an illusion and so it is that a unified, consensus-based standpoint could be worked out

22 Cf. Sartori: op. cit., p. 18.

among the members of society. People's interests and values are different, thus their standpoints are, evidently, also different in various social issues. The *criteria of the rule of law* do not work as a "qualitative filter" in that they *do not prevent the enactment of laws that are bad, ineffective, dysfunctional or even counterproductive*. It is often said that "the people cannot be wrong" or "the people are always right"; however, this should not mean that people always make correct, scientifically verified, consistent and well-considered decisions but that *people have the right to make a mistake*, i.e. the people's will also has priority if people make an inexpedient or wrong decision.

V.1. The rule-of-law self-defence of democracy

Democratic legitimacy must therefore be accepted as a starting point; however, *"the people's will" cannot be enforced without limits*. A decision that makes it impossible to enforce democracy in the future sets an evident barrier to democratic decision-making. It is therefore clear that the self-defence mechanism of democracy can never let the extreme case happen whereby democracy would liquidate itself (e.g. a referendum on cancelling regular elections cannot be permitted). This, however, no longer depends on democracy but *on the rule of law, which prohibits certain things based on their content, even if they were supported by most citizens* (via single, all-decisive and irrevocable voting). This does not just prevent the termination of democracy (e.g. the institution of elections) but it also covers all material value aspects that would violate equal rights, which is also accepted by democracy as a value, the human rights that also set a foundation for people's civil rights and the right to political participation as well as all the principles ensuring their organisational conditions and institutional guarantees (separation of powers, the judicial review of laws/constitutional court practice etc.). *A real democracy is possible only on a content basis; it is guaranteed by the criteria of the rule of law* (within this, constitutional court practice has had a key role since the middle of the 20th century).

V.2. Democracy and the constitutional court practice

The main thesis of this sub-chapter is as follows: *in fact, the constitutional court practice – in its consolidated form – is not opposed to the idea of democracy at all; what is more, the existence of the constitutional court practice can be a guarantee of real democracy*.

Hans Kelsen, who devised the modern, European, centralised constitutional court practice[23] faced criticism by the judicial review of legal regulations, basically focusing

23 As state chancellor Karl Renner's consultant, Kelsen's achievement was that the constitutional court and constitutional court practice were established in Austria in 1920. [Cf. Beyme, Klaus von: Judicial review. [Alkotmánybíráskodás]. In: Paczolay, Péter (ed.): Constitutional adjudication – constitutional interpretation [Alkotmánybíráskodás – alkotmányértelmezés]. Rejtjel, 2003. p. 119. Originally in: America as a model. The impact of American democracy in the world. Palgrave Macmillan, 1987, pp. 85-109.]

on two aspects. On the one hand, it criticised that the constitutional court practice contradicted parliamentary sovereignty and, on the other hand, that was also against the separation of powers (this latter aspect is not covered here in detail).[24] Kelsen's answer to the first criticism was that parliamentary sovereignty is only a sub-type of the principle of popular sovereignty; furthermore, as the goal is to trace back to the people's will not only one single branch of power but the operation of the whole state order, *popular sovereignty* is therefore not provided by parliamentary sovereignty but basically by state sovereignty, *the operation of the branches of power based on the people's will, where no single organisation can enjoy priority* compared to other state organisations ensuring popular sovereignty. In this situation, *it is the very task of the constitutional court to limit the possible violation of popular sovereignty by the parliament*: just as courts and public administration are subject to the law, the *parliament is also subject to the constitution and it may carry out legislative work only within the framework of the constitution.* As can be seen, the procedure of the legislative body is bound by the constitution and by the constitutional court, enforcing the constitutional provisions exactly with a view to popular sovereignty and democracy (where the point is to create a compromise between the majority and the minorities and, thus, to promote social peace). The task of the constitutional court is to enforce the provisions of the constitution as opposed to laws and decrees (and to terminate anti-constitutional norms), to resolve disputes over scope and competence (also based on the constitution) as well as to protect the minority, i.e. to prevent the tyranny of the majority.[25]

Christopher Wolfe stated in three points that three answers can be given to the criticism that judicial review is antidemocratic (the criticism basically relates to American decentralised judicial activities but can basically be extended to all types of constitutional court practice) and the advocates of constitutional court practice can prove with these answers that the institution of judicial norm review is not antidemocratic; on the contrary, it expressly promotes the enforcement of democracy. Accordingly: "*(1) the basic goals of the Court are democratic, (2) the judges are ultimately subjected to the control of the public will, (3) the modern judicial power was legitimated by tacit approval.*"[26] From among these, the most important is Wolfe's first argument on the democratic nature of judicial goals.

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24 Cf. Paczolay, Péter: Constitutional adjudication on the border of politics and law [Alkotmánybíráskodás a politika és jog határán]. In: Paczolay, Péter (ed.): Constitutional adjudication – constitutional interpretation [Alkotmánybíráskodás – alkotmányértelmezés]. Rejtjel, 2003. p. 16.; Favoreu, Louis: Az alkotmánybíróságok. In: Paczolay: ibid. p. 58. In original language: Favoreu, Louis: Les Cours constitutionelles, Paris, Presses Universitaires de France, 1992, pp. 1-105.

25 Cf. Paczolay: op. cit. pp. 16-17.; Favoreu: op. cit. pp. 58-59.

26 Wolfe, Christopher: Judicial review and democracy [Alkotmánybíráskodás és demokrácia]. In: Paczolay, Péter (ed.): Constitutional adjudication – constitutional interpretation [Alkotmánybíráskodás – alkotmányértelmezés]. Rejtjel, 2003. p. 129. Originally in: Judicial activism. Bulwark of freedom or precarious security? Brooks/Cole Publishing Company, California, 1991, pp. 49-71.

Therefore, as far as the democratic goals of constitutional court practice mentioned by Wolfe are concerned, this argument only legitimates certain constitutional court procedures in cases that are especially important for articulating democratic political interests. Thus, for example, *if legislation deprived some people of political rights or changed these political rights* (e.g. the right to vote or the rules of the election procedure) *in a way that it does not provide everybody with equal opportunities* to select political decision-makers, *it would injure the principle of democracy itself, as well as the decision-making process based on the opportunity of equal participation.* As this correction cannot be expected from the corrupted legislative majority because democracy must, in fact, be protected from *them*, this task can only be carried out by an entity that has no political responsibility and that is outside the political system, taken in a narrow sense (and this task should actually be carried out for the sake of democracy and in order to enforce the real public will). Similarly, *if certain basic human rights are endangered, e.g. the freedom of speech is injured (also including the freedom of assembly), people will not obtain the relevant information that helps them to take decisions expressing their real will* when selecting the future members of legislation. Democracy is also injured directly if the opportunity to access information is limited by prohibiting the freedom of speech of the persons possessing the information. The principle of democracy also provides the opportunity for everybody's interest should appear in the course of decision-making. All decisions have some losers and all legislative decisions are injurious to some people; to those whose opinion or interest was in the minority in the given debate. This does not injure democracy as long as these minorities change from time to time, i.e. there is a real chance that the person who once was part of a minority will someday belong to the majority on some other issues. *If, however, there are "*separated and isolated*" minority groups always consisting of the same people who are losers in all decisions and they are systematically suppressed by the majority, they will not be members of society and political decision-makers with equal rights and of an equal rank. The suppression of such homogeneous minorities can also be prevented by operating a body that is outside the legislation.*[27]

Tamás Győrfi, on the one hand, also highlights the principle mentioned earlier that democracy can only be realised if the legal system considers the voters (based on the known Dworkin's formula) as "persons of equal dignity",[28] i.e. an equal opportunity is provided for anyone to enter a majority and minority position from time to time,

27 Cf. Wolfe: op. cit. pp. 129-132.

28 Cf. Dworkin, Ronald: *Taking Rights Seriously*. Cambridge, Harvard University Press, 1977. p. 370. The same principle also appeared in the initial practice of the Hungarian Constitutional Court: "The prohibition of discrimination means that the law must treat everybody equally (as persons with equal dignity), i.e. the basic right of human dignity cannot be injured, and the aspects of dividing rights and benefits must be determined with the same respect and care, by considering individual aspects at the same rate." (9/1990. CC resolution, ABH 1990, pp. 46, 48.]

instead of a homogeneous majority enforcing its will against a homogeneous minority;[29] on the other hand, he also draws attention to the fact that – according to those who regard constitutional court practice as democratic – *the concept of a purely majority democracy does not consider the intensity of preferences at all*: "„it violates the principle of equal treatment as it prefers the weak preferences of the smallest possible majority over the strong preferences of the largest possible minority".[30] On another instance, Győrfi presents the standpoint of those who are in favour of constitutional court practice by claiming that (what he calls "procedural") democracy based purely on the majority principle is (may also be) incorrect in terms of content as "the procedural concept is insensitive to both the correctness of the reasons supporting preferences and the distribution of the burdens of the decision".[31] (In fact, Győrfi himself would also transfer the consideration of content arguments to the legislator; in his opinion, this is required by the principle of "equal care and respect".)[32]

V.3. The relationship between democracy (people's sovereignty) and constitutional court practice in Hungary

If we already project the problem to Hungary, the earlier question of what authorises the Constitutional Court to overrule the decisions of the political legislative body elected by the people (parliamentary laws) can receive three different answers – besides and in addition to what is set forth in the previous sub-chapter – and each answer (both together and separately) verifies that *the authorisation for constitutional court practice is not contrary to the requirement of democratic legitimacy*.

The *requirement of democratic legitimacy says that,* in a democratic political and legal system built on the idea of people's sovereignty, *no public authority decision can be made if it does not come directly or indirectly from the community of citizens*, i.e. if its ultimate source is not the people. Accordingly, *it must be ensured that each public authority decision* (either individual or general, i.e. normative) *can be traced back to the original decision of the voting citizens,* and this is where it must derive from, in one or more steps. By concentrating expressly on the current Hungarian situation (but also keeping the need

29 Cf. Győrfi, Tamás: Democracy. [Demokrácia], pp. 379-380. In: Takács, Péter – H. Szilágyi, István – Fekete, Balázs: State theory. Chapters and lectures on the general theory of the state [Államelmélet. Fejezetek és előadások az állam általános elmélete köréből]. Budapest, Szent István Társulat, 2012. pp. 376-381.

30 Cf. Győrfi: op. cit. p. 380.

31 Győrfi, Tamás: Limitations on majority decision-making and constitutional adjudication [A többségi döntés korlátai és az alkotmánybíráskodás]. In: Jakab, András – Körösényi, András (eds.): Constitution in Hungary and elsewhere. Political science and constitutional law approaches [Alkotmányozás Magyarországon és máshol. Politikatudományi és alkotmányjogi megközelítések]. MTA TK PTI, 2012. p. 42.

32 Győrfi: op.c it. (note 38) pp. 54-55.

for the general authenticity of the statements), the three justifications are as follows:[33]

1. First of all, the *members of the Constitutional Court*, having the power to annul laws, are elected in Hungary by the same body, i.e. the parliament (National Assembly), which also makes the laws. When electing constitutional judges, *the same indirect (presumed) people's will is enforced as when laws are adopted.* If the constitutional judges are elected by the National Assembly and it authorises them to carry out the constitutional review of the laws, then *there is* democratic legitimacy behind the constitutional court practice too (just as behind, for example, the president of the republic and any of his/her decisions or actions). It is true, though, that this legitimacy is not direct, i.e. it is not the people (their majority) who decide on the contents of the decisions of the Constitutional Court[34] but by the (majority) of constitutional judges; however, the same is also true of the

33 In addition, there is also a fourth answer that does not start out from the requirement of democratic legitimacy but from the philosophical interpretation of the term "majority". Alexis de Tocqueville was the first to analyse – after his two trips to America as early as in 1840 – the opportunity of the judicial review of laws by checking how it contributes to preventing the "tyranny of the majority". (Tocqueville, Alexis de: Democracy in America.) It is evident that basically the will of the majority must be enforced against the minority in a democracy; however, Tocqueville says that it is wrong to identify the majority as the majority of a *country, n*amely because the main laws (the laws of justice) were created by the *majority of the whole mankind*. If the laws of the people's majority are against the general laws of the majority of mankind, the latter must then be enforced. If only the majority of one nation expresses its will, this still does not mean the absolute validity of the law. If a larger nation can tyrannise a smaller one, or a person with a lot of power can tyrannise people under them; similarly, the majority of a nation can also suppress the minority with the laws created by it. And this, being the "tyranny of the majority" can and must be prevented. In Tocqueville's words, "A general law – which bears the name of Justice – has been made and sanctioned, not only by a majority of this or that people, but by a majority of mankind. The rights of every people are consequently confined within the limits of what is just. A nation may be considered in the light of a jury which is empowered to represent society at large, and to apply the great and general law of Justice. Ought such a jury, which represents society, to have more power than the society in which the laws it applies originate?" (Tocqueville, Alexis de: Democracy in America. The Lawbook Exchange. Ltd., Clark, New Jersey, 2003, p. 240.) {This is the very reason why the majority of a given country cannot create *any* norm or cannot give constitutional authorisation to create *any* norm without violating the content-related requirements of the rule of law. For example, by quoting the opinion of the Venice Commission dated June 2013, Imre Vörös wrote the following: "Creating or modifying the constitution (…) *is not an arithmetical issue*, i.e. not a quantitative opportunity that automatically derives from the 2/3 parliamentary majority (…). (Vörös, Imre: Outline of the nature of fundamental rights after the Fourth and Fifth Amendments to the Fundamental Law of Hungary [Vázlat az alapvető jogok természetéről az Alaptörvény negyedik és ötödik módosítása után]. Fundamentum, 2013. Vol. 3. p. 60. Highlighted in the original.)}

34 Similarly, people do not decide about many other aspects, either, e.g. presidential pardon, reports of the State Audit Office, ombudsman recommendations etc.

laws: their content is not decided directly by the voting citizens but only by the (majority of) representatives elected by them. Only the referendum has a *direct* democratic legitimacy in Hungary; all other contents reflect the people's will only *indirectly*. Of course, it cannot be said that both analysed activities (legislation and constitutional court practice) would have *the same* indirect democratic legitimacy: while the content of Constitutional Court resolutions goes through double mediation calculated from the people's will (the democratic legitimacy of these resolutions is doubly indirect as the resolutions are made by constitutional judges elected by parliamentary representatives who are elected by the people), the content of laws goes through only single mediation calculated from the people's will (the democratic legitimacy of the laws is indirect only once, as the decisions are made by the parliamentary representatives elected by the people). However, since legitimacy is only indirect in both cases (although at a different rate), we can say that there is a difference between the democratic legitimacy of constitutional court practice (resolutions of the Constitutional Court) and legislation (adopted laws); however, the difference is not *qualitative* (like between a referendum and parliamentary legislation, for example), only *quantitative*, i.e. gradual.

2. Looking at the requirement of democratic legitimacy based on the *legal source* used for the decision, we get an even stronger argument that verifies the constitutional court practice serving the protection of human rights in an even more plausible manner: namely because the *basis* of the *constitution's legitimacy* (the Fundamental Law in Hungary, used as a measure for judging laws) is clearly *stronger than the legitimacy basis of the laws that can be overruled*. While the constitution is adopted in any legal system in the form of a special procedure and/or with a qualified majority (in Hungary with a 2/3 majority of all parliamentary representatives) and amendment is also possible at the same rate, adopting most laws only requires a simple majority (i.e. more than half) of the parliamentary representatives who are present and have a quorum, but the 2/3 majority of the parliamentary representatives present is also enough for cardinal laws, and the 2/3 vote of all representatives is not required. As the legitimacy basis of the resolutions made by the Constitutional Court is stronger than that of the National Assembly acting as a simple legislator (the human/constitutional rights are protected by a majority of representatives – as well as by the constitution adopted by this majority – who were elected by a larger majority of the citizens compared to the majority that passed the laws), *the constitutional court practice does not violate – but, on the contrary, it serves – the requirement of democratic legitimacy*.
3. Finally, we can talk about the *actual* enforcement of the requirement of democratic legitimacy (taken in a sociological sense) also with regard to legislation only if the governing political forces – having gained parliamentary majority – *do exactly and only what they promised to the citizens in their election programme.* The reason is that voting citizens (ideally) vote for a political force based on its election programme

and promises, hence the democratic authorisation of the parliamentary majority is attached to the promises and programme points with which the given parties acquired the votes necessary for a parliamentary majority. Anything that they do without, or contrary to, such a promise and anything that they fail to do despite their promises violates the requirement of democratic legitimacy. As this has never happened anywhere yet (and it is not even possible in its entirety),[35] *the democratic legitimacy of legislation is not only indirect but it is also necessarily partial* (to a smaller or larger extent).

VI. Conclusion

All in all, it can be said that no matter how vague content the terms "*rule of law*" *or "human rights*" have, it is *necessary to enforce them* – at least to a minimum extent – *in all legal systems* and one of the most effective ways to do this is enforcement by the constitutional court (constitutional judges), even if this system has existed for less than two centuries. *As these rights can be violated in the most dangerous manner by that very majority and by the legislative body meant to represent them,* but at least consisting of politicians elected by the majority*, it is therefore not only verifiable but also necessary that* – in the spirit of justice but in a manner prescribed by the statutory law and by the constitution forming a part of it – *an authorised body (or bodies)* (in Hungary the Constitutional Court) *can review and cancel* (or at least ignore, like in the United States) *these laws in order to prevent a "tyrannical majority" from evolving.*

35 There are always unforeseeable problems that arise and require an *ad hoc* decision and, for this reason, some of the former promises cannot be fulfilled or it would not be expedient to fulfil them.

Domokos, Andrea[1]

The Role of the Constitutional Court in the Formulation of Criminal Law under Rule of Law

This study concentrates on the role played by the Constitutional Court in the formation of criminal law during the political transformation. According to the statement by Ferenc Nagy: "In the formation of criminal law complying with the statutory provisions of the Constitution and rule of law, the newly established Constitutional Court also actively participates beside the legislator..."[2]

Just as determining the composition of the Constitutional Court is today, so it was in the early days as well. „The Constitutional Court became one of the defining players in the constitutional transition".[3]

In the years after 1990, the establishment of a state governed by rule of law, as well as legal certainty and the protection of constitutional order, seemed to be the most important goals.

Tibor Király, a key figure in the study of criminal procedural law throughout this period and beyond, stated prior to the political transformation that punitive powers must never be unlimited.[4] The Constitutional Court in its decisions has seeking an answer to the question of where the boundaries should lie.

András Szabó, a former member of the Constitutional Court, wrote in 1989 that "...the law should stand on its own merits", - even without morality and without motivation. "This law, valid in and by itself, is able to promote general prevention with deterrence even when every other motivational factor fails". We should be unafraid of contributing a deterrent role to the law employing force because using force is no more unethical than violating the law.[5] The law anticipating and availing of the use of force is absolutely necessary, because when an infringement is committed, the noble motives

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2 Nagy Ferenc: *Tanulmányok a BTK Általános Részének kodifikációjához*. Budapest, HVG-Orac, 2005, 12.

3 Kukorelli István – Tóth Károly: *A rendszerváltozás államszervezeti kompromisszumai*. Lakitelek, Antológia Kiadó, 2016, 406.

4 Király Tibor: *A büntetőhatalom korlátai (1988)*. In: Király Tibor – Mezey Barna (szerk.): Szemelvények ötven év büntetőjogi és más tárgyú tanulmányaiból. Budapest, ELTE ÁJK Büntetőeljárási jogi és büntetésvégrehajtási jogi Tanszék, 2005, 203.

5 Szabó András: *A büntetőjog reformjáról és a reform büntetőjogáról*. In: Kriminológiai Közlemények, 26-27. Budapest, 1989, 44-94, 77.

that would prevent the use of force are missing. Retaliatory and deterrent criminal law is the *ultima ratio*, i.e. the ultimate solution applied as a last resort because every other dissuasive factor has failed. "Criminal law cannot be replaced with moral conviction, training in moral values, or a law-abiding culture, nor can it be an alternative to all the above. Criminal law does not redeem, instead; it retaliates..."[6]

In Decision 23/1990. (X.3.) AB András Szabó further specified in his parallel opinion that it is not the effectiveness of penalties that forms the basis of penalties, but the principle that "sin must not go unpunished and sin deserves punishment".

Criminal penalties should not necessarily be linked to accomplishing a goal or be suitable for the goal, since applying the penalties in spite of their not being effective or not reaching the objectives can be still necessary, right, and justified. The 'sin deserves punishment' principle can be realised even without accomplishing a goal, effectiveness, or fruitfulness. The societal purpose of criminal law is to be the keystone of sanctions for the law as a whole. Compared with the sanctions of other branches of law, András Szabó stated that criminal sentences have no reparative, restorative, or duty statuer role.[7]

According to him, the penalty for breaking the inviolable law has a symbolic function:

Violations of criminal law cannot go without punishment, even if we have a reason to do so, nor if the punishment doesn't achieve any objective, or if it is simply inadequate to meet a specified objective. The purpose of punishment lies in itself, in the public declaration of the inviolable law and in retaliation, disregarding any objectives. Punishment that disregards objectives is symbolic and retaliates against infringement of the inviolable law, which is synonymous with the principle of proportionate penalties. The principle of proportionality excludes purpose-oriented punishment, because what the latter requires and allows is not proportioning it to the gravity of the harm, but referring to the objective. For example, if we considered the purpose to be moral education or treatment, with respect to a serious criminal offence, the standard or the frame of reference would be education or curability and not the gravity of the infringement. However, the condition of the personality of an offender cannot form the basis of punishment under rule of law. The penalty for an infringement of inviolable law and the retaliatory and proportionate penalty is more humane than a purpose-oriented one. Although the latter seems to be humane and corrective in nature, the former does not affect one's personality, personal autonomy or freedom of conscience. The logic of imposing sentences in criminal law cannot be interchanged with the logic of education and cure if it is to remain within the judicial framework.

6 Ibid., 77.

7 It should be noted that, according to this concept, the ideal of restorative justice and reparation during the mediation procedure are considered as foreign matter in the system of criminal law and criminal justice.

He continues that it is retaliatory punishment that indeed has respect for the individual, since it does not step in the territory or role of a psychologist or social worker. As such, it is not binding for the offender to submit to such treatment as part of the punishment. These functions can only be offered as a service at the time of implementing the sentence.[8]

Criminal law forms the legal foundation of exercising punitive power – resolution 11/1992. (III.5.) AB

The AB decision declares that Hungary is a state governed by rule of law and at the same time it aims to achieve it as an objective. "Rule of law is realised when the Constitution is being taken into effect in deed and unconditionally. For law, the change of political transformation means, and legal transition is exclusively possible, in the sense that the whole legal system has to be harmonised with the Constitution of rule of law, as well as in view of the new legislative act, which must be held in unity". Resolution 11/1992. (III.5.) AB.

The same decision emphasises that the state must not have unlimited punitive power, as public authority itself is never unlimited, either. Public authorities may intervene in the basic freedoms and rights of an individual – "*lege ferenda*" – but only with constitutional authorisation and for constitutional reasons. The bans and directions of criminal law, in particular its punishments, all affect fundamental rights or legally protected rights and values.

Unavoidable, necessary, and proportionate statutory limitations are the basis and also the constitutional meaning of the explanation of the punishment meted out by criminal law (action in criminal matters), which is the last resort of all legal consequences, which states that it is the ultimate instrument among all possible legal consequences.

This AB decision also held that criminal law in the constitutional rule of law is not only instrumental, but it protects values, as it also has intrinsic values that are principles and guarantees of constitutional criminal law. Criminal law is the legal basis of exercising punitive powers and also serves as a „charter" for the protection of individual rights. Constitutional principles likewise become evident through the fact that both criminalisation and fixed penalties are regulated by law. Establishing criminalisation and threatening with punishment must have a firm rationale, predicated upon constitutional grounds, which implies that they must be necessary, proportionate, and applied as 'ultima ratio'.

Principles of the control exercised by the Constitutional Court – AB resolution 30/1992. (V.26.)

Resolutions more than once refer back to previous ones, indeed reformulating the same principles and concepts. In Decision 30/1992. (V.26.) AB, the applicability of criminal law as a last resort is again emphasised when it is stated that "criminal law

8 Szabó (1989) op. cit., 44-94, 77.

is the *ultima ratio* in the civil liability system". Its social purpose is to function as the keystone of sanctions for the whole legal system. The role and purpose of criminal sanctions, that is, punishment, is to maintain the integrity of legal and moral norms when the sanctions of other branches of law are proved to be helpful no longer.

Furthermore, the Constitutional Court also drew attention to the fact that giving effect to the punitive intention of a state is a constitutional duty. Under a democratic rule of law, the punitive power operates within the public authority of the state, which is constitutionally restricted to holding those committing crimes accountable.

Criminal offences violate the legal order of society and the right to impose penalties belongs to the state. The exclusive right to prosecute of crime also involves the duty to provide for the implementation of the punitive intention; therefore, at the same time, making offenders give account for their deeds based on criminal law is a constitutional duty of a state.

Exercising punitive powers will necessarily affect the constitutional and fundamental rights of individuals. The duties of the state derived from the Constitution justify the right of state bodies exercising powers to have effective means of performing their statutory tasks, even if these instruments seriously limit personal rights by nature.

The decision also discusses the issue of the enforceability of sentences. The Constitutional Court observed that implementing punitive power affects the individual in the most noticeable way in this stage of enforcing criminal responsibility. There is no doubt that the legal basis of interfering with core human rights is the final judgement that is reached in criminal proceedings. However, actual restriction and interference take place during the time of enforcing a conviction. Although the change is brought about legally in the condition of the individual's legal conviction, the genuine change is realised by enforcement.

The 30/1992. (V.26.) AB decision identified the criteria of the Constitutional Court's control. "It is a content requirement, arising from constitutional criminal law, that the law-giver may not act arbitrarily when defining the range of punishable conduct". The necessity for the criminalisation of a certain conduct must be judged by strict standards: "The legal set of instruments of criminal law, which necessarily restricts human rights and freedoms for the protection of different moral and legal norms and life conditions, should be only resorted to when it is certainly necessary to do so, and even then only in reasonable portion and when no other course of action is left to protect governmental, societal, and economic objectives and values, which are included in or traceable to the Constitution".

The Constitutional Court assigned itself the task, when evaluating the constitutionality of a provision of criminal law; to examine, whether the given provision of the Criminal Code "provides a temperate and appropriate answer to the phenomenon regarded as dangerous and undesirable conduct". In other words, does the Criminal Code strive to keep restricting basic constitutional rights to a strict minimum to achieve its objectives

in compliance with the applicable requirements? According to the requirements of constitutional criminal law, the provision describing a certain conduct that is prohibited with the anticipation of legal sanctions must be unambiguous, well-defined and clearly expressed. The clear expression of the legislative will regarding one's protected legal interest and the criminal conduct discussed is a constitutional requirement. "The message must be clearly articulated as to when an individual commits an offence sanctioned by criminal law. At the same time, it should restrict enforcers from giving potentially arbitrary interpretations to the law. Care must, therefore, be taken that the definition does not assign the range of punishable conducts too broadly and that it is distinct enough". (ABH 1992, 176.)

The vocabulary of the Constitutional Court (and of the works of András Szabó) include the term „constitutional criminal law", which ignited controversy among professionals. Imre A. Wiener considered the term „constitutional" as nothing more than the replacement of the former term „socialist". He holds that, since this new attribute was only necessary when criminal law was identical to the legal rules, today using any kind of branding is unjustified. [9] Imre A. Wiener explains: "For thousands of years, the concepts of law and rights have independently existed in all languages. According to the rules of formal logic, A cannot be equal to B. Therefore, identifying rights with the law disregards the rule of formal logic. The term "constitutional" can be attached to the law and it can be stated thusly – that we distinguish constitutional law from unconstitutional law. However, unconstitutional criminal law cannot exist with the correct conceptualisation of the terms".[10]

Ferenc Nagy does not consider using the term „constitutional" necessary either since, in the domain of criminal law, basic human rights and legal principles are enshrined in the Constitution and present an inviolable barrier.[11] "Criminal law, however, is not merely applied constitutional law, but it is an autonomous field of law with its own system of sanctioning and responsibilities that can also be construed as the actual limitation of the fundamental rights incorporated in the Constitution".

Under constitutional rule, a state does not allow execution by hanging (András Szabó) 23/1990. (X.31.) AB decision regarding the unconstitutionality of capital punishment.

The Constitutional Court declared, *inter alia*, the unconstitutionality of capital punishment, otherwise known as the death penalty, and negated the provisions applicable to it. It stated that the death penalty does not only limit the essential content of the fundamental rights of all human beings to dignity and life, but also allows the complete and irreparable annulment of life and human dignity, and also negates the rights ensuring these.

9 Wiener A. Imre: *Büntetőpolitika-büntetőjog*. In: Wiener A. Imre (szerk.): Büntetendőség-büntethetőség. Budapest, KJK-KERSZÖV., 2000, 31.

10 Ibid., 31.

11 Nagy Ferenc*: A magyar büntetőjog általános része*. Budapest, Korona, 2004, 37-38.

The Constitutional Court also found that the provision introduced by amendments to the second paragraph of Article 8 of the Constitution on 19 June 1990 is inconsistent with the cited text of the first paragraph of its Article 54. It is incumbent upon the Parliament to achieve consistency.

Human life and its inherent dignity are an inseparable unit and represent the highest value, above all else. Similarly, the right to human life and its inherent dignity is also an indivisible and unrestrained fundamental right as one unit, which is the source and prerequisite of a number of other basic rights. The right to human life and dignity as absolute values is a constraint on the punitive authority of the state.

The first paragraph of Article 6 of the International Covenant on Civil and Political Rights – to which Hungary is also a party and which was proclaimed by Law-decree No.8 of 1976 – agrees upon the following principle: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

Should justice be achieved? The justice of punitive law during the political transition

One of the significant questions raised by the political transformation was whether justice should be done. The Parliament passed a bill on 4 November 1991 that answered this question: "Could capital offences committed between 21 December 1944 and 2 May 1990 and not prosecuted for political reasons now be brought to justice"? The Constitutional Court ruled that this law was unconstitutional and declared legal certainty to be a primary value. A constitutional state under the rule of law may only respond to infringements in accordance with it. Guarantees of the rule of law are applicable to all. Laws must be clear, comprehensible and predictable. Provided that these principles are observed, the prohibition of the retroactivity of the law, and the ban of regularising *ex post facto* shall prevail.

AB decision 9/1992 (I.30) stresses again that legal certainty is an indispensable element of rule of law. Legal certainty makes it mandatory for the state, and first of all for the legislator to ensure that the law as a whole, as well as its various subfields and the particular legal rules, are also documented in a clear and comprehensible way for those concerned. In respect of their operation, they must be predictable and foreseeable. Hence, legal certainty does not only require the clarity of particular norms, but also the predictability of the operation of each legal institution. This is why procedural guarantees are fundamental in terms of legal certainty. Valid statutory rules can only be created by following the rules of formalised procedures and legal institutions can only operate constitutionally by observing the procedural rules. The requirement of rule of law regarding substantive justice can be met by remaining within the boundaries of institutions and guarantees providing legal certainty. In other words, legal certainty as the guarantee is the priority, and justice can only be examined only in relation to it.

The Constitution cannot ensure a legal right to the "enforcement of substantive

justice", just as it cannot ensure that no criminal sentences will be unlawful, as indicated in the decision. The above are the objectives and responsibilities of rule of law, which it can fulfil by establishing the appropriate institutions – ones that, first of all, provide procedural guarantees - and also assure the respective individual rights. The Constitution therefore provides rights for those procedures that are necessary and, in most cases, appropriate for enforcing substantive justice.

The Constitutional Court expressed its view in several decisions concerning the constitutional aspects of the criminalisation of specific conducts and concerning the fact that, when assessing the constitutionality of a given regulation of criminal law, it is necessary to examine whether the specific ruling provides a "moderate and appropriate response for the phenomenon considered dangerous and undesirable". In other words, whether criminal law is confined to the narrowest possible circle in trying to reach its objectives in accordance with the authoritative requirements in the event of limiting constitutional basic rights.

Legal certainty is primary - 11/1992.(III.5.) AB decision

The Constitutional Court emphasised the primacy of legal certainty in this decision. Therefore, it believes, for example, that the unjust result of legal relationships in itself is not a valid argument against legal certainty. We can also put it in this way: legal certainty is more important than truth.

In another place in the decision, the wording specifies: "By having the foundation of a value system of the rule of law while avoiding the guarantees of rule of law, even legitimate claims cannot be validated". Regarding the Law of Lustration, the decision emphasised that while the given historical situation can be taken into consideration, putting aside the foundational guarantees of rule of law using the excuse of the historical context and referring to justice required by rule of law is unacceptable.

The rule of law cannot be practiced if it is in conflict with rule of law. Objective legal certainty, which rests on formal principles, is superior to always partial and subjective justice. The Constitutional Court cannot disregard history, since its mission is also historical in nature. Moreover, the Constitutional Court is the trustee of the paradox of "revolution through the rule of law", and therefore it is essential for the Constitutional Court, within its own scope of authority, to ensure the harmony of legislation with the Constitution during the peaceful political transformation, which started with the Constitution of rule of law and is played out in the implementation of this Constitution.

According to the Constitutional Court's view, a constitutional rule of law may only respond to an infringement of rights in accordance with rule of law. The legal order of rule of law cannot withhold the guarantees of rule of law from anyone, since such rights must be conferred upon every individual as basic rights. Based on the value system of rule of law, even legitimate demands cannot be validated if that would require ignoring the guarantees of rule of law. While justice and moral justification

may be motivation for penalisation and the need for justice to be served, legal grounds for punishment must however be constitutional.

According to the AB Decision, the Law of Lustration raises a particularly sharp focus on the relationship between the law of former systems and rule of law based on the newly established Constitution. With the constitutional amendment declared on 23 October 1989, in essence, the new Constitution entered into force, and it introduced a radically different and new standard compared to the one previously followed for the state, the laws and the political system with the definition: "The Republic of Hungary is an independent and democratic rule of law" - states the decision. This is the meaning of the political category of "regime change" in constitutional terms. Therefore, the evaluation of the state measures required by the political transformation cannot be separated from the requirements of rule of law, which became crystallised in constitutional democracies throughout history and also served as a foundation during the constitutional revision of 1989.

The Constitution determines the fundamental institutions of the structure of the state under rule of law, as well as their main operating rules, and also includes human and civil rights with their essential guarantees.

Rule of law is realised when the Constitution is taken into effect in reality and unconditionally. As previously stated, for law, political transformation means that legal transition is exclusively possible in the sense that the whole legal system has to be harmonised with the Constitution of rule of law, as well as held in unity in view of the new legislative act. It is not only the legal rules and the operation of public authorities that must be in strict accordance with the Constitution, but the conceptual culture and value system of the Constitution should also pervade the whole of society. This is rule of law; this makes the Constitution a reality. The realisation of rule of law is a process. It is the constitutional obligation of public authorities to labour for its fulfilment. The political transformation happened on the basis of legality.

The principle of legality imposes the requirement on rule of law that the rules of the legal system concerning itself must be taken into effect unconditionally. The Constitution and the cardinal laws, which introduced revolutionary changes from a political viewpoint, were created in compliance with the legislative rules of the former legal order and derived their binding strength from there; as for their formulation, they are beyond reproach. The former legal order remained in force. In terms of validity, there is no difference between "pre-constitutional law" and the "post-constitutional law". The legitimacy of the various systems of the past half-century is neutral in this respect. It does not have to be interpreted as a separate category in terms of the constitutionality of the legal rules. All existing legislation, irrespective of when it was created, must be consistent with the Constitution. In assessing whether a rule is consistent with the Constitution, there are no two layers of legality, just as there are not two types of standards either. The time of origin of certain pieces of legislation can only have significance in the sense that once the newly established Constitution

entered into force, the former rules could have become unconstitutional.

The special handling of the law of previous systems, even while acknowledging legal continuity and legality, can be relevant with regard to two aspects. The first question is what can be done with those legal relations that had been created on the basis of old regulations, which have become unconstitutional over time and can they be brought into conformity with the Constitution? The second question is when judging the constitutionality of new regulations applicable to the now unconstitutional provisions of former systems, can the specific historical situation of the political transformation be taken into consideration? These questions must also be answered in compliance with the requirements of rule of law.

Csaba Varga very sharply criticised the decision made by the Constitutional Court concerning ministering justice.[12] In his view, the Constitutional Court shattered the underlying issue with its dismissive formal decision, instead of contributing to solving the problem.

"One of the distinguishing features of these decisions and similarly made decisions, which practically eliminate the chances of a meaningful political transformation, was that while squeezing itself into the lofty cloak of rule of law with some formal references, it was not even willing to face the underlying societal problem as a problem, something to be resolved". He described the Hungarian decision as a failure of our entire legal culture, in comparison with the Czech and German solutions.

Wiener also levelled criticism against the approach of the Constitutional Court: "It seems that the Constitutional Court interprets justice with reference to the application of the law, rather than to the creation of law, and justice has been pushed into the background in favour of legal certainty according to the interpretation of Constitutional Court".[13] According to Wiener, legal certainty and objective justice must be evaluated separately for the sake of clarity of the concepts, since punitive criminal law can satisfy the requirements of legal certainty, even if it violates objective justice in the meantime.

According to the thoughts of Ákos Pauler from over a hundred years ago, we may only speak about rule of law when law honours human rights. In his work, written in 1907, he stated that law was deficient in creating ideals. He extended his criticism to the regulations of criminal law too. His thesis is the following: "Law is only appropriate when it sees its own sanction as honouring the human individual".[14] Pauler defines fair law as the ideal law. „The state, therefore, while guiding its citizens towards the realisation of true culture, will also be seen as a rule of law since it also intends to possibly comply with the requirements of law".

12 Varga Csaba: *Teória s gyakorlatiasság a jogban: A jogtechnika varázsszerepe*. In: Gál István László – Kőhalmi László (szerk.): Emlékkönyv Losonczy István professzor halálának 25. évfordulójára. Pécs, 2005, 317.

13 Wiener (2000) op. cit., 31.

14 Pauler Ákos: *Az ethikai megismerés természete*. Budapest, Franklin-Társulat, 1907, 228.

According to Wiener, rule of law is a concept of legal philosophy, of which objective justice and legal certainty are also elements.[15] In Ligeti's wording, after the collapse of the former communist systems, it again became timely and relevant to demonstrate the boundaries of criminal law under rule of law and the relationship between criminal law and the Criminal Code.[16]

To show how much the former communist countries shared the same background, he used a very relevant quotation: "We expected justice, but received rule of law instead".[17] These were the words of the former East German Rüthers. Ligeti equally considers both the formal and the material concepts as constituent ingredients of rule of law: "A state is considered to be a rule of law only when it enables the manifestations of state power to be measurable by laws and is built upon the concept of justice".[18]

Ferenc Nagy also sees potential threats in the new system: "Other kinds of consequences are also noticeable in 'transitioning' to the criminal law that functions under rule of law; namely that the classical principles and rules of criminal law are being continually and gradually eroded..." „It may be slapping rule of law in the face that criminal law often becomes the instrument of political power, again alongside the pragmatics of criminal policy and hiding under its disguise".[19]

I myself hold the requirements of criminal law under rule of law and of constitutional requirements of the criminal law as normative. I greatly appreciate the role of the Constitutional Court in this; namely the doctrinal statement according to which the legal order of rule of law cannot withhold the guarantees of rule of law from anyone, since such rights must be conferred upon every individual as basic rights. Based on the value system of rule of law, even legitimate demands cannot be validated if the validation would require putting aside the guarantees of rule of law.

15 Wiener A. Imre: *Büntetőjogunk az ezredfordulón*. In: Acta Facultatis Politico-iuridicae Universitatis Budapestiensis XL, 2003, 7-54.

16 Ligeti Katalin: *A jogállami büntetőjogról*. In: Wiener A. Imre (szerk.): Büntetendőség-büntethetőség. Budapest, KJK-KERSZÖV., 2000, 84.

17 Ibid., 88.

18 Ibid., 88.

19 Nagy (2005) op. cit., 12.

Czine, Ágnes[1]

The Right to Trial within a Reasonable Time

1. Conceptual clarification

The right to a fair trial is in itself a complex set of principles. The right to trial within a reasonable time[2] (hereinafter "reasonable time requirement") is one of the sub-rights to a fair trial so, in order to present the constitutional context, first I consider it necessary to review the concept and principles of a fair trial.

The development of the principle of fair trial is the result of a historical process dated back to the thirteenth century. The detailed content and the elements of this principle have appeared in various international legal documents since the middle of the last century. In 1948, the Universal Declaration of Human Rights already set out the principle of fair trial in its Articles 10 and 11. According to the Geneva Conventions of 1949's Protocol II, drafted and adopted in 1977, fair trial is mandatory even in armed conflicts.[3]

The International Covenant on Civil and Political Rights, which was adopted in 1966 and entered into force in 1976, declares in its Article 14 that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." [4]

The Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the eight additional protocols thereto, were ratified by Act XXXI of 1993 in Hungary, then, except for Protocols 12 and 16, the others were promulgated by various laws (hereinafter together: the Convention).

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2 At this point, I must address the difference in the use of terms by the ECtHR and the Hungarian Constitutional Court. The ECtHR uses the concept of the *right to a fair trial within a reasonable time* as a sub-right to a fair trial and refers to it briefly as the reasonable time requirement, and refers to cases as length of proceedings cases. The Hungarian Constitution and the Fundamental Law use the concept of the *right to the adjudication within a reasonable deadline*, emphasising the right to a decision, to the completion of the proceedings and not just the right to a hearing. Despite two formulations, the essential content is the same.

3 Universal Declaration of Human Rights, UN webpage http://www.un.org/en/universal-declaration-human-rights/ accessed 30 September 2020

4 International Covenant on Civil and Political Rights, OHCHR webpage https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx accessed 30 September 2020

Article 6 of the Convention lays down the substantive content of a fair trial when it states that in the "determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The right to a fair trial has a position of pre-eminence in the Convention, both because of the importance of the right involved and the great volume of applications and jurisprudence that it has attracted.[5]

In line with international development, the principle of fair trial has also become part of the Hungarian constitution. The constitutional requirement of the fair trial was formulated by Article 57 (1) of the Constitution, which was in force until 31 December 2011. It says that everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law. As regards the substantive contents of the constitutional provision of the fair trial, Article XXVIII (1) of the Fundamental Law of Hungary – that came into force on 1 January 2012 – is identical to Article 57 (1) of the former Constitution. It stipulates that everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by law.

For the first time after the entry into force of the Fundamental Law, the Constitutional Court compared in its decision[6] the content of the relevant provisions of the former Constitution and the Fundamental Law. The result of this comparison was that there was no obstacle to the applicability of the arguments and findings of previous Constitutional Court decisions; the Constitutional Court considered the former constitutional practice, elaborated in connection with the fundamental right, to be applicable to a fair trial in the future.

Following the Fourth Amendment of the Fundamental Law (25 March 2013) with respect to the aspects fixed in Decision 13/2013. (VI. 7.) AB in connection with the applicability of the former Constitutional Court's decisions, the Constitutional Court re-examined whether the practice of a fair trial would be applicable in future. As a result of this examination, the Constitutional Court found that there was still no obstacle to the use of previous constitutional practice in relation to the fundamental right to a fair trial[7]. Subsequently, the Constitutional Court's decisions – in connection with Article XXVIII (1) of the Fundamental Law – were held in this spirit.

Clearly, as we saw, the relevant texts of the former Constitution and the Fundamental Law are identical in content. In my view, however, in the meantime there was a huge change in the regulation of and a difference in the content of the right to a fair

5 Harris, O'Boyle & Warbrick, *Law of the European Court of Human Rights* (3rd edn., Oxford University Press 2014) 370

6 Decision 7/2013. (III. 1) AB of the Constitutional Court, Statement of Reasons [24]

7 Decision 8/2015. (IV. 17.) AB of the Constitutional Court, Statement of Reasons [57]

trial. These results, on the one hand, from the spirit of the Fundamental Law and, on the other hand, from the shift in emphasis caused by the legal institution of the constitutional complaint. The case law of the Constitutional Court also shows that the importance of one of the sub-rights of the right to a fair trial, namely the reasonable time requirement, is now subject to a different assessment than before.

2. The sub-rights of the fair trial

Parliament has placed the right to a fair trial among judicial procedural guarantees regulated by Article XXVIII of the Fundamental Law. A fair procedure as a requirement, however, appears in Article XXIV (1). This latter basic provision explicitly sets out the requirement of fairness for the administrative authorities' proceedings. As a guarantee of judicial procedure, Article XXVIII (1) of the Fundamental Law is the correct reference. The principle of fair trial is enshrined in Act XC of 2019 on Criminal Procedure, too. It is also set out in the preamble to the Act explicitly, but also included in its various provisions (e.g. presumption of innocence in § 1, right to defence in § 3).

Article XXVIII (1) of the Fundamental Law contains a set of principles of due process, while its other paragraphs contain other guarantees of judicial procedure, namely:

- the presumption of innocence [Article XXVIII (2)],
- the right to defence [Article XXVIII (3)],
- the principle of the *nullum crimen sine lege* and *nulla poena sine lege* [Article XXVIII (4)],
- the *ne bis in idem* principle [Article XXVIII (6)],
- the right to legal remedy [Article XXVIII (7)].

The fairness of proceedings in the ordinary sense also includes the judicial procedural guarantees in Article XXVIII (2)-(7) of the Fundamental Law as the fulfilment of the requirements set out in Article XXVIII (1).

However, the significant difference is that while the procedural guarantees set out in paragraphs 2 to 7 are examined by the Constitutional Court on the basis of the general rules of necessity and proportionality, the requirement of paragraph 1 requires a specific assessment. In the practice of the Constitutional Court, the right to a fair trial is an absolute right, over which no other fundamental right or constitutional purpose can be considered, since it is itself the result of discretion and thus the right to a fair trial cannot be restricted. However, it is possible to examine, within the meaning of fair procedure, the necessity and proportionality of the restrictions in respect of certain sub-rights of the right to a fair trial. Sub-rights can be limited and they guarantee the fairness of the procedure in their entirety. The content of the right to a fair trial was formulated by Decision 6/1998. (III. 1.) AB and these principles

were later confirmed by the Constitutional Court in a number of decisions.[8] By interpreting Article XXVIII (1) of the Fundamental Law, the sub-rights of the right to fair trial could be formulated. According to the practice of the Constitutional Court, these in particular are the following:

- the right of access to court,
- the fairness of the hearing,
- the requirement of a public hearing and the public announcement of the judicial decision,
- the court established by law,
- the requirement for judicial independence and impartiality, and
- the requirement for decisions to be made within reasonable time.
- The rule is de facto not fixed, but according to the interpretation of the Constitutional Court, it is a part of a fair trial to ensure the equality of arms in the proceedings.[9]
- According to the practice of the Constitutional Court, the right to a reasoned judicial decision is also to be regarded as a part of the right to a fair trial. [10]

The Constitutional Court found in Decision 7/2013. (III. 1.) AB that there was no obstacle to the applicability of the arguments and findings contained in previous decisions regarding the right to a fair trial, and therefore the Constitutional Court considers them to be applicable in the future. In accordance with its practice based on the provisions of Articles 24 (2) (d) and 27 of the Fundamental Law, the Constitutional Court expressly stated that the constitutional requirements arising from the right to a fair trial, as elaborated in its previous practice, are not only related to the regulatory environment, but also to individual judgements.[11]

My opinion is that, in these cases, when a judicial decision itself is judged and the final decision can be annulled, the Constitutional Court should exercise this right with particular care and examine whether the petitioner's claim has a relevance in respect of fundamental rights and it constitutes such a serious violation that it can justify the annulment of the challenged judicial decision. Procedural violations emerging in judicial proceedings, by way of exception, may have a fundamental right nature and this circumstance raises the possibility of violation in the context of the right to a fair trial.

8 See Decision 5/1999. (III. 31.) AB, ABH 1999, 75; Decision 14/2002. (III. 20.) AB, ABH 2002, 101, 108; Decision 15/2002. (III. 29.) AB, ABH 2002, 116,118-120; Decision 35/2002. (VII. 19.) AB, ABH 2002, 199, 211

9 Decision 8/2015. (IV. 17.) AB of the Constitutional Court, Statement of Reasons [63]

10 Decision 7/2013. (III. 1) AB of the Constitutional Court, Statement of Reasons [34]

11 Decision 7/2013. (III. 1.) AB of the Constitutional Court, Statement of Reasons [27]

3. Principles of a reasonable time requirement according to the case law of the European Court of Human Rights

The reasonable time requirement has been elaborated in detail by the European Court of Human Rights (ECtHR). It published a summary of its case law in two guides, one on problems in its civil field and the other on aspects of criminal law. In this article, I shall examine the part of the latter case-law, which relates to the adjudication of criminal cases.

In criminal matters, the purpose of Article 6 § 1 of the Convention (right to a fair trial) is to ensure that the suspect does not remain under charge for an unreasonable length of time. The beginning of the period taken into account by the ECtHR is the date of the arrest (detention) of the accused and the date of the official notification by the investigating authority that he has committed a criminal offence.[12] The ECtHR considers the date when the accused is first interrogated as a suspect in Hungarian cases to be the beginning of the proceedings, so it also covers a part of the investigation phase of the proceedings[13]. The substantive requirements of "reasonable time" under Article 6 § 1 of the Convention are generally examined by the ECtHR until the criminal proceedings have been concluded, including the appeal stage, until the appellate courts rule on the merits of the charge and not merely on ancillary issues[14]. The ECtHR's definition includes not only part of the investigative phase of criminal proceedings, but also the enforcement of a final judgment. According to the ECtHR, the enforcement of the criminal consequences of a final decision is also part of the procedure, so any delay in doing so also renders the authorities liable, e.g. following the announcement of the acquittal, the detained accused shall be released immediately unless there is due cause[15]. According to the ECtHR, the length of the proceedings shall be assessed in the light of the specific circumstances of the case and in a comprehensive manner. The length of the proceedings *per se* does not mean that they have been protracted and that the courts have committed a breach of convention. Article 6 § 1 of the Convention requires the proceedings to proceed at a good pace, but the ECtHR considers that this should not be to the detriment of ensuring an adequate level of judicial activity. It is up to the member states to find the right balance between these two fundamental aspects.[16] The ECtHR also examines the absolute duration of the proceedings, as there may be cases where certain stages of the proceedings proceed at an appropriate pace, but the

12 Buzadji v. Moldova, App no 23755/07 (ECtHR, 5 July 2016), para 85

13 Csák v. Hungary App no 25749/10 (ECtHR,15 October 2015), para 5, Udvardy v. Hungary, App no 66177/11 (ECtHR, 1 October 2015), para 5

14 O'Neill and Lauchlan v United Kingdom, App no 41516/10, 75702/13 (ECtHR, 28 June 2016), para 82

15 Assanidze v. Georgia App no 71503/01, (ECtHR, 8 April 2004), para 181

16 Gankin and Others v. Russia App no 2430/06, 1454/08, 11670/10, 12938/12 (ECtHR, 31 May 2016), para 26

whole is still beyond a reasonable time.[17] The ECtHR considers criminal proceedings approaching or exceeding 10 years to be of such length as to constitute a clear violation of the reasonable time requirement of Article 6 § 1 of the Convention.[18] In assessing the reasonable length of criminal proceedings, the ECtHR takes into account not only the length of the proceedings but also other factors, in particular the complexity of the case and the conduct of the applicant and the public or judicial authorities concerned[19]. The complexity of the case may be supported by circumstances such as a large number of committed crimes, defendants or witnesses.[20] Complex criminal proceedings, which appear to be lengthy in absolute terms, do not necessarily infringe the reasonable time requirement either.[21]

According to the ECtHR, in assessing the applicant's conduct, it must be borne in mind that Article 6 of the Convention does not require him to cooperate with the judiciary. Nor can he be penalised for having recourse to all the remedies available to him. However, the applicant may also engage in litigation for which is not incumbent on the authorities to conduct the proceedings within a reasonable time.[22] According to the ECtHR, the applicant must be reprimanded if it is clear from the file that he has delayed the proceedings.[23] Nor can the applicant base a successful claim on the length of the proceedings resulting from his own escape, unless proved otherwise.[24] The applicant must exhaust the available domestic remedies, except those that are ineffective. With regard to Hungarian cases, the ECtHR stated that an objection due to the length of the proceedings [Section 262/A, Section 262/B of Act XIX of 1998 on Criminal Procedure (hereinafter: old Act)] was not considered to be such an effective remedy that the applicant must exhaust.[25] According to the ECtHR, Article 6 § 1 of the Convention obliges Member States to organise their judicial systems in such a way as to enable their courts to comply with the reasonable time requirement.[26] The reference

17 O'Neill and Lauchlan v United Kingdom App no 41516/10, 75702/13, (ECtHR, 28 June 2016), para 95, Moreno Carmona v. Spain App no 26178/04 (ECtHR, 9 June 2009), para 63

18 13 years 9 months in Csák v. Hungary App no 25749/10 (ECtHR, 15 October 2015), para 11; 8 years 3 months in Udvardy v. Hungary App no 66177/11 (ECtHR, 1 October 2015), para 11; 7 years and 4 months in János Dániel Szabó v. Hungary App no 30361/12 (ECtHR, 17 February 2015), para 8; 9 years in Balázs and Others v. Hungary App no 27970/12 (ECtHR, 17 February 2015), para 9

19 László Magyar v. Hungary App no 73593/10 (ECtHR, 20 May 2014), para 64

20 C.P. and Others v. France App no 36009/97, (ECtHR, 1 August 2000), para 30

21 Lakos v. Hungary, App no 51751/99 (ECtHR, 11 March 2003)

22 Most recently: Süveges v. Hungary App no 50255/12 (ECtHR, 5 January 2016), para 124

23 I.A. v. France App no 28213/95 (ECtHR, 23 September 1998), para 121

24 Vayic v. Turkey App no 18078/02 (ECtHR, 20 June 2006), para 44, Czimbalek v. Hungary App no 23123/07 (ECtHR, 23 September 2013), paras 18-19

25 Barta and Drajkó App no 35729/12 (ECtHR, 17 December 2013), paras 26

26 Grujovic v. Serbia App no 25381/12 (ECtHR 21 July 2015), paras 65-66

to serious backlogs and efforts to eliminate them does not exempt a member state from finding a breach of the Convention in relation to the length of the proceedings.[27]

According to the case law of the ECtHR, not only proceedings that are manifestly long but also those appearing to be unduly brief in absolute terms may be in breach of the Convention if they involve significant, unjustified periods of inactivity on the part of the court (or authority). The ECtHR considers acts or omissions as inactivity if the court (or authority) does not act with sufficient speed, or make an effort to continue the proceedings or facilitate the performance of the act in question.[28] The ECtHR considers that part of the proceedings where, as a general rule, no progress has been made in them for more than six months as inactivity.[29] A period can also be considered inactive if, for example, the courts are awaiting the opinion of experts without urgency or other pressing measures.[30] According to the case law of the ECtHR, the suspension of criminal proceedings does not count towards the period on which the breach of the Convention is based only if the measure was taken on reasonable grounds and the courts (as well as the authorities) did their utmost to continue the proceedings.[31]

According to the practice of the ECtHR, the stake and importance of the procedure from the point of view of the applicant must be examined as an additional factor. Consequently, in the case of a detainee, the ECtHR considers the delay in the main proceedings to be more serious than in the case of a defendant defending himself at large.[32]

Contrary to the other rights enshrined in the Convention, the violation of the requirement of a reasonable time is special in that the applicant does not have to wait for the domestic proceedings to be completed, but, *inter alia,* may also apply to the ECtHR during ongoing criminal proceedings for a violation of Article 6 § 1 of the Convention.[33]

According to the case law of the ECtHR, in a criminal judgment, the mitigation of a convicted person's punishment or the suspension of imprisonment may be considered as a remedy for a violation of the Convention resulting from the lengthy proceedings.[34] However, the ECtHR will only consider a reduction or suspension as an appropriate remedy if the national court expressly states, in the grounds of its judgment that the proceedings have been lengthy. The statement of reasons should also indicate that the court mitigated the sentence due to the length of the proceedings, including the suspension of the imprisonment. The reduction of the penalty must be not only apparent but also substantial.[35]

27 Béla Szabó v. Hungary App no 37470/06 (ECtHR, 9 December 2008), para 12
28 Zoltán Németh v. Hungary App no 29436/05 (ECtHR, 14 June 2011), para 55
29 Barta and Drajkó v. Hungary App no 35729/12 (ECtHR, 17 December 2013), paras 20-21
30 Pélissier and Sassi v. France App no 25444/94 (ECtHR, 25 March 1999, paras 69-70
31 Kriston v. Hungary App no 39154/09 (ECtHR, 24 September 2013), paras 5, 12
32 Süveges v. Hungary App no 50255/12 (ECtHR, 5 January 2016), para 121
33 Palásti v. Hungary App no 54244/10 (ECtHR, 22 April 2014), paras 10, 14
34 Lie and Berntsen v. Norway App no 25130/94 (ECtHR, 16 December 1999)
35 Lie and Berntsen v. Norway App no 25130/94 (ECtHR, 16 December 1999)

The ECtHR has stated in several cases concerning Hungary that, in view of the protracted criminal proceedings, the reduction of the punishment is considered a legal remedy. If the grounds for the judgment show the extent of the advantage granted due to the length of the proceedings, the applicant may no longer claim further compensation in that regard. Under Article 34 of the Convention, the applicant cannot claim in this case that he is the victim of a violation of Article 6 § 1 of the Convention. [36] In some cases, the ECtHR no longer accepted complaints from applicants who had received such a remedy.[37] However, the reduction of the penalty must be apparent from the grounds of the judgment, even if they were made in abbreviated form.[38]

4. Remedies for the violation of the reasonable time requirement available to the Constitutional Court

The Fundamental Law is based on Article XXVIII (1), in contrast to Article 57 (1) of the Constitution, which was in force before 1 January 2012, and expressly enshrines the right to assess rights and obligations within a reasonable time. In view of this, the Constitutional Court has ruled that the right to adjudicate a legal dispute within a reasonable time falls within the scope of the rights guaranteed in the Fundamental Law, the violation of which may form the basis of a constitutional complaint.[39]

Following the entry into force of the Fundamental Law, several petitioners referred in their constitutional complaint to the protracted nature of the underlying litigation and, consequently, to the violation of their right to a decision within a reasonable time.

The Constitutional Court has mostly rejected complaints based on the violation of this fundamental right, e.g. for failure to exhaust objection as a remedy[40], or due to lack of competence.[41] Exceptionally, however, the Constitutional Court also investigated a violation of this sub-right and stated in the specific case that the prolongation of the main proceedings was caused to a large extent by objective factors independent of the acting bodies.[42]

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36 Somogyi v. Hungary App no5770/05 (ECtHR, 11 January 2011), para 31, Goldmann and Szénászky v. Hungary App no 17604/05 (ECtHR,30 November 2010), para 26, Földes and Földesné Hajlik v. Hungary App no 41463/02 (ECtHR 31 October 2006), para 24, Kalmar v. Hungary App no 32783/03 (ECtHR, 3 October 2006), para 27, Tamás Kovács v. Hungary App no 67660/01 (ECtHR, 28 September 2004), para 26

37 Csorba v. Hungary App no 944/12 (ECtHR, 23 June 2015), Lehel v. Hungary App no 8185/05 (ECtHR, 16 September 2008), Dányádi v. Hungary App no 10656/03 (ECtHR, 6 July 2006)

38 Bodor v. Hungary App no 31181/07 (ECtHR,14 June 2011), para 13

39 Decision 3174/2013. (IX.17.) AB, Statement of Reasons [18]

40 Decision 3309/2012. (XI.12.) AB, Statement of Reasons [5]

41 Decision 3174/2013. (IX.17.) AB, Statement of Reasons [20] - [21]

42 Decision 3115/2013. (VI.4.) AB, Statement of Reasons [30]

In its decision[43] the Constitutional Court stated that, as the main body for the protection of the Fundamental Law, it cannot effectively perform its fundamental rights protection task related to the reasonable time requirement, which is part of the right to a fair trial. The Constitutional Court does not have at its disposal a legal remedy for the damage caused. Nevertheless, in its decisions, the Constitutional Court generally drew attention to the fact that the complainant may bring a special claim for damages against the court in order to assert his right to a fair trial and to complete it within a reasonable time[44]. In its decision,[45] the Constitutional Court established a constitutional requirement, namely in connection with the application of Section 258 (3) e) of the old Criminal Code[46]. Accordingly, in applying the provision of the old Code referred to, the constitutional requirement arising from Article XXVIII (1) of the Fundamental Law is that if the court mitigates the criminal penalty imposed on the accused due to the protraction of the proceedings, the reasoning of its decision shall contain the fact of the length of the proceedings and, in that connection, that the penalty was reduced and the extent of the reduction.

According to the reasoning of the above-mentioned decision, the reasonable time requirement is a sub-right to a fair trial. Consequently, the constitutional approach of examining the whole and some of the parts of the court proceedings at the same time must be applied to the examination of this sub-right in order to establish the trial court's intention to adjudicate within a reasonable time. If it can be concluded from the acts of the examined court proceedings, from the history of the lawsuit, that the court did not keep this constitutional requirement in mind, the protraction of the given criminal proceedings, the court's inactivity – regardless of the duration of the procedure – could then be found. On this basis, the proceedings in a case initiated and closed very rapidly may be protracted if the facts of the criminal proceedings do not indicate the efforts of the trial court to reach a decision on the charge as soon as possible, bearing in mind the requirements of a fair trial. The duration of criminal proceedings, even if the Act on Criminal Procedure is complied with, violates Article XXVIII (1) of the Fundamental Law if there are unreasonable periods of inactivity attributable to the trial courts and the extreme length of the criminal proceedings is not justified by the complexity of the case. In the opinion of the Constitutional Court, however, the unconstitutionality arising from the protracted criminal proceedings can be remedied during the imposition of a sentence. If it is established from the reasoning of the judgment that the court has imposed a lesser punishment during the imposition of the sentence due to the passage of time, or applied other sanctions instead of imprisonment, the defendant's right to adjudication within a reasonable deadline could be no longer be a relevant ground for violation.

43 Decision 3024/2016. (II.23.) AB, Statement of Reasons [18]

44 Decision 3174/2013. (IX.17.) AB, Statement of Reasons [20] - [21]

45 Decision 2/2017 (II.10.) AB

46 Act XIX of 1998 on Criminal Procedure

In order to ensure that the purpose of reducing the sentence was to remedy the length of the proceedings can be clearly established for the accused from the reasoning of the judgment, the Constitutional Court considered it necessary to define a constitutional requirement related to the application of Section 258 (3) (e) of the old Criminal Code.[47] As a result, Section 564 (4), b) of the new Criminal Code already contains the requirement established by the decision of the Constitutional Court, so the legislator has already raised it to the level of law.

It has also been emphasised by law enforcement, the legislature and society that court proceedings should be completed within a reasonable time, precisely in order to ensure that the proceedings are not protracted and that there is no period of inactivity in the court proceedings and that putting the judgement in writing does not unduly increase the length of the procedure. The National Courts Office also prescribed measures to facilitate the completion of the proceedings within a reasonable time. Judges are also required to report on a monthly basis on setting the date of pending cases and recording the completed cases in writing.

The legislature has already set itself the objective of reducing the length of criminal proceedings to a reasonable period by amending a number of provisions of the old Criminal Code.

The old Criminal Code had the following methods serving the purpose of accelerating procedures:

- appointing the hearing quickly,
- maintaining the rules on priority cases,
- limiting the duration of pre-trial detention,
- indicating in the judgment that the proceedings were lengthy and that the court therefore assessed the lapse of time when imposing the sentence.

In 2014, the ECtHR had already found such kinds of violations of the Convention in 24 cases and more than 400 cases were pending before it on the date of the *Gazsó judgment*.[48] As a result, it was clear that there was it deemed a structural problem, for which there had not been an adequate domestic remedy. The ECtHR therefore applied in this regard the so-called pilot judgment procedure.

In its pilot judgment, the ECtHR ordered Hungary to establish a legal remedy providing for pecuniary compensation in all proceedings, including criminal proceedings.

5. Creating an effective domestic remedy

The pilot judgment procedure in *Gazsó v. Hungary* was made possible by the fact that, by ratifying the Convention, Hungary undertook to ensure the reasonable time requirement under Article 6 and to ensure an effective remedy in the event of a breach

47 Decision 2/2017. (II.10.) AB, Statement of Reasons [82], [88], [99] - [100]

48 Gazsó v. Hungary App no 48322/12 (ECtHR, 16 July 2015)

of this right. According to Article 13 of the Convention, the member states have an obligation to ensure that court proceedings are concluded within a reasonable time by establishing effective rules of procedure that ensure efficient and timely proceedings and by creating appropriate conditions for the courts to operate in, and providing adequate redress for damages caused by unreasonably long proceedings.

The pilot judgment procedure has been used as a specific form of procedure since the *Broniowski judgment*[49] but was introduced into Rule 61 of the ECHR Rules only on 21 February 2011. According to the procedure applied by the ECtHR, this new procedure may be used if, on the basis of the facts set out in an application, a structural or systemic deficiency in the legal order of the member state can be identified and a number of similar complaints can be expected. The pilot judgment procedure may be initiated by the parties, but the ECtHR may decide to apply it *ex officio* and if the ECtHR selects one or a few cases, the member state must deal with them as a matter of urgency, in accordance with Rule 41 of the Rules. In the case at hand, the ECtHR must identify the error or omission of national law that may give rise to mass infringement and indicate the remedies available to the state at fault, at national level, in order to comply with the judgment of the ECtHR. The ECtHR may also specify a time limit within which these measures must be taken. If the ECtHR finds that the state at fault has failed to do so, it has the right to continue the process before the ECtHR and decide on all pending proceedings.

In its judgement in a civil lawsuit,[50] the ECtHR found that the length of court proceedings and the lack of related legal remedies resulted from structural deficiencies in the domestic legal system. The ECtHR in this pilot judgement procedure, called on Hungary to establish a domestic remedy (or set of remedies) without delay, but no later than one year after the final judgment (16 October 2015). This domestic remedy had to address the protracted court proceedings in accordance with the Convention principles laid down in ECtHR case law. At the same time, the ECtHR postponed the examination of further applications submitted after the judgment became final.

Article 13 of the Convention allows member states to choose between expedited and ex post remedies, subject to the provisions of the Convention, but they must take into account the case law of the ECtHR and the recommendations of the Committee of Ministers of the Council of Europe. States may decide to combine the two remedies, and may introduce a so-called combined redress model.

In *Barta and Drajkó v. Hungary*[51] in connection with a criminal case and in *Bartha v. Hungary*[52] in connection with a civil case, the ECtHR also stated that, in Hungary, the expedited legal remedies (objection) in their current form are ineffective against the protraction of the procedure.

49 Broniowski and Others v. Poland App no 31443/96 (ECtHR, 22 June 2004)

50 Gazsó v. Hungary App no 48322/12 (ECtHR, 16 July 2015)

51 Barta and Drajkó v. Hungary App no 35729/12 (ECtHR, 17 December 2013)

52 Bartha v. Hungary App no 33486/07 (ECtHR, 25 March 2014)

Following the call of the ECtHR, it became necessary to rethink domestic compensation for delays in proceedings, to develop uniform substantive and procedural regulations that meet the requirements of actuality, speed and efficiency. In December 2015, the Government informed the Committee of Ministers that, according to professional resolutions, the new procedural codes would ensure the prompt and efficient conduct of court proceedings, and a new *sui generis* compensation procedure could be introduced in parallel. The Government informed the Committee of Ministers that the compensation procedure would follow the German model, but would not have retroactive effect for constitutional reasons. At its meeting on 8-10 March 2016, the Committee of Ministers welcomed the legislative intention of the Hungarian authorities. In November 2016, the Government again informed the Committee of Ministers of the implementation of the *Gazsó* judgment, the measures taken and planned so far and the timetable for implementation. The ECtHR did not consider the measures taken by the Hungarian Government in the recent period to be satisfactory, and expects the introduction of a compensatory remedy that will provide the applicants with prompt and adequate compensation. The matter shall be placed on the agenda by the Committee of Ministers until a solution has been reached.

The ECtHR expects the introduction of a compensatory remedy that will provide applicants with prompt and adequate compensation. The bill regulating the subject was submitted by the Government to the Parliament in October 2018[53] and its discussion has begun.

Important steps have already been taken with the adoption of the new rules on civil, criminal and administrative procedure. These laws entered into force on 1 January and 1 July 2018 and made a significant contribution to speeding up procedures.

The Hungarian codes of different procedures introduced a number of solutions aimed at completing the proceedings within a reasonable time. Act XXX of 2016 on Civil Procedure (hereinafter: "Code of Civil Procedure"), for example, divided the first-instance proceedings into two sections; with this solution it switched to a split-trial system and gave a greater role to the preparation of the lawsuit. The admission phase of the lawsuit focuses on determining the precise content of the legal dispute and defining its framework successfully, so that the substantive litigation stage can be conducted more efficiently and quickly. The claim must specify, in a manner that does not require further interpretation, the content and type of the legal protection against the defendant and the court decision requested by the plaintiff for this purpose. The plaintiff must file his claim in such a way that, if the claim is well-founded, the operative part of a sentence or a court order with the same content can be issued. The new Code of Civil Procedure intended to make not only the preparation of the lawsuit but also the other rules of litigation more effective and pursued a dual purpose. On the one hand, the Code ensures that the right to a remedy is properly exercised, and on

53 It has been waiting for the discussion of Parliament's Legislative Committee for two years (see Bill T/2923).

the other hand, it does not allow room for litigation in appeal proceedings. In order to achieve that objective, it defined the scope of the appellate court's power of review and, in that regard, also the mandatory content of the appeal, and provided that the appellate court, in principle, shall adjudicate appeals without a hearing.

Act CL of 2016 on General Administrative Procedure also introduces several new solutions to speed up the procedure. Such is the case, for example, at the beginning of the proceedings, if the administrative authority rejects the application. The authority shall reject the application if the legal conditions are missing for initiating the procedure, but also if the authority exercises its discretionary power and considers that the application must be rejected. The initiation of the procedure is simplified so that the method of communication can be chosen by the client (orally, in writing, electronically). By definition, electronic communication also serves the aim of acceleration. The determination of the types of administrative procedures and their deadlines also apply the principle of adjudication within a reasonable time (e. g. automatic procedure - 24 hours, summary procedure - 8 days, full procedure - 60 days).

The aim of the codification work of Act I of 2017 on Administrative Court Procedure was to enforce the principle of effective legal protection as widely as possible. It is very important to ensure effective legal protection in time: there is a need for rules that allow for more concentrated litigation and more opportunities for final settlement by the court. The aim is therefore to improve temporal efficiency by establishing a differentiated system of immediate remedies based on current judicial case law and by limiting the reference to new facts and evidence so that the administrative authorities' pre-litigation procedure takes precedence.

In the view of the legislator, temporal efficiency is counteracted by the transformation of court proceedings into second-instance administrative proceedings. In connection with this, the Act re-regulated the judicial appeal system: it provides a regular appeal against a decision of a court of first instance, and some judgments and orders can be appealed. In addition to the ordinary legal remedy (appeal), the Act allows for a limited number of extraordinary legal remedies. The possibility of review is limited to the minimum according to the constitutional criteria: the Curia of Hungary will accept the request for review only in cases in which it is justified by a deviation from the published judicial practice or uniformity decision of the Curia of Hungary or the necessity of a preliminary ruling procedure.

The Explanatory Memorandum to Act XC of 2017 on Criminal Procedure (hereinafter: "Code of Criminal Procedure") also sets out the legal solutions with which the legislator intends to achieve the goal of efficient criminal proceedings and to speed up the proceedings. Efforts to accelerate and "tighten up" the procedure and, at the same time, to keep a reasonable time, have become paramount at all stages of the criminal proceedings, with precise time limits for the proceedings and penalties for failure to comply with each time limit. The Code of Criminal Procedure places special emphasis on the cooperation of the defendant, which is already possible during

the investigation. In line with the reasonable time requirement and economical procedure, most European states already apply the principle of different treatment and the application of procedural rules in cases where the accused confesses to having committed the crime, in contrast to proceedings in which the accused does not admit his guilt. As to the investigation, the deadline was increased from 2 years to two and a half years and the investigation phase is separated into the stage of detection and the investigation stage. A completely new legal institution is the preparatory procedure, which, together with the aforementioned legal institutions, aims to prepare the court proceedings thoroughly. In the court phase, the mandatory preparatory meeting, which must be held within the time limit, essentially serves to concentrate the litigation, the responsibility for which is not only on the court and the prosecutor, but also the accused and the defence counsel, and it requires a decision on behalf of the defence on the tactics as well. The measures in force have consistently sought to speed up criminal proceedings in ordinary and extraordinary court proceedings following the investigation, in order to meet the requirements within a reasonable time as set out in Article XXVIII (1) of the Fundamental Law.

Osztovits, András[1]

Online Justice – Opportunity or Risk?

Introduction

"Before the Law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the Law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. It is possible, says the gatekeeper, but not now. (…) The man from the country has not expected such difficulties: the Law should always be accessible for everyone, he thinks." These phrases, some of the most quoted ones of Franz Kafka's novel The Trial, formulate the most fundamental requirement of access to justice: it has to be accessible for everyone. As the courts' organisational and procedural models have developed, access to justice has become increasingly important and, in the course of formulating the details of judicial reforms, an increased emphasis has been placed on the modification of those provisions that produce effects contrary to such access.

The implementation of the right of access to justice has been hindered over time by various obstacles; the latest challenge that the judiciary must overcome results from the dynamic development of information technology (hereinafter: IT). It is increasingly seen that this trend is profoundly changing the current models of socioeconomic processes and is having impacts beyond those of the Industrial Revolution. There are small differences of opinion only as to the length of the change process.[2]

IT development poses a dual challenge to justice systems. First, disputes originating from digitally established legal relationships cannot necessarily be resolved within the traditional framework of court proceedings (due to the accessibility and handling of evidence and the provision and processability of case file documents). Second, the digital era has brought about changes in societal expectations regarding the administration of justice. The current expectations of the functioning of the courts are based on a set of basic principles and standards that have resulted from twohundred years of evolution. However, the radical changes in everyday life entailed by IT development may necessarily transform expectations vis-á-vis the judiciary as well. The process of digitalisation has also been recognised by the legal literature, in particular by AngloSaxon legal scholars.[3] It may not be a coincidence that the AngloSaxon countries were the

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2 This process is convincingly presented by Yuval Noah Harari in: 21 Lessons for the 21st Century. Animus, 2018, Budapest; pages 1580

3 Richard Susskind: Online Courts and the Future of Justice. Oxford University Press, 2019,

first to realise that guaranteeing access to justice was a systemic issue.[4] In Hungary, Zsolt Ződi's researches on the interplay between IT and law are to be highlighted[5]; the domestic legal literature, nevertheless, has so far failed to carry out a systemic analysis of "the pressure" exerted on the administration of justice by IT development. The present study therefore primarily aims at raising awareness of this phenomenon. Chapter I introduces the "gatekeepers" of the relevant Hungarian rules, which, because of their effects, impede the implementation of access to justice in the offline world as well: in addition it presents the digital developments carried out in the past few years to mitigate, in essence, their adverse consequences. Chapter II gives an overview of the fundamental principles on justice that may *prima facie* be infringed in "court proceedings not taking place in a courtroom". The following three chapters present the most successful online court platforms and their regulatory specificities, as well as the EU's single digital market; finally, a number of thesis statements are formulated to inspire further discussions.

I. Access to justice

This extremely complex and multifaceted fundamental right cannot be reduced to the simple assertion that if a country properly ensures the enforcement of civil claims through the courts and enacts a legislation to provide the organisational and procedural framework necessary thereto then it meets its obligation in respect of guaranteeing access to justice. It is no coincidence that, from time to time, a central focus is placed again and again on the issue of what the gatekeepers, as referred to by Kafka in his novel, are that hinder the parties' access to courts. After World War II – and based on the ideas of the AngloSaxon countries –, the reforms of access to justice were implemented in three waves. The first one focused on guaranteeing legal aid on the basis of social considerations. The second one, started in the 1970s, aimed at strengthening the enforcement of the rights of disadvantaged groups by way of defining the rules of collective redress mechanisms (public interest litigation, class actions). The third one – due to the exponential growth in the number of legal disputes – sought to shift the focus from the courts to outofcourt alternative dispute resolution methods. The above process of development has been supplemented, as

Oxford – hereinafter: Susskind; Ethan Katsh – Orna RabinovichEiny: Digital Justice. Oxford University Press, 2017, New York – hereinafter: Katsh – Rabinovich; Nick Bostrom: Superintelligence – Paths, Dangers, Strategies. Oxford University Press, 2014, New York

4 Tom Bingham: The Rule of Law. Penguin Books, 2011, New York; pages 1035 and 90109

5 See among others: Zsolt Ződi: Platformok, robotok és a jog. Új szabályozási kihívások az információs társadalomban (Platforms, robots and the law. New regulatory challenges in the information society). Gondolat, 2018, Budapest; Kódokba zárt jog (Law encrypted in codes) in: In Medias Res, issue no. 2019/2, pages 169186; Big Data a jogtudományban és a jogalkalmazásban (Big Data in the legal literature and in the application of law) in: Közjegyzők Közlönye (Journal of Notaries), issue no. 2019/1, pages 2336

of the beginning of the 2000s, by an ever-increasing need to take advantage of IT tools in the courts' proceedings and for the elaboration of online dispute resolution mechanisms.

The aforementioned three waves of the development of civil procedural laws have reached each European country's justice system, although at different times, and today they are considered to be natural and widely accepted. At the time of their inception, the reform ideas triggered repugnance and professional criticisms. Similarly, there is now a perceptible opposition to the concept of digital courts, but the historical examples show that what is unimaginable today will be the codified rules-based everyday practice the day after tomorrow.[6]

1. Organisational issues

Due to the differing nature of civil claims, it is difficult to resolve all of them in an efficient manner within a heterogenous organisational and procedural framework. The divergent and scattered regulation, on the other hand, reduces predictability, transparency and costeffectiveness. A number of different legal policy objectives and viewpoints regarding the addressing of the courts' issues of organisation and competence are known. For instance, there is a view according to which – in addition to efficiency and case distribution considerations – the provision of career advancement opportunities for judges also has to be taken into account in the drafting of the rules of competence of the Code of Civil Procedure.[7] In Hungary, a division of competencies exists between the civil courts of first instance (which entails that there is a division of competencies between the civil courts of second instance as well), based on a structured judicial system in which more complex cases and cases of higher litigation value are dealt with by high courts, while the remainder of the legal disputes are heard by district courts. It is a fact that the above structure is deeply rooted in the traditions of the Hungarian civil procedural regimes and also exists in numerous other European countries; nevertheless, its efficiency may be questioned for a variety of reasons. The duplication of the courts of first (and second) instance means that a larger number of judicial organisational units with separate leaders and case allocation orders have to be maintained, which is a transparent and comprehensible system only for the judges, whilst the parties to the proceedings, to a greater extent, and their legal representatives, to a smaller extent, struggle to understand it.

Together, the rules of competence and territorial competence form a guarantee

6 The most commonly voiced counterarguments against digital courts are summarised by Susskind, pages 179250

7 Pribula, László: A polgári perrendtartás megvalósult hatásköri modelljének értékelése - a történeti fejlődés tükrében (The assessment of the implemented model of competencies of the code of civil procedure – in the light of historical development) in: Jogtudományi Közlöny (Journal of Legal Sciences), issue no. 2020/1, pages 2134

for the right to a judge assigned by law, and at the same time they create a matrix through which the caseload of the courts may be influenced and adjusted as well. The starting point of the rules of territorial competence is that a court's general territorial competence has to be determined according to the place of domicile of the defendant under constraints, this rigid regulation is, however, softened by the rules of special territorial competence. Hence, the rules of territorial competence favour either the defendant or the plaintiff by way of designating the territorially competent court in the vicinity of the place of domicile of one of them. Such designation, nonetheless, is of significance only if there is a need for the physical presence of the party in the courthouse and loses its impact if the provision of case file documents, access to court papers and the holding of court hearings may also be ensured using online tools.

The above is justified by the success of the 2009 modification of the procedure relating to orders for payment. Until the entry into force of Act L of 2009 on the order for payment procedure, this nonlitigious procedure had also fallen within the courts' competence: as a general rule, the submission of orders for payment and statements of claim had been governed by the very same rules of competence and territorial competence. Following the 2009 modification that placed the handling of orders for payment within the competence of public notaries, and as a result of the simultaneous introduction of electronic orders for payment, the rigidity of the rules of territorial competence has been alleviated, and the current situation is that which public notary shall issue a particular order for payment is designated centrally; thus, the competent notary may not necessarily be the one – in compliance with the previously applicable general rule of territorial competence – according to the defendant's place of domicile. Experience shows that the above solution has been beneficial for everyone; orders for payment procedures have become quicker and more effective, while the division of work between the public notaries can also be settled in an efficient manner.[8] The success of the procedure relating to orders for payment also proves that the rules of competence and territorial competence are primarily of relevance if the parties' physical presence is required; on the other hand, if a service is to be received mainly or exclusively online then the importance of such detailed rules diminishes.

8 Judit Molnár: A fizetési meghagyás kibocsátása iránti kérelmek feletti hatósági kontroll terjedelme a jogszabály változások tükrében (The scope of the authorities' control over applications for the issuance of orders for payment in the light of legislative changes) in: Jogtudományi Közlöny (Journal of Legal Sciences), issue no. 2014/5, pages 239247; Judit Molnár: Alternatívák most és a jövőben is? Az egymillió forintot meg nem haladó pénzkövetelések érvényesítése Magyarországon (Alternatives today and in the future as well? The enforcement of pecuniary claims not exceeding 1 000 000 HUF in Hungary) in: Jog, Állam, Politika (Law, State, Politics), issue no. 2016/2, pages 151164

2. The absence of legal knowledge

It is a constantly recurring argument that ignorance of the law is no excuse for not complying with it. A distinction has to be drawn between ignorance of the law and the situation in which one of the parties involved in a legal relationship seeks to explore his legal options with due diligence, but he has only a limited amount of available resources. The latter situation is illustrated through an everyday example by Katsh and Rabinovich[9]: After seven years of marriage, with two young children and some assets, the fictional couple Sara and Joseph decide to divorce. Sara would like to obtain some information about her options; hence, she reaches out to a lawyer in her area. The attorney describes the legal process that awaits her, preparing Sara for lengthy and costly court proceedings. The lawyer also instructs Sara to restrict her communications with her husband. Her searches on the internet later on uncover options such as mediation, but she is swayed by the lawyer. Although Sara feels that she still does not know enough about her options, she files a legal action with the court through her lawyer. Sara and Joseph's divorce case is assigned a court date several months after the filing date. At the fixed date, they arrive at the courthouse only to find that their hearing is postponed for several months. The lawyer seeks to convince Sara that the postponement is good news, as it gives them more time to prepare. Sara assumes that this is an inevitable part of dealing with courts and the law.

One evening, while conducting additional online research, she comes across an online dispute resolution system for specifically handling family cases called *Rechtwijzer*[10]. The software asks each of the parties a series of questions in plain, everyday language, and then structures their communication with one another in an attempt to produce an agreement. Parties can communicate with one another online, twentyfour hours a day, seven days a week, from the convenience of their own home, office, or any other place with internet access. If an agreement is reached between the parties, a lawyer reviews it to ensure it is legal. If the parties fail to agree, they can ask for a lawyer to assist them online in reaching an agreement. The entire process can be completed in a brief period and at much lower cost than the typical court case.

The above example perfectly illustrates the most important consequence of the absence of legal knowledge: vulnerability. Realising that, the individual States seek to mitigate the latter consequence, principally by way of the dissemination of information related to the enforcement of claims (procedural legal information), and, to a lesser extent, by means of the provision of substantive legal information (*e.g.* through the development of a legal aid lawyer scheme or substantive measures for the organisation of procedures, etc.). One of the common characteristics of legal disputes originating from private law relationships – except for certain types of actions concerning the status or capacity of persons – is that the court's proceedings constitute an *ultima*

9 Katsh – Rabinovich, pages 149150

10 https://rechtwijzer.nl/

ratio means of dispute resolution, since the parties are entitled to dispose freely of their substantive rights, which includes that they are also given the opportunity to seek to reach a common position before a forum of alternative dispute resolution. Irrespective of the high quality of the functioning of the judicial system concerned, the parties' interests are certainly better served by their common agreement than by a court decision, having regard primarily to the fact that such an agreement is far more frequently followed by the parties' voluntary compliance. The presentation of the various options for the resolution of legal disputes originating from private law relationships and of their advantages and drawbacks should be carried out in a manner that is much more organised than it is today, because there is currently no single platform or forum that would make such a presentation in a clearly understandable way.

3. Court administration

The costs of court proceedings include not only the court's fees, but also – and principally – the time needed for the administration of justice. It is precisely the latter that is reduced as a result of the use of IT tools: paradoxically, it is not the period of time required for the adjudication of a case that is shorter, but it is rather the parties' desire to have their case settled faster and faster that is stronger. One of the most timeconsuming parts of judicial proceedings is the hearing phase: if several hearing dates are to be fixed then the parties become obliged to attend each of the hearings, either in person or by way of their legal representative. The travelling and waiting time wasted by the parties and their legal representatives increases the length of proceedings, which has an impact on the costs of litigation (lawyers' fees) and also results in additional costs relating to loss of earnings suffered by the party concerned.

The length and efficiency of court proceedings are directly affected by the degree of organisation and level of efficiency of the court administration. The handling of submissions, the sending out of decisions and the provision of access to case file documents from the beginning to the end of the legal process may add many days and weeks to the overall length of proceedings and may also increase their costs. The most spectacular development project of the last couple of years within the Hungarian justice system that was intended to have an impact on the aforementioned fields, was named the Digital Court project in 2018.[11] The latter includes all types of IT applications and instruments available to the judges, clients and judicial employees. A distinction can be made between the IT solutions that are specifically designed to assist judges in their adjudicating activities and those that support the parties to proceedings. The former comprise a series of applications to facilitate completing forms and are now

11 Osztovits, András: Az ítélkezés jövője a digitális világban (The future of the administration of justice in the digital world) in: A bírói hatalom gyakorlásáról szóló 1869. évi IV törvénycikk megalkotásának 150. évfordulója (The 150th anniversary of the elaboration of Act no. IV of 1869 on the Exercise of Judicial Power), Hvgorac, 2019, Budapest; pages 141146

capable of automatically completing the summons and notice forms under the new Code of Civil Procedure within the courts' document management programme. In addition, an application to fill in the forms used by the administrative and labour courts automatically is currently being introduced.

The judges' work is also assisted by a special application that monitors deadlines and limitation periods in the fields of both criminal and civil law. This application sends automatic messages to judges to inform them of the most important and timebound procedural acts, in particular to warn them about the expiry of limitation periods, the deadlines for putting the minutes of hearings and court decisions into writing or the date on which a decision establishing the termination of the court's proceedings must be delivered following the stay of proceedings.

Moreover, the Digital Court project covers the fields of drafting and standardising court decisions, as well as the development of their publication and anonymisation. The representatives of the various legal professions and the parties to proceedings have been demanding for a long time that court decisions be published in a transparent structure and be expressed in understandable terms, avoiding diverging patterns and wordings that vary from one high court to another or from region to region. The first step in the process of the publication of court decisions is anonymization, which had long been carried out in paper format and had constituted a serious obstacle to the rapid publication of decisions. There is now a new IT system to automate and, thus, to accelerate the process of anonymization efficiently.

There are currently around 900 speech recognition software sites at the Hungarian courts to help judges through the transcription of audio recordings in an automated manner, without human intervention. After further development, speech recognition may achieve a level of quality which will completely replace the work of human typists in the field of putting minutes and decisions into writing, resulting in a reduction in handling times and lengths of proceedings.

In order to facilitate access to justice, a number of digital tools to assist lodging submissions and provide interfaces for courttoclient and clienttocourt electronic communications and other online information platforms have been developed. Among the aforementioned IT solutions, the development of electronic communications should be particularly highlighted; it has been strongly supported by the legislator in the last ten years. In the majority of court proceedings, legal representatives and legal persons may lodge their documents instituting proceedings and their further submissions only by electronic means, and the courts are also obliged to send out their decisions electronically. This legislative and technological development in itself has significantly diminished the length of proceedings and has bypassed the practical problems arising from the postal service of documents, a method previously used as a general rule. Today, the lawfulness of the service of documents has to be established on the basis of postal acknowledgements of receipt much less frequently, since no such interpretational uncertainties may arise with regard to electronic service.

With the aim of informing the parties, an online service has been set up to advise them on the expected length of the various types of proceedings, with the help of which citizens can get an idea of the average length of proceedings (based on statistical data collected in the previous years) in the various types of cases at the court concerned. This online service is also useful because it enables the plaintiffs in civil lawsuits, where more than one court may have competence to hear their case, to learn in advance about their options and to compare the average lengths of proceedings before the different courts.

Another novel IT solution is that the parties are now capable of submitting their complaints relating to the functioning of the courts on an online platform as well, which makes the processing and settling of complaints more efficient and more transparent.

One of the oldest and most tangible obstacles to the exercise of the right of access to justice is the parties' physical distance from the courthouse. In the event that the parties are required to travel to another country or county, they may face serious organisational and workrelated difficulties, irrespective of their age group. One of the most spectacular development projects within the Hungarian court system in the past couple of years has been to establish a remote interviewing network that is capable of recording and transmitting images and audio in and from courtrooms.

This short overview reveals that an increasing number of procedurals steps can be already taken online at the Hungarian courts, which facilitates the judges' work, accelerates court proceedings and promotes the implementation of access to justice. The above progress, however, generates a set of selfamplifying processes in terms of the relationship between society and the courts. The more the average length of proceedings decreases, the more society's expectations concerning the judiciary grow: what was deemed to be a reasonable period of time one or two years ago, which would have been accepted in advance by the parties, is or will be considered too lengthy today or tomorrow. IT development is therefore both a blessing and a new challenge to be faced by the courts.

