Karoli Mundus II.

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Foreword

We expected more from 2021 than we got: the coronavirus epidemic is here to stay, almost as part of everyday life. Although vaccines have brought the end of the epidemic closer, many of the restrictions are still with us this year. This is certainly linked to the inevitable acceleration of digitalisation, which is increasingly turning the focus of jurisprudence towards the regulation of online spaces and the effective resolution of disputes arising from legal relationships created there. In our Yearbook, two studies specifically analyse the technological challenges facing the judiciary and present the responses of several countries.

This year's Yearbook also includes classic civil and criminal law issues, as well as a special focus on freedom of expression in the US and a study on the growth of wealth in European countries.

It is hoped that reading the 2021 edition of Karoli Mundus will help to turn difficulties into opportunities and advantages:

Christmas 2021, Budapest

Prof. Dr. András Osztovits
editor

Public Law

Papp, Petra[1]

History and existing provisions of substantive legislation on crimes against humanity in Hungary

1. Introduction

The study seeks to present the history and provisions in force of substantive legislation on crimes against humanity. The crime against humanity can be regarded as a relatively young delict in both international and domestic legislation, due to its legal definition after the Second World War.[2] However, it is not clear in what context the term "*crimes contrel'humanité / crímenes de les a humanidad / Verbrechengegen die Menschlichkeit / crimes against humanity*" was first coined. Some scholars point out that this term (or very similar terms) was used as early as the late eighteenth and early nineteenth centuries, especially in the context of slavery and the slave trade, as well as in Africa in relation to atrocities related to European colonialism, and elsewhere, such as the atrocities of Pope John Paul II. Due to the atrocities committed by King Leopold of Belgium in the Congo free state.[3] Other scholars[4] point out that the terminology of the crime against humanity stems from a joint declaration issued by the French, British and Russian governments in 1915 (allied governments)[5] in which the Ottoman Empire was to be held accountable for the massacre of the Armenian population.[6] The implementation of international law into national law has made significant progress over the last three decades. Thus, the way in which crimes against humanity are regulated is also bumpy.

1 Assistant Lecturer, Institute of Criminal Sciences.

2 Robinson, Darryl: Defining "Crimes Against Humanity" at the Rome Conference, *The American Journal of International Law,* Vol. 93, No. 1 (January 1999), pp. 43-57 https://www.jstor.org/stable/2997955 (accessed 30 September 2021). For more information, see, for example, Heydecker, Joe J. – Leeb, Johannes: *Der NürnbergerProzeß.* Köln, Kiepenheuer&Witsch, 2015.

3 Schabas, William: *Unimaginable Atrocities – Justice, Politics, and Rights at the War Crimes Tribunals.* Oxford, Oxford University Press, 2012, pp. 51-53

4 Bassiouni, M. Cherif: CrimesAgainstHumanity in International Criminal Law. Hague, Kluwer Law International, 1999, p. 62

5 Gellér, Balázs József: A nemzetközi büntetőjog. In: Belovics Ervin [etal.] – Busch Béla (szerk.): *Büntetőjog Általános Rész.* Budapest, HVG-ORAC, 2010, p. 524 [Gellér (2010a) op. cit.]

6 For more information, see, forexample, Dadrian,Vahakn: *The History of theArmenianGenocide: EthnicConflictfromtheBalkansto AnatoliatotheCaucasus.* New York, BerghanBooks, 1995.