II. The principles of the administration of justice

The basic principle that comprises the most attributes and entails the richest caselaw within the principles on justice is the right to a fair trial. The latter includes the principles of publicity, immediacy and oral proceedings. The principle of publicity ensures the possibility of society's control over the functioning of the courts and incorporates the media's right to report on judicial proceedings, with restrictions that vary from country to country. Image and sound recordings of court hearings may be made only with the consent of the parties present, and the lack of such consent or the absence of the party's physical presence in the courtroom entails that public control over the functioning of the courts cannot be exercised appropriately in an *ex post* manner. As part of England's recent judicial reform, audio recordings of online court hearings

have later been uploaded and published. In such a situation, society's control over the functioning of the judiciary can thus essentially be exercised without a limit in time.

Judicial practice attaches particular importance to the principles of immediacy and oral proceedings. This is also shown by the rule according to which the evidence taking measures taken by the first instance judge at the court's hearings can only be reviewed at the appellate stages of proceedings to a limited extent. The above rule and its related caselaw are based on the realisation that the judge best placed to assess the frequently contradictory and incomplete pieces of evidence correctly is the one who had the opportunity to actually and directly ascertain their truthfulness during the first instance proceedings.

The entirety of the principle of oral proceedings, closely related to immediacy, also applies only to first instance proceedings. One of the cumbersome aspects of oral hearings is that if, despite having been duly summoned, the witness or expert fails to appear before the court, or if a required material piece of evidence is not submitted, and consequently the court's hearing has to be postponed to a date several weeks or months after the original date, then such postponement, in itself, results in the significant protraction of proceedings. One of the conceptual modifications introduced by the new Code of Civil Procedure has therefore been to limit the application of the principle of oral proceedings: in the preparatory phase of the proceedings, the court is given a power of discretion to decide whether a preparatory hearing is to be held or whether the parties' written statements are sufficient for determining the framework of the legal dispute and the taking of evidence. If a preparatory hearing is to take place then the parties have to be summoned to it and it must take place in a courtroom, which makes the preparatory phase, aimed primarily at clarifying the parties' position, rather uneasy and overly formalised.

In its caselaw related to Article 6 of the European Convention on Human Rights (hereinafter: Convention), the European Court of Human Rights (hereinafter: ECtHR) has examined, on a number of occasions, the implementation of the principle of oral proceedings (frequently intertwined with the principle of immediacy); the relevant findings were summarised by the ECtHR's Grand Chamber judgement, delivered on 6 November 2018, in the case of Ramos Nunes de Carvalho e Sá v. Portugal[12]. The ECtHR has identified three exceptional situations: i. the court can fairly and reasonably decide the case on the basis of the case file, ii. the case raises purely legal issues of limited scope and iii. the case concerns highly technical issues where the existence of a speedy decisionmaking process is of particular importance, such as certain social security cases (paragraph 190). By contrast, the ECtHR has found that holding a hearing is necessary where there is a need to assess whether the facts were correctly established by the authorities, where the circumstances require the court to form its own impression of litigants by affording them a right to explain their personal situation or where the court needs to obtain clarification on certain points, *inter alia*

12 Applications no. 55391/13, 57728/13 and 74041/13

by means of a hearing (paragraph 191). The ECtHR has previously examined whether the lack of a public hearing at a lower-instance court may be remedied by a public hearing at the appeal stage. In a number of cases, it has found that if the appellate court has full jurisdiction – in particular to order the taking of evidence, to review the earlier assessment of pieces of evidence or to reestablish the facts of the case – the lack of a hearing before a lower level of jurisdiction may be remedied before that court by holding a public hearing. If, however, the appellate court has no such jurisdiction then an infringement of Article 6 of the Convention may be found (paragraph 192).

In respect of alternative dispute resolution mechanisms to be used through online platforms, Susskind analysed whether such mechanisms complied with the right to a fair trial, as stipulated by Article 6 of the Convention, and he concluded that if they could be followed by a procedure in which the principles of justice were to be fully respected then the possible deficiencies of the alternative dispute resolution forum did not conflict with the Convention. Susskind also raised the question whether the principles of publicity, immediacy and oral proceedings took precedence over the other principles of the administration of justice, and whether the former principles excluded the possibility of any change aimed at placing the venue of dispute resolution outside the courtroom or, eventually, to the online space. According to Susskind's opinion, consideration has to be given to both the advantages and drawbacks (a violation of the sofarknown contents of the basic principles) of online dispute resolution mechanisms. The solution he recommends is to enable, primarily, the judge seized with the case to decide whether the legal dispute at hand is to be resolved only on the basis of written preparatory materials and written statements or whether it is to be dealt with through the ordinary way of court proceedings, within the traditional framework of hearings.

III. Online court models

The implementation of the vision of online courts has already begun in many countries, which may constitute good starting points for further developments. In England and Wales, the HM Courts & Tribunals Service prepared, in 2015, a report in which the introduction of an internetbased court service, to be called Her Majesty's Online Court, was proposed. According to the proposal, a threetier court service should be set up for low-value civil claims. Tier one would help users with a grievance to classify and categorise their problem, to become aware of their rights and obligations, and to understand the options and remedies available to them. Tier two would provide online facilitation to bring a dispute to a speedy, fair conclusion without the involvement of judges and with the assistance of online facilitators. Tier three would provide online judges, who could hear the parties and who would be entitled to decide, at any time, to proceed with the dispute resolution process, pursuant to the general rules of procedure, in a courtroom. In 2016, the Secretary of State for Justice approved the above report and provided an amount of GBP 1 billion for the implementation of

judicial reform, part of which was dedicated to the establishment of online courts.

Susskind welcomes the establishment, of the Traffic Penalty Tribunal in England and Wales in 2000. It is entitled to deal with appeals submitted against penalty charge notices. The tribunal's platform enables the opposing parties to establish realtime contacts with each other by any internetbased device (smartphone, tablet). The parties are given the option of communicating with each other by various means, for instance, either via messages or by chat. Similarly to the idea of the aforementioned online court service, the platform is not operated by judges but by administrators who are responsible for assisting the parties, upon their request, in clarifying their position. Once both parties have uploaded or presented their evidence and arguments, the appealing party is free to decide whether to ask for the delivery of an edecision without any further hearing or to request a telephone hearing be held in the simultaneous presence of the administrator and the opposing party. The statistics of the past two years show that hearings have been requested in only 10 percent of incoming cases; 11 percent of the cases have been settled on the date of their receipt and 25 percent of them have been decided on within one week, while 70 percent of them have been adjudicated within 4 weeks.

From among the Chinese development projects, Susskind highlights the use of artificial intelligence. The Supreme People's Court is currently building a platform that contains 94 million cases, 46 million documents, 24,000 court staff files, 10 million pieces of statistical data and 100 million items of case information. They seek to improve their case management and ongoing judicial reform by using the method of Big Data analysis. In 2000, Singapore was the first country in the world to introduce a judicial form completion application, the use of which became obligatory for attorneys. In 2016, a programme called "The courts of the future" was launched under the leadership of the President of the Supreme Court, with the objective of using artificial intelligence and online dispute resolution methods. The following year, another programme was initiated to hold ehearings between the parties in cases involving low-value civil claims and labour disputes. Susskind also presents two initiatives from Australia. The first includes a service enabling judges and lawyers to communicate and exchange documents with each other online, without the need for their appearance in the courtroom; the second is a platform specifically for insolvency proceedings, in which form completion applications assist in the automation and processing of submissions.

In the United States of America, researchers at the University of Michigan developed an online service called Matterhorn, which was first put into use in 2017 at a district court in Michigan. This service is now operational at more than 40 courts in eight different States. It was originally designed to improve the efficiency of communications between the courts and citizens. Matterhorn is available 24 hours a day through smartphones and is mainly suited for the resolution of low value civil claims and family disputes. Moreover, the platform also transmits the court's decision to the parties. Another online court was launched in Utah in 2018 to deal with legal disputes with a litigation value of less than USD 11,000. This platform provides the parties with the

possibility of directly negotiating with each other to reach a friendly settlement without the involvement of a court or of requesting the assistance of facilitators to offer them guidance on fundamental legal issues and help them to reach an agreement. Facilitators are also responsible for assisting the parties in the submission of the necessary court papers if the parties fail to reach an agreement. In addition, facilitators may decide to bring the case before a judge, and the latter may either order the hearing of the parties or, upon their request, adjudge the dispute without holding a hearing, on the basis of the submitted written documents.

In Susskind's opinion, the best known and most advanced online dispute resolution mechanism currently operates in British Columbia, Canada under the name of the Civil Resolution Tribunal. This mechanism was launched in mid2016 to resolve pecuniary disputes with a litigation value of no more than CAD 5,000, while as of 2019, it can also be used in respect of claims for compensation for damage caused by a car accident below the value of CAD 50,000. The service offered by the tribunal has four tiers. Tier one consists of helping users to understand their legal situation; tier two aims at assisting the parties in reaching an informal agreement. If the parties cannot resolve their dispute by negotiation, tier three proposes the intervention of a case manager, who tries to help the parties to reach an agreement. Finally, if the latter phase also fails, tier four includes the delivery of a decision by an independent member of the tribunal (who, nevertheless, does not qualify as an ordinary judge).[13]

IV. The Digital Single Market in the European Union

In its programmatic paper, the European Commission (20152019) articulated the need for the establishment of a digital single market.[14] Initially, the latter primarily aimed at harmonising the various online economic and commercial services, but later on the policymakers started to realise that such harmonisation also necessitated the improvement of the efficiency of crossborder enforcement actions. The development of the above process at EU level is well illustrated by the fact that the conclusions, adopted on 9 June 2020, of the Council of the EU on shaping Europe's digital future expressly refer to the implementation of access to justice, which can be facilitated and improved by the digitalisation of the justice systems of the Member States throughout the European Union. The Council therefore called on the Commission to facilitate the digital crossborder exchanges between the Member States in both criminal and civil matters and to ensure the sustainability and ongoing development of the technical solutions that have been developed for crossborder exchanges.

The two most important online platforms that currently provide assistance in that regard are ejustice.eu and ecodex. They help users to fill in – in all the official languages of the EU – a number of forms attached to the various EU pieces of legislation adopted

13 Susskind, pages 165176

14 A Digital Single Market Strategy for Europe – COM(2015) 192 final

within the framework of judicial cooperation in civil and criminal matters, to gain knowledge of the contact details of the competent national courts and authorities and to familiarise themselves with the relevant national laws.

In this field, the most farreaching piece of EU legislation has been Regulation no. 524/2013/EU of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, on the basis of which the European Commission set up an online dispute resolution platform. The latter has taken the form of an interactive webpage that is accessible through a single entry point for consumers and traders who seek to resolve their disputes originating from online transactions outside the judicial process. The online dispute resolution platform provides general information regarding the outofcourt resolution of contractual disputes between traders and consumers arising from online sales and service contracts. It allows consumers and traders to submit complaints by filling in an electronic complaint form available in all the official languages of the institutions of the Union and to attach relevant documents. It transmits complaints to an alternative dispute resolution entity competent to deal with the dispute concerned and offers, free of charge, an electronic case management tool that enables alternative dispute resolution entities to conduct the dispute resolution procedure with the parties through the online platform. The Commission is responsible for the development, operation and maintenance of the platform and provides all technical facilities necessary for its functioning. The platform also offers an electronic translation function, which enables the parties and the alternative dispute resolution entity to have the information exchanged through the platform and necessary for the resolution of the dispute translated, where appropriate. Finally, the platform provides complainants with the possibility of requesting assistance from experts (the platform's contact points).

V. The regulation of online courts

According to Katsh and Rabinovich, all successful dispute resolution systems can be conceptualised as a triangle, the sides of which represent three elements: trust, experience and convenience. The regulation of both court proceedings and outofcourt, alternative dispute resolution mechanisms should include all three elements, but not necessarily to the same degree. The benefits of early online dispute resolution platforms were mostly in the area of convenience. As a result of technical progress and the rapidity and unlimited nature of gathering and processing data, the enhancement of the expertise side – by way of the replacing human judges – is the most important task of today. The processing and evaluation of data, facts and pieces of information are the key elements of all civil court proceedings, in respect of which the means of modern technology have immeasurably greater capacity than humans.[15]

Susskind makes a distinction between two regulatory models: the first one is based

15 Katsh – Rabinovich, pages 37-38

on the idea of introducing the use of digital tools within the framework of the courts' existing organisational and procedural rules, while the second one opts for the development of a completely new organisational and procedural regime. The latter model attributes a key role to online courts and assigns only a complementary function to the existing traditional framework. It would work mainly in first instance proceedings, which would provide the possibility of switching from a first instance online process to an ordinary appellate court procedure. The statistical figures in Hungary also demonstrate that 60 percent of lawsuits are concluded with final and binding effect at first instance[16], and the most timeconsuming procedural phases are concentrated in the first instance proceedings; therefore, if they can be shortened and made more efficient then it would have a positive impact on the overall length of proceedings as well.

Susskind supports the second model and gives an illustrative example, pointing out that it is not possible to change a tyre on a moving vehicle. He assumes that online courts should be accessible through a platform that would be able to assist the parties in obtaining information on their procedural and substantive rights, filling in forms, approximating their legal positions and reaching an agreement and that such assistance functions in themselves would greatly lessen the courts' workload. If the parties fail to reach an agreement, they should be entitled to lodge and clarify their submissions, to be heard and, ultimately, to have a decision in their case made through the platform or by other online means. This model, nonetheless, is not suitable for resolving all types of civil disputes and so, if the case involves complex legal issues, the platform's legal assistant may refer it for treatment under the conventional court procedure.

VI. Thesis statements

The present short overview has sought to raise awareness of the impact of IT development on the administration of justice and the consequential changes in the requirements to be complied with by the courts. The understanding of this phenomenon is made difficult by the fact that there is no absolute limit to which IT can be developed; what is unimaginable today will become a reality in a couple of years or decades. However, due to the dynamics of the development process, it can already be stated that the twohundredyear old judicial and procedural structure will not be able to manage, in a systemic manner, the changing socioeconomical expectations. Hence, safeguarding the right of access to justice requires radical changes.

The Digital Revolution, with an impact several orders of magnitude greater than that of the Industrial Revolution, has already started, in which the smooth and predictable operation of the justice system continues to be one of the cornerstones of social peace and has an effect on economic growth. Therefore, the country in which the above phenomenon is first acknowledged will be able to gain a significant competitive advantage by appropriately answering the following question: Are courts

16 https://birosag.hu/ugyforgalmi-adatok/birosagi-ugyforgalom-2019-eves-adatai

primarily buildings or service providers? Finding a solution that is compatible with the currently known principles of justice, based on professional and social consensus and works efficiently in practice will take a long time, and I intend to promote the launch of the solutionseeking process by drawing up the thesis statements below, hoping that they will be able to inspire further discussions.

1. IT transforms our economic and social practices, and an increasing proportion of civil law relationships are established online. The courts and the procedural legal framework of proceedings need to be made suitable for managing the above changes; the dominance of "databased" proceedings, in addition to "paperbased" proceedings, should be reached.
2. The majority of the principles of the administration of justice and the procedural principles thereof create an almost twohundredyear old structure, which increasingly hinders the efficiency and timeliness of proceedings. This model mainly gives priority to the courts' decisionmaking competence, while it attributes less importance to their role as service providers. The diversity and the acceleration of the development of legal relationships require an improvement in the flexibility of the organisational and procedural structure of the courts.
3. In practice, the effectiveness of access to justice is already impeded by many legal and nonlegal factors the number of which continues to grow due to the diversity and – partly – differing nature of online legal relationships. The direction of the changes to be made is the dismantling of obstacles and the expansion of the right to access to justice.
4. It is appropriate to distinguish between the concepts of digital court and online court. The former means the integration of IT tools into the existing organisational and procedural frameworks, while the latter seeks to rethink the current settings by imagining the courts mainly as service providers and by shifting the venue of court proceedings from the courtrooms to the online environment.
5. Digital courts and online courts are not mutually exclusive but rather as complementary forums, between which procedural interoperability should be guaranteed.

Köbel, Szilvia[1]

The Code of the Serving Church - The Impact of the Socialist State on the Constitution and Internal Laws of the Reformed Church in Hungary

Introduction

When we try to uncover the effects of the Socialist State on the constitution and internal laws of the Reformed Church in Hungary, we cannot disassociate from two broader contexts. One of them is, that every historical era and every governmental, social and political status will always have an impact on the internal laws of the churches that be. However small or big in magnitude and depth it may be, this impact usually goes through via different governmental measures and initiatives. Church autonomy is threatened whether the intention of the state is to limit and ban or simply aid the churches. An example of the former is the hostile and interventionist church policy of the communist party[2], and of the latter the Protestant church of the XVIII-XIX century, which had the status of state church and the schisms that took place within it as a result of the principle of "free churches in a free state".[3] The other context is, that this impact was felt across every conceivable religion, church or religious organization, not just Christianity. History shows that there are no exceptions, although there are some differences in the impact. These differences can originate from the state's relation to the theological viewpoint of the organization or the attitude of the religious leaders at that time. It is also observable, that depending on the interpretation of the relationship between the church and the state, different groups form within the church (conformists – nonconformists) which leads to theological debates, furthermore, in certain cases may lead to schisms and separation.[4]

1 Associate Professor, Department of Constitutional Law

2 See Szilvia Köbel: *The Legislation regarding Freedom of Religion and Conscience in some past Socialistic States during 1945 and 1989*. In Levéltári Szemle, 2005/2.; 53-61.

3 János Gyenge: *The History of Free Reformed Churches* Nagyvárad, 10th June 1924. http://konyvtar.proteo.hu/sites/konyvtar.proteo.hu/files/documents/1924/1481707052.pdf Time of download: 26th November, 2017

4 See István J. Kováts: *The Fundamental Questions surrounding the Constitution of the Reformed Church* Budapest, 1948. 435.

In the world of jurisprudence these processes can be grasped in the context of the relationship between the internal laws of the churches and those made by the state. This relationship between the two sources of law took various forms in the past (State Church, separation, cooperation.)[5] The separation of these two in the legislation created during the years of the party-state is especially challenging, because in the context of the Socialist State, one cannot speak of ecclesiastic law in its classical sense.

Professor of law, Andor CSIZMADIA, who for decades served as a legal advisor to the State Office of Church Affairs, wrote the following in the foreword of his monograph about the church policy of the Horthy-period, dated 1966: "As a result of the separation, we completely excluded the thorough inquires of the internal lives of the churches, their governing bodies and the norms that regulated them from the circle of our legal investigations for years on end, and essentially let the historical scholars deal with uncovering the relationship between the state and the churches".[6] This was indeed the case. During the years of the Socialist State (1949-1989)[7] the research on freedom of religion and conscience – along with the other fundamental rights – and the relationship between state and church was put on the sidelines of jurisprudence. As a result, the explicit course on ecclesiastical law was completely absent from law studies and only scarcely found in theological studies.[8] As a result, during these decades, aside from the above mentioned work of Andor Csizmadia, no complete, organizing, dogmatic-level work was ever created in the field of ecclesiastic law either from the state's or the Church's side.[9] The last protestant monography about

5 See these works on ecclesiastical law after the Hungarian regime change: Lóránd Boleratzky: *The Foundations and Sources of the Lutheran Ecclesiastical Law in Hungary*. Budapest, Ordass Lajos Baráti Kör, 1991.; Antal Ádám: *Philosophy, Religion, Church law*. Dialóg Campus, 2007.; Béla Szathmáry: *Hungarian Ecclesiastical Law*. Budapest, Századvég Kiadó, 2004. 507 p.; Balázs Schanda: *Hungarian Church Law*. Budapest, Szent István Társulat, 2000; Balázs Schanda: *Church Law*. Budapest, Szent István Társulat, 2012.; Lajos Rácz (edited by): *Ecclesiastical Law*. Budapest, HVG Orac, 2004.; Péter Antalóczy (edited by): *The Foundations of Church Law*. Budapest, Patrocinium Kiadó, 2012.; Szilvia Köbel (edited by): *The Foundations of Church Law and Ecclesiastical Law*. Budapest, Patricinium Kiadó, 2016., 2019.

6 Andor Csizmadia: *The Development and Practice of the Legal Relationships between the Hungarian State and the Churches during the Horthy-era*. Budapest, Akadémiai Kiadó, 1966.

7 We have to mention, that during the decades of ruling of the party-state we have to differentiate between time periods, as the seventies and eighties showed a gradual easement, however meaningful change only happened during the regime change.

8 This topic was primarily relevant in the context of legal history classes and in state law (commonly referred to as constitutional law since the 1970s) courses, amongst civil rights. In a special branch of the state law, one could find The State Office of Church Affairs, a national-wide agency created for the purpose of overseeing and controlling the churches. This, however, was but an insignificant part of the curriculum. See Péter Schmidt (ed): *Hungarian Constitutional Law*. Budapest, BM Academic and Propaganda Group Leadership, 1976.

9 We note here, that the studies that served as foundation for the party-state's church policy which analysed the relationship between the Church and the state, and were, on one hand,

ecclesiastical law prior to the regime change was by István J. Kováts. Kováts's almost 500-page long work, titled "*The Fundamental Questions surrounding the Constitution of the Reformed Church"* was finalized on the 28th of August 1947 – just before the creation of Act Nr. XXXIII of 1947 – and published in 1948, the same year as the agreement between the Reformed Church and the Socialist State was formed.[10] One must also mention the short, but important work of Dr. László Farkas, "A study on ecclesiastical law" from 1956. The short note was made specifically for theology students and can be found in the library of the Theological Academy of the Reformed Church in Sárospatak.[11] Géza Szabó's note called "Ecclesiastical Law Studies" was published in 1977 and was mainly used by the theology students in Budapest in the frame of the "Practising Theology" course.[12] During these decades, no comprehensive church law was ever created despite the mentioning of a certain "national religious law" in the agreements of 1948.[13]

As we've already mentioned László Farkas and István J. Kováts, we can note here, that both were seen as "enemies" by the state. According to the documents of the state security archives, after 1956, László Farkas was absolved from his position as Leader of the Convent Office, without any given reason, it was simply the "state's wish".[14] In reality, this was done in the form of forced abdication.[15] István J. Kováts, based on state security (political police) agent reports from the early '60s, was branded "enemy of the national democratic system", his name got connected with the Renewal

based on socialist science, and on the other created solely to support the undertakings of the state security agencies. See e.g. István Kónya (ed): *The Religious Theory of Marxism and the Education of Students on the Marxist World View*. Budapest, 1985.; József Lukács: *Churches and religiousness in Socialist Hungary*. Budapest, Kossuth Kiadó 1959, 1979.; *Collection of Criticism on Religion. The Educational Material on the Marxist-Leninist Specialization Training of the Hungarian Socialist Worker's Party*. (Kossuth Kiadó, 1970-1971.); István Berényi: *The Hostile Undertakings of the Clerical Reaction against our Democratic Order. The Tasks and Aspects of the Operative Work in this Field. BM Central Officer School, Police Academy, Division of Political Investigation*. Budapest, 1963. Study of the State Security. ÁBTL 4.1. A-3794. (Old marking: TH 160/2.)

10 István J. Kováts r. w.

11 See László Farkas: A study on ecclesiastical law. Sárospatak, 1956. Reference number AN.11.090. in the library of the Theological Academy of the Reformed Church in Sárospatak. I wish to thank university professor Béla SZATHMÁRY for this source.

12 Géza Szabó: *„Ecclesiastical Law Studies"* published by the Theological of Academy of the Reformed Church in Budapest during the 1976/77 school year. Budapest, 1977. Part III is available in the Ráday Library.

13 See Magyar Közlöny 1948/227., 271. and 276.

14 ÁBTL -3.1.2 – M-14620., page 56.

15 See the documents of László FARKAS's resigning in Dr. Erzsébet Horváth (edited by): *Renewal, Reorganization. Documents in the Council Archives of the Reformed Church in Hungary for the Research of Events between 1957 and 1958*. Budapest, Kálvin János Kiadó, 2008. 220-229.

Movement[16] and was under constant surveillance until his passing in 1965.[17] Agent "Péter Tóth" (code name), who himself was a dean of the Reformed Church, even made reports of his funeral.[18]

16 At the end of his 1947 book, István J. Kováts remarked, that the big questions surrounding the Reformed Church in Hungary were the "transition from a state-supported-church into a free system of churches" and the "transformation from a national religion into one based on free will". This system, however, can function only if a strong spiritual front is constructed, which solidifies the transformation into a Presbyterian system by including it in its constitution. J. Kováts. r. w.

17 ÁBTL – 3.1.2 – dossier nr. M-25802. "Péter Tóth", who was a reformed pastor and former student of István J. Kováts, his agent's report about retired under-secretary and theology professor István J. Kováts dated June 20 1961, was evaluated by the officer of the state security (handler of agent) the following way: "The agents report on István J. Kováts is interesting. It is clear from the report, that István Kováts is an enemy of the people's democracy and hopes that the system changes soon. … New task: Ascertain, which political questions interest István Kováts, how he imagines a regime change, which internal and external aids he hopes for and whether he himself is important in this situation. … As I've determined his task, I order the agent to visit István Kováts in his apartment on the 4th of July. … During his visit, after inquiring about the usual familial and health matters, the agent is to complain about problems concerning the church diocese and to mention some of these problems, of which there currently are plenty. Tell him, that the main problems were caused by the farmer's cooperative, because if the priests honestly tell the farmers what bothers them about the management of the former's cooperative, then they will get in trouble with the authorities. If they say the opposite, then they are being dishonest, and the farmers will distance themselves from the Church. The agent is to also complain about the Church not having enough money for pensions and if there is no change in sight – which would increase governmental support – then there won't be anything to pay the retired priest from. If Kováts reacts by saying there will be change in before mentioning this, then pursue that topic and ask his opinion on the matter. The agent is to tell him, that his opinion is, that the domestic forces – from whom the change can be expected – were intimidated after the 1956 revolution and that they are too afraid to act. He is to tell him, that he doesn't believe there is a force in Hungary that could start a revolution, because the western forces wouldn't support them, just like they didn't in 1956, because they too are afraid. The agent is to raise political questions, like the meeting between Kennedy and Khrushchev, Khrushchev's speech, and ask his opinion about them. The agent must be polite and humble, just like he used to be, when was Kováts' student. The agent is to act like he is really interested in the old professors' political stances, and to act as if he believes everything he says, but is interested in the details for reference."

18 The agents found it important, to inform the political police about the presence "Dr. László RAVASZ former bishop, Dr. László PAP former theological dean, István MORVAY institutional priest from Budapest, Károly DOBOS former avenue pastor" at the funeral, who had a somewhat intimate conversation. They were the leaders of the Renewal Movement and asked each other about their personal lives and work. "The police captain in charge of reviewing the report commented the following: "Obviously, their presence shows, that the former advocates of the Renewal Movement keep in touch, and comment with pity on the fate of each other. See ÁBTL -3.1.2 – dossier nr. M-25802/1

From the side of the domestic academics then, the party-state received almost no critical reflection concerning the codified legal status of the churches. The hostile separation model, constitutionally declared in 1949, was based on the Stalinist model of the same name and received some refinement through some party resolutions during 1958. The resolutions made it clear, that the cooperation between the state and the churches is possible and necessary, thus the model slowly swayed in the direction of a separation-cooperation model, at the same time maintaining its hostile position.[19] Because of this, the two sides of legislation (state church law and ecclesiastic law) started to get closer and closer. Instead of striving for a true separation however, the party-state demanded that the Church bow down to the design of the state concerning its internal laws and used every tool at its disposal to solidify the legal and administrative hold it possessed.

Below I wish to highlight three areas of the denominal relations of the Reformed Church, where the imprint of the party-state is abundantly clear: Ecclesiastical legislation, personal questions and organizational questions.

1. Ius Reformandi – Ecclesiastical Legislation

In this section, we primarily wish to determine just how much autonomy the Reformed Church had in creating, modifying and enforcing its own, internal laws – regarding both content and form. This study will focus on the documents concerning the synodal legislation, more precisely the Code of the Reformed Church (hereinafter: Code), containing six acts, which was adopted by the VII. Synod of Budapest in 1967 and eventually put into effect in 1968.[20] Regrettably, the related records are unavailable, their location unknown, thus we have to forgo our inquiry into them.[21] The official paper of the Reformed Church however reported multiple drafts of the Code, comments, remarks and details from arguments. Therefore, we can use this material as a source.[22]

The changes in the internal laws of the Reformed Church in the sixties are important for a number of reasons. First of all, the foreword of the Code states, that the Code was passed by the VII. Synod of Budapest in 1967, on the occasion of it being the 400th anniversary of the first Constitutional Synod of Debrecen. That year was also the

19 See Szilvia Köbel: *"Divide and Rule!" The Party-State and the Churches*. Budapest, Rejtjel Kiadó, 2005

20 At the same time the internal laws of the Reformed Church created between 1933 and 1951 were put out of effect with a separate act. See the Ecclesiastical Act II of 1964 on the abolishment of outdated acts. Published by the Reformed Church in the official paper of Reformed Church in Hungary. June, 1967. Series XIX., Issue Nr. 8, P. 169-170.; Complete and comprehensive legislation didn't take place in the Reformed Church until the Regime Change in 1989/90.

21 According to the information of Dr. Erzsébet Horváth, head of the Synod Archives.

22 See the 1967 and 1968 issues of the official paper of the Reformed Church in Hungary

450th anniversary of the reformation. Furthermore, 1968 was the 20th anniversary of the agreement between the Reformed Church in Hungary and the Hungarian State, and according to the original agreement, this would've been the year the subventions for the Church expired.

In the summer of 1967, on the occasion of the 400th anniversary of the Constitutional Synod of Debrecen, in a work called "Reformation: Our Heritage and Task", the Synod of the Reformed Church in Hungary recalls the dilemma of finding common ground with the state in the period immediately after the Second World War, preceding the agreements. They reminisced on one hand about how the Church showed its "willingness" to operate under the new governmental and social order in Hungary with its own means, and on the other hand how – this part is rarely quoted – the Church "resisted the urge to become an illegal political party", and distanced itself " from the very real danger of having political examinations – under the guise of Samaritan services pertaining to the unavoidable effects of such a large change in society – hide within the Church".[23]

The third session of the Synod opened on 1 April 1964 was held in autumn of 1967. This time the Synod conferred in the spirit of the reformation. Its main task was to exercise Ius reformandi, as in finishing the ecclesiastical legislation that began in 1959. During his opening speech as president, Bishop Dr. Tibor Bartha summarized the six drafts by saying that never in the history of the Church has there been a "legislation that took the perspectives of the 'Serving Church of Serving Christ' as much into consideration", as this draft did. According to the president, the draft clearly "brings the status of the Church forward from being a ruling national church to a serving one."[24]

The synod created the following ecclesiastical acts:

- Ecclesiastical Act I of 1967 on the Reformed Church in Hungary and its Service
- Ecclesiastical Act II of 1967 on the Constitution and Administration of the Church
- Ecclesiastical Act III of 1967 on the Servants of the Church and their Employment
- Ecclesiastical Act IV of 1967 on the Budget of the Church
- Ecclesiastical Act V of 1967 on the Pensioning of Reformed Clergymen
- Ecclesiastical Act VI of 1967 on Ecclesiastical Legislation

23 The official paper of the Reformed Church in Hungary, June, 1967. Series XIX., Issue Nr. 6; See the history of the "Free Reformed Church" that, under the leadership of Abraham KUYPER, separated itself from the Reformed Church of the Netherlands (that, at the time was the national religion) in 1886 and represented "historical Calvinism". (GYENGE, r. w. 11-16) Kuyper was Prime Minister of the Netherlands between 1900 and 1905, founded a party to "politically represent the spirit of Calvinism". In Hungary Dr. Jenő SEBESTYÉN supported "historical Calvinism" and proofread Kuyper's translated work. See Dr. Abraham KUYPER: *Lectures on Calvinism*. Translated by Sándor CZEGLÉDI and József CSŰRÖS. The translation was reviewed and provided with an introduction and further notes by Dr. Jenő SEBESTYÉN. Budapest, 1922. http://leporollak.hu/egyhtori/kalvin/izmus/KUY_PRIN.HTM Time of download: 30 November 2017.

24 Reformed Church. The official paper of the Reformed Church in Hungary. November 1967. Series XIX. Issue nr. 11. 241-243.

Ecclesiastical Act I of 1967 on the Reformed Church in Hungary and its Service states, that the service of the Church is to be regulated by the ecclesiastical laws and decrees, and those are to be based upon the Synod-Presbyterian polity.[25] In the debate, Bishop Tibor BARTHA outlined, in relation to the act, the theological fundamentals of the "service-theory".[26]

Ecclesiastical Act II of 1967 on the Constitution and Administration of the Church declares, that "the general matters of the Church are to be handled by the Synod".[27] In this act, we can examine the overlaps between church law and ecclesiastical law, essentially the laws, that provide a framework for the operation of the Reformed Church. The act then references the existing constitution: "The Constitution of the Hungarian People's Republic declares the separation of church and state."[28] The very same paragraph also adds the following twist: "However, the right to supervise the correct use of laws, originating from the sovereignty of the state and the constitution, prevails."[29] The "however" signals the contradiction between how it was officially planned, and how it actually materialized. The Constitution didn't reference the state's right to supervise, or other forms of constraint, neither in the section about the separation, nor in any other section. Act XXXIII of 1947 on the Equality of Churches didn't reserve the state's right to supervise, since this act also annulled provisions of the Act XLIII of 1895, that placed the state-approved churches under the "state's protection and supervision".[30]

In practice however, due to the state following the Stalinist model, it exercised complete control over the churches. With the establishment of the State Office of Church Affairs (in Hungarian: Állami Egyházügyi Hivatal, hereinafter ÁEH) in 1951, the administrative oversight returned into the legal system in the form of control and supervision (with the omission of "protection").[31] Therefore, the right to supervise churches didn't originate from either the state's sovereignty[32] or the Constitution, but

25 Act I of 1967, 8. § b)

26 Reformed Church. The official paper of the Reformed Church in Hungary. November 1967. Series XIX. Issue nr. 11. 244

27 Act II of 1967, 2. § (2)

28 Act XX of 1949 on the Constitution of the Hungarian People's Republic.

29 Act II of 1967, 3. § (1)

30 Act XXXIII of 1947 on the Abolishment of the adverse differences between established and recognized Churches. 2. §. This act contained paragraph 7-8. and 18. of Act XLIII of 1895 on the free practice of Religion.

31 See the following acts: Act I of 1951 on the Establishment of the State Office of Church Affairs; Decree No. 110/1951. (V. 19.) MT on the implementation of Act I of 1951 on the Establishment of the State Office of Church Affairs, the 25th Decree-Act of 1959 on the Establishment of the State Office of Church Affairs, furthermore State Decree No. 33/1959. (VI. 2.) on the implementation of the 25th Decree-Act of 1959 on the Establishment of the State Office of Church Affairs.

32 In the socialist jurisprudence the relationship between state and church was primarily

rather the existence of the State Office of Church Affairs (ÁEH).[33] Act II also states, that the relationship between the Church and the State is to be regulated[34] by the agreement.[35] Its next heading contains a rather interesting provision: "If the churches cannot ensure the free practice of religion, as guaranteed in the constitution and the agreement, it may turn to the state authorities for assistance."[36] This statement however, did not have sufficient legal guarantees, especially after the cessation of the Hungarian Administrative Court in 1949.[37] The next paragraph of the Act states, that the churches are granted autonomy by the State and that their municipalities are legal entities.[38] The act also reaffirms the parochial principle and the Presbyterian polity.[39]

The sixth paragraph of the act contains the provision, that best represents the state's right to supervise the churches. The act says, that "the churches have the right of ecclesiastical legislation", and the ecclesiastical laws created can be modified, explained and annulled later by a newer law. The section also states, that ecclesiastical laws mustn't contradict the state's laws. This decree however – while being pretty much in line with that of a Rechtsstaat[40] – does not entail the right of supervision. A statement in the very same section however shows an aspect of the hostile separation, that, in fact, was a non-separation: "The ecclesiastical laws are approved by the state."[41] This meant, that the state stood on the highest step of the ecclesiastical legislation. This right of approval didn't expand onto lower levels of legislation, because those were put into effect by the senior ecclesiastic authorities.[42]

In practice, this meant that the President of the ÁEH provided the law – approved by the synod – with a confirmation clause. This clause was part of a guarantee system between the branches of power, within the secular legislation, much in the same way as a king, who would sanction laws or like a state president who would sign them and have the right to order their declaration, all of which act as veto. From a

approached from the side of the state's sovereignty, however the opinion was, that the supervision exercised by the state before the war is not being employed by the Socialist State. See Ottó BIHARI: State Law. Budapest, 1984.

33 See Szilvia Köbel: "*Divide and Rule!*". 60-94.

34 Act II of 1967, 3. § (2)

35 The Agreement made between the Government of the Hungarian Republic and the Reformed Church in Hungary on 7th October 1948, published on 9th December 1948 in the Hungarian Journal

36 Act II of 1967, 3. § (3)

37 See Szilvia Köbel: *From protectors of human rights to „enemy of the people".* The prelude, circumstances and effects of the cessation of the Hungarian Administrative Court in 1949. Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest, 2019. 166.p.

38 Act II of 1967, 4. § (1)

39 Act II of 1967, 5. §

40 Rule of Law

41 Act II of 1967, 6. §

42 Act II of 1967, 7. §

dogmatic standpoint, this counts as joint legislation, since in order for the act to take effect, it needed an act of approval. In our opinion, this practice was too broad of an interpretation of paragraphs 7 and 8 of Act XLIII of 1895 – upheld by Act XXXIII of 1947 – about the governmental approval (by the Minister of Religion and Public Education) of bylaws and operational regulations of organizations. The precedent before the war was, that the Synod is to be held with the approval of the Governor (Miklós HORTHY), and the laws adopted by the Synod would then be presented to the Governor by the Minister of Religion and Public Education for approval and confirmation. This is how the formula looked, presented with and example: *"I hereby approve and confirm the ecclesiastical laws presented to me by the Royal Minister of Religion and Education of Hungary, created in the first session of the Synod of the Reformed Church in Hungary, that convened through my approval and opened 1 March 1939. Dated, 20 June 1939. Signed under hand and seal of HORTHY; Dr. Bálint Hóman."*[43]

The President of the State Office of Church Affairs (ÁEH) used the following formula: *"I hereby approve Ecclesiastical Act I of 1967 of Reformed Church in Hungary, as it does not oppose the constitution and laws of the state. 20 April 1968. JÓZSEF PRANTNER, Under-secretary, President of the State Office of Church Affairs."*[44]

It is also worth to take a look at the reaffirming clause of Ecclesiastical Acts I and II of 1964, adapted during the first session of the VII. Synod. Act I combined the authority of the Universal Convent and the Synod and Act II abolished the "outdated" – mostly pre-war – ecclesiastical laws. In this clause, the President of the ÁEH referred to Paragraph 1 of the 25th Decree-Law of 1959 on the Establishment of the State Office of Church Affairs (ÁEH), using it to reaffirm his right to accept the law: *"Through the authority imposed on me by Paragraph 1 of the 25th Decree-Law of 1959, I hereby approve Ecclesiastical Act II of 1964, created by the VII. Synod of Budapest – opened on April 1st, 1964 by the Reformed Church in Hungary – and submitted to the State Office of Church Affairs on April 1st, 1964. Budapest, 6th of July 1964. József Prantner President of the State Office of Church Affairs"*[45]

The reaffirming clause – similar to the ius supremi patronatus regis – was a legal institution from before the war and was salvaged by the party-state to serve their own purposes. It is interesting, that since church and state were not separated before the war, the legal institution of approving ecclesiastical acts fit into the legal system. In the Socialist State however – especially after the Constitution went into effect – this act had no legal foundation. It would be naïve however, to expect principles of

43 See e.g. the laws of the Reformed Church in Hungary. Act I-VI created by the Fifth Synod of Budapest, opened on March 1, 1939. Official Publication of the Reformed Church in Hungary. Budapest, 1941.

44 Code of the Reformed Church in Hungary. Published in Reformed Church, the official paper of the Reformed Church in Hungary, as an attachment to issues 7-8 in 1968.

45 Reformed Church, the official paper of the Reformed Church in Hungary. August 1964. Series XVI, Issue No. 8. 169-170

a Rechtsstaat from the party-state, since the essence of this system is to use laws as political tools. The fact, that the President of the ÁEH used Paragraph 1 of the 25th Decree-Law of 1959 for reference shows, that the reason for creating ÁEH, namely "to deal with matters between the state and religious denominations" was filled with political pretence.[46] The President of the ÁEH also took part in the session of the Synod, he even held a speech at the ceremonial closing session. In his presence, the ecclesiastical laws were adopted unanimously. József PRANTNER acknowledged the historical self-assessment of the Reformed Church and its work in the party-led Patriotic People's Front (in Hungarian: Hazafias Népfront, henceforth: HNF), as well as the "the Church's attitude towards the matter of social progress and the construction of socialism." The legally trained dr. Ferenc ERDEI, who was both the president of the closing session and the Secretary General of the Patriotic People's Front (HNF) stated, that the "new legislation corresponds with the Church's doctrine and codifies the genuinely good relationship that formed" between church and state. In his opinion, the Reformation that begun in 1517 and the "1917 socialist revolution have some in common." It is also worth to quote the closing statements of Bishop Tibor BARTHA: "And because this generation could – through the grace of God – refer back to the gospel, it enabled, for the first time in the legislative history of the Reformed Church in Hungary, to codify the laws of life and service of the serving church."

2. Personnel issues, with special regards towards the "new order" of fulfilling the ministerial positions – or – the "gradual change of the dilapidated workforce"

Questions surrounding the church personnel were always a defining element in the relationship between church and state. The ius supremi patronatus regis and the patronage institution were, although with everchanging contents, present in Hungary both de facto and de jure all the way up to 1990.

As part of the retaliation after the Revolution of 1956 the state expanded its institution of prior state approval regarding the fulfilment of leadership positions in the protestant churches, first just in practice, and later de jure in 1957. The implementing regulation really opened up the way for forceful governmental intervention. It is clear, that elements of the socialist legislation went on to be reflected in the ecclesiastical legislation regarding the fulfilment of ministerial positions.[47]

Because of these, Act III of the Reformed Church of 1967 on the church ministers and their employment is especially remarkable. Paragraph 33 of the Act states, that ministerial positions can also be changed through reassignment. The rule regarding

46 1. § of the 25th Decree-Law of 1959, (1)

47 See Szilvia Köbel: *"Divide and Rule!" The Party-State and the Churches*. Budapest, Rejtjel Kiadó, 2005. 39-45; Szilvia Köbel: *The 'Ius Supremi Patronatus Socialistae'*. In Rubicon online plusz, 2017/5. http://www.rubicon.hu/magyar/oldalak/szocialista_fokegyuri_jog/ Time of download: November 23, 2017

appointment and reassignment – which according to the original Presbyterian polity was an exception, as the norm was to be chosen by the congregation[48] – was used by the party-state as tool to indirectly intervene. In his above-mentioned work, István J. KOVÁTS acknowledges the necessity of external intervention, and refers back to Calvin, according to whom, the congregations would be wise to involve outsiders in the process of choosing ministers, so that it would "ensure God's will and the purity of the selection" and adds, that "the involvement of these external factors must be of a brotherly, not a tyrannical nature".[49]

Act III of the Reformed Church of 1967 stated, that if "the presidency of the diocese finds – either from personal, direct experience or from the reports on the canonical visit – that the continued work of a given minister in his role is disadvantageous for the congregation's interest, then he is obligated to launch the judicial proceedings concerning the reassignment. The judicial proceedings can also be ordered by the presidency of the church-district through the presidency of the diocese." According to the act, the reassignment is to be declared in a judicial decision.[50]

The Act then made the reassignment even more overwhelming: "The reassignment can be declared in the name of the Church's interest, even if the court does not find fault with the minister, the presbytery or the parish. Should this occur, the church-district is to cover the costs for the proceedings and the reassignment. The final, legally binding decision is always that of the church-district court. Because of this, the case should be appealed to the church-district court after the appeal period ends."[51] Furthermore: "If

48 István J. KOVÁTS writes the following referring to the various Reformed confessions: *"All these creeds and ecclesiastical laws show the Reformed Church's unwavering conviction that when it comes to deciding all important matters of the Church, whether it is about making important decisions or the selection pastors, nothing can happen without the knowledge and consent of the members. The principle of "about you – but without you" is completely foreign to the view of the Reformed Church and any sort of endeavour in this direction must also remain foreign, as long as they stand on the reformist foundations. If only for the fact, that according to the pure reformist ideology, nothing must be done in secrecy, least of all imposing a pastor upon a congregation."* KOVÁTS J. r. w., 225.; See also this quote from Albert KOVÁCS's work: The rules for electing pastor vary in all nine districts (…) The following elements are found in all of them: 1. The selection of a pastor is only possible when a brand new ministerial station is set up or when the pastor's office becomes vacant due to a voluntary change, final resignation, relocation by the church authority, or death. 2. The right to select a pastor belongs, in accordance with the laws, belongs to the congregation. (…) 9. If the selection has been properly conducted, the dean must confirm it and issue the authorization to the selected person to take office (concession), otherwise it will count as a refusal. (…) 12. Even though the congregations select their pastors themselves, they do not have the right to arbitrarily remove then, only through proper trial; the Supreme Court of the Church may declare loss of office due to wrongdoings listed in the Code." Albert KOVÁCS: *Ecclesiastical Law Studies*. Budapest, Magyar Protestánsegylet, 1878. 358-360.

49 Kováts J. r. w., 223.

50 Act III of 1967. 33. § (1)-(4)

51 Act III of 1967. 34. §

it is discovered during the judicial proceeding, that either of the two parties perpetrate an act or omission, that is listed as a misdemeanour in Act VI, disciplinary action is to be taken. This disciplinary action does not prevent the conduction of the reassignment. The reassignment is to be carried out by the presidency of the church-district."[52]

The things said during this session of the Synod make it apparent, that not only will the "new order" of selecting ministers harm congregational autonomy, its pushback is its explicit goal. The proposer of the draft, dr. Kálmán ÚJSZÁSZY emphasized during the session, that the "new order of the selection" takes the "interests of the ministry" and "social standpoints" into consideration. He explained, that "solving the problem of selection isn't a private matter for any congregation, thus the draft plans to involve the appropriate authorities in the matter." In his comment, Dr. Endre TÓTH argued, that "the congregation's right to independently select ministers has been ingrained into the public's mind as if it had been like that from the beginning", even though according to him it had only been practiced since 1907; prior to that, "the newly modernized nominating committee, even the dislocatio" – a.k.a. "the action of the diocesan congregations to place ministers into pastoral offices, who had no place or wished to change location, many times even those, whose relocation was deemed to be a public interest by the diocese" – existed. In the debate, Dr. Imre JÁNOSSY added, that, the "old way of selection caused a lot of damage, because every so often it would divide congregations for decades", further adding, that with this draft the Synod would practically ratify the "15-year-old" practice.[53]

Let us take a look at this practice.

The forced resettlements (deportation) out of Budapest – of ministers like Imre SZABÓ and Károly DOBOS during 1951 – did not happen through a state administrative decision, but rather through the involvement of superiors within the Church and through its relocation process.[54]

The forced abdications and the wave of discharges after 1956 can also be listed here.[55]

Amongst the documents of the ÁEH, a script of an ecclesiastical show-trial can be found about the placement of betanist[56] Reformed minister Béla BORBÉLY in 1966. We

52 Act III of 1967. 35. §, (1)-(2), 36. §

53 Reformed Church. The official paper of the Reformed Church in Hungary. November 1967. Series XIX., Issue No. 11. 246

54 See Szilvia Köbel: *Religious Threads in Certain Cases of Resettlements from Budapest during 1951 and 1953*. In György Gyarmati, Mária Palasik (edited by) *The Chandlery of Big Brother: Studies on the History of the Hungarian Secret Service after 1945*. p. 357. Budapest Historical Archives of the Hungarian State Security; L' Harmattan, 2012. pp. 171-194.

55 See Dr. Erzsébet Horváth (edited by): *Renewal, Reorganization. Documents in the Council Archives of the Reformed Church in Hungary for the Research of Events between 1956 and 1957. Budapest*, Kálvin János Kiadó, 2007; Dr. Erzsébet Horváth (edited by): *Renewal, Reorganization. Documents in the Council Archives of the Reformed Church in Hungary for the Research of Events between 1957 and 1958. Budapest*, Kálvin János Kiadó, 2008

56 MNL OL XIX-A-21-d-0029-7/1966.

quote from a report made by agents of the ÁEH, addressed to the ÁEH's president: "On the 13th of May 1966, together with representatives of the county agencies, we conducted a trial in Nyíregyháza, concerning the relocation of betanist Reformed minister Béla BORBÉLY. (…) The behaviour and reactionary attitude of Béla BORBÉLY is known to everyone. His methods are very refined, as such it is hard to provide evidence. (…) Because of this, it is desirable, both from an ecclesiastical and church policy standpoint, to relocate Béla BORBÉLY. We concluded, that the best solution for settling the matter was through the position of Bishop BARTHA, in the following way: The decision of the diocesan court will not be approved by the church-district court on the basis of improper qualification. Simultaneously, the church-district court will initiate a new, separate, case 'in the interest of the church-district'. This procedure is in accordance with the ecclesiastical laws. From a political standpoint, this seems to be an adequate solution, as it a) does not sentence Béla BORBÉLY as a betanist, thus the betanists won't get an opportunity to use him for their own interests; b) as a result of the relocation, Béla BORBÉLY will be torn out from his comfortable environment; […] c) his financial situation will be comparatively similar (he'll be able to educate his children), so they can't use this either; […] e) [sic!] because of the above, Bishop BARTHA will not be exposed to large attacks. This is also important from a church-policy standpoint. The county agencies agree with the above idea and pledge their complete support. Budapest, 16 May 1966. Károly GRNÁK, András MADAI."[57]

In 1967, a case took place in a state court, involving former member of the Christian Youth Association (in Hungarian: Keresztyén Ifjúsági Egyesület, KIE) Dénes BATIZ and his associates (pastors Bálint KOVÁCS and Károly DOBOS) who were, as a result of manipulation by the ÁEH, charged with conspiracy against the state.[58]

In 1967, Bishop Tibor BARTHA wrote the following to József PRANTNER, President of the ÁEH regarding the election of the dean of Budapest: "If the new deans, that are to be elected, live up to the expectations, then they shall win over those who can be won over, attack those who must be attacked and either convince or disciple those who are misguided. They will also have the task to gradually change the excessively dilapidated personnel (pastors, presbyters) that gathered in Budapest because of the adverse selection. In my opinion, this is the only way to organically and fundamentally eradicate the nodule that formed in Budapest."[59]

57 MNL OL XIX-A-21-d-0029-7/1966.

58 ÁBTL 3.1.9. V-155460., V-155460/2, V-155460/3, V-155460/4, V-155460/5. Documents of inquiry on Dr. Dénes BATIZ and associates.; MNL OL XIX-A-21-a-10-3/1968. President of ÁEH, József PRANTNER wrote the following to Reformed Bishop Tibor BARTHA: *"Respected Sir Bishop! I write to you in regard to your letter about Bálint KOVÁCS and associates. I met with the president of the Supreme Court, dr. Ödön SZAKÁCS and discussed the matter with him. Dr. Ödön SZAKÁCS made a promise, that he will draw the attention of the assigned Judicial President to the fact that the decision must be made with the mitigating circumstances mentioned by the Bishop taken into account. Budapest 22nd May 1968."*

59 MNL OL XIX-A-21-a-10-5/1967.

After 1968 even the new acts of the Reformed Church strengthened the authoritarian intervention into personnel matters. In this regard, even the necessity/expectation of auditing of the presbyteries was conceived by the state.[60]

3. Organizational questions

The organizational structure of the Reformed Church was already influenced by the resolutions of the Hungarian Working People's Party (in Hungarian: Magyar Dolgozók Pártja, MDP) during 1950-51, which adjusted the borders of the diocese to match those of the administration, primarily to facilitate the work of County Church Affair Secretaries (the local representative of ÁEH). Simultaneously, the party ordered the regional unification of theologies.[61] This was later followed by a number of organizational measures which were based on church policy interests. We quote an example here:

In 1966, József PRANTNER, President of the ÁEH wrote to Church Affair Secretary of Veszprém County about relocating the Bishop's Seat of the Transdanubian District of the Reformed Church from Pápa to Veszprém: "It must also be known to you, that we supported the relocation of the Reformed Bishopric to Veszprém because we wanted to counteract the reactionary Catholic influence."[62] In December of 1967, the Reformed Church (official paper) published the report of Bishop Dr. Lajos BAKOS, in which he thanked the relocation of his seat with the following words: "In this context, it may be appropriate for me to declare, with respect and affection, to the Honorable Diocesan General Assembly, that the future construction and establishment of a diocesan seat in Veszprém progressed so much, that, according to the agreement between the Church-District and the Parish of Veszprém, I was inaugurated by the Dean of the Church-District Veszprém on the 28th of May in the bishop-pastor position, and thus was able to move to Veszprém. I will use this opportunity to express my gratitude for the great support all of you – especially the State Office of Church Affairs, and both the district and city of Veszprém – provided in helping realizing this plan."[63]

Summary

We would like to conclude this study by asking the question of whether or not we can expect the party-state to uphold the principles of a Rechtsstaat. Well, it isn't that straightforward. On one hand yes, as the system itself tried to convince itself and the world that it was protecting human rights (through declarations and international

60 MNL OL XIX-A-21-a-10-5/1967.

61 See Szilvia Köbel: *"Divide and Rule!"*, 122.

62 MNL OL XIX-A-21-d-0029-6/1966.

63 Reformed Church. The official paper of the Reformed Church in Hungary. December 1967. Series XIX. Issue No. 12. 275.

propaganda), however, the very essence of the system and its underlying mechanisms were far from that of a Rechtsstaat. Looking back from within one, we can see, that – beyond the importance of informational compensation – it served as a lesson, that the laws did not mean real legal guarantees, nor did they guarantee the enforcement of fundamental rights.

The state socialist system averted the attention from its own illegalities and abusive practices by creating an enemy. While deeply disdaining the pre-war system in its propaganda, the system quietly adapted the old institutions and used them for its own interests. This is what made – despite the constitutional declaration of separation – the state right to supervise, the Ius supremi patronatus and the oversight and approval of ecclesiastical legislation possible.

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Anomalies in the Functioning of Local Authorities in Hungary Following the Change of Regime, with Particular Regard to the Functioning of Democratic Institutions and the Expansion of e-Government

1. Introduction

In our study we aim to point out the difficulties caused by the characteristics of regulation concerning local municipalities in the period following the regime change, especially from the perspective of efficiency. We also intend to present the significance of greatly broadened independence that municipalities received following the deconstruction of the socialist regime. However, in the course of the twenty years following the regime change, not only did this freedom fail to expand, but – due to the Hungarian characteristics – it became virtually dysfunctional in most settlements. Despite the many European examples, Hungarian political parties and the administration were unable to act effectively against the issues arising from the lack of resources and a fragmented settlement structure. Meanwhile, technology and, as a consequence, administration and state management underwent major changes. As the result of these changes, among other things, significant regional reform started in 2010 with the introduction of a new law on municipalities that took effect in 2013. Responsibility for task performance changed significantly and the former wide level of independence decreased greatly because fundamentally centralised performance of various tasks appeared in several public services. From a democratic perspective, this may present an ideological problem. However, from the perspective of efficiency, these changes portend grand possibilities. Moreover, with the appearance of new information and communication technologies (ICT), the logic of subsidiarity and regional organisation was also transformed to a significant extent. Bringing decision-making "closer" to citizens means something quite different today than it did 20 or 30 years ago.

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2. Municipalities in Hungary and the regime change

The Hungarian system of municipalities – transformed in 2013– was established at the time of the regime change, and its characteristics can in a large part be understood from the context of that regime change. As Gajduschek writes, "The intellectual context of the regime change can mostly be understood as the radical rejection of the former <communist> system. The most important characteristic of the former council system is that it operated basically as part of a centralised system, therefore, in the case of these bodies, there could be no actual autonomy of municipalities. The negative feelings of the population concerning the council system were increased by the establishment of joint community councils."[5] This happened around the 1970s. During this period, such communities were forced into a single joint council, between which century-old conflicts existed, sometimes ethnical or religious, usually traced back to long-forgotten reasons. Units created in this way of course could not be interpreted as actual communities for the people living in the individual settlements. Besides, peripheral settlements in the joint councils felt that the central authority condemned them to gradual decline. Standing in contrast to all this, the municipality act, created during the course of the regime change (Ötv.)[6] established new rules and regulations for the municipality system. This act made it possible for all settlements to set up municipality organisations. In this way, the number of municipalities doubled, and the average number of residents per municipality became one of the lowest in Europe.[7]

The most spectacular change is that in the place of the joint council system, a system of municipalities was established based on settlements alone. In this way, the number of operators doubled, and one of the most fragmented systems within the member states of the Council of Europe was established. The number of budgetary bodies in the local municipality system was about 13 000 – 14 000 in the years following the regime change. This legal solution was created despite knowing the international experience of applying mandatory municipality task performance partnerships. However, political considerations prevented their introduction, several times, and the act created more than 3 100 independent "republics" with total equality from a legal perspective.[8]

Granting autonomy for the municipalities was a definitive element of the new regulation.[9] However, the development of the municipality system is not only a matter of constitutional context.[10] The two most important institutional changes of the regime

5 Gy. Gajduschek, 'Változások az önkormányzati rendszerben, egy értelmezési kísérlet' (2012) 2 Fundamentum 61.

6 Act LXV on local government 1990.

7 ibid [1].

8 A. Vigvári, 'Decentralization without Subsidiarity Some Additions to Modernization of Hungarian Model of Local Government System' (2008) 22 Tér és Társadalom 143.

9 ibid [1] 62.

10 T. Horváth M., 'Kiszervezés – visszaszervezés: a helyi közszektor változása' (2012) 2 Fund-

change were the deconstruction of state property (privatization) and the establishment of a democratic political system. Hungary was in the vanguard among transforming Central European countries in deconstructing centralised power.[11] As the result of all this, the tasks and competences, most of which all municipalities were entitled to, were determined rather widely. A significant part of public services and the dominant part of so-called human public services became the responsibility of the municipalities. For example, just like organising healthcare, elementary and secondary education and the dominant part of social care also became tasks of the municipalities.

The primary political goal of the Ötv. was to establish an independent municipality system responsible to voters. Every settlement could exercise this right, and that was how the fragmented system of settlement municipalities, which was later widely criticized, and which has been – as we will see – the source of several problems to this day, was established.[12]

Several conflicts occurred in the operation of municipalities in the two decades after the regime change. Changes of such magnitude result in friction and institutional conflicts in both the economy as a whole and in the operation of the local municipality system. Local public services were reorganized along such conflicts, where severe social inequalities and supply-related tensions formed between the individual settlements.[13] Many times, however, these problems were not caused by the fragmented municipality system but by the deficiencies of the financing system.[14] The essence of the problem is that, with regard to most public services, the size of the regional unit required for financially efficient performance of tasks was not the same as the size of the political-administrational regional units. Additionally, the optimal size was different according to the nature of the task to be performed.[15] Local tasks, due to their nature, meant too large a budgetary burden for most municipalities. Most of the services categorised as citizen's rights were mandatory tasks, to be performed on-site, concerning which the municipalities had no opportunity to deliberate with regard to the quality of care. Therefore, appropriate-quality service was typically granted only in larger, city-level local authorities.[16]

The settlement municipalities had a great level of independence in performing "local public matters", a term that became differently interpreted by various parties.

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11 J. Hegedüs, G. Péteri, 'Közszolgáltatási reformok és a helyi önkormányzatiság', (2015) 2 Szociológiai Szemle 90.

12 ibid [7] 94.

13 Gy. Gajduschek, T. Horváth M., K. Jugovits, 'Hungarian Public Administration: Last Thirty Years, Waves in the Story' in P. Kovač, M. Bileišis (eds), *Public Administration Reforms in Eastern European Union Member States. Post-Accession Convergence and Divergence* (Ljubljana, Vilnius, 2017) 251.

14 ibid [7] 91.

15 T. Horváth M., G. Péteri, P. Vécsei, 'A helyi forrásszabályozási rendszer magyarországi példája, 1990–2012' (2014) LXI Közgazdasági Szemle 123.

16 ibid [11] 134.

Local independence was increased by several such authority competences that brought administrative decisions closer to local reality (e.g. in social administration), expanded the scope of tools of local development policy (e.g. building administration), and generally improved the operation of administration. Uncertainties in legal regulations also increased local independence; for example: the unclear or, at several points, contradictory wording of mandatory and volunteered tasks. As a consequence, municipalities had a very wide range of tasks, and their financing was increasingly reliant upon central sources redistributed in a controlled way.[17]

Therefore, in Hungary, a wide (even by international comparison) municipality competence was accompanied by a municipality system based on settlements and, due to the fragmented nature of the settlement structure, it operated with a large number of – at least legally equal – local authorities. This resulted in inadequate efficiency, and uneconomic, and often inefficient solutions from the perspective of performing public services. The sector became the owner of a significant amount of property, with mostly no or only limited marketability, and in a deteriorating physical condition. Nevertheless, the property was mostly passive, not being able (due to its nature and function) to provide collateral for financing municipality expenses. Municipality tasks were, to a significant extent, performed by quasi-fiscal organisations. From the beginning, the central government had the power to exert influence on municipalities with "manual control": primarily through resource regulation and investment support and secondarily through the system of sectoral laws.[18]

Hungary was criticized several times for the fragmented nature of settlement structures, and for the existence of so many small communities with a low number of residents. The fragmented nature of the municipality system and the limited opportunities to increase sources of income have been a problem for a long time. These factors led to ever more municipalities falling into a situation where, year over year, their revenues could not cover their expenses. In these circumstances, these municipalities could not always count on state support. In earlier times, many suggested involving private-sector capital, but it must be recognised that performing public services is not a profit-oriented activity, so those market financing constructs primarily established for the competitive sector, many times brought about only further, long-term indebtedness.[19]

But the size of the settlements continued to be an important factor. Throughout the nation, a significant part (over 90%) of settlements have population sizes under 5000. Within that, 60% of settlements have a population size below 1000. The proportion of settlements with fewer than 1000 residents exceeds 55% even when compared to the total number of settlements. This disproportion can best be illustrated the

17 ibid [7] 95.

18 ibid [4] 153.

19 Á. K. Csiszárik, 'The Indebtedness of the Hungarian Local Authorities after the Turn of the Millennium' (2008) 22 Tér és Társadalom 94.

by comparing it to the indicators of the other side. Only 2% (60 municipalities) of settlements have more than twenty thousand residents and only 23 (0.7%) settlements have more than forty thousand residents. There are only 8 settlements (0.25%) with the number of residents over one hundred thousand, including the capital, Budapest (1.7 million residents).[20]

The domestic literature often refers to the so-called Southern and Northern municipality models. An example of the former is the French system, where every settlement is an independent municipality, but the municipalities have relatively few independent tasks, and the state administration has quite a strong control over their activities. The Northern systems (e.g. the British or Scandinavian municipalities) are characterised by a wide range of responsibilities and significant autonomy. In these countries, however, larger municipalities exist, in which several smaller settlements belong to one municipal organization. In most Western European countries, this merger of municipalities happened at the same time as the "Communist" merging of settlements in Hungary.[21]

3. Possible solutions to the problems of municipalities

3.1. The role of middle level administration

In the past decades, especially in the period directly preceding Hungary's joining the European Union, several political and professional debates were conducted in Hungary concerning the middle level of administration. In a theoretical approach, we can say that the deficiencies of the fragmented and, as its result, weak settlement system as indicated above can be remedied with the help of middle-level regional units and strengthening such units.[22] All the conditions were met in Hungary for this purpose, because county level municipalities have, since the regime change, also been controlled by directly elected bodies through general meetings. With such strong political authorities – we could assume – efficiency problems could have been addressed appropriately. However, it is a typical paradox in Hungary that the middle level bureaucracy was unable to perform its functional tasks. If we consider the issue strictly from an efficiency perspective, in international comparison, even the size of the counties is below the optimal size (see NUTS regions based on the planning statistics nomenclature).[23] However, in Hungary, the issue is complicated

20 Source: <http://www.geoindex.hu/adatbazisok/arcadat/magyar-telepulesek-nepesseg-2016-01-01/> accessed 25. September 2019

21 Gy. Gajduschek, 'A közigazgatás szervezeti jellemzői – összehasonlító aspektusból' in K. Szamel, I. Balázs, Gy. Gajduschek, Gy. Koi (eds), *Az Európai Unió tagállamainak közigazgatása* (Complex, 2011) 37-58.

22 I. Pálné Kovács, Regionális politika és közigazgatás (Dialóg Campus 2001) 255-262.

23 I. Temesi, 'Territorial Public Administration' in A. Patyi – Á. Rixer (eds) *Hungarian Public*

because further adherence to the counties has a historical and political background. The fundamental organisational units of feudal administration in Hungary were the local authorities, primarily the comitats. The bases for the authority of the self-governance by the nobility were already laid down in the comitats in the 12th century. This form and organisation basically remained until the middle of the 19th century (Revolution and War of Independence of 1848).[24] Every comitat within the state was a separate world, legal authority, and lord over life and death in that area. The comitat managed the administration in the area of its own jurisdiction with its own organisations.[25] In 1943, Zoltán Magyary wrote the following about the comitats: "Among the organisational units of Hungarian administration, the comitat has an important role. Its jurisdiction is not special, but a general administrative authority. The comitat is a historic formation. This can be strongly seen from the regional distribution of comitats and their organisation and competence. For administration, the comitat is worth as much as its efficiency."[26] "The parishes are under the authority of the comitat, the jurisdictions of the comitat and the parish complements each other."[27] In Hungarian public thinking, the concept of the county is unquestionable to this day and is a politically important background because county-level general meetings provide a significant number of representatives in the Parliament: including the representatives of Budapest, the number of all the county level mandates is 381. Against this background, the solution reached is the best possible for the governing political elite because, besides centralising tasks (and thus supervision over a significant part of resources) it provides local political positions for those desiring them. In short, Hungarian politics was ripe for a corrupt system based on favors and patronage. Moreover, if we also consider the number of mandates that can be distributed at the local municipalities, then we get truly astonishing numbers. Hungary, though relatively small in geographical and demographic size, has 3177 mayors and 16787 mandates for representatives. Of those, more than 14,000 positions will be distributed in settlements with less than 10,000 residents.[28]

Taking even all this into account, delegation of public functions by regional units and level still has practical importance since it emphasises an important perspective that cannot be disregarded in the long run, namely, the perspective that certain types of public tasks must be organised considering the regional optimum of care. Therefore, exercising the socially common functions does not only include centralized activities

Administration and Administrative Law (Schenk Verlag 2014) 304-319.

24 A. Csizmadia, A magyar közigazgatás fejlődése a XVIII. századtól a tanácsrendszer létrejöttéig (Akadémiai Kiadó 1976) 560.

25 ibid [20] 39.

26 Z. Magyary, Magyar Közigazgatás (Királyi Magyar Egyetemi Nyomda 1942) 266.

27 ibid [22] 322.

28 National Election Office of Hungary <https://www.valasztas.hu/elnyerheto-mandatumok_onk2019> accessed 22. September 2019

but also requires a regional approach.[29] The failure of this and the failed attempt to establish a regional municipality level, however, shows that by the end of the second decade of the municipality system the social-political approval of decentralisation significantly weakened.[30]

As will be shown later, during the latest municipality reforms, the functions and tasks connected to the municipality system did not get stronger middle level. Instead, a centralisation process occurred with the help of counties as administrative units by the expansion of the jurisdiction of deconcentrated authorities.

3.2. Partnership attempts

On the one hand, partnership independence included the establishment of organisations performing the country level representation of the interests of municipalities. On the other hand, it included the opportunity for neighbouring settlements to join forces to perform tasks that could be undertaken independently only with difficulty or at too great cost. The latter in particular could have had a major role since, at the time of the regime change, the legislators intended wide-scale partnerships to remedy the fragmented nature of municipalities. However, the practice did not turn out according to the original expectations or goals. All in all, the level of interest in partnering remained minimal. It is assumed that, in doing so, the municipalities intended to meet the expectations of the residents, in the sense that "independence", the symbolic value of keeping the institutions, had a greater weight than the efficiency and effectiveness of services[31].

At the beginning of the 2000s, the alternative service organization and administrative solutions based on cooperation within a sub-region started to spread. With these, it became possible to treat a couple of the problems associated with the fragmented settlement municipality system. However, neither the voluntary partnership model, nor its later, controlled version brought spectacular results, since the budgetary-financing model did not adapt sufficiently to this administrative institution.[32]

The most successful partnership attempt in the period considered was the establishment of multi-purpose sub-regional partnerships. This administrative change decreased the budgetary share of county-level municipalities significantly when partnerships also received central financial support for regional administrative and service tasks, to which funds were assigned to finance jointly provided services even from the cooperating settlement municipalities. This sub-regional model spread gradually, and by 2010 almost 3 percent of local municipality expenses and 6 percent of state support were used by partnerships.[33]

29 ibid [11] 124.
30 ibid [11] 135.
31 ibid [1] 62.
32 ibid [7] 92.
33 ibid [11] 134.

The sub-regional partnership attempt was the only larger structural reform in the period. In the fragmented system of municipalities, which at the same time undertook a wide range of tasks, the multi-purpose sub-regional partnerships provided an opportunity to harmonise service organization and political considerations. The aim of partnerships was to create service organisational units of an economically rational size while maintaining the political independence of small settlements. Perhaps making use of structural resources dependent on partnership conditions would have been a good solution, but it was hampered by political resistance. Otherwise, Hungary made relatively good progress in establishing the system of institutions for the distribution of EU resources back then, even by international comparison.[34]

4. The municipality reform

The following can be established from the perspective of efficiency concerning the municipality system created following the regime change. The internal institutional limitations of the local municipality system could not be deconstructed sufficiently, therefore the problem of size efficiency could not be solved either. The problems of the fragmentation of the local government sector at the settlement level could be scarcely addressed by obligatory instruments of regulation as a result of constitutional barriers.[35] The institutional structure was also unable to appropriately react to the treatment of the size efficiency problem in Hungary. In many cases, the formation of rational, functional systems was prevented by a series of political decisions. It is also an important conclusion that even well thought-out models must always be adjusted to the new challenges governing the period to come; therefore principles in themselves – sublime as they may be – are often unfit to resolve practical problems.[36] The municipality system spent its reserves and, due to fragmentation, most of the municipality apparatuses lacked the necessary expertise to function effectively.[37] Municipalities were unable to become a real counter-balance to central power, nor could they break the centralisation of the system of power. The settlement municipalities, which were fragmented in both structure and national-level representation of interests, could not bring about actual, system-level decentralization.[38]

34 L. Matei, A. Matei, D. C. Zanoschi, O. Stoian, 'Comparative Studies on the Administrative Convergence Revealed by National Strategies of Administrative Reform in Some South-Eastern European States' in A. Matei, P. Grigoriou (eds) *Administrative convergence and reforms in South-Eastern European States. Analyses, models and comparative studies* (2011) 2 ASsee Online Series 201.

35 I. Pálné Kovács, 'Local Governance in Hungary – the Balance of the Last 20 Years' (2011) 83 Centre for Regional Studies of Hungarian Academy of Sciences Discussion Papers 13.

36 ibid [11] 145.

37 ibid [4] 167.

38 ibid [1] 64.

The reorganization of the administration resulted in the reduction of settlement autonomy, emptying the role of the county as public service provider and transforming it as the place for coordinating the redistribution of funds. In this system, administrative dependency increased instead of local accountability. The value of the local elected political leadership declined and new rules for exercising power locally were formed that, in total, increased central state dependency and political dependency. Therefore, political (democratic) authority became stronger, while the competences found here were weaker. Besides the reorganisation of local public services, a significant portion of state administration tasks were assigned to newly established county level government offices – directly dependent on the central government – and the districts subordinate to the government offices. In this way, 17 departmental administration authorities operate under government office heads appointed by the prime minister, from child protection services, to land registration, to pension insurance. Branches of these act as district offices; however, they are assigned fewer administrative tasks. [39]

All in all, the government gave a kind of answer to the acute problems characterising the municipality system. In its content, the answer is clearly a significant reduction of the autonomy of municipalities and an increase in state hierarchy.[40] The transformation has also been a political success because no government had previously dared to touch the municipality system. On the one hand, a lobbying group of significant power was built on municipality independence. On the other hand, the perceived independence of the settlement – in having its own municipality and other institutions – also had a huge, primarily symbolic, value for the citizens. In other words, addressing the issue of municipal governance had been considered political suicide. In the course of the reform, the government let remain the municipal structure, about which the public, and even a significant part of the profession is especially sensitive. In the meantime, a significant part of the functions was transferred from the municipalities to the state. Those forms having symbolic value (elections, bodies, offices) remained local. The principle of "one settlement, one municipality" also remained; however, both of these lost most of their actual function. State supervision increased with regard to the remaining functions. At the same time, their economic independence decreased. Municipalities basically took on an executive role regarding financing tasks.[41]

The local-regional level is where the tasks and competences of governmental administration are clarified and assigned. In the new model, state administrative bodies were reorganised as well. A significant part of the bodies of deconcentrated administration were integrated into the government offices that replaced county level administrative offices. Then, in 2012 an act was adopted on the sub-regional, district offices of the capital, and county government offices.[42] The latter drew significant

39 ibid [7] 96.
40 ibid [1] 70.
41 ibid [1] 71.
42 Act XCIII:2012

competences away from notaries, and thus from the organisations that until then could be connected to the office system of municipalities. This also involved the significant regrouping of public service employees.[43] As such, the concept of the closeness to citizens and clients needs to be reinterpreted as well since, with the development of technology, direct administration is forced increasingly into the background.

5. The most important financial problems of the municipality system

Within the local municipality financing practice, assigning public administration tasks and the resources to each of them is basically possible in two ways. The regulation system inherited from the planned economy calculates the expenses of the individual municipalities and, after deducting the planned local financial sources, it determines the amount of the central budgetary support provided in an itemised manner. Various forms of this model were created, depending on how detailed and intrusive the expenditure level provisions are and how the estimation of county or local personal revenues was conducted. The other method only regulates the revenues of municipalities. In this, the rules of local revenue generation and the amount of local tax revenues shared with the central budget (to be then complemented with support from the central budget) were determined according to legal regulations. The key element of independent management is that the municipality itself can decide on what and in what structure it spends its revenues. The right to impose taxes independently appeared on the revenue side.[44] In this resource regulation system, spending decisions are made locally, within the framework of budget provisions. In Hungary, the latter resource regulation model was introduced in 1990, following the European and other Western integration recommendations.[45] The essence of the resource-oriented system therefore is the high level of financial independence of local authorities. The free movement between the operational and accumulative budget is an important element of this financial independence. Later in the Hungarian practice, the free movement between the two budgets made it possible for municipalities to exhaust their assets.[46]

An important characteristic of the Hungarian municipality system is that the local municipalities became owners of a significant amount of property when they were established. One of the most definitive processes of the regime change was the destruction of state property. However, in the past period, the municipalities have squandered their property. Concerning the core property serving task performance, the greatest problem is that it is not operational, entrepreneurial property. Instead, the elements required for the performance of other services (institutions, schools, public roads, sewerage system, etc.), not only fail to generate profit, but, on the

43 ibid [6] 7.
44 ibid [1] 62.
45 ibid [11] 128.
46 ibid [4] 142.

contrary, their maintenance requires additional expenses.[47] One method for solving the problems caused by the fragmented settlement structure already described above is the financial balancing system. When every settlement municipality is responsible for expensive obligatory services such as public education and social care, minimal budgetary conditions can only be provided by state support. That is why the nature of the local municipality financing system is basically determined by the method of distribution, not the amount of support.[48] More developed regions, larger settlements, and settlements with better management had more opportunities and freedom of action, while the crisis areas, including regions with small villages, had fewer.[49]

As is known, the structural and financial deficiencies established at the time of the regime change became increasingly difficult during that period, eventually becoming unsustainable. These difficulties can be explained by inadequate management on the one hand and the decrease in the real value of state contributions on the other. Thus, in several places, state financing was not even enough for performing obligatory tasks, so municipalities spent a part of their own revenue as well on performing such tasks. The municipalities provided those local public services most similar to entrepreneurial activities primarily through establishing and operating non-profit (public interest) companies. These are primarily tasks related to municipal management, such as taking care of public areas, maintaining public institutions, waste removal, maintaining public cemeteries, etc. Companies founded for municipal management purposes operated, and are still operating, in the form of limited liability companies or companies limited by shares.[50]

Most of the municipalities not only agreed to perform obligatory tasks but also performed other, optional activities for the benefit of the residents, the settlement, and the social-economic environment. The Ötv. made it possible for the municipalities to provide additional services, depending on their capacities, besides their obligatory tasks. The law also stated that tasks undertaken voluntarily could not threaten the performance of the obligatory ones; however, this principle was not followed in practice.[51] Moreover, the law left the matter of what can be considered the "minimum obligatory level of tasks" open to interpretation. This situation provided grounds for the different professional or departmental laws to be able to influence municipality task performance to an extent greater than justified. Nevertheless, the concept of an obligatory task combined the local public tasks with those that could also be provided efficiently at the central or middle level. Tasks undertaken voluntarily often exceeded a municipality's financial capacities, so each municipality was forced to use some kind

47 ibid [4] 147.
48 ibid [7] 99.
49 ibid [6] 6.
50 Zs. Előházi, 'A helyi önkormányzatok kialakulása a rendszerváltó Magyarországon' (2009) Sep. Hadmérnök, 391-92.
51 ibid [4] 145.

of external, capital market source in order to perform the tasks undertaken.[52] Due to the factors specified above, the debt of Hungarian municipalities kept increasing in the first decade of the 2000s. The largest part of the debt stock was in credits; within those, development loans represented a growing proportion.[53]

Local revenue sources contributed to financing municipality tasks in an ever-increasing proportion. However, there were significant differences between the levels of economic development in the various large regions. The municipalities in the central region and in the more developed part of Transdanubia could exploit their own revenue opportunities, while in the other regions, the proportion of their own resources was much smaller. More than half of the local revenue of municipalities was local tax. Among local taxes, the business tax was dominant. Its significance has slightly decreased since the economic crisis, but it is still a relevant part of local taxes. This high proportion also partly explains the differences in local revenue by region and by settlement type. Taxable economic activity can mostly be found in Transdanubia and in the central region and in the larger settlements.[54] Hence, two large changes occurred in the structure of local municipality revenues. First, the role of local income revenue increased. Among them, local taxes were dominant, which mostly represent new funds for small settlements. However, since the role of the business tax was the most important among local taxes, significant regional differences arose between the settlements.[55] The financial basis of municipal autonomy was missing; their budget depended on central funds and central financing decisions. All of that paired up with the sources being unable to cover the expenses of operation as time went by. The independence of management included the right to decide independently on developments (investments) as well as taking on debt. Excessive will to comply with local expectations (paired with the actual lack of control and responsibility) on the one hand led to systematic overspending and on the other it resulted in a significant level of indebtedness among the municipalities.[56]

Municipal financing between 1990 and 2010 was built on four basic sources of revenue: local revenue, shared taxes, state contribution, and credit income. During the two decades, the proportion of local revenue increased, while the state contribution decreased. The latter was, for a time, balanced by the increase in shared revenues, and in this way the significance of centrally provided revenues did not decrease.[57] Financial decentralization in the last quarter of the past century served to delegate community decision-making to the lowest level possible and the most efficient use of resources. So, from the regime change, the financing of Hungarian municipalities followed the

52 ibid [15] 81-95.
53 ibid [15] 83.
54 ibid [11] 136.
55 ibid [11] 138.
56 ibid [1] 62.
57 ibid [7] 98.

principle that decision making must be delegated to the settlement level but, after 2010, a fundamental change occurred in this area.[58] After 2010, one of the elements of local municipality financial changes was the introduction of task financing. This means that a part of the central budgetary support was received by municipalities as the difference between average planned expenses and expected revenues. In just two years, the financial proportion of tasks performed at the local level decreased by one third: in 2012 the extent of municipality expenses compared to GDP was only 9.3% as opposed to 12.8% in 2010. The influence of state-community property increased and the opportunities for alternative service providers built on private organisations decreased in the field of both human and the public utility services.[59] It is, of course, a question of how one can measure the efficiency of task performance at a local level using uniform methods, because this would be an essential condition for every future development concept. Besides all these, due to the idea of municipal autonomy and strong democratic governance, accountability of inefficiently operating municipalities have also been curbed. This shows once again that, after 2010, central dependency grew stronger in the local municipality financing system.[60]

6. Local government and eGovernment

The appearance of electronic administration (eGovernment) is not a new development in either Hungary or in Europe. The European Union already recognised the opportunities of the information society back in the 90s[61] and, from the 2000s, several programmes and action plans helped to facilitate exploiting the advantages of technology in an economic, political sense. We do not intend to analyse and present these in detail here, as we have previously done so. Instead, we only intend to refer to the most important elements having an effect now and in the future on the life of local communities from the perspective of our topic. A chapter specially related to eGovernment has already appeared in the eEurope action plan.[62] The essence of this was that EU institutions and national public administrations should make every effort to use information technology to develop efficient services for European citizens and businesses. Public administration should:

- Develop internet-based services to improve the access of citizens and businesses to public information and services.

58 ibid [11] 122.

59 ibid [11] 125.

60 ibid [7] 101.

61 Commission, 'Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st Century – White Paper' COM (1993) 700 final 167.

62 Commission, 'eEurope 2002, An Information Society For All. Draft Action Plan prepared by the European Commission for the European Council in Feira, 19-20 June 2000' COM (2000) 330 final

- Use the Internet to improve the transparency of public administration and to involve citizens and business in interactive decision making. Public sector information resources should be made more easily available, both for citizens and commercial use.
- Ensure that digital technologies are fully exploited within administrations, including the use of open source software and electronic signatures.
- Establish electronic marketplaces for e-procurement, building out the new Community framework for public procurement.

Since then, the European Commission's eGovernment Action Plan supported the provision of a new generation of eGovernment services. It identified four political priorities:

- empower citizens and businesses,
- reinforce mobility in the Single Market,
- enable efficiency and effectiveness,
- create the necessary key enablers and pre-conditions to make things happen.

The Action aimed to help national and European policy instruments work together, supporting the transition of eGovernment into a new generation of open, flexible, collaborative, seamless eGovernment services at local, regional, national, and European level.

All the above-mentioned statements and the progress in eGovernment nowadays can be summarised as follows: digital technologies provide the opportunity to easily access and re-use the wealth of information held in the public sector. eGovernment could transform the old public sector organisation and provide faster, more responsive services. It can increase efficiency, cut costs, and speed up standard administrative processes for both citizens and businesses.

Thus, it is easy to see that almost 40 years after the regime change, the matter of eGovernment cannot be ignored with regard to local municipalities either. If we observe the advantage of these processes related to efficiency and speed, then we can see that most electronic solutions move towards centralisation. Back then, the basis for the assignment of regional units in the course of establishing the district and comitat system was accessibility. Districts were organised so that, from the most distant point of a district, one could get to the centre on foot in one day at the most. All this was similar at the county (comitat) level, but the basis for determining distance and time was movement on horseback. From the perspective of power relationships and task performance, time and distance were key factors, because essentially, the same administration and executive activities had to be performed then as today, albeit without the benefits of modern technology. Hence, the basis for regional structuring was the speed of the information flow.

Today, securing the flow of information is still one of the most important management tasks but, compared to the conditions of a thousand years ago, we have

much quicker means available. Nowadays it is of special importance to analyse the e-services systems provided by the local authorities, given the fact that these public administration authorities are situated as close as they can be to civil society. That is why it is practical and very useful to develop the structure and possibilities of e-government solutions, which can be available from the local authorities.[63] All of these – in our opinion – strengthen the idea that efficiency expectations, with the available technology, increasingly help centralisation processes. Hungarian reforms after 2010 also show that today such tasks can also be performed under central control, which could only have been organized this way earlier with great difficulty. For instance, today, it is not necessary to move documents between offices. Similarly, the time and cost of communicating is negligible, even compared to the situation a couple of decades ago. Even the amount of information that can be shared is practically unlimited. The only thing that has not changed significantly in the past couple of millennia is the speed of reading and comprehension; that is, the human processing of information (e.g. texts). Artificial intelligence may yet offer a solution to that final barrier as well. But such an analysis is the scope of a different study.

In the past years, several procedural law changes have also occured in Hungary, all suggesting that technology use will become ever more integrated in official and civil court administration. A new official procedural law[64] became effective, making it possible to pass even automated decisions, and a new civil[65] and administrative order of procedure[66] was created, both preferring electronic communication between courts and the parties to the proceedings.

Thus, everything points in the direction that the competences of settlement municipalities – at least from the perspective of efficiency – might become narrower, even to the point where these changes start threatening the identity of the local community. If the first municipality act[67] supplied public services better than the municipalities could do with their own resources, then it is worth considering the use of centralized solutions. Just think of the fact that, in several domestic settlements, the drinking water network, the sewerage system, and the public roads were renovated from structural funds. As such, the goal is of local importance but the tools and the funding are far from local. Therefore, in our opinion, electronic administration may bring a new quality to the management and democratic relationships of the local communities. The reason is that while the tasks can be performed more efficiently in a centralised manner, the local community and/or the citizens interested in a specific

63 B. Szabó, G. Cseh, Zs. Czékmann, B. Maksó, L. N. Kiss, 'Is Virtual Reality Really Neccessary for Local Governments?: Local Governments Digital Readiness in a Hungarian Convergence Region' (2016) 19 Curentul Juridic 46-62.

64 Act CL of 2016 on General Public Administration Procedures

65 Act CXXX of 2016 on the Code of Civil Procedure

66 Act I of 2017 on the Code of Administrative Litigation

67 ibid [2]

local community can participate in the decision-making processes important to them in an increasingly more direct manner. Then the released funds can be spent on other goals, such as preserving the local identity, community and culture. In short, whereas Hungarian municipal politics have historically (following regime change) varied between either between local or centralized decision making, electronic administration allows for optimal, balanced situation: local decision making, with centralized efficiency.

7. Conclusions

When the regime change started in Hungary, the state bureaucracy did not confront the problem that the quality of public services and the general level of development of the economy were closely interrelated.[68] The very wide level of autonomy declared by legal regulations was further increased in practice by the weakness of control over municipalities. The essence of the problem lies, on the one hand, between the extraordinarily wide range of tasks and competences and the strong autonomy granted to exercise them but with weak oversight, and on the other hand, in the fragmented nature of municipalities. The typically small municipalities are unable to perform their tasks at the appropriate level and with efficiency.[69]

Reviving lower-middle level (district) administration is the unrelenting wish of different professional representation groups, for example in the field of construction management. The regional level was not considered as a tier of government in Hungary but the place for forming, passing and implementing regional development decisions – in the beginning by using non-traditional management solutions. The remaining institutions for this were deconstructed, including the forms of municipality influence based on delegation. The forums for county development were also abolished. At the same time, the role of county municipalities decreased in this regard as well.[70]

We can thus see that, in some form, efficiency is contrary to, or at least competes with, certain elements of democratic operation. The wide autonomy that characterised the Hungarian municipality system since the regime change, together with the fragmented settlement structure, makes the functioning of most of the local municipalities difficult, if not impossible. Considering that we cannot change Hungary's geographical characteristics and demographic situations change only very slowly and incidentally, we consider two solutions effective in a theoretical sense. First, we could create "artificial" units of the optimal size, also considering economies of scale. In this case, organizing the services of a larger community might be more economical if there is democratic authority. The other solution is, in essence, maintaining autonomy, provided that the most important public services are not organized at a local level and the local political elite do not actually have a say in the management of resources. Instead, such decisions

68 ibid [4] 168.
69 ibid [1] 63.
70 ibid [6] 7.

would be left in the hands of an executive. Basically, the present solution is based on this method. It is entirely another matter which solution could be considered more democratic in a legal and political sense.

Consequently, closeness to citizens and accessibility by clients shall be ensured in new ways. With office organization tools, it is, of course, possible. Furthermore, the development of government information services is also built on this concept. Examples include: the single window administration, the government portal, and widening the scope of matters that can be conducted electronically.[71]

There is no sense in maintaining the extremely fragmented settlement structure, but it is very important to fulfil the democratic needs of local communities, even if their authority has ever lessening actual content. Considering all this, and rethinking the middle level – county – task performance would be practical, by creating fewer political and more professional, functional positions. If the local-level coordination of development also occurs here, several such initiatives that cannot be implemented independently on a settlement level, in the absence of cooperation, but which in a larger volume are not enough for the regional or even the central apparatus and infrastructure to pay attention to (local touristic, natural protection, environmental protection developments, and basic healthcare services just to mention the most important ones) could be realised efficiently.

In addition, digital technology could provide significant help concerning transparency, control, coordination, or even the operation of democratic institutions. The opportunity to present opinions directly in social media is becoming increasingly widely available. With appropriate security conditions, conducting electronic elections would also not be impossible. All of this could make procedures more cost effective and would allow for wider social coordination. It can also be seen that, through centralising task performance, the involvement and participation of NGOs has also been pushed into the background. So far we have considered to be of the greatest importance of NGOs that with the help of communication with those concerned, summarizing opinions, representing interests they act more efficiently and present the needs of citizens effectively. Nowadays the importance of NGOs described above decreased significantly with the convergence of communication tools and channels, theirs becoming more direct and interactive. A process has also started, as the result of which it is probable that instead of their former goals, these organizations will have a much more political role in the future, as long as it is even necessary in a representative democracy. However, is a subject for another study.

The results of electronic administration point towards centralisation because, with the removal of any communication lag, there is no longer need to have administration close to the citizens. With the development of so-called back-office processes, it is apparent that the administration itself has become able to intervene directly from much farther away if necessary.

71 ibid [6] 8.

Pókecz Kovács, Attila[1]

The Role of the School of Public Service (l'École de Bordeaux) in the French Administrative Law of the 20th Century

The school of public service (l'École du service public) is one of the most famous theories of French public law in the 20th century, the essence of which was that administrative law is nothing more than the law applied by the administration with regard to public service activities (*service public*). The concept of administrative law of a public service nature was at the crossroads of controversy for many decades.[2] Still, the notion of the school of public service itself remained quite flexible, having been left with several unresolved questions. I think the most important questions to be answered are who was the founder of the school, who were its followers, and what were its basic theories. The French administrative jurists and legal historians dealing with the improvement of administration have basically three directions regarding the establishment of the school. According to the first concept, Léon Duguit was the founder, a view excluded by the contradictions in Duguit's work exclude this. Finally, according to the third approach, Léon Duguit and Gaston Jèze are considered together to be the founders of the school of public service or school of Bordeaux. Although they agreed on some principles, they explained them in different ways. The followers of the school of public service were not unified regarding all questions, their concepts and methods of approach had great variety. In order to answer the questions to be clarified, I would first like to examine the circumstances of the establishment of the school of Bordeaux then to describe the main elements of the work of the jurists belonging to the school.

1. The establishment of the school of public service

Léon Duguit was an outstanding administrative jurist of the second half of the 19th century and the beginning of the 20th century who, by developing the theory of the legislation of public services, became the leading figure of this novel scientific area. The approach represented by him, namely that public service has a central role in

1 University Professor, Department of Civil Law and Roman Law

2 Mazeres, Jean-Arnaud: Duguit et Hauriou et la clé caché, in: *Autour de Léon Duguit*. Colloque commémoratif du 150e anniversaire de la naissance du doyen Léon Duguit Bordeaux, 29-30 mai 2009, (sous la direction de Melleray, Fabrice), Bruxelles 2011, 115-138.

administrative law, was the basic concept behind establishing the school. Since he was born in Bordeaux, he studied law there and was also a professor and dean of public law at the University of Bordeaux, the school he founded is also known as the school of Bordeaux (école de Bordeaux).[3] For long time, the expressions ‚the followers of Duguit', ‚the members of the school of Bordeaux' and ‚the theory of public service' were used as synonyms by the French jurisprudence. However, the famous administrative jurist called attention to the distinct contents of the three labels. According to him, duguists include authors subscribing to Duguit's concepts either in France or abroad. Contrary to this, according to the school of Bordeaux, the followers of Duguit are the authors who studied or taught in the faculty of law in Bordeaux (its headquarters is in Pey-Berland). The school of public service (école du service public) denotes the jurists agreeing with Gaston Jèze's famous phrase, namely that public service is the cornerstone of administrative law.[4] Of the three interpretations, I consider only the division of *service public* theory to be decisive today, and although the theory had followers who had not studied or taught in Bordeaux, I can accept the denomination ‚the members of the school of Bordeaux' regarding the theorists of the school of public service not working here, due to the historical traditions of science. In introducing the concept of *public service*, two jurists, Duguit and Jèze had vital roles, I think, so it is necessary to say a few words about their careers and works.[5]

Léon Duguit (1859-1928) was born into a wealthy and notable family in Bordeaux. Due to his extraordinary studies, he graduated as the top of the class in the Faculty of Law in Bordeaux. He had already worked as a lawyer when he received his doctorate. He succeeded in his first competition as early as in 1882 (at the age of 23), although he was the 6th in the hierarchy, and this helped him to get an appointment as university professor in the Faculty of Law in Caen. His first teaching obligation was on legal history. The years in Caen gave him the opportunity that, beyond jurisprudence, he could turn towards other illustrious representatives of social sciences. Together with Edmont Villey, they established the first meaningful journal of economic policy named „*Revue d'économie politique*" of which he was also the editorial secretary between 1888 and 1892. In 1886, he relocated from Caen to Bordeaux, where he was soon acknowledged by his colleagues and students. He travelled abroad a lot and was interested in exchanging views with his colleagues as well. As one lesson from his travels, he continuously encouraged sociology to be included in the curriculum of

3 Koi Gyula: *A közigazgatás-tudományi nézetek fejlődése. Külföldi hatások a magyar közigazgatási jog és közigazgatástan művelésében a kameralisztika időszakától a Magyary-iskola koráig*, Budapest 2014, 260-261.

4 Melleray, Fabrice: École de Bordeaux, école du service public et école duguiste. Proposition de distinction, *Revue du droit public et de la science politique en France et à l'étranger*, 2001/6. 1887-1905.

5 Bigot, Grégoire – Le Yoncourt, Tiphanie: *L'Administration française 2. Politique, droit et société 1870-1944.*, Paris 2014, 208-209.

faculties of law from 1890 onwards. In the following year, he established and directed a seminar on legal sociology, based on German patterns. Besides legal sociology, he supported teaching political economic science and constitutional law. His first paper in public law was published in 1896 in the *Revue du droit public,* and in the same year he was promoted to be on the jury in the competition trustee. This was a huge acknowledgement for a young (less than 40 years old) provincial university professor.[6]

Duguit went on to write a two-volume monograph on the state. The first part was published in 1901; the second part in 1903. In these two volumes, he introduced the basic principles of his concepts, which he later clarified and revised.[7] In the 1910s, he published two volumes of international renown. The first was published in 1912 under the title "*Les transformations générales du droit privé depuis le Code Napoléon",* showing the development of French civil law over the hundred years since the *Code civil* entered into force. In 1911, he began publishing his other monumental, five-volume work on constitutional law, entitled *„Traité de droit constitutionnel".* Foreign jurists also became interested in his work, and major journals began to review his articles as well. He often spoke at foreign conferences and accepted invitations to be a guest lecturer (in Coïmra in 1910, and Buenos Aires in 1911). In addition to the faculty of law in Bordeaux, from 1907 to 1911 he also took part in the educational activities of the École des hautes études sociales. In addition to his university roles in public life, he was active in the life of the city and professional associations as well. He was also elected a member of the local city council *(conseil municipal)* in 1908, where he mainly dealt with matters relating to the administration of hospitals. At the outbreak of World War I, he also ran for parliament, but after not being elected he turned his back on politics. During the war, he served in the administration of military hospitals. He lost one of his sons in the Great War, which shattered him to an extraordinary degree. After the war, in 1919, he became the dean of the faculty of law in Bordeaux and continued to perform abroad, too.[8] He gave lectures at the University of Colombia in 1920-1921, in Coïmbra in 1923 and in Bucharest in 1925. He played an active role in the work of the faculty of law that opened in Cairo. Together with Hans Kelsen and Weyr, in 1926 he co-founded the international journal of legal theory entitled *„Revue internationale de théorie du droit".* The following year he also took part in establishing the International Institution of Public Law *(Institut international de droit public)* chaired by Gaston Jèze. Duguit's scientific work was part of a general trend at the end of the 19th century that aimed to renew jurisprudence

6 Milet, Marc: Duguit Léon, in: *Dictionnaire historique des juristes français XII^e – XX^e siècle* (sous la direction: Patrick Arabeyre, Jean-Louis Halpérin, Jacques Krynen), Paris 2007, 358-361.

7 Melleray, Fabrice: Léon Duguit. L'État détrôné, in: *Le renouveau de la doctrine française* (Études réunies par Hakim, Nader et Melleray, Fabrice), Paris 2009, 215-262.

8 Pacteau, Bernard: Léon Duguit à Bordeaux, un doyen dans sa ville, in: *Thémis dans la cité. Contribution à l'histoire contemporaine des facultés de droit et des juristes* (Études réunies par Hakim, Nader et Malherbe, Marc), Bordeaux 2009, 87-105.

and to replace the legal dogmatic tendency, which was mainly based on textual exegesis. This was primarily manifested in adapting the application of new results and methods in social science to the features of jurisprudence. His theory of the state is characterised by his opposition to German doctrines. He did not consider the state to be a legal person endowed with sovereignty, as he did not see the essence of the difference between individuals and the state governing them in the nature of their legal personalities but in their functionally different roles. Duguit saw positive legal norms as the embodiment of objective law, corresponding to social solidarity and interdependence. [9]

At the centre of n thinking was a question that can still be considered relevant today: how can the state can be limited by law? As early as 1913, in his work on the transformations of public law *(„Les transformations du droit public")* he formulated his school's main thesis, namely that *„the concept of public service has become a basic concept of modern public law."*[10] It was then that he first realised that *service public* is an essential element of the state structure. Duguit was not the creator of the concept of public service, as it had already been created by administrative judicial practice in the previous years. Although Duguit used the term *service public*, he still considered it part of his political theory. In his case, public service / public services is not however a cornerstone of administrative law that would thus be distinguishable from other independent branches of law, such as civil law.[11] In his textbook *„Traité de droit constitutionel II"*, the third edition of which was published in 1928, Duguit defined the concept of *service public* as follows: *„Any action, the protection, regulation and control of which must be carried out by the government, since the provision of such action is essential for the realisation and development of social interdependence and, as having such nature, cannot be fully realised otherwise than by the intercession of the governing force alone."*[12] Duguit considered public services to be so fundamental to the community that he thought it impossible to stop them, even for a short time. As he considered continuity to be an essential element of public service, he thought strikes by civil servants *(fonctionnaires)* were beyond possibility, too. Based on his definition, through public service, the state and governors have the duty to use the state monopoly of violence to organise, regulate and control its implementation and to sanction those who obstruct its operation. The power of governors, he said, can only be directed to

9 Raynaud, Philippe: Léon Duguit et le droit naturel, *Revue d'histoire des facultés de droit t de la science juridique* 4 (1987), 169-180.

10 Duguit, Léon: *Les transformations du droit public,* Paris 1913, XIX. és 52-58. „*la notion de service public devient ls notion fondsmentsle du droit public moderne*".

11 Melleray, Fabrice: Léon Duguit. L'État détrôné, in: *Le renouveau de la doctrine française* (Études réunies par Hakim, Nader et Melleray, Fabrice), Paris 2009, 243.

12 Duguit, Léon*: Traité de droit constitutionel 2*, Paris 1928, 61. „*toute activité dont l'accomplissement doit être assuré, réglé et contrôlé par le gouvernement, parce que l'accomplissement de cette activité est indispensable à la réalisation et au développement de l'interdépendance sociale, et qu'elle est de telle nature qu'elle ne peut être réalisée complètement que par l'intervention de la force gouvernante*"

the performing public service; all other actions that have a different purpose than public service are worthless. According to him, public service is both the basis and the limit of government power *(„Le service public est le fondement et la limite du pouvoir de gouvernemantale.")*.[13]Duguit has not yet elaborated the list of public services in detail, as this would have been alien to his theory that governors *(gouvernants)* do not create rights, they only establish it. Thus, for him, the government has no discretionary power to establish public services, either. For Duguit, the range of public services is constantly growing simultaneously with societal development. At the same time, the conditions of public services are set by law; new ones can only be created by objective law and can only be administered within the framework of social interdependence *(interdépendence sociale)*.[14]

However, the theory of public service itself was only made the basis of administrative law by Gaston Jèze in 1914 in his 2nd edition of his textbook *„Principes généraux du droit administratif"* (the first version of which did not yet include it). This opened a new era in the scientific history of French administrative law.[15]

A Toulouse-born lawyer, Gaston Jèze (1869-1953) became one of the most prominent representatives of the theory of public service law in Bordeaux. [16] He continued his studies in his hometown as well, obtaining his doctorate in 1892 by a dissertation in civil law and Roman law, in accordance with the customs of the age.[17] Three years later, because of the outstanding achievement in the administrative competition, he was appointed draftsman for the prefecture of Seine county, where[18] his interest soon turned to educational and scientific work. He failed the professorial competition (*agrégation)* in both 1897 and 1899, succeeding only in the round of tenders announced in 1901, this time finishing second in the rankings. Already, after his first unsuccessful competition, he had published his first major university paper in 1898, entitled *„Éléments de la science des finances"* which he wrote together with his friend Max Boucard, the lecturer *(maître des requêtes)* at the *Conseil d'État*. Jèze was first appointed to the University of Lille, where from 1905 he became a professor of administrative law. From then on, he researched and taught in two areas, namely administrative law and financial law. His work in financial law made a significant

13 Duguit, 62.

14 Melleray, Fabrice: Léon Duguit. L'État détrôné, in: *Le renouveau de la doctrine française* (Études réunies par Hakim, Nader et Melleray, Fabrice), Paris 2009, 243-247.

15 Jèze, Gaston: *Principes généraux du droit administratif,* Paris 1914², X.

16 Kondylis, Vassilios: La conception de la fonction publique dans l'oeuvre de Gaston Jèze, *Revue d'histoire des facultés de droit et de la science juridique* 12 (1990), 43-54.; Venezia, Jean-Claude: Gaston Jèze et le service public, *Revue d'histoire des facultés de droit et de la science juridique* 12 (1990), 93-103.

17 Milet, Marc: Jèze Gaston, in: *Dictionnaire historique des juristes français XII^e – XX^e siècle* (sous la direction: Patrick Arabeyre, Jean-Louis Halpérin, Jacques Krynen), Paris 2007, 554-557.

18 Pacteau, Bernard: *Le Conseil d'État et la fondation de la justice administrative française au XIX^e siècle*, Paris 2003, 241.

contribution to making public finance law *(Finances publiques)* an independent discipline in France.[19] As early as 1904, he published his work entitled *„Principles généraux de droit administratif",* containing the principles of administrative law. Thanks to his prestige, he was invited to the faculty of law in Paris in 1909 and Georg Jellinek asked him to write a volume on French administrative law.[20]

The completed volume was published in 1913 in German.[21] At the turn of the century, several prestigious journals invited him to be a member of their editorial board. Founded in 1894, the journal of public law and political science called *„Revue de droit public et de la science politique"* entrusted him with the task of editor-in-chief in 1905. He was honoured after creating the first major journal in financial law, entitled *„Revue de science de la législation financières",* in 1903. Another recognition of his work in financial law was that in 1908 he became editor-in-chief of the journal *„Revue pratique du contentieux et des impôts",* which mainly analysed financial court cases and dealt with tax issues. He also gained considerable merit in processing the judicial practice of the jurisprudence in 1904, in the case collection entitled *„Année administrative"* that he co-created with Maurice Hauriou. As Duguit's successor, he became the principal representative of the theory of public services *(service publique)*.[22] His examination of the concept of competence and that of the administrative contract also played a central role in his works.[23] Alongside Léon Duguit, Gaston Jèze is considered the most respected French public jurist.[24]

Gaston Jèze looked at the older man's work with admiration and emphasised his prominent role in public jurisprudence. He considered Duguit a school founder but at the same time opposed some of his views. Jèze defended his master against Hauriou's attacks. He considered it Duguit's greatest virtue that he made the concept of public service become a method for solving all the problems of modern administrative law in the clearest way. Jèze became a believer of the *service public* theory but he also advocated Duguit's method of research, which he considered scientific, objective and realistic. The difference between Duguit and Jèze is apparent primarily in their conception

19 Molinier, Joël: Gaston Jèze à la théorie des finances publiques, *Revue d'histoire des facultés de droit et de la science juridique* 12 (1990), 55-70.

20 Koi Gyula: *A közigazgatás-tudományi nézetek fejlődése. Külföldi hatások a magyar közigazgatási jog és közigazgatástan művelésében a kameralisztika időszakától a Magyary-iskola koráig*, Budapest 2014, 261-262.

21 Jèze, Gaston: *Das Verwaltungsrecht der Französischen Republik*, Tübingen 1913.

22 Frier, Pierre-Laurent: La théorie de la nécessité dans l'oeuvre de Gaston Jèze, *Revue d'histoire des facultés de droit et de la science juridique* 12 (1990), 29-32.

23 Toujas, Dominique: La notion de compétence chez Gaston Jèze, *Revue d'histoire des facultés de droit et de la science juridique* 12 (1990), 87-91.; Salon, Georges: Gaston Jèze et la tgéorie générale des contrats administratifs, *Revue d'histoire des facultés de droit et de la science juridique* 12 (1990), 71-86.

24 Pacteau, Bernard: *Le Conseil d'État et la fondation de la justice administrative française au XIX^e siècle*, Paris 2003, 241.

of law: Jèze rejected Duguit's natural law-featured view, in that that law had already existed before the state was formed and the state did nothing but consolidat it. Their perceptions of the scientific and social role of university lecturers also clashed. While, according to Duguit, a jurist should be the conscience of society as well, for Jèze, scientific neutrality should come to the fore when studying law. Jèze's vision was that his master mixed politics and legal solutions. Over time, the distance between Jèze's and Duguit's conceptions widened further, although Jèze continued to apply his master's positivist sociological method and still considered himself a devotee of the school of Bordeaux. Although Duguit made the notion of *service public* well-known, it only became a general explanatory concept of all issues of administrative law in the course of Jèze's work.[25] In Jèze's view, *„individually and exclusively, only such a need can be regarded as a public service about which the governed have decided – in the public interest (intérêt général), at a given time and in a given country – to gratify it by using public services"*.[26] Thus, from the view point of the nature of public service, only the will of the governed should be taken into account. If this is not clear, the elements that may indicate the existence of this need should be reconsidered. In this respect, in contrast to Duguit's objective theory, Jèze placed a subjective element at the centre of his theory.[27]

Based on the above, it can be concluded that the founder of the public service theory is not Duguit alone but that the Bordeaux school was established together with his pupil, Jèze, instead.[28]

2. Representatives of the teachings of the school of public service

Thanks to the work of Duguit and Jèze, several prominent representatives of 20th century French administrative law saw themselves as followers of the school of Bordeaux. These include Louis Rolland, Roger Bonnard, Marc Réglade, Roger Latournerie and André de Laubadère.[29]

Louis Rolland (1877-1957) pursued his legal studies in Paris. He wrote two doctoral dissertations (1900-1901), one on the issue of postal correspondence in international law and the other on the secrets of postal employees. After that he became a lecturer, first in Paris (1904) and then in Algiers (1905). Following his successful competition,

25 Chevallier, Jacques: *Le service public*, Paris 2008, 39.

26 Jèze, Gaston: *Principes généraux du droit administratif,* Paris 1914², 16-17. „*Sont uniquement, exclusivement, services publics les besoins d'intérêt général que les gouvernants, dans un pays donné, à une époque donnée, ont décidé de satisfaire par le procédé du service public*".

27 Venezia, Jean-Claude: Gaston Jèze et le service public*, Revue d'histoire des facultés de droit et de la science juridique* 12 (1990), 101-102.

28 Païva de Almeida, Domingos: *L'école du service public*, thèse Université Paris I, Paris 2008.

29 Burdeau, François: *Histoire du droit administratif (de la Révolution au début des années 1970)*, Paris 1995, 346-348.

in 1906 he was appointed professor of administrative law at the Faculty of Law in Nancy, from where in 1918 he moved to Paris. He twice served as a Member of Parliament, thus during the French Third Republic he also became a member of the *Chambres des députés* between 1928 and 1936. At the heart of his administrative legal work it is the new and original concept of public service that he developed. He did not study in Bordeaux nor did he teach there, but after completing his dissertations on the post office he still joined the school of public service. In his textbook *(Précis de droit administratif)* he explained that administrative law is also the law of public services, but in his theories he did not completely join the main representative of the theory, Duguit.[30] Rolland owes the connection of his name with the school of public service in administrative law to three main factors. First, he created a *service public* concept which was novel, compared to Duguit's.[31] According to him, administrative law is essentially the law of public services *(„Le droit administratif est essentiellement le droit des services publics"),* but only in essence and not exclusively. With this subtle distinction, the author perceived that the role of the state could not be limited to the organization of public services only. Second, Rolland not only considers the state to be the custodian of all public services but also acknowledges its public service powers in the industrial and commercial fields. Its third and best-known merit is the formulation of the principles of public services (also called Rolland's Laws). Among these items, he states that the most basic principles of public service are continuity (*continuitê*), equality (égalité) and mutability (*mutabilitê*). Rolland's Laws are not rules of positive law but a set of principles, filtered and systematised from the study of judicial practice. There were initially only two Rolland's Laws, and then the third was joined by the fourth, which referred to the relationship between public service and the public legal person. The significance of this also had an impact on the right of civil servants to strike. Between the two world wars, his textbook on colonial legislation *(„Précis de législation coloniale")*, co-written with Pierre Lampué and first published in 1931, received great professional success and ran to several editions (1936, 1940).[32]

Roger Bonnard (1878-1944) studied law in Bordeaux, graduating in 1899. In 1903, under the guidance of Léon Duguit, he defended his doctorate written on disciplinary sanctions for the misconduct of civil servants *(„De la répréssion disciplinaire des fautes commises par les fonctionnaires publics")*. Following this, he became a lecturer

30 Rolland Louis: *Précis de droit administratif*, Paris 1934[5], 14. „*Le droit administratif est essentiellement le droit des services publics. On doit donc essayer d'abord de s'entendre sur cette notion*".

31 Rolland Louis: *Cours de droit administratif*, Paris 1944, 209. « *le service public est une entreprise ou une institution d'intérêt général placée sous la haute direction des gouvernants, destinée à donner satisfaction à des besoins collectifs du public auxquels, d'après les gouvernants, à un moment donné, les initiatives privées ne sauraient satisfaire d'une manière suffisante et soumis, pour une part tout au moins, à un régime juridique spécial* ».

32 Halpérin, Jean-Louis: Rolland Louis, in: *Dictionnaire historique des juristes français XII[e] – XX[e] siècle* (sous la direction: Patrick Arabeyre, Jean-Louis Halpérin, Jacques Krynen), Paris 2007, 884-885.

at the faculty of law in Rennes, and after the professorial competition in public law he first became a professor of constitutional law at the faculty of law in Rennes, then in 1922 he was appointed to Bordeaux as the successor to his master. In addition to Gaston Jèze, he became co-editor-in-chief of the magazine *„Revue de droit public"* from 1935, and from 1942 to 1944 he directed the editing work alone. From 1939 he co-edited the international journal *„Revue internationale de la théorie du droit"* on legal theory together with Kelsen and Giacometti. He also took an active role in university administration, first as dean of the Faculty of Law in Bordeaux, then after 1940 in the Higher Educational Advisory Committee and from 1938 in the Supreme Council for Public Education. He was also elected to the county council of Gironde in 1940. He crowned his university career in 1942 as the chairman of the public law competition for law schools *(président du concours d'agrégation des facultés de droit)*.[33] He continued his scientific work in the fields of constitutional law, administrative law and comparative law. In each of these disciplines, he passed on an imposing legal legacy to posterity. His textbook on administrative law was first published in 1926 *(„Précis élémentaires de droit administratif")*. His similarly classic public law work, entitled *„Précis élémentaire de droit public"* was published in 1925. In his work he gained merit by developing the theory of administrative subjective law.[34]

Marc Réglade (1895-1949), who was also born in Bordeaux and continued some of his high school studies there before completing them in Paris, can be considered Duguit's student as well as department successor. He obtained his law degree *(licence en droit)* in 1916, then gained a doctorate in politics and economics in 1919 and in jurisprudence in 1920 in Bordeaux. As a student of Léon Duguit, he specialised in the field of public law, so he taught subjects relating to the *droit public* and then continued his university career in Bordeaux, even after his successful university professorial competition *(agrégation)* in 1925. He taught constitutional law for a year at the university in Aix-Marseille in 1926 and then he was appointed a university professor in Bordeaux in November 1927. After Duguit's death, he took over his master's department in 1929. He was also discharged from military service because of his fragile state of health. As an active university professor, he died at the age of 54 after 23 years of teaching in Bordeaux. Despite his relatively short university career, as a student of Duguit he was particularly active in major scientific research, including the fields of constitutional law, international law and the philosophy of law. In his scientific *oeuvre,* including more than thirty works, his doctoral dissertation

33 Bigot, Grégoire: Roger Bonnard, in: *Dictionnaire historique des juristes français XII^e – XX^e siècle* (sous la direction: Patrick Arabeyre, Jean-Louis Halpérin, Jacques Krynen), Paris 2007, 137-138.

34 Pacteau, Bernard: *Le Conseil d'État et la fondation de la justice administrative française au XIX^e siècle*, Paris 2003, 242.; Noyer, Bernard: La doctrine du doyen Bonnard sur le droit naturel, , *Revue d'histoire des facultés de droit et de la culture juridique du monde des juristes et du livre juridique* 4 (1987), 181-215.

on customary law in national public law entitled *„La coutume en droit public interne"* (1919) and his work on social values and legal concepts consisting of norms and legal solutions, entitled *„Valeur sociale et concepts juridique: normes et technique"* (1950) have special significance. [35]

In the 1940s, 1950s and 1960s, several administrative jurists perceived the idea of *„service public"* as being pushed into the background in the practice of the French administrative courts. Bonnard, who worked in Bordeaux, expressed concern at the end of his life about the pragmatic judicial interpretation of public services, which he clearly considered a sign of decline.[36]

Roger Latournerie (1894-1977) served as a councillor and university lecturer as well. He is also linked to the fact that, as the government commissioner *(commissaire au gouvernement)* of the *Conseil d'État*, it was already recognised in the practice of the Council of State in the 1930s that there can be an intermediate category, between purely public services and purely private services, which is nothing other than private services of general interest.[37] These private service providers could be endowed with authority of public right by the legislature, subject to certain conditions such as eminent domain. Latournerie was also involved in the drafting of this important decision.[38]However, in its decisions of 1954-56, the *Conseil d'État* and the *Tribunal des conflits* again gave place to the theory of public services in its decrees. Although the Council of State acknowledged that the theory of *service public* was no longer the cornerstone of administrative law, it provides an essential element of many basic concepts of this branch of law. Such basic concepts of administrative law are public servant, public works and administrative contract. Before the eyes of the administrative courts, the doctrine of public services, reborn from the ashes, was called a legal Lazarus by President Latournerie.[39] In his 1960 study entitled *„Sur un Lazare juridique"* published in the official journal *Conseil d'État*, Latournerie re-emphasized the concept of public services, one that had been ignored by many jurists. As a result of his analysis, he still considered the concept of the three-element *service public* to be a coherent unit. In his view, the three elements of this remain: public interest, dependence on public power and its specific legal regulatory regime.[40] Subsequently, the new content of public services was again determined by the judicial custom. As a result, from then on, every activity of general interest that is under the control of the administration entrusted with public authority falls within the scope of it. The

35 Malherbe, Marc: *La Faculté de Droit de Bordeaux (1870-1970)*, Bordeaux 1996, 402-403.

36 Burdeau, François: *Histoire du droit administratif (de la Révolution au début des années 1970)*, Paris 1995, 473.

37 Burdeau, 419.

38 CE, 20 décembre 1935.

39 Latournerie, Roger: Sur un Lazare juridique; bulletin de santé de la notion de service public; agonie, convalescence ou jouvence, *Conseil d'État. Études et documents* 14, (1960), 61-159.

40 Burdeau, 476-477.

existence of the public authority was interpreted flexibly, so a social service carried out by private individuals in the public interest, in which the controlling institution has no public authority, is also a public service. For example, the new extended public services include the operation of urban theatres, the maintenance of urban casinos, the sports competitions organised by sports federations, or even the operation of the national lottery. With this broad interpretation, the concept came under fire again.

André de Laubadère (1910-1981), who also made the doctrines of *service public* at the heart of his work, was born in 1910 in Paris. He continued his secondary school studies in Toulouse, where he graduated in 1929. However, he completed his university studies in literature and law in Bordeaux. He received his law degree in 1930 and his doctorate in 1935. In the same year, he finished first in the university teacher competition. He was then assigned to Bordeaux as a professor, where he taught constitutional law from 1935 to 1939. After his years in Bordeaux, he was a university professor in Grenoble, Montpelier and Rabat, Morocco. It was not until 1951 that he returned to France, this time to Paris. He completed his university career as a university professor at Paris II. Among his works, the most important ones are his publication called *„Les réformes des pouvoirs publics au Maroc"* (1944), dealing with the reforms of public law in Morocco, and the handbook on the basic institutions of the French administrative law entitled *„Traité elémentaire de droit administratif français" (1953)*. The university curriculum related to public services was also part of his intellectual legacy. One work was made by his students with his permission on the basis of his lectures in 1959-1960 (*Cours de grands services publics et entreprises nationales: rédigé d'après les notes et avec l'autorisation de M. André de Laubadère*. 1959-1960 (1960). He was the jurist of the crisis period of administrative law. In his view, by the 1950s, not only the notion of *service public* but also the foundations of administrative law, its scientific systematization, administrative jurisprudence and public liability were in crisis. Laubadère was also a critic of the concept of *service public* represented by Roger Latournerie. Specifically, with regard to the legal system featured in public services, he rightly pointed out that this was not a consequence of the nature of public services but the manifestation of the fact that public authorities wished to endow the given organisation or activity with it.[41] Despite his criticisms, he remained the follower of the school of public service. He stated that the concept of public services should not be either a cornerstone of administrative law or the limit of jurisdiction of the administrative judge. In his view, there is no exclusive and dominant idea in administrative law but it nevertheless remained a fundamental element of the law of administration.[42]

With the deaths of the last representatives of the school of public service, Roger Latournerie (1977) and André de Laubadère (1981), the school of Bordeaux developed

41 Burdeau, 477.

42 De Laubadère, André: Revalorisations récentes de la notion de service public en droit administratif français, *Actualité Juridique. Droit administratif I. Doctrine*, (1961), 591-599.

by Léon Duguit and Gaston Jèze also disappeared.[43]

To summarise this short study, the school of public service (school of Bordeaux) founded by Duguit and Jèze was the most important scientific trend in 20th century French administrative law. In addition to the founding jurists, the main representatives were such excellences of the administrative law as Louis Rolland, Roger Bonnard, Marc Réglade, Roger Latournerie and André de Laubadère. The importance of the school has been relegated to the background nowadays but its main theories have still remained dominant in today's French administrative judicial practice.

43 Melleray, Fabrice: Que sont devenues les écoles de Duguit, in: *Autour de Léon Duguit*. Colloque commémoratif du 150e anniversaire de la naissance du doyen Léon Duguit Bordeaux, 29-30 mai 2009, (sous la direction de Melleray, Fabrice), Bruxelles 2011, 376.

International Law and EU Law

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Foreign Policy and International Relations of the Principality of Transylvania

I. Foreword

If one wishes to investigate the Principality of Transylvania from a legal history or international law perspective, one will find oneself in a conundrum. The primary reason for this can be found in the political, legal and historical disputes between Hungary and Romania regarding Transylvania. The other reason is that there are still a number of historical sources which do not offer a consensus regarding the legal status of the Transylvanian state existed between 16-18 centuries. Many of these sources state that the Principality of Transylvania was a semi-independent state under the suzerainty of the Ottoman Empire[2], however, the principality had all the mandatory elements required by international law for modern statehood[3]. According to new research we should overwrite the old principles surrounding the question of statehood. The above mentioned disputes between Hungary and Romania are not only present in the diplomatic channels, but also at a societal level, which means that all research has to be mindful of this too. It is also noteworthy that the historical meaning of the word Transylvania also had a different content, as opposed to nowadays. Also Transylvania means something else in geography, politics, international law or literature, but again, also at a societal level.

This essay is a study of the historical Principality of Transylvania with a focus on legal criteria, and without involving politics. The theme of the essay is the time of the independent state, so the period between 1526-1711. The research primarily focuses on the following question: was Transylvania an independent country in the investigated centuries, did it have statehood?

The goal is to present a specific state, which appeared in the 16th century on the map of Europe. That state was specific, as professor Gábor Barta stated: in less than two centuries Transylvania has been shown to us as the Eastern Kingdom of Hungary, as the Voivodship – a kind of autonomous region, as the Independent Principality, as the occupied province as well, and its *de facto* disappearance after the reign of Francis Rákóczy II[4]. From these periods a number of documents are still in existence which

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2 Béla Köpeczi (ed.), *Erdély rövid története* (Akadémiai Kiadó 1993) 239.

3 Emőd Veress (ed.), *Erdély jogtörténete* (Forum Iuris 2018) 180-193.

4 Gábor Barta, *Az erdélyi fejedelemség születése* (Gondolat 1984)

offer a full view of its history, political system, legal system, foreign relations from the beginning until the end of its statehood. From its birth to its disappearance we have every important document and source which contain evidence regarding the important question of statehood and international recognition.

At the centre of our research is the question of independence from an international law point of view. Despite Transylvania being one of the two legal heirs of the medieval Kingdom of Hungary[5], the region also developed as a newborn entity which had to fight for recognition, so the essay presents its role in the international community, in international law, its recognition and foreign policy.

According to international law in order for an entity to be recognized as a state, it has to have the following three mandatory elements: territory, population and sovereignty[6]. Transylvania had all three of these elements, this is a historical fact, which needs no further investigating. The first element of territory was composed of the medieval Transylvanian Voivodship: the Counties of Hungarians, the Saxon Seats and the Szekler Seats, the so-called Eastern Parts and Counties of the Medieval Kingdom of Hungary. These territories were named in the official title of the head of state as Prince of Transylvania, Lord of parts of Hungary, and Count of the Székelys. The area was about 100.000 square kilometers in the investigated period, out of which Transylvania itself as a geographical region constituted 59.000 square kilometers[7]. The second element of the statehood is population. In the investigated period the principality had a multi-ethnic population size of approximately 955.000-1.000.000[8]. The third criterion is that of sovereignty, which will be further examined together with the international recognition, in the second part of the essay. The reason is evident: no sovereignty can be effective without international recognition. Without international recognition, a state cannot act as a part of the international community, and will always be in dispute regarding claims of sovereignty by other states.

The Transylvanian state as a legal heir to the Kingdom of Hungary showed both the internal and international faces of sovereignty through the reign of its heads of state. Due to the fact that without international recognition a state cannot have any political and economic ties with other states and in a radical situation its very statehood would be put in jeopardy or its sovereignty would be subjected to claims or military action by other states, scholars consider that there is a fourth mandatory element: international recognition[9]. This essay tries to answer this complex question,

Transylvania, Erdély, Ardeal, Siebenbürgen means the same territory which started enjoying its own statehood after the siege of Mohács in 1526 and it constituted the alternative development of the Kingdom of Hungary, of Hungarian law and statehood.

5 Barna Mezey (ed.), *Magyar alkotmánytörténet* (Osiris 2003) 74-76.

6 Kovács Péter, *Nemzetközi közjog* (Osiris 2006) 165-174.

7 Veress 183.

8 Köpeczi 238.

9 Kovács 254-256.

Of course, history does not operate with the question *what would have happened if…?*, but the historical situation gave a non-hypothetical answer to Hungarian legal history. The Habsburg Hungarian Kingdom was situated in the West, while the national state was in the East. Both had different constitutional systems and this separated legal development can be a subject of legal and comparative research as well.

II. Historical background. Basics of the international recognition of the Principality of Transylvania

As mentioned in the foreword, the Principality of Transylvania was the legal heir of the Medieval Kingdom of Hungary after it was defeated by the Ottoman Empire in the siege of Mohács in 1526. This is supported by historical evidence surrounding the person and title of head of state. In that period in history the recognition of the title of a person also had an impact on the sovereignty of the land. The recognition of the title also meant the recognition of the state. Of course, historical facts and evidence also had an important role next to the other three elements, but the essay focuses mainly on the international aspects.

After the Battle of Mohács, where King Louis II. died, two legal monarchs were elected, which resulted in the division of the medieval Hungarian Kingdom into two parts. The Diet, the national assembly of Székesfehérvár first elected John Szapolyai, governor/voivode of Transylvania as King of Hungary on 10 November 1526, naming him King John I. On 17 December 1526, noblemen from the region known as Transdanubia formed another Diet in Pozsony (today's Bratislava) electing Ferdinand Archduke of Austria as King of Hungary, in accordance with the Habsburg-Jagellonian family contract. This resulted in Hungary legally having two heads of state at the end of 1526, which naturally caused a civil war to break out[10]. At that time, we cannot talk about a Transylvanian state, because King John I. was legally King and it was only the historical situation which caused his sovereignty to have effect only in the Eastern part of the Kingdom. However, the at the core of Transylvanian statehood lay the Kingdom of John I. When King John died in 1541, the Ottoman Empire commenced with the occupation of Central Hungary. The political and military situation changed radically, because the diet elected King John's newborn son as King John II, but his sovereignty only had effect in the eastern third of the territory of the former medieval Hungary[11]. The Ottoman Empire in Buda created the Vilayet of Buda, and Central Hungary became part of the Ottoman Empire for about 150 years.

As the result of the above mentioned historical facts medieval Hungary had been divided and had collapsed, but from an international law perspective, the situation was not quite so clear. King John I. was legally elected, thus legally a King of the Kingdom. After the civil war with Ferdinand, and due to the diplomatic situation,

10 Ignác Romsics (ed), *Magyarország története* (Akadémiai Kiadó) 310-338.

11 Veress 176-177.

he only reigned in the Eastern part of Hungary. The border between the two rival kings was not defined. King John's capital was Buda – the former royal capital – and his Kingdom can be named The Eastern Kingdom of Hungary. King John II, who went by the popular name John Sigismund, was elected King of the aforementioned Kingdom, however he was never actually crowned. His state was also in the Eastern part of the former country, but the border was mainly fixed by the river Tisza as the result of the Ottoman occupation of Central Hungary. This state could also be named a Kingdom, because of the title of John II., but in context it is named Szapolyai-Hungary against the Habsburg-Hungary or Royal Hungary. The Treaty of Speyer signed in 1571 between Ferdinand and John II., afforded the latter the right to use the title „Prince of Transylvania". Nevertheless John never used this title. Three days after the signing of the Treaty he suddenly died[12].

After the death of John II, the Transylvanian diet elected Stephen Báthory as head of state. Until his election as King of Poland, he used the medieval title of Voivode/ Governor of Transylvania[13]. The reason was simple, the Báthory family was not a royal house as the Szapolyai was, and at that time the common political program of both kingdoms, Hungarian states was the reunification of the Empire of Saint Stephen's Crown. Stephen Báthory having the title of Voivode symbolically reinstituted the Voivodship of Transylvania, as an autonomous part of Hungary. However, the Habsburg King Maximillian I. had no effective political power or sovereignty over Báthory's land. When Stephen Báthory became elected sovereign King of Poland he immediately changed his title to Prince[14], which was the title of the sovereign monarch at that time. Prince Sigismund Báthory, the heir of Stephen Báthory was the first head of state who was elected Prince of Transylvania, and the region was named Principality of Transylvania. The name remained until the end of its quasi independence, and was only formally changed in 1768 to Grand Principality under the Habsburg monarchs.

The name of the country as explained above has to do with the title and rank of the head of state. Nowadays the situation is the same: the Republic of France has a President, the Kingdom of the Netherlands and the Principality of Liechtenstein have a king or a prince. John Szapolyai was the undisputed King of Hungary. In the international community his title and rank was recognized by everyone. Even the rival Habsburg dynasty recognized it by the Treaty of Várad (today Oradea). The situation of his son, John Sigismund, however, was subject to more dispute. He was elected, but he was never crowned King of Hungary with constitutional and international consequences. Of course, his court and personal contacts used the title of King when addressing him, but internationally this was not clear. The Ottoman Empire as a consequence of their alliance, the Kingdom of Poland due to his Jagellonian mother, France due to its anti-Habsburg policy all recognized his royal title and country.

12 Köpeczi 228.

13 Köpeczi 228-229.

14 Veress 177.

Because of his protestantism, all the protestant countries also followed suite, behaving like the abovementioned powers. In fact, he was the Monarch of Transylvania, but due to the above reasons, he can be mentioned alongside the Kings of Hungary. He was more of a Hungarian King, than a Transylvanian Prince. He renounced his royal titles only in the Treaty of Speyer[15], three days prior to his death, therefore only ruling for three days as prince.

Stephen Báthory was the first Transylvanian head of state, who was elected by the Transylvanian diet. The right to elect the prince was one of the fundamental rights of the Transylvanian Diet. As was mentioned above, at the beginning of his reign Stephen Báthory first used the vassal voivode title in his official contacts with the Ottoman Empire or the with the Habsburgs. The sultan's ferman or alliance letter to him was also symbolic to Báthory. Before his reign, in the Szapolyai-period of the country, all the fermans were written as equal alliance letters of equal parties, but Báthory had to accept a vassal status symbolized by the acceptance of the voivode title. Despite this hard situation between the two Empires, his talentence and diplomatic activities made Transylvania a *de facto* independent State. When he was elected King of Poland, as monarch of an internationally recognized state, he could change his title to sovereign Prince as an equal member of the European monarchs[16]. Neither the Habsburgs, nor the Ottoman Empire wanted to go to war with the then great-power Poland and its crowned monarch, for Transylvania. The title voivode disappeared in the future, and in 1593 the Transylvanian Diet made a constitutional act regarding the head of the state. According to this act, the title is Sovereign Prince: *princeps Transylvaniae partiumque regni Hungariae dominus et sicolorum comes*. Thanks to their title and rank, the heads of state could make effective diplomatic activities and conduct foreign policy independently, which meant that the princes were in fact not vassals, but rather allies of the Ottoman Empire. Of course this alliance was in fact not equal due to the power of the Ottoman Empire, but in much of this period Transylvania could conduct foreign policy independently, as we will explain below. During the independent Transylvania, the country had 18 princes, mostly well educated, multilingual, protestant Hungarian noblemen. Also most of them were very active in the public international life, whose actions and their effects constitute the unique Transylvanian foreign policy.

III. International recognition of the Principality of Transylvania

John Szapolyai, as King John I., was legally king. As the undisputed monarch of an internationally recognized kingdom, he was also recognized as such by the Habsburgs. His son, John Sigismund or King John II. and his land was also recognized by most of the European monarchs and by states, such as France, Poland, the protestant principalities and kingdoms and naturally by the Ottoman Empire. The reason of the

15 Veress 191.

16 Veress 192-193.

protestant recognition came from his personal life, as a typical renaissance person, he was born as a roman catholic crown prince, but his open soul accepted the lutheran, and afterwards the reformed theology and finally he died as a unitarian monarch. His religious personality and his legislative actions are the roots of the world famous Transylvanian freedom of religion, tolerance and patience which was legally constituted by the Act on Freedom of Religion of 1568 and 1571 in the Transylvanian Diet[17]. In the investigated time the effective recognition of the head of state also meant the recognition of the state. After the disappearance of the royal Szapolyai dynasty, Transylvania had a great issue of legitimacy[18]. The elected Stephen Báthory came from a wealthy provincial family, but not from a royal house. When he was elected King of Poland, his kingship as an international status solved that legitimacy issue and he started to use the title and rank of sovereign prince, which resulted in the recognition of the state as the Principality of Transylvania. The name of the title came from the text of the Treaty of Speyer, but Stephen Báthory was the one who effectively filled it with content and attached to it undisputed sovereignty. After his reign all the heads of state used this internationally recognized title and the Principality of Transylvania – with few exceptions – was also recognized.

The Ottoman Empire as a great power considered Transylvania to be an Ottoman vassal state, but most of Europe did not see it so. The reason for this European recognition came not only from the personal qualities of the princes, but also from protestantism. Transylvania was part of the cultural, political and economic life of Europe, and declared itself a European state (see: cultural memories and contacts, educational contacts, built heritage and diplomatic relations explained in the fourth part of the essay). Transylvania negotiated at a diplomatic level with most of the European states of that time. All the peace treaties, international contracts, alliances, dynastical marriages are clear evidence of the equal international status of the Principality with the other European states[19]. The Transylvanian State joined the Protestant Alliance in the Thirty Year War and also joined the Holy League. Such memberships in international organizations are also significant evidence of state recognition. The most glorious example of international connections and recognition was the 1648 Peace of Westphalia, which created the political and international system of Europe until the Vienna Congress, in some aspects until the First World War. The mentioned treaty system, which constitutes one of the fundamental building blocks of modern international law and sovereignty, declared the Principality of Transylvania as a partner of the Protestant Alliance, an allied state of England and Sweden. Switzerland and the Netherlands were also recognized by this treaty system, which means that the Westphalia system constitutes a *de iure* recognition in a collective form of the Principality of Transylvania. The Peace Treaty of Karlowitz between the Ottoman

17 Mezey 74.

18 Veress, 191.

19 Veress, 194-202

Empire and the Holy League declared the *de iure* independence of Transylvania. It is also noteworthy that some of the dynastic connections were also important: Gabriel Bethlen, Stephen Báthory and Sigismund Bathory were married to imperial or royal princesses from Europe, Michael Apaffy II's guardian was William of Orange, King of England, Governor of the United Provinces of the Netherlands. If we accept that Transylvania was an Ottoman vassal state, no dynastic connection would have been formed in such ways. The diplomacy of the Principality was clearly successful.

IV. The directions of the diplomacy of the Principality of Transylvania

The Transylvanian National Assembly controlling the Princes' diplomacy[20], usually followed two basic recommendations: loyalty regarding the alliance with the Ottoman Empire and good connections with the neighboring and Christian countries[21]. The executive power of the foreign policy was under the Prince, but the supreme forum of the diplomacy was the National Assembly. Loyalty towards the Ottoman Empire was a necessary condition for the election of a prince mandated by the National Assembly. The reason is clear, between the two world powers – i.e. the Habsburg and the Ottoman –, the Transylvanian statehood had its basis on the Ottoman alliance for most of the investigated period[22]. The Transylvanian diplomacy was in a special, but difficult situation. Most of the time, the state's territory came under attack by either of the two Great Powers who wished to extend their sovereignty onto Transylvania. The Ottoman Empire considered Transylvania as its vassal state, the Habsburg Empire considered it as a rebel province, despite Transylvania being declared and recognized clearly as an independent legal heir of the Kingdom of Hungary. Small fatherland between two pagans – said the chronicle. These were the reasons and roots of the active and effective Transylvanian diplomacy. In the most glorious time of the independence, Transylvania would have territorial successes and also affected the Ottoman policy at its borders in Wallachia and Moldova.

The supreme directive of the diplomacy was the Ottoman loyalty. The fall of the Ottoman Empire was the reason for the fall of the principality too, but it survived by its name until 1867[23]. The theme of the essay is the time of the independent state, so the period between 1526-1711. In the following parts the essay tries to introduce the main directions of the Transylvanian diplomacy. To be noted, all the directions were effected at the same time, but there were periods with dominant directions, as follows:

20 Mezey 75.

21 Zsolt Trócsányi, *Törvényalkotás az Erdélyi Fejedelemségben*, (Gondolat Kiadó 2005) 20.

22 Ferenc Eckhart, *Magyar alkotmány- és jogtörténet*, (Politzer Zsigmond és Fia Jogi Könyvkereskedés 1946.) 278-281

23 Veress 282-285.

The first period: (1526-1571) - beginnings, core of the identity:

In the first period until the extinction of the Szapolyai dynasty the main diplomatic directions of the State were the reunification of the Kingdom under the Szapolyai kings with the recognition of their title as kings. In fact, that direction had nothing to do with the question of state recognition, which did exist, at issue was the recognition of the government. In our definition, if a state changes its constitutional system, it will not necessarily have to receive recognition, but in this special situation with two rival kings determinated the foreign policy at the first period.

King John I. realized that the Habsburgs could not keep Hungary safe against the Ottoman Empire, so reuniting Hungary could only work without them. The active diplomacy looked for diplomatic help from France under Francis I. After the French coalition, which did not work, King John I. turned to the Ottoman alliance[24]. That diplomacy was in a schizophrenic situation and King John I. hesitated. For him as a legitimate and constitutional king, a Christian monarch, it was essentially the last chance by turning to the Islamic Empire as an ally. His decision was supported by the traditional Hungarian anti-germanic sentiment and on the common goal of reuniting Hungary. The French king was also in an alliance with the Ottoman Empire since 1525, fact which could also justify the alliance with the Ottomans. This diplomacy was successful, however it was the final step of the total dissolution of medieval Hungary. When King John I realized it, the eastern Hungarian diplomacy tried to reunite Hungary under the Habsburg monarch. On 24 February 1538 the two sovereign monarchs signed the Treaty of Oradea/Nagyvárad/Grosswardein. Both kings recognized each other as kings, also declared if John dies, his heir would be King Ferdinand I. If John would have a son, he would become the Duke of Szepes, a newly created dukedom in Northern Hungary. The other main task of the treaty was the alliance against the Ottoman Empire. The most interesting thing in that treaty was the paradox situation, that two sovereign Hungarian kings made an agreement about their realm, meaning an internal problem was solved and negotiated in an international treaty. As a result of the treaty the Eastern Kingdom of Hungary, the pretender of the Principality of Transylvania, which had already the mandatory elements of statehood, population, the territory and sovereignty, also got the fourth, but not additional element of state recognition. This meant that the Eastern Kingdom of Hungary became an equal state with other sovereign states in Europe at that time.

Without effective Habsburg diplomatic, military and economic help the execution of the treaty was a loss. King John I. afterwards tried to build contacts with the traditional good ally Poland and married Princess Isabel of the Jagellonian dynasty. With this step, the execution of the Treaty of Nagyvárad became an illusion and transformed and used as the basis of the next Szapolyai-Habsburg, or Báthory-Habsburg treaties (29 December 1541 – Treaty of Gyalu, 8 September 1549 – Treaty of Nyírbátor, 10 March 1571 – Treaty of Speyer). The only difference was that the dukedom of Szepes

24 Romsics 334-336.

was dissoved and for the Szapolyais or Báthorys the Habsburg monarch created the dukedoms Oppeln and Ratibor. At that time the Ottoman alliance was effective, except the few years when the country was under Habsburg rule under General Castaldo as governor and Francis Kendy and the Hero of Eger, Stephen Dobó as voivodes.

The second period (1571-1613) - the time of the Báthorys

In this period the main issue before the foreign policy was still the unification of Hungary. The Transylvanian National Assembly realized that the Habsburgs could not realize the unification and the two great empires had equal power. According to this recognition, the Transylvanian National Assembly elected the wealthy nobleman Stephen Báthory as Voivode of Transylvania. The more significant points of his reign have already been detailed in the above. Báthory as a Polish King could recognize the sovereign Princely title in Europe. The Báthorys built good relations with Wallachia and Moldova, proposing an anti-Ottoman coalition. Transylvania, as an allied state of the Republic of Venice and the Habsburg Monarchy fought in the Long War (Fifteen years war) too. This time there was also a chance to change the constitutional electoral monarchy into a hereditary monarchy. The sultan recognized the right of the Báthory family to the throne of Transylvania, however, the national assembly protected its electoral rights. Stephen Báthory, as King of Poland had also taken diplomatic and military steps in creating a great anti-Ottoman coalition of the Eastern European states, led by him and for this reason he also tried to obtain the Russian throne[25].

The third period (1605-1606, 1613-1657) – the glorious time of the protestant monarchs

The third period was the golden age of the Principality of Transylvania. The diplomacy worked well regarding the Ottoman alliance, successful anti-Habsburg protestant policy was the main content of the period[26]. Transylvania joined all the Western European coalitions against the Habsburg Empire and the leading coalition partners (countries like Sweden, England, Venice, the Netherlands) recognized its statehood. The princes could grant freedom of religion in royal Hungary. The anti-Habsburg conspiracies in royal Hungary looked at the Transylvanian state as having a real possibility and also the power to reunite Hungary under a national king. The treaties of Vienna (1606), Nickolsburg (1621) and Linz (1645) granted not only the Transylvanian interests, but declared the constitutional interests of the royal Hungarian nobility against the royal court. In international focus, in the peace treaty of the Habsburg-Ottoman Long Turkish War, the Treaty of Zitava the prince of Transylvania, as an equal partner was the mediator between the two global powers.

In this period Hungary was also reunited under Transylvania two times, but for a few years only. Stephen Bocskay became Sovereign Prince of Hungary, Prince Gabriel

25 László Nagy (ed), *Báthory István emlékezete*, (Zrínyi Kiadó) 5-41.

26 Köpeczi 262.294.

Bethlen was elected King of Hungary. Under the mentioned protestant princes, the Principality of Transylvania managed to obtain from the Ottomans the appointment of friendly voivodes in neighboring Wallachia and Moldova. At this time Transylvania paid no tax to the Ottoman Empire. The Habsburg Kingdom of Hungary paid a yearly tax to the Ottomand of 200.000 golden florints. The Principality's diplomacy at that time worked with permanent ambassadors in the ally states. To be noted, Transylvania used the asylum system, thus when political or religious refugees from Hungary or from Europe came to Transylvania, they could have safety, the Transylvanian State would not send them back.

The fourth period (1657-1661) - the time of deterioration

The powerful, peaceful, wealthy and successful Principality deteriorated in four years[27]. The Transylvanian diplomacy had not obtained the Polish throne since the reign of Stephen Báthory. The actual political situation and the Ottoman alliance and pressure until Prince George Rákóczy II. could prevent real actions in Poland. However, Prince George Rákóczy I.'s second son Sigismund had a real chance under the support of the protestant Radziwill Dukes, but because of his early death the plan finally failed. However, Prince Sigismund's brother, the ruling prince George Rákóczy II. started a war for the Polish Crown without Ottoman consent. The result was diplomatically and militarily a tragedy and ended with an Ottoman, Tatar and Wallachian invasion of Transylvania[28].

The fifth period (1661-1690) - The Apafis, fight for survival

After a short interregnum Transylvania had rebuilt itself. In this period the main diplomatic direction was the secret anti-Ottoman alliance. The Ottoman Empire had been in decline at this time and Transylvania's solution to preserve its independence was to join the Holy League. The asylum system still worked and until 1687 there was no official break with the Ottoman alliance. Transylvanian diplomacy forced every possible diplomatic step to recognize and preserve its independence, but the global political balance changed dramatically. As a member of the Holy League, Transylvania was an allied power of the Habsburgs, of France, of the Papal State, of Venice, it still had good relations with the Wallachia and Moldova, with Poland and the protestant states[29]. As a result of the successful war between the Holy League and the Ottoman Empire, Transylvania nominally got its sovereignty back, but under the Habsburg Monarch by way of the Diploma Leopoldinum of 1691, as one of the Habsburg Monarchies in Europe[30]. Transylvania was not reunited with Hungary, it got its separate governmental institutions within the Habsburg Monarchy.

27 Köpeczi 312-317.
28 Romsics 422-424.
29 Köpeczi 325-327
30 Romsics 424-427.

The sixth period (1691-1713) - Wars of independence

As a result of the Diploma Leopoldinum and the Treaty of Karlowitz, Transylvania lost its *de facto* independence and became a Habsburg province. The newly organized Habsburg governmental institutions were not integrated into the organicly developed and traditional constitutional system of Transylvania, causing internal political crises and resulting in many wars of independence[31]. Those wars named after the leading persons like Prince Emerich Thököly, Prince of Northern Hungary and Transylvania, or Prince Francis Rákóczy II., Ruling Prince of the Federative States of the Kingdom of Hungary and Principality of Transylvania. All these wars of independence were under Ottoman and French financial support and had Dutch and English mediations too. Under Francis Rákóczy II. Transylvania was a member of the Confederation of Hungary and Transylvania, thus Transylvania had no independent foreign policy, so only the National Assembly functioned. Prince Francis Rákóczy II.'s title of ruling prince of Hungary was not recognized internationally, thus in international relations he used the traditional and undisputedly recognized Transylvanian princely titles. However, most of the territory of the principality was under Habsburg rule during the wars.

V. Conclusion

The Principality of Transylvania was created and developed as a legal heir of the medieval Kingdom of Hungary. Its role was quite important in the Hungarian and Romanian history and cultural heritage, as fatherland of many nations and nationalities. To discuss and explore its history, especially legal history can have some effects nowadays too. The Transylvanian tolerance is proverbial and based on its balanced international policy in the past, which resulted for example the first act on freedom of religion in history and the survival of the multi-ethnic society.

If we look at the criteria for statehood in international law, Transylvania meets all those requirements: the Principality of Transylvania was an independent, sovereign entity, a state in Europe in the 16th-17th centuries. There is much evidence, such as the international documents, the dynastic connections and the political and diplomatic behavior of the countries at that time. Formally, in the beginnings, it was an equal allied state of the Ottoman Empire, in the end, as a consequence of Prince George Rákóczy II.'s foreign policy it became a vassal state and lost its independence. In its history there were periods when it had to pay a kind of fee to the Ottoman Empire, or the Ottoman Empire appointed the head of state, but this appointment constituted an exception. For example, in the golden era, or the Báthory era, the National Assembly freely elected the prince, under Gabriel Bethlen or under the Rákóczys Transylvania paid no fees, or just symbolically tributes of its yearly income. Transylvania most of the time investigated was not under other state's sovereignty, was not annexed or occupied. The reason was clear and the Ottoman Empire realized it also: the route

31 Köpeczi 327-337.

to Vienna was not across Transylvania. The Habsburgs would not gladly occupy that eastern country, they needed their forces against France, or against the other Ottoman fronts. The inner policies, such as cultural, educational, religious and defense policy were absolutely free of foreign and Ottoman effects, maybe more free than nowadays as members of different international organizations or entities, or member states of the European Union. Many historians believe that because Transylvania was obliged to pay tax tribute or fee to the Ottoman Empire, this fee is an evidence of its vassal status. To pay such fees or taxes was not out of the ordinary for that time. For example the Habsburg Kingdom of Hungary was also obliged to pay such taxes and fees to the Ottoman Empire in its history, mostly much more than Transylvania. Thus to pay such fees and taxes does not constitute evidence of Ottoman vassal status and it has no effect on the question of sovereignty.

The Principality of Transylvania was not only the heir to the Hungarian medieval state, but was also an buffer state between two global powers. Both of those powers wished and were interested in its independence, semi-independence and neutrality from their conflicts. As heir to the Hungarian statehood, the Principality of Transylvania rescued the Hungarian culture, literature and legal system, developed them further and created a specific, Transylvanian culture and identity, mixed with the rescued Romanian, Saxon, Armenian, Jewish elements and heritage as well. After almost two hundred years of sovereignty it lost its independence, formally and nominally preserved it until 1867 when union was formed with Hungary, within the Austro-Hungarian Empire.

Manzinger, Krisztián[1]

Nation-stateness Carved in the Constitution – The Question of Székely Land's Territorial Autonomy in Romania

The pandemic COVID-19 hit Romania in March 2020 and caught the Romanian political elite in the middle of an ordinary political crisis. After weeks of chaotic events – culminating in the later annulled agreement between the Ministry of Internal Affairs and the Romanian Orthodox Church to celebrate Easter, as if there was no pandemic killing dozens of Romanians a day – the political elite at last found some solid ground on which to act on 29 April 2020. That day, the Romanian Senate rejected a draft on the territorial autonomy of Székely Land, a Hungarian-populated area in the geographic centre of Romania.[2] The voting on it and the connected political declarations showed the extreme way in which the Romanian political elite tend to react when the myth of the ethnic homogeneity and the administrative unity of the country, although not its territorial integrity, are challenged.

In this paper, we examine the deeper background to this political scandal, presenting the overall Romanian view on notions such as 'unity', 'indivisibility' and 'autonomy'. First, we briefly discuss ethnic nation-building in general; later we focus on how nation-stateness has been presented in the Romanian Constitution in the past one hundred years. After that, we present the example of the Hungarian Autonomous Region, existing between 1952 and – with serious modification in the 60s – before being eliminated by the Ceauşescu regime. We will also pay attention to the questions of nation-stateness and territorial autonomy in the period after 1989, in this way showing the current framework in which a Romanian President might considered himself entitled to launch a verbal attack on both the ethnic Hungarian Romanian citizens living in Székely Land and Hungary in an almost unprecedented way since the fall of National-Communism. In this paper, however, we do not intend to describe in detail the current plans for the autonomy of the Hungarian minority, we focus solely on the Romanian position.

The rivalry between nation-stateness and aspirations for autonomy has always been a current issue in Romania, especially in the 2018-2020 period, marking the centenaries of such events as the Union of Transylvania and Romania, promising

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2 Local Hungarians are called Székelys, and they constitute a subgroup of the ethnic Hungarian nation.

autonomy for the Hungarian and other minorities; the signing of the Minority Treaty of 1919 by Romania, and the Treaty of Trianon that set the Hungarian-Romanian border where it still exists today.

1. Nation-state and autonomy

The idea of the modern nation-states emerged at the end of the 18th century and has been influencing interstate relations and the stability of states since then. When building a nation-state, legislators aim at the unification of economic and social life within the borders through administrative authority, the strengthening of political and economic control, and the standardization of the culture. According to the argumentation, co-citizens have to share a common national identity, national language and national public culture to create a solid nationhood as a basis for trust, solidarity, and territorial stability.[3] Nation-states have been struggling to achieve this level of desired unity and ethnic homogeneity through various activities, ranging from the physical destruction or expulsion of minority communities to their assimilation.

Policies on language and identity are imposed in typical nation-states by the intelligentsia and the political and social elite according to their own culture and ideological beliefs. They usually intend to increase artificially disparities between the prestige of the official national language and the minority languages to push minority populations towards assimilation or at least to the state of bilingualism. History has often shown that minority languages have no real chance of survival when they represent backwardness and the national language represents modernity.[4] The situation might be different, however, when a nation-state tries to impose the official language on a regionally concentrated linguistic minority having their own institutions, or at least the tradition of such institutions.[5] Against such assimilatory attempts, those minority groups usually strive for self-governance or autonomy to protect their identity, language and collective existence.

Minority wishes for such institutions and majority nationalism have the same roots; the difference between them is that the latter can easily be labelled as a struggle for modernity. This is because majority nationalism and nation-state building are interconnected: they aim at the creation of an exclusive social, economic and cultural

3 Kymlicka, Will – Bashir, Bashir (eds.): *The Politics of Reconciliation in Multicultural Societies*. Oxford, Oxford University Press, 2012, 11.

4 Rubio-Marín, Ruth: Language Rights: Exploring the Competing Rationales, In: Kymlicka, Will – Patten, Alan (eds.): *Language Rights and Political Theory*, Oxford, Oxford University Press, 2007, 65., Díaz López, César E.: The Politicization of Galician Cleavages, In: Stein, Rokkan – Urwin, Derek W. (eds.): *The Politics of Territorial Identity*. London-Beverly Hills-New Delhi, Sage Publications, 1982, 393.

5 Kymlicka, Will – Patten, Alan (eds.): *Language Rights and Political Theory*. Oxford, Oxford University Press, 2007, 13.

space within the existing borders; while minority aspirations to have a 'safe space' could be labelled as hurdles in the process of building a modern nation-state. Therefore, falsely, the same aspiration could be called 'modern' with regard to a majority population and 'pre-modern' in the case of minorities.[6]

A state pursuing assimilatory nation-building often describes itself as a 'nation-state' in its constitution to highlight the primordial importance of this endeavour. Such a constitutional arrangement frames the functioning of the state and determines the policies orienting laws and other legal acts in the direction of the main goal of homogenisation. This might be seen as a very unfortunate development, since this way the majority-minority rivalry is written into the constitutional order and minorities are pushed into an unfavourable position.

2. Romania and 'nation-stateness'

Romania describes itself "*a sovereign and independent, unitary and indivisible nation-state*" in Art. 1 alin. 1. of its Constitution.[7] According to the census of 2011, almost 90 percent of the population was of Romanian ethnicity, which might be a legitimate base for proclaiming itself a nation-state. The reason that Romania cannot be considered a nation-state is that some two-thirds of the remaining 10 percent of the population belong to one ethnic group, Hungarians, and again two-thirds of them, i.e. some 5 percent of the total population of the country, live in two geographic areas where they constitute a regional majority. One is Székely Land, covering two and a half counties in the geographic centre of Romania, and the other, a more mixed one called Partium, lies along the northern section of the Romanian-Hungarian border. The existence of these two regions is not reflected in the Romanian constitutional order; nevertheless, politics and the functioning of the state are preoccupied with their existence: they firmly oppose any attempt at self-governance.

Self-identification as a nation-state is elemental for several Central European nations, including Romanians.[8] The historic fragmentation of the Romanian ethnic territory, the presence of "aliens" in great numbers and their colonisation to Romanian lands throughout the centuries have become key parts of the national consciousness.[9]

6 Bakk Miklós: Birodalmi kisebbség avagy a modernitás nyelve. *A hét*, 1998/44, http://bakk.adatbank.transindex.ro/belso.php?k=2&p=1738 (9 June 2020)

7 "România este stat naţional, suveran şi independent, unitar şi indivizibil."

8 It is debated, however, whether Romania belongs to Central Europe. According to Huntington, she belongs to the Orthodox world headed by Russia. Nevertheless, he emphasises that Romania's western parts belong to the Western civilization and that 'Orthodox' Romania often cooperates with the 'Catholic' Hungary belonging to the Western civilization. Huntington, Samuel P.: *The Clash of Civilizations – And the Remaking of World Order*. London, The Three Free Press, 2002, 126., 158., 160-162.

9 Mihăilescu, Vintilă: *Blocul carpatic românesc*. Bucureşti, Monitorul Oficial, 1942, especially 11–12. The idea requires the acceptance of the official theory of Daco-Romanian continuity,

According to the general approach, all foreign rulers, especially the Hungarians in Transylvania and the Russians in Bessarabia, deliberately neglected the Romanian ethnic presence and tried to turn the towns − the cultural, economic and social centres of the Romanian territory − into *alien fiefdoms*.[10] In the past century and a half, to counter-balance such foreign impacts, Romania has tried to reinforce unity[11] and to increase the Romanian-ness of the state by supporting the Romanian element in various ways; these have characterised the history of Romanian statehood since its independence, and especially after the Great Union of 1918.

3. Greater Romania in the interwar period

The first Romanian Constitution, adopted in 1866, was based on the liberal constitution of Belgium of 1830. It did not contain the terms *unitary* and *national* as core elements of Romanian statehood until 1923. The reason for their inclusion after World War I was to counterbalance the intention of the Entente Powers to question the national nature of Greater Romania and to turn the country "*into a new and disastrous Austria-Hungary*"[12] by forcing it to sign the minority treaty in 1919. Therefore, the modified Art. 1 alin. 1 of the Constitution in 1923 intended, on the one hand, to ban the creation of regional self-governments[13] and on the other, to project the myth of the state in unity, undisturbed by minority blocks.[14]

For obvious reasons, until the creation of Greater Romania, the Romanian political elite had no anti-autonomy feelings. Before World War I, the leaders of the three-million-strong Romanian minority in the Kingdom of Hungary first advocated reinstating Transylvania's historical autonomy within Hungary. However, after 1905, they urged the implementation of the 1868 law on linguistic rights, the recognition

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rejected by Hungarian historians as unfounded.

10 Jalea, Ion: *Ardealul, Banatul, Crişana, Maramureşeana şi Bucovina*. Bucureşti, Editura Steinberg, [1919?], 43., 15.

11 The ideological content of the continuous fight of the Romanians for unity was elaborated around 1968, the 50th anniversary of the Great Union Day. Notable publications were Berciu, D. (ed.): *Unitate şi continuitate în istoria poporului român*. Bucureşti, Editura Academiei Republicii Socialiste România, 1968. Pascu, Ştefan: *Marea adunare naţională de la Alba Iulia*. Cluj, Universitatea Babeş-Bolyai, 1968. The discourse has remained the same since then, for instance: Djuvara, Neagu: *O scurtă istoria ilustrată a românilor*. Bucureşti, Humanitas, 2013, 306-308. For a critical approach see Boia, Lucian: *Istoria şi mit în conştiinţa românească*. Bucureşti, Humanitas, 2011, 214-250.

12 Finance minister Vintilă Bratianu's words are quoted in Nagy Lajos: *A kisebbségek alkotmányjogi helyzete Nagyromániában*, Kolozsvár, Minerva Irodalmi és Nyomdai Műintézet R.-T, Erdélyi Tudományos Intézet, 1944, 26.

13 Takács Imre: Gondolatok Románia alkotmányáról, *Magyar Kisebbség* 1995/1, Kukorelli István: Románia alkotmányáról, Magyar Kisebbség, 1995/2.

14 Nagy op. cit. 70.

of nationalities as constituent parts of the Hungarian political community and the creation of ethnically homogenous counties to allow nationalities to govern themselves.[15] Romanian politicians supported this approach in the belief that autonomous territories could more easily unite with Romania when the neighbouring Austro-Hungarian and Russian Empires broke up.[16] The conviction, i.e. that autonomy leads to secessionism, is still prevalent in Romanian society and among the political elite.

In terms of autonomy, a significant caesura came with the Great Union Day in 1918. Although the Transylvanian Romanians promised national autonomy to the minorities in the Resolution adopted in Gyulafehérvár (Alba Iulia today),[17] and the Romanian government itself undertook in the 1919 Minority Treaty to provide religious and educational autonomy to the Székelys and Saxons;[18] after the union, the Romanian political elite was unwilling to discuss or even to hear about autonomy any more, since they considered it a hurdle to building a nation-state. After some hesitation,[19] they were joined by the former political leaders of the Romanian minority in Hungary, who, after the union of 1918, became more interested in gaining political power at the national level than keeping it in a much smaller Transylvania.

The Romanian Constitution of 1923 denied minorities any recognition as collective entities. Senator Dissescu, in charge of drafting the modification, argued that this

15 See the resolution adopted at the Romanian National Party's congress in Nagyszeben (Sibiu) in 1905 at Kemény G. Gábor: *Iratok a nemzetiségi kérdés történetéhez Magyarországon a dualizmus korában 1867-1918. IV. kötet*, Budapest, Tankönyvkiadó, 1966, 534–536. Famous emigrant Romanian political writers from Hungary, Eugen Brote and Aurel Popovici also advocated along these lines and for these goals in their works *Die rumänische Frage in Siebenbürgen und Ungarn* and *Die Vereinigten Staaten von Groß-Österreich* in 1895 and 1906, respectively.

16 Jancsó Benedek: *A roman irredentista mozgalmak története*. Budapest, Attraktor, 2004, 359.

17 Point III. 1. "*Full national freedom for all the co-inhabiting peoples. Each people will study, manage and judge in its own language by individuals of its own stock and each people will get the right to be represented in the law institutions and to govern the country in accordance with the number of its people.*" With the exception of the mere fact of unification, Romania did not recognise the Resolution of the Assembly as legally binding in order to not be bound to provide minority rights. See Decree-Law No. 3631 of the 11th December of 1918 regarding the Union of Transylvania, Banat, Crișana, the Satumare and Maramureș with the Old Kingdom of Romania.

18 Art. 11. "*La Roumanie agree d'accorder, sous le contr□ le de l'État roumain, aux communautés des Szeckler et des Saxons, en Transylvanie, l'autonomie locale, enc e qui concerne les questions religieuses et scolaires.*" The autonomy promised to the Székelys and Saxons would have been less extensive than the territorial autonomy promised by Czechoslovakia in its minority treaty of 1919 to the Rusyns of Transcarpathia □ the widest possible with regards to the unity of the state. Baranyai Zoltán: *A kisebbségi jogok védelme*. Budapest, Oriens Nemzetközi Könyvkiadó és Terjesztő Részvénytársaság, 1922, 25, 114.

19 The leaders of the (former Romanian) National Party did not attend Ferdinand II's coronation ceremony in Alba Iulia in 1922 in a protest against the incorporation of Transylvania into Romania without a special legal status. They voted against the Constitution of 1923 in the Romanian Parliament for the same reason.

way there might be no 'confusion' about the meaning of the words *Romanian* and *Romanian citizens*; since the legislator intended the two to be synonymous in order to show that "*minorities are part of the majority*".[20] The false intention of the Senator was obvious; nevertheless, he was inclined to withhold support for notable differences. For instance, he explained that the constitutional declaration that the Romanian Orthodox Church was the dominant church in Romania was equal to stating that a painting is dominated by a colour, and he stressed that the equality of the churches before the law would be safeguarded[21] − a promise never delivered.

Despite not being generous at all and being discriminatory, the Romanian minority policy intending to create a nation-state did not apply the tactic of ethnic cleansing before 1940.[22] This was true although Romania had traditionally been a *de facto* multicultural state, not only in terms of extensive minority communities on its territory but also because of the heterogeneity of the population of the urban centres.[23] Before World War I, the main international pressure on Romania was exercised, mostly from the US, due to the legislative hurdles impeding Jews living in north-eastern Romanian towns to acquire Romanian citizenship.

Laws aiming to exclude of non-Christians from citizenship and, state-driven colonisation to increase the share of ethnic Romanians (a policy first applied in Dobrudja after 1878,[24]) and assimilatory pressure exercised together with the Roman Catholic Church on Hungarian-speaking Csángós[25] were the first tools used by Romanian policymakers to homogenise the population. In the interwar period, they applied similar policies − ethnically discriminatory legislation, intentional colonisation of Romanians into Transylvanian urban centres to decrease the Hungarians' and Germans' share and to rural areas along the Hungarian border[26] and in Dobrudja[27] to break

20 Paál Árpád: *A kisebbségi lét tanulóévei Erdélyben II*. Csíkszereda, Pallas-Akadémia Könyvkiadó, 2008, 162.

21 Dragomir, Silviu: *La Transylvanie roumaine et ses minorités ethniques*. Bucarest, M.O. Imprimerie Nationale, 1934, 99.

22 L. Balogh Béni: *Küzdelem Erdélyért – A magyar-román viszony és a kisebbségi kérdés 1940-1944 között*. Budapest, Akadémiai Kiadó, 2012, 213.

23 In 1900, Romania had the second highest proportion of foreigners and stateless people, together making up 7.9 percent of the population and living mostly in multicultural urban centres. Only Switzerland had a greater proportion, 11.5 percent, in that year. Boia, Lucian: *Cum s-a românizat România*. Bucureşti, Humanitas, 2015, 23–24., 81–84. The majority of non-citizens living in towns were Jewish.

24 Iordachi, Constantin: «La Californie des Roumains» L'intégration de la Dobroudja du Nord à la Roumanie, 1878-1913. *Balkanologie*, Vol. VI (1-2), décembre 2002, 167–197.

25 Diószegi László: „…nálunk most es a Templomban a nyelvünk tiltva vann." *Regio*, 2010/4, 163–191.

26 Szilágyi Ferenc: A történelmi Bihar településföldrajzának alapjai. Új Nézőpont, 2017, 4 (2), 81.

27 Ekrem, Mehmet Ali, *Din istoria turcilor dobrogeni*. Bucureşti, Kriterion, 1994, 104-105.

the homogeneity of those minority-populated areas-to strengthen the Romanians' position in the newly acquired territories.

According to the Romanian evaluation, interwar Romania was a state "*basically national in existence*" since the proportion of ethnic Romanians was 73.4 percent while not a single minority exceeded 10 percent. Furthermore, "*the minorities did not live in continuous geographic blocs but constituted only sporadic islets in the sea of the majority Romanians*".[28]

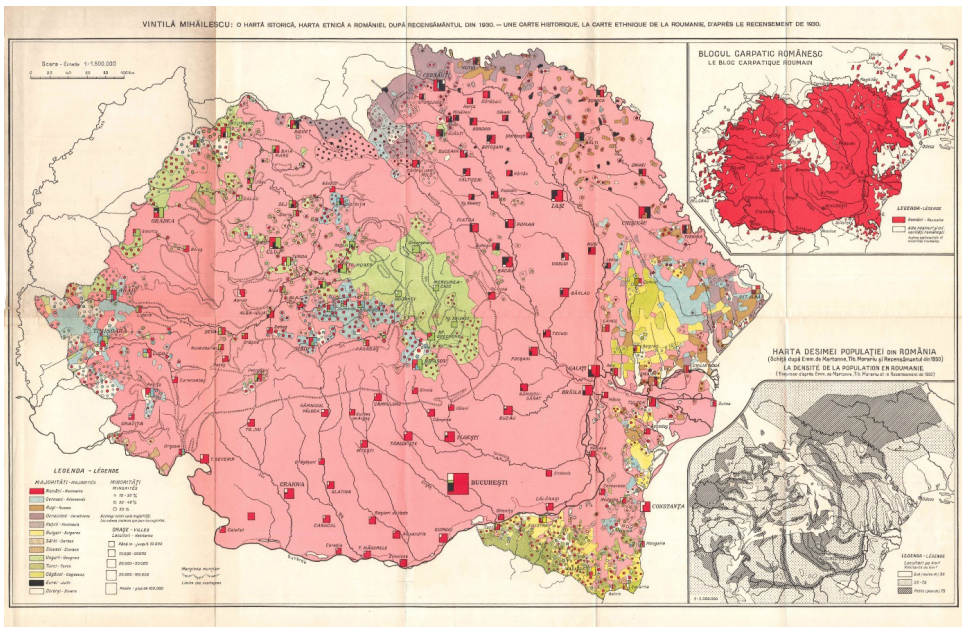

Figure 1. Romania's ethnic map according to the census of 1930. (Source: Vintilă Mihăilescu: Blocul carpatic românesc, M.O., Bucureşti, Imprimeria Naţională, 1942)

A glance at the ethnic map of Romania from 1930 clearly shows that the statement was false: there was a sizeable Hungarian ethnic bloc in the geographic centre of the country and a more blurred but still visible German-speaking one next to it. There were also considerable non-Romanian populated areas along the western, northern and eastern borders. The western had an ethnic Hungarian majority in the north and the centre and a weaker German-speaking majority in the south. The northern borderland predominantly had an ethnic Ukrainian majority while eastern Dobrudja and Budjak[29] had a more mixed population, where ethnic Romanians were only in small numbers. The Transylvanian-born politician Emil Hațieganu, who held cabinet-level posts several times in Romanian governments after 1918, named these minority-populated areas

28 Dragomir op. cit. 52.

29 Today part of Ukraine, between the Danube and the Dniester rivers.

the "ideal protection" against any irredentist neighbour. since aggressors would first have to devastate those territories where their kinfolk reside.[30]

Similarly to the pre-1918 Romanian minority in Transylvania, the post-1920 Hungarian minority of Transylvania viewed autonomy as a tool to protect the community from the assimilationist and discriminatory policies of the state. Nevertheless, the content of the longed-for autonomy was not clear; in the interwar period some 70 plans were created in Transylvania due to the parallel majority (Romanian) and minority (Hungarian and German-speaking) nation-building processes and the internal division of the 1.4 million strong Hungarian community.[31] The first important proposal for an autonomy statute for Székely Land was drafted in 1931, becoming part of the programme of the National Magyar Party in 1933. It was the first time that the Transylvanian Hungarian political elite accepted the idea of regulating the political status of Székely Land in a way distinct from other Hungarian-populated parts of Romania.[32]

Nevertheless, the Romanian side still rejected every call for autonomy; for instance, the Romanian diplomat and later foreign minister Nicolae Titulescu expressed at the International Diplomatic Academy in Paris in 1929 that it was Romania's just interest "*to not have any alien institution within its national body to avoid the existence of a state within the state*".[33] When creating the regions (*ţinut*s) in 1938, the Romanian leadership even attached the Hungarian-majority county of Trei Scaune-Háromszék, and the ethnic Hungarian-German-majority county of Braşov-Brassó to a region lying mostly in Wallachia to avoid having a region in the centre of Romania where the share of ethnic Romanians is under 50 percent.[34]

4. The territorial autonomy of Székely Land in the communist Romania

After World War II, in a completely changed context, the new Romanian constitutions defined Romania in various ways. The text of 1952 lacked the elements "*unitary and indivisible*" and "*nation-state*", while those of 1948 and 1965 did not contain the word

30 He also called the Székelys hostages surrounded by a "sea of Romanians". Balogh Júlia: *Az erdélyi hatalomváltás és a magyar közoktatás 1918-1928*. Budapest, Püski, 1996, 14–15.

31 Bárdi Nándor: Javaslatok, modellek az erdélyi kérdés rendezésére (A magyar elképzelések 1918–1940). *Magyar Kisebbség* 2004/1–2, 329. Bárdi Nándor: A romániai magyarság kisebbségpolitikai stratégiái a két világháború között. *Regio* 1997/2, 32–67.

32 Zahorán Csaba: Egy kis Magyarország Nagy-Romániában. Alternatívák a Székelyföldre a két világháború közötti magyar tervezetekben. *Magyar Kisebbség* 2009/1-2, 144.

33 Titulescu, Nicolae: *A béke dinamikája*. Bukarest, Kriterion Könyvkiadó, 1982, 37.

34 Mureş region had a Romanian majority of 52.3 percent with Hungarian and German ethnic minorities of 32 and 11.2 percent respectively. Had the two other counties been part of the region, the proportion of Romanians would have fallen to 49.5 percent according to the Romanian census of 1930. Only one out of the ten regions did not have an absolute Romanian majority; the northern Suceava region where Romanians nevertheless constituted the largest ethnic group.

"nation" when defining the "state".[35] Contrary to the texts before, the constitutions adopted in the communist period contained provisions on minority issues. Furthermore, that of 1952 declared not only the full equality before the law of the "minorities living together" (minorităţi conlocuitoare) with the Romanian majority but, in Art. 19, it also created a Hungarian Autonomous Region (HAR) for the "*Hungarian population forming compact blocks in the Székely districts*". That came in spite of a Communist Party resolution, adopted in 1948, that declared the minority question in Romania 'resolved'. The creation of the HAR must be understood in the context of a Stalinist regime and a totalitarian state, i.e. it did not allow for real self-governance; even until today, this was the only constitutional arrangement that allowed the existence of an ethnically defined administrative region within Romania.

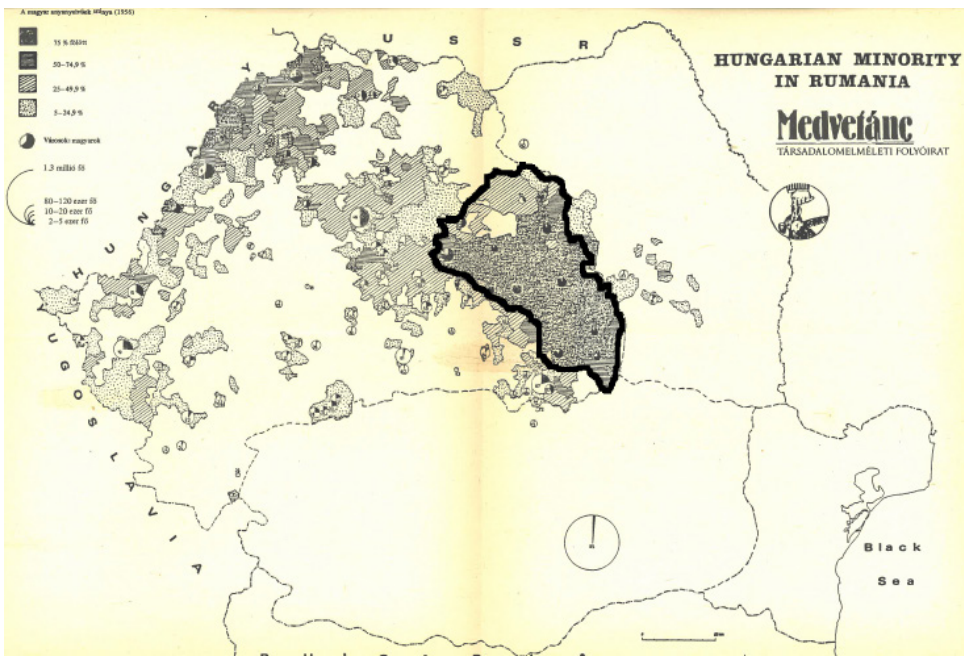

Figure 2. Romania's ethnic map according to the census of 1956 and the HAR. Despite the HAR having an ethnic Hungarian majority of 77 percent, it comprised only a third of the Hungarian community of Romania. (The source of the original map, modified by the author, is *Jelentések a határokon túli magyar kisebbségek helyzetéről*. Budapest: Medvetánc könyvek 1988)

35 Contemporary academics argue that these do not mean the discontinuity of the nation-statehood of Romania, since that was not called into question, neither within nor outside Romania. Ionescu, Cristian: Comentarii pe marginea art. 1 din Constituţia României revizuită. *Pandectele Române*, 2014/10, 88. The texts of the constitutions in original Romanian can be accessed at http://legislatie.resurse-pentru-democratie.org/constitutie/constitutia-romaniei.php (9 June 2020)

The HAR was imposed on Romania by the Soviet Union. In the Soviet regime, territorial autonomy was designed to avoid "necessary" social transformations to turn into ethnic confrontations. The policy of *korenizatsiia*, introduced in the Soviet Union in the early 1920s, consisted of two major tasks: the creation of national elites and the promotion of local national languages.[36] Their unconditional Stalinist beliefs and the exemplary discipline of the new regional ethnic Hungarian elite of the Székely Land after 1945 were among the main reasons for setting up HAR.[37] The new elite's role was to implement the social changes required by the Stalinist system in an ethnic Hungarian territory within Romania, i.e. to "modernise" education and culture and to communicate central directives to the local population − also in Hungarian.[38] Therefore, the Soviet intrusion not only created the HAR but also made Hungarian regionally official to grant "*the best possible way of inclusion of minority workers into the state life*".[39]

For Romania, this was not the first time of encountering Soviet minority autonomy in practice. In 1924, Moscow set up the Moldavian Autonomous Soviet Socialist Republic across the river Prut, the then eastern Romanian border. This was viewed by Bucharest as both an acknowledgement of the existence of further Romanian-populated territories beyond the borders and a threat to Romania's territorial integrity.[40]

The second such event took place in late 1944, with the introduction of the Soviet military administration in Northern Transylvania. Due to the atrocities committed by Romanian paramilitary forces in the territory reoccupied from Hungary − which had ruled it since the second Vienna award in 1940 − the Soviet leadership decided to transfer administrative powers to local Romanians and Hungarians under the protection of the Soviet Army.[41] Between November 1944 and March 1945, local leftist Romanians and Hungarians created an administration based on local communities and the equality of the two peoples and languages.[42] Nevertheless, the results were

36 The term korenizatsiia was not in use in the 1920s, when they used the term *natonalisatsiia,* meaning nation-building, instead. Martin, Terry Dean: *The Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923-1939*. Cornell University Press, 2001, 12., 25.

37 Bottoni, Stefano: A sztálini „kis Magyarország" megalakítása, 1952. In: Bárdi Nándor (ed.): *Autonóm magyarok? Székelyföld változása az „ötvenes" években*. Csíkszereda, Pro-Print, 2005, 314.

38 Gagyi József: Magyar Autonóm Tartomány: egy centralizációs kísérlet, Hatalom, értelmiségiek, társadalom. In: Bárdi Nándor (szerk.): *Autonóm magyarok? Székelyföld változása az „ötvenes" években*. Csíkszereda, Pro-Print, 2005, 405.

39 Beér János: A Román Népköztársaság új alkotmánya (II.). *Jogtudományi Közlöny*, 1953/5–6., 232.

40 Guzun, Vadim: Transnistrian Autonomy: The Romanian Diplomatic and Security Perspective (1924). *Revista Istorică*, 2013/3–4., 277–278.

41 The Soviets were well aware of the situation in the region even in late 1944, just weeks after the occupation. Andreevna Pokivalova, Tatiana – Muslimovici Islamov, Tofik: *Problema Transilvană - Disputa teritorială româno-maghiară şi URSS 1940-1946. Documente din arhivele ruseşti*. Cluj-Napoca, Eikon, 2014, 318 - 340.

42 On 13 March 1945, the day the Romanian administration entered Northern Transylvania, Transylvanian Hungarian publicist Edgár Balogh summarised the experiences of the North-

soon eliminated after the Romanian administration entered the region in March 1945, despite Prime Minister Petru Groza's Hungarian-language speech on 13 May promising "*the truest possible brotherhood between Romanians and Hungarians*".[43]

According to the census of 1956, some 77 percent of the total population of 565,000 of the HAR were ethnic Hungarians; Romanians constituted a majority in the northern Topliţa-Maroshévíz and Reghin-(Szász)Régen districts. In the beginning, not only the majority of the regional leadership and the personnel of the administration were ethnic Hungarian but also those of the secret police agency (Securitate) and the militia, 71 and 60 percent respectively.[44] These, added to the official bilingualism and nominal autonomy, represented a new model of integration, especially in comparison to interwar Romania, and helped ordinary Székelys to accept the fact they were living in a Communist Romania.[45] However, some one million ethnic Hungarians lived outside of the HAR, often forming regional or local majorities, who had increasingly few minority rights since the state reduced those outside of the HAR arguing that the Hungarian language and culture enjoy equal rights in the HAR. Soviet intrusion is to be stressed yet again, since the creation of the HAR was not a result of the development of Romanian minority policy but a tool for the Soviet Union to control Romania and to avoid interethnic tensions being ignited by socialist social reforms.[46]

The visibility of the Hungarian-majority region in the centre of the state, provided by the HAR, was undesirable for Romania. During a party meeting between Hungarian and Romanian Communist Party leaders in autumn 1954 in Budapest, the Romanian side expressed its concerns about Hungary paying too much attention to ethnic Hungarians living in friendly Socialist states, and to Transylvania in particular, arguing that it might create the impression of calling into question the existing borders between Romania and Hungary.[47] During a meeting between the Hungarian and Romanian

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ern Translyvanian autonomy that "(…) *Northern Transylvania's Romanian and Hungarian peoples could give a hand to each other under the protection of the Red Army and were able to build up a joint democratic local administration in a peaceful and just way* (...)." Balogh Edgár: *Hídverők Erdélyben 1944-46*. Budapest, Kossuth Könyvkiadó, 1985, 54.

43 The text of the speech, under the title *Erdély a legpokolibb politikai üzelmeknek esett áldozatul címmel*, was published by the Hungarian daily Erdély on 16 May 1945.

44 Novák Csaba Zoltán: *Magyar Autonóm Tartomány*, xhttp://lexikon.adatbank.transindex.ro/mobil/tarsadalomismeret/szocikk.php?id=12 (9 June 2020)

45 Bottoni, Stefano: *Sztálin a székelyeknél*, Csíkszereda, Pro-Print, 2008, 18.

46 Similar policies were applied in other multi-ethnic socialist states as well. Kymlicka, Will: Western Political Theory and Ethnic Relations in Eastern Europe, In: Kymlicka, Will – Opalski Magda (eds.): *Can Liberal Pluralism be Exported? – Western Political Theory and Ethnic Relations in Eastern Europe*. Oxford, Oxford University Press, 2001, 64.

47 See the details of the conversation between Valter Roman and Mátyás Rákosi at Andreescu, Andreea – Nastasă, Lucian – Varga, Andrea (eds.): *Minorităţi etnoculturale – Mărturii documentare. Maghiarii din România (1945-1955)*. Cluj, Seria Diversitate Etnoculturale în România, 2002, 799–804.

party first secretaries in spring 1955, the Romanian side expressed its concerns for the Hungarian Embassy's demand in Bucharest for an "official map of the HAR" for use in Hungarian public education, for debating Transylvanian issues in Hungarian newspapers and for high-level Hungarian communist party circles protesting against the forced Romanian closure of the Hungarian consulate in Cluj (Kolozsvár). The Romanian side also rejected all intention to open a new Hungarian consulate in Târgu Mureş-Marosvásárhely, the administrative centre of the HAR.[48]

The Romanian fears were further increased by Nikita Khrushchev's speech in East Germany in March 1959. The first secretary of the Communist Party of the Soviet Union spoke about the disappearance of the state borders after the world-wide victory of the Communism. He expressed his belief that "*after that, there will remain only ethnic boundaries, but of course there will be not border guards or customs officers on those borders*".[49] The Romanian party leadership considered having an HAR with a 77 percent Hungarian majority in the middle of the country as a threat, especially because they still believed that systematic Hungarian activity was going on in Transylvania to create an autonomous region and re-join the territory with Hungary,[50] as Romanians intended before World War I.