II. The relationship between international and domestic law from the point of view of constitutional law

The implementation of international law in national law has made significant progress over the past three decades. Thus, the path of regulating crimes against humanity is bumpy.[7] The role of international law as a source of law is recognized in criminal law through international obligations towards Hungary [The Fundamental Law of Hungary (25 April 2011), Article Q[8]]. Although this has not always been the case, since the regulation of the relationship between international law and domestic law, in other terms, the valid and effective effect of international obligations within the State, in the development of the Hungarian Constitution, has been overshadowed and neglected throughout the development of the Hungarian Constitution.[9] The unwritten historical constitution, then Act I of 1946 on the form of government of Hungary and, in its original form, the text of the first written constitution, Act XX of 1949 on the Constitution of the People's Republic of Hungary, did not contain any provision on international obligations. This was in force until 31 December 2011. This was due to the prevailing mindset in contemporary socialist jurisprudence, which did not recognize the enforceability of the standards of international law within the State, without a separate decision by the State to that end, i.e. transformation into internal law.[10] The particular public perception of that period was expressed in the

7 For more information, see, forexample, Sári, János: A Népköztársaság Elnöki Tanácsa. In: Schmidt Péter (szerk.): Magyar alkotmányjog. Budapest, BM Tanulmányi és Propaganda Csoportfőnökség, 1976. Kukorreli, István – Takács, Imre: A magyar alkotmány története. Az alkotmányosrendszerváltozás jellemzői. In: KukorreliIstván (szerk.): *Alkotmánytan I.* Budapest, Osiris, 2003. Sulyok, Gábor: A nemzetközi jog és a belső jog viszonya: a fontosabb elméletek és a hazai gyakorlat, *Leviatán,* Tom. 3., 2005. Lamm, Vanda: Megjegyzések a hazai jogrendszerről. In Szentpéteri, József – Teplán, István – Vizi, E. Szilveszter (szerk.): Előmunkálatok a társadalmi párbeszédhez. Budapest, Gazdasági és Szociális Tanács, 2006. Sulyok, Gábor: Visszatérés a nemzetközi jog és a belső jog viszonyának alaptörvényi szabályozása, *Jog – Állam – Politika,* 2012/4., pp. 18-19. https://dfk-online.sze.hu/images/J%C3%81P/2012/4/sulyok.pdf (accessed 30 September 2021.) Molnár, Tamás: A nemzetközi jog és a magyar jog viszonya. In: Jakab, András – Fekete, Balázs (szerk.): Internetes Jogtudományi Enciklopédia, 2018. http://ijoten.hu/szocikk/a-nemzetkozi-jog-es-a-magyar-jog-viszonya (accessed 30 September 2021.)

8 The Fundamental Law of Hungary (25 April 2011) https://nemzetikonyvtar.kormany.hu/download/0/00/50000/Alapt%C3%B6rv%C3%A9ny_angol.pdf (accessed 30 September 2021.)

9 Bodnár, László: A nemzetközi jog magyar jogrendszerbeli helyének alkotmányos szabályozásáról, *ActaUniversitatisSzegediensisActaJuridicaetPolitica, Tomus* XLVII. Fasciculus 10., 1996, p. 20. http://acta.bibl.u-szeged.hu/6820/1/juridpol_047_019-036.pdf (accessed 28 September 2021.)

10 Molnár (2018) op. cit., sections [2]-[4].

fact that a relatively large number of international treaties[11] were published and were essentially declarative in nature, i.e. they did not constitute a real source of law for the application of the law.[12] On this basis, the practical implementation of a very rigid and extremely dualistic transformation model is drawn up, which has not or only acknowledged on a case-by-case basis the primacy of transformed international law over domestic law.[13] The first step towards international law was the amendment of the Constitution by Act XXXI of 1989, which 'settled' the relationship between international law and Hungarian law, the fulfilment of international legal obligations within the State.[14] Because of the laconic, overly general wording of the provision and the resulting vagueness, several different meanings could be read from it. This was also sharply criticized by the literature.[15] Finally, by three decisions of the Constitutional Court [No. 53/1993. (X. 13.), 4/1997. (I. 22.), 30/1998. (VI. 30.)], it led the dualist-transformational system out of the text. According to this, the generally recognized rules of international law become part of Hungarian law by general transformation, while international treaties must be incorporated into the Hungarian legal system individually by separate legislative publication, so-called special transformation.[16] This constitutional norm was replaced by Article Q) of The Fundamental Law of Hungary (25 April 2011) from 1 January 2012, which merged the state goal of declaring Hungary's participation in international relations and the new international legal clause that plays the role of a bridge between international law and the Hungarian legal system. Other sources of international law become part of the Hungarian legal system by proclamation by law. From the point of view of my subject, I would like to refer here to the problematic question that the Rome Statute[17] is not part of the

11 This was mostly done by decrees of law adopted by the Presidential Council of the People's Republic of Hungary. This body was also endowed with the widest international contracting powers. For more information, see, Sári(1976) op. cit.