In the second half of the 1950s, the nationalist forces gained control within the Romanian Communist Party − then the Romanian Workers' Party − and the Central Committee of the party started to "address" the presumed Hungarian threat and its Soviet support.[51] They managed to transform the HAR into the Mureş-Hungarian Autonomous Region (MHAR) by joining majority Romanian-populated districts and detaching majority Hungarian-populated ones. With this alteration, the proportion of ethnic Hungarians within the region decreased from 77 percent to 62 percent. The reference in Art. 19 of the Constitution to the region as one composed "*of a compact Magyar Székely population*" was also deleted.[52] The regional leadership was also put in local Romanian hands and the use of the Hungarian language started to decline. The pressure was so great that "*people became afraid to use their mother tongue at party events and started to discuss even those issues connected to the Hungarian-language cultural magazine and Transylvanian Hungarian literature in Romanian*".[53]

48 The notes of the conversation can be accessed in Romanian at Andreescu – Nastasă – Varga op. cit. 804–809. Romania rejected the proposal to open a Hungarian Consulate in Târgu Mureş-Marosvásárhely.

49 Földes György: *Magyarország, Románia és a nemzeti kérdés 1956-1989*. Budapest, Napvilág Kiadó, 2007, 42.

50 Mioara, Anton: Un proiect controversat: Regiunea Autonomă Maghiară – De la modelul stalinist la recurenţa naţionalistă. *Revista Istorică,* 2012/3–4., 385.

51 See further details in Mioara op. cit. 384–389.

52 Ronald A. Helin (1967) The Volatile Administrative Map of Rumania, *Annuals of the Association of American Geographers*, 57(3) Sep. 1967, 499.

53 Novák Csaba Zoltán (ed.): *Aranykorszak? – A Ceauşescu-rendszer magyarságpolitikája, 1965-1974*. Csíkszereda, Pro-Print Könyvkiadó, 2011, 242.

From the 1970s, after the dissolution of the MHAR, public affairs were conducted solely in Romanian, even in solidly Hungarian areas.[54] The increasingly despotic and bureaucratic Romanian government intended to avoid creating areas that contain groups bound together by feelings of community and to use local governments solely to implement policies laid down by the central government.[55] At that time the rotation of local party leaders, used by the party leadership to prevent party officials from develop a local hinterland against the centre in Bucharest, hit ethnic Hungarians more severely than the Romanian majority, since new leaders were usually ethnic Romanians: "*ethnicity became the most important criteria for becoming a leader; an ethnic Romanian was* a priori *capable of leadership*".[56] There was therefore no room for any debate about the possibility of any autonomy or self-governance until the revolution of 1989.

5. The question of autonomy after 1989

Although the new political system provided a certain degree of local autonomy to the communes and towns, exercised by elected leaders, the idea of regional autonomy has not become more accepted. Furthermore, most of Romanian society still rejects the idea of an autonomous Székely Land: in 2015 some 72 percent opposed such a possibility.[57]

After the ethnic violence in 1990 in Târgu Mureş-Marosvásárhely,[58] which eliminated any hope of autonomy, the leading Romanian political party, the National Liberal Party (PNL) and the representatives of the Hungarian community, the Democratic Alliance of Hungarians in Romania (DAHR), agreed to improve minority education, set up cultural institutions and decentralise administration.[59] The half-hearted

54 Novák Csaba Zoltán – Tóth-Bartos András – Kelemen Kálmán Lóránt: Újjászületés, Háromszékből Kovászna – Kovászna megye megszervezése és intézményesülése 1968-1972. Háromszék Vármegye Kiadó – Pro Print Kiadó, 2013, 74–75.

55 Helin op. cit. 501.

56 Markó Béla: *Kié itt a tér*. Csíkszereda, Pallas-Akadémia Könyvkiadó, 2011, 186.

57 *SONDAJ INSCOP Românii cred că preşedintele şi premierul trebuie să colaboreze strâns pe subiecte de interes public* (28 September 2015) http://adevarul.ro/news/politica/sondaj-inscop-romanii-cred-presedintele-premierul-trebuie-colaboreze-strans-subiecte-interes-public-1_56081e12f5eaafab2c0ef7e0/index.html (9 June 2020)

58 The interethnic clashes in Târgu Mureş–Marosvásárhely in mid-March 1990 led to the re-creation of the secret services, abolished after the Revolution of 1989. In the town, five people lost their lives and several were wounded during the clashes and the Romanian army and police did not play a neutral role, to say the least: they did not protect the Hungarian community, and allowed the transportation of ethnic Romanians into the town, i.e. the "reinforcement" of the Romanian side. The Romanian armed forces only intervened after the Hungarian "side" "started to gain the upper hand.

59 Borbély Zsolt Attila – Szentimrei Krisztina: *Erdélyi magyar politikatörténet 1989-2003*. Bu-

implementation of this compromise since then has highlighted the consequences of lack of institutionalisation − without proper legal and administrative protection, as hoped from granting autonomy, Hungarians have continuously felt threatened regarding their rights and existence as a community while the Romanians have seen Hungarian appeals for autonomy as attacks against the state, putting the whole issue into the sphere of politics and transforming every question into a zero-sum game.

The supremacy of nation-stateness became of central importance after 1989 in Romania due to the lack of consensus on the content of the term *political community* and the motive of hiding social discrepancies behind indoctrinating national unity.[60] The Constitution of 1991 reinstated all the elements introduced in 1923 and went even further, declaring the following characteristics of the state unchangeable: "Romanian", "national", "unitarian", and "indivisible in Art. 152 alin 1".[61]Art. 4 alin. 1 proclaims that "*the state is founded upon the unity of the Romanian people and the solidarity of its citizens*", while Art. 54 alin. 1 declared that "*loyalty to the country is a sacred duty*".

The parliamentary *milieu*, adopting these changes, was extremely hostile: a report was compiled on the Romanians allegedly persecuted and expelled by the local Hungarians in the Székely Land after 22 December 1989,[62] not mentioning, however, that those Romanians were settled there by the Communist regime to execute the orders of the Ceauşescu dictatorship and without any reference to the wave of lustration, the purge of communist-era officials, going on throughout most former socialist states. This parliamentary document deliberately created the false impression of ethnic clashes in the Hungarian-majority area instead of describing the events accurately. Later, in 1994, the Diocese of Covasna Harghita was created to rebuild the severely weakened Romanian Orthodox Church network, and to provide an umbrella for Romanian nation-building in the Székely Land.

Despite the agreement of 1990 and due to the assimilatory pressure exercised by the state on the Hungarian community, the first autonomy plans appeared very soon. First, the plans focused on the separation of the education system. In October 1992, the representatives of the Hungarian community adopted the Declaration of Kolozsvár/Cluj, demanding autonomy within Romania. After 1993, the comprehensive autonomy plans emerged, aiming simultaneously at the territorial autonomy of Székely Land, based on official bilingualism and effective self-governance, the local autonomy of

dapest, Reintegratio Könyvek, 2003, 12–14.

60 Capelle-Pogacean, Antonela: Nemzet a poszkommunista Romániában: az egység utópiája és a különbözőség kihívása. *Pro Minoritate*, 1999/tél, 62–63.

61 Such a law is not unique; the French Constitution excludes the possibility of reinstating the monarchy, while the German Constitution declares the federal nature of Germany to be unchangeable. Of course, such constitutional arrangements can be changed but in two steps: first the legislator has to abolish the ban, and after that can be changed the text.

62 *Raportul Harghita Covasna* (1991) http://agache-aurel.blogspot.be/2010/10/raportul-harghita-covasna-justificare.html (9 June 2020)

smaller Hungarian-majority areas outside the Székely Land, and cultural autonomy providing linguistic rights, education and culture for the Hungarian diaspora elsewhere in Romania.

Despite the official discourse, that both *nation* and *nation-state* refer to the community of citizens, the text of the Romanian Constitution is still not clear: these words could have both civic and linguistic-ethnic meaning.[63] This became obvious with Decision no. 80 of the Constitutional Court (CC) in 2014, when the forum interpreted Art. 1 alin. 1 according to ethnic exclusivity.[64] The majority of the CC argued that (1) introducing special administrative units reflecting to historical particularities, and (2) the creation of minority self-governments, and (3) the legalisation of the use of minority symbols are all unconstitutional. According to the court, the first would harm the national and unitary nature of the state (points No. 29-36 of the decision), while the second, in addition to these, would also negatively affect citizens' equality before law. Furthermore, they argued that, although the possible consultation power of minority organisations is not unconstitutional it does need to be regulated in the Constitution (points No 37-44).[65] With regard to the use of minority symbols, they argued that, unless the state symbols are mentioned, the freedom to use minority symbols might lead to the false belief that minorities have an option to choose between their symbols and the symbols of Romania (points No. 48-51).

In his dissenting opinion, the ethnic Hungarian member of the CC argued that the example of Italy shows clearly that the unitary nature of a state does not exclude the possibility of regional autonomy (VI. 4.2.), and there are also examples for the parallel use of regional and state symbols. He urged the clarification of the term '*national',* since sometimes the Constitution uses the notion in an ethnic way, not in a civic one, which might result in minorities becoming *aliens* in their own motherland (III). He continued by stating that the recognition of special minority rights is not unfamiliar to the Romanian legal system: since 2003, the Constitution contains a provision at Art. 73 alin. 3 point r, on the obligation to adopt a law on the statute of minorities (IV. 3.).

Today, the fight for and against autonomy has several forms in Romania. Since Romanian nationalism has achieved most of its aims − for instance, the major Transylvanian towns, even Târgu Mureş – Marosvásárhely, the Székely capital –

63 Ionescu op. cit. 91–93., Varga Attila: A román alkotmány módosításának főbb tételei. *Provincia*, 2002/8-9., 4–5.

64 *Decizia Nr.80 16 februarie 2014 asupra propunerii legislative privind revizuirea Constituţiei României* https://lege5.ro/Gratuit/gm4tgojwg4/decizia-nr-80-2014-asupra-propunerii-legislative-priv-ind-revizuirea-constitutiei-romaniei (9 June 2020)

65 In Romania, when denying minority rights or implementing them in the narrowest way possible, the argumentation usually refers to the lack of Constitutional approval or legal inconsistency. Due to this position and the lack of a permissive social atmosphere, there is a constant effort from ethnic Hungarian politicians to regulate every minority right in detail in law.

have a Romanian majority, while the former German ethnic enclaves have vanished completely–today multiculturalism is presented as enriching Romanian culture[66] instead of a curse of alien intrusion as seen before.

However, using the Hungarian language and symbols − especially the Hungarian flag and the regional Székely flag − are still banned and sanctioned. For instance, Law 7/1994 bans the use of "alien" flags, including that of the Hungarian nation, identical to the flag of Hungary. Local self-governments are still fined for using the Hungarian flag, parallel to the Romanian, in 2019. Any official use of the regional Székely flag is also banned and sanctioned,[67] and it is over-politicised, since it represents an aspiration for autonomy towards both sides, the Hungarian community and the Romanian authorities, too. For instance, in January 2018, then acting Prime Minister Mihai Tudose said that "*those who fly the Székely flag on institutions should be hanged beside the flag. There should be no word about any kind of autonomy for the Székelys*" and that "*as a Romanian and prime minister, I reject any kind of dialogue in connection with creating autonomy on any part of Romania*".[68] He withdrew his declaration in a couple of days; however, he soon had to resign from office, although not for this declaration.

Denominations can also be seen a threat to Romanian nation-stateness. In 2015, an NGO was not registered because its name would have been 'Pro Turismo Terrae Sicolorum' (*For the Tourism of the Székely Land* in Latin). In its verdict No. 2209/2015, dated on 14 December 2015, the Tribunal of Harghita argued that the denomination shows an impermissible ethnic focus of the future activity of the NGO, which is contrary to Art. 3 alin. 3 of the Constitution.[69] The applicants appealed against the first-instance judgment to the Courts of appeal in Târgu-Mureş. They argued that there were several registered NGOs bearing the name of Romanian-majority regions, for example Bucovina, Ţara Oaşului, Ţara Bârsei, etc. The Court of appeal, in its verdict No. 2/2016, dated 4 February 2016, declared the application inadmissible, arguing that the Constitution does not recognise regions. They also considered the case of the Romanian-majority regions mentioned by the applicants as different, since those are *ethnically neutral*, while the Székely Land is not. The problem with this argumentation,

66 Dumitrescu, Doru – Căpiţă, Carol – Manea, Mihai (eds.): *Istoria minorităţilor naţionale din România – Material auxiliar pentru profesori de istorie*. Bucureşti, Editura Didactică şi Pedagogică, 2008, 17. The Parliament declared 25 May, 28 September, and 13 November the day of the Slovak, Czech, and Hungarian language in Romania, respectively.

67 Romanian courts consider the Székely flag a commercial flag, subjected to Law 185/2013 on commercial publications; see for example the decisions No. 1335/2015 of 27 November 2015 of the Court of appeal in Oradea, or the No. 95/320/2014 of 7 October 2014 of the Tribunal of Târgu Mureş.

68 Tudose: Dacă steagul secuiesc va flutura pe instituţiile de acolo, toţi vor flutura lângă steag (11 January 2018) https://stirileprotv.ro/stiri/politic/tudose-refuza-sa-discute-despre-autonomia-tinutului-secuiesc-udmr-mesaj-primitiv.html (9 June 2020)

69 "Administratively, the territory of the state is organised into communes, cities, and counties. According to the law, some cities are proclaimed municipalities."

besides giving a clear example of double-standards in Romania, is that there is no "ethnically neutral" denomination for the Székely Land in the Romanian language: it is called *Secuimea*, Ţinutul Secuiesc or Ţara Secuilor, i.e. all names are connected to the local majority Hungarian-speaking population.

Although the Romanian legal system and administration rejects any discussion on the fact that two and a half counties in the middle of Romania are different from the others, Romanian politics is aware of the difference. In this paper, we do not enter into detail about using the topic of autonomy for gaining political capital in general – but fighting demonised topics and myths is harmful: it might delay facing reality[70] – we will solely focus on events with special importance connected to our topic.

Between 2012 and 2014, a popular movement increased social awareness of using the then recently created regional Székely flag, giving in that way a symbol to striving for autonomy. In 2013 and 2014, several popular events were held, among them a 53-kilometre-long human chain in support of autonomy; and several local self-governments in Covasna, Mureş and Harghita counties adopted resolutions expressing their will to join the future autonomous Székely Land within Romania. This was a no-go for Romanian institutions and parties; for instance, the county leader of the then governing Social Democrat Party (PSD) threatened a member of the Miercurea Ciuc-Csíkszereda local council belonging to PSD with exclusion if he voted in favour of the resolution in which the seat of Harghita county expressed its will to join the autonomous Székely Land.[71]

Due to the intensification of population movements, Romanian state institutions started to step up against such events in the mid-2010s. The prefects (government representatives in the counties) sued the respective local governments due to their resolutions and central authorities and institutions also felt the necessity to raise their voices. In 2014, the Romanian Government presented its position on a proposal for the territorial autonomy of the Székely Land to the Szekler National Council.[72] The government argued that there was no international obligation for Romania to grant collective rights to national minorities or ethnic autonomy. Furthermore, they expressed their concern that such an administrative reform might harm the functioning of the state and negatively affect the co-existence between the majority and the minorities.

The Romanian Intelligence Service (SRI) in its yearly report of 2014, the last one publicly available, mentioned "*ethnic extremism*", "*pro-autonomist discourse*", and "*the*

70 Boia, Lucian: *Istorie şi mit în conştiinţa românească*. Bucureşti, Humanitas, 2011, 279.

71 Consiliul PSD amenintat cu demiterea: Ar fi votat pentru autonomia Tinutului Secuiesc (17 July 2014) http://www.ziare.com/mircea-dusa/ministrul-apararii/consilier-psd-amenintat-cu-demiterea-ar-fi-votat-pentru-autonomia-tinutului-secuiesc-1311668 (9 June 2020)

72 Guvernul raspunde Consiliului National Secuiesc: Romania nu are nicio obligatie sa acorde autonomie teritoriala pe criterii entice (11 June 2014) https://www.hotnews.ro/stiri-esential-17465664-guvernul-raspunde-consiliului-national-secuiesc-romania-nu-are-nicio-obligatie-acorde-autonomie-teritoriala-criterii-etnice.htm (9 June 2020)

aggressive manifestation of Székely specialties" as tasks they have to fight against.[73] The Superior Council of Magistracy (CSM) declared in 2014 that even a discussion on the autonomy of the Székely Land would be an attack on the rule of law, since that reaches beyond the limits of the Constitution.[74] Moreover, the first version of the strategy on public order and safety for the 2015-2020 period, drafted by the Ministry of Internal Affairs, specified struggles for ethnic autonomy as a threat to public order and safety;[75] however, this was omitted from the final version.[76]

Romania has also done everything to step up against any action that could result in international pressure on it regarding the question of territorial autonomy. Without going into detail, it is to be noted that, internationally, Romania usually (falsely) describes striving for autonomy as a pro-Russian intrusion aiming at weakening NATO's east flank. Romania has also been vocal in opposing the regulation of minority rights in the European Union: it attacked in Court the European Commission's decision to register the Minority SafePack Initiative,[77] a European Citizens' Initiative to adopt EU law on certain matters concerning national minorities,[78] and also attacked[79] the Commission's decision that registered the proposed citizens' initiative entitled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures'.[80] This latter was proposed by the Szekler National Council and rejected at first by the Commission in 2013; however, the initiators appealed the decision twice and eventually won before the General Court of the European Union. Romania also took part in that legal process on the losing side, that of the Commission.

73 *Raportul de activitate al Serviciului Român de Informații în anul 2014*, https://www.sri.ro/assets/files/rapoarte/2014/Raport_SRI_2014.pdf, 7

74 The text of the communication is available in Romanian at *CSM: Proiectul UDMR de autonomie, agresiune la statul de drept* (11 September 2014) https://www.digi24.ro/stiri/actualitate/justitie/csm-proiectul-udmr-de-autonomie-agresiune-la-statul-de-drept-292557 (9 June 2020)

75 *Közbiztonsági veszélynek minősítenék az autonómia követelését* (24 March 2015) https://www.maszol.ro/index.php/belfold/44935-kozbiztonsagi-veszelynek-minositenek-az-autonomia-koveteleset (9 June 2020)

76 *Strategia națională de ordine și siguranță publică 2015-2020*, Hotărâre 779/2015 https://lege5.ro/Gratuit/haydeojtha/strategia-nationala-de-ordine-si-siguranta-publica-2015-2020-hotarare-779-2015?dp=haztombygqzde (9 June 2020)

77 Romania lost the case in the first instance in 2019 (T-391/17, Romania v Commission); however, it appealed to the General Court of the European Union and the procedure is ongoing.

78 Minority SafePack Initiative, https://europa.eu/citizens-initiative/initiatives/details/2017/000004_en

79 Romania v Commission Case T-495/19.

80 Cohesion policy for the equality of the regions and sustainability of the regional cultures, https://eci.ec.europa.eu/010/public/#/disabled (9 June 2020)

6. The question of the Székely Land's autonomy in April 2020

There have been several occasions after 1989 when politicians used the topic of the Székely Land's autonomy for gaining political capital. There is an interesting example that happened in 2011, when Romanian President Traian Băsescu talked about a plan to re-organise the administrative system by creating greater regions with administrative powers comprising several counties, however excluding the Hungarian-majority counties of Covasna and Harghita. He intended to keep those two in direct subordination to Bucharest, as counties normally are in Romania, without allowing them to form a Hungarian-majority region, but also without merging them into one with a Romanian majority. The president denied rumours that he might have offered merging the two counties into a separate region.[81]

Since then, no central plan for reorganisation has been implemented, partly because the Romanian political elite have no answer to the challenge of the Székely Land. There have been, however, several drafts submitted to the Romanian Parliament on the autonomy of those Székely Land; those of 2004,[82] 2005,[83] 2017,[84] and 2019,[85] all rejected by both Houses. Another draft was submitted to the Parliament in 2018, calling for the implementation of point III.1 of the Alba Iulia Resolution of 1918, i.e. providing self-governance to the Transylvanian minorities. The Chamber of Deputies rejected the draft in March 2019;[86] but it is currently on the agenda of the Senate.[87]

These drafts were submitted by ethnic Hungarian MPs, yet with the intensification of the aspirations for autonomy, ethnic Romanian MPs felt the need to ban such activities. Two drafts were submitted in 2015, to ban territorial autonomy and any

81 *Basescu: Harghita si Covasna, "niciodata unite". Ce a propus presedintele, UDMR-ului* (22 June 2011) http://stirileprotv.ro/stiri/politic/basescu-harghita-si-covasna-niciodata-unite-ce-a-propus-presedintele-udmr-ului.html (9 June 2020)

82 Pl-x nr. 87/2004 Propunere legislativă privind Statutul de Autonomie al Ţinutului Secuiesc http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5343 (9 June 2020)

83 Pl-x nr. 295/2005 Propunere legislativă privind Statutul de autonomie al Ţinutului Secuiesc http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=6470 (9 June 2020)

84 Pl-x nr. 5/2018 Propunere legislativă privind Statutul de autonomie al Ţinutului Secuiesc http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=16801 (9 June 2020)

85 Pl-x nr. 670/2019 Propunere legislativă privind Statutul de autonomie al Ţinutului Secuiesc http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=18286&cam=2 (9 June 2020)

86 Only the ethnic Hungarian MPs supported the draft and three Romanian MPs, two from Transylvania and one from the Republic of Moldova. http://www.cdep.ro/pls/steno/evot2015.nominal?idv=22199&ord=3 (9 June 2020)

87 L148/2019 Propunere legislativă pentru implementarea subpunctului 1 al punctului III din Rezoluţiunea Adunării Naţionale de la Alba Iulia din 1 decembrie 1918 https://senat.ro/legis/lista.aspx?nr_cls=L148&an_cls=2019 (9 June 2020)

form of secessionism[88] and ethnic flags,[89] respectively; however, both were rejected by the Parliament. Another symbolic question has been June 4, the day Hungary signed the Treaty of Trianon in 1920. In 2015, there were two drafts aiming to declare that date a national remembrance day; the first was withdrawn by the initiators,[90] while the second was rejected by the Houses.[91] During the turbulences in the spring of 2020, detailed below, a third draft was however adopted by the Romanian Parliament, and sent to the CC for examination.[92] The adoption of the law and thus declaring June 4 a national day was condemned by the leaders of the Hungarian community, arguing that Romania should acknowledge that, by signing the Treaty of Trianon, it received not only territory but also more than a million ethnic Hungarians to whom Romania has unfulfilled duties.[93]

Drafts on the territorial autonomy of the Székely Land have always been sensitive issues; however, the case in the spring of 2020 was particularly so. The Romanian political class lost ground in the unprecedented situation created by the COVID-19 pandemic and they needed an issue to prove their ability to 'defend' the country. This came with the tacit approval[94] of a draft on the Székely Land's autonomy by the Chamber of Deputies on 23 April 2020. The whole scandal arose in a very complicated situation when the Romanian elite was hopelessly struggling with the pandemic and receiving criticism on sensitive issues: circles from the Moldavian President attacked Romania for its ineffectual help in Moldova's fight with the pandemic and pointing out that Hungary's help was far more useful,[95] the Minority SafePack Initiative, with

88 *Pl-x nr. 152/2015 Propunere legislativă privind interzicerea autonomiei teritoriale şi a oricărei forme de secesionism* http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=14202 (9 June 2020) The Chamber of Deputies, as the decisive house, rejected the draft on 21 February 2017.

89 Pl-x nr. 140/2015 Propunere legislativă privind interzicerea steagurilor cu caracter etnic http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=14152 (9 June 2020)

90 L253/2015 Propunere legislativă pentru declararea zilei de 4 iunie Ziua Tratatului de la Trianon, https://senat.ro/legis/lista.aspx?nr_cls=L253&an_cls=2015 (9 June 2020)

91 L480/2015 Propunere legislativă privind declararea Zilei de 4 Iunie Ziua Trianonului şi a luptei împotriva asupririi maghiare, https://senat.ro/legis/lista.aspx?nr_cls=L480&an_cls=2015 (9 June 2020)

92 L459/2019 Propunere legislativă pentru declararea zilei de 4 iunie Ziua Tratatului de la Trianon, https://senat.ro/legis/lista.aspx?nr_cls=L459&an_cls=2019 (9 June 2020)

93 *Magyarország sértegetése közepette szavazta meg a román parlament a Trianon-törvényt, ünnepnap lehet a diktátum évfordulója* (13 May 2020), https://kronikaonline.ro/belfold/kelemen-a-trianon-torvenyrol-buntudat-nelkuli-tobbseg-soha-nem-fitogtatja-a-hatalmat?fbclid=IwAR3jK6M-0JouUVtn7xkG5hb4Dw7Hl2ZFH_PoOLgByD2OOI1ZN93sdK2MPsdI (9 June 2020)

94 When the Chamber of Deputies is the first house to approve a draft, it has 45 days to do that—60 days for complex drafts and 30 days for drafts in an urgent procedure. If the Chamber fails to decide within the term, the drafts is considered adopted and transferred to the Senate for final approval. *Organizarea şi funcţionarea Camerei Deputaţilor – Procedura legislativă*, http://www.cdep.ro/pls/dic/site.page?den=introcd1-i (9 June 2020)

95 *Batjocura unui deputat din R. Moldova la adresa României, după ce Bucureştiul a oferit un ajutor uma-*

the aim of creating an EU framework for the protection of national minorities—seen as a threat by Romania[96] – was submitted to the European Council, and Hungary was preparing for the commemoration of the 100th anniversary of the Treaty of Trianon.

The leading role was played by the Saxon – ethnic German – Romanian president, Klaus Iohannis, who has started to build a political career for after his second, and last presidential term ends. He blamed his political opponent, the PSD, for helping UDMR to "*provide autonomy with wide competences for the Székely Land while the government and other authorities are fighting for Romanian lives*" and for "*giving Transylvania to Hungary*".[97] Of course, the speaker of the Chamber, belonging to the PSD, also rejected the draft and blamed the government, supported by the President, for causing the tacit approval with its delayed answer to the draft.[98]

This was not the first time for the incumbent Romanian President to attack PSD and injure the Hungarian community in Romania and Hungary at the same time: in 2014 he presented the aspirations for Székely Land autonomy as part of a secret PSD-plan for the feudalisation and 'baronisation' of Romania, i.e. subordinating the regions of the country to local strong-men, or 'barons'.[99] In 2020, he again reiterated his firm stand for the unitary and national character of Romania, however, in such

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nitar: Au trimis două lăzi cu măști când se termină carantina și după ce ne-a ajutat Ungaria (1 May 2020) https://adevarul.ro/moldova/politica/batjocura-unui-deputat-r-moldova-adresa-romaniei-bucurestiul-oferit-ajutor-umanitar-trimis-doua-lazi-masti-termina-carantina-ne-a-ajutat-ungaria-1_5eabf4d05163ec427151547e/index.html?utm_source=widget&utm_medium=website&utm_campaign=topdesktop (9 June 2020), and *Nou atac la adresa României din partea oamenilor lui Dodon: Nu aveţi nici măcar potenţialul Ungariei. Ajutoarele să le păstraţi pentru spitalele din București* (1 May 2020) https://adevarul.ro/moldova/politica/nou-atac-adresa-romaniei-partea-oamenilor-dodon-nu-macar-potentialul-ungariei-ajutoarele-pastrati-spitalele-bucuresti-1_5eac37b15163ec42715380a7/index.html (9 June 2020)

96 The organisers of the Minority SafePack submitted a textual draft to the European Council in January 2020. In 2017, after the General Court ruled that the European Commission has to re-examine the European Citizens' Initiative Minority SafePack, Romania attacked the decision; however, it lost the case in 2019. Case T-391/17 (ECLI:EU:T:2019:672) Romania appealed the decision and the case is ongoing.

97 *Declarația de presă susținută de Președintele României, domnul Klaus Iohannis* (29 April 2020) https://www.presidency.ro/ro/media/declaratia-de-presa-sustinuta-de-presedintele-romaniei-domnul-klaus-iohannis1588152968 (9 June 2020)

98 *Senatul se reuneste de urgenta pentru autonomia Tinutului Secuiesc. Proiectul incaiera partidele: Ei sunt vinovatii!* (29 April 2020) https://ziare.com/politica/lege/senatul-se-reuneste-de-urgenta-pentru-autonomia-tinutului-secuiesc-proiectul-incaiera-partidele-ei-sunt-vinovatii-1608959 (9 June 2020)

99 *Klaus Iohannis: In ultimii ani, ne indreptam spre feudalizarea, spre baronizarea Romaniei. Sunt adeptul statului national unitar. Nu cred in regionalizare pe criterii etnice* (11 August 2014) https://revistapresei.hotnews.ro/stiri-radio_tv-17873073-klaus-iohannis-ultimii-ani-indreptam-spre-feudalizarea-spre-baronizarea-romaniei-sunt-adeptul-statului-national-unitar-nu-cred-regionalizare-criterii-etnice.htm (9 June 2020)

a harsh way that it was described as a "strong nationalist message",[100] and even the German press criticised him for using language not heard since the collapse of the national-communist regime of Ceauşescu in 1989.[101]

7. Conclusion

Autonomy has been seen as a remedy against nation-building nation-states in Central Europe but as a threat from the point of view of those states. Before World War I, the Romanian political elite considered political autonomy for geographic areas with an ethnic Romanian majority in the neighbouring countries a useful tool to impede concurrent nation-building and to lead to unification with Romania when the time is ripe. This conviction has been prevalent since then and resulted in firm anti-autonomy feelings after the Great Union of 1918, when Romania started to build its own nation-state covering a much bigger area than that the pre-war Romanian nation.

In the first decade after Transylvania's incorporation into Romania in 1918-1919, the leaders of the Hungarian minority rejected any claim for an autonomous Székely Land since they were interested in a solution affecting every member of the community, not only those living in the Székely Land. This approach changed in the 1930s, but it did not lead to any change on the Romanian side.

A significant change came in 1952, when the Soviet leadership obliged Romania to create the Hungarian Autonomous Region in the Székely Land. The decision was motivated by the Soviet experiences and the strong will to avoid social changes turning into ethnic conflicts in the Hungarian-populated area of Romania. The institution, being very distinct from any Romanian minority policies, existed until 1968; however, the increasingly nationalist Romanian Workers' Party changed its boundaries in 1960 to reduce the percentage of ethnic Hungarians. The region, autonomous in name only, could not have been self-governing in a totalitarian dictatorship; even so, that is the only example of Romania implementing at least nominal territorial autonomy for regions with a Hungarian ethnic majority to this day.

After 1989, the Romanian fears connected with autonomy did not cease; on the contrary, the political elite − on both the Romanian and ethnic Hungarian sides − started to use the topic to gain political power, pushing the issue into an over-politicised and extremely sensitive context where both sides apply the mentality of the zero-sum

100 *Romanian president causes diplomatic spat with Hungary* (4 May 2020) https://www.euractiv.com/section/all/short_news/romanian-president-causes-diplomatic-spat-with-hungary/?fbclid=IwAR1xWCf5FuoI5voi3B-ZYuLHNZYzU71E707avwc4joV7e_ZXDT60fgty4TE (9 June 2020)

101 *Rumäniens Präsident Klaus Johannis – Ein Hetzer als Karlspreisträger* (4 May 2020) https://www.spiegel.de/politik/ausland/rumaenien-praesident-klaus-johannis-ein-hetzer-als-karlspreistraeger-a-de417ba1-64aa-4c44-ba42-21a687f88154?fbclid=IwAR2Uy0BbxXpP_m3ZhZYRdQMqsA5N91oaXhnUxqwcKF0-BErQnD-wtsHoc40 (9 June 2020)

game. This has resulted in declarations such as that of Romanian President Iohannis at the end of April 2020. The bitterness of the whole situation derives from lack of dialogue between the parties: one sustaining using every possible means the vision of a non-existent nation-stateness while the other striving for an autonomous Székely Land.

The losers are all of us: the Hungarian community, because they are always reminded that Romania is not their homeland; the Romanian majority because they are entertained by Romanian politicians using false fears of losing parts of the country instead of talking about enhancing social conditions and modernising Romania; Romania itself because it is stuck in a position where enormous funds are spent on an unnecessary fight, and Central Europe as well, since until the equal status of the Hungarian community is granted there can be no trust between Romania and Hungary, these two key countries connecting the Northern and Southern Slavic peoples, and lying between Germany and Russia.

Törő, Csaba[1]

The Aims and Means of Hungarian Foreign Policy in Support of EU Enlargement in the Western Balkans – A Brief Overview of Current Practice

Continuity in Hungarian foreign policy with respect to the Western Balkans

The last official comprehensive Hungarian foreign policy strategy – published 8 years ago, right after the Hungarian EU Presidency in 2011 – declared that Hungary intended to extend its assistance to the countries of the Western Balkans region "by sharing experiences regarding EU accession, the use of EU funds, institutional capacity-building and democratic transition". In the context of EU enlargement to the Western Balkans, Hungary stressed the importance of progress in the accession of Serbia and Montenegro while recognising the urgency of the inclusion of North-Macedonia. Albania, Bosnia-Herzegovina and Kosovo into the integration process in order to safeguard the security and stability of the region.

It also fully and actively supported NATO membership for Montenegro placing the entire Adriatic littoral under the transatlantic security umbrella. The stability and consolidation of market economies and democratic political institutions and the improvement of the investment environment, including legal certainty, in the Western Balkans have been all expressly and consistently determined as Hungary foreign policy. Hungarian foreign policy toward its southern neighbourhood has reflected the conviction that the possibility of enlargement, the extension of the perspective of membership, remains the only truly effective geopolitical instrument of the European Union in South Eastern Europe. Decisive external influence over the political, social and economic conditions in the remaining cluster of Western Balkans countries outside the Union can only be exercised effectively by the EU through the sole incentive and ultimate reward of the perspective of membership in exchange for sustained pacification, reconciliation and cooperation across the still fragmented region. For this reason, Hungary continues to maintain its unconditional political endorsement of the EU aspirations of all the six Western Balkans states (WB6) in the region.

With respect to the security of the region and sustainable conflict resolution efforts, Hungary stated its commitment to continued participation in the multinational

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peace support operations in the Western Balkans within the framework of KFOR and EULEX in Kosovo, as well as EUFOR ALTHEA in Bosnia and Herzegovina.[2]

Institutional and diplomatic Hungarian assistance in pursuit of EU aspirations in the Western Balkans

In pursuit of practical support and assistance for the EU integration aspirations and efforts of Western Balkans countries, successive Hungarian governments over the last 15 years have offered to share the country's experience of administrative and legal, as well as institutional adaptation for EU membership as a form of practical assistance through the transfer of knowledge of and insights into accession preparations. Besides the diplomatic and political means of endorsement within diverse formats (for instance EU summits) and fora (such as the Visegrad Group or the Council of the EU) for policy coordination of the European Union, capacity-building initiatives have also been offered by Hungary as pragmatic and targeted tools to bolster certain state structures and functions necessary for the implementation of EU accession tasks in each country of the Western Balkans.

The parliamentary dimension of institutional capacity-building represents one of the areas where Hungary has gained prominence and demonstrated effective support for the preparation of respective national institutions in various states of the region.[3] As the result of successful applications for the implementation of EU-financed Twinning projects, the Hungarian National Assembly has led and conducted an impressive number of parliamentary capacity-building programmes (seven accomplished between 2010 and 2017) – in partnership with several parliaments from other EU Member States – in Albania, Bosnia and Herzegovina (one still ongoing there), Croatia and Kosovo throughout the last decade as the result of systematic and continued engagement.[4]

As another visible and distinct instrument of direct and practical assistance from the Hungarian government to its partners in the Western Balkans, Hungarian diplomats, as EU integration advisers, have been assigned to the Foreign Ministries or other government units in charge of coordinating the legislative and policy measures required by EU accession preparations in each state in the region (Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia) in the last couple of years. In the course of their daily and direct collaboration with the host government institutions, these EU advisers have been deployed to act as a conduit

2 *Hungary's Foreign Policy after the Hungarian Presidency of the Council of the European Union*, MFA, 2011, pp. 22-23

3 Horváth Zoltán: A magyar Országgyűlés intézményfejlesztési tevékenysége a délkelet-európai térség parlamentjeiben, különös tekintettel a Nyugat-Balkánra, *Parlamenti Szemle*, 2017/1, pp. 139-145

4 *Evaluation of the Twinning instrument in the period 2010-2017*, Final Report 2010-2017, European Commission, 2019, pp. 191

for the transfer of Hungarian experience, knowledge and perspectives in support of all (diplomatic, legal and technical) aspects of national preparations for the pursued EU membership by the host countries.

Hungarian contribution to the reinforcement of core state functions in the Western Balkans

In the light of the dramatic experience of the hardly controllable flood of migrants in 2015, it became a key Hungarian foreign policy interest to provide actual support – by bilateral measures and also through the allocation of potential EU resources – for Western Balkans countries to perform vital state functions. In the southern security foreground of Hungary, the institutional capabilities of each state to mount effective control and protection of their respective borders constitute the prerequisite for the prevention and containment of another wave of potential migrant influx through the Balkans trail into the European Union across Hungary. Therefore, from the perspective of Hungarian border protection and national security, it is essential that all of its southern neighbours should maintain and enhance the effectiveness of their border control functions. The Hungarian foreign policy aim of support for stable and cooperative partners in the region assumed a new dimension and required the use of new and flexible measures to reinforce vital state functions in the Western Balkans, where the floodgates to withstand the pressure of a sudden surge in mass irregular migration proved highly fragile.

Using its own resources, Hungary delivered technical assistance and dispatch police contingents both as part of coordinated reinforcement by the Visegrad Group and also in a bilateral manner in several rounds following the acute migrant crisis in 2015. In the last few years, Hungary demonstrated on several occasions the consistency of its active support, by means of recurrent deployments of police forces, for the border protection efforts of Western Balkans countries straddling the migration route through the Eastern Mediterranean and South Eastern Europe. After the peak in the migrant crisis in 2015, a new pattern for the illegal flow of people emerged in the region leading from Greece via Albania and Macedonia through Montenegro and Bosnia and Herzegovina to Croatia, Slovenia and Austria.[5] Even if the trail of uncontrolled migration appeared to be mainly diverted from Hungary, the risk of another wave of uncontrolled large scale population movement migration has been perceived as a real source of threat to Hungarian sovereignty and security.

In order to create a forward line of protection for Hungarian security, the reinforcement of national borders and their control in the southern neighbourhood of Hungary became a priority in its foreign policy towards the countries most exposed to relentless mass movements of people across their territories. The frontiers for the containment of irregular migration in the Western Balkans could be bolstered both

5 *Hungary supports border protection efforts of countries lying on new migration route*, 7 June 2018, https://www.kormany.hu/en/news/hungary-supports-border-protection-efforts-of-countries-lying-on-new-migration-route

by technical assistance and also by the deployment of extra personnel at the borders under increased threat and pressure. Hungary was willing to provide actual human and psychological reinforcement for the overstretched capacities of the affected states. In demonstration of its commitment, Hungary has sent police contingents to Serbia and North Macedonia as the extension of preventive and protective measures to the southern borders of its neighbours, which have constituted an extended Hungarian security perimeter for the last three years.

In line with its stated national security interest in strengthening the performance of border control and protection capabilities in the region, Hungary repeatedly sent police units to its immediate southern neighbour, Serbia, and also further "upstream" into North Macedonia, with a difficult frontier in the chain of national borders along the migratory path from the EU gateway (Greece) towards the centres of migrant gravitation within the European Union. In a sequence of reinforcement assistance measures, Hungary has dispatched contingents of its police officers to "frontline countries" of the Western Balkans as small auxiliary forces of law and order deployed in response to the anticipated danger of a new wave of migrants across the South East European "front yard" of Hungarian and EU security.[6] Hungarian police officers take part in joint operations with their host countries by performing patrol duties to prevent and uncover attempts to cross state borders illegally without detection and also assisting in the apprehension of people smugglers and irregular migrants within the territories of North-Macedonia and Serbia. In carrying out their assigned duties, they rely on their own service equipment and exercise their right to take police action under the supervision of the local police authorities.[7]

During the recent years since 2015, it has evolved into a permanent feature of Hungarian foreign assistance towards both countries to regularly dispatch Hungarian police units in order to undertake joint operative tasks with local forces. These contingents contribute to the protection of borders between Serbia and North Macedonia as well as North Macedonia and Greece by investigating and preventing illegal entry into Serbian or Macedonian territory. The provision of limited, but actual complementary constabulary capabilities in the Western Balkans neighbourhood of Hungary as a particular and targeted form of capacity-building is intended to enable more efficient performance of vital state functions (border control) in Serbia and in North Macedonia which are deemed critical for Hungarian national security.[8]

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6 *Hungary to send 20 police officers to patrol Serbian border*, 4 October 2016, http://abouthungary.hu/news-in-brief/hungary-to-send-20-police-officers-to-patrol-serbian-border/

7 *Hungarian police officers sent to Serbia and Macedonia to patrol borders*, 3 May 2017, http://abouthungary.hu/news-in-brief/hungarian-police-officers-sent-to-serbia-and-macedonia-to-patrol-borders

8 *Hungarian police force continues to help North Macedonia and Serbia tackle migrant crisis*, 3 April 2019, http://abouthungary.hu/news-in-brief/hungarian-police-force-continues-to-help-north-macedonia-and-serbia-tackle-migrant-crisis/

Beyond its support on the basis of bilateral collaborative arrangements with its direct or indirect neighbours, Hungary also sought to reinforce state capacities in the Western Balkans through Central European cooperative initiatives and offers. In 2016, the governments of the Visegrad Group (V4) countries declared "their willingness to provide the most exposed countries of the Balkans region, in general, with adequate means of practical support based on the actual needs".[9] Aligned with possible occasional partners, the V4 continues to prove the most convenient and primary choice for the mobilization of political support and available resources of like-minded Central European partners in the pursuit of the Hungarian foreign policy aim of strengthened external border protection in the Western Balkans region. At their summit in 2018, the V4 and Austria agreed on their coordinated and joint efforts to "provide the necessary human resources and technical support pool in order to implement targeted border policing activities with the countries of the Western Balkans".[10]

Hungarian participation in the stabilisation and security of the Western Balkans

Hungary has declaredly and consistently conducted an active policy of direct participation in multilateral endeavours to sustain the conditions of peace and security in its southern neighbourhood in order to prevent conflagration and deterioration in potentially (Bosnia and Herzegovina) and actually (Kosovo) volatile situations in the most difficult former conflict zones of the Western Balkans. Hungarian contributions to NATO and EU operations in the region represent the most tangible measures of assistance and the tools of effective pursuit of its own security interests in the maintenance of regional security and post-conflict stabilisation.

In planning future Hungarian foreign military deployments in crisis management operations, the Western Balkans region is foreseen to remain the main area of engagement for the Hungarian defence force in the performance of post-conflict peace- and state-building responsibilities. In Kosovo and in Bosnia and Herzegovina already more than 500 Hungarian soldiers serve in peace support operations in those countries, under NATO and EU flags respectively.[11] With the accomplishment of Hungarian military deployment in Afghanistan, the former Western Balkans conflict zones will stay at the foreseeable centre of Hungarian expeditionary security missions representing direct benefits for and added value to the foreign policy objectives of Hungary in its immediate neighbourhood.

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9 *Joint Statement on Migration of the Prime Ministers of the Visegrad Group*, Prague, 15 February 2016

10 *Visegrad Group and Austria Summit Declaration on "setting up a mechanism for assistance in protecting the borders of the Western Balkan countries",* Budapest, 18 June 2018

11 *Western Balkans region continues to remain main area of peacekeeping responsibilities*, 2 July 2019, https://www.kormany.hu/en/ministry-of-defence/news/western-balkans-region-continues-to-remain-main-area-of-peacekeeping-responsibilities

a) *Bosnia and Herzegovina*

From the perspective of Hungarian foreign policy, peace and security in the Western Balkans has been consensually identified as a fundamental interest of Hungary. The stability of Bosnia and Herzegovina (BiH) remains one of the decisive elements in the regional fabric of security – besides Kosovo – as it is still considered the most vulnerable in the region from both a political and economic perspective. In the long-term, the inclusion of BiH into the organisational structures of European and Transatlantic integration – namely the EU and NATO – would underwrite its security and stability as a viable multinational and sustainable state entity. In the meantime, until its integration is accomplished, external multinational guarantees – in the form of military operation – on the ground remain necessary, together with active engagement of and support from both organisations, as well as their willing and able Member States. Among them, Hungary has become one of the most reliable and prominent contributing states to the continued stabilising presence of the European Union (EUFOR) in collaboration with NATO.

For several years, Hungary has been one of the participating countries with an uninterrupted presence in the BiH theatre of international military operations, first under NATO, then EU command. The Hungarian proportion and significance expanded over the years. Currently, Hungary furnishes the 2nd largest contribution to the EU Operation ALTHEA and regularly holds positions (such as chief of staff) at the operational command level. By virtue of its continuous and significant contribution, Hungary has demonstrated its active commitment to the preservation of stability and state unity in BiH, which extends well beyond political and diplomatic declarations. Within the EUFOR military contingent, its central component, the manoeuvre unit – Multinational Battalion (MNBN) – representing its rapid response capacity currently comprises Hungarian, Austrian and Turkish troops.[12]

Through sustained engagement in the provision of military means of security in the longest running EU military crisis management operation, the direct "investment" of Hungary through its military personnel and resources in collective peacekeeping and stabilisation endeavours in its southern neighbourhood represents a rewarding course of action with tangible returns for Hungarian foreign policy and external security priorities.[13]

12 *EUFOR Operation ALTHEA European Union Military Operation Bosnia and Herzegovina (BiH)*, Mission Factsheet, July 2019, http://www.euforbih.org/eufor/images/pdfs/Mission_Factsheet_0719.pdf

13 *The peace and stability of Bosnia-Hercegovina is in the fundamental security interests of Hungary*, 17 May 2016, https://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-peace-and-stability-of-bosnia-hercegovina-is-in-the-fundamental-security-interests-of-hungary

b) Kosovo

In the other theatre of post-conflict stabilisation in the Western Balkans, Hungary has also been actively involved in international peace support in Kosovo through its contribution to the multinational forces under NATO command (KFOR) in the country. For years, the Hungarian Defence Forces have provided a significant military presence in the form of the Tactical Reserve Battalion (KFOR Tactical Manoeuvrable Unit, KTM) placed under the direct control of the KFOR Commander as an emergency response unit. In case of any eruption of disturbance or conflagration of violence in Kosovo, the Hungarian troops are designated to be deployed as "emergency responders".[14]

In addition to its responsibility and readiness within Kosovo, the Hungarian military presence stands ready as reserve capability, not only for KFOR but also for the EU military crisis management operation in Bosnia and Herzegovina. Interestingly, the tactical reinforcement unit that happens to be comprised of solely Hungarian troops is also assigned to shore up the military units serving in Operation ALTHEA – coincidentally with a large component of Hungarian soldiers – in the event of a deterioration or destabilisation of security in BiH. While the size of KFOR has been reduced as the situation has improved and NATO priorities changed, Hungary not only maintained its engagement, but it even became more significant as the focus of the Hungarian contribution to international peace support operations shifted onto the Western Balkans in recent years.[15]

After the significant reduction of Hungarian military presence in Afghanistan within ISAF and besides the Hungarian unit participating in the international training mission in Iraq, the Western Balkans clearly remained the constant area for active and distinct Hungarian engagements in multilateral post-conflict operations under EU and NATO flags in accordance with the stated strategic foreign policy objectives of Hungary in the region.

Hungarian support for EU enlargement reinforced through the Visegrad Group

The advancement of the EU membership aspirations of Western Balkans states, as a Hungarian foreign policy aim, has been reinforced through the participation of Hungary in the formation of clear and consistent support by the Visegrad Group (V4) for EU enlargement in the region. Vocal endorsement and promotion of the perspective of EU integration for all the six countries in the South East European neighbourhood of the Union has remained a constant feature of the shared V4 approach with regard to the strategic objectives and rational of future EU enlargement.

14 KFOR Tactical Reserve Battalion, https://jfcnaples.nato.int/kfor/about-us/units/ktm

15 *Hungary will be increasing the number of its military personnel in the KFOR*, 15 November 2018, https://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/hungary-will-be-increasing-the-number-of-its-military-personnel-in-the-kfor

The Visegrad countries have consistently and unreservedly supported EU enlargement for years collectively in their coordinated positions. Presenting their unified stance on that matter, the V4 cluster has invariably and repeatedly confirmed its commitment to the support of the accession aspirations of the WB6 countries for more than a decade. In May 2019, the foreign ministers of the Visegrad Group held the 10th annual congregation with their Western Balkans counterparts.[16] On each occasion, it has been confirmed that the Central European quartet sustains its unconditional endorsement of the enlargement process towards the aspirants from South Eastern Europe.

In their joint letter to the President of the European Council, the prime ministers of the Visegrad Group warned that any "further delay in making a positive decision" would result in a serious deterioration of stability in the region and limit the ability of the EU to perform "an active role in our own neighbourhood", and calling for a "decisive discussion" among EU heads of state and government at their summit in October 2019.[17] It was just the latest example of commendable and direct diplomatic engagement by the V4 countries at the highest level in support of EU enlargement.

In the wake of the last setback in October 2019 in the continuation (with Montenegro and Serbia) or in the eventual launch (with Albania and North-Macedonia) of the EU accession process with every eligible partner in the region, the Visegrad countries reiterated their concerted drive for a revitalised EU enlargement avenue for the Western Balkans. The Visegrad quartet continues to deliver a reliable and steady support base within the Union for the EU membership aspirations of all Western Balkan countries despite their diverse political and economic conditions prior to the opening of the actual accession process. For this very reason, the V4 cluster fully supported the proposed redefinition by the European Commission of the EU accession process, in order to make the accession process more effective and credible by allowing the Western Balkans to move forward based on real progress in fundamental reforms.[18]

The shared V4 commitment to the enhanced credibility of the EU accession process in South East Europe reflected and represented the guiding priority of Hungarian foreign policy: ensuring stability, security and prosperity in the region through sustained motivation for ever-closer integration of Western Balkans societies, economies, institutions and political structures with the EU. With respect to the transformation of the South East European EU neighbourhood though inclusion, the Visegrad Group remains the primary platform for amplifying the sound and effect of Hungarian endeavours on shaping a common EU policy to that end.

16 *V4 Foreign Ministers' Joint Statement on the Western Balkans*, Bratislava, 28 May 2019

17 Alexandra Brzozowski: Visegrad 4, North Macedonia in last-ditch effort to change French enlargement veto, *Euractiv.com*, 17 October 2019

18 *Joint Statement of the Ministers of Foreign Affairs of the V4 countries on the Western Balkans,* 27 February 2020, http://www.visegradgroup.eu/documents/official-statements/joint-statement-of-the-200323

Certain relevant areas for targeted Hungarian efforts through the Visegrad Group (and other friends) for continued EU enlargement

With respect to the future direction of their continued support for the EU accession of Western Balkans countries, the Visegrad governments could be advised to intensify their efforts to engage all potential and willing member states – primarily the Friends of Enlargement, the so-called Tallinn Group and every other possible partner – inside the Union in three crucial aspects of continued EU enlargement process.

First, the geopolitical and strategic rationale underpinning the expansion of the European Union into South Eastern Europe should be reinforced as the principal objective of EU enlargement prevailing over the ideological vision of social engineering in pursuit of model post-national European countries in the Western Balkans prior to their EU accession.

Second, it will be inevitable to change the tone and perspective of the discourse on the nature and reason of enlargement at all levels of intergovernmental coordination and decision-making (from working groups of the Council to the heads of state and government in the European Council) and in the supranational organs (European Commission and European Parliament) of the European Union as well as within EU member states. Relying on the experience and evidence of 15 years of EU membership in the wake of the largest act of enlargement in the history of the EU integration, V4 countries should take the lead in changing the perception of EU enlargement and insist on its honest explanation as a mutually beneficial strategic bargain for all sides. In response to the profoundly wrong and incorrect interpretation of the extension of EU membership as an act of charity and generosity by wealthy EU members towards less prosperous countries, the Visegrad Group should recall and stress repeatedly the evident example of the multiple trade, investment and labour benefits offered by the accession of Central and Eastern European states to the single European market and most EU members in a variety of forms.

Third, the Visegrad countries need to make concerted efforts to ensure that the necessary financial resources will be available in the next budgetary cycle for EU enlargement. In order to secure sufficient funds for pre-accession financial assistance, the final size and structure of the Multiannual Financial Framework (MFF) should include the appropriations for the material support of EU accession to cover the considerable expenses of transformation and adaptation as well as reinforce the administrative, institutional and structural capacities of EU candidates from the Western Balkans for the years of their membership preparations. Without adequate budgetary resources, EU enlargement, as the most successful policy instrument for the external relations of the European Union so far, would be practically deprived of its most effective facilitating tool and incentive for the implementation of often costly reforms in candidate countries.

Concluding remarks

Practically, the six Western Balkans state are already integrated to a large extent into the EU in various aspects of their economic reality: their exports, the provenance of foreign direct investment, the ownership of most institutions in their financial sectors and also the main destination of emigrants from its population. Nevertheless, no assurance can be given on the date when any or every candidate from the Western Balkans (or anywhere else) would eventually become an EU member. Maintaining the momentum of their aspirations and efforts to proceed towards integration into the European Union is not a panacea for all the problems of the Western Balkans, but it is the most effective tool that EU members or institutions could possibly find to keep these countries on track and to inspire regional stability as well as cooperation. Any unjustifiable, therefore unnecessary delay in EU enlargement to the Western Balkans is a politically short-sighted manifestation of the collective inability of the Union as a political alliance to assume responsibility for shaping its own immediate strategic environment.

Tóth, András[1]

Competition Law as Market Regulation in the Example of EU Energy Markets

1. Introduction

The idea of regulation by competition law may seem strange at first glance. Market regulation is sectoral and *ex-ante*, while antitrust is *ex-post* and sector-neutral. However, we need to be prepared to be familiarised with this approach. The Commission's proposal for a New Competition Tool (NCT) moves EU competition law further into this direction of regulatory intervention which would allow the Commission to impose behavioural and where appropriate, structural remedies in order to tackle competition problem much more effectively.[2] The essence of regulation is to establish rules of conduct for the future. The operation of the antitrust has typically been based on sanctioning market behaviours occurred in the past, as in the case of the criminal law. The likelihood of sanction is the threat by which the regulator could reach the social respect of the legal rules. In this concept, deterrence is of great importance. However, this type of regulatory approach is not always able to effectively protect society. This has also been pointed out by competition law practice. In the case of market power, the application of Article 102 TFEU can only take place in slow and cumbersome procedures. E.g. in the Microsoft case[3], after a 6 years long investigation by when the Commission obliged Microsoft to provide access to its competitors the company enjoyed 60% market share on the downstream market. Two years later when the Commission had to compel Microsoft to fulfil its obligations by imposing penalty payment, the company already held 74% market share.[4] Another recent example: the remedies imposed on Google in respect of its self-preferencing practices, after a seven-year investigation, turned out that Google's antitrust proposal not helping shopping rivals.[5] Of course, in sectors such as the digital economy where there is no sectoral

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2 European Commission, 'Antitrust: Commission consults stakeholders on a possible new competition tool' (2 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977> accessed 20 July 2020

3 *Microsoft* (Case COMP/C-3/37.792) Commission Decision C(2005) 4420 OJ L 166/20 [2008] para 499

4 *Microsoft* (Case COMP/C-3/37.792) Commission Decision C(2005) 4420 OJ L 166/20 [2008] footnote 355

5 Yun Chee, Waldersee (2019)

regulation, the antitrust rules could serve temporarily the only regulatory intervention tool in the hand of the regulator. However, the competition in the digital economy is much more dynamic and fragile therefore the European Commission and other national competition authorities are encouraging the application of the much faster interim measures.[6] Nevertheless, the markets characterised by market power need to be subject to *ex-ante* regulation in the long run, as the proposed Digital Services Act demonstrates it in the context of this digital economy.[7]

The NCT continues and reinforces the competition law regulatory approach which was already implemented in the form of a commitment decisions under Article 9 of Regulation 1/2003 and which has shown its strength in the energy sector. Article 9 of the Regulation 1/2003 allows the Commission to conclude antitrust proceedings by making commitments offered by a company legally binding. Such a decision does not conclude that there is an infringement of the EU antitrust rules but legally binds the companies concerned to respect the commitments offered. When competition law works as a regulation, it does not intend to influence the behaviour of market players with the deterrent effect of sanctioning past infringements, but set exact rules for the future. This approach has been used strategically by the Commission in energy market competition proceedings under Article 9 of Regulation 1/2003. Almost one third of the total EC commitments decisions under Article 9 of Regulation 1/2003 have dealt with market conduct in the energy sector since 2004.[8]

The common energy policy is considered as one of the top European priority projects.[9] The aim is a continent-wide energy system where energy flows freely across borders, based on competition and the best possible use of resources, and with effective regulation of energy markets at EU level.[10] Since the liberalization of the EU energy

6 European Commission, 'Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets' (16 October 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109> accessed 01 October 2020; Autorité de la concurrence, 'The Autorité de la concurrence has ordered interim measures against Google' (31 January 2019) <https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/31-january-2019-online-advertising-directory-enquiry-services-0> accessed 20 July 2020

7 European Commission, 'Commission launches consultation to seek views on Digital Services Act package' (2 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_962> accessed 20 July 2020

8 De Klein, L., 'PaRR Analytics: One-third of EC commitments decisions in energy sector' (*PaRR*, 13 March 2018) - De Klein (2018)

9 Xueref-Poviac, E. 'Access to facilities in the energy sector: An overview of EU and national case law' (*Concurrences*, 3 Mai 2018) – Xueref-Poviac (2018); and European Commission, 'Commission priorities for 2015-19 – Energy Union' <https://ec.europa.eu/commission/priorities/energy-union-and-climate_en> accessed 28 August 2018

10 European Commission, 'The Communication of the Energy Union Package by the Commission' (25 February 2015) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015DC0080> accessed 20 July 2020

markets, the competition law enforcement has been active in the sector to promote more competitive gas and electricity markets in Europe and to facilitate market integration as well as the exchange of energy between Member States.[11]

This paper shows that the regulatory style application of competition law which has proved to be an effective complement to European energy regulation in three areas. One is the development of the internal energy market, which has been supported by EU competition law through the elimination of destinations restriction and the limits of interconnector capacities (Chapter 2). The second is to promote infrastructure-based competition through network divestitures and capacity releases (Chapter 3). The third area is to free customers from long-term contracts and make them available to competitors (Chapter 4.).

2. Unifying eu single energy markets

2.1. Eliminating destination restrictions

The EU-approach in regard of destination restrictions was traditionally – in consideration of the high extent of dependency in the gas import[12] – long-term take-or-pay contracts (in both the upstream[13] and the downstream[14] relation) provide the security of gas supply, as they provide security for both the producer and for the purchaser through stable supply.[15] However, a significant change of this approach can be seen due to the liberalization of the European gas supply markets and the fact that purchasers are now capable of having access to other sources of supply, for instance LNG.[16] Nevertheless the EU competition law prohibits resale and use restrictions, as they are against the integration of the European energy market.

In the following cases, the Commission aimed at removing the destination restrictions contained in the energy agreements (concerning both electricity and gas) through the widespread application of competition law. In doing so, it applied both Articles 101 and 102 TFEU, depending on whether the agreements were implemented, with or without negotiations, as a result of unilateral conducts by a dominant company.[17]

11 European Commission, 'Report of the European Commission on Competition Policy 2016' (31 May 2017) <http://ec.europa.eu/competition/publications/annual_report/2016/part1_en.pdf> accessed 20 July 2020

12 The three main sources for natural gas import are Russia (42 per cent), Norway (24 per cent) and Algeria with 18 per cent.

13 contract between the upstream producer and for instance the EU buyer

14 contract between the wholesaler and the end- purchaser

15 Talus, K. 'Long-term natural gas contracts and antitrust law in the European Union and the United States' (2011) The Journal of World Energy Law & Business, Volume 4, Issue 3 – Kim Talus (2011)

16 Ibid 263-264.

17 *EDF S.A. (Long-term contracts France)* (Case COMP/39.386) [2010]; *Bulgarian Energy Holding*

The application of Article 101 TFEU concerned both vertical and horizontal energy agreements.

Ruhrgas and Gaz de France agreed in 1975 on the joint construction of a gas pipeline to transport gas from the Soviet Union to Germany and France. In the arrangement known as the MEGAL agreement, the parties stated that they would refrain from selling natural gas transported by the MEGAL pipeline in each other's national markets (horizontal market sharing agreement). E.On Ruhrgas, the legal successor of Ruhrgas and GDF Suez legal successor of Gaz de France agreed in 2004 that the aforementioned agreement had never been enforced and therefore they would consider it to be void. In 2007 the Commission, initiated proceedings[18] and held that the actual market conduct of the two groups of undertakings did not substantiate the provisions of the formal agreement of 2004 as they continued to employ their agreement concluded in 1975 even after the liberalization of the European gas energy market in 2000 (entry into force of the first gas directive[19]), and kept it in effect until 2005. In its decision adopted in 2009, the Commission imposed on E.ON Ruhrgas and E.ON, jointly and severally, a fine of EUR 553 million, and on GDF Suez also a fine of EUR 553 million, which was the highest amount of fine imposed by the Commission in the energy sector. However, in its judgement of 29 June 2012 the General Court[20] reduced the fine on the E.ON group to EUR 320 million because it found that the Commission did not adduce any evidence to support the conclusion that the infringement in question continued on the French market following the 2004 agreement.

In 1997 Gaz de France entered into a vertical agreement with Italian gas suppliers ENI and ENEL; in this agreement, the two Italian companies undertook to sell the gas supplied to them only in Italy to refrain from selling it in France. In this case[21] the Commission found in 2004 that in light of the liberalization of the energy market in 2003-2004 (after the entry into force of the second gas Directive[22] in August 2004), the parties no longer abided by their existing agreement, and therefore no fine were imposed in the proceeding. In both cases MEGAL and *ENEL / ENI / Gaz de France*, the Commission considered the actual market behaviour of the parties when assessed the length of the market-sharing agreement. In MEGAL case, the parties expressly agreed that, following the liberalization started in 2004, the market-sharing agreements

(Case AT.39767) [2015]

18 *E.ON AG, E.ON Ruhrgas AG, GDF Suez SA* (Case COMP/39401) [2009]

19 Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas [1998] *OJ L 204, 1–12.*

20 Case T-360/09, *E.ON Ruhrgas and E.ON vs Commission* [2012] ECLI:EU:T:2012:332

21 *ENEL,ENI, Gaz de France* (Case COMP/38662) [2004]

22 Directive 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] *OJ L 176, 57–78*

were invalid but did not enter each other's markets. In case *ENEL / ENI / Gaz de France* case, there was no such agreement, but the parties actually started competing each other. It appears that in MEGAL case the Court was not persuaded by the lack of evidence of a competitive market conducts as regards the existence of a restriction of competition especially regarded the fact that the parties expressly stated that their agreement was invalid. By contrast, in the ENI/ENEL/Gas de France case, in the absence of an agreement, the Commission accepted that the infringement had come to an end on the sole ground that the parties started competing with each other.

In 2000 the Commission started investigating several gas supply contracts containing territorial restrictions between non-EU producers and European enterprises.[23] In October 2003 the Commission announced in a press release the settlement of the investigation in regard to Gazprom and ENI.[24] As a result of the settlement, the parties concerned removed all territorial restrictions from the concluded agreements, thus declared that ENI is entitled to the resale and transport of the purchased gas without any restrictions and they also undertook to avoid such restrictive provisions in the future and deleted the clauses which required the consent from ENI for the sale of gas to other customers in Italy by Gazprom.[25]

In 2012 the Commission opened a proceeding[26] against *Bulgarian Energy Holding* as in the view of the Commission, the undertaking had abused its dominant position on the free market of wholesale electricity by unilaterally requiring its customers to refrain from exporting electricity with regard to sales outside Bulgaria, limiting their freedom to choose where to resell, thereby the *Bulgarian Energy Holding* had hindered competition through territorial restrictions. The Commission's proceeding ended in October 2015 with a commitment made by the Bulgarian company to the effect that *Bulgarian Energy Holding* would sell a minimum amount constituting a specific, significant part of the electricity produced by itself and its subsidiaries through the independent, newly established power exchange for a period of 5 years from the establishment of the exchange.

The Commission started investigating Gazprom in 2011. In the view of the Commission, Gazprom restricted competition on the market of natural gas supply in three ways. First, it restricted its customers in a number of Central and Eastern European countries in the export of gas to other countries (territorial restriction).

23 European Commission 'Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts' (11 July 2007) < https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1074> accessed 01 October 2020

24 The press release of the European Commission is available at: European Commission 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses' (06 October 2003) <http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=hu> accessed 01 October 2020

25 Kim Talus (2011)

26 *Bulgarian Energy Holding* (Case AT.39767) [2015]

Second, it may have applied unfair pricing policies in five Member States[27]. In those Member States, the price of natural gas (because of it being pegged to the oil price as opposed to spot market prices), may have exceeded the fair market value (excessive pricing). Third, Gazprom imposed unfair contractual conditions in Bulgaria and Poland such as making wholesale gas supplies conditional upon the participation of the Bulgarian incumbent gas wholesaler in the South Stream pipeline project; furthermore, the Polish and Bulgarian parties were required to accept Gazprom's increased control over certain transit pipelines. In response to the competitive concerns raised by the Commission, Gazprom undertook to definitively remove all contractual obstacles to the cross-border re-sale of gas and to facilitate free gas distribution in Central and Eastern European gas markets as well. Furthermore, Gazprom undertook to adjust gas prices in Central and Eastern Europe to competitive benchmark prices, such as Western European distribution prices, and to give its customers an effective tool to make sure their gas price reflects the price level in competitive Western European gas markets, especially at liquid gas hubs. Finally, Gazprom cannot act on any advantages concerning gas infrastructure, which it may have obtained from customers by having leveraged its market position in gas supply. In May 2018 the Commission accepted the final commitments offered by Gazprom and made these obligations legally binding in its decision[28] on it.

2.2. Enhancing the interconnector capacities

The Swedish transmission system operator curtailed export capacity on the Swedish interconnectors[29], thereby reserving the electricity generated in Sweden for the national market while the liberalisation of the European energy market set the objective of integrating systems. On the basis of this fact, the Commission stated that the transmission system operator discriminated customers upon their residency.[30] In the Commission's proceeding[31] the undertaking claimed that such transmission capacity limitation was necessary to maintain the stability of the system; however, the Commission held that this could have been achieved by means other than export restriction. In 2009 the company undertook to subdivide the Swedish transmission system into two zones with a view to insuring the stability of the system, and to build a new cross-border interconnector.

27 Bulgaria, Estonia, Latvia, Lithuania, Poland

28 PJSC *Gazprom (Upstream gas supplies in Central and Eastern Europe)* **(**Case AT.39816) Commission Decision C(2018) 3106 **[2018]**

29 Transmission lines between the power systems of neighbouring countries, which connect the areas controlled by the transmission operators of the respective countries

30 Grasso, R., Ratliff, J., 'Unilateral conduct in the energy sector: An overview of EU and national case law' (*Concurrences*, 12 July 2018) – Grasso, Ratliff (2018)

31 *Svenska Kraftnät (Swedish Interconnectors)* (Case COMP/39351) [2010]

The Commission started a formal investigation in 2017 to assess whether Transgaz, the Romanian gas transmission system operator, infringed EU competition rules by restricting exports of natural gas from Romania which is the second largest gas exporter in the EU. Following the opening of the formal investigation, Transgaz offered commitments to address the Commission's concerns. Transgaz has committed to make available capacities at interconnection points for increased natural gas exports from Romania to Hungary and Bulgaria.

The high-voltage electricity grid operator in Germany (TenneT) hindered Danish producers from selling electricity in Germany, by way of limiting capacity in the electricity interconnector connecting Western Denmark and Germany. In 2018 the Commission started an investigation[32], shortly afterwards TenneT proposed its commitments. In the commitments the firm undertook to make the maximum capacity of the interconnector accessible to the market.[33]

3. Promoting the liberalisation process by fostering infrastructure based competition

The liberalization regulation of the European infrastructure markets (like in telecommunication and energy sector) does not require ownership divestitures of the incumbents' networks. Therefore the incumbents could remain vertically integrated which created significant competitive advantages and high barriers of entry for potential newcomers. In order to facilitate the development of the European infrastructure markets the EU opened up the incumbents' infrastructure for the competition and required the incumbents to provide access to their competitors. Therefore the liberalisation regulation of the European infrastructure markets (like telecommunication and energy) is on the basis of the so-called network based competition. The network based competition model balances between incumbents' vertical integration detrimental to market liberalization and market entrance necessary to create welfare enhancing competitive environment. However, the competition law remained applicable in the liberalised markets besides the sectoral regulations and it appears that in the energy sector the EU strived to make up for the deficiency of the liberalisation regulations by using competition law instruments, for instance through ordering infrastructural divestures and capacity enhancement, such as in the cases listed below.

3.1. Infrastructural divestitures

There are different degrees of unbundling, of which one type is the so-called ownership unbundling, where the company concerned divests its assets to third parties.[34] There

32 *TenneT TWO GmbH (DE/DK Interconnector)* (Case AT.40461) Commission Decision C(2018) 8132 [2018]

33 Grasso, Ratliff (2018)

34 Kim Talus (2011) 265-266

was a legislative dispute on unbundling during the course of legislation of the Third Energy Liberalization Package, whether these remedies are disproportionate or not. Unbundling through proportional divestment can be an appropriate measure to settle competition concerns.[35]

a) Czech Republic

The incumbent dominant firm on the market for generation and wholesale supply of electricity in the Czech Republic, prevented entry to the wholesale and generation markets[36] by pre-emptively reserving capacities it did not need. In 2013 the Commission accepted the commitment offered by CEZ to divest part of its generation assets (power plants) (800-1000MW) to a suitable purchaser (competitor).

b) Germany

In 2009 RWE[37], a dominant firm in the gas transmission market by virtue of its network in Germany undertook to divest its German gas transmission system business as a structural remedy[38]. Previously it had limited its competitors' access to its high-pressure pipelines by intentionally understating the capacity of its network, its tariffs for network access caused a margin squeeze, and it failed to implement an effective congestion management system. In reference to the margin squeeze, the Commission found that RWE may have prevented competitors from competing efficiently by setting its transmission tariffs at a high level and thus creating asymmetry.[39]

In the 2000s E.ON[40] abused its dominant position on the market for the demand of secondary balancing reserves when it withheld generation capacity from the German electricity wholesale market, thereby increasing prices and deterring investment in generation by third parties, furthermore, it purchased balancing energy from itself. In the course of the proceeding started for the above reasons, in 2008 E.ON undertook to divest one fifth of its generation capacity, and unbundle the entire high-voltage transmission system business from the distribution network controlled by the company.

d) Italy

35 Grasso, Ratliff (2018)
36 *CEZ, a.s.* (Case AT.39727) Commission Decision C(2013) 1997 [2013]
37 *RWE AG (RWE Gas Foreclosure)* (Case COMP/39402) Commission Decision 2009/C 133/08 [2009] OJ L 133/10
38 Grasso, Ratliff (2018)
39 Ibid
40 *E.ON AG (German Electricity Wholesale Market)* (Case COMP/39388) Commission Decision 2009/C 36/08 [2008] OJ L 36/8

In 2010, the Commission suspected that ENI abused of its dominant position. According to the Commission[41], ENI limited import capacities in the following ways: by holding capacity back unduly (capacity hoarding), when refusing to grant competitors access to capacity available on the transport network, limiting investment in its international transmission pipelines (strategic underinvestment) and so-called capacity degradation, which means that the firm may have delayed the distribution of new capacity[42]. In this latter case it granted access to its pipelines in a less attractive manner, for instance with limited availability. On the grounds of the abovementioned practices, the Commission found that ENI foreclosed competitors and thus restricted competition on the market. In 2010 ENI committed to divest its international gas transmission pipelines bringing gas from Russia and Northern Europe to a suitable buyer.

3.2. Capacity enhancement

The German firm E.ON tied a significant part of the transmission capacities available in the German gas market through long-term bookings, with the intent of foreclosing its competitors from access to its grid. As a result of the Commission's proceeding[43] however, in 2010 E.ON undertook to release a certain amount of long-term transport capacities (17.8 GWh/h) available in its network. In the second step, E.ON undertook to reduce, by October 2015, its overall share of long-term capacity bookings below a threshold to be specified and to remain below the threshold for a further 10 years from the date when it first reached it. However, in 2016 E.ON asked for the termination of its commitment because of the sale of its high-pressure pipelines. The Commission can review under Article 9 (2) of Regulation 1/2003 cases if there is a change in the facts compared to the ones on which the decision was based. The Commission authorised[44] the termination of the commitments in view of the change of market circumstances considering that the German gas markets had been opened to new participants, therefore, E.ON was released from the commitments almost 5 years before the original schedule.[45] In the practice of the Commission there was only one other decision[46] under Article 102 TFEU where the commitments were terminated

41 *ENI Spa* (Case COMP/39315) [2010]

42 Grasso, Ratliff (2018)

43 *E.ON SE/MOL* (Case COMP/39317) Commission Decision C(2005) 5593 [2016]

44 *E.ON SE/MOL* (Case COMP/39317) Commission Decision C(2005) 5593 [2016]; The summary of the Commission Decision was published in the Official Journal: *E.ON SE/MOL* (Case COMP/39317) Commission Decision C(2005) 5593 [2016] C 89/24

45 Scholz, U., Vohwinkel, T. 'The Application of EU Competition Law in the Energy Sector' (2017) Journal of European Competition Law & Practice, Volume 8, Issue 3 – Scholz, Vohwinkel, (2017)

46 Grasso, Ratliff (2018)

earlier than originally proposed, in the *Deutsche Bahn* case[47].

The leading French energy company foreclosed access to gas import capacities in France by strategic underinvestment in its LNG terminals and by the long-term reservation of its gas import capacity for its own purposes. Therefore, the Commission opened proceedings[48], and in 2009 GDF Suez committed itself to limit its reservations to less than 50% of the total French long-term entry capacity by 2014.

4. Elimination of long-term customer restrictions

The long-term downstream gas and electricity contracts can restrict customers in the selection of the supplier. In vertical relations under the Article 101 TFEU, exclusive contracts concluded by non-dominant undertakings no longer than 5 years are in the safe harbour in the EU competition law.[49] The same approach applied under the Article 102 TFEU[50] if the buying party is not an undertaking e.g. in the energy markets when the buyer is a final consumer of the energy.

In 2004 the Commission opened a formal investigation against Distrigaz, the Belgian dominant gas supplier under Article 102 TFEU. In the view of the Commission, long-term contracts limit the freedom of choice of consumers and thus the entry of other gas suppliers on the market due to the combination of two factors: the market share of the service provider (number of tied consumers) and the duration of the contracts.[51] In the case of Distrigaz, 35-45% of customers were tied for a period exceeding one year. In 2007 Distrigaz undertook[52] for industrial users, does not tie a substantial part of the market (equivalent to 30% of its sales) for more than one year ahead. Distrigas agreed to ensure that on average 70% of the gas that it has contracted to supply to customers covered by the commitments will return to the market every year.

The French incumbent operator on the supply of electricity market was investigated by the EU Commission in 2010 under Article 102 TFEU, because presumptively the EDF prevented competitors entering the market through volume, duration and exclusivity clauses stipulated in the contracts concluded with industrial customers.[53] In the accepted commitments, EDF committed on the one hand to limit the duration of

47 *E.ON SE/MOL* (Case COMP/39317) Commission Decision C(2005) 5593 [2016]

48 *GDF Suez SA* (Case COMP/39316) [2009]

49 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102, 1–7

50 see: Communication from the Commission 2009/C 45/02 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, 7–20. para 36.

51 *Distrigaz S.A., Distrigas N.V.* (Case COMP/37966) [2007]

52 Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/37966, [2007] OJ C 77/48, 48–49

53 *EDF S.A. (Long-term contracts France)* (Case COMP/39.386) [2010]

its contracts in a maximum term of 5 years and on the other hand to return minimum of 60% (on average 65%) of the electricity contracted to sell to industrial customers to the market each year.[54]

Gas Natural, a dominant company in the gas market, and Endesa, the market leader in the electricity in Spain entered into an agreement by which Endeasa covered all its gas requirements for electricity generation. At the same time, potential entrants lost an attractive client. The Commission initiated a proceeding[55] in 2000 and Gas Natural and Endesa undertook to reduce the gas volumes covered by the contract and the duration of the supply contract by one third. In spite of this reduction the duration still remained long, 12 years. It seems that the Commission acknowledged the pro-competitiveness of the agreement since it allowed Endesa to secure a stable and predictable price for gas supplies to power stations it intended to build.[56]

5. Conclusion

The EU competition law plays an important supporting role in the liberalization of European energy markets. The competition law regulated energy markets mainly manifested through the commitments decisions made by the EU Commission. Due to them the competition law developed the internal energy market by eliminating of destinations restriction and the limits of interconnector capacities. The competition law also promotes infrastructure-based competition through network divestitures and capacity releases, furthermore free customers from long-term contracts and make them available to competitors. The regulatory style application of competition law has proved to be an effective complement to European energy regulation. The market regulation through competition law has been used strategically by the Commission in energy market competition proceedings under Article 9 of Regulation 1/2003. The NCT continues and reinforces this competition law regulatory approach developed in the energy sector in the digital era.

54 Grasso, Ratliff (2018)

55 *Gas Natural, Endesa* **(**Case COMP/**37542) [2000]**

56 Jones, C. (ed.) 'EU Energy Law, Volume 2: EU Competition Law and Energy Markets', Claeys & Casteels Law Publishing (2016) 254

Kecskés, András[1] **– Halász, Vendel**[2]

The Most Important Changes in the European Regulation of IPO Prospectuses

1. The role of prospectus documents in IPO transactions

Initial public offering *(IPO)* refers to the process by which the shares of a company are publicly offered[3] for the first time[4]. This can happen by selling newly issued shares (*primary shares*) or by the public selling of the shares that have previously been privately offered (*secondary shares*). In Hungary, a public offering is a sale offer of securities aimed at investors not specified previously, which includes sufficient information on the conditions of the offer and on the securities in order to facilitate the decision-making of potential investors.[5] Because this is the first time that the company's shares are offered publicly to the community of investors, those who intend to purchase/subscribe to those shares cannot be made aware of the capital market performance of those shares; there is no stock market presence and therefore no data. To ensure investor confidence, comprehensive information is needed on the investment opportunity and the company. This is why prospectus documentation is important during an initial public offering. In the course of an initial public offering, the prospectus is the primary informational and marketing document for investors. In fact, the issuer tells the story of the company (and that of the security) in this document.[6] It contains all the information that might be necessary for potential

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3 See GRIFFITH, Sean J.: *Spinning and Underpricing – A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, Brooklyn Law Review Vol. 69. Issue 2. (2004) p. 585

4 See UTSET, Manuel A.: *Producing Information: Initial Public Offerings, Production Costs, and the Producing Lawyer,* Oregon Law Review Vol. 74. Issue 1. (1995) p. 280; GRIFFITH, Sean J.: Spinning and Underpricing – A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings, Brooklyn Law Review (2004/2) p. 585.; KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC – LexisNexis, Budapest-Wien, 2013.) p. 25.

5 See DR. TOMORI, Erika: *Értékpapírjog és a tőkepiac szabályozása* (Közép-európai Brókerképző Alapítvány, Budapest, 2008) p. 168; Article 5 paragraph (1) point 94. of Act CXX of 2001 on capital markets

6 See GEDDES, Ross: *IPOs and Equity Offerings* (Butterworth-Heinemann 2008) 95

investors to make a decision regarding the investment.[7] During its preparation, it also has to be taken into consideration that the prospectus must comply with the rules of the stock exchange where the securities are to be listed. For issuing shares on foreign markets, it is advisable to prepare the prospectus in the language used in the international financial sector.[8]

In principle, each state, securities commission and stock exchange has its own regulation concerning the content of the prospectus. At the same time, each has similar characteristics. In 1998 the *International Organization of Securities Commissions (IOSCO)* released its own international disclosure standards *(International Disclosure Standards)* in order to promote cross-border offerings. The standards are intended to guarantee the comparability of information and high levels of investor protection. As for the content requirements of the prospectus, ten different categories are indicated. The order and organisation of information can be changed, but each item must be incorporated. This is important, because the effective European Union regulation on prospectuses is also founded on the above standards with regard to the content requirements.[9] The prospectus is indispensable during the IPO transaction for three reasons. First, it is a statutory obligation to prepare one; second, it is an essential marketing tool; and third, an accurate prospectus reduces possible liability arising from misleading investors. As such, it has to fulfil several functions. As it reduces the liability of the company's management, it should be sufficiently long, yet to-the-point.[10] Nevertheless, its marketing function should not be neglected during its preparation, either.[11]

The disclosure of the prospectus provides potential investors with the necessary data in order to evaluate the securities.[12] It gives an accurate picture of the shares

7 See GEDDES, Ross: *IPOs and Equity Offerings* (Butterworth-Heinemann 2008) 54; KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC – LexisNexis, Budapest-Wien, 2013.) pp. 25-27., 69-71.

8 See KECSKÉS, András: *The European Regulation on Drafting Prospectuses in Initial Public Offering Transactions*, JURA 21: 1 pp. 56-66., 11 p. (2016)

9 See GEDDES, Ross: *IPOs and Equity Offerings* (Butterworth-Heinemann 2008) 95–97

10 See SZUCHY, Róbert: *A gazdasági társaságok társadalmi felelősségvállalása* In: Szalma, József (szerk.) A Magyar Tudomány Napja a Délvidéken, 2013 Újvidék, Szerbia: Vajdasági Magyar Tudományos Társaság, (2014) 287-307 old.

11 See GEDDES, Ross: *IPOs and Equity Offerings* (Butterworth-Heinemann 2008) 95–97; KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC-LexisNexis, Budapest-Wien, 2013) 69-71.; KECSKÉS, András: *The European Regulation on Drafting Prospectuses in Initial Public Offering Transactions*, JURA 21 : 1 pp. 56-66., 11 p. (2016)

12 See SPINDLER, James C: *'IPO Liability and Entrepreneurial Response'* (2007) U Pa L Rev Vol 155 1187, 1195–1201

offered for purchase, the financial situation of the company and its capital structure. It contains the description of the company's business activity and the presentation of the business results from the last period.[13] The compilation of these data is primarily the task of the issuer and the investment service provider acting as lead bank. The basis of the prospectus is the information reviewed and compiled in the course of the *due diligence* investigation. The consultants of investment service providers participating in the transaction also review and complete the prospectus[14], and auditors check all of its statements of financial relevance, and confirm their accuracy (this is known as a *comfort letter*). The legal advisor assists in the preparation of the document and identifies and addresses potential liability issues.[15]

The legal advisor also reports on whether the prospectus can be regarded as complete, and whether the data included in it are accurate.

On the other hand, the prospectus has a significant marketing role as well. It is advisable that it makes a favourable impact and promotes purchase intentions. It therefore contains the strategy of the company and its investment activity; it also indicates the position of the company within the industry. Preparing the prospectus is an important and time-consuming element of the IPO process. The full length of a prospectus might even be 300–400 pages. Accordingly, one must devote sufficient time to its preparation in the timetable of the transaction. This might last for one or two months depending on the company and the amount of data to be processed. As was pointed out previously, the issuer, his legal advisor, the auditors and investment service providers also take part in preparing the prospectus. Conflicts of interest may arise between issuer and the underwriter during an IPO, which is why Nasdaq requires an independent investment bank to be used as an advisor.[16] The drafting of a prospectus document requires considerable experience in order to find the delicate balance between the different functions. On one hand, it has to meet legal requirements and the regulations connected to listing; on the other hand, it has to function as an effective marketing tool as well.[17]

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13 See GEDDES, Ross: *IPOs and Equity Offerings* (Butterworth-Heinemann 2008) 95

14 See COKE, Michael: *'Success in the Form of an IPO: A Brief Case Study of A123 Systems, Inc.'* (2009) Nanotech L & Bus Vol 6 513, 519

15 See KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC-LexisNexis, Budapest-Wien, 2013) 69-71.

16 See BUJTÁR, Zsolt: *Eladó az egész világ? Avagy - ETF-k szabályozási kérdései* JURA 2016, 22. évf: 1. szám 171-181. old.

17 See KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC-LexisNexis, Budapest-Wien, 2013) 69-71.; KECSKÉS, András: *The European Regulation on Drafting Prospectuses in Initial Public Offering Transactions*, JURA 21 : 1 pp. 56-66., 11 p. (2016)

2. The development of rules on prospectuses in the European Union

The success of an offer of securities, and thus of the capital-raising process, is usually dependent on the existence of a market on which the securities in question can subsequently be traded and which will provide liquidity for the securities. There must also be an efficient price-formation process, such where any capital gains can be effectively realised. And in particular, admissions to trading rules are a key element in the capital-raising process as they provide issuers with a means of signalling their credibility to investors.[18] The Admission Directive[19] of 1979 imposed detailed, harmonised admission requirements in respect of the admission of securities to an official listing on stock exchanges operating within the EU Member States.[20] This directive was the first to impose mandatory disclosure requirements on issuers accessing the capital markets. The main purpose of its adoption was to harmonise the conditions applicable to admission to official listing on stock exchanges operating within the Member States. Its regulation also addressed the ongoing disclosure obligations of officially listed issuers.[21]

The so-called Listing Particulars Directive[22] was adopted in 1980; it linked harmonisation to the integration of European securities markets, and its aim was also to remove the regulatory obstacles of varying disclosure requirements faced by issuers in raising finance. In 1989, the Public Offers Directive[23] in turn introduced a code of disclosure covering issues of securities to the public.[24]

Mutual recognition was initially addressed for listing particulars in 1987, and then for public-offer prospectuses in 1990.[25] These early directives, did not however favour the system of mutual recognition of disclosure documents between Member States, and therefore they could not properly foster capital increases on a pan-European basis.

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18 See MOLONEY, Niamh: *EC Securities Regulation* (Oxford University Press, Oxford, 2008) p. 67.

19 Directive 79/279/EEC (coordinating the conditions for the admission of securities to official stock exchange listing)

20 See MOLONEY, Niamh: *EC Securities Regulation* (Oxford University Press, Oxford, 2008) p 68.

21 See MOLONEY, Niamh: *EC Securities Regulation* (Oxford University Press, Oxford, 2008) p 103; KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC – LexisNexis, Budapest-Wien, 2013.) 72.

22 Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing

23 Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public

24 See MOLONEY, Niamh: *EC Securities Regulation* (Oxford University Press, Oxford, 2008) p.104

25 See MOLONEY, Niamh: *EC Securities Regulation* (Oxford University Press, Oxford, 2008) p.104

Hardly two or three issuers per year chose the complex regime available.[26]

In 1999, the Financial Services Action Plan was adopted by the European Commission. This ambitious programme had four key strategic objectives: developing a single European market in wholesale financial services; creating open and secure retail markets; ensuring financial stability through establishing state-of-the-art prudential rules and supervision; and setting wider conditions for an optimal single financial market.[27] The Action Plan – to encourage raising capital on an EU-wide basis – proposed (as a priority 1 action) the upgrade of the Directives on Prospectuses through a possible legislative amendment. The objective was to overcome obstacles to the effective mutual recognition of prospectuses, so that a prospectus or offer document approved in one Member State would be accepted in all. In addition, incorporating "shelf registration" would provide for easier access to capital markets on the basis of streamlined prospectuses, derived from annual accounts.[28]

At its Lisbon session held in 2000, the European Council treated the reform of disclosure obligations connected to the trade of securities as a priority, and it tried to open up the widest possible access to investment capital on an EU-wide basis. In this way, the creation of a single European passport for the issuers, which was deemed to be of fundamental importance for the completion of the internal market in financial services, came into focus.[29] This political intention also materialised in the Second Progress Report relating to the implementation of the Financial Services Action Plan[30], in which the reform of

26 See MOLONEY, Niamh: *EC Securities Regulation* (Oxford University Press, Oxford, 2008) p.107; KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC – LexisNexis, Budapest-Wien, 2013.) 72-73.

27 See MALCOLM, Kyla, TILDEN, Mark, WILSDON, Tim, *Evaluation of the Economic Impacts of the Financial Services Action Plan* (March 2009) p. 3. Available at http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_economic_impact_en.pdf

28 See Financial Services: Implementing the Framework for Financial Markets: Action Plan, Communication of the Commission, COM (1999) 232, 11.05.99. p. 22. Available at: http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf; KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC – LexisNexis, Budapest-Wien, 2013.) 72-73.

29 See SZUCHY, Róbert: *Az Európai Unió összefonódás-ellenőrzési rendszere a jogbiztonság tükrében* 2010 Gazdaság és Jog 18. évf. 7-8 32-40. old. and SZUCHY, Róbert: *Verseny, szabályozás és a hatékonyság – A hatékonyság szerepe az Európai Uniós összefonódás-ellenőrzési rendszere tükrében.* 2010 Ünnepi tanulmányok Sárközy Tamás 70. születésnapjára pp. 425-449. old.