12 Bodnár (1996) op. cit., p. 21

13 Decree-Law No. 27 of 1982 was the first piece of legislation at the legal level to deal with the procedure relating to international treaties.

14 SeeSection 7(1) of Act XX of 1949.

15 Bodnár (1996) op. cit., p. 20, Vörös, Imre: Az Európai Megállapodás alkalmazása a magyar jogrendszerben, *Jogtudományi Közlöny,* 1997/5., p. 232, Kovács, Péter: Nemzetközi szervezetek szankciós típusú határozatai magyarországi érvényesíthetőségének alkotmányjogi gyakorlata és problémái. In: Bodnár, László (szerk.): EU-csatlakozás és alkotmányozás. Szeged, SZTE ÁJK, 2001, p. 134; Szénási, György: A nemzetközi szerződésekkel kapcsolatos döntéshozatalra és eljárásra vonatkozó hatályos magyar jogi szabályozás és a napi valóság, ahogy azt a hivatásos jogalkalmazó látja és tapasztalja, *Magyar Jog,* 2002/7., p. 397; Sulyok (2005) op. cit., p. 86, Lamm (2006) op. cit., p. 22.

16 Sulyok (2012) op. cit., pp. 18-19

17 RomeStatute of the International Criminal Courthttps://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf (accessed 01 October 2021.)

Hungarian legal system. According to customary law[18], of course, the definitions of international crimes are part of the Hungarian legal system, and the international convention promulgated by Hungary also contains several related provisions[19], but this does not relieve the legislator of the obligation to publish.[20] In my opinion, this legislative failure to act against humanity can be particularly dangerous, since the offence under discussion has no international convention, and the Rome Statute is the primary source of law.

III. International legislation on crimes against humanity

III.1. Beginnings

The terminus technicus of crimes against humanity was created in 1945 by the Statute of the International Military Tribunal at Nuremberg (IMT).[21]

Article 6(c) of the Nuremberg Charter specifies for the first time crimes against humanity[22]: *"namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."*[23]

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18 For more information, see, for example, Hoffmann, Tamás: A nemzetközi szokásjog szerepe a magyar büntetőbíróságok joggyakorlatának tükrében, *Jogelméleti Szemle,* 2011/4. http://jesz.ajk.elte.hu/hoffmann48.html#_edn1 (accessed 01 October 2021.)

19 See, for example, Decree-Law No. 16 of 1955 on the proclamation of an International Convention on the Prevention and Punishment of the Crime of Genocide, dated 9 December 1948.

20 *"As a result of the obstruction and postponement of the publication of the Rome Statute, there have been legal coherence problems which may jeopardise daily cooperation with the International Criminal Court of a legal aid nature, in particular as there are a number of articles in the Criminal Code and the Criminal Procedure Act which are subject to the provisions of the 'Law on the Enforcement of Obligations arising from the Statute of the International Criminal Court' depending on certain institutions, certain steps."* Kovács, Péter: Miért nincs még kihirdetve a Római Statútum? Gondolatok a Római Statútum és az Alaptörvény összeegyeztethetőségének egyszerűségéről, *Állam- és Jogtudomány,* 2019/1., p. 69 https://jog.tk.mta.hu/uploads/files/2019-01-KOVACS.pdf (accessed on 01 October 2021.)