30 The *Financial Services Action Plan [(FSAP), Financial Services – Implementing the Framework for Financial Markets: Action Plan. Commission Communication of 11.05.1999* COM (1999)232] was adopted by the main decision-making bodies of the European Union in 1999. The necessary legislation procedures were concentrated on three areas in order to ensure the competitiveness of European capital markets: single EU market for institutional investors, public and safe market for private investors, modernised rules to ensure fair commercial

the regime of mutual recognition received significant attention.[31] The *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* (Lámfalussy Report)[32] also strongly advocated the model of market financing, and urged quick measures for the completion of the internal capital and securities market. It pointed out that, in the European Union, the single passport ensured for issuing securities was still not a reality. The then-prevailing system discouraged companies from raising capital on a European level, and thus accessing a really large, liquid and integrated financial market.[33]

Based on the above reasons, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Prospectus Directive) was adopted. The purpose of this Directive was to harmonise requirements for drawing up, approving and distributing the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.[34] The aim of the Directive (and its implementing measures) was also to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora.[35] The Directive has been amended several times, and its regulatory framework was completed by implementation regulations. It is therefore important to mention Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses, as well as the format, incorporation by reference and disclosure of such prospectuses and dissemination of advertisements. Since it was adopted, this source of law has been amended several times.[36] This regulation was directly effective and applicable in Hungary as well.[37]

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conduct and modern supervision of markets.

31 Commission of the European Communities: REPORT FROM THE COMMISSION Progress on Financial Services SECOND REPORT Brussels, 30.05.2000 COM (2000) 336 final Accessible at (16.06.2020.): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0336:FIN:EN:PDF

32 See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (Lamfalussy Report) (Brussels, 15 February 2001) Accessible at (19.06.2020.): https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf

33 See MOLONEY, Niamh: *EC Securities Regulation* (Oxford University Press, Oxford, 2008) p. 110; KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offerings, Corporate Governance, and Hostile Takeovers* (Translated by Anna Tolnai and the Authors) (HVG-ORAC – LexisNexis, Budapest-Wien, 2013.) 73.

34 See Directive 2003/71/EC Article 1 (1)

35 See Directive 2003/71/EC Preamble 10.

36 It is also important to mention Commission Regulation (EC) No 1569/2007 of 21 December 2007, which regulates the establishment of a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council. This regulation is still in force.

37 See KECSKÉS, András, HALÁSZ, Vendel: *Stock Corporations – A Guide to Initial Public Offer-*

3. The new Prospectus Regulation and related Commission Delegated Regulation

Since July 21, 2019[38] a new regulation is applicable to initial public offering prospectuses[39] in the European Union, Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (Prospectus Regulation). This new Prospectus Regulation was amended once by Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets. Based on Article 44 of the Prospectus Regulation, the European Commission adopted a delegated act to supplement the regulatory framework of the Prospectus Regulation. This became Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004.

The background of the adoption of this new regulatory framework was analysed by the Commission Staff Working Document – Impact assessment – Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading (Impact assessment).[40]

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ings, Corporate Governance, and Hostile Takeovers (Translated by Anna Tolnai and the Authors) (HVG-ORAC – LexisNexis, Budapest-Wien, 2013.) pp. 73-74.

38 According to Article 49 of the Prospectus Regulation, as a main rule, it shall apply from 21 July 2019. However, certain exceptions (regarding certain Articles of the Prospectus Regulation) are listed in Article 49 paragraph 2 of the Prospectus Regulation.

39 According to Article 1 paragraph 1 of the Prospectus Regulation, the Prospectus Regulation lays down requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State. So the Prospectus Regulation is not only applicable just to IPO prospectuses. However, this Article focuses mainly on its effects regarding IPO transactions.

40 EUROPEAN COMMISSION: COMMISSION STAFF WORKING DOCUMENT - IMPACT ASSESSMENT Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading {COM(2015) 583 final} {SWD(2015) 256 final} Brussels, 30.11.2015 SWD(2015) 255 final (cited as European Commission: Impact Assessment) Accessible at (2020.06.15.): http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015SC0255&from=EN

4. The IPO-related reasons for adopting the new Prospectus Regulation

According to the Impact Assessment, the previous Prospectus Directive (2003/71/EC) had some deficiencies.

The Prospectus Directive resulted in insufficient harmonisation. It left Member States with considerable discretion in its implementation and application. According to the Impact Assessment, the resulting differences hindered the emergence of a truly integrated EU capital market. As an example, it can be mentioned that Member States have applied differently the flexibility in the Prospectus Directive to exempt offers of securities with a total value below EUR 5 000 000. The result was that the requirement to produce a prospectus arose at different levels across the EU. The European Securities and Markets Authority (ESMA) also found indications that, in practice, prospectus approval procedures were handled differently between Member States.[41] To solve these problems, it was fundamental to achieve more convergence in the disclosure regimes for capital markets across Member States and also to achieve more convergence in the application of rules relating to the preparation and publication of prospectuses.[42]

It was also an important problem that the compliance costs related to the Prospectus Directive were considerably high. The Impact Assessment estimated that the costs for an equity prospectus were EUR 1 million on average, which is a significant cost in connection with an IPO transaction. Legal fees were considered as the most significant part of the costs associated with prospectus documentation; these accounted for 40% or more of the costs. What probably stands in the background of the high legal costs is that IPO prospectuses and their summaries are long documents, which were often drafted with a focus on avoiding liability risks and that required substantial legal support.[43] Internal costs (about 23%) are the second most important cost factor. Third, we should mention audit costs and fees charged by the competent authorities, which represent together about a quarter of the costs. An important aspect of the costs associated with drafting prospectus documents is that some of these costs are fixed, so they do not vary perfectly in proportion to the sums raised. This is especially problematic and demanding for smaller issuers, such as SMEs.[44] Consequently, the Impact Assessment concluded that the costs of a new prospectus have a proportionally bigger impact on smaller issuances (and probably so on smaller issuers).[45] Based on the above, the compliance costs and disclosure requirements related to an IPO are particularly high for smaller firms. For example, in 2013 a study[46] provided an estimation

41 See European Commission: Impact Assessment p. 10.
42 See European Commission: Impact Assessment pp. 15-16.
43 See European Commission: Impact Assessment p. 8.
44 See European Commission: Impact Assessment pp. 8-9.
45 See European Commission: Impact Assessment p. 8.
46 See FESE, Guide to Going Public in Europe, 2013. Annex 7 provides additional data on European IPOs by value and volume. European Commission: Impact Assessment p. 11.

that listing costs can account for 10 to 15% of proceeds for IPOs of less than EUR 6 million and only 5 to 8% for IPOs above EUR 50 million.[47] This particularly shows that, for numerous firms (most notably for SMEs), these costs represent a significant burden, which may deter them from a potential IPO transaction. With regard to these firms, the listing costs may outweigh the benefits of a listing.[48] The IOSCO also recognised that the 'costs and fulfilment of regulatory requirements' (i.e. the financial and bureaucratic burden) are one of the two most important factors that may hinder the access of SMEs to capital markets. [49]

Furthermore, the regulatory framework of the Prospectus Directive not proved to be flexible enough and so it was inappropriate for SMEs (and also for some type of securities). The reason for this was that the Prospectus Directive applied insufficient differentiation and proportionality to the requirements between specific situations and issuers. This resulted, in some cases, in an inappropriate administrative burden and one that might even have deterred companies from accessing capital markets.[50] It was important to address this problem because bank financing is usually predominant among European companies, and in particular SMEs.[51] According to the European Commission, the vast majority of SME financing was provided by banks and only 20 per cent or less of the capital was obtained from capital markets. Also, there were (and probably are) considerable differences between Member States regarding the means of financing used by SMEs. For example, in Slovakia, Denmark and Sweden, equity financing was used by 9 to 32% of SMEs as a source of funding. On the other hand, in Hungary, Portugal and the Czech Republic, almost no equity funding was used. Also, the overall average percentage of SMEs that used equity financing in the EU was only 3%.[52] The banking and financial crisis[53] that started in 2007-2008 showed that such strong reliance on bank financing may have significant drawbacks.[54] For example, with regard to such crises, the availability of bank financing significantly decreases, as liquidity drains from the banking system. It is also important to mention that (although most SMEs and companies in general have well-established relationships with their banks) such (almost) exclusive reliance on one financing option (i.e. bank financing) limits the

47 See European Commission: Impact Assessment pp. 10-11.

48 See European Commission: Impact Assessment pp. 10-11.

49 See European Commission: Impact Assessment pp. 10-11.

50 See European Commission: Impact Assessment p. 9.

51 See LENTNER Csaba-ZÉMAN, Zoltán: *A pénzügyi válság bankszabályozási controll elveinek meghatározóbb történeti elvei* Európai Jog 17. évf. 1. szám 2017. január 8-13. old

52 See European Commission: Impact Assessment p. 12.

53 See BUJTÁR, Zsolt: *Az eszközalapú kereskedelmi kötvény Egyesült Államokbeli tündöklésének és bukásának okai* Jura 2016 22. évf. 2.szám 214-224. old.

54 See LENTNER, Csaba: *A pénzügyi válságkezelés lehetséges alternatívái Magyarországon és az Európai Unióban* 2009 Gazdaság és Jog 17. évf. 12. szám 15-21. old. and LENTNER, Csaba – ZÉMAN, Zoltán: *Handling Crisis – Role in the Economy*, Moderni Veda 2016, 2016. év 3. szám, 45-58. old.

company's bargaining position. Equity financing and so capital markets should be used at least as a viable alternative (and so as a potential competitor) to bank financing.[55]

In the European Union as a result of such problems, capital markets remained unattractive for many companies, in particular SMEs, as an alternative source of funding. However, if companies have problems with raising capital effectively, that may result in less investment and so fewer jobs and less growth in the European Union.[56] Consequently, regarding this problem, it became an important objective to reduce the administrative burden of compliance with the EU rules on prospectuses, and to make the regulatory framework of prospectuses more flexible and appropriate for the various types of securities and issuers covered, in particular SMEs. New regulations therefore had to improve access to capital markets for SMEs and companies with reduced market capitalisation.[57]

The regulatory framework of the Prospectus Directive was also criticised on the ground that it was not effective enough at protecting investors. As mentioned above, prospectus documents were usually drafted in order to mitigate potential legal liability risks, and that led to overly lengthy and complicated prospectus documents. However, such an approach is not entirely suitable for informing potential investors properly and providing them with suitable and appropriate information to avoid bad decisions.[58] Among the rules on drafting prospectuses. the Achilles-heel of investor protection was particularly the way that prospectus summaries were regulated and prepared. The role of the prospectus summary is basically to provide potential investors with concise and easy to understand information about the investment opportunity and the (equity) security subject to the transaction. Although these documents should be very easy to read and to the point, they were blamed – as they were prepared under the Prospectus Directive – for being too long, unwieldy and too comprehensive.[59] Consequently, an important objective was to reform the requirements regarding the prospectus summary (and, hence, investor protection). To achieve this goal, making disclosures to investors under the prospectus regime more effective was a key element.[60]

5. The most important IPO-related changes in the Prospectus Regulation

With the adoption of the Prospectus Regulation, the regulation and harmonisation of rules on preparing and publishing prospectuses in the European Union is achieved in the legislative form of a „regulation". The proposal of the Prospectus Regulation[61] also

55 See European Commission: Impact Assessment p. 12.
56 See European Commission: Impact Assessment p. 13.
57 See European Commission: Impact Assessment pp. 15-16.
58 See European Commission: Impact Assessment p. 9.
59 See European Commission: Impact Assessment p. 9.
60 See European Commission: Impact Assessment pp. 15-16.
61 See European Commission: Proposal for a Regulation of the European Parliament and of

emphasised that applying this legislative form "would address such problems which typically arise in the transposition of a directive and would enhance coherence and integration throughout the internal market".[62] The Preamble of the Prospectus Regulation also emphasises the necessity to adopt a regulation in this field and provides a detailed analysis regarding the background to choosing this legislative form. According to the Preamble, "*it is appropriate and necessary for the rules on disclosure when securities are offered to the public or admitted to trading on a regulated market to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on persons involved in such offers are applied in a uniform manner throughout the Union. Since a legal framework for the provisions on prospectuses necessarily involves measures specifying precise requirements for all different aspects inherent to prospectuses, even small divergences on the approach taken regarding one of those aspects could result in significant impediments to cross-border offers of securities, to multiple listings on regulated markets and to Union consumer protection rules. Therefore, the use of a regulation, which is directly applicable without requiring national law, should reduce the possibility of divergent measures being taken at national level(…).*"[63] As the preparation and publishing of prospectuses is regulated by means of a Regulation, those rules (as emphasised above) are directly effective and directly applicable in all Member States of the European Union[64] without any specific transposition to national law.

The Prospectus Regulation recognised that, for offers of securities to the public with a total consideration in the Union of less than EUR 1 000 000, the cost of producing a prospectus is likely to be disproportionate to the envisaged proceeds of the offer. For this reason, the Prospectus Regulation considered it appropriate that the obligation to draw up such a prospectus should not apply to offers of such a small scale.[65] Based on the above, Article 1 paragraph 3 of the Prospectus Regulation stipulates that its rules "shall not apply to an offer of securities to the public with a total consideration

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the Council on the prospectus to be published when securities are offered to the public or admitted to trading, Brussels, 30.11.2015 COM (2015) 583 final 2015/0268 (COD) {SWD (2015) 255 final} {SWD (2015) 256 final} Accessible at (14.06.2020): https://eur-lex.europa.eu/resource.html?uri=cellar:036c16c7-9763-11e5-983e 01aa75ed71a1.0006.02/DOC_1&format=PDF

62 See European Commission: Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, Brussels, 30.11.2015 COM (2015) 583 final 2015/0268 (COD) {SWD (2015) 255 final} {SWD (2015) 256 final} pp. 7-8. Accessible at (14.06.2020): https://eur-lex.europa.eu/resource.html?uri=cellar:036c16c7-9763-11e5-983e 01aa75ed71a1.0006.02/DOC_1&format=PDF

63 See Regulation (EU) 2017/1129 Preamble 5.

64 According to Article 288 of the Treaty on the Functioning of the European Union, a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

65 See Regulation (EU) 2017/1129 Preamble 12.

in the Union of less than EUR 1 000 000, which shall be calculated over a period of 12 months".

The Prospectus Regulation also considered the varying sizes of financial markets across the Union. Based on that, it provided the option for Member States to exempt offers of securities to the public not exceeding EUR 8 000 000 from the obligation to publish a prospectus. According to Preamble 13 of the Prospectus Regulation, Member States should be free to set out in their national law a threshold between EUR 1 000 000 and EUR 8 000 000, expressed as the total consideration of the offer in the Union over a period of 12 months, below which the exemption should apply, taking into account the level of domestic investor protection they deem to be appropriate. According to Article 3 of the Prospectus Regulation (*Obligation to publish a prospectus and exemption*), securities shall only be offered to the public in the Union after prior publication of a prospectus in accordance with the Prospectus Regulation. However, based on the second paragraph of this Article, a Member State may decide to exempt offers of securities to the public from the obligation to publish a prospectus provided that the total consideration of each such offer in the Union is less than a monetary amount calculated over a period of 12 months that shall not exceed EUR 8 000 000.

Article 1 paragraph 3 thus exempts small-scale offerings from the scope of the whole Prospectus Regulation, and Article 3 paragraph 2 also provides an opportunity for Member States to exempt some small-scale offerings (under EUR 8 000 000) from the obligation to publish a prospectus. These rules of the Prospectus Regulation provide significant flexibility for issuers when planning smaller equity offerings.

The regulatory system of the Prospectus Regulation reformed the rules on the summary of the prospectus to enhance the protection of retail investors. On the one hand, that resulted in a detailed description of the content of the summary in Article 7 of the Prospectus Regulation. On the other hand, the Prospectus Regulation intends to establish requirements that enhance the usefulness of the summary and ensure that it is easy to understand. This is why the Preamble of the Prospectus Regulation stipulates that the summary of the prospectus should be short, simple and easy for investors to understand.[66] Moreover, the Prospectus Regulation found it appropriate to limit the length of the summary. According to Article 7 paragraph 3 of the Prospectus Regulation, the summary shall be presented and laid out in a way that is easy to read, using characters of readable size; furthermore, it shall be written in a language and a style that make it easy to understand the information, in particular, in a language that is clear, non-technical, concise and comprehensible for investors. The summary shall be drawn up as a short document written in a concise manner and of a maximum length of seven sides of A4-sized paper when printed. The summary shall be made up of the following four sections: an introduction, containing warnings; key information on the issuer; key information on the securities; key information on the offer of securities to the public and/or the admission to trading on a regulated market. The summary is one key component of the

66 See Regulation (EU) 2017/1129 Preamble 30.

prospectus document. The other two main components of the prospectus document are the registration document and the securities note (when the prospectus consists of separate documents). However (as previously according to the Prospectus Directive), it is possible to prepare the prospectus as a single document.[67] The main parts of prospectus documents therefore remained the same as those in the former Prospectus Directive.

The Prospectus Regulation also represents a new approach regarding how the risk factors should be presented in (IPO) prospectuses. It provides detailed instructions on how to incorporate the risk factors into the prospectus documents. The primary purpose of including risk factors in a prospectus is to ensure that investors make an informed assessment of such risks. This provides them with the opportunity to take investment decisions in full knowledge of the facts.[68] According to Article 16 of the Prospectus Regulation, "the risk factors featured in a prospectus shall be limited to risks which are specific to the issuer and/or to the securities and which are material for taking an informed investment decision, as corroborated by the content of the registration document and the securities note. The Preamble of the Prospectus Regulation more specifically clarifies that a prospectus should not contain risk factors which are generic and only serve as disclaimers, as those could obscure more specific risk factors that investors should be aware of, thereby preventing the prospectus from presenting information in an easily analysable, concise and comprehensible form.[69] When drawing up the prospectus, the issuer, the offeror or the person asking for admission to trading on a regulated market shall assess the materiality of the risk factors based on the probability of their occurrence and the expected magnitude of their negative impact."[70] The Prospectus Regulation requires that each risk factor shall be adequately described. It should be explained also how the risk factor affects the issuer or the securities being offered or to be admitted to trading. The assessment of the materiality of the risk factors may also be disclosed by using a qualitative scale of low, medium or high.[71] The risk factors shall be presented in a limited number of categories depending on their nature. In each category, the most material risk factors shall be mentioned first according to the assessment described above.[72] The rules of the Prospectus Regulation regarding the presentation of risk factors in prospectus documents are complemented with further rules. For example, according to Article 16 paragraph 4 of the Prospectus Regulation, the ESMA shall develop guidelines to assist competent authorities in their review of the specificity and materiality of risk factors. The European Commission is also empowered to adopt delegated acts to provide further specific rules regarding risk factors.[73]

67 See Regulation (EU) 2017/1129 Article 6(3) and Articles 10 and 12.
68 See Regulation (EU) 2017/1129 Preamble (54)
69 See Regulation (EU) 2017/1129 Preamble (54)
70 See Regulation (EU) 2017/1129 Article 16 (1)
71 See Regulation (EU) 2017/1129 Article 16 (1)
72 See Regulation (EU) 2017/1129 Article 16 (2)
73 See Regulation (EU) 2017/1129 Article 16 (5)

One of the most important innovations of the Prospectus Regulation was that it established the possibility for smaller issuers to apply so-called EU Growth prospectuses. These are capable of facilitating IPO transactions among smaller issuers (for example small and medium-sized enterprises) and it significantly reduces the associated bureaucratic burden. As the Preamble of the Prospectus Regulation states, a proper balance should be struck between cost-efficient access to financial markets and investor protection when calibrating the content of an EU Growth prospectus.[74] According to Article 15 of the Prospectus Regulation, the following persons may choose to draw up an EU Growth prospectus under the proportionate disclosure regime. First of all (and most importantly), it is possible for small and medium-sized enterprises (SME) to choose it. According to the Prospectus Regulation, SMEs are companies, that, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000. The Prospectus Regulation also regards those companies that are defined in point (13) of Article 4(1) of Directive 2014/65/EU[7576] (for example issuers, other than SMEs, whose securities are traded or are to be traded on an SME growth market) as SMEs, provided that those issuers had an average market capitalisation of less than EUR 500 000 000 on the basis of end-year quotes for the previous three calendar years.[77] Article 15 paragraph 1 point (c) and (d) describes further issuers who are allowed to choose the EU Growth prospectus. The Preamble of the Prospectus Regulation emphasises that the reduced information required to be disclosed in EU Growth prospectuses should be calibrated in a way that focuses on information that is material and relevant when investing in the securities offered. It is also important to ensure proportionality between the size of the company and its fundraising needs, on the one hand, and the cost of producing a prospectus, on the other hand.[78] Article 15 of the Prospectus Regulation requires that an EU Growth prospectus under the proportionate disclosure regime shall be a document of a standardised format, written in a simple language and which is easy for issuers to complete. It shall consist of a specific summary, a specific registration document and a specific securities note. The information in the EU Growth prospectus shall be presented in a standardised sequence in accordance with the delegated act adopted by the European Commission, namely Commission Delegated Regulation (EU) 2019/980. According to its Article 28, the EU Growth registration document for equity

74 See Regulation (EU) 2017/1129 Preamble 51.

75 'Small and medium-sized enterprises' for the purposes of Directive 2014/65/EU, means companies that had an average market capitalisation of less than EUR 200 000 000 on the basis of end-year quotes for the previous three calendar years.

76 See Regulation (EU) 2017/1129 Article 2 (f)

77 See Regulation (EU) 2017/1129 Article 15 (1) b)

78 See Regulation (EU) 2017/1129 Preamble 52.

securities is a specific registration document for equity securities that shall contain the information referred to in Annex 24 of the Commission Delegated Regulation. Such information comprises the persons responsible, third party information, experts' reports and competent authority approval; strategy, performance and business environment; risk factors; corporate governance; financial information and key performance indicators (KPIs); shareholder and security holder information; and documents available.[79] According to Article 30 of the Commission Delegated Regulation (EU) 2019/980, the EU Growth securities note for equity securities is a specific securities note for equity securities that shall contain the information referred to in Annex 26 of the Regulation. Such information is the purpose, persons responsible, third party information, experts' reports and competent authority approval; working capital statement and statement of capitalisation and indebtedness; risk factors; terms and conditions of the securities; details of the offer/admission to trading.[80] Article 33 contains detailed rules regarding the specific summary for the EU Growth prospectus. It requires that the specific summary for the EU Growth prospectus shall provide the key information that investors need to understand regarding the nature and the risks of the issuer, of the guarantor and of the securities that are being offered. The content of the specific summary shall be accurate, fair, clear and not misleading. It is also stipulated that the specific summary shall be consistent with the other parts of the EU Growth prospectus,[81] the main parts of the specific summary for the EU Growth prospectus are the following: introduction; key information on the issuer; key information on the securities; key information on the offer of securities to the public.[82] The above-listed requirements of Commission Delegated Regulation (EU) 2019/980 on the specific summary, registration document and securities note for EU Growth securities are less complicated and particularised as with regard to "ordinary" equity securities summary, registration document and securities note.[83]

6. Conclusion

Regulation (EU) 2017/1129 (Prospectus Regulation) can be considered as an important step forward in strengthening the European capital market. By choosing the legislative form of a Regulation, it can enhance coherence and integration throughout the internal

79 See Commission Delegated Regulation (EU) 2019/980 Annex 24 Section 1 – Section 7.

80 See Commission Delegated Regulation (EU) 2019/980 Annex 26 Section 1 – Section 5.

81 See Commission Delegated Regulation (EU) 2019/980 Article 33 (1) – (3)

82 See Commission Delegated Regulation (EU) 2019/980 Annex 23 Section 1 – Section 4.

83 Compare in this regard Commission Delegated Regulation (EU) 2019/980 Annex 24 and 26 (which regulates the specific registration document and securities note for EU Growth securities) with Annex 1 and Annex 11 (which regulate the registration document and securities note of "ordinary" equity securities). Annex 24 has 7 sections, while Annex 1 has 21 sections. Annex 26 has 5 sections, while Annex 11 has 10 sections.

market. It provides significant legal certainty for investors and also for issuers that they face the same rules regarding the preparation and publication of prospectuses in all EU Member States, thanks to the Prospectus Regulation.

Prospectus Regulation also significantly improves investor protection. For example, the new rules on the prospectus summary enhance the usefulness of this important part of the documentation. As the summary is the only part of the prospectus that is usually read by the majority of potential investors, the new requirements can significantly contribute to informed investment decisions. In addition, the new approach regarding how the risk factors should be presented in an IPO prospectuses significantly improves their ability to assess risks. These new rules significantly contribute to the protection of retail investors.

Furthermore, it can be considered an important contribution of the Prospectus Regulation to capital market development and IPO activity that it introduces the so-called EU Growth prospectuses for smaller issuers. This new possibility for smaller issuers (most importantly SMEs) takes into consideration the size of the company and its fundraising needs when it establishes the requirements regarding the content and complexity of the prospectus. As such, EU Growth prospectuses intend to ensure that the costs associated with the preparation of prospectuses do not deter smaller issuers from accessing capital markets (and so from carrying out successful IPO transactions). At the same time, they also ensure appropriate investor protection, as they focus on information that is material and relevant.

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The Undertaking as an Alternative to Secondary Insolvency Proceeding in Romania and in Hungary – A comparative analysis

Introduction

The differences between Member States with regard to substantive and procedural rules a common source of difficulties in cross-border dimension. The same is true for insolvency proceedings.

Among others, Regulation 2015/848 of the European Parliament and the Council on insolvency proceedings (hereinafter: EIR-R) provides some new legal instruments to limit the possibility of secondary insolvency proceedings. Undertaking (Art. 36.) is one of the new features, and was not known before in Continental legal systems.

We consider that the application of an undertaking in different insolvency regimes also causes some difficulties. To demonstrate this assumption, we will compare the Romanian and the Hungarian legislation in this field and show the differences and similarities.

1. Undertakings: the new legal tool

The context is as follows: the main proceeding was opened in one Member State and the debtor has an establishment in another Member State, where secondary proceeding could be opened. The practitioner of the main insolvency proceeding wants to avoid the opening of the secondary proceeding, because he wants to dispose of the assets that are situated in this country.[4] For this reason, the insolvency practitioner gives a unilateral undertaking – a promise – to those local creditors who are entitled to file for the opening of secondary proceeding. In this undertaking he promises that, when distributing those assets or the proceeds received as a result of their disposal, he will comply with the distribution and priority rules under national law that creditors

1 Assistant Research Fellow, Department of Civil Procedure Law
2 Judge, Supreme Court, Hungary
3 Judge, Bucharest Tribunal, Romania
4 Björn Laukemann, 'Instruments to avoid or postpone secondary proceedings' in Burkhard Hess et al. (eds.), *The implementation of the New Insolvency Regulation. Recommendations and Guidelines* (Max Planck Institute 2017) 56-62

would apply if secondary insolvency proceedings were opened in that Member State.[5] Giving an undertaking is a deviation from the law of the main proceeding, because the ranking of claims in the main proceeding is different to the ranking of claims in the Member State where the undertaking has been given.[6]

The precedent used by UK lawyers, which gave the idea to put it into the EIR-R – known as "*ex parte James*"[7] – contains very similar rules to hold back creditors who have the right to file for the opening of secondary proceeding.[8] This brand-new instrument is not well detailed in the EIR-R; the gaps in the rules give national legislators the possibility of filling them, and this is why we can find diverse solutions in the Member States.

Giving an undertaking in a different Member State from where the main proceeding was opened is a great opportunity but also a great challenge. The insolvency practitioner of the main proceeding must be familiar with the rules governing the insolvency, the procedure of the courts and other formalities.

In the following chapters, we will summarise the relevant rules relating to the undertaking issue in the Romanian and the Hungarian jurisdictions and make some remarks on the questions raised.[9]

2. Essential features of the insolvency proceedings in Romania

Insolvency proceedings in Romania are mainly governed by Law no. 85/2014 regarding preventive insolvency proceedings and insolvency proceedings (hereinafter: Insolvency Code).[10] The Code of Civil Procedure is also relevant for insolvency proceedings.[11]

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5 For a more detailed description see: Csőke Andrea, *A határon átnyúló fizetésképtelenségi eljárások* (The cross-border insolvency proceedings) (HVG-ORAC 2016) 366-380. See also: Björn Laukemann, 'Art. 36.' in Moritz Brinkmann (ed.), *European Insolvency Regulation* (Beck-Hart-Nomos 2019)

6 See in this context: Ilya Kokorin, 'Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices' in: Vesna Lazić and Steven Stuij (eds), *Recasting the Insolvency Regulation. Improvements and Missed Opportunities* (Springer 2020) 22-54.

7 *Re Condon, ex parte James* [1874] LR Ch App 609.

8 Following practical experience gained from the English proceedings in MG Rover Belux SA/NV [2007] BCC 446., Collins & Aikman Europe SA [2006] EWHC 1343 (CH), Nortel Group [2009] EWHC 206 (Ch), the new regime empowers the court at the request of the main insolvency practitioner to postpone or even refuse the opening of secondary proceedings in specific situations. See: Björn Laukemann, 'Instruments to avoid or postpone secondary proceedings' in: Burkhard Hess et al. (eds.), *The implementation of the New Insolvency Regulation. Recommendations and Guidelines* (Max Planck Institute 2017) 56-62

9 On the implementation of Article 36 EIR-R at the domestic level, see: Realisation of the EU Insolvency Regulation (EIR 2015) in national (procedural) law of the Member States, CERIL Report 2018-1 on Insolvency Regulation (Recast) and National Procedural Rules, 2018.

10 *Law no. 85/2014 on insolvency prevention and insolvency procedures* was published in the Official Journal of Romania, Part I, no. 466 of 25 June 2014.

11 The Romanian legal framework has recently undergone very significant changes: most im-

2.1. Types of insolvency proceedings

The insolvency procedures currently regulated by the Romanian insolvency law are:

- pre-insolvency proceedings: ad-hoc mandate procedure ("*mandatul ad-hoc*") and concordat preventive ("*concordatul preventive"* – the insolvency practitioner is the "*administrator concordatar*"), and
- insolvency proceedings, in the form of a judicial reorganisation ("*reorganizarea judiciara"* – the insolvency practitioner is the "*administrator judiciar")* or of a winding up procedure/liquidation (*procedura falimentului* – the insolvency practitioner is the "*lichidator judiciar*").

The *ad hoc mandate* is a confidential procedure, opened at the request of the debtor, involving the appointment of an ad hoc agent *("mandatar ad-hoc*") by the court to negotiate a deal with one or more creditors.

The *concordat preventive* is characterised by the possibility of suspending compulsory winding-up for as long as several months while the agreement with the creditors is negotiated.

The *judicial reorganisation procedure* requires the drafting, approval and implementation of a reorganisation plan subject to the approval of the general meeting of creditors. During the reorganisation period, the debtor is represented by a special administrator, appointed by the general meeting of shareholders.

The *winding-up procedure* leads to the liquidation of the debtor's estate and distribution of proceeds in satisfaction of its liabilities. During this procedure, the debtor is represented only by the judicial liquidator. The judicial liquidator manages the debtor's activity exclusively for the purposes of the liquidation; he is entitled to file actions for declaring any fraudulent acts concluded by the debtor and prejudicing the creditors' rights as void; he sells the debtor's assets and distributes the proceeds among the creditors.[12]

2.2. Creditors' rights

After the opening of the insolvency proceedings, the creditors are notified to file requests for the admission of their claims. The deadline for submitting their requests

portantly, the jurisdiction counts on a new Code of Civil Procedure and a new Civil Code, both of which interact significantly with the insolvency framework*; New Civil Code- Law 287/2009*, published in Official Bulletin no. 505/2011, in force from 1 October 2011; *New Civil Procedure Code- Law 134/2010,* republished in Official Bulletin no. 545/2012, in force from 15 February 2013.

12 See more details about Romanian insolvency proceedings, see Alina Valeanu, 'Romania' in: Frank Heemann and Stela Ivanova (eds.), *Insolvency & Restructuring, Central and Eastern Europe* (Bnt CEE Insolvency Survey 2020/2021) 63-70. See also: Ileana Glodeanu 'Romania' in Christian Hoenig and Christian Hammerl (eds.), *Insolvency and Restructuring Law in Central & Eastern Europe* (Linde 2014) 355-393

cannot exceed 45 days from the opening of the insolvency proceedings. The claims are analysed by the insolvency practitioner in order to be registered in the list of claims ("*tabelul de creante*") or rejected. If the creditor doesn't file his claim, he is not considered a creditor in the proceedings; his preclusion from them is established by the insolvency practitioner.

As a rule, the notification of foreign creditors falls within the competence of the judicial administrator or the judicial liquidator. National legislation regulates both a general system of publicity and a special system of publicity through individual notification of the debtor's creditors. The place where one can see "summons, convening notices, notifications and service of process issued by the courts of law, the judicial administrator/judicial liquidator after the opening of the insolvency proceedings" is the IPB (Insolvency Proceedings Bulletin)[13] - www.bpi.ro/

If an insolvency proceeding has been opened, all creditors must participate in such proceedings in order to satisfy their claims against the debtor. No other separate or out-of-court procedure is possible. The insolvency proceeding is monitored by creditors through the general assembly of creditors, which is convened and chaired by the judicial administrator or liquidator. A creditors' committee can be formed, which aims to provide creditors with a centralised decision-making body in order to monitor the course of the proceedings in the best interests of the creditors. The creditors' committee is responsible for analysing the debtor's situation and making recommendations with respect to the debtor's activity, negotiating with the insolvency administrator or liquidator, reviewing their reports, etc.

2.3. Preparing the undertaking

Romanian law does not give an undertaking the meaning and the effects provided by EIR-R. The official authorities in the insolvency proceedings are the court, the syndic judge, the general meeting of creditors, the special administrator and the judicial administrator/liquidator. The activity of the syndic judge in general is limited to judicial control of the practitioners' activity and litigation related to insolvency procedures. Management or administrative decisions related to the debtor's estate are not within the judiciary's competence. The control of the management in the procedure is exercised by creditors, through their own bodies. The syndic judge has coordination duties, while the administrator or liquidator has mainly executive duties.

13 Law 85/2014, Section 2 – Definitions, Art. 5(6) *"Insolvency Proceedings Bulletin, hereinafter referred to as the IPB, means the bulletin published by the National Office of the Trade Register which registers summons, convening notices, notifications and service of process issued by the courts of law, the judicial administrator/judicial liquidator after the opening of the insolvency proceedings as stated herein, as well as other instruments which need to be published according to the law".*

2.4. Undertaking when the main insolvency proceeding is in Romania

In Romanian law there are no special provisions for the application of an undertaking, so the EIR-R is the only source in this issue. We consider that there are two possible options.

In the reorganisation procedure, the judicial administrator could propose and give an undertaking, which could be part of the reorganisation plan, as a tool for an efficient administration of the main insolvency proceeding, in direct relation to the complexity of the restructuring process. The undertaking during the implementation of the reorganisation plan is possible taking into consideration its purpose and effects on the debtor's estate. It is the creditors' right to approve the reorganisation plan.

In the winding-up procedure, the insolvency practitioner is entitled to make a proposal for an undertaking. The courts have limited power in relation to the management and the estate of the debtor. The general assembly of the creditors has the right to approve the insolvency practitioner's proposed undertaking.

There are no provisional or protective measures according to the national law to ensure compliance by the insolvency practitioner with the terms of the undertaking, except general rules related to the insolvency practitioners' competences, duties, liability for their activity in the procedure.

2.5. Undertaking when the main proceeding is opened in another Member State, and the main insolvency practitioner wants to give an undertaking in Romania

There is no exclusive jurisdiction for conducting secondary proceedings in the country or controlling the undertaking procedure. According to the Romanian provisions in relation to the national competent court for the opening of a secondary insolvency proceeding, "*all proceedings in this law…… fall under the scope of competence of the tribunal or, where applicable, of the specialised tribunal in the jurisdiction of which the debtor had its corporate/professional seat for at least six (6) months before the court was notified"* [Art.41. (1) Law no.85/2014].

There are no formal conditions of the undertaking given by the main insolvency practitioner to the local creditors according to the rules of your insolvency law, other than those written in Art. 36. Romanian creditors should be informed of the opening of a main insolvency proceeding in another Member State, the intention of the insolvency practitioner to provide an undertaking and the contents of the undertaking and the arguments supporting it, including the effects on creditors' rights and the local debtor's estate.

Creditors vote on a reorganisation plan and are divided into five categories: preferential claims, wageholders' claims, tax claims and unsecured claims. The reorganisation plan must be approved by an absolute majority in each category, in relation to the claims, not the number of creditors.

The conditions for confirming a reorganisation plan are the following: at least two, three, or half (depending on the number of categories) of the categories of claims listed in the payment schedule must accept the plan, but on condition that at least one of the disadvantaged categories also accepted the plan and creditors jointly holding at least 30 per cent of the aggregate claims value has accepted the plan; each disadvantaged category of claimants who rejected the plan shall be treated correctly and fairly in the plan; and receivables that shall be fully repaid within 30 days from the confirmation of the plan or in accordance with the credit or leasing agreements from which they originate are considered non-disadvantaged claims whose holders have accepted the plan.

How can the status of local creditors in the voting process, including the justification and the amount of their claim, and how to bring together all creditors or just relevant creditors, financial, budgetary ones, be established; how can the balance between the rights of local creditors and the general purpose of undertaking for the main proceeding and the debtor's estate be ensured? Even though there is no provision in the national law, the Romanian syndic judge may consider an application on the legal basis of Article 36 (5) EIR-R admissible, to take note and verify the legal requirements of the undertaking and its approval, but it is just a presumption, in the absence of any relevant jurisprudence. The Romanian insolvency law has kept the traditional view that, in applying the procedure, the main role lies with the courts, thus certifying the essentially judicial nature of collective proceedings.

In relation to other requirements for the approval and the EIR – R referral to "*the rules on qualified majorities and voting procedures that apply to the adoption of restructuring plans"*, if this provision is broadly interpreted, it may require the involvement of the court (syndic judge) to supervise the voting procedure, if they are subject to litigation. A formal confirmation of the Romanian court decision to approve the undertaking does not seem necessary, but there exists the possibility for a Romanian judge to consider it his duty to examine *ex officio* some formal requirements, such as the approval by a qualified majority of local creditors, the publication and notification of the undertaking and the real possibility for unknown creditors to find out about the undertaking.

Regarding the interaction between the parties and the court, in the context of digitalisation, there is the possibility of sending the petition to the court by e-mail. In an out-of-court procedure – preparing the undertaking – this route cannot be used.

3. Essential features of insolvency proceedings in Hungary

The Hungarian Insolvency Act[14] (hereinafter: HIA) came into force in 1992, and has been modified several times. It deals with companies and any other economic organisations. The insolvency of natural persons and individual entrepreneurs is not covered by the HIA.[15]

14 Act XLIX of 1991 on Insolvency Proceedings

15 See more details about the Hungarian insolvency proceedings: Csőke Andrea *Nagykommen-*

3.1. Types of the insolvency proceedings

The HIA regulates two types of insolvency proceedings: "*csődeljárás*" means a procedure conducted by the debtor itself, the goal of which is to get an agreement with creditors to avoid insolvency. In this, the court appoints an insolvency practitioner *("vagyonfelügyelő"),* whose role is to control the debtor's activity and evaluate creditors' claims against the debtor.

The other insolvency proceeding is "*felszámolási eljárás*", which is a type of winding up procedure. The role of the appointed insolvency practitioner ("*felszámoló"*) is to terminate the business activities of the debtor and distribute its assets among creditors according to a ranking provided for by HIA. At the end of the procedure the debtor legally terminates and is deleted from the register.

There are no other proceedings, such as a pre-insolvency or hybrid procedure in Hungary relating to economic organisations.

3.2. Creditors' rights

Information on the opening of insolvency proceeding is available for Hungarian creditors in the Official Journal (www.cegkozlony.hu), and for foreign creditors in the insolvency register (https://fizeteskeptelenseg.im.gov.hu). However, according to Art.54. of the EIR-R, insolvency practitioners also have the duty to give information to foreign creditors on the opening of the insolvency proceeding.

Two conditions need to be satisfied to become a creditor. Creditors must file the claims with the insolvency practitioner within 30 days for a *csődeljárás*, and within 40 days in the case of a *felszámolási eljárás* from the opening of the proceeding, and the creditors have to pay a registration fee, which is 1% of their claim.

The creditors may form a creditors' committee for the protection of their interests and to provide representation, as well as to monitor the activities of the insolvency practitioner. The committee shall represent the founding creditors in court and during consultations with the insolvency practitioner.

3.3. Preparing the undertaking

If the main proceeding was opened in Hungary, only the insolvency practitioner in the *felszámolási eljárás* has the right to give an undertaking in another Member State. In a *csődeljárás,* an undertaking is not possible.

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tár a csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvényhez [Comprehensive Commentary on the Insolvency Act], (Wolters Kluwer 2019). See also: János Bóka, Katalin Gombos, Tekla Papp, András József Pomeisl, *Commercial and Economic Law in Hungary* (Wolters Kluwer 2019), Chapter 6. János Tóth and Bálint Tóásó, 'Hungary' in Christian Hoenig and Christian Hammerl (eds.): *Insolvency and Restructuring Law in Central & Eastern Europe* (Linde 2014) 241-287

3.4. When a main proceeding was opened in Hungary

Statements of undertaking issued to creditors established in other Member States shall only be considered valid if approved in advance by the Hungarian court.

In a request submitted to the court, the insolvency practitioner shall present the assets situated in the other Member State of the undertaking, supported by financial statements and documents, their value, plans for the sale of such assets, and the objectives to be achieved by the undertaking on behalf of the creditors as a whole, as well as the disadvantages that the lack of an undertaking is likely to cause. The information thus provided will include a list of claims of known foreign creditors in the other Member State, also summarising the rules set out in the HIA for the payment of such claims, and how they should be classified in the priority order provided by HIA.

If the creditors in the other Member State affected do not approve the statement of undertaking that was approved by the court in advance, the insolvency practitioner shall inform them in writing, without delay, of the possibility of joining the main insolvency proceedings opened in Hungary, including the ensuing obligation to pay a registration fee, with the proviso that the time limit for the submission of notices for claims shall commence on the day of voting on the statement of undertaking.

Traditionally, Hungarian creditors and creditors' committees are not very active in controlling insolvency proceedings, so this is why the legislator transferred the task of checking the undertaking in the main proceedings to the court. The court must inform the creditors and order them to make a written statement about the undertaking, but it is not binding on the court. In such a situation – when the main proceedings were opened in Hungary – any insolvency court is entitled to approve a proposal to give an undertaking; there is no court with exclusive jurisdiction.

In the event of any unlawful action or negligence – including failure to fulfil the undertaking –foreign creditors may file an objection against the insolvency practitioner within 15 days. This is a legal remedy, wherein the creditors can ask the court to compel the insolvency practitioner to fulfil the undertaking.

3.5. When the main proceeding is opened in another Member State, and the main insolvency practitioner wants to give an undertaking in Hungary

The Fővárosi Törvényszék (Budapest-Capital Regional Court) shall have exclusive competence and exclusive jurisdiction for opening and determining proceedings opened in the form of territorial insolvency proceedings and for controlling the undertaking proceedings.

There several other formal conditions of the undertaking given by the main insolvency practitioner to the local creditors according to the rules of your insolvency law than those written in Art. 36.

The statement of undertaking by a foreign insolvency practitioner to Hungarian local creditors must also contain a legal statement declaring that the undertaking is following the validity requirements according to the national law of the Member State of the main proceedings.

The foreign insolvency practitioner must inform the Hungarian local creditors of the assets that are situated in Hungary and affected by the undertaking, including their value and plans for the sale of such assets written in Hungarian, and shall declare that the information is complete. All known Hungarian local creditors and their claims must be enumerated in the statement of undertaking.

The foreign insolvency practitioner needs to inform Hungarian local creditors of the voting process for his undertaking to be approved. Voting must be conducted in the presence of a public notary.

In the process of the approval of the undertaking, the creditors will be grouped into secured and unsecured creditors. Creditors have votes according to their accepted claims against the debtor; each 50,000 HUF claim represents one vote. If the plan is approved by the majority of votes in both categories, the undertaking is approved. However, there are many problems with those rules in practice**.** In reality the most serious difficulty is rooted in national law. The HIA could not solve the problem of creditors' disputed claims. A claim that has been rejected or disputed by the insolvency practitioner does not entitle the claimant to vote. Claims that have been disputed by the debtor, such as conditional claims, will only be taken into account by the undertaking if the holder of the disputed claim provides proof of enforcing his claim against the debtor by means of judicial or administrative procedures, and that he has opened or initiated such action.

The rules for *felszámolási eljárás* do not allow long-distance voting, so it is not allowed in undertaking proceeding, too. Our opinion is that the law has to be changed to follow the digitisation of the real world.

4. Conclusions

It is entirely clear from the above that, although we are close neighbours, and there are companies with a seat in one country and an establishment in the other, our insolvency rules are totally different. The Hungarian one is old, rooted in an Act adopted at the end of 20th century; meanwhile the Romanian is a new one and very similar to the French insolvency law.

The Hungarian legislator – from a cross-border point of view – tried to keep up with the new European rules of the EIR-R; the Romanian one did not wake up yet, while the courts will have to deal with the problems. The only solution is to use the rules in a creative manner to make the undertaking mechanism work in practice.

From the creditors' point of view, bad or inadequate rules are much better, than the situation of no rules. Lack of rules leads to legal uncertainty in cross-border situations,

as the resolution of problems depends on the preparedness of the participants in the proceedings.

It is very interesting to see the diverse solutions of these countries relating to the undertaking, which have come from the different systems of national insolvency rules. In Hungary, the HIA gives a major task and responsibility to the judge, while Romanian rules are based on creditors' activities, giving them the possibility to deal with their interests.

Our goal was to show how serious the challenges may become for an insolvency practitioner, a judge or creditors when they are facing a possible undertaking. We are encountering common problems. The "trailblazers" – those who have to deal with the undertaking in practice for the first time – will show us the direction to resolve the situation. This reality requires some flexibility and a positive attitude on the part of all parties involved debtors, creditors and national authorities with competence in the field in order to produce positive effects and develop the undertaking as an effective mechanism for international cooperation.

Boóc, Ádám[1]

A Sailor's Knot or a Life Belt? Comments on the Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration)

I.

The Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration) (hereinafter: *Prague Rules* or Regulation) was officially signed on the 14th December 2018 in Prague, after four years of preparation. It is a question whether the Regulation is going to serve as a reliable sailor knot fixing the ropes, or a lifebelt giving chance to survive for those who got into trouble in the sea of arbitration. This study seeks answers to this question.

In this work, we will summarise the most relevant special features of the Regulation, taking into account that there is no practical experience yet, and the literature is basically only about the text of the Prague Rules themselves, so it focuses on the possible future effects.[2]

The aim of the Regulation, which can be considered as a recommendation with regard to international arbitration, is to regulate taking evidence and provide an efficient procedure for arbitration. [3] As it is, the Regulation helps the arbitration procedure to be even more efficient and well-conducted. [4] It is the work of a 46-member international work team, in which jurist professor and lawyer Alexander Belohlavek took on a key role. The lawyer József Antal was the Hungarian member of the work team. The Prague Rules have so far been officially translated into English, Portuguese, Russian, Spanish, Chinese, Estonian, Lithuanian and Latvian.

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2 It is worth mentioning that the 2nd edition 2019 of Revista Română de Arbitraj deals with Prague Rules in detail. See: Revista Română de Arbitraj. season 13, 2 (2019).

3 See the detailed description of Prague Rules including background studies and analysis: www.praguerules.com (date of access: 2019. 07. 18.)

4 See summary on the taking of evidence in arbitration procedure: Gary B. Born: *International Arbitration. Cases and Materials.* Alphen aan den Rijn, 2011. 768 – 791.

II.

The aim of the Regulation is in fact to make arbitration procedure more efficient. Of course, the Regulation is not binding; it's more like a guideline. In the arbitration procedure, the parties and the arbitration presidium can decide whether to apply the Prague Rules, but they can also refuse to apply them. Obviously, the Prague Rules are not suitable for replacing the procedural code of an arbitration institution (for example ICC or LCIA). The Preamble of the Regulation itself emphasises that, by the application of the Prague Rules, the presidium of the arbitration takes on a much more important role in conducting the procedure.

According to the first comments on the Prague Rules, they reflect much more the continental point of view than the system of taking of evidence in Common Law.[5] According to some authors, for example Michal Kocur, the Prague Rules follow principally the continental system of taking evidence.[6] In this sense, the Prague Rules can be an alternative to IBA Rules (*IBA Rules on the Taking of Evidence in International Arbitration*).[7] We can also find opinions of Anglo-Saxon authors according to which it is an open question if the Prague Rules embedded in Anglo-Saxon legal culture, are an appropriate alternative to the IBA Rules in international arbitration procedures.[8]

The Prague Rules are set out in the following twelve Articles on the efficient arbitration procedure:

- Article 1: *Application of the Prague Rules*;
- Article 2: *Proactive Role of the Arbitral Tribunal*;
- Article 3: *Fact finding*;
- Article 4: *Documentary evidence*;
- Article 5: *Fact Witnesses*;
- Article 6: *Experts*;
- Article 7: *Iura Novit Curia*;

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5 See summary: Klaus Peter Berger: *'Common Law v. Civil Law in International Arbitration: The Beginning or the End?'* Journal of International Arbitration, 3 (2019), 295 – 313.

6 See: Michal Kocur: *Why Civil Law Lawyers Do Not Need the Prague Rules*. https://www.praguerules.com/upload/iblock/a41/a41366c67308ea1286a4d3a3a3fde2a7.pdf (date of access: 17th of August 2019.)

7 Az *IBA Rules on the Taking of Evidence in International Arbitration* szövegét angolul lásd: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines (date of access: 18th of July 2019.) See in Hungarian: Kecskés László – Lukács Józsefné (edited): *Book of arbiters*. Budapest. 2012. 369 – 380. See also: Varga István: *Questions of proving in international arbitration procedures.* In: *Magister Artis Boni et Aequi. Studia in Honorem Németh János.* (edited by: Varga István – Kiss Daisy) Budapest, 2003. 877 – 913.

8 Lásd: Rob Javin-Fisher –Erika Saluzzo: *Prague Rules on evidence in international arbitration: a viable alternative to the IBA Rules?* https://www.praguerules.com/upload/iblock/587/5872685539bddee7618083c020f6ff93.pdf (date of access: 18th of July 2019.)

- Article 8: *Hearing*;
- Article 9: *Assistance in Amicable Settlement*;
- Article 10: *Adverse Inference*;
- Article 11: *Allocation of Costs*;
- Article 12: *Deliberations.*

As it can be seen from the titles of these Articles, the Prague Rules themselves are not enough to be considered a comprehensive set of arbitration regulations, but they can function as a supplement in order to achieve an efficient procedure of arbitration, so it can result in an even more decent arbitration process. We make to following comments on the above-mentioned Articles, in order to present the Regulation including but not limited to.

Application of the Prague Rules: The Regulation, due to its nature and as a soft law instrument, can only be applied based on the agreement of the parties or the decision of the arbitral tribunal. It is important to mention that it is also possible to apply only specific parts of the Regulation. The practical implementation of this will be especially interesting, considering the complexity of the Prague Rules. The Regulation also mentions that, during its application, *lex arbitri* in particular has to be considered in every case, along with the other applicable regulations and the agreements of the parties. [9]

Proactive Rule of the Arbitral Tribunal: The essence of the Prague Rules can be summarised as the title of this Article. The actual purpose of the Regulation is to give an opportunity for arbitrators to control and guide the procedure in a proactive way. In this Article, the case management conference is explained. The essence of the case management conference, a concept known and applied by many international arbitration procedures, is that, after the formation of the arbitral tribunal and the description of the basic documents of the case, the tribunal holds a conference in the presence of the parties. During this, a schedule is established and applied to the rest of the procedure, including the deadlines; the parties clarify the claim they wish to enforce, the facts on which parties agree and disagree and what the basic legal grounds are on which the parties seek to enforce their claims. During the case management conference, or later in the procedure, there is a chance for the tribunal to inform them of its preliminary opinion on the case (preliminary view). Here, it is possible, among other things, for the arbitral tribunal to take a position on what facts the parties agree on and what facts dispute, what types of evidence the arbitral tribunal will consider to have full probative value, and what its preliminary position is on the parties' legal arguments.

9 On the important correlations of *lex arbitri* and arbitration see from the latest literature: Jacomijn Van Haersolte-Van Hof – Erik V. Koppe: *International Arbitration and the Lex Arbitri.* Grotius Centre Working Paper 2014/033. https://ssrn.com/abstract=2518978 (date of access: 18th July 2019.)

Basically, the arbitral tribunal here gives an opinion in advance (presumably also in order to conduct the proceedings more efficiently) on certain issues concerning important issues of the case, which may even affect the content of the judgment. Therefore, an important rule for guarantee is that such a preliminary opinion by the arbitral tribunal shall not in itself constitute evidence of a lack of independence or impartiality of the arbitrator and shall not be the reason of exclusion. Taking international practice regarding arbitration independence and impartiality into account, it cannot be certain that, in a particular arbitration case, an unfavourable preliminary opinion will result in a party initiating exclusion proceedings against the arbitrator. [10] As such, it is possible that the application of this part of the Prague Rules will affect the international practice of excluding arbitrators, and it is also possible that it will change the *IBA Guidelines on Conflicts of Interest in International Arbitration* practice developed by IBA (International Bar Association) and widely used ever since. [11]

It also important to mention that the Rules of Proceedings of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, entered into force on the 1st February 2018, contain the possibility of a case management conference as follows:

36. [Case Management Conference]

(1) Within thirty days following the constitution of the arbitral tribunal, a case management conference shall be held with the participation of the parties, in person or by means of telecommunication, in order to draw up the procedural timetable.

(2) During the case management conference, the arbitral tribunal shall come to terms with the parties as to the procedural rules to be determined pursuant to Section 31(1) and (2) of the Rules, the means of evidence expected to be applied, including especially the necessity of expert evidence, and shall also invite the parties to declare if they request that a hearing be held. In light of these, the arbitral tribunal shall establish the procedural timetable and set time limits for each procedural act.

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10 On the independency and impartiality of arbiters from the Hungarian literature see especially: Boóc Ádám: International commerce arbitration. Nomination and exclusion of arbiters. Budapest, 2009.

11 See the English text of *IBA Guidelines on Conflicts of Interest in International Arbitration*: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines (date of access: 18th July 2019.) See in Hungarian: Kecskés László – Lukács Józsefné (edited): *Book of arbiters*. Bp. 2012. 358 – 369. See also: Boóc Ádám: *The new arbitration clauses in the mirror of the new IBA directives. In: European legal culture. Novation and tradition in the Hungarian civil law.* (The edited version of the lectures organized by the Association of Civil Law Professors and the Faculty of Law ELTE University on the 17-18th June 2011.) (edited by: Fuglinszky Ádám – Klára Annamária) Budapest, 2012. 457 – 472. See the original summary of *IBA Guidelines* of 2004: Mathias Scherer: *The IBA Guidelines on Conflicts of Interest in International Arbitration. The First Five Years. 2004 – 2009*. Dispute Resolution International 4 (2010) 5 – 53.

(3) During the case management conference or within 3 days thereafter at the latest, the arbitral tribunal shall render a procedural order on the agreed terms and course of the proceedings.

(4) In light of the circumstances and complexity of the case the arbitral tribunal may decide to

a) proceed without a case management conference and directly set a hearing, or

b) by mutual consent of the parties, continue the case management conference as a hearing, or

c) decide on the case with neither a case management conference nor a hearing. The arbitral tribunal shall notify the parties of this in advance and shall provide the parties with an opportunity to file a request that a hearing be held. [12]

It is important to mention as a relevant difference that the regulations on the case management conference of Rules of Proceedings of the Arbitration Court of Commerce do not state that the arbitrators may or shall give an opinion on the questions, considered relevant, of the case. Of course, this may lead to the concepts and fundamental rules of fair procedure to prevail during the procedure. [13]

III.

Fact finding: In order to establish the facts of the case, the Prague Rules give the arbitral tribunal a very proactive role, which of course does not relieve the parties of the burden of proof. This proactive role also means that the Tribunal may call upon any party to attach specific documents, request evidence, or have the right to order an on-site inspection, take other steps that it deems necessary, or appoint experts even in legal issues. This is basically the strengthened version of the weakened inquisition concept (*eingeschränkter Untersuchungsgrundsatz)* known and used in German law. [14]

Documentary evidence: In arbitration, documentary evidence is known to play a primary role in relation to proof, so it is no coincidence that the Prague Rules devote a great deal of space to these relevant rules. According to the fundamental rules established, the parties have to present the evidence on which they wish to rely in

12 See: https://mkik.hu/mkik-vb-eljarasi-szabalyzat-2018 (date of access: 25th July 2019.) See the general presentation of the activity and organization of the Hungarian Commerce Court of Arbitration: Burai – Kovács János: *The organization and the regulations of the Hungarian Permanent Commerce Court of Arbitration, first steps in order to improve competitiveness of the Court of Arbitration.* In: *Annual book of Commerce Court of Arbitration 2018*. (szerk.: Burai – Kovács János) Budapest, 2019. 105 – 110. o.

13 See also: Nochta Tibor: *Thesis about Guarantees of a Fair Trial in Arbitration Proceedings.* In: *Annual book of Commerce Court of Arbitration 2018*. (edited by: Burai – Kovács János) Budapest, 2019. 381 – 385. See also: William W. Park: *Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure.* Arbitration International 23 (2007). 499 – 503.

14 See also: Varga István: *The new Rules of Proceeding of the Permanent Commerce Court of Arbitration.* In: *Study on the commerce court of arbitration.* (edited by: Bodzási Balázs). Budapest, 2018. 58.

the procedure at the beginning. The *document production* and the *discovery* known in the Anglo-Saxon legal system according to which the other party can be forced to present the evidence are applicable exceptionally. If any of the parties want to apply this rule, it primarily needs to be initiated during the above-mentioned case management conference and, besides the formal request, it why *document production* or *discovery* needs to be applied in the case must be justified. If the Arbitral Tribunal also agrees with this request, a suitable and open deadline for *document production* and *discovery* will be included in the procedural schedule, including procedural deadlines, during the case management conference. In exceptional circumstances, if a party submits a request for document production or discovery after a case management conference, it may be approved by the arbitral tribunal under the Prague Rules, just like under many other rules of international commercial arbitration, only if the arbitral tribunal is satisfied that it has not previously been possible for the party concerned to make such a request at the case management conference.

It should be noted that the above rule is analogous, at least in terms of temporality, to the following rule of Article 12 (2) of the UNCITRAL Model Law on the exclusion of an arbitrator: *(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made*.[15]

According to the above rule, a party may submit a request of exclusion against an arbitrator nominated by it only on the basis of a reason that came to its notice after the nomination. The situation is similar here, as according to the Prague Rules, in order for a party to initiate *document production* or *discovery* after a case management conference, it has to prove that it was not in a position to conduct the exploration procedure at the time of the preparatory consultation, so for example it has to present new, unknown facts and circumstances that make this probable.

In general, if one of the parties requests document production or discovery, it must prove regarding the documents concerned, that they are material and relevant for the decision, not in the public domain, inaccessible, or in the possession or control of the other party. Of course, a document that has consequently been placed in the arbitration proceedings is also subject to the strict obligation of confidentiality that characterises the arbitration proceedings as a whole.

Fact Witnesses: Although witness hearings are not as common in arbitration procedures as in state court procedures, they are of course not unknown in arbitration either. [16]

15 See: UNCITRAL Model Law on International Commercial Arbitration, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/07-86998_ebook.pdf Date of download 27th of September 2019 12:46

16 On witness evidence in arbitration procedures see: Lawrence W. Newman – Ben H. Sheppard (ed.): *Take the Witness: Cross-examination in International Arbitration.* New York, 2019[2].

When a witness hearing proposal is submitted during any part of the procedure, the party must indicate the identity of the witness, the factual circumstances in which the witness wishes to be heard and the relevance of the testimony to the outcome of the case.

The Arbitral Tribunal, having heard the parties, has the right to decide which witnesses they wish to hear. The Regulation states that, in making its decision, the Arbitral Tribunal shall consider whether the testimony is relevant regarding the case, whether hearing it is unreasonably burdensome and whether it results in duplication, meaning whether it relates to an assertion that has already been proved or otherwise.

If the Arbitral Tribunal does not allow the witness to be heard, this shall not prevent the party from obtaining written testimony from the witness and attaching it to the files. The arbitral tribunal may itself recommend that the party obtain written evidence from that witness.

Once in possession of a written testimony, the arbitral tribunal may decide not to hear the witness. However, if the other party expressly insists on hearing the witness personally on the basis of the written testimony given by the opponent, the arbitral tribunal shall hear that witness, unless there are *good reasons* for the contrary. In my opinion, this also proves that the parties are expressly the masters of the case in the arbitration proceedings.

The Regulation also emphasises that if the arbitral tribunal, in possession of the written testimony, has decided not to hear a witness, it does not restrict the Arbitral Tribunal from giving probative value to the testimony.

Regarding the technical rules for the examination of witnesses, the Regulation states that it shall be conducted and led by an Arbitral Tribunal, and may decide accordingly, for example, not to allow the parties to ask certain questions. It is worth mentioning that the Regulation does not regulate the legal institution of *affidavit,* known in Common Law, at all.

Experts: Expert evidence can play a very important role in arbitration proceedings, as in many cases, due to the nature of the dispute, as many questions can arise where special expertise is needed to answer them.[17] The Regulations also seek to assist in the procedure of taking expert evidence. Either the Arbitral Tribunal may decide that the involvement of an expert is necessary, or the parties may request this. If the Arbitral Tribunal decides to involve an expert, it may request a proposal from the parties on the person of the expert, and in this context the arbitral tribunal may specify certain requirements regarding the qualification requirements and possible budgets of the

17 On the role of experts in the arbitration procedures see Nigel Blackaby – Constantine Partasides: *Redfern and Hunter on International Arbitration*. Oxford, 2009[5] 406 – 413.; Giovanni De Berti: *The Arbitrator and the Arbitration Procedure – Experts and Expert Witnesses in International Arbitration: Advise, Advocate or Adjudicator?* In: Austrian Yearbook on International Arbitration (edited by: Christian Klausegger – Peter Klein) Wien, 2011. 53 – 63.

expert. [18] It is important that the Arbitral Tribunal is not tied to the person of the expert nominated by the parties; it may nominate a person other than the person nominated by the parties as an expert, or even set up a committee of experts from the persons nominated by the parties. (In addition, the Arbitral Tribunal has other options for appointing an expert, for example requesting a proposal on the person of the expert from an impartial organization or even from a chamber of commerce.) Besides, the Regulation mostly contains the known rules of civil law, so we will not describe them in detail. With regard to expert costs, it should be emphasised that, as a general rule, the parties must jointly advance the expert's fee. However, if one of the parties is reluctant to advance it, the Arbitral Tribunal shall call upon the other party to advance the expert fee.

Another important feature is that the parties are obliged to provide all the information and documents related to the case to the expert in order to perform his/her expert duties. The expert may appear and be heard in person at the hearing, either by the request of one of the parties or on the Arbitral Tribunal's own initiative.

Iura novit Curia: In my view, this rule is one of the most significant innovations of the Prague Rules. In arbitration proceedings, the burden of proof on the legal position is primarily on the litigant party, but under this rule the arbitral tribunal may apply different legal provisions, which have not been referred to in the parties' submissions, including but not limited to public policy. The Arbitral Tribunal may also rely on other legal literature, not referred to by the parties, that may be relevant to the legal provisions in the questions of the case, if the tribunal provides the opportunity to the parties to express their point of view on these legal authorities.

In these cases, the Arbitral Tribunal shall obtain the opinion of the parties on the rules to be applied. Even now, without knowing the practical application of the Prague Rules, it can be said that this provision is completely novel compared to the current practice of international commercial arbitration and it may induce significant changes in certain procedures that actually apply the Prague Rules. It should be emphasised that the opportunity for the Arbitral Tribunal to be free to use legal authorities not invoked by the parties may open up new perspectives for arbitrators in terms of legal reasoning and justification.

Hearing: With regard to the hearing, the Regulation states that primarily on the basis of the principle of cost-effectiveness, the arbitral tribunal and the parties shall endeavour to settle the dispute essentially on the basis of documents. If either of the parties requests or the arbitral tribunal deems it necessary, it is of course possible to hold hearings, but in this case it has to be organised in the most cost-effective manner possible, either by limiting the duration of the trial or by using video, electronic or telephone communication to avoid unnecessary travel costs.

18 On the experts nominated by the parties see: Doug Jones: *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last.* Arbitration International 24 (2008). 137 – 156.

Amicable Settlement: Unless any party objects, the arbitral tribunal may take a very active part in the amicable settlement of the dispute by mutual agreement; moreover, with the prior written approval of the parties, any member of the arbitration panel may act as a mediator between the parties. [19] This corresponds to the well-known peculiarity of arbitration, according to which the proportion of amicable settlements in arbitration proceedings is significantly higher than in court proceedings. [20]

Adverse inference: This provision of the Prague Rules contains a rule that is basically an existing rule in common law but also known in other legal systems with different wording. [21] According to this, if a party fails to follow the instructions and orders of the arbitral tribunal without a legitimate reason, for example does not provide any evidence, it may be considered as detriment by the Arbitral Tribunal, even leading to it accepting the opposing party's contrary position in the absence of the evidence requested.

Allocation of costs: According to the Regulation, when the arbitral tribunal decides on the allocation of costs in its decision, it shall take into account, *inter alia*, the behaviour of the parties and their cooperation or lack of cooperation in the proceedings. Of course, this rule has to be completed with the rule of costs being mainly charged to the losing party but, in my view, the sometimes different cost calculating methods of different arbitration institutions should also be taken into account. Some arbitration institutions, such as the VIAC in Vienna or the Hungarian MKIK, determine the fees of arbitrators and the administrative costs of arbitration on the basis of the value of the litigation. With regard to other arbitration systems, such as the rules of the London-based London Court of International Arbitration (LCIA), remuneration is based on the time spent on the case and is settled accordingly. [22] All of this also shows

19 On the question of *amicable settlement* in international arbitration in the latest literature see: Klaus Peter Berger: T*he Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing.* Journal of International Arbitration 35 (2018). 501 – 516.

20 See also in this matter: Gellért György: *New Act on the arbitration*. Magyar Jog 45 (1995). 451 – 452.

21 The www.praguerules.com website contains the following Rule on the *adverse inference*: If a party does not comply with the arbitral tribunal's order(s) or instruction(s) without justifiable grounds, the arbitral tribunal may draw, whether it considers appropriate, an adverse inference with regard to such party's respective case or issue. (date of download: 29th July 2019, 12:32)

22 On the rules of MKIK of bearing the costs see: https://mkik.hu/dijkalkulator-2018-januar-1-tol (date of download: 13th October 2019, 22:22). On the rules of VIAC of bearing the costs see: https://www.viac.eu/en/cost-calculators (date of download: 13th October 2019, 22:22). On the rules of LCIA of bearing the costs see: https://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration.aspx (date of download: 3rd October 2019, 22:27). On specific questions of arbitration in the law of the UK see: Boóc Ádám: *Invalidation of the decision of the arbitration courts law of the UK*. Magyar Jog 66 (2019). 460 – 467.; On the history of the arbitration of the UK see: Kecskés László: *The evolution*

that the Regulation only contains general, indicative rules regarding the bearing of arbitration costs.

Deliberations: The Regulation imposes the obligation on the arbitrators to do everything possible to render the decision as soon as possible regarding the period of reflection and consideration before the decision is made. If a hearing is held, the arbitral tribunal shall conduct internal consultations among its members prior to the hearing, and after the hearing the tribunal shall discuss the decision as soon as possible. If no hearing is held on the case then, after the receipt of the documents, the tribunal shall deliberate on the substance of the case as soon as possible. All of this is intended to help bring the matter to an end without undue delay.

According to this note that summarises briefly the Prague Rules, obviously without knowing the practical application, we can say that the Regulation is capable of having a significant influence on international commerce arbitration. To decide whether the Rules can be considered as a reliable sailor's knot, fixing the ropes, or a lifebelt giving a chance for survival to those who got into trouble at sea will be the task of the future and the future's international arbitration practice, and that of course may indicate further examinations and research.

of civil law in the big legal system of the continental Europe. Pécs, 2004. 163 – 164.

Civil Law

Jakab, Éva[1]

Roman Law in the Provinces: A Case Study

The Romans were "obsessed with making wills, both of their own and others, to a degree and for reasons which may be hard to grasp today" stated Champlin in his book on the social context of the Roman law of succession.[2] It is told of Cato the Elder that he was anxious lest he was left intestate for a single day of his life.[3]

Testamentary succession was the first choice in legal life.[4] Wealthy Romans made their wills promptly when they reached the age of legal capacity. Pliny the Younger stated that a person's will is the real mirror of his character: "The Romans tell the truth only once in their lives, in their will."[5] However, there can be no doubt that wills mattered more for the "propertied and the educated" of Roman society. Concerning this milieu, an interesting case is delivered with a strong link to Roman Britain[6] – D. 36.1.48(46) Iavolenus 11 epistularum:

Seius Saturninus archigubernus ex classe Britannica testamento fiduciarium reliquit heredem Valerium Maximum trierarchum, a quo petit, ut filio suo Seio Oceano, cum ad annos sedecim pervenisset, hereditatem restitueret. Seius Oceanus antequam impleret annos, defunctus est: nunc Mallius Seneca, qui se avunculum Seii Oceani dicit, proximitatis nomine haec bona petit, Maximus autem trierarchus sibi ea vindicat ideo, quia defunctus est is cui restituere iussus erat. Quaero ergo utrum haec bona ad Valerium Maximum trierarchum heredem fiduciarium pertineant an ad Mallium Senecam, qui se pueri defuncti avunculum esse dicit. Respondi: si Seius Oceanus, cui fideicommissa hereditas ex testamento Seii Saturnini, cum annos sedecim haberet, a Valerio Maximo fiducario herede restitui debeat, priusquam praefinitum tempus aetatis impleret, decessit, fiduciaria hereditas ad eum pertinet, ad quem cetera bona Oceani pertinuerint, quoniam dies fideicommissi vivo Oceano cessit, scilicet si prorogando tempus solutionis tutelam magis heredi fiducario permisisse, quam incertum diem fideicommissi constituisse videatur.[7]

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2 E. Champlin, Final Judgements. Duty and Emotion in Roman Wills (200 BC - AD 250), 1991, 6-8;

3 Plut. Cat.Mai. 9.6.

4 R. P. Saller, Patriarchy, Property and Death in the Roman Family, 1997, 161 ff.

5 Plin. ep. 8,18; Champlin 1991, 82-87.

6 For *Britannia* see A. R. Birley, The Roman Government of Britain, 2005, 65ff.; also L. Wallace, The Early Roman Horizon, in M. Millett, L. Revell, A. Moore (eds.), The Oxford Handbook of Roman Britain, 2016, 115 ff.

7 D. 36.1.48(46): "Seius Saturninus, a chief pilot of the British fleet, by his testament left Valerius Maximus, a captain, his fiduciary heir and demanded of him that he restore the

Seius Saturninus, commander of the British fleet of the Roman army, drew up his will.[8] Saturninus seems a real name, not a pseudonym, because a Saturninus is also attested in the 2nd century AD in an inscription from Colchester (Roman Camulodunum), in a *honesta missio* of a cavalry-man.[9] Anyway, by his will, our Saturninus appointed Valerius Maximus (presumably a comrade or a friend) as a fiduciary heir and demanded of him to restore the entire inheritance to Seius Oceanus, the testator's son, on his attaining the age of sixteen. Thereafter the testator died, and his estate went as trust to Valerius Maximus − as laid down by the will. However, it happened that the young son of the testator died before coming of age. Thereupon, an uncle of his, Mallius Seneca, claimed the estate under intestate succession as the nearest blood relation: he filed an action against Valerius Maximus, who had held the estate since the death of the testator as a fiduciary heir, demanding that he hand over the entire property. The case came before court.

Birley assumed that the case might have been tried by a British provincial court, presided by Javolenus Priscus.[10] *Gaius Octavius Tidius Tossianus Lucius Iavolenus Priscus* was an eminent jurist and a successful politician under the reign of Trajan. We are informed of his life and career by inscriptions and literary sources. In AD 83 he served as *legatus pro praetore* and commander of the *Legio Tertia Augusta* in Africa. In AD 86 he was appointed to *iuridicus* (chief judge) of the province of Britain. Later on, he served as *legatus pro praetore* in Germania and Syria as well. According to Pomponius he became

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inheritance to Seius Oceanus, the testator's son, on his attaining the age of sixteen. Seius Oceanus died before he had attained that age. Now Mallius Seneca, who claims to be the maternal uncle of Seius Oceanus, demands these goods by right of relationship, but Maximus, the captain, claims them for himself on the ground that he to whom he was to restore them is dead. I am asking, therefore, whether these goods belong to Valerius Maximus, the fiduciary heir, or to Mallius Seneca, who claims to be the maternal uncle of the dead boy. I replied: 'if Seius Oceanus to whom the fideicommissary inheritance should have been restored under the testament of Seius Saturninus at his age of sixteen by Valerius Maximus, the fiduciary heir, has died before he attained the prescribed age, the fiduciary inheritance belongs to him who was entitled to the other goods of Oceanus; for the fideicommissum vested in the life of Oceanus, that is, if he be deemed by deferring the time of payment to have allowed the fiduciary heir the guardianship of the goods, rather than to have made the fideicommissum payable upon an uncertain day."

8 Just to offer some scholarly literature to the case: Ph. Heck, ZRG RA 10 (1889) 104; B. Kübler, ZRG RA 31 (1910) 188; Ot. Sommer, ZRG RA 34 (1913) 398; B. Kübler, ZRG RA 41 (1920) 32; H. Siber, ZRG RA 48 (1928) 762; M. Kaser, ZRG RA 95 (1978) 47; K. H. Misera, ZRG RA 98 (1981) 458, 462.

9 CIL XVI 130 (= RIB II 2401.12); Birley 2005, 150; E. Birley, JRS 28 (1938) 228; M. Roxan, Britannia 11 (1980) 335-337. See also A. Mócsy, Die Namen der Diplomempfänger, in W. Eck, H. Wolff (eds.), Heer und Integrationspolitik, 1996, 437-466.

10 Birley 2005, 271; following him L. J. Korporowicz, Roman Law in Roman Britain: An Introductory Survey, The Journal of Legal History 33 (2012) 143.

the leader of the *schola Sabiniana*, and the teacher of Salvius Julianus.[11]

By appointing a fiduciary heir, the fleet commander Saturninus chose a rather new, deliberate form for passing over his property. Initially, trusts were treated as requests, only morally but not legally binding. Final disposals through fideicommissa could concern just some items of property or the entire estate of the deceased − as it was the case with Saturninus. Bequeathing a *fideicommissum hereditatis* (trust of inheritance) meant instructing someone's heir with a request to pass the entire estate on a third person later; actually, it meant to be an executor.[12] Indeed, it was popular i cases where the heir (or legacy) named by the testator actually lacked legal capacity; for instance, being a peregrine with no known address, whose identity could not be confirmed, or was under age, as it was in our case. Initially, trusts were free from any limitations and restrictions.[13] Nevertheless, their fulfilment depended entirely on the *fides* (honesty) of the trustee. In our case, the informal request might have sounded like: "It is my earnest hope that you will pass everything to my son when he will be sixteen."[14]

Iavolenus Priscus, the famous jurist and high official in imperial administration, was confronted with the problem of a miscarried testament. Presumably, he also consulted or corresponded (as suggested by Jill Harries[15]) with other jurists in order to come to a fair decision in this prominent trial of high society. Finally, he responded that Saturninus' property should pass under intestacy. Iavolenus Priscus raised the argument that the purpose of the fiduciary bequest was to protect the estate until the testator's child came of age. The *fideicommissum* should not enable the use of someone's property for an indefinite period of time.[16]

Iavolenus Priscus' careful consideration can be explained by its similarities to the famous *causa Curiana*: in both cases, the testator's resolution was to avoid intestacy and

11 W. Eck, Jahres- und Provinzialfasten der senatorischen Statthalter von 69/70 bis 138/139, Chiron 12 (1982) 316-320.

12 For fideicommissa see A. Torrent, Fideicommissum familiae relictum, 1975; Johnston, The Roman law of Trusts 1988; A. Murillo Villar, El fideicomiso de residuo en derecho romano, 1989; V. Giodice-Sabbatelli, La tutela giuridica dei fedecommessi fra Augusto e Vespasiano, 1993; F. Longchamps de Bérier, Il fedecommesso universale nel diritto romano classico, 1997; L. Desanti, Restitutionis post mortem onus. I fedecommessi da restituirsi dopo la morte dell'onerato, 2003.

13 Gai. 2.285; see D. Johnston, Prohibitions and Perpetuities: Family Settlements in Roman Law, ZRG RA 102 (1985) 220-290; M. Kaser, R. Knütel, S. Lohsse, Römisches Privatrecht, 21ˢ edition, 2017, 386 ff., U. Babusiaux, Wege zur Rechtsgeschichte: Römisches Erbrecht, 2015, 330-345.

14 D. 4.4.1.1; see to it A. Wacke, Der Rechtsschutz Minderjähriger gegen geschäftliche Übervorteilungen, TR 48 (1980) 203 ff.

15 J. Harris, Saturninus the Helmsman, Pliny and Friends: Legal and Literary Letter Collections, in A. König, Ch. Whitton (eds.), Roman Literature under Nerva, Trajan and Hadrian, 2015, 1-34.

16 For a detailed exegesis see E. Jakab, Ein fideicommissum aus der Praxis des Javolenus Priscus: D. 36,1,48(46) (11 epist.), in Th. Finkenauer, B. Sirks (ed.), Interpretationes Iuris Antiqui (FS Nishimura), 2018, 67–84.

to pass over his property according to his will.[17] However, there was also a significant difference, the missing substitution in Saturninus' case. Saturninus omitted to fix a *substitutio pupillaris*; he did not appoint Valerius Maximus as a substitutive heir if his son died intestate. Valerius Maximus remained just a trustee, a *fideicommissarius*. It is evident that our case was tried and judged under Roman law. Furthermore, it is also obvious that the persons involved belonged to Roman legal culture. Roman Britain was a Romanised country, with Roman citizens settling in Britain and provincials keen to adopt Roman culture and Roman law. Stepping forward to other parts of the Empire, where a strong local (Hellenistic) tradition survived, the picture can be more confused.

The law of succession as tool of political power

Tony Honoré pointed out, that the "upholding of codicils and of trusts" were two of Augustus's innovations − which were formed through legal opinions and legislation given by leading jurists.[18] But Augustus invented many more new rules in the law of succession! Looking for an extra source of revenue out of which to pay a professional army, he set up a new tax falling exclusively on *cives Romani*, the *vicesima hereditatium*, or five per cent estate duty. It applied to all but small estates and fell upon all heirs except close relatives; I don't need to say that it was bitterly hated by the Romans. To encourage lawful marriages and offspring in high society (and to defeat their frivolous lifestyle) Augustus imposed sanctions on the unmarried and childless. They could inherit little or nothing, for childless husbands and wives, not even between each other (the *lex Iulia de maritandis ordinibus* and the *lex Papia Poppea*).[19]

Furthermore, especially for the province of Egypt, Augustus established the so called *Idios Logos*, a 'Special Account' of the fiscus.[20] It served the needs of Roman provincial administration for raising more revenues. It administered imperial land, and acquired and sold waste land (*adespota*) and such properties that by law fell to the state, such as those of intestates and criminals. For the present, it is of relevance that it imposed penalties (fines or confiscation) for various offences against the rules of inheritance and marriage law.

17 E. Jakab, Inheritance, in P. du Plessis, C. Ando, K. Tuori (eds.), The Oxford Handbook of Roman Law and Society, 2016, 499-500; U. Manthe, Ein Sieg der Rhetorik über die Jurisprudenz: der Erbschaftsstreit des Manius Curius – eine vertane Chance der Rechtspolitik, in U. Manthe, J. von Ungern-Sternberg (eds.), Große Prozesse der römischen Antike, 1997, 74–84; F. Wieacker, The causa Curiana and contemporary Roman jurisprudence, The Irish Jurist 2 (1967) 151–164; Ph. Thomas, The intention of the testator: from the causa Curiana to modern South African law, in J. Hallebeek (ed.), Inter cives necnon peregrinos: essays in honour of Boudewijn Sirks, 2014, 727–740.

18 T. Honoré, Emperors and Lawyers, 1994, 33 ff.

19 Kaser, Knütel, Lohsse 2017, 415-417.

20 W. Schubart, Der Gnomon des Idios logos. Erster Teil (= Ägyptische Urkunden aus den staatlichen Museen zu Berlin, Griechische Urkunden, V/1), 1919.

Our main concern is the law of succession, especially the way it is mirrored in legal documents. Therefore, I focus on wills− as manifested, drawn up by testators, as individuals all over the Roman Empire. An overview of the documentary evidence can enable new issues on legal identity − as felt by Romans and non-Romans in a multicultural world. Considering both approaches can offer a more sophisticated picture. Before turning to simple statistics, I must introduce some further premises about the law of persons and the law of succession. It concerns strict boundaries set up by public law between people of different provenance, language or culture.

BGU II 388 (dated 158-9 AD) and the Gnomon of the Idios Logos

Court proceedings, a report on hearings presided over by Postumus, the prefect of Egypt (45-48 AD), can demonstrate the difficulties that arose in a mixed society. Sempronius Gemellus, a wealthy soldier, was murdered − and his death led to a panic in his family. We learn that the lady of his house, a certain Ptolemäis, immediately ordered one of the servants to hide the silver they possessed. Another person was asked to drive away the flocks possessed by the deceased. The family members were feverishly occupied with concealing belongings, at least the movables − before the officials arrived. In the present trial, the persons involved are accused of theft; it is a criminal procedure, the hearing took place before the judge of the Idios Logos. It turned out that Gemellus appointed his son as his sole heir in a will. He was represented in court by his guardian. An advocate was questioned too, a certain *Flavius Julius alias Sarapion*, who composed legal documents for the family − years before.

Here, we must have a glance at the special issues of the Idios Logos concerning inheritance and social mobility. The main rules − and previous decisions in delicate cases − of this 'Special Account' were collected in a so called Gnomon ('Handbook' or 'Regulatory Code').[21] It was first issued by Augustus and originally drawn up in Latin but preserved in a Greek translation (BGU V 1210 + P.Oxy. 3014).[22] Of the 114 preserved paragraphs of the Gnomon, 34 relate to inheritance (§§ 3–36, about 30%). This special guide has been collected, copied and sent around the province − to be applied by the Imperial fiscal administration.[23] The restrictions concerned the

21 Schubart 1919; G. Plaumann, Der Idioslogos. Untersuchung zur Finanzverwaltung Ägyptens in hellenistischer und römischer Zeit, Abh. d. Preuß. Ak. d. Wiss. 1918, Phil.-hist. Kl. Nr. 17, 1919; O. Lenel, J. Partsch, Zum sog. Gnomon des Idios Logos, 1920; S. Riccobono, Il Gnomon dell'idios Logos, 1950; J. Mélèze-Modrzejewski, Gnomon de l'idiologue, in V. Giuffrè (ed.), Les lois des Romaines, Milano 1977, 520–57.

22 For dating see Schubart 1919, 3–5 and 8; recently also A. Dolganov, Imperialism and social engineering: Augustan social legislation in the Gnomon of the Idios Logos, in Th. Kruse (ed.), Dienst nach Vorschrift: Vergleichende Studien zum „Gnomon des Idios-Logos", 2020 (forthcoming).

23 P. Swarney, The Ptolemaic and Roman Idios Logos, 1970, 77–81 stressed that the Idios Logos acted as sales agent, administrator, investigator and judge.

strict boundaries between different groups of the population: Roman citizens; *Astoi*, the citizens of Alexandria; and Egyptians, the provincial populace from the *chora*.[24] The significant differences in status (so typical for ancient societies) are particularly evident in the Gnomon. The fiscal rules tried to hold back any intercourse, any type of social mobility (marriages, networking, bequeathing etc.) between them.[25] It is worth quoting some rules from this famous collection: § 4 ordered that the property of those who die intestate and have no other legal heir is to be adjudged to the fiscus. § 18 (BGU V 1210, l. 56–58, § 18) quoted an imperial constitution of Vespasian; according to it, any inheritance left in trust by Greeks for Romans or by Romans for Greeks is to be confiscated. The constitution extended the limits of capacity for fideicommissa, too;[26] any type of last wills that violated the law had to be sanctioned with confiscation. § 52 set out that Romans were not permitted to marry Egyptian women. § 7 (l. 33-34) ordered that any wills not made according to the public ordinances of Roman law were void. § 8 extends these prescriptions also to codicils: if supplements in Greek were added to a regular Roman testament, they were to remain ineffective.[27]

Romans must have strictly observed *ius civile* in their last wills − as developed by archaic legislation, praetorian edicts, lawyers' decisions and Emperors' statutes, focused on the city of Rome. The severe rules of capacity excluded many persons whom a testator might wish to benefit. § 8 (BGU V 1210, l. 35–37) stressed that Romans were not allowed to make Greek wills; furthermore, if the clause 'whatever I shall order in Greek codicils shall be valid' was added to a Roman will, it was not admissible, for a Roman were not permitted to write a Greek will. The authorities took care that Romans wrote their wills exclusively under the formal and internal rules of *ius civile*.[28] The capacity to make wills and to take under a will was strictly linked to *status*: any type of succession was forbidden between Romans and Peregrines by Senatus consulta as quoted above.[29]

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24 Recently U. Babusiaux, Römisches Erbrecht im Gnomon des Idios logos, ZRG RA (Zeitschrift der Savigny-Stiftung, Romanistische Abteilung) 135 (2018) 109–115.

25 As already pointed out by L. Mitteis, Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs, 1891, 102–110.

26 Later on, this rule was strengthened again by the Emperor Hadrianus.

27 Riccobono 1950, 35–6; B. Strobel, Römische Testamentsurkunden aus Ägypten vor und nach der Constitutio Antoniniana, 2014, 30–1; M. Nowak, Wills in the Roman Empire. A documentary Approach, 2015, 194–9.

28 Th. Rüfner, Testamentary formalities in Roman law, in K. G. C. Reid, M. J.de Waal, R. Zimmermann (ed.), Comparative succession law, I: Testamentary formalities, 2011, 1–26; see already H. Kreller, Erbrechtliche Untersuchungen aufgrund der Graeco-aegyptischen Papyrusurkunden, 1919, 328–337; Riccobono 1950, 119–123.

29 There were exceptions and privileges for some social groups; see for it recently E. Jakab, Testamente, Soldaten und der Idios logos, in Th. Kruse (ed.), Dienst nach Vorschrift: Vergleichende Studien zum „Gnomon des Idios-Logos", 2020 (forthcoming), at Fn 19; A.

Otherwise, until the time of Septimius Severus, ordinary soldiers could not marry during their service, and even children of marriages contracted before entry, if born during service, did not count as born of a lawful marriage.[30] In the course of their service, which lasted over 25 years, soldiers were damned to live in unlawful relations (concubinage). Marriage-like relationships established during service and continued in a non-legalised state could not be cured by marriage until the *honesta missio*.[31] Also offspring procreated in such unions could only be legalised after the *honesta missio*.

Returning to the criminal case tried by Postumus, it is very likely that the female, Ptolemäis, who was keen to hide the movables, was the concubine of the deceased; probably she was also the mother of his son. Concerning the unlawful marriage and the probable status difference between the parties, she had a very limited chance of succession. Moreover, under the will, she could inherit not more than 500 drachmas from her deceased partner – as ruled by § 14 of the Idios Logos; all the rest fell under confiscation.

Of legal documents

Our main task is provincial legal practice; cases tried by provincial courts served as an introduction to the topic. In the following I focus on legal culture, as mirrored in documentary texts, especially in wills – as the subject of the present case study. How did such testaments look?[32] How many have been preserved? What is their message about legal culture and 'law in action'? Did the 'principle of personality' apply? Did the legal status of individuals (whether Romans, citizens of Alexandria or Egyptians) have a significant impact on their everyday legal practice? A wide range of documents should be scrutinised to give a proper answer; it still requires future detailed studies.

Fortunately, there is a fragmentary text preserved on a tiny wooden tablet, documenting the last will of a citizen (who remained anonymous) of Roman Britain.[33] It was excavated long ago in North Wales, in Trawsfynydd; its transcription and edition were published by R. Tomlin: "The book when first found was of the form and size of a thick octavo. It consisted of some 10 or 12 leaves. These were joined together with

Lovato, Testamentum militis. Sull consodilamento giuridico di un privilegio, in M. Chelotti et al. (ed.), Scritti di storia per Mario Pani, 2011, 162–163; J. Stagl, Das „Testamentum militare" in seiner Eigenschaft als „ius singulare", Revista de Estudios Histórico-Jurídicos 36 (2014) 130–131.

30 S. E. Phang, The Marriage of Roman Soldiers 13 B.C.-A.D. 235: Law and Family in the Imperial Army, 2001, 197 ff.; J. Evans Grubbs, Women and the Law in the Roman Empire: A Sourcebook on Marriage and Widowhood, 2002, 158–159; Nowak 2014, 11 ff.

31 M. Mirkovic, Die römischen Militärdiplome als historische Quellen, in W. Eck, H. Wolff, H. (eds.), Heer und Integrationspolitik, 1986, 249–57.

32 H. Hurst, The Textual and Archaeological Evidence, in M. Millett, L. Revell, A. Moore (eds.), The Oxford Handbook of Roman Britain, 2016, 96 ff.

33 R. S. O. Tomlin, A Roman Will from North Wales, Archaeologia Cambrensis 150 (2001) 143-156.

a wire which was entirely corroded when it was first found. All the leaves except the covers had a narrow raised margin on both sides."[34] Of the original text, just some fragmentary lines are preserved:

...[ante]quam moriar ex asse herede[m iubeo] [---] ceteri alii omnes exheredes sunt[o---] leg[e] non alia [quam] quanta quibusqu[e ---] --- ded[ero] donavi donari[q] u[e] iusser[o ---] ... Tuque MA[---]SENE adito ce[r]nito hereditatem meam --- centum p[ro]ximis morti<s> mea(e) quibus DIE [sci]es [po]t[e]risque sci[r]e te mihi esse heredem le legitumam testibus pr(a)esentibus heredes sunto qui [sci]ant se eius rei ADVO CA[--- e]sse quod si ita n[on] creveris hereditatem [meam s]i aditum noluer[is exher]es esto [---] C[---]AM quam [ex asse mihi] heredem instutui

"[*The name and status of the testator*] ... before I die, I order that [*name*] be my sole heir...

Let all others for me be disinherited [...] on no other terms than that as much as I shall give, have given, shall have ordered to be given [...] and you [enter upon, accept my estate [... *within*] the next hundred [*days*] after my death in which you know or can know that you are my legitimate heir, in the presence of witnesses [...] let the heirs be those who know that they are [...] of this property.

But if you do not thus accept my estate, if you refuse to enter upon it, be thou disinherited [...], whom I have instituted as my sole heir."[35]

The thin rectangular slab of wood was covered with wax, which preserved the writing in cursive Latin. It formed the first page of a Roman will, bequeathing the property with solemn words: "... before I die, I order that [*name*] be my sole heir... Let all others for me be disinherited …" According to Tomlin, it is a veteran auxiliary soldier who designates a woman as sole heir to his estate, possibly his daughter (or wife?), and charges her to accept it within a hundred days.[36] The rest followed on tablets, which have now been lost.

According to the sources, Roman wills were written on waxed tablets − but, surprisingly, a very few have survived: FIRA III 47 (will of Antonius Silvanus); R. Tomlin, Archeologia Cambrensis 150, 2001, 143-156; P.Mich. VII 437; BGU VII 1695; BGU VII 1696. There are four wills known from Egypt; then this British example from Wales, and the four testaments from North Africa (of unclear provenance) put up recently for auction. Roger Tomlin speculated that the number of Roman citizens in the second century in Britain might have grown up to 100,000; the number of last wills must have exceeded half a million or more in Britain alone − but all that survived is one single tablet.

By the way, solemn Roman wills followed an archaic pattern;[37] the strict wording is

34 Tomlin 2001, 145.

35 Translation of Roger Tomlin.

36 Tomlin 2001, 152.

37 Rüfner 2011, 4-6; A. Watson, The Law of Succession in the Later Roman Republic, 1971, 8-21.

presented by Gaius in his *Institutiones* but also delivered in formula books from Roman Egypt, for instance in the template of P.Hamb. I 72.[38] Therefore, the main clauses of a broken text can easily be completed using better preserved samples. The best example is that of Antonius Silvanus, drawn up on wooden tablets, in a military camp close to Alexandria, in AD 142 (FIRA III 47). The testator was a soldier, a cavalryman, who served in Egypt and chose the old formula to compose his last will. The comparison with the British tablet demonstrates the strong formalities, repeating the same clauses − notwithstanding the very different provenance. The legal language is obviously congruent: *ex asse, exgeredes sunto, cernito* … Antonius Silvanus appointed his son as his sole heir – and ordered all others to be disinherited. He set a deadline of a hundred days to accept the inheritance − and appointed Antonius R…, his brother, as a substitute. The ordinary soldier, not even a Roman citizen yet, met all social expectations with his will: appointing his nearest blood relatives, letting legacies to the mother of his son, to his brother, and comrades in his squadron and manumitting his old slave.

Tabulae hereditatis used the archaic formula of *mancipatio*, a transaction through 'copper and scale'.[39] In line 5 we read: 'Purchaser of the estate for the purpose of testation: Nemonius, corporal of the troop of Valerius …' It is not clear if the formalities of the old *mancipatio* − as known in the Twelve Tablets from the 5th century BC − were carried out precisely, even by this soldier in the military camp of Roman Egypt, in the 2nd century AD. It seems more likely that the *mancipatio* lost its original significance, but the solemn wording was carefully retained in notary practice as a special kind of deed, a unique formula for drafting respectable wills. Looking at the sources, there are altogether fifteen wills that came down depicting the archaic formula with 'copper and scale'. Most of these documents were drawn up in the 1st or 2nd century AD, in Roman Egypt. The first is ChLA IX 399, dated at 91 AD; the last P.NY II 39, dated 335-345. It means that the formula was used over almost four hundred years. It is remarkable that, of all these mancipatory wills, only four were composed in Latin; all others are in Greek (although these were precise translations of the Latin formula). Of the fifteen deeds applying the very Roman formula, there are only four wills of soldiers or veterans (27 %). The low representation of the Roman army can serve as a strong argument that the traditional Roman formula cannot be explained simply by military connections. Furthermore, the four wills composed in Latin are not necessarily congruent with those of soldiers.[40]

But let's scan the entire set of documentary evidence! I restrict the simple statistical analysis to the wills drafted before 212 AD, before the *Constitutio Antoniniana*.

38 E. A. Meyer, Legitimacy and Law in the Roman World: tabulae in Roman Belief and Practice, 2004, 44-63.

39 Meyer 2004, 265-76.

40 Latin ChLA IX 399, ChLA X 412, FIRA III 47 and the template P.Hamb. I 72. Wills of soldiers or veterans are represented in P.Select 14, FIRA III 47, ChLA X 412, BGU I 326 (50% congruent).

Checking the wills delivered from the Roman period, we get a total of 68 texts; 26 Roman wills and 42 local wills. The obvious disproportion of the local wills can be cleared if we consider the geographical provenance. It is remarkable that, of the total of 68 documents, altogether 31 came down from Oxyrhynchos; 4 Roman wills and 27 local wills. Subtracting them from the opening data, we come to the following result: notwithstanding Oxyrhynchos, there are 22 Roman wills and 15 local wills preserved by the sand in Egypt. Did local custom play a less significant role than commonly supposed (except in Oxyrhynchos)?

There is a total of 26 Roman wills known from the Roman Empire. Of these, four documents were preserved from North Africa (?), one in Britannia, and twenty-one in Egypt. Considering the language issue, 16 were composed in Latin, 10 in Greek. It is interesting to compare them with the status issue. It should be scrutinized whether the Latin language was used only by soldiers or veterans. Can it be assumed that using the Roman formula (written in a formal, archaic Latin legal language) was merely an impact of the Roman army? Anyway, of the total of 26 Roman wills, only 8 can be linked – with some certainty – to the Roman army. They are only 50 % of the wills drawn up in Latin.

Looking at the names of the parties (the personal names of testators, heirs, recipients of legacies, witnesses), it can be found that, in the wills drafted in Greek, 6 preserve Roman or Roman-styled names; it means that Roman citizens also preferred to use the Greek language; nevertheless they applied the very Roman formula, translated into Greek. This result is in no way surprising: it is widely known that veterans of the Roman army belonged to local ethnic groups and also kept their local identity after receiving Roman citizenship. Furthermore, it is very likely that freedmen or even Romans living in the countryside were strongly assimilated into the local provincial social classes. These people often understood only Greek, as also demonstrated in their wills: at the end of a testament written nicely in formal archaic Latin, there is often a personal *hypographe* (subscription, signature) appended by the testator in Greek.

The "horror of intestacy"

The last case I wish to introduce concerns the legendary 'horror of intestacy', as already quoted by Cato.[41] A papyrus from Roman Egypt, P.Mich. III 159, preserved an official document that concerns a Roman military milieu, too. The deed is dated AD 37-43, but its exact provenance is unknown because it came from antiquity traders. Likely, it was drawn up in the Arsinoite *nomos*, in the Fayum. The text is in good, official Latin, written by a skilled hand – recording a decision in an inheritance case. It was tried in a military camp because almost all those involved were soldiers. The *praefectus castrorum* appointed a *centurio*, a certain Publius Matius, as *iudex datus* (judge) to settle the dispute; this Publius Matius was obviously a Roman citizen, serving in the third Cyrenaic legion.[42]

41 Plut. Cat.mai. 9.6.

42 B. Palme, Römische Militärgerichtsbarkeit in den Papyri, in H.-A. Rupprecht (Hg), Sympo-

The lines 1-5 summarise the essential elements of the trial: the names of the parties, agency, calling the soldiers by their military rank and unit. Thereupon follows the legal problem to decide: *ageretur de proximitate*, consanguinity, or the nearness of the blood relationship. In line 6, the centurion is appointed to judge in high technical language: *iudicem dedisset iudicareque iussisset*. The high officer, the prefect of the camp, who was in charge of jurisdiction, empowered a centurion of his troop to decide in the present case.[43]

At first glance, the many names and military ranks are confusing. Several people were involved in the litigation: Dionysius, the son of Manlius, represented by his son, M. Trebatius Heraclides, on one side; and M. Apronius and M. Manlius on the other side. It is not easy to say who was plaintiff and who was defendant. The phrase *absentis causam defendit* seems to indicate that the elder Dionysius (the brother of the deceased) must have been the defendant. Nevertheless, the verb *defendere* has different meanings: in several legal sources, it just stands for 'to represent'. We do not know if the elder brother, the veteran Dionysius, who lived on his estate in the countryside, got his hands on the estate of the deceased − or the subject of the present trial is just to decide who can apply for the *bonorum possessio intestati* (for the civil and military property of the deceased) as well.[44]

Previous documents can be assumed − but were not copied into the present court proceedings, such as the petition (*actio*) of the plaintiff, or some preparatory procedural acts carried out by the parties and laid down in formal legal documents, such as *vadimonia* etc.[45] In this trial, both parties seem to have produced evidence about their family connections to the deceased.

Educated on modern Roman law textbooks, the object of the trial seems a rather simple case, a mere school-exercise. However, the *centurio* Publius Matius does not seem to have felt like that. He gives the impression that he was rather scared, and therefore employed three advisors to consult about the facts and the legal background. Based on their names, it can be assumed that at least two of them were not Roman citizens, but provincials with knowledge of local customs, probably also local laws. Why?

The judges stated that no valid last will was produced by the litigants: either the deceased never made one, or he did but it turned out to be void (*intestatus decessisse diceretur*). After the examination of the evidence, Publius Matius pronounced (*sententiam dixit*) that Dionysius son of Manlius, the brother of the deceased should be considered the nearest blood relation.

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sion 2003, 2006, 358-394.

43 B. Palme, The judicial system in theory and practice, in J.G. Keenan, J.G. Manning, U. Yiftach-Firanko (eds.), Law and Legal Practice in Egypt from Alexander to the Arab Conquest, 2014, 482-502.

44 Kaser, Knütel, Lohsse 2017, 393-395.

45 Kaser, Knütel, Lohsse 2017, 452-453; A. Roger, Vadimonium to Rome, ZRG RA 114 (1997) 160; J. Platschek, Vadimonium factum Numerio Negidio, ZPE 137 (2001) 281.

What documents might the two young soldiers who lost the trial have produced? It seems to me that they argued they were not only the sons of the sister, but of the deceased as well. Looking between the lines and considering that the case was tried in Egypt – and also soldiers of local provenance were employed for legal advice – one can assume a "local marriage", an Egyptian sister-marriage in the background. Although it counted as incest (a crime) under Roman law it can be taken that such marriages were also tolerated among provincials in the Roman period of Egypt. The sister's sons might be the offspring of such a marital conjunction.

The existence of such marital unions can also be assumed based on the relevant legislation and precedents quoted in later proceedings. Among others, the Emperors granted several privileges to their legions. For instance, § 35 of the Gnomon of the Idios Logos attested that 'Children and kinsmen are permitted to inherit from soldiers who die intestate if the claimants are of the same genos, status.' It means that children procreated in unlawful marriages could succeed their (soldier) father under intestacy.

However, the very Roman context was obviously a disadvantage for the deceased's sons in the case delivered in P.Mich. III 159. Probably the judging *centurio* was young, rather unskilled and did not feel free to adjudicate just upon equity – as delivered later in other similar cases adjudicated by a prefect of Egypt or by an Emperor.

To conclude

This short introduction to the world of documentary texts already shows, that the survival of sources tends to occur by chance. There are plenty of wooden tablets excavated in Italy in the Vesuvian area or in the provinces, also in Britain; however, the main body of sources was overwhelmingly preserved by the sands of Egypt. In looking at papyri from Roman Egypt, scholars are not only interested in administration or jurisdiction, but also in everyday legal practice in this very province. The significance of this rich evidence should not only be restricted to Egypt. Reports of court proceedings, citation of previous decisions of high judges, statutes of administration or private legal documents – the essential issues can be extended by analogy also to other cases, from other provinces, and even to the legal life of Rome.

A further issue concerns the different types of sources. Legal opinions of jurists offer a short summary of facts and a compromised legal opinion. For centuries, our access to Roman law was exclusively seen through the prism of this special legal approach. Documentary texts enable a different approach, that of every day legal life.[46]

We may ask whether there was a direct link between citizenship and documentary practice—in spite of documentary evidence. Did the principle of personality always apply? For proper answers, further investigations are wanted.

46 E. Jakab, Prozess um eine entlaufene Sklavin (P.Cair.Preis.^{2} 1). Vertrag in der provinzialen Rechtskultur, ZRG RA 135 (2018) 520-526.

Legal historians dealing with this topic offered very different explanations for this phenomenon. In 1891, Ludwig Mitteis published his pioneering book 'Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Reiches'. According to him, the papyri from Egypt demonstrate that the 'new citizens' were consequently obliged to live according to Roman law.[47] Roman law conquered the provinces, and there was an eternal 'antagonism', a fight between Roman law and indigenous laws—which ended up finally with the overwhelming victory of Roman law. Some decades later, even Fritz Pringsheim believed in a 'Hellenistic resistance to Roman influence', lasting for centuries. All these concepts are to be revised.[48]

Law, custom and imperial jurisdiction − the legal order is a social action in general and a communicative action in particular. Like Jürgen Habermas, we can emphasise that "orders based on subjective recognition of their legitimacy rely upon their consensual validity. That is to say, individuals undertake and shape their social actions in order to respond to norms of action, both because they themselves recognize those norms as binding and because they know that other participants in their society feel an equal obligation to recognize those norms."[49]

47 Mitteis 1891, 148-156.

48 F. Pringsheim, The Greek Law of Sale, 1950, 481-482.

49 J. Habermas, Theorie des kommunikativen Handelns, Band I. Handlungsrationalität und gesellschaftliche Rationalisierung, 2. Aufl., Frankfurt a.M. 1982, 190.

Arató, Balázs[1]

The Legal Institutions of Asset Preservation and Asset Transfer in Hungary

1. Introduction; Typical life situations where asset preservation and asset transfer may be relevant

Asset transfer and asset preservation are hot-button issues today. While Western Europe boasts considerable traditions in this area too, legal devices that had been existing in the western part of the continent for decades, have only recently appeared in the countries of the former socialist bloc. Until recently, the demographic crisis experienced all over Europe and the relatively weak will and ability of the succeeding generation in Central and Eastern Europe have also been exacerbated by a lack of legal institutions facilitating the preservation and transfer of assets. In Hungary, legal devices supporting estate planning have already been established, and not only do they offer solutions to domestic problems, they are also attractive to foreign investors.

First, we should review briefly the typical life situations where interest in the institutionalized forms of asset transfer and preservation can arise, i.e. where the legitimacy of the available legal institutions is derived from. For example, when may a person become interested in transferring his assets or taking certain measures to protect such assets in the course of good faith business practices? It is high time to address the issue of succession within family businesses across Europe. Sad statistics show how many companies fall victim to the fact that the head of the family does not prepare timely or with due care for the generational change and that there is no successor who would be able to continue the business. The success of succession in family businesses depends to a large extent on the retiring leader making well-informed use of the opportunities inherent in the institutionalized forms of wealth transfer and preservation. At the same time, the issues of asset preservation are on the agenda not only for family businesses, but also, for example, when a wealthy owner wants to dispose over his estate while still alive, but has concerns about the character of his future heir. Worries in such cases mostly concern the child, who lacks the skills to preserve and increase the family wealth and it is feared that he will live off the accumulated assets, or risk or squander them by making bad financial decisions. In case of multiple heirs, the equity owner may also fear that a dispute over inheritance breaks out between his descendants (potentially born from different relationships)

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that leads to a further prolongation of the already time-consuming probate procedure and ultimately to a loss of property.

Wealth transfer also offers solution to cases, where the individual assets are located in different countries and thus, upon succession, multiple probate proceedings would need to be conducted in accordance with the laws of the various countries. This problem is not completely bridged by the European certificate of succession either.

Accordingly, in the above cases, the purpose of the wealth transfer is to preserve its unity and to ensure that the heirs (or other beneficiaries) benefit from the proceeds of the accumulated wealth without compromising its actual assets.

The need for wealth preservation has prompted the legislator to expand the range of legal instruments serving this purpose. In the spirit of this consideration, the new Civil Code allows for fiduciary asset management and introduces the legal concept of private foundations (family foundations). While in case of the former, a largely Anglo-Saxon influence can be detected, the latter has proved to be an effective device mainly in the Austrian legal system in preserving complex (family) estates over multiple generations. Our new legal institution serving similar purposes -that has been in effect since 2019- is the asset management foundation, through which the legislator intends to provide a special alternative for the preservation and increase of truly significant estates.

Since in Hungary lineal-descent inheritance and giving have not been subject to taxes and duties[2] for almost a decade, the above listed legal options are primarily used for preserving and enriching estates and not as means for tax optimization.

The newly adopted legal institutions may also be attractive to foreign equity owners, because during the geographical diversification of their assets, they may now focus on Hungary and may take advantage of the extremely favorable Hungarian tax environment. Below, we examine the professional forms of asset transfer and asset preservation institutionalized in the Hungarian law.

2. Fiduciary asset management

The new Civil Code introduced fiduciary asset management contracts in 2014, which have no historical precedents whatsoever in the Hungarian legal system. In enacting this legal institution, the device of the trust -a concept of widespread application in Anglo-Saxon legal systems- served as a model, but due to the specifics of the Hungarian legal environment, certain corrections had to be made. In light of this, we can conclude that fiduciary asset management has become an integral part of the Hungarian law as a legal institution performing the functions of trusts.[3]

2 See e.g., Sec. 16 (1) i) of Act XCIII of 1991 on Duties that provides that the share of the estate received by the decedent's next of kin or surviving spouse shall be exempt from inheritance duty.

3 See details in B. SZABÓ Gábor, ILLÉS István, KOLOZS Borbála, MENYHEI Ákos,

The introduction of fiduciary asset management in Hungary was simultaneously met by aversion rooted in philosophical traditions and expectation born out of natural needs. The legislator had to weight, in this situation, which model to follow and to consider the regulatory environment into which this completely new, but undoubtedly gap-filling legal institution was adopted.

Fiduciary asset management is a special, atypical legal relationship that carries certain characteristics of agency, professional service and consignment relationships. Contracts are not the only way to establish fiduciary asset management relationships, they can also be created by unilateral statements, such as a will, provided of course that the trustee makes a declaration of acceptance.[4]

Fiduciary asset management under the new Civil Code is a three-party legal relationship, the subjects of which are the settlor, the trustee and the beneficiary. The essence of this legal concept is that the settlor transfers the ownership of his property or properties (assets) to the trustee for the purpose of asset management, determines the method of asset management and at the same time designates the beneficiary, i.e. the person in whose interest and for whose benefit the assets must be managed.[5] The trustee, therefore, becomes the owner of the assets entrusted to him, but is obligated to manage the assets separated from his own assets or other assets he manages, and keep separate records thereon. Fiduciary asset management is an independent title for the transfer of ownership and must be indicated as such in the real estate register and the company register. Therefore, if for example the founder of a family business transfers all shares of the company to fiduciary asset management, the trustee will be listed in the company register as the holder of the shares, but he will acquire the ownership of shares under the title of fiduciary asset management. A further feature of the legal relationship is that the trustee manages the assets in his one name, but on behalf of the beneficiary designated by the settlor. This is also reflected by the related terminology, according to which the trustee is the legal owner and the settlor is the economic owner. The main advantage of splitting the ownership and the decision-making positions is to provide the expertise needed for making decisions and keeping private estates together.

The formal requirements for fiduciary asset management contracts should also be mentioned here. The Civil Code provides for a so-called simple writing, which

SÁNDOR István: *A bizalmi vagyonkezelés*, Második, bővített és aktualizált kiadás, Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2018.

4 See Sec. 6:329 (2) of the Civil Code providing that where fiduciary asset management is created under a will, it shall take effect upon the trustee`s acceptance of the appointment under the conditions set out in the will with a retroactive effect to the death of the testator.

5 Civil Code, Sec. 6:310 [Fiduciary asset management contracts] (1) Under a fiduciary asset management contract the trustee undertakes to manage the assets, rights and receivables entrusted to him by the settlor (hereinafter referred to as: assets managed) in his one name and on the beneficiary's behalf, and the settlor undertakes to pay the fee agreed upon. (2) The contract shall be executed in writing.

means that, as a general rule, neither legal representatives nor witnesses need to be involved in the transaction.[6] If, however, the ownership of real estate is conveyed while establishing fiduciary asset management relationship, then the additional requirements stated by specific legislation i.e. the Act on Real Estate Registration[7] are applicable at least to the documents, based on which entries to the real estate register are made. Obviously, different requirements apply if the fiduciary asset management concerns business shares, rights, claims, or contractual rights and obligations. Depending on this, we have to keep in mind the requirements of suitability for registration by the court of registration and the requirements applicable to subrogation[8], assignment[9] and transfer of contracts[10]. The trustee may be remunerated for his activities, which is payable by the settlor. The parties may also agree that the trustee is entitled to remuneration depending on and to be paid from the outcome of the asset management activity. Through the latter, the legislator also recognizes the legitimacy of success fee-type arrangements -which is widely accepted by judicial practice- for fiduciary asset management relationships.[11]

Upon the termination of the fiduciary asset management relationship, the trustee releases the managed assets to the person designated by the settlor, who can be the former beneficiary of the fiduciary asset management, or even a new trustee. It is important to note, however, that the death or dissolution of the settlor, the trustee, or the beneficiary does not, or does not necessarily, result in the termination of the fiduciary asset management relationship. This is where one of the main virtues of this legal device lays, since the owner of the estate can set up, while being alive, a long-term system of guarantees making sure that his estate remains unified and serves the intended purpose.

Fiduciary asset management contracts can be concluded for definite or indefinite terms, but not more than fifty years. This provision of the Civil Code is compulsory and thus the parties cannot derogate therefrom by their agreement. In my opinion, this kind of time constraint is not very favorable to founders of family businesses, because their minds are set (or will be set) for much longer time periods once family businesses in Central and Eastern Europe have multi-generational history. For a long time, the issue of the ways of terminating fiduciary asset management contracts has been uncertain. Can the settlor exercise the right of termination, if the fiduciary asset management contract was concluded for an indefinite term? A positive answer would

6 See Sec. 6:310 (2) of the Civil Code.

7 See Sec. 32-36 of Act CXLI of 1997 on Real Estate Registration.

8 See Sec. 6:202 of the Civil Code.

9 See Sec. 6:193-6:201 of the Civil Code.

10 See Sec. 6:208-6:211 of the Civil Code.

11 A success fee or commission is a special service that is due in exchange for taking care of a matter or for performing an activity subject to the occurrence of a result causally related thereto (BH2014.46.).

follow from the agency nature of the legal relationship, the Civil Code, however, provides that the settlor may terminate the fiduciary asset management contract established for an indefinite term, if the contract, itself, does not provide otherwise. In other words, it is possible to exclude or limit the right of termination.[12] Accordingly, the legislator sets forth a special rule for fiduciary asset management relationships regarding the exclusion or restriction of the right to terminate. This option will undoubtedly be attractive to family businesses interested in the long-term survival of the legal relationship. The trustee may terminate the contract with three months' notice, but the Civil Code allows the parties to derogate in this regard. Finally, the settlor has the option to recall the trustee by simultaneously appointing another trustee. In the latter case, the legal relationship survives, but there is a change in the person of the trustee. Furthermore, the Civil Code states that the settlor, himself, may arrange for his own replacement in the event of his death or dissolution without legal succession, by appointing in the contract the person who is entitled to exercise the rights and fulfill the obligations of the settlor. The settlor is also entitled to limit the rights of the designated person, i.e. he can for example exclude the termination of the asset management contract by the designated person.[13]

The legal relationship at hand is also special because, although it is an agency-type relationship, the Civil Code expressly states that the trustee may not be instructed either by the settlor or by the beneficiary. Contrary to this, in traditional agency contracts, the principal has a wide scope of instruction rights.[14] Nevertheless, the trustee does not have unlimited right to dispose over the assets entrusted to him, rather he may dispose over the managed assets within the limits of and subject to the conditions set out in the fiduciary asset management contract. Consequently, the settlor has the best opportunity to have a formative impact on the asset management activity at the time of contract conclusion.

The trustee -by taking into account the primary objective of serving the beneficiary's best interest- is obligated to protect the managed assets from foreseeable risks under the principle of reasonable business practices. This creates an enhanced requirement in comparison with the principle of reasonable conduct expected in a particular situation.[15]

Therefore, the settlor must carefully consider before contract conclusion his objectives, interests and the potential future risks that he wishes to avoid, because this

12 Compare with Sec. 6:213 (3) of the Civil Code providing that "unless otherwise provided for in this Act, a contract entered into for an unfixed duration, setting up a long-term relationship may be terminated by either party giving a reasonable period of notice. Any exclusion of the right to terminate shall be null and void."

13 See details in BODZÁSI Balázs: *A bizalmi vagyonkezelés (trust) magyar szabályozását érintő módosítások*, In: Fontes Iuris, Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2018/1., 5.

14 See Sec. 6:273 (1) of the Civil Code providing that the agent shall follow the instructions of the principal.

15 See details in BODZÁSI Balázs: *A bizalmi vagyonkezelés (trust) magyar szabályozását érintő módosítások*, In: Fontes Iuris, Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2018/1., 2.

is the time when he has the most power to shape the legal relationship according to his own interests. After contract conclusion -in the absence of the right to instruct- the primary task of the settlor and the beneficiary will be monitoring the asset management activity. If the settlor finds that the trustee has breached the contract, he can, of course, bring action against the trustee. Such as, for example, when the trustee transfers a specific property to a third party without authorization. The settlor may, at this time, reclaim the asset in question from the third party who did not acquire it in good faith or for consideration. Of course, the beneficiary can also exercise these rights, since the assets are managed for his benefit, and therefore, he also has a legitimate interest in keeping the assets together and having them managed according to the settlor`s instructions included in the contract. The scope of exercising the right to check must otherwise be elaborated by judicial practice.[16]

Generally speaking, the purpose of fiduciary asset management, on the one hand, is the separation of assets (for example before starting a risky business or concluding marriage) and, on the other hand, is providing income to the beneficiary by the settlor, without the beneficiary bearing the burden of making the necessary decisions, because e.g. he may lack the required skills. The main advantage of fiduciary asset management for family businesses is that even in the absence of capable successors, the founder can ensure the preservation and enrichment of the family estate by transferring e.g. all shares held in the family business to fiduciary asset management and by designating the beneficiary and determining the method and viewpoints of asset management. Thus, even if the offspring lacks the required abilities, he can still be taken care of without jeopardizing the family business and having to worry about the wasting of the family wealth. This legal institution also allows the use of arrangements that are excluded or only allowed to a limited extent in case of wills. For example, when assets are transferred to fiduciary asset management, the founder of the family business may provide that the ownership of shares will pass to the beneficiary subject to meeting certain conditions (for example, obtaining qualifications or diploma). It is also possible to cover the costs of the studies required for acquiring ownership of the shares from the proceeds of the managed assets. This legal device is, therefore, characterized by a degree of flexibility that wills and other transactions typical in the event of death usually lack. For example, fiduciary asset management can also be used for conveying assets much later than the death of the settlor and according to a predefined procedure to the successors, who meet the relevant requirements and are fit to continue the family business. In case of wills, this arrangement would be inconceivable, since such a provision is invalid under the rules of succession. These are precisely the advantages that make fiduciary asset management so attractive to family businesses interested in wealth preservation and enrichment. In conclusion, the Hungarian rules on fiduciary

16 See details in SÁNDOR István: *A bizalmi vagyonkezelési szerződés*, In: OSZTOVITS András (szerk.): *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok Nagykommentárja*, III. kötet, Budapest, OPTEN Informatikai Kft., 2014., 797.

asset management have become sufficiently flexible. They provide adequate guarantees and thus this legal device has become an excellent solution for the challenges of asset transfer and preservation and that of generational changes.

At the same time, the last five years did not bring a breakthrough in the propagation of fiduciary asset management. The reason for this, on the one hand, is that due to the novelty of the regulation, few were informed that this legal device was adopted into our legal system, and on the other hand, it took some time for the legislator to eliminate the ambiguities and inconsistencies in the normative text. The spreading of the legal form might also have been hindered by the innate mistrust that characterizes the thinking of Hungarian businessmen –perhaps due to to historical experiences- and that equity owners were reluctant to transfer the ownership of their core assets.

Thanks to the statutory guarantees and the benefits offered by this legal arrangement, however, today more and more people choose this method of wealth preservation. To make fiduciary asset management a more attractive option, the legislator has also amended several related pieces of legislation. Examples include the Act on Judicial Enforcement, the amendment of which strengthens the asset protection function of fiduciary asset management, and the Acts on Corporate Tax and on Personal Income Tax, which make this vehicle increasingly popular from a taxation aspect. Regarding the asset protection function of the legal institution, it must be stressed that despite previous disputes, the untouchability of assets under fiduciary asset management now seems unambiguous in judicial enforcement procedures brought against the settlor, provided that the conveyance of property to fiduciary asset management does not involve the concealment of assets under the Civil Code.[17] Contrary to the former regulation, the party seeking judicial enforcement can longer terminate the fiduciary asset management and only the court can hold -in a lawsuit brought for establishing the relative ineffectiveness of the contract- that a transaction aims at the concealment of assets and impose the legal consequences resulting therefrom.

In summary, the concept of fiduciary asset management is a gap-filling development in the Hungarian civil law that provides solution to a number of problems that could not be tackled with traditional legal institutions. At the same time, some circumstances must also be taken into account in case of fiduciary asset management. Such as, for example, the compulsory share of inheritance, which is the part of the estate that the testator's next of kin is entitled to. The Civil Code provides that in determining the compulsory share, the assets under fiduciary asset management must be included.[18] Choosing the right trustee may also be a problem. Given the novelty of the legal institution, there are not many market players who would be adequately prepared

17 See Sec. 6:120 of the Civil Code.

18 Sec. 7:80 (1) of the Civil Code provides that the basis of a compulsory share of inheritance is the net value of an estate, and the net value, at the time of advancement, of the advancement granted by the testator inter vivos, including the value of the assets that the testator transferred to fiduciary asset management.

to perform such tasks, while this is a basic expectation, since the very essence of the legal relationship is trust. Thus, if the founder of a family business without a suitable successor, seeks to preserve the unity and income-generating capacity of the family fortune through fiduciary management, he must devote sufficient time to planning and electing the right partner. Both natural persons and legal entities can be appointed as trustee, but pursuing this activity in a professional manner is subject to license and meeting a number of conditions. Finally, the tax implications may also vary depending on who carries out the activity.[19]

3. The asset management foundation

As we could see above, the new Civil Code has created a new vehicle for preserving family wealth across generations by introducing the concept of fiduciary asset management. This legal institution, however, did not offer a comprehensive solution for every life situation due to its limitations. Its terminability arising from the contractual relationship and its time constraint can be pointed out as disadvantages.

Perceiving this, the legislator passed the bill on asset management foundations in the spring of 2019,[20] creating a special combination of fiduciary asset management and private foundations examined in detail below. This new legal form gives economic actors interested in wealth transfer, intergenerational asset preservation and wealth creation a new legal instrument applicable in virtually any life situations.

The legislative intent behind the Act on Asset Management Foundations, therefore, was to make a special type of foundation available to investors and estate owners for the purpose of managing their assets. These foundations -similarly to other foundations regulated in the Civil Code- are separate, independent legal entities and their specialty is that they carry out the asset management as their main activity. According to the applicable law, the asset management foundation may engage in the management of assets entrusted to it and other assets received by it for fiduciary asset management for a similar purpose.

The asset management foundation is established by the founder with the goal to manage the assets granted by him, to use the so generated proceeds to accomplish the objectives and tasks set out in the charter and to provide financial distributions to the designated beneficiary.[21]

19 See details in Act XV of 2014 on Trustees and the Rules of Their Activities (Bvktv.).

20 See Act XIII of 2019 on Asset Management Foundations.

21 See Section 2 (1) of Act XIII of 2019 on Asset Management Foundations providing that the asset management foundation may be established for the purpose of managing the assets conveyed by the founder and to ensure that proceeds therefrom are used for implementing the tasks specified in the charter document and for providing financial distributions to the person or persons designated as beneficiaries.

Accordingly, the function of the asset management foundation -similarly to fiduciary asset management- is to provide financial distributions to the beneficiaries. Asset management foundations may be established not only for private, but also for public interest purposes, however, the law sets forth special rules for asset management foundations created for such purposes.

The first asset management foundation established in Hungary for public interest purpose was the asset management foundation of Corvinus University, Budapest, which was set up as a pilot project in the spirit of developing a new structure for operating universities.

The minimum capital requirement of the asset management foundation is HUF 600 million, that is, the founder must allocate assets of at least this value to the foundation. This minimum capital must be provided by the founder upon the establishment of the foundation, before submitting the application for registration. Here, unlike in case of other legal entities, the initial capital (assets allocated to the foundation) cannot be provided later; this obligation must be met in full upon establishment. The law only permits the subsequent provision of the part of the asset contributions that exceed the minimum capital. It should be emphasized that the minimum capital does not include the assets transferred for fiduciary asset management. In other words, the minimum capital must be provided to the foundation by the founder without regard to the foundation`s assets received for fiduciary asset management.

Assets may be contributed, similarly to the establishment of companies, both in cash and non-monetary assets (in-kind contribution). However, there is an important difference: in case of asset management foundations, in-kind contributions must be evaluated by an auditor in all cases. The provided non-monetary contributions (in-kind contributions) must be included in the charter itemized by assets, with all details necessary for identification. The founder may decide to reserve the founder's rights to himself, or may, at his discretion, delegate them in whole or in part to the foundation or the board of trustees. One of the important goals of regulating this novel legal form in the Hungarian law was "to enable asset management foundations to be "autonomous" by guaranteeing that their long-term (potentially decades long) operation in pursuance of their goals is independent from the founders by ensuring the founder cannot intervene in this process, including by the exercising of the founder's rights."[22] With regard to the high minimum capital, the legislator imposes as an additional guarantee the requirement of appointing a permanent auditor, as well as the establishment of a supervisory board beyond the board of trustees of at least five members that acts as the executive body. This of course entails significant costs, which, depending on our point of view, can even be regarded as a disadvantage of the legal instrument. At the same time, the incurring costs should be considered in light of the fact that those who can meet the requirements stated for the assets to be allocated

22 Quote from the ministerial reasoning attached to Act XIII of 2019 on Asset Management Foundations, in particular the detailed reasoning attached to Section 5 of the Act.

to the foundation are likely to have adequate funds to cover these additional costs.

If the founder delegated the founder's rights to the foundation, or authorized the board of trustees to exercise these rights, he is also required to appoint an additional person beyond the auditor and the supervisory board. This person is the foundation's asset controller, who primarily monitors the activities of the board of trustees, but also, where appropriate, the supervisory board.

The foundation`s asset controller has extremely broad powers and a strong mandate. His main task is to control the exercising of the founder's rights and the foundation's management and operations, but may also exercise the supervisory board's rights, such as for example initiating judicial review proceedings, if he finds a legal anomaly and cannot be remedied otherwise.[23]

As we can see, the personnel of an asset management foundation is extensive, and thus the founder has to reckon with significant maintenance costs.

The founder has to state in the charter the objectives of the asset management activity and the circle of beneficiaries. In addition, an investment policy must be prepared, which, together with the asset management objectives set out in the charter, serve as the basis for managing the foundation's assets. The investment policy must specify the portfolio to be managed, the principles of risk management and the manner and rules of adopting resolutions necessary for making investment decisions. If the founder fails to draw up the investment policy, it shall become the obligation of the foundation within six months of establishment. The investment policy drawn up by the foundation, in such cases, is reviewed by the supervisory board and, if the body makes a proposal to adopt the policy, it must ultimately be approved by the person exercising founder`s rights.[24]

In summary, the asset management foundation is a special subtype of foundations regulated by the Civil Code, which does not become a trustee by virtue of its establishment and the allocation of assets necessary for its establishment, but only acquires this legal status, if it receives additional assets for fiduciary asset management for the purposes specified by law.[25]

Similarly to private foundations, the asset management foundation is set up by the founder to pursue a long-term objective with the funds provided and the organization described in the charter. What sets it apart from other foundations is that the founder creates it specifically to generate income for the designated beneficiaries. Its main activity is asset management and its goals are achieved by using the proceeds of the asset management activity.

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23 See Sec. 6, 7 and 8 of Act XIII of 2019 on Asset Management Foundations on the board of trustees, the supervisory board and the asset controller.

24 See Sec. 9 (2), (3) and (4) of Act XIII of 2019 on Asset Management Foundations.

25 Regarding the purposes recognized by law, see Sec. 2 (1) of Act XIII of 2019 on Asset Management Foundations.

The main difference between the fiduciary asset management activity and the asset management foundation is that the latter only carries out portfolio management, the most important part of the asset management activity, with its own assets and does not provide investment services to third parties.

That the legislator fixed the minimum capital to be allocated to the asset management foundation in an amount that well exceeds the average size of Hungarian private estates indicates that this legal institution was not primarily intended for domestic equity owners. The primary goal of the legislator might have been to lure back to Hungary offshore assets that have been accumulated in tax havens by Hungarian equity owners since the change of regimes. In addition, the legislator might have also intended to attract foreign fortunes pursuing a geographical diversification strategy to Hungary. Polish wealth owners are expected to take advantage of the new Hungarian legal instrument first and to the greatest extent, but due to the favorable tax environment, Western European equity owners are likely to also consider transferring a part of their assets to Hungarian asset management foundations. Regardless of this, of course, there will be Hungarian equity owners, who can exploit the benefits provided by asset management foundations, but the widespread domestic propagation of this legal form is likely to take many years, since it is contingent on permanent economic growth, even if minor setbacks occur.

In any case, we can definitely say that one of the most effective means of preserving, maintaining the unity of and increasing large estates over decades and centuries, as well as that of their transgenerational transfer is the legal institution of the asset management foundation, provided that the founder can provide a contribution of at least HUF 600 million and can finance the relatively high operating costs resulting from the organizational structure of the asset management foundation.

4. The family foundation

An additional novelty of the new Civil Code is that it has laid the groundwork for the so-called family foundations. This means that contrary to the former rules, foundations now can be established for private purposes –and not exclusively for public purposes- provided that the private purposes are long-term.[26] This permissive attitude of the legislator paved the way for family foundations.

Definitions are not provided in any law as to what exactly what we mean by private purpose. According to the definition found in the professional literature, a foundation can be considered to be of private interest, if it serves the interest of a single person or a small community, without creating benefits for the society.[27]

26 See Sec. 3:378 of the Civil Code that provides that foundations are legal persons set up to pursue the long-term objective defined by the founder in the charter document.

27 See MICZÁN Péter: A magáncélú alapítványról, In: Gazdaság és Jog, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2018/6., 14-20.

The restrictions included in the Civil Code naturally apply to private or family foundations as well, including the provision that foundations may not be formed with the objective of performing economic activities. Foundations are only authorized to perform economic activities, if they are directly connected to the achievement of the foundation's goals. Consequently, the role of family foundations in managing family assets is negligible, but this organizational form is excellent for ensuring that family members are supported, raised and educated throughout the course of multiple generations. The use of this legal device for other purposes, however, is hindered by its applicability in a limited scope and the narrow framework of the allowed economic activities.

5. Summary

In light of the foregoing, we can conclude that family businesses facing the challenges of generational change and persons interested in asset preservation and partition can now choose from among several alternative solutions in Hungary as well. From a wealth preservation aspect, we can see that legal concepts having well-proven, centuries-old traditions in Western Europe have also appeared in the Hungarian law with a particularly flexible system of rules.

The legal instruments of wealth transfer enacted in Hungary not only provide reliable, advantageous and flexible estate planning vehicles for domestic equity owners, they can also attract foreign investors when they seek to create a diversified property structure alongside their portfolio or on a geographical basis. Among the advantages offered by Hungary, our 9% corporate tax rate -the lowest Europe- should be highlighted. This, together with the legal institutions of asset preservation, greatly increase Hungary's international competitiveness and attractiveness to foreign investors.

Molnár, István János[1]

Distribution Contracts in Hungarian law – The Recognition of an Important Vehicle of Trade Relationships by the Civil Code

1. Introduction

Distribution contracts are among the most important contracts of today's economic relationships and have been continuously developing in Hungary since its transformation into a market economy in the 1990s. Over the recent decades, hundreds of business entities have classified themselves as distributors or dealers of one or more products made by other (mostly foreign) manufacturing or processing enterprises[2].

Distribution contracts as such were born in international trade, as one of the most important instruments involving foreign marketing organisations. This contract type, similarly to its "elder brother" contract, of agency, is fit for the purpose of significantly reducing the economic risks of a manufacturer or trader who wishes to enter a new market in another country. Before starting to sell its products or services in a given market, the economic enterprise has to examine the target country's economic, political and social characteristics, to seek potential buyers and to make detailed plans and schedules for deliveries. If these tasks are performed by the manufacturer or trader himself, he must bear all risks: he must handle language problems, the consequences of cultural, economic and legal differences between the target country and his home one and he must also face potential problems in choosing the right business partners. On the other hand, if the enterprise does not have the goal of establishing direct relationships with all potential partners, these tasks may be left to a distributor (or several), who would purchase the goods from him with the purpose of resale. This solution lets the enterprise avoid the costs of setting up a separate marketing division and building and maintaining a trade organisation. In addition, the risks attached to the resale of the products are undertaken by the distributor, whose knowledge of the particular market may be taken by the supplier as an advantage.

The existence of distribution contracts, as a distinct form in international business relationships, has been beyond doubt for a long time. Most monographs on international

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2 In Hungarian the terms "*forgalmazó*" or "*viszonteladó*" are commonly used.

trade contracts discuss them as an independent type of contract[3], and distribution contracts were recognised by some Hungarian authors, too[4].

2. Definition of the distribution contract, its distinction from other contract types

2.1. Definition of the distribution contract

As mentioned earlier, by concluding a distribution contract, the economic risks arising from not establishing the best route to identify and sell to potential buyers may be avoided or at least significantly reduced, since the supplier does not have to enter into negotiations with individual buyers or retailers, but only with one single distributor, relating to whom sufficient information on their credibility and solvability may be obtained much more easily.

Pursuant to a distribution contract, the supplier (the manufacturer or the trader) obliges himself to sell defined good(s), in the frame of a durable relationship, based on the common interest in the most effective distribution, to a buyer (distributor, dealer) who buys the said goods for the purpose of resale.

Based on this definition, the following may be identified as central elements of the distribution contract:

- the supplier's obligation to sell the goods to the distributor in consideration of payment of the purchase price;
- the aim of resale on the distributor' side;
- the durable character of the relationship; and
- the common interest of the parties in effective distribution.

3 See for example: Schmitthoff's Export Trade - The Law & Practice of International Trade 10th Edition (London, Stevens & Sons 1990 – Chapter 15, pages 259-271), Jean-Michel Jacquet - Philippe Delebecque: *Droit du commerce international* (Paris, Dalloz 1997, pages 191-193), or Hans van Houtte: *The Law of International Trade* (London, Sweet & Maxwell, 2002 – Chapter 5, pages 180-184).

4 The first article published specifically on the matter was written by the author of this article (*A forgalmazói szerződések, mint a piacszervezés eszközei* – Distribution agreements, instruments of market organisation – *Külgazdaság* 1996/6 - page 81). Professor Gábor Bánrévy devoted a separate chapter to this contract type for the first time in the second edition of his work on the law of international economic relations (*A nemzetközi gazdasági kapcsolatok joga* - Budapest, Szent István Társulat, 2001 – page 154) and he has carried on discussing it in later editions of the same work as well. It also appears as a form of contract of market organisation in Imre Vörös' work (*A nemzetközi gazdasági kapcsolatok joga* – KRIM Bt., 2004) on page 196.

2.2. Distinction of the distribution from other contracts

a) Distinction from sale contracts

It may be concluded from the above definition that distribution contracts are close relatives of contracts of sale, considering that in both cases the main obligation of the supplier (seller) is the transfer of ownership of the goods. Nevertheless, a distribution contract may not be considered a pure sale contract. It is rather a framework agreement that defines those rules that are generally applicable to the different sale agreements to be concluded successively by the supplier and the distributor during the term of the distribution contract[5].

As another supplementary element, the distribution contracts also contain the aim of resale, unlike contracts of sale, where the purpose of taking title to the goods remains completely irrelevant. The distributor purchases the goods hoping that he, as seller, may resell them to his own customers.

The aim of resale is generally emphasised as a crucial element of distribution contracts in sources on international trade law[6]. Nevertheless, in some cases it is defined – from the supplier's side – as a "sales concession", which obliges the supplier "*to allow the distributor to resell the products to end users for the duration of the contract*"[7]. Others emphasise that a distribution contract may not be described as a "grant of sales licence" as it is sometimes referred to by traders, since it provides for "*the conclusion of straightforward contracts of sale*"[8] and not for the granting any licences.

Finally, the distribution contract always creates a durable relationship, which is not the case in a sale, which generally remains a "single" transaction.

b) Distinction from framework sales agreements

A distribution contract may not be considered as a framework sales agreement either, since it not only contains the general rules applicable to future sales, but also provisions relating to the parties' common interest in distribution.

In my view, this common interest is the crucial element that so distinguishes distribution from sale that it becomes an independent, sui generis *type of contract.*

5 Van Houtte: page 181

6 See e.g. Jacquet-Delebecque: page 193. Schmitthoff also points out that the seller may ask for a clause obliging the distributor to offer the supplier's goods in the market (Schmitthoff: page 268).

7 Van Houtte: page 180.

8 Schmitthoff: page 262.

c) Distinction from sale pre-contracts

The distribution contract may not be considered as a pre-contract for sale either, since its conclusion does not create an obligation to enter into further contracts of sale. Nevertheless, in general, if the distributor does not order goods from the supplier within a specific period of time, it gives a reason for the supplier to terminate the distribution contract unilaterally.

On the other hand, although the clauses of the distribution contract relating to the are evidently dependent on the future conclusion of individual sales contracts, all restrictive clauses, such as exclusivity or non-competition, become immediately effective and remain in force during the whole contractual term, even if no individual sales are ever concluded[9].

d) Distinction from agency contracts

In practice, the distributor acts as the *quasi* agent of the supplier, since the obligations of the supplier and the distributor relating to improving the efficiency of distribution are pretty similar to those fixed for the principal and the agent in an agency contract[10].

The main difference between the two separate contract types is that the distributor purchases the goods from the supplier, takes title to them and resells them in his own name and at his own risk, while the agent in general does not conclude any sales contract; he only negotiates it, or, even if he is entitled to conclude contracts, it is always done in the name and at the risk of the principal.

The other important difference between the two contracts is that the remuneration for the agent's work is the commission paid by the principal on the sales contracts concluded by this latter with a customer introduced by the agent, while the distributor's "remuneration" is comes from the difference between the price paid by the distributor to the supplier and the resale price (i.e. the price received by the distributor from his own purchaser).

Of course, it cannot be ignored that the common interest of the parties in the distribution of the goods is an element that is found in both contract types. We will see later on, in the part introducing the applicable regulations of the different jurisdictions,

9 Schmitthoff: page 261.

10 Law-Decree 8 of 1978 on the application of the Hungarian Civil Code to foreign economic relationships (the "Foreign Trade Civil Code"), which fixed for the first time in Hungarian law the legal rules for commercial agency, contained such "*collateral obligations to improve distribution*" (Article 23 a) of the Foreign Trade Civil Code). Neither Act CXVII of 2000 on the independent commercial agency contract, nor Act V of 2013 on the Civil Code (the "Civil Code") took over these provisions. Nevertheless, it still remains undisputable that – especially in international trade relations – the agent must continuously survey the market situation and must perform market analysis, marketing and advertising activities.

that in many of them this characteristic led to the applicability of certain provisions to distribution originally related to agency by way of analogy.

e) Distinction from commission contracts

Distribution agreements have to be distinguished from commission contracts (*bizományi szerződés*) for similar reasons. In this latter case the commission agent (commissionaire) sells the goods in his own name but at the risk of his principal, while his remuneration is, similarly to that of the agent, the commission calculated and paid after the accomplished transactions.

As a conclusion of the foregoing, a distribution contract certainly means an independent and distinct type of contract that contains two major elements, the general (framework) provisions relating to the individual sales and the provisions relating to the obligations dictated by the common interest in the distribution of the goods.

2.3. A broader interpretation of distribution contracts

From the above definition, it may also be concluded that the distribution contract has a narrower and a broader interpretation, too. As compared to the narrower interpretation described above, when using a broader interpretation, the individual sales concluded in respect of the goods also belong to the distribution relationship. In any case, these individual transactions may not be totally separated from the distribution contract, since the general provisions that should be applied to all individual sales are determined in the distribution contract.

3. Parties to the distribution contract

Generally speaking, anybody may be party to a distribution contract. However, as distribution is a contract of business life, the parties to it are normally persons performing business activities.

On one side of the distribution relationship is always a business entity (enterprise) dealing with manufacturing, processing or wholesaling goods. In general, he does not sell the given product in a given territory directly to consumers or retailers; he sells it to a wholesaler (distributor). In a distribution contract, this party is generally referred to as the supplier (or, in some cases, as the seller)[11].

On the other side there is the wholesale trader, who generally sells the product to retail traders, or to end-users. This party is referred to as distributor or dealer (or in some cases, as buyer or purchaser)[12] in the distribution contract. Some scholars

11 In the Civil Code the legislator also uses the term "supplier" (*szállító*) to denote the party transferring the ownership of the goods to the other party.

12 In the Civil Code this party is called as distributor (*forgalmazó*).

emphasise that the distributor must be a merchant and independent of the supplier[13].

It is to be noted that, in many cases, the conclusion of a contract with a distributor is subject to the existence of a certain distribution network under the control of the distributor which is in practice a network of sub-distribution relationships based on the logic and structure of the distribution contract[14].

4. Indirect object of the distribution contract

The indirect object of the distribution contract is always a tangible thing that is manufactured by the supplier, or purchased by the supplier from the manufacturer for the purpose of distribution. In a distribution contract, the object may be defined in three different ways:

- one or several goods identified by its or their name(s), catalogue number(s), custom tariff number(s) or any other appropriate way,
- one or several group of goods, or
- in general, all of the goods manufactured (distributed) by the supplier.

In this latter case, in practice, it may be raised whether the distribution contract also covers the goods that the supplier starts to manufacture or distribute after the conclusion of the distribution contract. It is also a question whether the effect of the distribution contract ceases to apply in respect of goods that the supplier discontinues to manufacture or trade. These issues should be regulated in the contract itself.

5. Content of the distribution contract

Because, in most jurisdictions, this type of contract remains totally or partly unregulated, the drafting of distribution agreements in international trade remains very important. It is therefore not surprising that, in general practice (especially at the international level), distribution contracts are very detailed and exhaustive.

It is to be noted here that the distribution contract may be concluded not only in writing, but also orally or implicitly. Anyway, the lack of sufficient legal background generally results in the distribution contract being put in writing.

13 Jacquet-Delebecque: page 193.

14 Jacquet and Delebecque are of the opinion that the existence of a structured network is inevitable. Such network should be coherent and homogeneous in which the distributor (*le concessionaire*) determines the network's general policy and defines the global strategy of the acquisition of clients (Jacquet-Delebecque: page 193).

a) Definition of the territory:

In the distribution contract the distribution territory (i.e. the territory where the trading rights are to be in effect) is generally defined by reference to one or more political units, which, in the case of international contracts, may be one or more different countries or groups of countries, while in domestic relations they can be even smaller geographical units, such as a town, a county, a state (province) or a region[15].

With regard to the strict attachment of distribution rights to a well-defined territory, distribution contracts normally prohibit sales outside the territory. The definition of the territory thus does not only defend the distributor's position, but also limits his field of activity.

b) Provisions applicable to the individual sales contracts:

In the framework of the distributor relationship, sale transactions are in general embodied in sales contracts concluded in the form of orders and confirmations. Distribution contracts in most cases lay down the terms and conditions according to which orders and confirmations must be placed. In them, the parties determine the goods to be supplied, their quantities, the time and date of delivery, or, if a transporter or forwarder is used, this fact.

c) Determination of the price:

With regard to the fact that there are repeated sales between the supplier and the distributor, the determination of the price is a crucial element. In principle, price may be agreed upon in the orders and the confirmations, but this is not typical of consumer products. More often, price is determined in a general manner and to be applied to all sales, for example by reference to the price list of the supplier in force.

Two remarks must be made here. First, there may be circumstances influencing the parties' relationship during the whole contractual term, which the parties must take into consideration in the price determination process (e.g. inflation, worldwide market situation, etc.). Second, in many cases the distributor may be entitled to some reductions from the list price (rebate), especially regarding the purchased volume.

In distribution contracts, the so-called "m.f.c." price is applied very often. In this case the parties agree that the distributor shall pay the "most favoured customer" price, i.e. the best price which the supplier "*would obtain from another customer at the critical date*"[16].

15 Schmitthoff: page 266

16 Schmitthoff: page 266

d) Exclusivity:

An exclusivity clause can be found in most distribution contracts. Its general meaning is that the supplier may not, in respect of the same goods and the same territory, appoint other distributors and it also undertakes not to sell directly, either. In this case, the contract is labelled an "exclusive" agreement. However, modern commercial usage also recognises a "sole" agreement, in which the supplier undertakes that it will not appoint other distributor in the specified territory, but direct sales may remain possible for him[17].

In most jurisdictions, the terms "exclusive" and "sole" have not been clearly defined judicially, so it is always advisable for the supplier to specifically reserve for itself any rights it desires to sell in the specified territory.

The pure definition of the distribution territory does not automatically create exclusivity. Consequently, it may occur that several distributors are operating on the same territory. If the contract contains an exclusivity clause, its aim is to exclude the possibility of such double (triple, etc.) distribution.

e) Prohibition of parallel distribution:

Many distribution contracts contain also a non-competition clause, which means that the distributor may distribute the products of other manufacturers (distributors) only with some limitations, or may not distribute such products at all.

The situation is pretty much similar in respect of restraint of trade clauses applicable after the termination of the distribution contract.

f) Provisions relating to the quantities to order:

In practice, there are distribution contracts in which the supplier fixes a minimum quantity that the distributor must order in a given period. The non-fulfilment of the obligation to reach the minimum order level generally entitles the supplier to terminate the contract unilaterally.

The ordered quantity may have importance in the other direction, too. It is not unusual that, by reaching a certain quantity level, greater advantages are granted to the distributor (e.g. price reductions, extension of the contractual scope to other products or territories, etc.).

g) Specification of the resale price:

Distribution contracts sometimes might deal with resale prices, too, i.e. it is fixed at what price or with what margin the distributor may resell the products. Nevertheless,

17 Schmitthoff: page 260

such provisions are nowadays very rare due to competition legislation[18]. Consequently, in most cases the distributor may fix the resale prices at his own discretion.

h) Obligations to improve distribution:

Although the distributor is considered as an independent buyer and not an agent and he fully undertakes the risks of reselling the goods, evidently the supplier also remains interested in selling as many goods as possible in the given territory. Consequently, similarly to agency contracts, the following elements are normally fixed in the distribution contracts, too:

- the distributor is liable for performing adequate advertising and marketing activities and must continuously provide the supplier with information on the market situation, while
- the supplier is liable for providing the distributor with sufficient information, product samples, catalogues, brochures, etc. and in most cases also for bearing a certain part of the advertising costs.

It occurs quite often that the supplier also grants the distributor some licence to use patents and/or trademarks. In such cases, the distribution contract may contain the provisions of a licence agreement, too and the applicable legislation on the given industrial property must also be taken into consideration.

6. Termination of the distribution contract

Distribution contracts are usually concluded for an indefinite period of time and the right to ordinary termination is provided to both parties, generally to the end of the calendar year and with sufficient notice period. The non-performance of obligations relating to place a minimum value of orders for a fixed period, or purchases by the distributor falling below a certain volume normally give the supplier the right to ordinary termination.

A serious breach of contract is generally a valid cause for extraordinary termination as well. The violation of exclusivity on the supplier's side and late or non-payment or the violation of non-competition obligations on the distributor's side may qualify as such serious breaches.

Indemnity is an important question to be regulated in the distribution contracts. As we will see later on, some of the different jurisdictions emphasize the right of the distributor to adequate indemnity in the event of early termination by the supplier (excluding, of course, when the termination is caused by a breach by the distributor). Indemnity is

18 It would definitely be contrary to Hungarian competition law to fix resale prices under Article 11 (2) a) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

generally fixed in terms of the annual turnover and the duration of the relationship.

In respect of the termination of the distribution contract, it is still to be noted that – although the ownership of the delivered goods is normally transferred to the distributor – many contracts provide for the return of the distributed goods to the supplier or the supplier's right of repurchase at the end of the relationship. The aim of these provisions is to assure smooth transfer from one distributor to another without disturbing potential customers (retailers) in the market by the existence of uncontrolled quantities of the distributed products.

7. Distribution contracts in the different legal systems

The spread of distribution contracts in international trade evidently has a significant effect on national legislation, too. Nowadays, many legal systems not only recognise the independent character of this contract type, but that it may also appear in purely domestic relationships; moreover, some of them may even have their own laws on the matter[19]. In general, the solutions of the different jurisdictions may be distinguished as follows:

a) Distribution in Anglo-American law:

In common law jurisdictions, there are normally no specific legal provisions that would apply to distribution contracts, other than those relating to competition. Consequently, courts have a general role in determining the applicable rules that are based on common law.

For example, in English law, if a contract that is concluded for an indefinite period of time does not contain any provision regarding its termination, it is terminable only after giving reasonable notice[20].

English common law does not provide indemnity for the distributor on termination. In many cases, even if such indemnity is fixed in the contract for a case of contractual breach, such a clause is interpreted by the courts as a penalty clause and therefore is unenforceable. However, if the clause imposing a payment of some kind of a consideration is purely to reflect a genuine pre-estimate of loss on termination then it will be allowed[21].

In American law the basic notion of indemnification of a distributor upon termination is known as "recoupment". The idea behind the recoupment doctrine is quite different from that behind indemnity in continental European laws: "*after the distributor has made a*

19 There are different monographs that discuss the applicable legal provisions of different countries to distribution contracts. One of the most important ones is the one edited by Augustín Jausàs, *Agency and Distribution Agreements - An International Survey* (London, Graham & Trotman). Any references made to this work herein are based on the first edition (1994).

20 *Decro-Wall SA v. Marketing Limited* [1971] 1. W.L.R. 361

21 Jausàs: page 265

substantial investment on the assumption that it will have access to the manufacturer's product line, the distributor should be allowed to recoup the investment even if the manufacturer has an unfettered right to terminate". As such investments may automatically be recovered in longer relationships, the recoupment "*is usually confined to recovery of preliminary expenses for agreements that were terminated shortly after they were signed*"[22].

b) In countries where commercial law is based on German law, the courts apply the legal provisions on commercial agency to distribution as well (especially in respect of exclusivity, termination and indemnity), by way of analogy when the distributor (*Vertragshändler*) is in a situation of economic subordination to the supplier, comparable to that of an agent[23]. According to this strict principle in German law[24] the provisions of Article 89b of the Commercial Code on agency contracts are applicable if

- the distributor was integrated into the distribution system of the supplier, and likewise an agent and
- the distributor was contractually obliged to provide information on the names of his customers to the supplier.

The distributor is entitled to claim an indemnity (*Ausgleichanspruch*) after the termination of the distribution contract if and to the extent that

- the supplier substantially benefits from the business relationships acquired by the distributor even after the termination of the distribution contract,
- the distributor loses income as a result of the termination of the distribution contract, which, had the contractual relationship been continued, he would have gained on the basis of already signed or future contracts with clients acquired by him, and
- the payment of compensation, in consideration of all circumstances, is just and equitable[25].

The same applies in Austria[26], where the analogous application of agency law to distributorship corresponds to the consistent practice of the Supreme Court[27]. As a precondition for the application of legislation on commercial agency[28], the distributor must form part of the vertical sales network in the same way that agents normally do.

22 Jausàs: page 276
23 Van Houtte: page 184
24 Jausàs: page 118
25 Article 89b (1) of the Commercial Code *(Handelsgesetzbuch)*
26 Jausàs: page 28
27 Judgment of 22 April, 2009 OGH 3 Ob 44/09f, Judgment of 5 May, 2009 OGH Ob 10/09s
28 *Bundesgesetz über die Rechtsverhältnisse der selbständigen Handelsvertreter* - Federal Law Concerning the Legal Relations of Self Employed Commercial Representatives [Agents] *(Handelsvertretergesetz - HVertrG 1993)*

In Swiss law, one may experience some uncertainty in respect of the matter. Agency and distribution contracts are generally treated similarly with respect to term and termination. With respect to open ended distribution contracts, courts usually apply the legal provisions for agency[29] by analogy. Fixed-term distribution contracts are terminated without further notice upon expiry of the fixed term[30]. In connection with fixed-term agency agreements, the law explicitly provides that a tacit continuation at the end of the term entails a renewal of the agency agreement for the same period of time, but not for more than one year[31]. It is uncertain whether the same rule applies to distributorship agreements by analogy. Until 2008, the case law consistently denied the analogous application of provisions of agency law on indemnity[32]. Finally, in a decision of 22 May 2008, the Swiss Supreme Court decided that a distributor may be entitled to goodwill compensation for his clientele like an agent[33], if certain conditions were met.

c) In countries influenced by the French Civil Code, issues relating to distribution are partly covered by specific legislation.

In France, provided that some conditions are met, distributors are protected by the provisions of Article L330-3 of the Commercial Code that requires pre-contractual information from the supplier to be given to the distributor in respect of the circumstances of the distribution at least twenty days before execution of the contract. The content of such information is fixed by decree[34]. Another article of the *Code de Commerce* prohibits the "brutal interruption" (*rupture brutale*) of a permanent commercial relationship. It is mandatory to set a notice period, the length of which depends on the duration of the relationship, the commercial usages and the interprofessional accords[35].

Exclusivity has been specifically regulated in French law since 1943. In 2000, the relevant provisions were inserted in the Commercial Code. With regard to exclusive supply systems that oblige a distributor to buy exclusively certain products from the supplier, exclusivity must not exceed a period of 10 years[36].

The French court practice created a sanction for "abusive interruption" (*rupture abusive*) of a distribution contract which, in certain cases, allows the distributor to claim from the supplier the reimbursement of those investments that could not be

29 Article 418q of the Code of Obligations (*Obligationenrecht*)

30 Article 418p (1) of the Code of Obligations

31 Article 418p (2) of the Code of Obligations

32 Jausàs: page 254

33 Swiss Supreme Court decision 134 III 497

34 *Décret n°91-337 du 4 avril 1991 portant application de l'article 1er de la loi n° 89-1008 du 31 décembre 1989 relative au développement des entreprises commerciales et artisanales et à l'amélioration de leur environnement économique, juridique et social*

35 Commercial Code article L442-6 paragraph 5

36 Commercial Code article L330-1

recovered due to the termination of the contract[37]. This intervention by the judge is motivated by the goal of achieving a balance in the contract by adjusting the asymmetry originating from the different economic power of the parties[38]. On the other hand, the jurisprudence has remained silent about the eventual claims by the distributor relating to the loss of clientele.

Belgium is one of the very few countries in the world with a specific legal regime for the termination of certain distribution contracts. The Law of 27 July 1961 on the unilateral termination of exclusive distribution contracts of indefinite duration[39] often gave rise to surprise in other countries. In 2014, its provisions were inserted in Book X of the Code of Economic Law[40]. For such provisions to apply, the distribution rights should be exclusive, for a territory including (part of) Belgium and for an indefinite duration[41]. It should be noted that all fixed-term distribution agreements are, starting from their third renewal, considered to have become agreements of indefinite duration[42]. The Law provides that distribution contracts to which it applies, in the absence of a serious breach, may only be terminated by giving reasonable notice or by paying compensation in lieu of notice[43]. The law also provides that, if certain conditions are met, distributors are entitled to claim additional compensation from the suppliers, irrespective of whether reasonable notice was given or not. This additional compensation is to cover goodwill, costs and investments incurred by the distributor and distributor staff redundancy costs[44].

8. International and EU regulations on distribution

8.1. International regulations

Distribution contracts are not covered by any specific international convention, such as those relating to international sale[45] and agency[46]. In international practice, it is

37 *Cass. com., 20 jan. 1998*, nº 96-18.353 https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007041221

38 Dávid Sobor: *A disztribútor védelme a forgalmazási szerződés megszűnése esetén* (The protection of the distributor in case of termination of the distribution contract) – Gazdaság és Jog 2014/12 page 16

39 *La loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée*

40 *Code de Droit Economique du 28 février 2013*

41 It does not matter whether it is also appointed as the distributor in other territories but case law agrees that the protective clauses in the Code of Economic Law should apply only to its "Belgian" activities. Conversely, it is argued that a foreign distributor will also be entitled to protection under the law if, and to the extent that he is (also) active in Belgium.

42 Article X.38 of the Code of Economic Law

43 Article X.36 of the Code of Economic Law

44 Article X.37 of the Code of Economic Law

45 United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980

46 UNIDROIT Convention on Agency in the International Sale of Goods, Geneva, 1983

questionable whether any of the said conventions are applicable to distribution[47].

On the other hand, the international practice of distribution contracts is profoundly influenced by the model contracts elaborated by the International Chamber of Commerce, namely *The ICC Model Distributorship Contract – ICC No. 518*[48] and *The ICC Model International Sale Contract Manufactured Goods Intended for Resale – ICC No. 556*[49]. These texts evidently may not be considered as mandatory legal instruments, but are still of great help for practicing lawyers and businessmen to draft distribution contracts.

8.2. European competition law policy

Without deeper analysis, it must be noted that matters of distribution in the European Union are, for most commercial purposes, considered under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU")[50]. Anti-competitive provisions that might be found in distribution agreements include retail price fixing, customer restrictions, export bans, non-competition, exclusivity and minimum purchase obligations. However, in compliance with the principles developed by the Court of Justice of the European Union, the European Commission acknowledges that Article 101(1) TFEU is not applicable where the impact of the agreement on competition or trade between Member States is not appreciable[51].

The prohibition contained in Article 101(1) TFEU is not absolute. Any anti-competitive agreement that falls within the scope of Article 101(1) may benefit from an exemption under Article 101(3). Such exemption is generally available, if the pro-competitive advantages of the agreement outweigh its anti-competitive effects. There

47 As for France for example, a case is reported where the *Cour de Cassation* declared inapplicability of the Hague Convention 1955 to distribution contracts. Consequently, the Vienna Convention would not apply to them either (*Cass. 1re civ., 15 mars 1988*, Bull. civ. I, no 83 - Jacquet-Delebecque: page 192).

48 *ICC Egyedárusítói Mintaszerződés*

49 *ICC Mintaszerződés viszonteladásra szánt feldolgozott áruk nemzetközi adásvételére*

50 Article 101 of the TFEU generally prohibits all agreements between companies that may affect trade between countries within the European Economic Area ("EEA"), and which have as their object or effect the restriction, prevention or distortion of competition within the EEA. This prohibition applies not only to horizontal agreements, but also to vertical agreements, including agreements between enterprises acting at different levels of the distribution or production chain.

51 In the Commission's "De Minimis Notice" (Notice on Agreements of Minor Importance of 25 June 2014 - OJ 2014/C 291/01), the Commission indicates the circumstances in which it considers that agreements do not constitute an appreciable restriction of competition with the help of market share thresholds. Consequently, vertical agreements where neither party holds a market share of more than 15%, are presumed not to breach Article 101(1) TFEU, provided that they do not have as their object the prevention, restriction or restriction or distortion of competition within the internal market).

are two types of exemption: (i) an exemption following an individual self-assessment and (ii) a block exemption.

Distribution is also covered by a block exemption regulation[52] and the accompanying Vertical Restraints Guidelines[53]. Their scope of application covers all agreements between economic operators at different economic levels: these are so-called "vertical" agreements entered into between a supplier (even from outside the EU) and a distributor that have an economic effect within the European Union. Another block specific exemption regulation is in force in respect of the motor vehicle sector[54].

8.3. Distribution agreements in the European harmonisation process

The issue of regulating the distribution agreement as a specific contract was also raised in the course of the process of European harmonisation of private law. The European Parliament requested the creation of a European Civil Code as early as in 1989. In 1997 the Dutch Government, as then Chair of the European Union, held a conference titled 'Towards a European Civil Code'. In the same year, among other academic groups, The Study Group on a European Civil Code was formed, chaired by Professor Christian von Bar at the University of Osnabrück. The Study Group began its work in 1998. From the outset, it was envisaged that at the appropriate time its results would be presented in an integrated complete edition, but finally the results were published in a separate series. One of them, the so-called PEL CAFDC, published in 2006, deals with commercial agency, franchise and distribution[55].

Two years later, the Study Group on a European Civil Code and the Research Group on Existing EC Private Law presented, for the first time, the Draft of a Common Frame of Reference (DCFR) on Principles, Definitions and Model Rules of European Private Law. In 2009, the revised and final version came out[56]. The DCFR follows the structure of the PEL CAFDC and in its Part E it deals with commercial agency, franchise and distributorship.

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52 Commission Regulation (EU) No. 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010, OJEU L 102/1

53 Commission Guidelines on Vertical Restraints, 2010, OJEU C 130/1

54 Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector

55 Principles of European Law. Study Group on a European Civil Code. Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC). Prepared by Martijn W. Hesselink, Jacobien W. Rutgers, Odavia Bueno Díaz, Manola Scotton, Muriel Veldmann (Sellier European Law Publishers GmbH, Munich 2006)

56 Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) Outline Edition - Sellier European Law Publishers GmbH, Munich 2009

Among the general rules, the DCFR provides for the pre-contractual information duty of the parties, the common obligation of the parties to cooperate and to inform each other and the obligations relating to confidentiality[57].

It regulates in detail the issues of termination of the contractual relationship and its consequences[58]. The main elements are as follows:

- In the case of a contract for a definite period of time, there is no obligation of renewal. The contract will only be renewed, for an indefinite period of time, if the parties so agree.
- In the case of a contract for an indefinite period of time, both parties have the right to terminate the contractual relationship by giving notice to the other. If the notice period is of reasonable length, no damages are payable.
- Whether a period of notice is of reasonable length depends on the circumstances, but a period of notice of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months (6 months of notice for the supplier) is presumed to be reasonable.
- Where a party terminates a contractual relationship without giving a reasonable period of notice the other party is entitled to damages, the general measure of which is such sum as corresponds to the benefit that the other party would have obtained during the extra period for which the relationship would have lasted if a reasonable period of notice had been given.
- Termination for non-performance is only allowed if such non-performance is fundamental.
- When the contractual relationship comes to an end for any reason, a party is entitled to an indemnity from the other party for goodwill if and to the extent that the first party has significantly increased the other party's volume of business and the other party continues to derive substantial benefits from that business, provided that the payment of the indemnity is reasonable.
- If the contract is voided, or the contractual relationship terminated by either party, the party whose products are being brought onto the market must repurchase the other party's remaining stock, spare parts and materials at a reasonable price, unless the other party can reasonably resell them.

The DCFR further contains a definition of "distributorship" and provides the obligations of both the supplier and the distributor. Pursuant to the DCFR, distribution contracts are contracts "*under which one party, the supplier, agrees to supply the other party, the distributor, with products on a continuing basis and the distributor agrees to purchase them, or to take and pay for them, and to supply them to others in the distributor's name*

57 DCFR Articles IV.E. – 2:101-2:104

58 DCFR Articles IV.E. – 2:301-2:306. There are also some further provisions on the right of retention and the right of both parties to receive a written and signed statement setting out the terms of the contract (Articles 2:401-2:402).

and on the distributor's behalf"[59]. The DCFR recognises three different specific forms of the distribution contract:

- the exclusive distribution contract "*under which the supplier agrees to supply products to only one distributor within a certain territory or to a certain group of customers*";
- the selective distribution contract "*under which the supplier agrees to supply products, either directly or indirectly, only to distributors selected on the basis of specified criteria*"; and
- the exclusive purchasing contract "*under which the distributor agrees to purchase, or to take and pay for, products only from the supplier or from a party designated by the supplier*"[60].

The DCFR further specifies the following obligations of the supplier:

- The obligation to supply the products ordered by the distributor "*in so far as it is practicable and provided that the order is reasonable*".
- The obligation to inform the distributor during the performance of the characteristics, prices and terms of supply of the products, any recommended prices and terms, any relevant communication with customers and advertising campaigns.
- The obligation to warn the distributor of decreased supply capacity.
- The obligation to provide advertising materials at a reasonable price.
- The obligation to make reasonable efforts not to damage the reputation of the products[61].

As far as the distributor's obligations are concerned, provided that the contract is exclusive or selective, the DCFR contains the following provisions:

- The obligation to distribute, which means that the distributor "*must, so far as practicable, make reasonable efforts to promote the products*".
- The obligation to inform the supplier during the performance concerning any third party claims or infringements of the supplier's intellectual property rights.
- The obligation to warn the supplier of decreased supply requirements.
- The obligation to follow the reasonable instructions of the supplier "*which are designed to secure the proper distribution of the products or to maintain the reputation or the distinctiveness of the products*".
- The obligation to provide the supplier with reasonable access to the distributor's premises to enable the supplier to check the distributor's compliance with the standards agreed upon.
- The obligation to make reasonable efforts not to damage the reputation of the products[62].

59 DCFR Article IV.E. - 5:101 (1)
60 DCFR Article IV.E. – 5:101
61 DCFR Articles IV.E. – 5:201-5:205
62 DCFR Articles IV.E. – 5:301-5:306

9. Distribution contract in Hungarian law

9.1. Development before 2014

Recent practice clearly shows that distribution contracts have been becoming increasingly important for economic relations in Hungary. The number of distribution contracts has been increasing, even purely domestic ones, but evidently this type of contract still remains typical of international trade relations. Anyway, it is increasingly common for bigger Hungarian manufacturer companies to sell their products, domestically or internationally, by way of distribution contracts.

However, the practical spread of this contract type, at least up to the entry into force of the new Civil Code[63], had not been followed by the appearance of applicable legislation, and – apart from the works of Bánrévy and Vörös referred to above – the legal scholarship has not addressed this issue in detail. Monographs discussing the individual contract types in domestic law remained silent about distribution. This, however, does not deny that distribution contracts were already present in the economic life and that their legal reality would have required a more serious analysis and specific legal rules.

As with all other types of contract having no specific applicable legislation, the general provisions of the former Civil Code[64] on obligations applied. Beside that – and especially because of the lack of specific rules – jurisprudence had some importance in determining the legal provisions on distribution.

From some earlier published case law, one may conclude that the acting panel could not really deal with the issue. For example, the Arbitration Court attached to the Hungarian Chamber of Trade and Industry, in judging a contract that was subject to Hungarian law between a Hungarian supplier and his Italian distributor[65] stated that, in the case of a distribution agreement that "*contains sales and agency elements as a mixture*", a distinction must be made "*between the framework agreement that may largely be described by elements of an agency contract, and the individual contracts containing mainly elements of a sales contract*". As a result of the above, the Arbitration Court separated the distribution contract into two parts and applied the Vienna Convention to the individual sales contracts, while other elements of the (framework) agreement were judged pursuant to the provisions of the old Civil Code and the provisions of the Foreign Trade Civil Code[66] on agency.

In 1998, *Katalin Székely* analysed another relevant court case in her article published

63 Act V of 2013 on the Civil Code (a *Polgári Törvénykönyvről szóló 2013. évi V. törvény*)

64 Act IV of 1959 on the Civil Code of the Republic of Hungary (*a Magyar Köztársaság Polgári Törvénykönyvéről szóló 1959. évi IV. törvény*)

65 *VB 9638; BH 1997/10*

66 Law-Decree 8 of 1978 on the application of the Civil Code of the People's Republic of Hungary on foreign economic relations (*1978. évi 8. tvr. a Magyar Népköztársaság Polgári Törvénykönyvének a külgazdasági kapcsolatokra történő alkalmazásáról*)

in *Külgazdaság*[67]. This time, the ordinary court had to establish whether an exclusive distribution agreement validly existed between a Hungarian and a foreign company. As a preliminary issue, the court had to decide which country's law had to be applied and, somewhat unexpectedly, established that the party required to provide the most characteristic performance was the distributor and therefore the court applied the law of the country in which the distributor had its establishment[68]. With this remarkable decision, the court admitted that a distribution agreement was a contract that was not mentioned in Law-Decree 13 of 1979 on private international law and which must be distinguished from sale. As far as the substantive law is concerned, the court applied the general provisions of the Civil Code on obligations[69].

A very Hungarian old court statement also mentioned "exclusivity". Statement nº GKT 23/1973 – modified several times – said that if the supplier sells the product to a third party with no respect for the exclusivity granted to the buyer, by this *"he fails to fulfil one of his obligations. If, as a consequence of such failure, the other party loses his interest in the contract as a whole, impossibility of performance may occur in respect of the transaction, in its integrity*". From this reasoning of the court one, might conclude that, in the case of a violation of exclusivity, the contract may even terminate according to the provisions on impossibility of performance, if the other party does not wish to maintain the contract; in other words, there is no need to terminate the contract formally. The Statement also added to the above that if the supplier is liable for the impossibility of performance, the other party may claim for damages under the Civil Code. Although the Statement clearly seems to provide guidelines for distribution contracts, we did not find any case law evidencing that such application had ever been made[70] and, in addition to this, it was declared inapplicable by the Supreme Court itself in 2006[71].

Other court decisions qualified the distributorship as a mixed contract containing elements of the sale, the supply and the mandate contracts[72].

In any case, the term "distribution" (*forgalmazás*) seemed to appear with increasing frequency in Hungarian legislation and also in the domestic jurisprudence. Apart from the fact that distribution is becoming more common in economic life, European legislation that has been followed by the Hungarian Parliament and Government for a

67 Dr. Katalin Székely: *A nem nevesített szerződések és a kizárólagos forgalmazásra irányuló megállapodás* (Külgazdaság Jogi Melléklete, 1998/4 – Innominate contracts and the agreement on exclusive distribution)

68 It is to be noted that this solution is completely in line with international practice. In most cases, the distributor's law is applied to the contract (van Houtte: page 161).

69 Székely: page 55

70 Except Case *BH1990.69* where the role of the Statement was only marginal

71 *2/2006. (V. 22.) PK vélemény az ítélkezés elvi irányítása korábbi eszközeinek felülvizsgálatáról* (Opinion on the reconsideration of former instruments of discipline-based guidance of judicature)

72 Budapest Metropolitan Court (*Fővárosi Bíróság*) *G. 41.192/2002/201, G. 41.743/2007/74.* Budapest Metropolitan High Court (*Fővárosi Ítélőtábla*) *Gf. 40.534/2010/4.*

long time has also a significant effect in this respect. European competition legislation is duly implemented in Hungary[73] and distribution matters must be dealt with by the Competition Office.

I consider the entry into force of the Rome I Regulation[74] as a very important milestone in the recognition of the distribution contract in Hungary as a distinct contract type. Article 4 paragraph 1 sets forth specific provisions on the applicable law to different contracts, including distribution. Pursuant to point f) of the said paragraph, such contract "*shall be governed by the law of the country where the distributor has his habitual residence*". This provision had a very important consequence: as in many cases Hungarian substantive law might be applicable (when the distributor has his habitual residence here), there arose a greater need to determine provisions that may be relevant and applicable to distribution.

9.2. Distribution contract in the Civil Code

The Concept of the new Civil Code[75] did not mention distribution contracts and it could not be found in the experts' proposal either. Therefore it was somehow "unexpected" that this type of contract appeared in the final text[76].

The insertion of the distribution contract into the Civil Code was not welcomed by everybody. Lénárd Darázs even considered this contract type, similarly to the franchise contract, as a "*foreign body*" in the code, regarding that these contracts "*are extremely colourful in practice, having different economic and legal content, compared to which, the regulation contains unjustified restrictions*". In addition to this, he argues, the relevant provisions of the Civil Code are "*abortive*" as they incorrectly catch the nature and essence of these legal relationships and have nothing to do with business life[77].

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73 See Act LVII of 1996 on the prohibition of unfair market practices and limitation of competition (*a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról*), Government Decree 205/2011 (X.7.) on the exemption of certain groups of vertical agreements from the prohibition of limitation of competition (*Korm. rendelet a vertikális megállapodás egyes csoportjainak a versenykorlátozás tilalma alóli mentesítéséről*) and Government Decree 204/2011. (X.7.) on the exemption of certain groups of vertical agreements from the prohibition of limitation of competition in the motor vehicle post-market (*Korm. rendelet a gépjármű utópiacra vonatkozó vertikális megállapodások egyes csoportjainak a versenykorlátozás tilalma alól való mentesítéséről*)

74 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

75 *Az új Polgári Törvénykönyv koncepciója* (Magyar Közlöny 2002/15 – January 31, 2002)

76 András Osztovits ed.: *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja,* Opten Informatikai Kft., Budapest, 2014, Volume III, page 877

77 Lénárd Darázs in Ferenc Petrik ed.: *Polgári jog – Kötelmi jog – Az új Ptk. magyarázata*, HVG-Orac Lap- és Könyvkiadó Kft., Budapest, 2013, Volume VI, page 237

The official reasoning of the Civil Code[78] refers to the DCFR as a source taken into consideration at the drafting of the legal text and other commentators also emphasise this connection[79]. However, if we look the structural place of this contract type in the Civil Code, we may already find a significant difference: while both the PEL CAFDC and the DCFR regulate the distribution and the franchise contracts together with the contract of agency, this third contract type was separated by the Hungarian legislator and its rules were set forth under another title. Péter Gárdos explains this difference with the intention of the legislator to stress the resale of the product or service by the distributor or the franchisee on his own behalf and for his own benefit, instead of the cooperation in relation to the conclusion of the contract[80].

a) Definition of the distribution contract:

Article 6:372 of the Civil Code defines the distribution contract as follows: "*Under a distribution contract, the supplier shall sell certain specified movables (for the purposes of this Chapter: products) to the distributor, and the distributor shall buy the product from the supplier and sell it on his own behalf and for his own benefit.*" This definition is quite similar to the one provided in the DCFR, as it also contains the supplier's obligation to sell the products and the distributor's obligation to buy and resell them, on his own behalf and for his own benefit. However, another article further specifies that the provisions relating to distribution must be applied not only to sale and resale of goods, but also with regard to "*the provision of services*"[81], which is not the case with the DCFR. As a consequence of this extension of the scope of application of the relating provisions, they are applicable not only to the so-called intertwined (chain) contracts of sale, aiming to forward the goods from the producer to the consumer, but also to those to ensure that services can reach users who may not be in direct contact with the original service provider[82]. Darázs feels that, in practice, the acquisition of services for the purpose of resale can hardly be imagined, as the service provider provides its own services to the consumers[83].

As far as the parties' main obligations are concerned, some of them are identical to those of a contract of sale (to "sell" by the supplier, i.e. to transfer the ownership of the product and to "buy" by the distributor, i.e. to take over the product and to pay

78 *A Polgári Törvénykönyvről szóló 2013. évi V. törvény indoklása*

79 Péter Gárdos in Lajos Vékás – Péter Gárdos ed.: *Kommentár a Polgári Törvénykönyvhöz: kommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez*, Wolters Kluwer, Budapest, 2018, page 2102

80 Gárdos: page 2103

81 Article 6:375 of the Civil Code

82 Péter Miskolczi Bodnár in Judit Barta – Zoltán Fazakas – Gyöngyi Harsányi – Péter Miskolczi Bodnár – Róbert Szuchy – Edit Ujváriné Antal: *Kereskedelmi szerződések alapvető szabályai* (Basic rules of commercial contracts -Patrocinium, Budapest, 2016) page 72

83 Darázs: page 240

its purchase price), but there is an important third element added: to (re)sell it by the distributor on his own behalf and for his own benefit. Darázs feels that, by an "extreme" interpretation of the law, the distributor would breach the contract if he does not resell the product[84], but Miskolczi points out that emphasis is rather added to a resale "on his own behalf and for his own benefit" and not to the resale itself. According to the latter, the aim of the legislator was to distinguish clearly the distribution contract from the other types of intermediary contracts[85]. Other commentators feel that, in respect of the obligation to resell, the distributor has no "liability for a result"; his task is only to attempt the resale[86].

Apart from its definition, the Civil Code regulates only four matters relating to the distribution contract, namely

- the common obligation of the parties to protect the good reputation of the product;
- the obligation of the supplier relating to advertising;
- the right of the supplier to instruct; and
- the right of the supplier to inspect the performance of the contract.

b) Protection of the product's good reputation:

Pursuant to Article 6:373 (1) of the Civil Code it is the parties' common obligation to "*protect the good reputation of the product*". Miskolczi argues that this provision does not require active conduct from the parties, only abstention[87], but I do not share this opinion: in my view, "protecting" shall also include any positive acts aiming at safeguarding the product from any harmful action (i.e. initiating a trademark infringement or passing off procedure etc.).

Some of the authors point out that the use of the notion of "good reputation" is somewhat unfortunate, as it is normally attached to natural and legal persons, as personal right[88], while a product has no "good reputation"[89]. This makes this category "empty" and its violation remains without sanctions[90]. Other commentators thinks that the "good reputation" in Article 6:373 is not identical to that of the persons, but "*the good reputation created for a product, as goodwill, emits to both the producer and the distributor*"[91].

84 Darázs: page 237
85 Miskolczi: page 75
86 Gárdos: page 2105
87 Miskolczi: page 76
88 Article 2:45 (2) of the Civil Code
89 Miskolczi: page 75, Darázs: page 238
90 Darázs: page 238
91 Gárdos: page 2108

c) Advertising:

On the other hand the supplier's obligation to inform the distributor of advertisements concerning the product and to transfer to the distributor, for a fee, the necessary advertisements[92] definitely requires the active conduct of the supplier. Although the Civil Code remains silent about the tasks of the distributor related to advertising, Miskolczi points out that the above mentioned provision, beyond the parties' general obligation to cooperate, *de facto* creates a common obligation for the parties to advertise the product in the most effective way[93].

Darázs vehemently criticises these provisions of the Civil Code. He claims that the legislators forgot to define what should be considered "advertisements" and it is also not clear how an advertisement may be "transferred"[94]. This is definitely true. However, it has to be stated in favour of the legislators that these provisions clearly came from the DCFR[95].

d) Instruction:

Article 6:374 (1) of the Civil Code provides for the supplier's right "*to instruct with regard to the appropriate distribution of the product*". This provision clearly distinguishes the distribution contract from a sale, where the former owner evidently cannot give any instruction to the new one. This issue, again, divides the authors: While according to Darázs the provision of the right of instruction is groundless[96], Miskolczi thinks that, with regard to distribution, it is reasonable to authorise the supplier to provide a smooth and the most effective way of the product reaching consumers by way of setting up special requirements e.g. in respect of the storage or treatment of the product[97]. Nevertheless, the exercise of this right of instruction may not make the performance of the contract significantly harder for the distributor and the instructions must be in line with the professional usages. Gárdos explains this provision with the intention of the legislator to consider the interests of the supplier as more important than those of the distributor. In addition, this right of instruction is limited to the "*appropriate way of distribution of the product*", including the presence of the distribution site, the placing, packaging of the product or the provision of product samples[98].

92 Article 6:373 (2) of the Civil Code
93 Miskolczi: page 76
94 Darázs: page 239
95 See Articles IV.E. – 5:204 – 5:205, Article IV.E. – 5:306
96 Darázs: page 240
97 Miskolczi: page 77. Others also argue that when providing the supplier with the right of instruction, the Civil Code considers that the interests of the supplier deserve protection more (Gárdos: page 2109)
98 Gárdos: page 2109

The Civil Code contains, in respect of the distribution contract, the provisions automatically attached to the right to instruct in other types of contract, too: if the supplier gives inappropriate or unprofessional instructions, the distributor shall warn him of this. However, contrary to other contract types, such as mandate or agency where there is a right to cancel the contract, the distributor is obliged to perform such inappropriate or unprofessional instructions if, despite the warning, the supplier maintains them. This stricter rule is partially compensated by the rule providing for the supplier's liability for any damage arising from performing the instructions. The other special rule for distribution contracts is that the distributor has no right, but is rather required to refuse to follow the instruction if performing it would lead to the violation of a law or an authority decision, or would endanger the person or property of others[99].

e) Inspection:

Finally, pursuant to Article 6:374 (3) of the Civil Code the supplier may inspect the performance of the contract and the instructions. This right of inspection extends to the performance of the contract and compliance with the instructions. In line with the principle of the generally expected standard of conduct, the exercise of this right by the supplier may not unnecessarily disturb the distributor's activities[100].

f) Other issues:

Compared to the DCFR, the Civil Code does not contain any specific provision on the termination of the distribution contract. Gárdos laconically explains this with the view that, with regard to distribution contracts the aspects requiring adequate time limits for the termination are "*less determinant*" than those relating to the franchise and distribution contracts[101].

Dávid Sobor points out that, in the absence of specific provisions on the matter, the general contract rules become applicable, which provide some protection for distributors, though its level of does not reach the level provided by the Belgian, French or German national regimes[102].

Pursuant to Article 6:213 (3) of the Civil Code „*contracts giving rise to permanent legal relationships and concluded for an indefinite period of time may be unilaterally terminated by any of the parties while applying an appropriate notice period*". Evidently, the length of the notice period may only be determined on a case by case basis. Sobor hopes

99 Article 6:374 (2) of the Civil Code
100 Gárdos: page 2110
101 Gárdos: page 2106
102 Sobor: page 16

that the analysis of the foreign rules would give points of reference to the courts[103].

The Civil Code does not contain any provision relating to the reimbursement of the distributor's investment costs in the case of termination. While some argue that the Hungarian courts may apply the relevant rules on agency by analogy[104], Sobor does not share this optimism, considering the lack of any legal provision allowing such a measure. On the other hand, the application of the principles of good faith and fair dealing and the obligation of cooperation may provide some instruments for the distributor to claim for reimbursement of his costs[105].

The Civil Code remains silent on the compensation to be paid for the transfer of clientele, too. It is evident that, following the termination of the distribution contract, the continuous operation of the distribution system by the supplier or a new distributor is based on the foundations built by the former distributor. Here, Sobor argues, the rules on unjustified enrichment might be the basis of a compensation claim[106].