21 IMT Charter, Article 1., 6.

22 The explicit intention to create the definition is the accountability of Nazi war criminals. S. Domokos, Andrea: Nemzetközi büntetőbíráskodás eszméje. In: Máthé, Gábor [etal.]: *Jog és Állam 7., Bűnügyi Oktatók Országos Találkozója (BOT) – 2004*. Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2005, p. 25; Hoffmann, Tamás: Nemzetközi büntetőjog. In: Kende, Tamás [etal.]: *Nemzetközi jog*. Budapest, WoltersKluwer. 2014, p. 551

23 Bassiouni, M. Cherif: Emberiesség elleni bűncselekmények. In: Gutman, Roy – Rieff,

This definition was also used by other international criminal courts. Initially, the International Military Tribunal for the Far East (IMTFE)[24] and then the Allied Control Committee of Germany decree No. 10,[25] under which the Allies prosecuted the Germans in their own occupied zones. Finally, the International Criminal Tribunal for the former Yugoslavia (ICTY),[26] the International Criminal Tribunal for Rwanda (ICTR),[27] the International Criminal Court (ICC)[28] and hybrid courts such as the Special Court for Sierra Leone[29] and the Extraordinary Chambers in the Courts of Cambodia[30].[31]

David (szerk.) [ford. LattmannTamás – Süli István]: *Háborús Bűnök*. Budapest, Zrínyi, 2002, p. 104

24 IMTFE Charter Article 1., 5. https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (accessed 02 October 2021.)

25 Bassiouni, M. Cherif:*CrimesAgainstHumanity: HistoricalEvolution and ContemporaryApplication*. New York, Cambridge University Press, 2011, p. xxxi.

26 S/RES/877 (1993) https://undocs.org/S/RES/877(1993) (accessed 02 October 2021.) Hungary incorporated its Statute into domestic law by Act XXXIX of 1996. In 2017, the Tribunal concluded its operation to punish those responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. S. CRS ReportforCongress, April 23, 1998, pp. 1-2 https://fas.org/sgp/crs/row/96-404.pdf (accessed 02 October 2021.); Domokos (2005) op. cit., p. 23; UN ICTY, 2017. https://www.icty.org/en/press/icty-marks-official-closure-with-moving-ceremony-in-the-hague (accessed 02 October 2021.)

27 S/RES/891 (1993) https://undocs.org/S/RES/891(1993) (accessed 02 October 2021.) Hungary incorporated its Statute into domestic law by Act CI of 1999. The first conviction for genocide took place in 1998, when Jean-Paul Akayesu was held accountable for his actions. S. ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment, 23 Nov. 2001, Case No.ICTR-96-4-T. https://unictr.irmct.org/en/cases/ictr-96-4 (accessed 02 October 2021.)
The tribunalclosedatthe end of 2015. S. Biedermann, Zsuzsánna: A ruandai népirtás, *Afrika Tanulmányok folyóirat*, 2013/2., pp. 75-77 http://real.mtak.hu/9153/1/03_biedermann.pdf (accessed 03 October 2021.)

28 ICC Article 1; Bassiouni, M. Cherif: NegotiatingtheTreaty of Romeonthe Establishment of an International Criminal Court, Cornell*International Law Journal,* 1999, Vol. 32: Iss. 3, Article 3., pp. 443-460 http://scholarship.law.cornell.edu/cilj/vol32/iss3/3 (accessed 02 October 2021.); Wiener, A. Imre – Ligeti, Katalin: HungarianReportonthe International Criminal Court, *Acta-Juridica Hungarica,* 2002, Vol. 43., Iss. 3-4., p. 263 http://real.mtak.hu/46907/1/ajur.43.2002.3-4.5.pdfhttp://real.mtak.hu/9153/1/03_biedermann.pdf (accessed 03 October 2021.)

29 S/RES/1385 (2001) https://undocs.org/S/RES/1385(2001)http://real.mtak.hu/9153/1/03_biedermann.pdf (accessed 03 October 2021.) For more information, see, for example, Kovács, Péter: Nemzetközi büntetőbíráskodás. In: Jakab, András – Fekete, Balázs (szerk.): Internetes Jogtudományi Enciklopédia, 2018, sections [64]-[67] http://ijoten.hu/szocikk/nemzetkozi-buntetobiraskodas (accessed 03 October 2021.)

30 ECCC, Article 1., 2. https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (accessed 03 October 2021.); Bassiouni (2011) op. cit., pp. 255-256; Kovács (2018) op. cit., sections [68]-[70]

31 Bassiouni (2011) op. cit., p. 256

Article 5(c) of the Charter of the International Military Tribunal For The Far East is about crimes against humanity: *"Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders. organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."*

Compared to the Statute of the Nuremberg Tribunal, there are two differences. The first is that these acts are always crimes against peace.[32] The second is *„persecution on religious grounds"*.[33] Article 6 also states that neither the official position of the accused nor the act carried out on command relieve him of criminal liability, but at most an attenuating circumstance *if justice so requires*,[34] which is in accordance with the Nuremberg principles.

Pursuant to Article 5 of the Statute of the International Tribunal, *"the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:*

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts."[35]

The article cited appears to be close in substance to Article 6(c) of the Statute of the Nuremberg Tribunal Statute, but the Statute of the Yugoslav Tribunal considers 'committing in an armed confrontation' to be a constitutive condition for a crime against humanity. It should be noted that in the practice of the Yugoslav Tribunal, 'committing in an armed conflict'[36] means that there was an armed conflict at the time

32 Gellér, Balázs József: *Nemzetközi büntetőjog Magyarországon, Adalékok egy vitához, (Egyes jellemzők leírása és diagnózis kísérlet)*. Budapest, Tullius, 2010, p. 32 [Gellér (2010b) op. cit.]

33 Gellér (2010b) op. cit., p. 33

34 Gellér (2010a) op. cit., p. 529

35 Act XXXIX of 1996, Article 5.

36 International law has neverdefinedtheconcept of war. S. Valki, László: Háború, erőszak, agresszió. In: Kende, Tamás [etal.]: *Nemzetközi jog*. Budapest, WoltersKluwer, 2014, p. 720; International lawusestheconcept of armedconflictatthistime. S. Greenwood, Christopher: The Concept of War in Modern International Law, *International and Comparative Law Quarterly,*

and place of the crime, and that no link between the crime and the conflict is necessary.

The Court of Appeal of the Yugoslav Court of Justice stated in the Tasdic case:

"[...] the now crystallised rule of customary international law is that the factual nature of crimes against humanity requires no connection to international or internal armed conflict. [...] When drafting the Statute, the Security Council drew the framework of this scope of crime unnecessarily narrower than how it would develop under customary international law."[37]

Thus, according to the correct interpretation, the Yugoslav Tribunal strictosensu does not require any link between crimes against humanity and (international) armed conflict, but the latter was objectively necessary for criminal liability to be established.[38]

In particular, in the Nikolic case, in which the Council of first instance of the Yugoslav Tribunal outlined the fundamental characteristics of crimes against humanity.

These characteristics are as follows:

(i) these delicacies must be directed against a specific group of civilians;

(ii) the acts must be to some extent organized and systematic;

(iii) although the acts do not need to be linked to a political stance established at national level, they should not be carried out merely because of isolated acts of some individuals.[39]

This terminological approach is also reflected in the Mrkic, Radic and VeselinSlijvancanin cases.[40]

1987, vol. 36., p. 283; M. Nyitrai, Péter: *Nemzetközi és európai büntetőjog*. Budapest, Osiris, 2006, p. 176

37 ICTY, Prosecutor v. Tadić, AppealsChamber Decision ontheDefenceMotionforInterlocutoryAppealonJurisdiction, 2 October 1995, Case No.IT-94-1., par.141. https://www.icty.org/case/tadic/4,2016-6-9. (accessed 03 October 2021.); Beresford, Stuart: The International Criminal TribunalfortheFormerYugoslavia: theFirstFourYears, *Otago Law Review,* 1999, Vol. 9, No. 3., p. 565http://www.nzlii.org/nz/journals/OtaLawRw/1999/7.html (accessed 04 October 2021.);

38 *„[…] What is inhumane, and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife."* S. ICTY, The Prosecutor v. DuškoTadićaka "Dule", Decision onthe-DefenceMotionforInterlocutoryAppealonJurisdiction, AppealsChamber, 2 October 1995, Case No. IT-94-1-AR72, par.119. https://www.icty.org/x/cases/tadic/acdec/en/51002.htm (accessed 03 October 2021.); (accessed 03 October 2021.); Seealso more details: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70#Fn_3460CD3C_00022 (accessed 02 October 2021.)