10. Conclusion

Distribution is one of the contracts in business law that is developing significantly in our days. Despite this, and although its existence is broadly admitted all over the world, distribution, with some minor exceptions, is not subject to specific legislation in either national legislations or international legal instruments. As a consequence, jurisprudence has an important role in determining the legal background to it.

There is no doubt that distribution is already present in the Hungarian legal thinking and therefore its recognition by the Civil Code as a distinct type of contract is warmly welcomed. It is somewhat unfortunate that the regulation of such contracts remained incomplete. It does not fully follow the European harmonisation initiatives and did not take into consideration the new trends of national legislations, and the inadequate provisions of the Civil Code must therefore be completed by the courts.

103 Sobor: page 16

104 Ádám Fuglinszky – Attila Menyhárd: *Európai jogalkotás és nemzeti törvényhozás* (European law making and national legislation – Polgári Jogi Kodifikáció, HCG-Orac, Budapest 2002/5-6) page 45

105 Sobor: page 17

106 Sobor: page 17

Kun, Attila[1]

Some Tentative Explanations for the Protracted Development of Platform Work (As a Transnational Phenomenon) in Hungary

Introduction

As has been widely reported, the gig economy is still rather immature in Central and Eastern Europe, more concretely (as a case study) in Hungary. According to some research estimates, the share of the Hungarian adult population (6.7%) making some earnings from platform work is well below of the rates of such countries as Spain (11.6%), Portugal (10.6%) and Germany (10.4%). etc.[2] Furthermore, in Hungary, platform work, as such, is neither defined nor regulated. Moreover, platform work (as a phenomenon) is immature, hardly visible and marginal; it is not (yet) perceived as a separate regulatory / employment field and it also lacks specific policy (etc.) attention.[3]

In this context, the present paper aims to put forward some tentative, potential and structural explanations for the slower, sluggish development of the phenomenon − and its regulation − in Hungary. Even though the reasons identified and described below are surely country-specific, some of them might deserve wider reflection. The following main reasons are identified and analysed in the paper: 1. lack of a labour-(law)-related focus within the discourse; 2. lack of legal clarity; 3. plethora and fragmentation of contractual choices; 4. lack of a legal-political focus; 5. lack of civic, public pressure; 6. potential supplanter-effect of some prioritized non-standard forms of work; 7. potential distorting effect of some political goals and / or financial measures; 8. the overly flexible nature of the standard employment relationship (as giving less motivation for non-standard forms of work in general).

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1 University Professor, Department of Labour Law and Social Security

2 See the so-called COLLEEM project, cited by Makó Csaba, Illéssy Miklós Nosratabadi, Saeed (2020): Emerging Platform Work in Europe: Hungary in Cross-country Comparison, European Journal of Workplace Innovation, Volume 5, Number 2, June 2020, 158. – Makó Csaba, Illéssy Miklós, Nosratabadi, Saeed (2020)

3 See for further details: Meszmann T. Tibor (2018): Industrial Relations and Social Dialogue in the Age of Collaborative Economy (IRSDACE), National Report Hungary, CELSI Research report 27, 2018. – Meszmann T. Tibor (2018).

1. Lack of a labour (law)-related focus within the national discourse on platform work

One can have the impression that the whole 'platform-workers' discourse is not primarily a matter of status / classification (employee vs. self-employed) in Hungary (as opposed to countries where the discourse is more developed and nuanced), but a matter of plain lawfulness (declared / undeclared or formality / informality). Accordingly, the related Hungarian debate (if any) is more focused on taxation, unfair competition and public law / administrative law issues (instead of a labour law perspective, focusing on the status question[4]). According to estimates, some 10–15% of employment (captured by the Wage Survey) is undeclared in Hungary.[5] No data are available on the issue to what extent platform work contributes to these figures, but one may guess that this newly emerging sector can represent a considerable share of undeclared work. As experiences show, the platform economy in Hungary is functioning principally in sectors where, by default, rather informal services are characteristic (e.g. babysitting, household work, cleaning, taxi services etc.). In sum, platform work in general bears a high level of informality in Hungary (lacking institutionalized practices, standards etc.).

2. Lack of legal clarity: the 'grey zone' of labour regulation

Act I of 2012, the Labour Code (hereinafter LC) is based − to a great extent − on traditional employment and full-time contracts of indefinite duration. The LC includes a brief – relatively vague and seemingly very broad, but non-operational, rather formalistic and old-fashioned − statutory definition of the employment relationship, the employer and employee. Accordingly, "an employment relationship is deemed established by entering into an employment contract. Under an employment contract: a) the employee is required to work as instructed by the employer; b) the employer is required to provide work for the employee and to pay wages." (LC § 42.). "'Employee' means any natural person who works under an employment contract." [LC § 34 (1)]. "'Employer' means any person having the capacity to perform legal acts who is party to employment contracts with employees (LC § 33.). These definitions are formalistic in the sense that they are based on the 'employment contract', offering little room for extensive, inclusive, creative interpretation (e. g. involving platform workers, or other non-standard contractual practices). A redefinition of the notion of the employment relationship might be desirable in order to apply a less formalistic, more purposive definition (focusing more on the economic dependency aspect).

4 For example, there is no case-law at all concerning the classification of platform workers.

5 Albert Fruzsina – Gal Robert I. (2017): ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts Hungary 2017, EU, Directorate-General for Employment, Social Affairs and Inclusion, 18. – Albert Fruzsina, Gal Robert I. (2017)

Furthermore, Hungarian labour law is based on a classical 'binary divide' between subordinate and independent workers (i.e. employees, with the full coverage of labour law, and the self-employed, without any labour law protection); there is no intermediary (third) category. However, it must be noted that the first draft of the new LC (July 2011) attempted to extend the scope of the LC to other forms of employment (in the event of the existence of certain preconditions). The Proposal foresaw the category of "person similar in his status to employee" widely known in an increasing number of countries (i. e. economically dependent workers). Workers in this category depend economically on the users of their services in the same way as employees, and have similar needs for social protection. For that reason, the Proposal suggested extending the application of a few basic rules of the LC (on minimum wage, holidays, notice of termination of employment, severance pay and liability for damages) to other forms of employment, such as civil (commercial) law relationships aimed at employment (a 'person similar to an employee'), which in principle do not fall under the scope of the LC. This planned legislative solution intended to promote the social security of workers, regardless of the nature of the legal relationship within the boundaries of which work is performed. By virtue of this solution, the Proposal was expected to reduce the evasion of the rules of labour law and the efforts made by employers to seek release from the effect of labour law, and thereby it aimed to contribute to the legalisation of employment. Finally, the new legal category was left out from the final text of the Code, mainly because of political debates and because of its rejection by social partners. This category might have been applicable to platform works, too (at least to some extent). However, it would be difficult (if not impossible) to estimate the potential effect of a reform like this, but such a 'third category' could even multiply problems of classification instead of solving them.

In sum, the labour law status of platform workers in Hungary is undecided. There is no special regulation either on platform per se, or on a broader, more general 'third category'. As Makó et al. note, Hungarian labour law "presently hardly answers any questions related to the protection of platform workers. Therefore, it would be necessary to create a separate and detailed legal regulation regarding workers outside the scope of employment relationships, with specific attention to platform workers."[6]

3. Plethora of contractual choices

Platforms claim that they only serve as 'matchmakers' (some of them even officially register as a 'private job brokerage agency'[7]), and it is up to the parties to decide on the

6 Makó Csaba, Illéssy Miklós, Nosratabadi, Saeed (2020), 165-166.

7 Article 6 of Act IV of 1991 on Job Assistance and Unemployment Benefits lays down that, apart from government employment agencies, labour exchange services ("private labour exchange services") may be provided by a person who is able to meet the relevant requirements prescribed by legislation issued on the basis of the authorisation of the Act.

actual legal form of work and / or taxation. In other words: platforms do not interfere with the autonomy of the two parties − users and platform workers − to organise their own employment frameworks (and this 'matchmaker' role of platforms is not − yet − https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1334 really called into question in Hungary from a labour law point of view). As mentioned before, one may suspect (and experience) that parties (mediated via a platform) often use informal, undeclared practices. Even if the parties choose to apply formal, legally recognised practices, several employment and taxation forms and regimes are available, even beyond (and within) the plain employee versus self-employed binary. Three unique legal categories are described briefly here; these are (and can be) relevant for platform work in Hungary. None of them is without problems, as described below.

A.) The legal construction of *simplified employment* and occasional work relationships (hereinafter: SE) is partly regulated by Chapter XV of the LC (as a specific form of the employment contract), partly by Act LXXV of 2010 on Simplified Employment (which regulates SE's administrative and public law aspects). SE is formally an employment relationship, more precisely an atypical one, probably the most atypical one, being relatively far from the protective level of the standard employment relationship. In fact, the SE system is a kind of 'budget/ low-cost', or 'second-class' employment relationship, partially 'outsourced' from the scope of standard labour law (the LC defines the applicable and the non-applicable labour law rules). The SE system provides employers with a 'cheap', administratively less burdensome and flexible − but also less protective − method of occasional employment. It is a form of casual work, or marginal part-time employment. Officially, it is intended to tackle undeclared work. SE is exempted from certain minimum labour and/or social protection standards or obligations. There is no space to go into more details here, but it must be noted that SE entails lower, more flexible minimum wages (as of 2013): employers have to pay only at least 85% of the general national minimum wage and 87% of the national minimum wage for employees with secondary level qualifications (guaranteed wage minimum). Practically speaking, this might be one of the biggest enticements of the whole SE system for employers (in light of this, Gyulavári heavily criticises this regulatory solution and states that this differentiation can have no rational explanation[8]). The SE regime is also very handy for platform work.

The Government is authorized to specify the conditions and detailed regulations relating to the provision of private labour exchange services and for the notification of private employment agencies. This system is subject to the provisions of Government Decree No. 118/2001 (VI.30.). The Decree uses the terms temporary work agency (TWA) and private job brokerage agency (PJBA).

8 Gyulavári Tamás (2018): Az alkalmi munka a magyar jogban, In: Bankó, Zoltán; Berke, Gyula; Tálné, Molnár Erika (szerk.) Quid Juris?: Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára, Pécs, Magyarország, Budapest, Magyarország: Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Kúria, Munkaügyi Bírák Országos Egyesülete, 134-135. – Gyulavári T. (2018)

B.) So-called *household work (HW)* has a special status in Hungarian tax law. Household work is a personal service performed for a natural person as employer. Since 2010, wages from household work (i.e. paid by natural person 'employers' to household service 'employees') do not bear any common charges. This unique tax category ('outside' of the tax regime) is regulated by Chapter I of Act 90 of 2010 on the creation or amendment of certain laws on economic and financial matters. The category of 'household services' shall be interpreted narrowly, as only those activities that are listed in the Act (home cleaning, cooking, washing, ironing, child care, home teaching, home care and nursing, housekeeping and gardening) are exempted from tax; no similar tasks can be considered as a household job. The household worker must be a natural person performing household work who does not perform this activity as a sole proprietor or as an entrepreneur. The employer must also be a natural person. Such employment must be free from all kinds of business motives. Although this form of employment is free of common charges (and it is exempted from the tax regime), the 'employer' has to send a report (via an electronic form, or a phone-line) to the tax authority every month when he or she employs a household worker and has to pay a − rather symbolic − monthly flat-rate registration fee. In practice, as statistics show, despite the very low registration fee, HW is rarely registered (and / or such natural person employers are not aware that registration is compulsory). The HW regime is neutral towards the labour law status of household workers, and it is not a separate form of atypical / non-standard work. In other words, the household worker and the natural person employer may choose the form of their legal relationship freely (it might be an employment contract, contract of services under civil law or simplified employment; however, in practice, such work is often informal). After all, the construction of household work is not really seen as genuine 'labour'; it is more perceived as an economic activity and a lawful source of auxiliary income. Furthermore, as no contributions are paid; the household worker is not covered by social security.

HW can be mediated via platforms; there are some examples for this in Hungary (e.g. C4W). In sum, the HW regime represents a − fairly unsuccessful − attempt to legalise informality in the field of household work (increasingly organised via platforms as well).

C.) *Self-employed persons* (tentatively including platform workers) can choose *several tax regimes*. Among others, the private entrepreneur may, provided that certain statutory conditions are met, opt for a special, favourable regime of flat-rate taxation, called Fixed-Rate Tax of Low Tax-Bracket Enterprises and on Small Business Tax (KATA). Taxpayers opting for KATA, as a main rule, pay a specific monthly flat-rate tax (of 50,000 HUF – or 75,000 HUF if they choose to do so) instead of corporate or payroll tax. The popularity of this small taxpayers' itemised lump-sum tax (KATA) has grown heavily in recent years (with thousands of small- and micro entrepreneurs opting for it). It can lead to abuses in the area of employment, as it can motivate an 'escape', or a comfortable way out from employment status to self-employment (giving

room for a tempting, much 'cheaper' and easier method of taxation).

In sum, it seems that the intense fragmentation of contractual options and the variability of different tax measures can have the potential to distort labour-law rationales. Therefore, it can be perceived that the potential equalisation of the financial burden of various non-standard forms of work would be able to contribute to more transparent and fair employment practices (both in general and in the field of platform work).

4. Lack of a legal-political focus

In general, labour law is currently not primarily perceived in Hungary as 'social law', but rather as one instrument of economic and employment policy. The official reasoning of the draft LC (2012) contained the following telling formulations of such policy-objectives: "reducing the regulative functions of state regulation", "implementation of flexible regulations adjusted to the needs of the local labour market", etc. One can have the impression that the unrestrained faith in the supremacy of the market and the contract (as a regulatory tool) puts the state's role as the guardian of decent working conditions in the shade. Partly as a consequence, there is no separate ministry of labour / social issues in Hungary and labour law protection is not a priority issue on the political agenda at all. Long-term, purposive[9] thinking is missing in the field; national-level tripartite dialogue is weak and, in terms of EU labour law (and employment policy more generally), the country is much more a "follower" than a "trend-setter'. For instance, in the field of platform work, no official policies or regulatory concepts exist and the legislator will most certainly wait for a future EU law measure before it starts to act (Note: an interview with a high-level government official from the Ministry of Finance – which was responsible for labour law matters till the end of 2019 – has confirmed this total lack of policy attention with respect to platform work in Hungary[10]).

5. Lack of civic, public pressure

According to some opinions, Hungarian society is – by default – "very individualistic, highly segmented and lacks a strong grassroots institutional network", which is not a good foundation for well-functioning industrial relations.[11] Social dialogue is

9 Davidov, Guy (2016): *A Purposive Approach to Labour Law*. Oxford University Press, Oxford, 2016. – Cf. Davidov, Guy (2016).

10 Kun Attila: Hungarian National Report (draft report), "*NEWEFIN - New Employment Forms and Challenges to Industrial Relations" project (Supported by the European Commission - Application ref. VP/2017/004/0028 Improving expertise in the field of industrial relations)* – Kun Attila (2020).

11 Toth A., Neumann L. and Hosszu H. (2012): Hungary's full-blown malaise, in: Lehndorff S. (ed.) *A triumph of failed ideas. European models of capitalism in the crisis*, Brussels, ETUI, pp. 152. - Toth A., Neumann L. and Hosszu H. (2012)

generally weak in Hungary. It is not a surprise that it is even weaker in the platform economy sector.

In general, one might dare to state that non-standard forms of work (including platform work) are largely out of the sight of unions and social partners in Hungary (of course, exceptions do exist, but one can have the impression that 'the exceptions prove the rule'). The same opinion was confirmed by recent empirical research dealing with precarious employment in Hungary. This research clearly points out "the lack of involvement of social partners, especially trade unions, in influencing the regulation and employment policies of the government" and that "industrial relations are poorly utilised in fighting precarious employment."[12]

Workers' organisations in the platform economy in Hungary are currently non-existent (no data reported and trade unions also do not report any activity in this respect). There is one (relatively new) association of platforms, the Sharing Economy Association (In Hungarian Sharing Economy Szövetség, SESZ). The Sharing Economy Association was established in March 2017 to promote the development of the sharing economy in Hungary. Its main goals is the interest representation of platforms regarding training, regulation, etc. Not much activity is reported, according to its website.[13] According to interviews, the above-mentioned SESZ prepared a specific tax-law proposal in relation to platform work. However, this proposal is not fully worked out; it has never been openly or widely discussed and promoted and it is far from being implemented.

In total, no steady, relevant and weighty social pressure exists in Hungary for the regulation and / or 'humanisation' of the platform economy.

6. Potential supplanter effect of some prioritised non-standard forms of work

The so-called supplanter or superseding effect of some artificial, state-supported non-standard forms of work might also be a − partial − explanation for the overall underdevelopment of the platform economy in Hungary. For instance, as briefly described below, student employment in Hungary is 'de facto', practically monopolised (or at least heavily dominated) by the school cooperatives' sector.

Act X of 2006 on Cooperatives regulates unique non-standard forms of work via cooperatives. It regulates four specific types of cooperatives: school cooperatives (SCs), social cooperatives, agro-economic cooperatives and general interest associations of pensioners (i.e.: pensioners' cooperatives). Via these cooperatives, the legislator created very specific frameworks of work for certain well-defined groups of workers (students, the 'needy', people working in agriculture, those receiving old-age pensions),

12 Meszmann T. Tibor (2016): Country report: Hungary — PRECARIR: The rise of the dual labour market: fighting precarious employment in the new member states through industrial relations, project no. VS/2014/0534, CELSI, 1. - Meszmann T.Tibor (2016)

13 https://www.sharingeconomy.hu/

in which employment entails substantially lower costs, and, at the same time, as a 'price' of cheap and flexible employment, these workers are excluded from the standard shelter of labour law and are placed in a significantly less favourable, more flexible legal position. Two out of these four forms of cooperatives − school cooperatives and pensioners' cooperatives − give rise to a specific triangular form of work, which bears a strong resemblance to the structure of temporary agency work.

SCs fulfil a significant role on the labour market and they have a dominant and unique market share in the field of youth employment. Work via a school cooperative is 'cheap' for users (SCs enjoy "full immunity" from social security contribution; no social contribution tax is to be paid) and flexible, because this form of work is no longer an employment relationship under the LC. Working via SC is truly a hybrid, *sui generi*s legal relationship.

In sum, SCs are regulated in quite a controversial manner in Hungarian law and they seem to be heavily and disproportionally over-supported by public policy as compared to their factual activity and effectiveness. The SC sector seems to operate as a kind of state-funded 'business' and what extra services (in terms of social and employment policy) are carried out by SCs in exchange for the exceptional state support is not fully evident and transparent. Among others[14], Kiss also argues that the whole employment policy applicable to cooperatives should be changed in Hungary.[15]

Although the issues of cooperative-employment and SCs in Hungary are separate 'stories', in the context of platform work one may speculate that, because of the monopolising effect of SCs, not many students (and pensioners) turn to alternative, new forms of employment, such as platforms.

7. Potential distorting effect of some political goals and / or financial measures

The Hungarian 'story' of Uber is the probably neatest example of how strong political visions and wills can quickly overrule professional debates and / or spontaneous developments.

Uber started its business in Hungary in the autumn of 2014. From the beginning, there were heated discussions about the legality of its service. Taxi drivers protested against Uber several times, because they thought that Uber drivers offered the same

14 Kun Attila: School cooperatives. : A 'Hungaricum' in labour law in the field of youth employment. In: Roberto, Fernández Fernández; Henar, Álvarez Cuesta (szerk.*) Empleo juvenil: Un reto para Europa (Youth employment: A challenge for Europe)* Cizur Menor, Spain: Sociedad Aranzadi, 71-91. - Kun Attila (2016); Sipka Péter and Zaccaria Márton Leó (2017): A szövetkezeti tagi munkaviszony jogi kockázatai, különös tekintettel az alapvető munkavállalói jogokra, Munkajog, HVG Orac, 2017/1., 2017 december, 23-30. - Sipka Péter and Zaccaria Márton Leó (2017).

15 Kiss György (2017): Employment Relationship between School Cooperatives and Their Member: The Stepchild of Employment, 14 *US-China L. Rev.* 499, Vol. 14 August 2017 No. 8. 514. – Kiss György (2017)

service as regulated taxis, but without complying with relevant laws and with the aim of avoiding taxation. Uber took a stand against regulatory and state bodies, claiming that it was not operating taxis, but was functioning as an online market-space. At a later stage, Uber and the Hungarian government seemingly found a compromise on how the business could operate legally, but in the end, a new Act (Act LXXV of 2016 on the legal consequences of unauthorised passenger transport by car) entered into force in the summer of 2016, in practice hampering Uber's operations. The taxi-drivers' lobby seemed to reach it goals. The Act sets out that an intermediary that provides a passenger service has to comply with the rules applying to dispatching services. If the intermediary does not comply with these rules, the Transportation Authority can impose a fine and, if after this fine the intermediary continues to provide such a service, it can order the cancellation of its electronic data in the business register. The Hungarian authorities and the government proposed that Uber should register as a transport organizing service provider in Hungary, which Uber openly resisted. On July 14th, a day after Act LXXV of 2016 was passed, setting rules for intermediary operations of transport organizing companies, Uber announced that it would cease its operations in Hungary.

8. The overly flexible nature of the standard employment relationship (as giving less motivation for non-standard forms of work in general)

In general, as a union economist (quoted by Kártyás) noted, "the new labour regulation makes typical employment flexible enough that employers do not need to turn to the new forms."[16] Maybe this statement sounds somewhat speculative, but it certainly makes some sense. It might also be an exaggeration, but some authors assume that the new Labour Code had a regulatory vision to support "the most flexible labour market in the world".[17] Indeed, it is a widely shared view in Hungary that the default, 'standard' Hungarian labour law itself offers plenty of possibilities to alter the structure and content of a seemingly standard employment relationship in a way that includes a huge array of flexibility and 'atypicality'. Thus, the formally 'standard' contract can easily be turned into materially 'non-standard' one via flexible − collective and individual − contractual arrangements and work organisation. It seems that the current labour market need for creative, non-standard forms of work (including platform work) is still somewhat limited.

16 Kártyás Gábor: New forms of employment: Employee sharing, Hungary, Case study 15: Policy analysis. 14.

17 Gyulavári Tamás, Kártyás Gábor: Effects of the New Hungarian Labour Code: The Most Flexible Labour Market in the World? LAWYER QUARTERLY 2015 (5) : 4 pp. 233-245., 13 p.

Summary

The gig / platform economy is still rather immature in Central and Eastern Europe, more concretely (as a case study in the present paper) in Hungary. Platform work (as a phenomenon) is immature, hardly noticeable and marginal; it is not perceived (yet) as a distinct regulatory / employment field and it also lacks specific policy (etc.) attention. In this context, the present paper aimed to put forward some tentative, potential and structural explanations for the slower, sluggish development of the phenomenon − and its regulation − in Hungary. Even though the reasons identified and described above (summarised in eight points) are surely country-specific, some of them might deserve wider reflection.

Law of Economics

Gosztonyi, Márton[1]

The Moral and Solidarity Economy during the Pandemic in Hungary

Introduction

Coronavirus. This word has completely rewritten, interwoven and transformed our economy, social relationships, work-life, education system etc., so basically our whole lives. It required an incredibly quick adaptation from everyone; however, its effects on our lives were far from even. While a number of infections and deaths have weighed on the country's population, a number of new fault-lines have emerged along social strata, accumulated goods, types of work and settlement differences, during which a more fortunate part of society has survived the pandemic relatively easily in a locked down, self-isolating, working or learning online situation, while the situation of low-income, disadvantaged social groups was further exacerbated by the epidemic.

In catastrophes, economic crises and epidemic situations when the infrastructures and operating mechanisms of the state and the markets come to a standstill for a while, a "vacuum of action" suddenly arises, in which certain social groups and activities are simply "forgotten" by society or by decision makers; their problems almost disappear, and they don't even get as much attention as they do in a non-disaster situation. These groups tend to coincide with social groups who, already in a difficult financial situation, have little opportunity to make their voices heard, whose savings or assets are either completely absent or very low in volume. They have the least opportunity to present their problems to decision makers and then get concrete help.

Many social groups were left out of the concepts of decision-makers during the coronavirus crisis in Hungary, therefore they were even more affected by the epidemic. At state level, no substantive social policy, education policy or health policy was made for them, and in addition, one type of social benefits (public works) was even reduced. Contrary to the practice of other European Union member states (Germany or the United Kingdom), the Hungarian state supported the middle class rather than disadvantaged social groups. There is no question that helping disadvantaged Hungarian citizens should have been a state task but, as this did not happen, in many cases citizens organised it by themselves or were organised through mutual assistance networks or by non-governmental, civic organisations.

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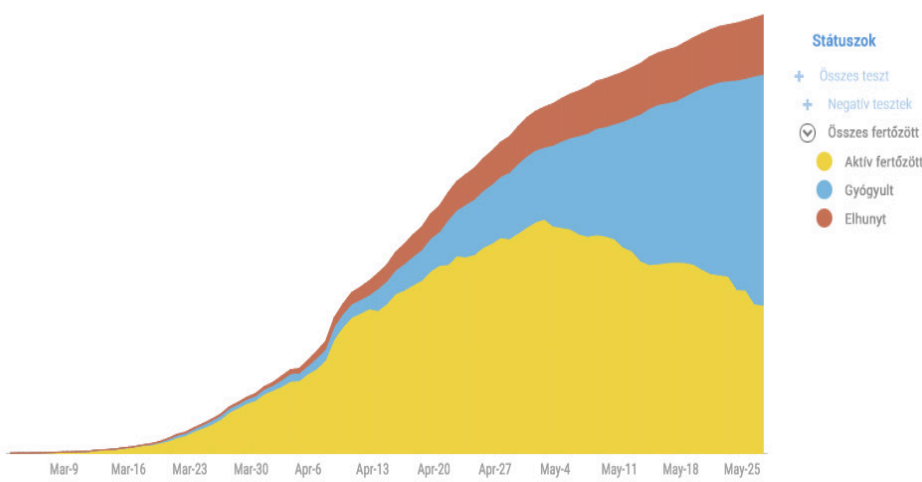
A number of formal and informal shopping communities, mutual lending companies, relief funds, and volunteer-based bottom-up assistance programmes have been launched, all aimed to solve the acute problems that already existed at the outbreak of the coronavirus. These practices all fit into the theoretical and conceptual frameworks of the solidarity economy or human economy, as well as the moral economy.

However, because of the extreme diversity of these practises, the present paper focuses only on a small slice of these entities. In this article, I analyse the community funding of the programmes launched by non-governmental organisations on the fundraising platform most used by Hungarian NGOs, (Adjukössze "Put Together" https://adjukossze.hu/), and within this only those that managed to collect the most funds, between March 4, 2020 and May 27, 2020. in every main coronavirus category (https://adjukossze.hu/koronavirus).

In my paper, I adjusted this to the number of active infections attributed to the epidemic. As one can see from the curve below (Diagram 1), the first person infected by COVID in Hungary was recorded in the official statistics on March 4, 2020. The curve then started to rise sharply and then, on April 4, 2020, the epidemic peaked in the country. Then the curve showed a continuous decrease trend until May 27, 2020, which is the closing date of my data. On May 27, 2020, the epidemic did not end in Hungary. At that time, 1436 people were registered as actively infected (yellow area), 1856 people had recovered from the disease (blue area) and, 505 people passed away during the epidemic (red area), according to the official statistics.

Diagram 1: Changes in the number of active coronavirus cases in Hungary, recovered and deceased



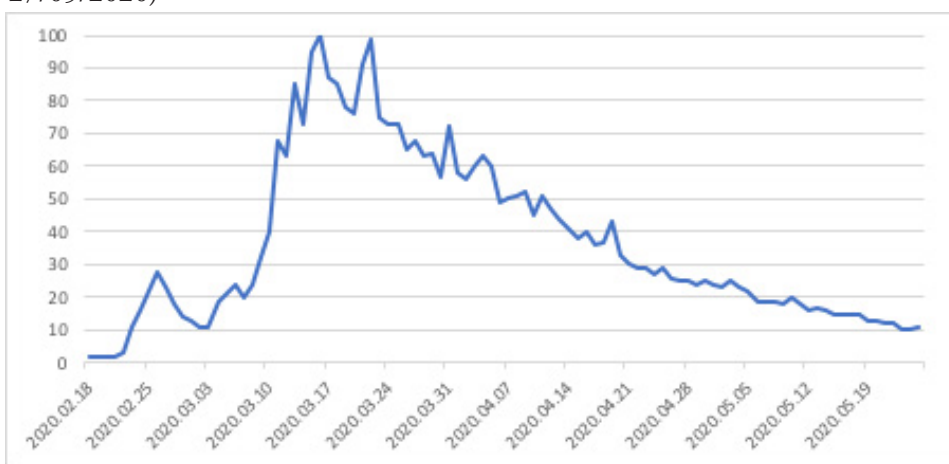
Source: https://atlo.team/koronamonitor/#Graphics ***(27/05/2020)***

I am looking for the answer to the following questions: what trends can be observed in Hungary in the fundraising, donation part of the programmes, given the challenges of the coronavirus, on the largest fundraising platform in Hungary? Furthermore, to what extent have these campaigns strengthened or weakened each other? Who provided financial assistance and to what extent? To what extent did the intensities of these collections coincide with the epidemic curve, and to what extent can they be explained by other factors, such as changes in the volume of COVID internet searches?

Donation, solidarity economy and NGOs

If we stop for a moment and disregard the official statistics related to the epidemic, and look at the intensity of the population in Hungary during the study period, the internet search for coronavirus and related keywords have a completely different curve[2] (Diagram 2).

Diagram 2: Hungarian searches for the Coronavirus search term (02/18/2020 -27/05/2020)



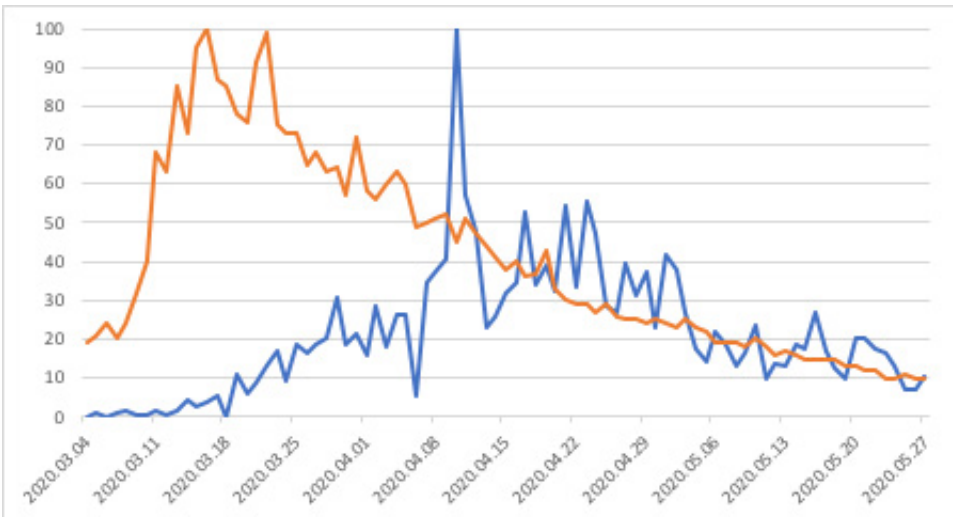
Source: Google Trends, https://trends.google.com/trends/explore?date=2020-02-18%20 2020-05-27&q=Koronav%C3%ADrus ***(May 27, 2020)***

It can be clearly seen that the part of the population that has access to the Internet was informed about the pandemic (22/02/2020) long before the first infected person was registered in the official statistics. As a result, we see a jump in the trend as early as February – due to news from China – and from the beginning of March we can see a continuous rise with two maximum points (March 16, 2020 and March 21, 2020) and then the volume of searches decreases continuously.

2 The days with the highest number of searches for the given term are marked with 100 points on the chart, and the additional points on the curve are determined to that extent.

If we transform the infection curve and the internet search curve, we can see that two completely different event-horizons took place over time (Diagram 3). While the public attention turned to the epidemic mostly in mid-March after a very rapid upswing (orange curve), the infection curve (blue curve) began to rise much later and then reached its maximum point in May with a one-month lag. Nothing shows the difference between the two curves better than being negative and extremely weak Parsons correlation (-0.137) between them.

Diagram 3: Curves of Web searches, and COVID infections (04/03/2020–/27/05/2020)



Where does this discrepancy come from? There are, of course, a huge number of factors involved in this, ranging from the introduction of state restrictions on leaving home to health measures to the flow of information, but now, without claiming to be exhaustive, I would only focus on one. I would like to highlight the effects of solidarity and the human economy, as well as civic activism, among the many explanations.

Solidarity economy, human economy, or moral economy practices are usually intensified in social crisis situations. This is when the collective reactions of the population, which can respond to economic and political crises when social rights are violated and the economy or the state is unable to provide effective solutions, take on a different, alternative, critical model. In many cases, these activities emerge not only as economic activities, but also as civic participation, participatory democracy, or as new practices of governance and advocacy[3] that can range widely from adaptation to autonomy.

A rich academic literature has been emerged in recent decades in French, Spanish, and English about the solidarity economy, human economy, the third sector, or

3 Kousis M. - Paschou M. (2017): ALTERNATIVE FORMS OF ESILIENCE A typology of approaches for the study of Citizen Collective Responses in Hard Economic Times, PACO, Issue 10 (1), 136-168

about the moral economy. The concept of a solidarity economy was coined by Luis Razeto, a Chilean philosophy professor, and has become a central concept of one of the oldest functioning civic movements in Latin America ever since.[4] However, these economic concepts are far from new. Moulaert and Ailenei trace these alternative economic practices all the way back to ancient Egypt, Greece, and Rome, and also point out that they have been observed throughout the entire human history.[5] Thus, we can find examples in mediaeval European cities, the Byzantine Empire, Muslim countries, India, Africa and North America. However, they only become widespread on a broader social level, at the turn of the 19th and the 20th centuries in response to socio-economic crises, exploitative economic relations, and mass impoverishment caused by the Industrial Revolution.[6] The associations, cooperatives or other alternative / socio-economic structures were formed at that time and they were institutionalized at the beginning of the 20th century and were simultaneously influenced by the 18th-19th century utopian socialism and ideologies of Christian democratic and liberal movements.[7] In the aftermath of World War II, another wave of these economic forms emerged, this time responding to the crisis of the mass production system in the 1970s with the creation of a new, alternative movement that included participatory and ecological ideologies, the Schumacherian idea of "Small Is Beautiful" and the local development systems. These socio-economic practices first flourished in France and Latin America, and then solidarity movements began to emerge in the United Kingdom, the United States, Africa, and in many countries in Asia. Its latest wave of solidarity structures has emerged as a response to the 2008 global financial crisis and the response to rapidly growing inequalities.[8]

The concept of the solidarity economy is spread over an extremely wide constellation, and the concept of solidarity itself is even more diverse. It may include mechanisms of taxation and state redistribution, charity, donations, altruistic contribution and political support, social policy, redistribution of social benefits, financial funds, social enterprises, and NGO programmes.[9] As a result, the practices associated with it are also widely implemented,

4 Ould Ahmed P. (2014), "What does 'solidarity economy' mean? Contours and feasibility of a theoretical and political project", *Business Ethics: A European Review*, 24 (4): 425-435.

5 Moulaert F. and O. Ailenei (2005), "Social Economy, Third Sector and Solidarity Relations: A Conceptual Synthesis from History to Present," *Urban Studies*, 42 (11): 2037-2053.

6 Moulaert F. and O. Ailenei (2005)

7 Defourny J. and M. Nyssens (2012), "Conceptions of Social Enterprise in Europe: A Comparative Perspective with the United States" in B. Gidron and Y. Hasenfeld (eds.), *Social Enterprises: An Organizational Perspective*, London: Palgrave MacMillan.

8 Piketty T. (2015), *The Economics of Inequality*, Harvard: Harvard University Press; Almeida P. (2007), "Defensive Mobilization: Popular Movements against Economic Adjustment Policies in Latin America," *Latin American Perspectives*, 34 (3): 123-139.; Kousis M. and C. Tilly (2005), "Introduction", in M. Kousis and C. Tilly (eds.) *Economic and Political Contention in Comparative Perspective*, Boulder, CO: Paradigm Publishers.

9 Simonič P. (edit) (2019): Anthropological perspectives of solidarity and Reciprocity, Lju-

and they methods can also take many forms. They may be exchanges based on solidarity[10], local trading systems (LETS)[11], local money[12], ethical banks[13], local market cooperatives[14], alternative forms of production[15], critical consumption movements[16], housing and anti-eviction civic initiatives[17], resistance and spontaneous actions of financial recovery[18], or even new donation practices[19], and the list can be continued with many more.

As the number of studies on these alternative citizenship initiatives increases, so does

bljana, Znanstvena založba Filozofske Fakulteta universal v Ljubljani

10 Fernández MM (2009), "El trueque solidario: Una estrategia de supervivencia ante la crisis argentina de 2001", *Revista Pueblos y Fronteras digital*, 4 (7): 5-29.

11 Granger RC, J. Wringe and P. Andrews (2010), "LETS as Alternative, Post-capitalist Economic Spaces? Learning Lessons from the Totnes 'Acorn'," *Local Economy*, 25 (7): 573-585.

12 Seyfang G. and N. Longhurst (2013), "Growing green money? Mapping community currencies for sustainable development", *Ecological Economics*, 86: 65-77.; Schroeder RFH (2013), "The Financing of Complementary Currencies: Risks and Chances on the Path to Sustainable Regional Economies". The "2" International Conference on Complementary Currency Systems (CCS) 19-23 June 2013, The Hague.

13 Cowton CJ (2006), "Financing the social economy: a case study of Triodos Bank," *International Journal of Nonprofit and Voluntary Sector Marketing*, 6 (2): 145-155.; San-Jose L., J. Retolaza, and J. Gutierrez-Goiria (2011), "Are ethical banks different? A comparative analysis using the radical affinity index. " *Journal of Business Ethics* 100 (1): 151-173.

14 Phillips R. (2012), "Food Cooperatives as Community-Level Self-Help and Development," *International Journal of Self Help and Self Care*, 6 (2): 189-203.

15 Corrado A. (2010), "Chapter 2: New peasantries and alternative agro-food networks: The case of Réseau Semences Paysannes", in A. Bonanno, H. Bakker, R. Jussaume, Y. Kawamura and M. Shucksmith (eds.), From Community to Consumption: New and Classical Themes in Rural Sociological Research. *Research in Rural Sociology and Development*, 16: 17-30.

16 Fonte M. (2013), "Food consumption as social practice: Solidarity Purchasing Groups in Rome, Italy," *Journal of Rural Studies*, 32: 230-239.

17 Fominaya CF and AM Jimenéz (2014), "Transnational diffusion across time: The adoption of the Argentine Dirty War 'escrache 'in the context of Spain's housing crisis", in D. della Porta and A. Mattoni (eds) *Spreading protest: Social movements in times of crisis,* Colchester: ECPR Press.; Nez, H. (2014), "Practices of Social Solidarity and Economic Alternatives in Times of Crisis: The" Network of Social Rights "of Carabanchel, Madrid," paper presented at the 8th ECPR General Conference, Session 007 Citizens 'Resilience in Times of Crisis, Panel 231: Changing Interactions between Publics and Policies in Times of Crisis, 3-6 September 2014, University of Glasgow, Glasgow; Romanos E. (2014), "Evictions, petitions and escraches: Contentious housing in austerity Spain", *Social Movement Studies*, 13 (2): 296-302.

18 Dalakoglou D. (2012), "Beyond Spontaneity: Crisis, Violence and Collective Action in Athens," *City*, 16 (5): 535-545.

19 Barkin D. (2012), "Communities constructing their own alternatives in the face of crisis," *Mountain Research and Development*, 32 (S1): 12-22. Lamont M., JS Welburn, and CM Fleming (2013), "Responses to Discrimination and Social Resilience Under Neoliberalism: The United States Compared," in PA Hall, M. Lamont (eds.) *Social Resilience in the Neoliberal Age*. Cambridge: Cambridge University Press.

the number of theoretical approaches.[20] However, an important feature of forms of the solidarity economy is that they prioritize resilience "which involves dynamic processes that promote positive adaptation in the context of significant disadvantages"[21]. Additional goals of the solidarity economy included to reform failed, stagnant economic and political systems, through the development of collective resilience and participatory systems and to promote participatory democracy and civic cooperation, and also to broaden social activism in both economic and political terms.[22] These economic initiatives therefore create a new type of political and social actions, a bottom-up participatory structure that promotes and lays the foundations for an economy of solidarity. Solidarity economic approaches thus highlight the importance of bottom-up alternative initiatives and practices based on cooperation and reciprocity, and prioritise strengthening social capital over economic capital gains.[23] In the economy of solidarity, a number of theoretical directions have emerged, all of which place different emphasis on each of the quartet of the individual, the economy, society and the environment.

The human economy focuses on human "well-being" which includes all human needs.[24] Thus, it not only includes those needs that can be met by private market transactions with economic activities, but also, for example, security, a healthy environment, and intangibles such as dignity that cannot be reduced to purely quantifiable economic transactions. According to human economy theorists, we are living in an era where market mechanisms (which have always been the result of social fabrication and have never been processes that are controlled by an "invisible hand") have been extended to new segments with the goal of increasing economic efficiency.[25] At the same time, people have realised that treating new social segments as goods (e.g., improving the economic efficiency of the education market) is neither morally nor socially independent of the norms themselves. As a result, human economy theorists are sceptical about economic evolutionary models based on the concepts of efficiency and abstract individual rationality, and rely more on a broader concept of the economy that also takes into account material, historical, social, cultural, and environmental factors.[26] In the human economy, the focuses are on individuals whose preferences and decisions are sometimes based on rational calculations, but generally stem from a family, social, and political context.[27]

20 Kousis- Paschou (2017)

21 Walsh, F. (2015*), Strengthening family resilience*. Guilford Publications, 4.

22 Murray K. and A. Zautra (2012), "Community resilience: Fostering recovery, sustainability, and growth," in M. Ungar (ed.) *The Social Ecology of Resilience: A Handbook of Theory and Practice,* New York: Springer; 340.

23 Moulaert and AIlenei (2005)

24 Hart K.- Laville JL - Cattani A. (Edited) (2010): The Human Economy, Cambridge Polity Press

25 Hann C. - Hart K. (2011): Economic Anthropology - History, Ethnography, Critique, Cambridge Polity Press

26 Hann C. - Hart K. (2011)

27 Hann C. - Hart K. (2011)

The assumptions of the moral economy are based on similar fundamentals, which are summarised in the theses of James Scott[28]. Scott demonstrates, following the example of villages in Southeast Asia, that the basic mechanisms of action and transactional schemes that operate an economy are based primarily on ethical, moral principles rather than profit maximization based on individual rationality. Consequently, this trend questions the axioms of neoliberal economics.

From all this, it can be seen that donation, as will be discussed in this article, is embedded in an extremely broad social and economic theoretical conceptual framework, and it represents only a small practice within. Of course, with regard to donation, the elements forming solidarity economy that have been listed above are also realised because the donor relinquishes his assets for the benefit of another party during the donation, in order to promote moral and ethical goals. However, the process does not necessarily promote a bottom-up process based on reciprocity, but rather via a programme by an intermediary (non-governmental organization, NGO). As a result, it is far from being able to create as much social and economic change as other methods embedded in a solidarity economy, and can sometimes even run counter to the goals of a solidarity economy, as it can strengthen dependency or conceal unequal power relations. As a result, donation is one of the peripheral elements of the solidarity economy, which can be most closely associated with classical economic transactions that are only indirectly related to the reforms of "real" social power relations.

However, in order to be able to analyse the mechanism of donation in Hungary, we also need to give a brief overview of the dilemmas related to NGOs. With the decline of state involvement, the organisational concept of "civil society", the "third sector" has been strengthening in many countries of the world since the 1970s. However, after the turn of the millennium, with the emergence of mass grassroots movements, the novelty of classical civil, non-governmental organisations is fading, and it has come under fire and strong attacks in many countries. NGOs have recently been the subject of a number of criticisms that their dominant view ("doing good" in difficult situations) is steadily losing legitimacy. This can be traced back to their "magical power," under which their custodianship of the remedy for social problems and developmental dilemmas has also dissipated.[29] At the same time, in addition to critical voices, in many cases there are still many academic writings highlighting the importance of NGOs, pointing out their extreme diversity, both in terms of their activities and their structure. NGOs can effectively represent social campaigns in an institutionalised framework, and they can generate new ideas and approaches in development problems.[30]

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28 James C. Scott (1976): The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia, Yale University Press

29 Bebbington A. (2005): Donor-NGO relations and representations of livelihood in nongovernmental aid chains, World Development, vol. 33, issue 6, 937-950.

30 Hart K.- Laville JL - Cattani A. (Edited) (2010)

In summary, the conceptual framework of donations is determined by the theoretical framework of the solidarity economy and the operational practices of it by NGOs as intermediaries. This framework however includes ambivalent and sometimes contradictory concepts of interpretation of these entities.

Methodology

The data used for the analysis came from the "Adjukössze", which is an online fundraising platform. The data was formatted using a Web scraping code written in Python: with this technique, it was automatically possible to access a large set of information from the website, to analyse the donors, the amounts donated, and the days on which the amounts were donated. As the data change in real time on the platform, they were analysed from March 3, 2020 to May 27, 2020. On May 27, 2020, a total of 31 fundraising campaigns were running on the platform, during which the organisations would have liked to raise a total of HUF 44,035,000 and on that day HUF 18,865,682 had been raised so far (https://adjukossze.hu/koronavirus). It is also important to emphasize, from a methodological point of view, that not all ongoing campaigns were analysed in this paper, only those that had collected the most funding in each of the 9 main categories. In addition, a campaign can run on the interface for up to 31 days, so similar campaigns for a similar purpose launched by the same organisation during the epidemic have been added together. Each programme had extremely noble goals; some of them promoted the digital education of disadvantaged children; another aimed to solve the housing problems of homeless people; another campaign helped to feed stray dogs; another helped actors who had lost their jobs due to the pandemic; and, another provided assistance to victims of increased domestic violence due to the epidemic[31].

The epidemic data for Hungary were derived from the Covid19 database (COVID-19-data) containing official world statistics, from which only those statistics that were limited to Hungary and within the time period of the analysis were used. Internet searches in Hungary were provided by a web application called Google Trends[32].

Transformations between variables and descriptive statistics were made from all these databases using the SPSS 23v statistical software, and quadratic regression analyses were also performed with it. The use of Quadratic Regression Analysis was supported by the fact that this method was able to provide the best fitted parabola to the data, using the least squares method.

Finally, network data and statistics were created using the Gephi software; with its help, it became possible to analyse the donation relationships both statistically and visually.

31 For all the campaigns included in the analysis, see Table 1 in Appendix

32 Google Trends : (ONLINE: 30/05/2020): https://trends.google.com/trends/explore?-date=2020-02-18%202020-05-27&q=Koronav%C3%ADrus

Results – What can we see from the data?

The 9 most successful donations in the 9 main categories on "Adjukössze" came from the donations of almost 2,000 people, but their distribution varies greatly across the categories. The most donors donated to the animal protection programme (39.7%), followed by the education programme (19.8%), the cultural programme (13.3%), and the faith programme (12.9%). These 4 programmes represent 85.7 percent of the total donors in the sample (Table 1).

Table 1: The distribution of donors along categories (20/03/2020 – 27/03/2020.)

Programme	Number of donors	Percentage distribution
Animal protection	771	39.7
Culture	258	13.3
Education	385	19.8
Faith	251	12.9
Environmental Protection	29	1.5
Health	44	2.3
Legal protection	95	4.9
Social	80	4.1
Sports	27	1.4
TOTAL	1940	100.0

In the period between March 20, 2020 and March 27, 2020, 1940 donors donated nearly HUF 17.5 million in total to the programmes, which is scattered along the categories on a wide scale in terms of its distribution, volume and average values (Table 2).

Table 2: Donation amounts by category (HUF)

Programme	N	Sum	Min.	Max.	Median	Average	Std. dev
Animal protection	771	4,788,895	300	100,000	4000	6,211	7,298
Culture	258	3,009,896	1000	350,000	5000	11,666	25,028
Education	385	4,613,000	500	150,000	5000	11,982	19,062
Faith	251	2,120,400	500	100,000	5000	8,448	10,466
Environmental Protection	29	270,000	2000	50,000	5000	9,310	10,202
Health	44	630,000	2000	300,000	5000	14,318	44,384
Legal protection	95	663,500	1000	30,000	6000	6,984	6,665
Social	80	1,202,001	1000	200,000	10000	15,025	25,583
Sports	27	132,400	2000	15,000	4000	4,904	3,003
TOTAL	1940	17,430,092	300	350,000	5000	8,985	16,517

The table shows that half of the total donation amount (53%) was collected by two programmes; an animal protection programme which provided food for stray dogs on the one hand, and an educational programme on the other, which provided access to digital education for disadvantaged children. However, in terms of the number of donors, the health programme as well as the social programme performed the best in terms of donations. Understandably, we see large differences along the minimum donation and maximum donation amounts; however, the median and mean values, with the exception of a few small outliers, show broadly similar donation averages. The median value was HUF 5,000 and the average value was around HUF 10,000 throughout the programmes. All this shows that the donation amounts were put together from extremely small amounts of donations. This is also supported by the distributions of large amounts of donors.

Although it is relatively difficult to draw a limit on what counts as a large donation, it can be applied as a rule of thumb – and consistent with the descriptive statistics – that we do not make a big mistake when considering donors who donated HUF 100,000 or more to a programme as large donors (Table 3).

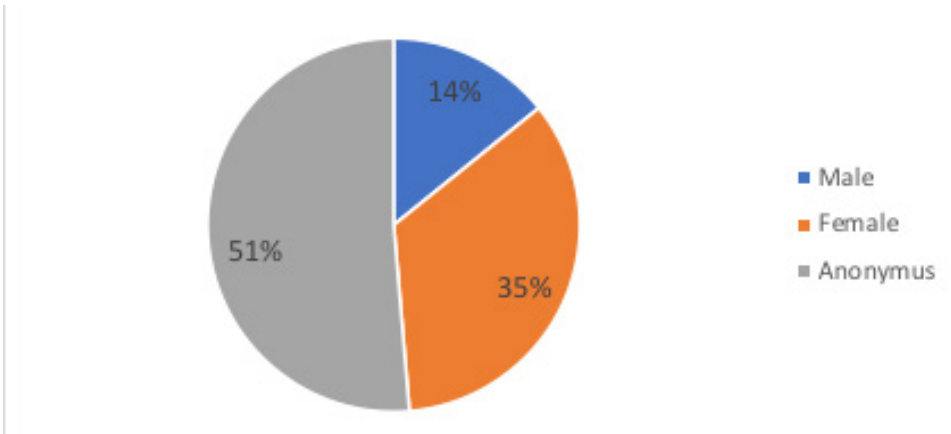
Table 3: Distribution of large donors by programmes

Programme	Donors	Large Donors	Percentage of large donors
Animal protection	771	1	0.13
Culture	258	3	1.16
Education	385	10	2.60
Faith	251	1	0.40
Environmental Protection	29	0	0.00
Health	44	1	2.27
Legal protection	95	0	0.00
Social	80	2	2.50
Sports	27	0	0.00
TOTAL	1940	18	0.93

Based on this, an extremely small proportion of all donors, about 1% (18 people, 0.93%), fall into this category. If we take a look at their distribution along the programmes, we can see there were no large donors at all in a third of the programmes, however, it can also be seen that there were 3 programmes (Education, Health, Social) where the proportion of large donors exceeded 2% and even almost reached 3%. However, this is still representing an extremely small proportion of all donors, which means that the programmes have raised their donations from an extremely large number of people and from extremely small amounts of donations.

An interesting descriptive statistic is obtained by comparing anonymous (Anonymous[33]) donors with donors who give their name, and by looking at the gender distribution of those donors who give their name (Diagram 4).

Diagram 4: Distribution of anonymous and non-anonymous donors by gender



It can be seen that, at the total donor level, that about half of the donors gave their name to the donation and half remained anonymous. It is important that the proportion of women donors is dominant, almost twice as much as the percentage of male donors. If cross-tabulate the results by the programmes, we get Table 4[34].

Table 4: Gender and anonymous distribution by programme (%)

	Animal.	Cul.	Edu	Faith	Env.	Health	Legal.	Soc.	Sport
Male	7.9	25.2	20.3	17.5	13.8	15.9	5.3	13.8	3.7
Female	40.2	24.0	32.5	27.5	37.9	31.8	42.1	31.3	44.4
Anonymous	51.9	50.8	47.3	55.0	48.3	52.3	52.6	55.0	51.9
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

It can be seen that each programme's profile is quite similar to the total; about half of the donors are shrouded in anonymity and we cannot detect any outliers along this. In the gender ratio, on the other hand, a slightly higher proportion of male donor participation can be seen in the culture and education programme, and an even lower proportion of male participation, along the categories of human rights, animal protection, and sports.

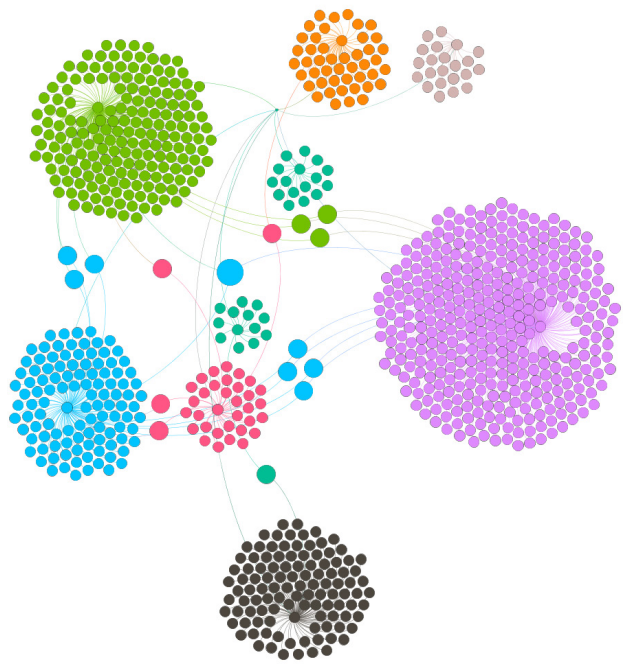
With regard to donations, it is worth briefly addressing the topic of how many donors

33 Although Anonymous means anonymous donor, it also has another meaning in Hungary, as historians call King Bela III's clerk as Anonymous who lived at the turn of 12th and 13th centuries and who wrote the Gesta Hungarorum (Vajay 1998).

34 The value of chi2 of the crosstab is 87,374 at a significance level of 0.000

can be linked to a particular programme, and what is the overlap between the donors of different programmes. The network and basic statistics of the 9 programmes are shown in Figure 1 and Table 5[35]. Each node in the network represents a donor, and node-connections are indicated by edges between the nodes.

Figure 1: Donors Network



5.Table: Basic network statistics

Nodes	909
Edges	925
Network density*	0001
Modularity	8
Average path length	1493
Number of connected components	1

* The number of actual edges divided by the number of potential edges

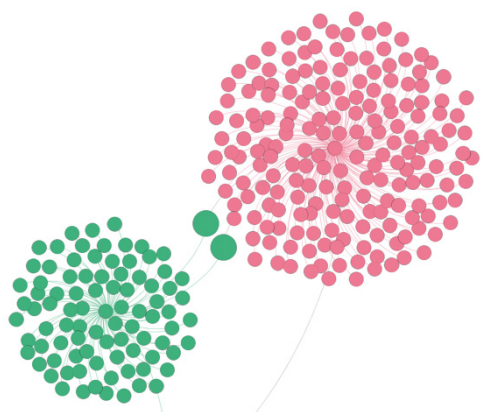
It is clear from both the figure and the network statistics that the network itself has a rather low density (0.001) which means that a given donor usually donates to one specific programme. The number of donors who have donated to more than one

35 The network diagram only shows non-anonymous donors.

programme is extremely small, only 1.5% (14 out of 909). All of this, of course, may be due to the fact that the network only displays those who have donated with their names; we have no information on anonymous donors, and they represent about half of all donors. However, based on these data the entire network can break down into well-separated clusters along the programmes. What is interesting about the network is that even this small number of people donating to multiple programmes are enough for an entire network to emerge between the programmes, and the structure does not fall apart into separate subnets.

The same lack of cross-donation appears in a case where we compare not completely different but completely identical programmes instead. During the coronavirus, two almost identical programmes ran on the platform; both collected donations to promote digital education for disadvantaged children. The network of donors of these two programmes is shown in Figure 2.

Figure 2: Donor network of two similar educational programmes

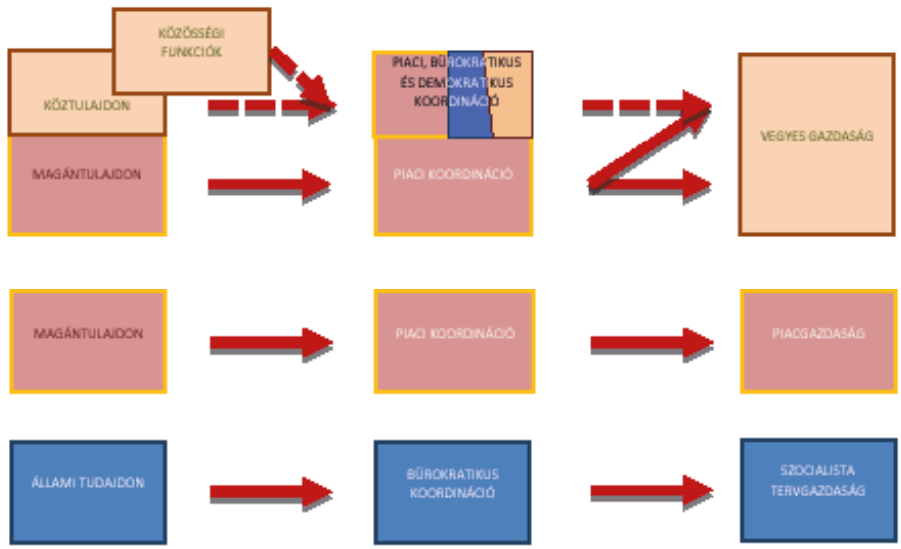


The network is characterized by 281 nodes, 283 edges, and the density of the network is 0.004, which is very strongly consistent with the data measured on the large network. There are also very few (0.7%) cross- or multiple donations across the network.

From all this, it can be seen that each programme and campaign has its own support base, which can mobilise separately within the framework of a possible fundraising campaign. The overlaps between these donors are minimal, whether we are looking at different programmes or identical ones.

The time series distributions of donations along the programmes are summarised in Diagram 5. It can be clearly seen that the donation curves of the programmes show completely different time series distribution. The animal protection, the social programme, and the education programme responded quite early, in March, to the problems caused by the epidemic, while in other categories, fundraising campaigns were launched only from mid-May.

Diagram 5: Time series distributions of donations (20/03/2020 to 20/05/2020)



It is evident from Diagram 5 that the donation intensity of the programmes was highly variable, producing a large amount in the first 3-6 days after the start of the campaigns, and then further outbursts can be observed along the curves for each communication event or news. However, on average, there were 2-3 days in the programmes when a significant amount of money flowed into the campaign; the rest of the campaign was slightly scattered around the average of the given campaign.

If we compare the curve of the epidemic and the curve of Internet searches with the donation curves of the programmes, we get Diagrams 6 and 7.

Diagram 6: Curve of the epidemic (number of active infected cases, red colour) and curves of the programmes

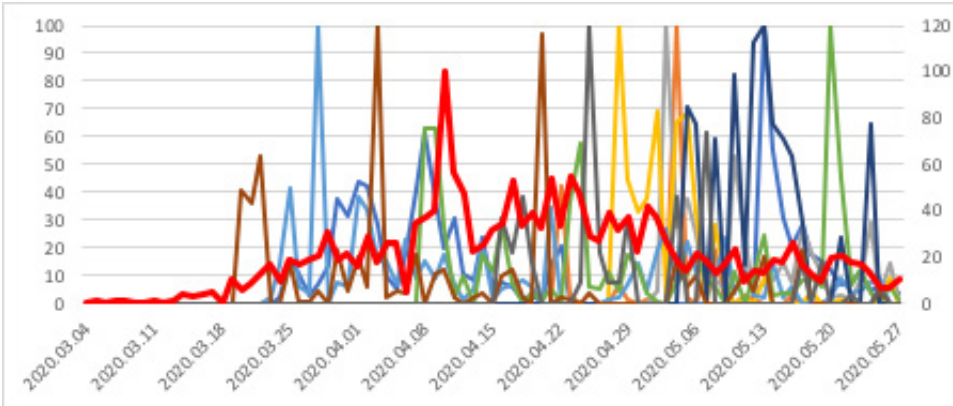
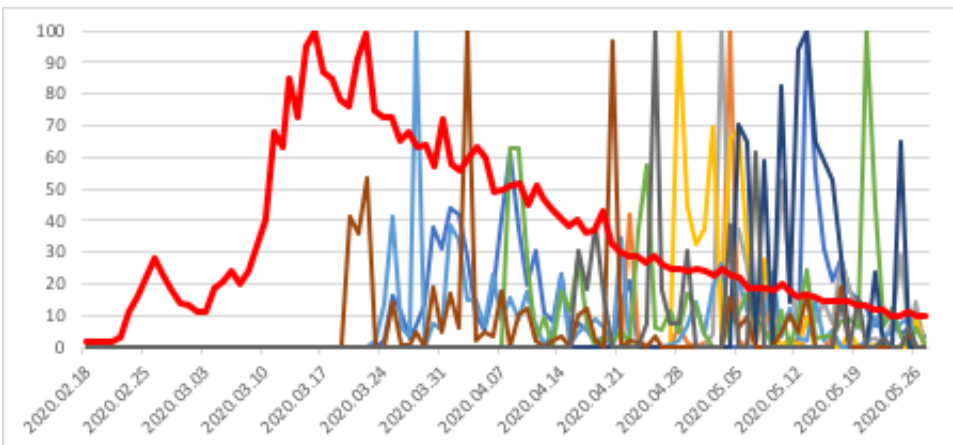


Diagram 7: Curve of the internet searches (red colour), and curves of the programmes



It is striking both in the epidemic curve (Diagram 6) and in the Internet search curve (Diagram 7) that both described a very different line than any other donation curve. It can be clearly seen with regard to the epidemic curve that donations started much earlier than the number of active infected people started to increase, and they showed outstanding values even after the number of infected people decreased. The internet search curve shows a slightly different picture, where it can be seen that donation programmes started with a strong delay, almost 1 month later, than the search curve would have started to rise sharply. However, donations remained much more intense, regardless of the flattening of the search curve.

The same results can be obtained by analysing the data by quadratic regression. Neither the epidemic curve nor the Internet search for either programme has a statistically

significant R for the models (Appendix Table 2). Based on this, the programmes and the two explanatory curves were completely independent from each other statistically. In other words, they did not affect each other in a statistical sense. Here, in a statistical sense, we should stop analysing the data, but it is still worth moving a little further, even if the R value of the models are not significant, and take a look at the ANOVA and coefficient values (Tables 3 and 4 in Appendix). Based on the results of the ANOVA, it can be seen that sport as well as faith programmes show significant results with the Google search curve (at the 0.05 level), but we cannot observe such correlation with the epidemic curve. With regard to the coefficients there are even less significant cases, only one case, with respect to the culture which has a value that is statistically significant.

So, what can we see from all this? In particular, it takes time to develop programmes that respond to specific coronavirus problems. That is the explanation for the difference that can be seen between Internet searches and the start of donations. A programme needs to be set up, the associated activities need to be organised, which has resulted in a delay of about 3-4 weeks depending on how the population has begun to detect the outbreak. It can also be seen that these programmes are mostly multiplied when the epidemic curve is halfway through flattening. All of this means that with the exception of a few early but even more successful birds, most of the programmes only started when the epidemic was over, and could only mitigate the consequences of the epidemic.

Conclusion

Based on the analyses, it can be seen that the Hungarian society was completely unprepared for the pandemic, both socially and economically. Those social groups who have so far been excluded from the horizons of decision-makers have become even more marginalised because of the coronavirus.

The few programmes that Hungarian NGOs were able to launch at about the same time as the outbreak happened, were only a few drops in the sea of "problems, and only a relatively small number of donors gave donation to them in terms of the total population of the country. This resulted, on the one hand, from the information vacuum in which the Hungarian NGOs are stuck, and on the other hand, the lack of resources in the segment, and the fact that almost every NGO campaign has its own support base, with very little inter-connections between them, and these support bases can only provide extremely fragmented and sporadic donations.

It can also be seen that organisations and the population begin to realise the current nature of social problems when the epidemic is already passing, so at best, the participation of citizens can only mitigate the social and economic problems in the wake of the epidemic. This is shown by the fact that the curves of donations and the epidemic or information curves were almost completely independent from each other.

Although with regard to donation we see a weak attempt which move towards to strengthen the Hungarian solidarity economy, the high proportion of anonymity

among supporters and the relatively small volume of support and the small size of the Hungarian civil sector do not allow us to interpret it as the appearance of a new human-centred economic mechanism at the macro level. However, it is known that society will not become democratic unless we find a way to democratize and reform the economy. Donation is a very small step in this direction, and the lessons from this paper shows that a next possible epidemic wave in the future will still have a negative impact and strongly adverse effects on the lives of marginalized social groups if the decision-makers do not pay attention to them.

Appendix

Table 1

Category	Organisation	URLs
Health	Hospital School Foundation to Support the Learning of Sick Children	https://adjukossze.hu/kampany/online-tanitjuk-az-orvosok-apolok-gyerekeit-a-korhazsuliban-1951
Animal protection	Ant Community	https://adjukossze.hu/kampany/elelemhiany-a-menhelyeken-1905
		https://adjukossze.hu/kampany/hivj-meg-ebedre-egy-kutyat-1994
Social	From Street to Apartment! Association	https://adjukossze.hu/kampany/segits-az-ule-nak-atveszelni-a-koronavirust-veszhelyzetet-1894
		https://adjukossze.hu/kampany/segits-az-ule-nak-atveszelni-a-koronavirust-veszhelyzetet-1937
Culture	Independent Performing Arts Association	https://adjukossze.hu/kampany/tamogassuk-az-eloado-muveszeti-teruleten-dolgozokat-1896
		https://adjukossze.hu/kampany/tamogassuk-az-eloado-muveszeti-teruleten-dolgozokat-1954
Faith	Society of Jesus Foundation	https://adjukossze.hu/kampany/minosegi-kozvetitestechnikat-a-jezus-szive-templomba-1973
Environmental Protection	Pangea Cultural and Environmental Association	https://adjukossze.hu/kampany/kutatok-a-jovo-termeszetbuvaraiert-1920
Education	Civil College Foundation	https://adjukossze.hu/kampany/ablak-a-padra-legyen-a-digitalis-oktatas-mindenkie-1922
		https://adjukossze.hu/kampany/ablak-a-padra-digitalis-eszkozoket-a-raszorulo-gyerekeknek-1992
Sports	Downdog Yoga Studio Association	https://adjukossze.hu/kampany/tamogass-hogy-jogazhass-jogazz-hogy-tamogass-1989
Legal protection	Emma Public Benefit Association	https://adjukossze.hu/kampany/zold-utat-az-anyaknak-1971
Education	Resource Foundation United Way Hungary	https://adjukossze.hu/kampany/otthon-iskolat-minden-otthonba-1952

Table 2 - Quadratic Regression Models - Model Summary

Variables	Programmes	R	R Square	Adjusted R Square	Std. Error of the Estimate
Changes in the number of Internet searches	Animal protection	206	, 043	019	16.963
	Health	135	, 018	- 006	11.933
	Faith	361	130	109	13.289
	Legal protection	246	.060	, 037	17.692
	Culture	279	, 078	, 055	13.442
	Education	250	, 063	, 040	16.419
	Sports	436	191	171	21.629
	Social	207	, 043	, 020	16.836
	Environment protection	201	, 040	, 017	14.605
Changes in the number of active infections	Animal protection	215	, 046	, 023	16.929
	Health	, 078	.006	- 018	12.006
	Faith	131	, 017	- 007	14.126
	Legal protection	192	, 037	013	17.914
	Culture	197	, 039	015	13.724
	Education	359	129	107	15.831
	Sports	137	019	- 005	23.814
	Social	, 058	003	- 021	17.180
	Environment protection	226	, 051	, 028	14.523

Table 3 - Quadratic Regression Models - ANOVA

Variables	Programmes	Sum of Squares	df	Mean Square	F	Sig.
Changes in the number of Internet searches	Animal protection	1047.514	2	523.757	1,820	168
	Health	215.130	2	107.565	755	473
	Faith	2165.796	2	1082.898	6.132	003
	Legal protection	1649.095	2	824.548	2.634	, 078
	Culture	1250.163	2	625.081	3.459	, 036
	Education	1479.259	2	739.629	2.743	, 070
	Sports	9028.232	2	4514.116	9.650	, 000
	Social	1043.376	2	521.688	1,841	165
	Environment protection	734.992	2	367.496	1.723	185

Changes in the number of active infections	Animal protection	1143.556	2	571.778	1,995	143
	Health	72.095	2	36.048	250	779
	Faith	284.509	2	142.254	713	493
	Legal protection	1002.947	2	501.473	1.563	216
	Culture	624.085	2	312.042	1,657	197
	Education	3034.798	2	1517.399	6.054	.004
	Sports	884.621	2	442.311	780	462
	Social	81.864	2	40.932	139	871
	Environment protection	931.430	2	465.715	2.208	116

Table 4 - Quadratic Regression Models - Coefficient Values

Variables	Programmes	Unstandardised Coefficients		Standardised Coefficients	t	Sig.
		B	Std. error	Beta		
Changes in the number of Internet searches	Animal protection	556	320	818	1.737	, 086
	Health	- 039	225	- 082	- 172	863
	Faith	- 543	251	- 971	-2.165	, 033
	Legal protection	- 191	334	- 267	- 572	569
	Culture	667	254	1,214	2,630	, 010
	Education	- 029	310	- 043	- 092	927
	Sports	-1.279	408	-1.355	-3.132	002
	Social	230	318	340	722	472
	Environment protection	118	276	201	426	671
Changes in the number of active infections	Animal protection	422	245	415	1,720	, 089
	Health	115	174	163	662	510
	Faith	160	205	192	784	435
	Legal protection	458	259	428	1,763	, 082
	Culture	313	199	382	1,576	119
	Education	503	229	506	2.193	, 031
	Sports	154	345	109	446	657
	Social	131	249	130	525	601
	Environment protection	434	210	497	2,064	, 042

Birher, Nándor Máté[1] **– Alpár, Vera Noémi**[2] **– Knoll-Csete, Edit**[3] **– Sőréné Batka, Eszter**[4]

Human solidarity[5] – the ultimate victory of good-will, understanding, knowledge and peace[6]

Introduction

The origin of solidarity can be traced to the Roman legal concept of *correality*[7], where a single thing was owed by more than one person. There was just a single obligation, under those circumstances. There was a transformation and growth of this idea during the *ius communae*, before being codified in the Napoleonic Code of 1804. [8]. Our

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5 This study in the form of working paper can be found at the link below under this title: 'What the Word needs now is solidarity' https://www.cambridge.org/engage/coe/article-details/5f30f379c67b860019834f8f accessed 09. Oktober 2020.

6 Albert Szent-Györgyi: "I thank you for this teaching with all my heart and lift my glass to human solidarity, to the ultimate victory of knowledge- peace, good-will and understanding." The International Human Solidarity Day is celebrated since the year 2006. The UN General Assembly on December 22, 2005 had proclaimed that the Day would take place on December 20 each year.

7 Especially as far as *bonae fidei iudicia* were concerned. More about this in: Wylie, J. Kerr: '*Solidarity and Correality,* Studies 'in Roman Law I., XVI + 265 pp. (Edinburgh and London 1923) 245. - J. Kerr Wylie (1923)

8 Obligatio in solidum: A solidary obligation, or an obligation *in solidum*, is a type of obligation in the civil law jurisprudence that allows either obligors to be bound together, each liable for the whole performance to be bound together, all owed just a single performance and each entitled to the entirety of it. Solidarity can be either active or passive. A solidary obligation that is active exists among the obliges (creditors) in the transaction. It is passive when it exists among the obligors (debtors) in a transaction. The origin of solidarity can be traced to a Roman idea known as *correality* where a single thing was owed by more than one person. Under these circumstances, there was just a single obligation. There was a transformation and growth of this idea during the *ius commune* before being codified in the Napoleonic Code of 1804. In Louisiana law, solidary obligations are governed by articles 1789–1806 of the Louisiana Civil Code. Wikipedia (2020). .< https://en.wikipedia.org/wiki/Solidary_obligations > accessed 10. March 2020.

fundamental principle is that solidarity protects society from lawlessness, injustice, isolation, vulnerability and above all from disintegration. Solidarity was the name of an organisation and movement of workers against the communist government in Poland, which began in 1980 and established free elections in 1989. In this article, we examine how social solidarity[9] can appear in the regulatory work of a nation or on higher, international level and vice-versa: how law affects social solidarity[10]. We describe why people act on the basis of solidarity, which could be the root of their behaviour, and how solidarity works in practice. We collected many meanings and phenomena relating to solidarity; this term is becoming increasingly relevant in a global crisis, because it is time (or it should be the time) to show solidarity and humanity. The financial crisis in 2008 and the COVID-19 situation, in view of the pandemic, create some interesting and crucial, in societal and economic terms, opportunities for solidarity that might be readily analysed. Politicians and religious leaders often use this word to become more popular or influence people's understanding of delicate situations or even to gather followers to help solve the problems. We summarise the philosophical origins, the moral framework and the basis of this term. We outlined the Durkheimian sociology, which argues that the cohesion of the modern, "organic" society is built up from the interdependency system of increasingly differentiated and specialised individuals. Before covering the global society in practice, we collected the sociological aspects as well, all the way to describing the procedures to ensure that household evictions are only carried out as a last resort and with due process.

9 The term solidarity appears to have entered the English language in the 19th century from the French "solidarite". The term, as well as related ones, has a considerable history. In the 1765 Encyclopedia (Encyclopedia ou Diction-naire ..., 1765) of Denis Diderot (1713-1784) and Jean Le Rond d' Alembert (1717-1783), one finds the definition of „Solidarité". A French-English dictionary from the 19th century gives prominence to the legal significance of the terms solidaire (a bond or contract), solidairement (wholly, for the whole) and solidarité (being bound or obligated in solido) (Boyer's French Dictionary, 1830, p. 480). The roots of these terms lie in a form of obligation at law involving joint and several liability, as well as rights. This remains the third meaning provided in the Oxford English Dictionary (Oxford English Dictionary: 1933, vol. 10, p. 400). The current collectivist interpretation of these terms is apparently drawn from French communist understandings of the latter part of the 19th century (cf. Skeat, 1956, p. 580]. In English, the word came to designate "the fact or quality, on the part of communities, etc., of being perfectly united or at one in some respect, esp. in interests, sympathies, or aspirations" (Oxford English Dictionary: 1933, vol. 10, p. 400]

10 Engelhardt H.T. '*Solidarity: Post-Modern Perspectives'*. In: Bayertz K. (eds) Solidarity. *'Philosophical Studies in Contemporary Culture*,' (vol 5. Springer, Dordrecht 1999.) – Engelhardt H.T. (1999)

The New interpretation framework of solidarity

The issue of solidarity raises moral, legal and religious questions at the same time[11]. How and why should it be, can it be, or is it necessary to cooperate with the other person? The answer can only be given by the cooperation of all the three previously mentioned areas of a normative system. The complexity of this question is shown by the fact that although the meaning of solidarity itself as a "terminus technicus" was developed by the ideologues of the Enlightenment, its roots go much deeper. Even the religious thought of the Old Testament recognised solidarity in the common fate that unites the chosen people with the Creator who covenants with them. (There are many further examples of solidarity in the Book of Prophets.) In addition, in the early Christian communities, the obligation to pay attention to each other and to cooperate also gained practical significance. St. Paul, for example, regards the community as an organic whole, in which individuals are parts of the community, stating that if something is bad even for the smallest member of the body, it is bad for the whole body[12]. Human solidarity may be regarded as inherent in Islam, for example, as well. One of Islam's five pillars aims at ending poverty, helping poor citizens and sharing prosperity via giving alms (Zakat[13]) to strengthen society, achieve peace, protect the planet and foster a life of dignity for all.

In the modern age, solidarity is mostly a reflection of the need for togetherness, the importance of cooperation, not only according to the principles of Enlightenment, but also in Christian social education[14]. However, especially with regard to more serious community challenges, if it is raising awareness of the environmental impact of unsustainable social functioning or a major epidemic, possible armed conflicts, we need to look at how the individual is prepared to show solidarity with people in need.

If we look at the frequency of use of the term solidarity, it can be seen that, in the recent period − from the late 1970s − the frequency of use of the word in English and German has declined. The exception to this is the period since coronavirus appeared and solidarity became a frequently used word again − at least according to Google search engines[15].

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11 Birher N., Jog, erkölcs, vallás, in Birher N., Homicskó Á., (eds.) *'Az egyházi intézmények működtetésének etikai alapjai ', [Ethical foundations for the running of ecclesiastical institutions]* (Budapest 2019) 9-24. – Birher (2019.)

12 *Róm 12,4-8; 1Kor 6,12-20; 10,14-22; 12,4-8;*

13 Zakat (2020) <https://www.investopedia.com/terms/z/zakat.asp> accessed 01.March 2020

14 We are particularly thinking about the German social movements that have been active since the second half of the 1800s and the political organizations that have unfolded from them. Birher N., A társadalmi megújulás két példája. W. E. VON KETTELER ÉS HAMVAS BÉLA, in Deliberationes XI/2 (2018) < http://gff-szeged.hu/uploads/fm/dokumentumok/2019/Deliberationes_2018_02_net_jav.pdf, > accessed 29. April 2020. – Birher (2020)

15 https://trends.google.hu/trends/explore?date=today%205-y&q=solidarity, https://books.google.com/ngrams/graph?content=solidarity&year_start=1800&year_end=2008&cor-

1. Figure shows the change in search frequency for the word "solidarity" between 10 November 2019 and 20 April 2020. Source: Google trends

The trend is a proper indication of the recognition that – in order to be able to create social systems (including production systems) that are integrated and lasting along the lines of values - it is necessary to take into account the fact that one is not simply an individual but a "*zoon politicon*", a creature of the community, and also has a kind of social existence. His life cannot be interpreted without others. He alone cannot conceive, be born, grow up, or learn.

The other person facing him does not delimit him; he does not simply become aware of his personal finality, as Jean Paul Sartre puts it, because the others are not hell but, on the contrary, give the possibility of life (eternal life). Every real life is an encounter - we know from Martin Buber. Solidarity is the right way to deal with these encounters, to experience the encounters disinterestedly. There is no direct selfishness in solidarity. Solidarity is based on the recognition that I could be in a situation when I need help at any time. That is why it is my duty to help. Solidarity, moreover, is a specific principle that appears in all norms. Neither law, nor morality, or religion can be imagined without enforcing the principle of solidarity. In fact, John Rawls' theory of justice is also based on this principle. A society that pushes this principle into the background becomes unviable. The world of the selfish is not reproductive. Jesus of Nazareth articulates this evolutionary truth beautifully: "If the grain of wheat does not fall to the ground and does not die, it remains alone, but if it dies, it bears much fruit."

Under the principle of solidarity, human beings are considered to have common fundamental characteristics, equal dignity and human rights. According to the church's teaching, solidarity is goodwill and an aspiration in society that is directed for the benefit of all people.[16]

The word "solidarity" comes from the Latin word solidus, which means solid, concise, a complete whole, and it was initially used in certain legal contexts. The obligation of solidarity was the unlimited obligation of each debtor, as regards the total

pus=15&smoothing=3&share=&direct_url=t1%3B%2Csolidarity%3B%2Cc0#t1%3B%2C-solidarity%3B%2Cc0 > accessed 29. April 2020 – Trends 4.

16 http://www.ncsszi.hu/download.php?file_id=973 > accessed 28. February 2020. – ncsszi (2020)

amount of a total debt, to which any person is to settle the obligations of the others.[17]

What true innovation means is recognizing the necessary and joyful power of interdependence. Here, however, interdependence does not mean the interconnection of producer and consumer chains, as they are self-serving and do not affect the horizons of humanity beyond material reality. Interdependence primarily means family, nation, state - in Aristotle's interpretation, and from Jesus' point of view, love and eternal life. Focusing on today's current challenges in Western life should elevate sustainability as well as social equity. If we do not become aware of this fact, we will be unable to secure the future entrusted to us by our grandchildren and great-grandchildren.

Behind all innovations the solidarity must be the basic idea for ensuring a human future. Following these abstract principles, we examine how a country can regulate solidarity in law and ethics in practice (the presentation of the need for religious regulation goes beyond the scope of this dissertation). Within the regulation at national level, we also analyse a specific legal institution - implementation – where "solidarity" can be an important step towards greater social justice.

The purpose of solidarity is to build our common purpose, and to embody our mutual care and concern for justice. Solidarity works best when we respect each other's differing needs and life circumstances, understand that there are many ways of being in solidarity and co-ordinate our responses.

In common terms, solidarity means mutual commitment and the willingness to help each other, which - to be honest - unfortunately has almost completely disappeared today.

The modern-liberal bases of solidarity

Mechanical and organic solidarity

Modern thought recognised: Solidarity is a kind of "glue" between individuals, the bond of unity between the members of society united around a mutual mission, goal or against a common enemy. Émile Durkheim is usually considered the father of modern social sciences, as he basically established the framework for the academic discipline of 20th and 21st century sociology (similarly to Max Weber and Karl Marx). In his well-known, widely cited book *The Division of Labour in Society* (1893), he examined and analysed the "glue" of society, which he named social cohesion, or solidarity, which can be divided into two types: mechanical societal solidarity and organic societal solidarity[18].

Mechanical solidarity is an old type of societal integration. Before the industrial revolution, the "mortar between the bricks" of society was the similarity of its members,

17 Anzenbacher, A., *'Keresztény társadalometika.' [Christian social ethics]* (3 edn, Budapest, Szent István Társulat, 2001) 187. 188. – Anzenbacher (2001) 187

18 Brunkhorst Hauke, trans. Jeffrey Flynn *'Solidarity: From Civic Friendship to a Global Legal Community'*(Cambridge: MIT Press, 2005) xxv 336. - Brunkhorst (2005)336.

the simplicity of farming, trade and production; the low level of the division of labour; territorially fragmented, but regionally unified beliefs, values, and religiosity; the homogeneity of individuals: a system of human relations and connections characterised by a ruled lifestyle, which is often based on the kinship ties of familial networks and intertwined with tradition. As a linguist, Noam Chomsky found a close relationship between identity and language in studies that emphasize that a speaker's identity is not a definite phenomenon, but open to transformation, which is contextual and this is done through interactions: the research is based on practical categories and variability of identity, where solidarity and distance, as well as the granting of temporary autonomy and the exercise of power are the cornerstones[19].

The historical dividing line – or rather – breakpoint between the two principles (the mechanical and organic solidarity) was the Industrial Revolution and technological developments that resulted in an ever-increasing need for knowledge-sharing and ever-expanding and specialised professions in a much more complex society. Rawls suggested in his book A *Theory of Justice*, that the "*egalitarian difference principle, which involves treating the endowment of each as part of the jointly held resources for the benefit of society as a whole, presupposes a high degree of solidarity among the participants*." By contrast, Hauke Brunkhorst attempts to delineate a concept of solidarity that is not heavily tied to strong concept of community.

Obviously, the central normative concept is "democratic solidarity," the bond among free and equal citizens, who in modern democracies are not identical in any ascriptive characteristics. Furthermore, examining the problem following the line of Emile Durkheim's argument, Brunkhorst[20] develops a concept of solidarity suited to a democratic society, namely that a modern society must be a "solidarity among strangers." Moreover, it is intended to be Universalist, as far as it is rooted in a "patriotism of human rights" central to modern constitutional democracy and is impartial. It is local and biased. This does not in any way detract from the universality of moral duties or human rights[21]. It only aims to distinguish between the universal level of morality and

19 As a Hungarian example. It was highlighted by the studies of Hamori (2006) and Szabo (2011).

20 Brunkhorst's distinctive approach to the concept of "solidarity combines history, normative theory, and political sociology in an innovative contribution to social and political thought. The first part of the book provides a historical account of the development of this modern egalitarian idea of democratic solidarity out of, and, in contrast to, the less egalitarian notions of civic friendship in the Greco-Roman world and brotherliness in the Judeo-Christian tradition. Part II analyses the modernization of Western societies, which destroyed the older solidarities that depended on the hierarchical structures of premodern societies. This process gave rise to problems of exclusion that modern societies could solve only with the help of democratic solidarity. Democratic constitutions aimed to bring social forces under the control of a politically constituted people; constitutions served as the institutional embodiment of democratic solidarity".

21 Equal respect applies to all human beings as such; concern applies in more local groups, like

the local, solidarity-based level of certain forms of social justice. Solidarity, accordingly, is an interesting attitude, since it "lies halfway between unmediated feelings like love or compassion and a pure rational Kantian recognition of the moral standing of fellow human beings who have dignity and rights. One may describe solidarity as sympathy mediated by a belief in a common project". Rawls gave a really surprising definition of justice and solidarity in society: "*All social primary goods — liberty and opportunity, income and wealth, and the bases of self-respect, — are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured*"[22] This way solidarity combines personal and impersonal components: the objects of solidarity are mostly anonymous in the sense that the subject does not personally know them. However, they are not considered as just human beings abstracted from all their individuating characteristics either[23].

Organic Solidarity, in contrast with Durkheim's Mechanical Solidarity, is grounded in the differences between people that call for cooperation and division of labour if they are to be overcome. It is the recognition of the importance of the different functioning in different parts of society, analogous to the harmonious functioning of parts of an organism. According to Dénes Némedi's remarkable suggestion[24], a three-element theory could explain that constellation: the theory of social differentiation, the theory of the moral attachment of individuals[25)], and the theory of value integration of group consciousness. This would be significantly different from the general concept of the Division in the general structure of complex theory. Durkheim later took steps in this direction, but the most important changes in his theory did not ultimately lead to this. Solidarity[26] is also one of the six principles (dignity, freedoms, equality, solidarity, citizens' rights, and justice) of the Fundamental Rights of the European Union[27].

peoples. Miller, Richard *'Cosmopolitan Respect and Patriotic Concern. Philosophy and Public Affairs'* (Princeton University Press,1998) Vol. 27, No. 3. (Summer, 1998), 202-224. – Richard Miller (1998) 27. 202. 22.

22 Ibid. While Rawls has since modified his theory of justice to some extent, the basic idea of the difference principle is still captured by the original formulation: "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect, are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured" (303). Hauke Brunkhorst

23 By this way: We care for people with whom we feel solidarity but do so based on their belonging to "our" group fighting for a certain goal rather than as just individual human beings.

24 Némedi D.: Dürkheim In: *Tudás és társadalom (Knowledge and Socíety)* Nagy L. (edit.): Durkheim's Philosophy; Áron Press, 1996, Kempelen Farkas Digital Library, 2006. <https://regi.tankonyvtar.hu/hu/tartalom/tkt/durkheim-durkheim/index.html>accessed 18. March 2020 – Némedi (2006) 500.

25 Kohlberg, Lawrence; Charles Levine; Alexandra Hewer *'Moral stages: a current formulation and a response to critics.*' (Basel, NY: Karger 1983.) – Kohlberg, Lawrence; Charles Levine; Alexandra Hewer (1983)

26 Solidarity: such as the unifying principle that defines the labour movement

27 Charter of Fundamental Rights of the European Union and December 20 of each year is

Noam Chomsky argued, from an ideological and cultural point of view, that solidarity is the core element and driving force of human nature. Guided by his opinion Adam Smith, David Hume and others emphasised the importance of solidarity, but from a practical viewpoint they reached the opposite conclusion when the examples - taken from real life - were analysed.

The difference between Mechanical and Organic Solidarity can be made more understandable by considering their law systems. In a mechanical society, with regard to crime, people respond intensely, emotionally: go to get revenge and urge to remove the perpetrator from the community; in this way the transgressor expects a typical mediaeval, Biblical punishment, such as stigmatisation, imprisonment, exile, and even sentence to death. In contrast, in the organic society everybody is different, without a strong, unified morality; therefore, what is considered a "sin" is breaking the processes, disrupting the system, not the violation of morality. The modern "organic" punishment is creative and tailored to re-forming and correcting the rule-breaker, this is called restitutive law (as distinct from retributive law). According to the Durkheimian viewpoint, crime is a natural and healthy phenomenon of society. Similarly, in the welfare states the basic principle of crime prevention is to support solidarity in communities and to embrace bottom-up, collaborative initiatives. Professional aspirations for crime prevention include strengthening social inclusion and tolerance, eliminating prejudices, consistent action to combat all forms of discrimination and the widest possible use of restorative justice tools to repair the damage caused by crime. This principle is based on the almost 150-year-old foundation of organic solidarity.

"When one speaks of solidarity, one surely means to keep it within limits. When one turns systematically to fashioning social structures to feed the poor or protect those in danger by enforcing altruism, one discovers debates at various levels concerning the proper character of social structures and the goals they should pursue."[28] Engelhardt criticised the theory of solidarity, describing poverty and the uncertainties of definitions and meanings thus: There does not appear to be agreement regarding substantial, concrete, content-full understandings of solidarity. Yet, it is precisely about such issues that agreement is necessary if one is to determine whether solidarity should be directed first to achieve equality or first to preserve individual freedom. One can have a solidarity among libertarians and individualists, just as one can have a solidarity among egalitarians. Moreover, one needs to know how much of what one may or should sacrifice for others. Supporting others may not only benefit them, but also harm them. There may be forms of support that may meet short-term needs while undermining the best interests of those one aids. Explorations of solidarity begin with ambiguities concerning the concept and its application. These ambiguities for their part disclose the predicament of our time: there is no one universal moral narrative to give canonical moral content or guidance.

International Human Solidarity Day recognized as an international observance.

28 K. Bayenz (1999) *'Solidarity'* (Kluwer Academic Publishers 1999) 293-308. - K. Bayenz (1999) 293-308.

Today, therefore, we cannot be satisfied with the simplified dogmatic definition of solidarity but must clearly outline at least two systems of norms: legal and societal (and the third are those of various religions), as the framework for cooperation within society in order to ensure a sustainable future.

Solidarity-based behaviour

Which part of our curriculum comprises solidarity[29]? How much solidarity is there in humans[30]? Economists and psychologists try to explain why people share. Are we more in solidarity than we thought – or are we just disguised egoists? Human beings are not only rational, as scientists claim. Man tries to balance self-interest and fairness. A very fair person feels bad when he is better off than his partner in a transaction and therefore gives him more. In order to be able to be in solidarity with others, he renounces something.[31] Why do we help another person or stand up for him?[32] Is there any answer? We help other people to ensure the dissemination and preservation of our basic information about other ones. We tend to support people whom we classify as similar due to different characteristics such as kinship or appearance. Those who are similar, we think, also carry parts of our genetic material. Another theory is that we orientate ourselves towards helping us to see if we can expect help from the person in the future. This principle is called "Reciprocity". Being in solidarity seems rewarding. It also increases our status. Only those who are strong can support others. The one who helps feels better. "The higher the anonymity in a society, the less solidarity there is."[33] "Everyone is best helped if he thinks only of himself in the competition". [34]"There can be not only competition, but also solidarity"[35]. "A society does not work without solidarity[36].

29 "There has been a general assault in the last 25 years on solidarity, democracy, social welfare, anything that interferes with private power, and there are many targets. One of the targets is undoubtedly the educational system…" (Noam Chomsky, 2000) 231.

30 Solidarity research (2020) <Https://www.zeit.de/wirtschaft/2010-07/solidaritaet-forschung> accessed 29.April 2020

31 Solidarity Game (2020) Solidarity Game: Axel Ockenfels, Gary Bolton: ERC: A Theory of Equity, Reciprocity, and Competition (2020)<https://www.researchgate.net/publication/4745797_ERC_A_Theory_of_Equity_Reciprocity_and_Competition> accessed 28.April 2020.

32 Artenschutz (2020) <Https://www.fluter.de/sites/default/files/artenschutz.pdf > accessed 28.April 2020.

33 Urban ethology (2020) Http://evolution.anthro.univie.ac.at/institutes/urbanethology/staff/grammer.html > accessed 28.April 2020.

34 Christioph Lütge (2020) <http://www.luetge.de/Familie_Luetges_Homepage/Christoph.html > accessed 28.April 2020.

35 Psychologist Michael Kastner (2020). <https://www.k-p-c.org/beratungsteam/univ-prof-dr-dr-michael-kastner/ > accessed 28.April 2020.

36 Gesellschaft funktioniert nicht ohne Solidarität (2020) <https://www.caritas.de/neue-caritas/heftarchiv/jahrgang2012/artikel/gesellschaft-funktioniert-nicht-ohne-sol > accessed

Solidarity "is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say, to the good of all and of each individual, because we are all really responsible for all[37]." Solidarity has many faces; depending on how people act in solidarity, for example out of self-interest or out of coercion. The various forms of solidarity include solidarity from natural solidarity (usually in small groups of relatives), solidarity out of self-interest (in the sense of giving and taking), fairness, coercion and solidarity out of self-sacrifice[38]. Solidarity out of fairness is in the interests of everyone, but it can be escaped without harm and "free rider position" adopted, i.e. benefiting from the positive effect without reciprocity (e.g. in the provision of public goods). We then need a willingness to be fair in order to make one's own contribution freely. Solidarity out of coercion is usually institutionalised when fairness is obviously not enough for everyone to make their contribution. Such coercion today is usually the result of democratically adopted laws, which is why the term "force" can be contentious. Solidarity from self-sacrifice refers to solidarity-based action, which is neither linked to self-interest nor can be regarded as a requirement of fairness.

The five solidarity groups of different sizes by Gerhard Kruip (Various groups of solidarity[39]) include the social area of the family, the field of civil society organisations, the nation state, supranational associations such as the European Union and world society. Kruip stated that "sustainably accepted forced solidarity requires at least five things: the fullest possible control of their observance, fairness in the distribution of their burdens, effectiveness and efficiency in the use of resources, democratic procedures to determine them and the lasting awareness that it is right to organise certain forms of solidarity through compulsory solidarity. It seems that for the humanity of a society it is important to combine the various solidarities optimally. A large part will be based on self-interest. Solidarity through self-interest also has its value and should not be talked down by excessive moralising. Solidarity from fairness will continue to work in many areas today. In addition, solidarity through coercion is also needed, otherwise too many weaker ones will be excluded and not all the necessary public goods can be produced and the costs for them distributed fairly. However, because not everything that belongs to a human society can be organised based on coercive measures, the potential for solidarity of self-sacrifice and fairness must also be promoted and maintained."

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28. April 2020.

37 Pope John Paul II. (1987)

38 Mahatma Gandhi (2020) <https://www.mkgandhi.org/articles/grelevance.htm > accessed 10.März 2020

39 Sozialethik (2020) <https://www.blogs.uni-mainz.de/fb01-kath-sozialethik-eng/vita-id-120/ > accessed 28. April 2020.

Solidarity in practice today

Solidarity is necessary in a divided world, because of inequalities in human development and differences in economic growth[40]. People feel responsible for solving problems; governments and non-governmental organisations (NGOs) have special programmes to help. The form of global solidarity includes cross-border solidarity, regional support, scholarships, helping by reconstruction after war or natural disasters, or regarding epidemic or pandemic, activism, new global arrangements and shared security.

Solidarity as an abstract term dates to the labour movement, then developed in different directions, but there is no definition of who should have solidarity with whom. In the global world, several areas exist, where the term is frequently used, for example by the International Labour Organization (ILO), the World Health Organization (WHO), the International Monetary Fund (IMF) and the World Bank, the United Nations High Commissioner for Refugees (UNHCR) and by the protest movement against the Group of Seven (G7) or Group of Twenty (G20). Solidarity is the conception of assistance in the European Union and in the United Nations.

Global solidarity

The year 2020 was declared to the year of the Solidarity. "What the world needs now is solidarity. With solidarity we can defeat the virus and build a better world."[41] Are we responsible for all conflicts in the world? Can we help in fact to solve them? Everybody can do something in his own community. "You can work on the good ones in the world,[42]" as well. The new global governance reflects on the dysfunctions, which cannot be solved by traditional tools[43]. A significant part of the global elite lost its sense of solidarity.[44] The New Earth Politics suggested by Simon Nicholson and Sikina Jinnah, and the Earth System Governance of Frank Biermann proposed finding new ways and establishing new dialogues and "megalogues"[45]. The new century made a huge jump and created new levels of systems, functions and instruments. The main risk factors contain climate change, environmental degradation, violent conflicts, absolute poverty, and rapid demographic transition. Peter M. Haas described the so-called epistemic communities, where there are networks of knowledge-based decision-makers to define the problems, to identify various policy solutions and to

40 Human Development Report (2019) < http://hdr.undp.org/sites/default/files/hdr2019.pdf > accessed 28. April 2020.

41 UN-Secretary General Antonio Guterres

42 „Du darfs am Guten in der Welt mitarbeiten." (Albert Schweitzer 1875-1965)

43 Laszlo Z. Karvalics 'Utak a globális tudáskormányzáshoz – Az elméleti megfontolásoktól egy hídfőállás koncepciójáig' *[Ways to the global knowledge governance]*, Információs Társadalom, XIX. évf. (2019) 1. szám, 8–32. old. XIX.2019.1.1. accessed 05. April 2020. – Laszlo Z. Karvalics (2019)

44 Dubai World Economic Forum 2019

45 Megalogue (2020). <https://en.wiktionary.org/wiki/megalogue > accessed 04. April 2020.17..

assess policy outcomes. The common policy enterprises support the common goals and improve social welfare, due to open dialogues and "megalogues". In the regular sessions of international organisations and global forums, delegates of the countries, NGOs, politicians and scientists gather to discuss the global problems.

The United Nations General Assembly adopted the Resolution 70/1, Transforming our World: the 2030 Agenda for Sustainable Development on 25th September 2015 with 17 Sustainable Development Goals and 169 targets, which aim to end poverty and hunger, protect human rights, human dignity and the planet from degradation, and foster peace.[46] "We are determined to mobilize the means required to implement this Agenda through a revitalised Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity, focused in particular on the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people. The scale and ambition of the new Agenda requires a revitalised Global Partnership to ensure its implementation. We fully commit to this. This Partnership will work solidarity with the poorest and with people in vulnerable situations. It will facilitate an intensive global engagement in support of implementation of all the Goals and targets, bringing together Governments, the private sector, civil society."

"If you want to go too fast, go alone. If you want to go fair, go together.[47]" The "leave no country behind"[48,] international action of the United Nations supports countries' capacity to enact and finance their development strategies, and enable channels through which global wealth can be redistributed. This action promotes global rules for an equitable distribution of income and development opportunities at the international level, taking effective action on international cooperation, on tax, cross-border financial flows, migration and remittances, debt relief and trade. For shifting development cooperation to a more comprehensive and representative framework, the programme integrates new and traditional providers, in which governance representatives of both donors and recipients take part. In all the above-mentioned areas, least developed countries should be prioritised."

The 56th Munich Security Conference (so called "Westlessness") Munich Security Report 2020[49] from February 14 to 16 2020 was about the question "Has the West lost its way?" At this conference, which was founded in 1963 under the themes of peace, networked security and solidarity was discussed through dialogue between

46 Migration (2020) <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf > accessed 04. April 2020.

47 Lost Boys of Sudan (2020) <https://www.imdb.com/title/tt0383475/ > accessed 04.April 2020.

48 Leaving no one behind (2020) https://sustainabledevelopment.un.org/content/documents/2754713_July_PM_2._Leaving_no_one_behind_Summary_from_UN_Committee_for_Development_Policy.pdf > accessed 04. April 2020.

49 Munich Security Report (2020). https://securityconference.org/assets/user_upload/MunichSecurityReport2020.pdf > accessed 04. April 2020.

senior politicians, diplomats, military and security experts from the member countries of North Atlantic Treaty Organisation (NATO) and the European Union, but also from other countries such as China, India, Iran, Japan and Russia. Representatives of international diplomacy held discussions in the following fields: energy security, cyber security, health security, human security, arms control, coronavirus, climate change, social media, artificial intelligence and the Libyan conflict. In conclusion, what is needed for our shared security is a common understanding.[50]

"No one country is alone": for example, with regard to SARS-CoV-2/COVID-19[51], the international community[52] has given China[53] valuable moral and material support, such as shipping diagnostic kits, as well as supplies of masks, gloves, gowns and other personal protective equipment to China and some of the countries that needed them the most[54]. After the situation was declared a pandemic, the World Health Organization (WHO) launched the Covid-19 Solidarity Response Fund.[55] In all affected countries, citizens should try to act on basic human solidarity – mostly in their neighbourhood[56] – which means we must take care of older people or help citizens in need. Many of them understood that they should stay at home (self-lockdown) because of the limited capacity of the hospitals, and in order to stop or at least limit the spread of the pandemic.

In the 21st century, consumers became more interested in the origin of products. People understood the importance of environmental protection. To keep safe the Earth safe, we need common actions and participation by all of us, even companies, students and governments. One of the best examples of common engagement is the Fridays for Future[57] (FFF) movement, which mobilises tens of thousands of young people worldwide and has been taking them to the streets[58] since August 2018. Multinational

50 NATO Secretary General Jens Stoltenberg

51 Coronavirus (2019) https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports > accessed 04. April 2020.

52 Twenty-one countries have provided aid to the coronavirus-hit China to help battle the spread of the disease. South Korea, Japan, Thailand, Malaysia, Indonesia, Kazakhstan, Pakistan, Germany, the UK, France, Italy, Hungary, Belarus, Turkey, Iran, the United Arab Emirates, Algiers, Egypt, Australia, New Zealand, Trinidad and Tobago, and the UNICEF have provided aid.

53 Foreign Minister of China, Wang Yi

54 Tedros Adhanom Ghebreyesus (Director General, World Health Organization)

55 Covid 19 (2020) https://www.covid19responsefund.org/ > accessed 04. April 2020.

56 Songs for solidarity (2020) https://girlinflorence.com/2020/03/14/songs-for-solidarity-italians-unite-through-music-from-balconies-terraces-and-windows/ > accessed 04. April 2020

57 Fridays for future (2020) https://fridaysforfuture.org/ > accessed 10. April 2020.

58 Every Friday in 2018 and 2019, instead of going to school kids go on strike to campaign for better climate protection, demanding their governments take action to limit global warming under the 1.5-degree Celsius limit specified in the UN`s Paris climate agreement. The FFF school strikes have developed into a global movement aroused global solidarity on environmental protection.

groups, if they want to address more consumers, need special arrangements, such as Corporate Social Responsibility[59] and sustainable business management. Governments established their soft power[60] and public diplomacy, which includes the export of their own interests in the frame of political, ethnic or religious solidarity.

The European Union is a community of European States established on the spirit and principles of solidarity. In the charter of EU Fundamental Rights, Articles 27-38[61] described the expectations of the behaviour of the Member States, how they relate to each other. However, did this solidarity work in times of need[62]? – this question was raised at the global pledging conference[63], (called global response – on 4 May 2020) by

59 CSR (2020) https://en.wikipedia.org/wiki/Corporate_social_responsibility > accessed 28. April 2020.

60 The soft power (2020) https://softpower30.com/ > accessed 28. April 2020

61 Charter of Fundamental Rights of the European Union (2012/C 326/02) Title IV, Solidarity: Workers' right to information and consultation within the undertaking, Right of collective bargaining and action, Right of access to placement services, Protection in the event of unjustified dismissal, Fair and just working conditions, Prohibition of child labour and protection of young people at work, Family and professional life, Social security and social assistance, Health care, Access to services of general economic interest, Environmental protection, Consumer protection

62 The German Federal Foreign Office initiative to bring home German travellers cost 50 million EUR, helped other European citizens to return home, as well. Many other European Foreign Ministries followed them and offered the same.
The most infected country of The European Union was Italy in March 2020, followed by Spain in April. As the region of Lombardy reported the first local transmission of the virus with three new cases, officially the pandemic began on 20th of February in Italy. The first case in Spain was reported at end of January; the spread of the pandemic became faster in March and made Spain the most infected European State from April.
Under the cohesion policy, on 14 March 2020, the European Commission proposed the new Coronavirus Response Investment Initiative to direct 37 billion EUR to fight against Covid-19. To this effect, the Commission supposed to relinquish this year its obligation to request Member States to refund unspent pre-financing for the structural funds. This amount is to about 8 billion EUR from the EU budget, from which the Member States will be able to use 29 billion EUR to supplement structural funding across the EU. In that event that, a public health crisis might happen, the Commission proposed to extend the scope of the EU Solidarity Fund up to 800 million EUR for the year 2020, which can be mobilized rapidly - if it is needed - especially for the Member States, hit by the virus the most.

63 Donor conference is an international assembly of politicians and diplomats to collect money to finance relief efforts after war or natural disasters. Donor Conferences are organised around the world to support reconstruction or recovery after civil or natural catastrophes.
1996 in Dayton two DCs for disarmament and reconstruction aid: USD 1.23 billion
2001 Brussel DC for Yugoslavia: DM 3.5 billion
2006 DC in Sweden for Lebanon after the war: USD 900 million
2013 DC in Brussels for reconstruction of Mali: EUR 3.25 billion 2014 Berliner DC for Green Climate Fund (GCF): USD 9.3 billion

the EU together with the partners of the G20 and G7, and with other private partners[64] as well. EUR 7.5 billion were given for funding to start global research cooperation, to develop diagnostics, increase treatment effectiveness and to develop vaccines. The EU has already committed over 380 million Euros to research and innovation measures to prevent the spread of the virus. However, this budget was not enough to solve the human and the economic catastrophe and to avert economic recession. The French-German Initiative made on 18 May for about 500 billion Euros for the recovery of European business. Supporting the initiative, the European Council on 21 July 2020 agreed on a Covid-19 assistance package, the solidarity-based recovery fund called Next Generation EU, with 750 billion euros to mitigate of the economic consequences of the pandemic.

Since in 2020[65] the European Commission allowed the Member States again to protect their own economic actors - based on the Article called on the world for more solidarity as well.

Y. N. Harari[66] called it a leaderless world in his article in *Time* magazine." Today humanity faces an acute crisis not only due to coronavirus, but also due to lack of trust among humans. To defeat an epidemic, people need to trust scientific experts, citizens need to trust public authorities, and countries need to trust each other. Over the last few years, irresponsible politicians have deliberately undermined trust in science, in public authorities and in international cooperation. As a result, now we are facing this crisis without global leaders who would inspire us, organise and finance a coordinated global response. History indicates that real protection comes from sharing reliable scientific information, and from global solidarity. The epidemic could be a golden opportunity for the EU to regain the popular support it has lost in recent years. If the more fortunate members of the EU swiftly and generously send

2014 DC in Cairo for Reconstruction of Gaza: USD 5.4 billion
2015 DC in Berlin started for "Impfallianz GAVI" to collect USD 430 million
2017 DC in Brussels for Syria: EUR 6 billion (support for Syria between 2012 to 2017 from Germany EUR 4.5 billion)
2017 DC in Geneva for Yemen after the civil war: USD 1.1 billion
2018 G5-DC Mauritania for financing PIP (Programme d'investissements prioritaires) : EUR 1.3 billion
2019 Germany supposed to organise a DC for East-Ukraine, wanted EUR 3 billion
2019 started a French DC for fighting against Aids, TBC and Malaria will collect USD billions into the Global Funds
2020 DC for Albania after the earthquake: EUR 1.15 billion
The most famous live aid concert was held in July 1985 -raised USD 127 million for famine relief in Africa. The word hunger help (Welthungerhilfe) was founded in Germany, supported 8900 projects so far, in 70 countries with EUR 3.53 billion, aimed at zero hunger until 2030.

64 EU, UN, WHO, Saudi Arabian, GB, Japan, Canada, Germany, France, Madonna, Bill and Melinda Gates

65 Fist time was in 2008 because of the financial crisis 2007-2008

66 Yuval Noah Harari (2020) < https://www.ynharari.com/ > accessed 10. April 2020.

money, equipment and medical personnel, to help their hardest-hit colleagues, this would prove the worth of the European ideal better than any number of speeches. If, on the other hand, each country is left to fend for itself, then the epidemic might sound the death-knell of the union."[67]

Two practical examples of solidarity

The German regional funding programme and the Hungarian eviction

Examining the role of public administration in increasing solidarity and how solidarity prevails on a regional basis, it is worth understanding the deeper aspects of the concept, which is a historical and economic philosophical doctrine. Hechter (1987) distinguishes two types of social solidarity, action (behaviour) and emotion (sentiment). Regarding solidarity for action, the individual mobilises his resources in the interest of community, while the emotional approach in social solidarity manifests itself in empathy, regret, friendship, and in love.

Lindenberg (2002) does not consider Hechter's approach to be sufficient and, according to him, social solidarity in action should be further subdivided: In this case the common good, the behaviour of the individual, is adapted to the group, while the distributional situation consists of allocating costs and benefits to the individual in the interests of the group acting against its own interests. Regarding an emergency, the individual will offer help to the group. In an unfortunate situation, the individual may behave differently than the group expects. In retrospect, however, the individual is able to explain why he did so (psychology calls it cognitive dissonance). In many cases, the literature defines three concepts in a very similar way: social solidarity, collective action and altruism. They are mostly defined as a slightly overlapping set.

These three important concepts lead us to new paradigms of the welfare state and the service state[68], which must be based on the paradigm system of social solidarity, including those already described above. Already in the 1960s, the issue of inequality of opportunities for the disadvantaged, the unfortunate, those living in minority groups and the poor, and the importance of the application of positive discrimination came to the fore in scientific and social policy discourses. Later, this was replaced in the 1980s and 1990s by the inclusion of access and equal treatment in the legislation and the proliferation of ombudsmen, but today the literature speaks more of fairness and social solidarity. Public administration faces serious challenges in offsetting the distortions of economic life and the failures of social ascension.

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67 Leadership (2020) https://time.com/5803225/yuval-noah-harari-coronavirus-humanity-leadership/?fbclid=IwAR3suGYPOKwzIJFs59wv7AMci9Co2-Ftsi1Qw2_z7eCqpNJCXTi-Uwu5Aex8 > accessed 10. April 2020.

68 By Merriam-Webster Dictionary: „…the *service state*… takes the whole domain of human welfare for its province and would solve all economic and social ills through its administrative activities" — Roscoe Pound

Welfare states intervened in the functioning of the market and society in a predetermined way, through political and administrative means. Signs of this can be seen in the expansion of social transfers (benefits, pensions, etc.), the fulfilment of fundamental social rights, and the provision of public services. Services affect not only the poor but also the state and society as a whole has become the subject of the activities of the welfare state. As a part of this, educational and cultural goods were also accessible to a wider range of people, as these services developed into free or state-subsidised forms. The ideas of national solidarity and social responsibility were accompanied by the strengthening of state power. The transformation of welfare states (sometimes with significant delays per state) arrived at a crossroads in the 1980s. Welfare states, at the height of their successes, were forced to change attitudes due to the 1973-74 oil price explosion and crisis. It has become clear that, in the face of deteriorating economic performance (rising inflation and unemployment, an aging society), a state system that is basically in line with the situation prevailing half a century ago cannot be maintained. Social-philosophical critiques of welfare states have also influenced shrinking and profile cleansing. The accusations that often come up today are the following:

- Frequent misappropriation of benefits (not by those who need them),
- Corruption and inefficiency,
- Over-proliferation of the state, integration of too many roles,
- Low- and poor-quality services for a lot of money,
- Office orientation instead of customer orientation. Preparing the legal environment to support new social phenomena and processes;
- Subsidiarity and deconcentrating (delegation of decision-making competence, transport of public administration closer to citizens),
- Outsourcing and commercialization of many public tasks (energy, post, etc.) keeping it, it seeks to move from a superior position to a subordinate, cooperative relationship with those to whom it offers its services.

In the administration of the service state, the concept, organizational culture, operating model, technological infrastructure, transformation schedule, and pervasive long-term thinking of the administration, become emphasised. All this serves solidarity, which underpins the long-term security of society, a kind of calm, benevolent prosperity.

Solidarity in Germany between the federal states

The economic strength of the Member States of the European Union varies widely. It is not the aim of the European Union to bring all states to the same economic level. However, the EU is committed to the principle of solidarity, which helps the weaker ones improve their circumstances and become more developed. This solidarity is expressed materially in the European structural and regional policy, which specifically supports the regions lagging behind. However, solidarity is also the basis

of cooperation between the EU countries politically, in fields of security challenges, disasters and dealing with refugees as well. The central issue of the European Funding Programmes is to support weaker regions and reducing inequalities between the areas of the Member States. Article 107 of the EU Treaty even allowed state aid for the Member States to promote the economic development of areas where the standard of living is abnormally low because of their structural, economic and social situation.

The German Federal Republic started its domestic contribution programme for structurally weaker regions in 1969[69] and it was based on the Constitution[70]. After the reunification, it was necessary to develop a special programme (Solidarity Pact[71]1995-2019) for the new federal states[72] (former German Democratic Republic) and to introduce a special tax, the Solidarity Surcharge[73]. This surcharge has financed the costs of German Unity since 1995; the highest amounts are 5.5 % of income tax and corporation tax. The federal government is entitled to this tax[74].

The reconstruction of the East requires a long-term and secure financial perspective. The federal state principle enshrines the constitutional principle of solidarity between each other. On this basis, the Federal Government has supported the new German States, including Berlin, since reunification in order to reduce the special burden of sharing and to fill the infrastructure gap vis-à-vis the West German States.

Fond "Deutsche Einheit"

(1990-1994): This Fond was an immediate solution to the inclusion of the new federal states in the compensation mechanism that already existed among the old ones; it created unpredictable risks and additional burdens for them due to the considerable differences in the financial capacity of the new and old states at the time.

69 In 6. October 1969 (BGB1. I S. 1861) modified by Article 269 der Verordnung vom 31 August 2015 (BGB1. I S. 1471). The designated Areas implemented by **"**Der Koordinierungsausschuss der Gemeinschaftsaufgabe".

70 Grundgesetz für die Bundesrepublik Deutschland Art 91a, b

71 Germany's federal government agreed a "Solidarity Pact" with the federal state governments to support the eastern German states financially and lift them to economic parity with the former West. That pact expired at the end of last year – 2019.

72 107/2. c. TREU: „aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division".

73 In November 2019, the German Cabinet approved near-complete abolition of the Solidarity Surcharge for 90 percent of taxpayers from 2021. The solidarity tax introduced as a special tax in 1991 for infrastructure development and projects in eastern Germany after German reunification in 1990. The charge currently levies an additional 5.5 percent income tax or corporation tax after a certain level of earnings. In 2018, the solidarity surcharge contributed EUR 18.9 billion to the federal budget. For 2019 the Federal Government expected EUR 19.4 billion and in 2020 EUR 20 billion.

74 Grundgesetz Art 106 (2020) https://www.gesetze-im-internet.de/gg/art_106.html, Grundgesetz Art 105 https://dejure.org/gesetze/GG/105.html > accessed 10. April 2020.

The Unification Treaty, therefore, provided for transitional arrangements in the area of financial compensation.

Solidarity Pact I (SP I)

(1995 - 2004): Since 1995, the new states and Berlin have been fully and equally involved in the overall German financial compensation scheme. The new federal states and the capital received special assistance from the Federal Government in order to overcome the consequences of the German division, in addition to the normal transfer mechanism for financial compensation: tax equalisation, state financial equalisation and federal supplementary allocations, for example measures to improve economic infrastructure.

Solidarity Pact II (SP II)

(2005 - 2019): The 2001 Memorandum of Understanding on the SP II directly linked to the SP I put the new federal states and Berlin on a secure footing in the long term. The SP II reflects the shared belief of the Federal Government and the states that the East German states need a long-term and secure perspective and demonstrates state-level solidarity. The SP contributes 156 billion euros to the development of a self-sustaining economy in eastern Germany. The SP II consists of two parts, the so-called "Basket I[75]" and "Basket II[76]".

New rules on financial relations between the Federal Government (FG) and the states for the period from 2020

In 2019, the legal provisions on federal-state financial compensation, including Solidarity Pact II, and other financial provisions between the federal government and

75 Basket I: During the period, the Federal Government allocates special needs-supplementary allocations (SoBEZ) to the East German states under the Financial Compensation Act amounting to EUR 105 billion in annual steps to eliminate fragmentation-related backlogs in the infrastructure as compensation for the weaker financial capacity of the local authorities compared to the local authorities of the old states. The amount decreased each year.

76 Basket II: The new states received around EUR 51 billion from the disproportional funds of the Federal Government; this is relatively more than the budget for the old states. The funds from basket II decreased every year parallel to reducing the remaining structural weaknesses and inherited liabilities. The Federal Government and the East German states agreed in 2006 on specific policy areas for using this Basket. In addition, these states received support from the EU structural funds to promote economy and infrastructure during the Solidarity Pact II. The FG paid in the period from 2005 to 2012 a total of EUR 40.3 billion for Basket II. This means that the Federal Government has already fulfilled approximately 78 % of its obligations under Basket II of Solidarity Pact II. The East German states report once a year on the use of Solidarity Pact II funds and on their progress in closing the infrastructure gap through the "Progress Reports on Building East". In its comments on these progress reports, the Federal Government explains the nature and amount of its services under Basket II.

the German States, expired. The current legislature includes a new system of federal-state financial relations, since the most important political principle is the principle of equal living.

The discussion between the Federal Government, and the states and the coalition agreement also provide for the establishment of a federal financial commission, involved representatives of the municipalities. Two points are particularly important for the eastern German states in order to fulfil their constitutional tasks and continue to stimulate growth: the division of tasks between the Federal Government and the states, and the future financial resources so that the less well-off countries get enough financial compensation. These financial flows are of considerable importance for improving the financial situation of the eastern German states.

According to experts, the Solidarity Pact focused only on the states of the former German Democratic Republic (GDR). However, inequality issues remain, not only between the new and the old federal states, but also between the regions and districts within the federal states. In Germany, there are several less developed regions compared to the other part where the new member states are. Economic growth is still faster in the old federal states and slower in the new ones; however, with 37 %, "Landkreis Südwestpfalz[77]" has the lowest level of gross domestic product (GDP) per capita and the highest is in Wolfsburg[78], with 385 %. The German Parliament decided to finish the Solidarity Pact and to extend the former law in the frame of the Coordination "Gemeinschaftsaufgabe" (i.e. 'joint task') and ensured for all federal states the same conditions for getting financial support. Due to this decision, the German legislation has changed the former law (1969/2015). The common regulations, put into force on 1st January 2020, focused on current challenges such as decarbonisation, digitalisation, innovation and demographic change[79].

A few thoughts on the eviction procedure

Nowadays, morality loses its importance. Moral behaviour, religion have become a matter of choice. In the rule of law, however, the law and its enforcement are not about choices or preferences. Obeying the law is mandatory for all people without exception – as is also set out in The Fundamental Law of Hungary.

The functioning of society, after all, is not determined by only one set of norms, but several. Moreover, their relationship is determined by several connections, because legal standards are included in moral concepts. There should not be any doubt about the relationship between morality, law and religion. Law must prevail by interacting with other social norms. Law must be applied, and it should be linked closely to moral rules, despite the fact that those are at a higher level – and they are even supposed to be at a higher level – concerning, that merely based only on moral rules, a society cannot

77 Rhineland-Pfalz

78 Niedersachsen

79 People to job or job to people

be framed of legal and be regulated by it. What is more, legal norms are compellable. It is good to have a moral foundation of law since while applying enforcement, equity should also be applied at the same time.

Implementation is an excellent example of how law and the ethical aspects can appear in solidarity.

Enforcement procedures are determined by a set of laws, but by drafting legislation - on the procedures under a State of Emergency -, many forms of solidarity may be manifested in their practical application.

Everyone must have heard about people being evicted due to non-payment of their mortgage, from the media if not from elsewhere. This is how most people hear about court bailiffs, and the activities they carry out, which seem to be not very popular. The Hungarian Judicial Executive Faculty has tried – in vain - to strengthen and safeguard public confidence in the judiciary by 'enforcing the right to a fair trial'.[80]

It is true that there is a long way from the beginning of the enforcement procedure to the end of the auction, the closing element of which is the possession of the auctioned property by the purchaser. Under the Hungarian legislation in force, apart from special cases, there is an eviction moratorium from 15 November to 30 April.

However, the duration of the moratorium does not always provide unfailing protection, since exceptional cases arise here as well.

For example, the ban does not apply to those who have arbitrarily re-entered, (since they moved in without any title, such as breaking into an apartment and moving into it without the owner's permission), or if the debtor has previously been subject to a fine.

There is also no moratorium on those whose property is auctioned by the judicial officer for the termination of joint ownership.

Furthermore, the court instructs the bailiff to carry out the eviction if the debtor or a person living in the same household with him is entitled to use another residential property which can be moved into, instead of the residential property to be vacated.

There is no place for deferral, even if the claimant arranges for the accommodation of the debtor for the duration of the deferral, or the party requests enforcement, where the party is likely to have his or her housing without taking possession of the dwelling property to be vacated is not provided.[81]

As shown above evictions can result from many circumstances. From the foreign currency crisis, through arbitrary squatters, and non-payment of the rent of municipal dwellings, to the arrears in rent or even overheads, to taking possession of properties purchased at auction with sitting tenants.

Before learning about the process of possession, some concepts relating to the sale need to be clarified, given that the court bailiff has the possibility to take possession only regarding immovable property.

80 35/2015 (II.25) Ministry of Justice Decree.

81 Act LIII. of 1994. § 182/A.

With regard to an auction of real estate, it is therefore important to distinguish between a property in the status of 'vacant' or 'occupied' The term 'vacant' may be misleading, since in many cases someone lives in the property during the auction. From a legal point of view, however, the very fact that someone lives in the property does not mean that the property is auctioned in ad.

The property usually must be sold in a removable state, which means that, after the successful sale of the property, the new owner can take possession of it if the legal conditions are met, regardless of whether the auctioned or in debt or in debt.[82]

It should be stated as a fact that, unlike relocation, unhabitable immovable sales result in a decrease in the starting price. The success of the auction can be greatly affected, so it is not indifferent to auction buyers to buy the property in an unhabitable condition.

Properties are usually auctioned in residential areas.

According to court practice, the person who remains in the dwelling - during the real estate sales - cannot be considered an unjust user of the dwelling, so the new owner cannot make the resident move. The remaining residual person shall have the same rights as a tenant. If the residual person is not in the property by virtue of a right of usufruct, this may mean that the residual person will have to pay a user fee for the use of the property– to the new owner. It should be stressed that the new owner may not exercise the right of 'normal' termination in such a case.[83] The buyer must have known, at the time of his intention to buy, that he had acquired the property from the general rights of ownership by limiting the exercise of the right of possession and use.[84]

A situation may arise where the immovable property is not exclusively owned by the debtor, i.e. jointly owned immovable property is sold, subject to the provisions of Civil Principal Decision. 2010/2142

According to this decision:

„With regard to the price-control of the jointly owned immovable residential property on the grounds of a cash debt, it is necessary to examine whether the immovable property is occupied, i.e. whether the 'non-debtor' co-owners are living in the immovable property".[85]

The Judicial Enforcement Act of 1994 at certain stages expressly obliges the bailiff to transfer the auctioned property to the Auctioneer.[86]

In Hungary, auctions, take place differently to those in Austria or Germany regarding the obligation to move out.

82 Act LIII. of 1994. § 141 (2).
83 364/2004 Court Decision
84 Pfv.III.23.162/1998/3 Mansion Principal Decision.
85 2010/2142 Civil Principal Decision.
86 Act LIII. of 1994. § 154.

In Austria and Germany, the debtor must move out of the property before the property is auctioned, and the bailiffs are subordinated to the court (In our country they work under the supervision of the court, which makes quite a big difference).

On the other hand, in Hungary, the obligor must leave the property within 30 days, counted from the end of the auction, along with his possessions.

Of course, the obligation to move out is affected by many different circumstances, enshrined in legislation, which we have no opportunity to discuss in this article, unfortunately.

As we mentioned before, after the implementation procedure has been opened, if it takes place at all, there is a long way to the sale of the debtors' property at auction, in the event of non-compliance.

Practice shows that people, until the very last moment, do not even believe that the procedure can reach this stage; moreover, they almost do not even realise the gravity of the consequences.

Therefore, in many cases it could easily happen that the obligor really has nowhere to go after the eviction, or just starts thinking about where to go. This is the moment when solidarity would be needed during the procedure and to which legislators have not found a solution yet.

How can solidarity appear by the actions of bailiffs?

Solidarity appears at several points during the enforcement procedure, starting with Act LIII of 1994 on Judicial Enforcement (hereinafter referred to as Vht.). It is, therefore, appropriate to refer to certain pieces of legislation, from the Fundamental Law of Hungary to various government measures.

Throughout the enforcement procedure, the bailiff must bear in mind the principle of graduality.[87] In particular, the amount managed by the payment service provider and the debtor's wages should be implemented and the debt recovered. If, as anticipated, the debt is not recovered from the salary or the amount held in the debtor's account within a relatively short period, proceedings shall be initiated on movable or immovable property. It is important to note that the enforcement of immovable property can only be performed upon a request for enforcement![88]

The bailiff shall defer the judgment debtor's payment obligation in equal monthly instalments under the conditions set out. An enforcement procedure is pending against the judgment debtor for the recovery of a money claim not exceeding five hundred thousand forints or not exceeding one million forints, and a mortgage is registered in the real estate register on the judgment debtor's residential property in security of other claims as well

That means above: If the amount of the capital claim to be recovered does not exceed five hundred thousand forints or not exceeding one million forints, and the

87 Act LIII. of 1994. § 7.

88 Act LIII. of 1994. § 139 (1).

claim is also pledged, the auction may only be set up if the debtor has not complied with the payment of the instalment arrangement to be made to him. [89]

In a special case, the debt to be recovered itself arises from a legal relationship in which the debtor was obliged to pay a sum of money in instalments with the consent of the party seeking enforcement, since in this case the claimant himself decided to pay it to accept the service in instalments. In this case, that is also a condition for granting the opportunity to pay part of the debt; the law also specifies this in principle: an amount, which, if the relationship had been maintained, corresponds to the amount due by the date of payment. [90]

Hungary shall strive to provide social security to all its citizens.

Hungary shall implement social security for the persons listed in Paragraph (1) and other people in need through a system of social institutions and measures.[91]

Hungary shall strive to provide every person with decent housing and access to public services.[92]

As described above, the Government has initiated many important measures to help debtors to escape seemingly hopeless situations.

I choose from these measures those that were of great importance during the enforcement.

a) The Act on the debt settlement of natural persons [93] entered into force on 1 September 2015. Under Act CV of 2015, "private bankruptcy" was introduced into the Hungarian legal system as a new legal institution. The provisions of the act are implemented in a cascading way. The purpose of the debt settlement procedure is to restore the solvency of the individual using the individual's assets and income, while at the same time obtaining a full or partial return to creditors. Bankruptcy protection can be used by all those who have usable wealth and income, as well as a willingness to pay, but lack the ability to pay. At the end of the successful procedure, the debtor is exempt from paying his additional debts after having fulfilled the expected level of his debts.[94]

b) In 2011, a piece of legislation was created on the provision of housing for natural persons who are unable to fulfil their obligations under the credit agreement

The programme seemed to be successful, in that with the help of the National Asset Management Programme, 155,000 people escaped a multi-million-dollar debts while still staying in their homes. Nine out of 10 former foreign exchange authenticators

89 Act LIII. of 1994. § 52/B.
90 Act LIII. of 1994. § 52/A (6).
91 The Fundamental Law of Hungary A. no 19.
92 The Fundamental Law of Hungary A. no 22.
93 Act CV of 2015.
94 Csődvédelem (2020.) http://www.csodvedelem.gov.hu/hirek/32>accessed 2 February 2020.

in distress have bought back their homes. As a result of the repurchased properties, NET Zrt.'s real estate portfolio has been significantly reduced and its task has been transformed. The review of the company's operations has become opportune. As a result, the draft law submitted proposes the repeal of the NET Law and thus the termination of NET Zrt. The remaining tasks of the company, such as the purchase of instalments and the management of the remaining approximately 4600 leases, are planned to be carried out by the Hungarian National Trust Ltd. in the future

c) In 2018, another law was created on ensuring the creation of homes for natural persons participating in the National Asset Management Programme[95].

d) Creating Act XXXVIII of 2014 on the Resolution of Questions Relating to the Uniformity Decision of the Curia Regarding Consumer Loan Agreements of Financial Institutions tried to help debtors as well.

„According to the Curia, the non-disclosure of the exchange rate risk was unfair ("unclear, incomprehensible") and, therefore so was, the provision of the contract according to which the exchange rate risk was borne by the consumer."[96]

Given that these laws mean that the debtor may only get rid of his loan in respect of claims secured by mortgage law and if his/her property is purchased by the National Asset Manager. All the other cases will continue towards repossession and eviction, except those.

From one point of view, this regulation can serve as a quick solution to those people, who have difficulty with payment, but from another point of view, people can quickly be put on the streets.

We stress that the participation in these programmes[97] must be subject to compliance with strict rules on several points, but unfortunately, we have no opportunity to explain these criteria in this publication, although it would be worth taking the time to.

However, those legislative measures have indeed been considered as part of solidarity to help the situation of debtors, it could be said that, at some level, debtors who comply with their obligations to pay on a timely and regular basis are marginalised.

The number of enforcement procedures, auctions and subsequent evictions does not seem to reduce year by year.

Although the measures discussed above provide some temporary solutions for debtors, they are very far from enough and, in many cases, provide only makeshift solutions for their problems instead of real ones.

Unfortunately, in Hungary, enforcement procedure is not connected with social workers, though would be necessary.

95 Act CIII. of 2018.

96 Civil Rights Resolution 2/2014.

97 Act XXXVIII of 2014

Solidarity can be diverse if we really would like to find a solution via judicial enforcement.

As we have seen, solidarity can appear in many forms throughout the procedure, but we must not forget the fact that the process is only viable if there is cooperation from the debtor's side, too.

The legislation provides discounts; we try to help debtors with various debt settlement programmes, but their cooperation in this regard is also needed.

From the moment The State of Danger was announced on 11th March 2020, we have been flooded with news about the spread of the virus, and casualties; moreover, about all the necessary measures and new regulations adopted by the Government in order to help people in this situation. Solidarity plays an important role as the novel coronavirus – also known as COVID-19 – continues to spread across the globe and has been classified as a pandemic by the World Health Organization (WHO).

As we all know, the outbreak started in the Chinese city of Wuhan on 12 December 2019 and swept across all the countries without exception.

The implementation of judicial enforcement has also been heavily affected by the measures taken by the Government, published in the Hungarian Gazette on March 23, 2020 at night. From the day after Government Decree No 57/2020 (III.23.) was published, and will be in force for 15 days[98], it radically reshaped the work of court bailiffs in Hungary.[99]

The provisions on immovable property and evictions have been amended as follows:

Having jurisdiction in the place in connection with eviction from properties may only be taken after the State of Danger is terminated… (The earliest date when it can be carried out again is on the 15th day after the State of Danger is terminated)

If the 15th day that follows the end of the State of Danger, falls between 15th November and 30th April, the time limit shall be restarted on the 15th day that follows 30th April. That means the moratorium becomes 15 days longer than it was before.

No auction shall be held regarding the natural person's immovable properties during the period. If properties are already under auction, they are allowed to be sold if the auction had come to an end successfully, except for those properties of which auctions are already given continued auction notice.

Germany plans to introduce similar measures in the area of evictions, but they enter into force only on 1st April 2020. Unlike in Hungary, the German measures are only put in place to prevent evictions from rental dwellings (tenant evictions). Foreclosures are left unchanged in several other countries, notably The United States of America.

The German federal government wants to protect tenants from eviction during the outbreak. Ministry spokesman Rüdiger Petz said: „We work to make sure that no one loses their home."

98 Fundamental Law of Hungary A. no 53.

99 57/2020 Government Decree (Extended by 73/2020 Government Decree).

According to reports by the ministries of justice, home affairs and economy, tenants shall not be notified of their termination due to rental debt during the period of the virus, from 1st April to 30th September. In principle, however, the tenant remains liable for paying the rent.

Johannes Fechner, a legal expert for the German Social Democratic Party, said: "In the case of residential and commercial rents, rents are deferred for the time of the epidemic […] No one has to worry about losing their apartment just because the Corona crisis prevents them paying the rent."[100]

"This special housing compensations has to be applied to those cases where people ended with a huge loss of income, are in need and are otherwise unable to pay." said Daniel Föst, the spokesman for building and housing policy of the Free Democratic Party.[101]

In Germany, the Senate Department for Justice announced that the Berlin District Court, which is responsible for all enforcement measures, had issued the appropriate decrees, and so did the other courts. The Köpenick District Court, for example, recommended that judicial officers are not allowed to have jurisdiction in the place and must avoid any contact with debtors or creditors. Pre-arranged venues have also been cancelled after consultation with creditors. Even those, who have fallen short of paying their gas, water or electricity bills will also benefit from these measures. As we can see, the measures taken by the Germans leave the foreclosures in virtually unchanged form; they only limit on-the-spot procedures.

In Hungary, under the new regulation, tax enforcement has been suspended. As a result, enforcement actions cannot be carried out in cases that were transferred to the court bailiffs by the tax authorities.

In contrast, tax authorities do not stop enforcement procedures in Germany. "Continuous income is important for providing liquidity and maintaining the functioning of the community." Therefore, the collection and enforcement procedures of the Berlin tax offices are not terminated.

However, according to the Senate Treasury Department, federal and state governments have adopted tax measures because of the Corona crisis. "This will make equity measures such as deferral or tax relief easier for those people who were directly affected by the outbreak of the coronavirus."[102]

We believe that several measures are really needed to be taken, given that enforcement is already considered a sanction; still it remains an important part of the legal process. As Frank Ignatius put it: "It would be in vain to hold a tribunal if the sentence had

100 Manager-Magazine (2020) https://www.manager-magazin.de/politik/deutschland/corona-bund-will-mieter-vor-zwangsraeumung-schuetzen-a-1305631.html> accessed 25 March 2020

101 Oldenburger Onlinezeitung (2020) https://www.oldenburger-onlinezeitung.de/nachrichten/coronavirus-bundesregierung-prueft-massnahmen-zum-mieterschutz-36946.html> accessed 25 March 2020.

102 RBB24.25.3.2020.

not been enforced."[103] However, in some respects, preventing new auctions from being held, as regards the residential property of natural persons, may not have too many benefits in the long term if we put the interests of debtors first.

Now, of course, it could be a solution, but if we look at the amendment to the eviction moratorium, it is practically irrelevant whether the property is sold, since the debtor does not have to leave it. Thinking about it further, if their property were to be sold, the amount raised could be recovered, or at least interest would be greatly reduced. There will therefore be no reduction in interest rates, however, after the end of the State of Danger; the procedures will continue in the same way with regard to claims with accumulated arrears. If the current trend continues, and the current crisis will continue to ripple, which is for sure in 2021, debtors could face a serious increase in repayments.[104] The above measure, although it requires out-of-power performance from the State, in my view, can only provide an interim solution to the problem.

Another problem is that there has been no differentiation in the procedures we refer to, in the title of the claims. We are referring here to the case where the procedure was for child support, which is at the top of the sequence of satisfactions.[105] Consequently, it is the child who does not receive the amount due to him or her. It must be seen that foreclosures cannot be limited solely to foreign currency loans or claims purchased by factoring companies; the process is much more complex than that.

In my view, the government's actions, as underlined in the present paper, are intended to show solidarity with those people who have fulfilled their potential obligations relating to repayments in the first place but, due to the measures put in place to prevent the spread of the epidemic, they have lost their jobs, and now have financial difficulties.

People who did not make payments before the health crisis will not do so in future either. Our experience shows that, it seems to aggravate the situation even further between them and the bailiffs, which is evident from the tone of their letters and their demeanour during the phone calls. As I see it, in order not to have a complete anarchy in terms of procedures in the country, in many cases the policies of the surrounding countries should be followed, and it may not be necessary to ensure the same benefits for everyone.

What else could we do? (Ideas that might offer a solution)

Having adequate housing and shelter is a fundamental human right and a basic human need. A solid financial background is a basic need for everyone to be able to do their work, to be able to build financial security for their family and to make a decent

103 Frank, I. *A közigazság törvénye magyar honban, Második rész I. [The administrative law in the Hungarian land second part I.]* (Buda, Magyar Királyi Egyetem 1846) 277.

104 Pénzcentrum (2020.) https://www.penzcentrum.hu/hitel/a-19-legfontosabb-kerdes-es-valasz-a-hiteltorlesztesi-moratoriumrol.1090803.html> accessed 26 March 2020.

105 Act LIII. of 1994. § 164.

standard of living. For these people who have lost their homes, it is a great challenge to return to everyday life, and it often seems hopeless in their adverse circumstances. It takes an extraordinary effort for every person and family to create a new home because it is not so easy to overcome vulnerability and the feeling of humiliation. It therefore can be seen in many cases that without having a proper home and assistance, the problem will only continue to worsen. If there is no financial backing, the standard of living will decline; the absence of one fundamental human right is the cause of becoming marginalised. We should just think it over, if the parent's or the parents' social situation deteriorates that will jeopardize the mental, physical wellbeing of the children raised in those families. Problems generate problems. Something has to be done and there is an urgent need to intervene.

The literature distinguishes four European models of state engagement, Mediterranean, Scandinavian, Anglo-Saxon and continental. The differences are mainly caused by the various degrees of taxation, state redistribution and state intervention in market processes. (The essence of the Anglo-Saxon model is a state that is neutral in relation to low tax levels, low state redistribution and market developments.)[106]

The countries with the Nordic model include Sweden, Finland, Denmark and the Netherlands. These countries are characterised by extremely high levels of taxation and significant social redistribution, with high levels of social benefits and public services. Another feature of the Scandinavian model is the high level of social care and high level of public sector.

Unfortunately, in Hungary, social workers still have not been involved at all in the area of implementation, despite the fact, that there is often a lack of awareness and total desperation among the members of this segment of society, which could be improved with the help of the right measures.

Lack of information always creates problems to be addressed. Above all, it would be important to inform people properly, to identify problems, to raise awareness of the consequences.

Building a completely new social model always involves substantial costs; problems need to be addressed, and it cannot be expected to derive only from exclusive public funding.

In my view, what is would and could be necessary to create is a solidarity-based social network - linked to the implementation procedure.

Given that we work in the field of implementation, we see several opportunities to build a system resting on a social basis built around on solidarity.

Unfortunately, in the context of this article, we are unable to explain the systems it would create for a longer period.

However, we would like to mention that several systems have already been built up, only those need to be developed, redesigned and the funds needed to re-reallocated, and that way the system might work, without the government's extra financing expenses.

106 ATV (2020.) http://www.atv.hu/belfold/20180128-mukodhet-a-skandinav-modell-magyarorszagon> accessed 7 March 2020.

The aim, in the implementation procedure, is to redress the housing problems of working families having only one item of residential property and of single persons, and to promote their independent livelihoods.

The State, the Hungarian Judicial Executive Faculty, together with the Ministry of Justice, the Court of Justice, the Notaries, the Employers, the Judicial Officers and even the Debtors all strive to create a real social care system backed by financial contributions.

Conclusions and summary

Solidarity is also known as the power of humanity. Solidarity has many meanings with so many people living on our planet today. We are different; we do not have the same opinions on certain topics, and that is the way it has to be! However, there is one thing that every one of us has in common: we are all human beings.

In the social teaching of the Church, the values of freedom and responsibility, justice and solidarity strike a balance between individuals and community, which frees man from the effects that hinder physical and spiritual existence. This harmonious state of development is called the public good of Catholic social teaching.

According to Habermas, "the social integration power of law ultimately defines he sources of social solidarity.[107]

Protection should be given to everyone so that everyone is protected from forced evictions, so that no people or even families with children can be deprived of their homes without providing them again with adequate housing.

As I have already said, having adequate housing is a fundamental human right and a basic human need.

Without enough financial support and cooperation, unfortunately, the fates of the evicted people may be sealed in numerous cases.

The principle of solidarity as a normative social principle is, above all, a principle of law, emphasises Nell Breuning.[108] Therefore, the social ethics principle requires that solidarity is incorporated into the rules, the framework provisions, applying it to those in need in everyday life.

By linking the social ethics principle to individualism, which is reflected in personal morality, in my view, an institutional structure of solidarity could be created.

However, using the resources at our disposal and creating a solidarity-based funding system, social funds can be provided for people in need and for cooperation. (in this article "social fund "would be a new point of the procedure, because in Hungary, there is no connection between the social workers and enforcement procedure…)

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107 Habermas, J. *'Faktizitat und Geltung. Beitrage zur Diskurstheorie des Rechts und des demokratischen Rechst.' [Fact-citation and validity. Contributions to the discourse theory of law and democratic law.]* (Frankfurt, Suhrkamp. 1992) 282.

108 Anzenbacher (2001) 188.

„True morality is not a simple ““you” relationship, but a complex “we” relationship”.[109]

Please, let us allow a quote to finish our article:

„Someone said me once
On a lonely day
Live your life as you will but
In every circumstance
Do not forget about giving hands since
A billion and more people
Relying on each other
In the belief of
The power of humanity like
You are one of those who do care about solidarity.”[110]

109 Birher, N., Homicskó Á. O. *’Kézikönyv az egyházi fenntartású intézmények számára, Jog, erkölcs, vallás.’ [The basics of the functioning of ecclesiastical institutions]* (1 edn, Budapest, Károli Gáspár Református Egyetem Állam - és Jogtudományi Kar 2020. 9-24.

110 Youthreporter (2020) https://www.youthreporter.eu/de/beitrag/solidarity-also-known-as-the-power-of-humanity.15138/#.Xmqw2ahKjb0 > accessed 08. March 2020.

Udvary, Sándor[1]

Economic Analysis of Several Issues Related to the Enforcement of Civil Judgments in Hungary

Introductory remarks

Any legal instrument might serve multiple purposes, first and foremost its societal purpose in general. Within this framework, we can subdivide this category (without thorough classification) into classes of societal importance, such as the need for the survival of a group (such as ensuring water and the food supply); other physical needs (e.g. defence) or, for example, the demographic needs of a society; or simple mundane activities that facilitate the pursuit of happiness for each citizen. These needs of a society are embedded in legal instruments that ensure their application. However, underlying this, there exists a fundamental rational issue: what makes it possible and useful for citizens to cooperate in order to form a functioning society? It is in their self-interest to join their productive capabilities into a working economic system that provides for the common functions of their joint enterprise: society and the state itself. This is the economic system, which works as an exchange market for the activities of individuals, however useful or simply joyous they may be, all contributing to the reality of a working society.

The importance of the economic system must not be underestimated, as we are intimately and personally familiar with the rise and fall of the communist economic system, and the dangers of exaggerated collectivism. Hence, we now mainly see societies working in the framework of more or less social capitalism, based on the operation of self-interest, which is a factor in the welfare of the individuals and due to the invisible hand of society at large. Naturally, the functions of the state (as the organ of society), once classical – namely national defence, protection of citizens from each other, the regulation of lawful behaviour and adjudicating disputes – are on the rise, and new functions and new roles arise that are incorporated by the state, such as welfare measures. However, all these activities are made possible by a well-functioning economic system. The lack of an economic incentive often renders desirable goals unattainable. For our purpose, we therefore assert that economic feasibility is a necessity for the proper operation of the law, and it is also true of the adjudication of disputes in a broad sense. It does not mean that this basic function of the state must operate for profit; for example, the utility of national defence is verified by the lack of war;

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in other words, we do not have an army for aggressive warring, but for avoiding it.

Applying this analogy to the adjudication of disputes, it must be maintained for achieving peace in the country; legal peace, which is in itself the bedrock of an orderly society, providing framework for citizens to pursue their own objectives. Hence, economic logic may convince us to uphold institutions that are particularly in contradiction with the self-interest of a person (why would I, who have never been before a court, pay for the salary of judges), but, seen as a whole system, they provide invaluable services (I pay my share of taxes, because it upholds the legal order, in which I may pursue my activities in peace).

Does this mean that the legal system is completely exempt from the economic logic, then? On the contrary! Laws and even litigation operate under the umbrella of economic logic, even though sometimes we need to see a wider picture for this reality to appear. In this paper I will reiterate well-established notions of law and economics and apply them to the particular field of enforcing civil judgments. I also analyse special regulations that are intended to enhance the enforcement of judgments, most importantly the incentive of the bailiff to conduct a fair procedure. I also examine information disparity and its effect on the necessity of commencing an enforcement procedure. My aim – besides generating a debate on the issue – is to prove the economic feasibility of the present rules and highlight those that may be problematic.

1. Pacta sunt servanda. This Roman law rule is almost holy scripture for lawyers, especially those in the civil law area. *Alterium non laedere.* Or if so, the damage must be compensated for: this seems to be an everlasting order, which has been enforced in a broader or narrower sense for millennia. They are legal orders and moral theses at the same time, and further moral theses might become legally recognised, such as in the legal nullification of contracts in violation of the *bona fidei* principle. While law was a field of practical knowledge for thousands of years, lately it is subjected to rationality: it is a fair expectation that the law, the whole legal system, shall abide by the rules of formal logic and be subject – beyond social needs – to those logical rules, the origins of which can be traced back to ancient times, but which have made their own special development in other areas of social sciences, amongst them, economic science. If law abides by rationality, should it abide by rationality in its economic sense?

Economic analysis of law is a discipline over 60 year old,[2] which has sprung out from the cooperation of economic and legal scholars in the United States; today it is applied not only to the civil law area, but also to criminal law, and administrative law.

2 Coase and Calabresi infra compiled the fundamental articles that initiated the thought experiment in this direction. See: Ronald Coase: *The Problem of Social Cost*, Journal of Law and Economics, 1960 3:1-44.; Guido Calabresi: *Some Thoughts on Risk Distribution and the Law of Torts*, Yale Law Journal, 1961 70:499-553. One other authority on the topic, author of several fundamental books and articles and former chief circuit judge in the 7th District Court of the USA is Richard A. Posner, see e.g. *Economic Analysis of Law*, Boston: Little Brown, 1973.

[3] Beside the wide range of international literature, numerous Hungarian authors have written on this subject.[4] Textbooks cover the basic legal and economic theories, with special regard to property and contractual issues in particular,[5] and devote a smaller but important portion of their contribution to the assertion of claims, mainly in civil judicial procedure. However, I have yet to find a comprehensive contribution in the literature regarding the actual enforcement of civil verdicts; to the issue of coercive measures related to civil claims upheld by the court; and how these rules fit into the general system of economic theory. This paper discusses that topic and endeavours to set these rules into a new framework with the hope of generating a debate on the topic.

2. According to a Hungarian author on the law of enforcement of civil claims, Ignác Frank, "It is futile to hold a tribunal, should the enforcement of the verdict not follow." Though our doctrine of civil procedure separated the issues of enforcement from the Code of Civil Procedure and although the right to enforce a decision is not automatically part of the legally binding effect of a verdict, his statement can be intuitively proved with the assumption of the contrary. Should the judgment of a court for the final settlement of the parties' dispute be rendered a dead letter, and should the parties not be affected by its actual emergence, the judicial procedure would lose the very element that provides for the restoration of peace under the law. The very fact that a dispute arose between the parties or the judicial protection of rights was necessary for other reasons is the proof that peace under the law needs to be preserved, since at least one party challenges civil order and the other party considers this important enough to plead for legal protection. Hence, the institutionalisation of enforcement is a necessary element of any legal order – should anyone call it into question.

3. For a lawyer, it is the content of the norm that is relevant; the fulfilment of any obligation shall be viewed through the prism of whether a deed is prescribed or prohibited in a norm. Economic analysis of the law has no such presupposition (while other, sometimes simplifying presuppositions in accordance with its field of science exist). Quite the reverse, it has a deeper theoretical insight, that legal relationships have several options dependent upon the choice of a rational actor and, when it comes to a decision, their welfare must be the primary concern. Hence the deduction with persuasive mathematical and logical apparatus, that *pacta sunt servanda* – axiomatic for a lawyer – might not apply in every case from the economist's point of view; there are cases where the logical and economic decision is to terminate or even break the

3 Marianna Nagy: *The Application of Rational Choice Theory in the Study of the Administrative Enforcement of Law*, ELTE ÁJK Annales 2010.

4 Ld. pl.: Attila Harmathy - András Sajó (szerk.): *A jog gazdasági elemzése*, KGJ, Budapest, 1984.; Attila Menyhárd: *A kötbérről és a foglalóról*, in: A Polgári Jogot Oktatók XXII. és XXIV. Országos Találkozójának Válogatott Tanulmányai, Novotni Alapítvány, Miskolc, 2018, 67-78.; Ákos Szalai: *A magyar szerződési jog gazdasági elemzése*, L'harmattan, Budapest, 2013.; Béla Pokol: *Posner gazdasági jogelmélete*, JESZ 2000/3. szám

5 Robert Cooter-Thomas Ulen: Jog és közgazdaságtan, Budapest, 2014.

contract. During this rational sequential decision process or simultaneous gameplay – with simplification – the laws of welfare economics shall apply; where parties seek to maximise their utility. This might be modified by the economic theories such as introducing social utility. Within this framework of decision-making process, norms, whether ethical or legal, appear as only one factor among others and not expected to override the economic logic that is presented e.g. in Pareto-optimum on the individual or social scale.

Here we refer to the two schools in the economics of law, namely the normative school and the other one, analysing the efficiency of particular legal institutions. While normative analysis aims to create a norm that best fits an economic rationale, analysis of particular legal institutions endeavours to show the dynamics of incentives and disincentives within a set framework of legal regulations. This short essay begins with several normative aspects and then sets off to analyse concrete legal regulations and their beneficial or disadvantageous nature.

4. Legal order extends to the whole of society and regulates issues that are not assessed in monetary terms, rather on an emotional level. For example, our family law regulates the parental custody rights, which can hardly be monetised at first glance; nevertheless, their enforcement must indisputably be part of our laws. The theory of utility – that is to be maximised by the individual – is a very powerful tool, since it explains why parental custody is also a valued right that is sometimes fought to the bitter end, even though its monetary value is hardly expressible. Even though I try to avoid those areas where a claim is not monetary then, based on the previous remark, these claims also may be subjected to this economic prism, since the utility-maximising citizen will allocate value-bearing assets (time, energy, money etc.) to have these claims enforced in their favour.

5. Enforcing monetary claims and the economic analysis of their legal background are considerably easier to analyse than adjudicating in family law cases or those where the value of human dignity is at issue. Since we face financial claims here, their value is easier to determine, both from the point of view of the parties and other participants in the enforcement. The main parties to the transaction are the creditor and the debtor and, for the sake of expediency, we assume the existence of an enforceable decision. However, the ways of obtaining an enforceable decision are very different. Typically, the right to enforcement shall be based upon a non-appealable, final judicial decision, that contains one or more obligations on the losing party and the time-limit for voluntary completion has passed without effect.[6] These are important in our analysis because, if we consider the dynamics of the whole transaction in economic terms, we have passed almost the whole decision tree that is usually analysed in the legal economic literature. The parties concluded a contract, whereby they assessed each others' capability and willingness to comply (wrongly, as the dispute proves); however,

6 General preconditions of enforceability in the Act LIII of 1994 on Judicial Enforcement (hereinafter: Vht.) §13.

the relevant legal facts show that fulfilment did not take place, upon which the party defaulted against – after having assessed their costs and chances of winning – reacted by claiming their rights before the court (setting aside other summary procedures for the moment). In the civil procedure, that is a sequential gameplay according to the economic analysis of law, the set of facts were ascertained, to which the judge rendered a sentence obliging the losing party in the court of first instance and on appeal, second instance.[7] The legal economic concept of perfect damages is of less importance to us now (it is important from the perspective of being an incentive or disincentive in deciding whether to sue); it is enough to presume that the creditor rests assured with the sentence that is now enforceable using coercive forces of the state, if necessary.

There is a similar decision tree present for the minor pecuniary claims not exceeding an amount of HUF 5 million (cca. EUR 14,000), where there is a mandatory order for payment procedure before the public notary. According to the statistics, a small minority of the cases turn into the time and money-consuming litigation before the courts upon the debtor's statement of opposition. Its result is, however, the same: the final order for payment is enforceable as the final sentence of the court. A third typical enforceable document is an authenticated document from the public notary, which very cost-effectively avoids the litigation or order for payment procedure and offers a direct route to enforcement, provided that strict conditions are met. Our analysis does not cover the assessment of costs and the chances of those decisions as necessary steps for producing an enforceable document; however it is remarkable that, according to the rule on costs of procedure, the Hungarian rules, in accordance with European and British law, order the loser to pay the costs of the prevailing party (loser pays principle). Therefore, the costs of obtaining a judgment shall be added to the successful claim; in other words, the obligation to reimburse of costs is an important incentive to settle, because the parties may reduce their losses if, having assessed the true costs of losing the lawsuit, settle in due course, where they even might split the costs.

6. The costs of claim enforcement are proportional to the volume of the claim. According to the thesis of the economic analysis of law, if the number of violations of rights increase or if the costs of litigating the claims decrease, the numbers of suits will rise and, correspondingly, enforcement cases will increase, too (although to a lesser extent, due to the possibility of negative judgement and voluntary compliance). It is consistent with reason that, together with the rise in the volume of litigation, the coercive enforcement of judgments will rise, and also, assuming same base of enforceable decisions, any decrease in the costs of the enforcement procedure will increase the number of enforcement procedures initiated. The same base means the same volume of enforceable documents (final judgment, order for payment, authenticated document), where the higher costs of enforcement might deter even the prevailing party to initiate the actual enforcement. Particularly so, if even the

7 I neglect the economic analysis of these steps, as they are extensively covered by Cooter and Ulen, Robert Cooter-Thomas Ulen: Law and Economics (6th ed.), Addison-Wesley, 382-453.

costs of enforcement have a high chance of not being reimbursed, in which cases the judgment stays dead paper.

It was the litigation procedure, for which the following equation was created by legal economists, according to FC (filing cost) = EVC (estimated value of claim),[8] and the equilibrium represents the point at which the decision of the rational decision maker turns. With lower filing costs, they will file the claim; at a higher rate they revise their filing intentions and abandon their claim. I point out that, if the claimant creditor loses their claim completely [EVC=0] that counts as a failure in the functioning of the claim-enforcement system, a 100% failure with respect to the actual claim. According to the legal economists, the aim of the legislator should be to minimise the costs of litigation together with minimising the costs of systemic failures. The function where FC>EVC also shows that the system of claim enforcement certainly creates failure (at least in an economic sense).

7. This equation might be referred to the execution procedure itself. If we assume the same volume of enforceable decisions (which might be an unfounded assumption, since the will to litigate a claim will respond to the efficiency of execution, especially if it declines), than we might accept FCe (filing cost of enforcement) = EVeC (estimated value of enforced claim)[9] as an equilibrium. Under that range, filing for execution is irrational, whereas over this point it is irrational to forego it.

The Hungarian rules of judicial enforcement, especially those on costs[10], provide for proportionality, with a low and high threshold of costs. The lowest threshold of fee payable to the court bailiff is HUF 9,000; the highest must not exceed HUF 1,000,000; between the two amounts the fee corresponds to the value of the claim to be enforced. There are further elements of costs, some *pro rata* to the value of the case (namely the flat rate cost of 50% of the above-mentioned fee, added to it); other elements are itemised (such as an hourly fee based on site visits and travel costs). There are the so-called flat costs of the chamber, which are based on the Section 34/A of the Vht. and due after successful enforcement; HUF 1,000 up to a HUF 400,000 claim value; over this, 1% of the claim value without an upper threshold. A further element of the costs is the incentive to the bailiff, the enforcement premium, which is only due as a proportion of the debt successfully recovered, of 8% up to HUF 5,000,000,HUF 400,000 between HUF 5,000,000 and 10,000,000 and 6% of the sum above HUF 5,000,000, finally above HUF 10,000,000 enforcement HUF 700,000 and 3% of the portion above HUF 10,000,000 shall be due as enforcement premium.[11] This

8 Az EVC equals to the total value of the claim multiplied with the chance of successful litigation (V*p, where p≤1)

9 EVeC-t equals the total value of the claim multiplied by the chance of successful enforcement (V*p, where p≤1)

10 35/2015. (XI. 10.) IM decree on the Costs of the Judicial enforcement procedure (hereinafter: Dsz.)

11 See. Dsz. 14-16. §§, where there are several exclusions from the main rule. For example, costs

premium is clearly an incentive for the court bailiff to attend to his work carefully, while it also can be viewed as sharing the risk between the creditor and the bailiff.

For the creditor, this clear set of cost rules facilitates the calculation of the left side of the equation, namely the evaluation of the FCe (filing cost of enforcement), since these costs are fixed by law (just like the costs of the public notaries and judicial procedures). Those cost elements that are proportional to the value of the claim, are connected to successful execution, thus they do not burden the creditor in advance and so there is no need to take them into consideration from the creditor's point of view. The other side of the equation is the estimated value of the enforced claim (EVeC), which equals the total value of the enforced claim (plus interest and other accessories) multiplied by the chance of successful enforcement. Calculating this side is not a trivial exercise, since the creditor might well lack the proper information.

8. The lack of willingness to comply on the debtor's side is proved by the deadline for voluntary completion elapsing without success. The remaining question concerns the capability to comply. However, the legal order does not entitle the creditor to gather information from various databases (information available from official public records); however, authorised persons in are able to review the financial status of the debtor but only after the execution procedure has commenced. That means that the creditor may only calculate their real chances – receiving the information gathered by the bailiff – only after the enforcement procedure has commenced. This informational asymmetry (and also lack of means to comply) is assuaged by those *in rem* (such as mortgage) or *in personam* (a guarantor) if given in the contract, but even in this case, the danger of there being insufficient funds is still possible.

According to my thesis, the legal system – based on understandable data protection principles – does not support a creditor with an independent data-collection permit in order to assess their chances of recovering the debt; their information asymmetry – if they did not defend themselves during the transaction with the abovementioned guarantees – will only be alleviated during the enforcement procedure. However, the lack of information could be eased on the part of creditor with a partial procedure, where – assuming a final judicial decision, still before filing for enforcement and with proper legal guarantees – the court bailiff, upon request and for an appropriate fee, would be able to retrieve information on the debtor and provide it to the creditor. That would set them in a position where the chances of success could be evaluated properly and a debt beyond reasonable hope of recovery would lead to the enforcement procedure being abandoned[12] Even though this is a loss on the part of the creditor, they would avoid incurring the advancement of further (flat) costs that would remain her burden in the event of an unsuccessful execution. At societal level, these decisions

are reduced by the discount given to the debtor who voluntarily vacates his house that was sold on auction (as provided by Vht. 154/A-154/B. §§).

12 With thanks to Dr. Sándor Sz. Szabó attorney at law for this remark.

would appear as a gain in the form of unpaid procedural costs,[13] also remarking that enforcement institutions would not gain this income but would also not have to take the procedural steps and the work going with them. However, there are other structural perspectives that make the decision on commencing the enforcement procedure unilateral. The debtor may be interested in – as evidenced by the lack of voluntary fulfilment – hiding their assets, thereby excluding them from the execution. If the data on their financial positions had to be retrieved before the commencement of the procedure – of which action he must be informed of due to data protection principles – it would serve to warn him and avoid *mala fidei* actions. Since securing assets for coercive measures may only rest upon enforcement procedures that have commenced and be performed by authorised persons (namely court bailiffs), the simultaneous nature of retrieving information and commencing coercive measures seem unavoidable.

There are other factors that support the initiation of an enforcement procedure, most eminently financial and accounting considerations. Should the management of a corporate creditor neglect their fiduciary duty by failing to enforce a claim, it might render the management having civil liability, even criminal liability in a form infidel or neglectful management, a criminal offence with further preconditions. On the accounting side, any claim may only be written off as uncollectable if the enforcement procedure delivered that result. These factors increase the right side of the equation [EVeC], increasing the justification for commencing an enforcement procedure. It is clear that dismissing or easing these requirements would reduce the volume of enforcement. However, this decrease would also be a failure of the enforcement system,[14] provided that a final judicial decision remains unenforced, and contradicting our thesis on the use of execution in maintaining the legal order of society.

9. Up to this point we did not mention the systemic background to enforcement. The Hungarian system relies heavily on commercial incentives to make its enforcement efficient. Before 1994, judicial enforcement was part of the judicial organisation and the actors were employed by the courts. Their job was poorly regulated, due to the completely different approach to judicial enforcement under the socialist regime, which remained mainly unchanged until 1994.

As one of the last Acts of the first freely elected Parliament, it passed Act LIII of 1994 on Judicial Enforcement, which introduced a two-prong system. A body of so-called County-Court bailiffs remained in the employment of the court – this part of the organisation was responsible for the enforcement of mainly state dues and costs, such as unpaid criminal costs, court fees etc. Their efficiency did not rise in terms of successfully enforced cases.

Another body was founded, the independent court bailiffs, later organised into

13 Procedural costs are always transactional costs, increasing the total costs of a transaction without furthering its real merit.

14 See Point 6., by analogy to the EVC=0 case, in this cast EVeC=0, totaling a 100% failure.

a chamber (Magyar Bírósági Végrehajtói Kamara). An independent court bailiff applies for a post at a particular local court, is appointed by the Minister for Justice, and works in a given area of competence but as an entrepreneur, at his own financial risk. His fees and costs are determined by the law and recovered from the debtor or rarely from the creditor. He is strongly incentivised by his position to rationalise the performance of his office and, for a successful procedure, there is the above-mentioned enforcement premium, which holds the promise of profit for his activities. This part of the organisation has greatly improved enforcement in terms of recovered debts. The economic motor behind this was bailiffs' well-guarded self-interest; they hold state powers, therefore must be strongly controlled, but they also have to be incentivised – that is the for-profit operation of the office. In my opinion, it is a balanced system, which contributes to my thesis supra, that the efficiency of the enforcement system corresponds to the health of the legal system: should enforcement be systemically inefficient, the rule of law will ultimately suffer.

Concluding remarks

We have shown in this paper that the enforcement of civil judgment, seldom subject to economic analysis of law, is also governed by the theoretical notions of that area of research. Even for matters of emotional importance, these enforcement laws must be applied. The well-developed equations related to civil litigation may be duly modified to enhance our understanding of this particular area of civil procedure. We have shown how cost-benefit analysis works in deciding whether to commence the enforcement procedure, and also uncovered the information disparity that might lead to either under- or over-enforcement (in terms of initiated procedures). We also have shown that this disparity, the lack of information on the side of the creditor, might only be overridden with official assistance from a bailiff, who can lawfully collect the data necessary for a proper decision. This work must therefore be rewarded, no real incentive in terms of reducing enforcement costs might be given to decrease the number of total procedures. We concluded with remarks on the enforcement institutions and the systemic incentives that helped enhance their efficiency. We hope that, based upon our present work, further writings will clarify the relationship between the law and the economics of enforcement.

Abstracts

Public Law

Tóth, J. Zoltán (Associate Professor, Department of Constitutional Law)
The Principles of the Rule of Law and Democracy: Mutually Exclusive or Mutually Reinforcing Categories?

The present paper deals with the meanings of the rule of law and democracy, and the content that each term covers. The exact range of meanings of both concepts is disputed, but both have a "core meaning" on which there is a widespread agreement. Although democracy and the rule of law are perceived by many as mutually exclusive categories, if we look at the "core" of the two concepts, the ostensible contradictions can be resolved. The main thesis of my paper is that democracy and the rule of law (no matter how we define them) are, in fact, not independent from each other; we cannot talk about "real" political democracy in the absence of certain criteria for the rule of law.

Domokos, Andrea (University Professor, Institute of Criminal Sciences)
The Role of the Constitutional Court in the Formulation of Criminal Law under Rule of Law

The Hungarian Constitutional Court played an important role in the formation of criminal law during the political transformation after 1990. At that time the establishment of a state governed by rule of law, as well as legal certainty and the protection of constitutional order, seemed to be the most important goals. AB decisions declare that Hungary is a state governed by rule of law and at the same time it aims to achieve it as an objective. The decisions emphasise that the state must not have unlimited punitive power, as public authority itself is never unlimited, either. Establishing criminalisation and threatening with punishment must have a firm rationale, predicated upon constitutional grounds, which implies that they must be necessary, proportionate, and applied as 'ultima ratio'.

Czine, Ágnes (Associate Professor, Institute of Criminal Sciences)
The Right to Trial within a Reasonable Time

The right to a fair trial, which in itself includes several sub-rights, is an important element of the constitutional guarantee system. One element of the right to a fair trial is the reasonable time requirement. The development of the content of this sub-right

is greatly influenced by international law, in particular the case law of the European Court of Human Rights. This paper seeks to outline how the case law of the ECtHR has enriched the content of rights to trial within a reasonable time through the practice of the Hungarian Constitutional Court.

Osztovits, András (University Professor, Department of EU Law and Private International Law)
Online Justice – Opportunity or Risk?

Information Technology (IT) development poses a dual challenge to justice systems. First, disputes originating from digitally established legal relationships cannot necessarily be resolved within the traditional framework of court proceedings. Second, the digital era has brought about changes in societal expectations regarding the administration of justice. The current expectations of the functioning of the courts are based on a set of basic principles and standards that have resulted from two hundred years of evolution. However, the radical changes in everyday life entailed by IT development may necessarily transform expectations vis-á-vis the judiciary as well. This paper therefore primarily aims at raising awareness of this phenomenon. Chapter I introduces the "gatekeepers" of the relevant Hungarian rules, which, because of their effects, impede the implementation of access to justice in the offline world as well. Chapter II gives an overview of the fundamental principles on justice that may prima facie be infringed in "court proceedings not taking place in a courtroom". The following three chapters present the most successful online court platforms and their regulatory specificities, as well as the EU's single digital market; finally, a number of thesis statements are formulated to inspire further discussions.

Köbel, Szilvia (Associate Professor, Department of Constitutional Law)
The Code of the Serving Church - The Impact of the Socialist State on the Constitution and Internal Laws of the Reformed Church in Hungary

This paper tries to uncover the effects of the Socialist State on the constitution and internal laws of the Reformed Church in Hungary. The hostile separation model, constitutionally declared in 1949, was based on the Stalinist model of the same name and received some refinement through some party resolutions during 1958. The two sides of legislation (state church law and ecclesiastic law) started to get closer and closer. Instead of striving for a true separation however, the party-state demanded that the Church bow down to the design of the state. This paper wishes to highlight three areas of the denominal relations of the Reformed Church, where the imprint of the party-state is abundantly clear: Ecclesiastical legislation, personnel questions (status of pastors), and organizational questions. While deeply disdaining the pre-war system in its propaganda, the system quietly adapted the old institutions and used

them for its own interests. This is what made – despite the constitutional declaration of separation – the state right to supervise, the Ius supremi patronatus and the oversight and approval of ecclesiastical legislation possible.

Csáki-Hatalovics, Gyula Balázs (Associate Professor, Department of Public Administration) – Varga, Ferenc – Molnár, Péter – Loebs, Patrick
Anomalies in the Functioning of Local Authorities in Hungary Following the Change of Regime, with Particular Regard to the Functioning of Democratic Institutions and the Expansion of e-Government

After the political transitions of 1990, the laws pertaining to the local governments were changed. According to the constitutional rules, the legislation provided a system wherein autonomy was the most important factor for municipalities. Yet, after two decades, it became clear that the borderless autonomy was ineffective and the exceptionally broad freedoms in which these municipalities operated led to an economic crisis that resulted in indebtedness, especially in the smaller local political units. The fragmented settlement system was also a Hungarian specialty which also led to significant operational inefficiencies. After 10 years, legislative reforms sought to create a more effective legal basis for municipality operations, while simultaneously maintaining the constitutional guarantees. These reforms had seemingly disrupted some legal achievements from the 1990's, although those constitutional institutions were never proven to be sufficiently functional, nor meet the demands of the diverse municipality system. 10 years after this transition, it can be clearly seen that in the unique Hungarian circumstances, the new regulations achieved their goals. Comprehensive insolvency, seen by many as the most important problem, ceased, and the local governments became much more effective in their local community building affairs.

Pókecz Kovács, Attila (University Professor, Department of Civil Law and Roman Law)
The Role of the School of Public Service (l'École de Bordeaux) in the French Administrative Law of the 20th Century

The school of public service (school of Bordeaux) founded by Duguit and Jèze was the most important scientific trend in the 20th century French administrative law. The school of public service (l'École du service public) essence was that administrative law is nothing more than the law applied by the administration in case of public service activities (service public). In addition to the founding jurists, the main representatives were such excellences of the administrative law as Louis Rolland, Roger Bonnard, Marc Réglade, Roger Latournerie and André de Laubadère. The importance of the school has been relegated to the background nowadays but its main theorems have still remained dominant in today's French administrative judicial practice.

International Law and EU Law

Fazakas, Zoltán (Assistant Lecturer, Department of Commercial Law and Financial Law)
Foreign Policy and International Relations of the Principality of Transylvania

The international law requires the existence of three mandatory elements in order to recognize a state. These are territory, population and sovereign authority over them. If we focus on the Transylvanian state, meeting these requirements will not represent an issue. The interesting question is the fourth, but not additional criteria of statehood in international law, the international recognition. Without international recognition a state cannot act as a part of the international community and will always be in collision between claims of sovereignty by other states. In Transylvanian history the country always had this collision with the Habsburg and the Ottoman Empire. The essay shows that the independent Principality of Transylvania had the recognition of other states, also had regular foreign policy and diplomatic relations. To demonstrate that statement, the essay is built on three points and parts as follows: the evolution of the state from the Eastern Kingdom of Hungary until the Principality of Transylvania, the foreign policy of the Transylvanian state, its directions and orientations and the international relations of the Transylvanian state, with evidence of state recognition.

Manzinger, Krisztián (Assistant Professor, Institute of Social Science and International Studies)
Nation-stateness Carved in the Constitution – The Question of Székely Land's Territorial Autonomy in Romania

In the early 1920s, after gaining Transylvania with a one-point-five million strong ethnic Hungarian minority, Romanian politicians modified the constitution to glorify nation-stateness, the unity and the indivisibility of the newly enlarged Romania. They did that to tackle autonomy movements; indifferent if articulated by minority Hungarian or German or majority Romanian elements of the society. This approach has not been changed since; anti-autonomy feelings in both the Romanian politics and the public opinion have been prevailing. The anti-autonomy approach also results in ethnically selective implementation of the minority rights granted in Romanian laws, providing thus, however, a strong argument for the necessity of ethnically neutral institutions. Between 2018 and 2020, at the centenary that Romania obtained the area, diverging Romanian and ethnic Hungarian minority opinions on the possibility of an officially bilingual autonomous entity in Székely Land, a Hungarian-language area in the geographic centre of Romania. The constitutional ban, the grievances in the legal system and the firm opposition of the Romanian politicians have been inflating social tensions and providing a tool for nationalists. At the same time, regrettably, they

weaken Romania's stability and undermine trust-building both between Romania and its Hungarian community, and Romania and Hungary, hindering regional cooperation.

Törő, Csaba (Associate Professor, Institute of Social Science and International Studies)
The Aims and Means of Hungarian Foreign Policy in Support of EU Enlargement in the Western Balkans – A Brief Overview of Current Practice

Support for EU enlargement in the Western Balkans stands out as one of the permanent features of Hungarian foreign policy with respect to the South East European neighbourhood of the Union. The present short assessment intends to provide a quick review of the ways and means applied by Hungary to manifest this support and promote its aims in practice. These include Hungarian institutional and diplomatic assistance in pursuit of EU aspirations in the Western Balkans as well as Hungarian contribution to the reinforcement of core state functions in the Western Balkans (such as border control), participation in the stabilization and security of the Western Balkans together with political and diplomatic support for EU enlargement reinforced through the Visegrad Group.

Tóth, András (Associate Professor, Department of Infocommunication Law)
Competition Law as Market Regulation in the Example of EU Energy Markets

In the field of energy sector, regulation and the regulatory style application of competition law has proved to be an effective combination. Regulation and competition law enforcement together have not only contributed to the development of the internal energy market and promoted infrastructure-based competition through network divestitures and capacity releases, but also have freed customers from long-term contracts and made them available to competitors. Therefore, EU competition law has shown how very important supporting role it has in the liberalisation of European energy markets. The European Commission used mainly commitment decisions to influence the market. These tendencies seem to be continuing, as the Commission's proposal for a New Competition Tool also aims to strengthen the Commission's tools for regulatory intervention, in forms of imposing behavioural and structural remedies. This paper gives an insight to this regulatory style application of competition law in the field of the European energy market.

Kecskés, András (Associate Professor, Department of Economics) – Halász, Vendel
The Most Important Changes in the European Regulation of IPO Prospectuses

Initial public offering (IPO) refers to the process by which the shares of a company are publicly offered for the first time. Because this is the first time that the company's

shares are offered publicly to the community of investors, those who intend to purchase/subscribe to those shares cannot be made aware of the capital market performance of those shares; there is no stock market presence and therefore no data. Regulation (EU) 2017/1129 (Prospectus Regulation) can be considered as an important step forward in strengthening the European capital market. By choosing the legislative form of a Regulation, it can enhance coherence and integration throughout the internal market. It provides significant legal certainty for investors and also for issuers that they face the same rules regarding the preparation and publication of prospectuses in all EU Member States. This paper summaries the main goals and achievements of this Regulation, from a critical point of view.

Muzsalyi, Róbert (Assistant Research Fellow, Department of Civil Procedure Law) – Csőke, Andrea (Judge, Hungarian Supreme Court) – Nastasie, Nicoleta Mirela
The Undertaking as an Alternative to Secondary Insolvency Proceeding in Romania and in Hungary – A comparative analysis

The differences between Member States with regard to substantive and procedural rules a common source of difficulties in cross-border dimension. The same is true for insolvency proceedings. Among others, Regulation 2015/848 of the European Parliament and the Council on insolvency proceedings provides some new legal instruments to limit the possibility of secondary insolvency proceedings. Undertaking (Art. 36.) is one of the new features, and was not known before in Continental legal systems. The application of an undertaking in different insolvency regimes also causes some difficulties. To demonstrate this assumption this paper compares the Romanian and the Hungarian legislation in this field and shows the differences and similarities.

Boóc, Ádám (Associate Professor, Department of Civil Law and Roman Law)
A Sailor's Knot or a Life Belt? Comments on the Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration)

The Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration) (hereinafter: Prague Rules or Regulation) was officially signed on the 14th December 2018 in Prague, after four years of preparation. It is a question wheather the Regulation is going to serve as a reliable sailor knot fixing the ropes, or a lifebelt giving chance to survive for those who got into trouble in the sea of arbitration. This paper seeks answers to this question.

Civil Law

Jakab, Éva (University Professor, Department of Civil Law and Roman Law)
Roman Law in the Provinces: A Case Study

The Romans were obsessed with making wills. Testamentary succession was the first choice in legal life. Wealthy Romans made their wills promptly when they reached the age of legal capacity. However, there can be no doubt that wills mattered more for the "propertied and the educated" of Roman society. Concerning the milieu, this paper introduces an interesting case with a strong link to Roman Britain: the last will of Seius Saturninus, commander of the British fleet of the Roman army.

Arató, Balázs (Associate Professor, Department of Commercial Law and Financial Law)
The Legal Institutions of Asset Preservation and Asset Transfer in Hungary

The legal instruments of wealth transfer enacted in Hungary not only provide reliable, advantageous and flexible estate planning vehicles for domestic equity owners, they can also attract foreign investors when they seek to create a diversified property structure alongside their portfolio or on a geographical basis. The need for wealth preservation has prompted the legislator to expand the range of legal instruments serving this purpose. In the spirit of this consideration, the new Civil Code allows for fiduciary asset management and introduces the legal concept of private foundations (family foundations). The legislator passed the bill on asset management foundations in the spring of 2019, creating a special combination of fiduciary asset management and private foundations. The newly adopted legal institutions may also be attractive to foreign equity owners, because during the geographical diversification of their assets, they may now focus on Hungary and may take advantage of the extremely favorable Hungarian tax environment. Among the advantages offered by Hungary, the 9% corporate tax rate -the lowest Europe- should be highlighted.

Molnár, István János (Associate Professor, Department of EU Law and Private International Law)
Distribution Contracts in Hungarian law – The Recognition of an Important Vehicle of Trade Relationships by the Civil Code

Distribution contracts have a significant role in today's economic relationships especially in international trade. Despite this fact, up till now the international harmonisation process has not yet created any instruments that may generally be applicable for cross-border transactions. Consequently, national legislations must be taken into consideration, but in most of the jurisdictions this contract type remains

unregulated. Since 2014 Hungary has been one of the very few exceptions as the Civil Code contains specific provisions on distribution contracts which are examined in this article. The paper concludes that the said provisions do not fully follow the European harmonisation initiatives and are not in line with the tendencies followed by national legislations either.

Kun, Attila (University Professor, Department of Labour Law and Social Security)
Some Tentative Explanations for the Protracted Development of Platform Work (As a Transnational Phenomenon) in Hungary

The gig / platform economy is still rather immature in Central and Eastern Europe, more concretely (as a case study in the present paper) in Hungary. Platform work (as a phenomenon) is immature, hardly noticeable and marginal; it is not perceived (yet) as a distinct regulatory / employment field and it also lacks specific policy (etc.) attention. In this context, the present paper aims to put forward some tentative, potential and structural explanations for the slower, sluggish development of the phenomenon − and its regulation − in Hungary. Even though the reasons identified and described in this paper (summarised in eight points) are surely country-specific, some of them might deserve wider reflection.

Law of Economics

Gosztonyi, Márton (Senior Lecturer, Department of Economics)
The Moral and Solidarity Economy during the Pandemic in Hungary

The aim of this paper is to introduce the theoretical foundations of the solidarity economy and to analyse the current crisis from a systemic perspective and to present and analyse donation practices on the biggest donation platform in Hungary. During disasters, economic crises or pandemic, when the infrastructures or the operation of the state and the market stagnate for a certain time, mutual help and alternative livelihood solutions provide for the survival of a lot of marginalized social groups. We can become closer to analysing the moral - and solidarity economy at the system level through donation practices, and also get a better understanding of the nature of economic and social responses in times of crisis.

Birher, Nándor Máté (Associate Professor, Department of Legal History, Legal Theory and Church Law) – Alpár, Vera Noémi (Lecturer, Department of Economics) – Knoll-Csete, Edit (PhD Student) – Sőréné Batka, Eszter (PhD Student)
Human Solidarity – the Ultimate Victory of Good-Will, Understanding, Knowledge and Peace

Fighting a pandemic, financial or climate crisis, it is evident that solidarity, science and decisive solutions are needed. The recovery from the currently corona pandemic must guarantee a sustainable future for coming generations on a solidarity basis. This paper examines how social solidarity can appear in the regulatory work of a nation or on a higher international level and, vice-versa, how law affects social solidarity. The paper also aimes to describe why people act based on solidarity, which could be the root of their behaviour, and how solidarity works in practice. The financial crisis in 2008 and the COVID-19 situation, in view of the pandemic, create some interesting and crucial, in societal and economic terms, opportunities for solidarity that might be readily analysed, too. Politicians and religious leaders often use this word to become more popular or influence people's understanding of delicate situations or even to gather followers to help solve problems. The paper summarises the philosophical origins, the moral framework and the basis of this term.

Udvary, Sándor (Associate Professor, Department of Civil Procedure Law)
Economic Analysis of Several Issues Related to the Enforcement of Civil Judgments in Hungary

Law of enforcement of civil judgment, seldom subject to economic analysis of law, is also governed by the theoretical notions of that area of research, as this paper showed. The well-developed equations related to civil litigation may be duly modified to enhance our understanding of this particular area of civil procedure. The paper demonstrates, how cost-benefit analysis works in deciding whether to commence the enforcement procedure, and also uncovers the information disparity that might lead to either under- or over-enforcement (in terms of initiated procedures). This disparity, the lack of information on the side of the creditor, might only be overridden with official assistance from a bailiff, who can lawfully collect the data necessary for a proper decision. This work must therefore be rewarded, no real incentive in terms of reducing enforcement costs might be given to decrease the number of total procedures. The paper concludes with remarks on the enforcement institutions and the systemic incentives that helped enhance their efficiency.