39 ICTY, Prosecutor v. Nikolić, Review of the Indictment pursuant to Rule 61, 20 Oct 1995, Case No.IT-95-2-R61., par.26. https://www.icty.org/en/case/dragan_nikolic#acjug(accessed 01 October 2021.)

40 ICTY, Prosecutor v. Mrkic, Radic, VeselinSlijvancanin, Review of the Indictment pursuant to Rule 61, 3 April 1996, Case No.IT-95-13-R61., par.30.; Ld. még részletesebben https://www.icty.org/x/cases/mrksic/tjug/en/070927.pdf (accessed 02 October 2021.); M. Nyitrai (2006) op. cit., p. 189

The Statute of the Yugoslav Tribunal has expanded the scope of basic acts on rape and torture. The Council of the Yugoslav Court of First Instance also pointed out that there may be significant overlaps between crimes against humanity and war crimes,[41] but that crimes against humanity can also be committed in peacetime, as opposed to war crimes, which can be committed specifically during a war.[42]

As set out in Article 3 of the Statute of Rwanda Tribunal:

"The International Criminal Court of Rwanda shall have the right to prosecute persons responsible for the following offences if they have been committed in a wide and systematic attack on the civilian population on national, political, folk, racial or religious grounds:

(a) manslaughter;
(b) extermination;
(c) soaking;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecution on political, racial or religious grounds;
(i) other inhumane acts."[43]

That wording differs from Article 5(c) of the Statute of the Yugoslav Court of Justice in that there is no need for an armed conflict at the time of the offence. The factual element is a widespread or systematic attack on a discriminatory basis, whether national, political, ethnic, racial or religious, or on a civilian population, which is also a factual element in the practice of the Yugoslav Tribunal, even though it does not appear in its Statute, but does not impose the condition for the realization of crimes against humanity that factual conduct is committed on a discriminatory basis.[44]

III.2. In our days

For the purposes of the Statute of the International Criminal Court (also known as the Rome Statute[45]), a crime against humanity is understood to mean any of the following acts committed as part of a wide-ranging or systematic attack on the civilian population, knowing of the attack:

41 M. Nyitrai (2006) op. cit., p. 190.

42 Bassiouni(2002) op. cit., p. 105

43 Act CI of 1999, Art. 3.

44 Sántha, Ferenc: Az emberiesség elleni bűncselekmények, *Miskolci Jogi Szemle,* 2008/1., p. 56; Papp, Petra: Emberiség vagy emberiesség? Az emberiesség elleni bűncselekmények nemzetközi és magyar jogi szabályozása. In: Nagy, Péter – Wiedemann, János (szerk.): *Tudományos eredmények – hallgatói TDK dolgozatok 2018-2019*. Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, ActaIuvenumCarolensia XI., 2019, p. 417

45 Compare it to footnote 17.

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3 or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court,;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 7(2) of the Rome Statute provides for further interpretative provisions for certain conducts.[46]

The ICC is assisted in the interpretation and application of crimes against humanity (including crimes against humanity) by the Elements of Crimes document. In addition, under Article 21 of the Statute, the court may consider so-called external sources,[47] such as international conventions that incriminate international criminal offences, during its enforcement activities.[48]

IV. Hungarian legal interpretation and implementation of crimes against humanity

After the Second World War, the first full codification of Hungarian criminal law took place with the adoption of Act V of 1961. Thus, in a separate chapter, the Criminal

46 Ibid.

47 E.g. an international conventionagainsttorture and othercruel, inhumanordegradingpunishmentsortreatmentdevelopedunderthe United Nations in 1984. S. https://www.ohchr.org/en/professionalinterest/pages/cat.aspx (accessed 02 October 2021.)

48 ICC, RomeStatuteArticle 21.: *„[…] (a) In thefirstplace, thisStatute, Elements of Crimes and itsRules of Procedure and Evidence; (b) In thesecondplace, whereappropriate, applicabletreaties and theprinciples and rules of international law, includingtheestablishedprinciples of the international law of armedconflict; (c) Failingthat, generalprinciples of lawderivedbytheCourtfromnationallaws of legalsystems of theworldincluding, asappropriate, thenationallaws of Statesthatwouldnormallyexercisejurisdiction over thecrime, providedthatthoseprinciplesarenotinconsistentwiththisStatute and with international law and internationallyrecognizednorms and standards."* Compare it to footnote 17.

Code codified crimes to be prosecuted under international law under the name of crimes against peace and humanity, which included crimes against peace, war crimes and the crime of genocide, but not the sui generis crimes against humanity.[49]

The same approach was followed by Act IV of 1978 on the Criminal Code, which also regulated international crimes in Chapter XI, which is also known as crimes against humanity. Chapter XI classified the various offences under international law under two titles: title I "Crimes against peace" included incitement to war (§ 153), illicit recruitment (§ 154), genocide (§ 155) and apartheid crime (§ 157). So, this title functioned as a collection category, since it included genocide and a specific crime against humanity, apartheid. However, title II "War crimes" contained only crimes prohibited by international humanitarian law. Thus, until the adoption of Act C of 2012, the Hungarian criminal law did not know the category of crimes against humanity at all, but it referred to crimes against humanity as crimes under international law. Since part of the legal literature translated this category as crimes against humanity, this regulatory deficiency, which was linked to the misleading title of Chapter XI of the Criminal Code, resulted in serious problems in terms of the application of law. The terminology debate stemmed from the ambiguity of the original English and French terms and the different regulatory approaches behind them. Crimes against humanity / *crimes contrel'humanité* / *crímenes de les a humanidad* / *Verbrechengegen die Menschlichkeit* can indeed be translated as either a crime against humanity or against all mankind. In the view of Károly Nagy and Erich Kussbach, the use of the term 'crimes against humanity' in the Hungarian language is justified, since this group of crimes is one of the most international legal crimes, all of which have humanity as their legal object. The statutory definitions of crimes have been introduced to criminalize inhumane acts against the civilian population, so the translation of 'crimes against humanity' certainly seems more accurate. Crimes against humanity are part of this conceptual space, a category of crimes against humanity. Legislature resolved this problem in Act C of 2012 on the Criminal Code ('Criminal Code IV'), creating the Chapter on Crimes Against Humanity (Chapter XIII) and the following chapter on War Crimes (Chapter XIV).

IV.1. Crimes against Humanity in Act C of 2012

Section 143 of Criminal Code IV contains the statutory definition of crimes against humanity, which is in accordance with Article 7 of the Rome Statute. Humanity is the legal object of crimes against humanity in a broad sense. In a narrow sense, the population of a State, or part of it. Various criminal acts can be carried out

49 Act II of 1950, onthegeneral part of the Criminal Code, contained in Section 138 thedefinition of thecrimeagainst a national, ethnic, racialorreligiousgroup, whichoverlapswithcrimesagainsthumanity.

against the population.[50] Their common elements are that they can be carried out if the conduct is carried out as part of a comprehensive or systematic attack on the population.[51] However, a comprehensive and systematic attack does not mean that a war[52] specified in the interpretative provision of Criminal Code IV must exist. In the event of war, the offence specified in Chapter XIV of Criminal Code IV may be established. The passive subject of the crime is the population,[53]or a part of it, or a member thereof, regardless of gender, age, origin, or nationality.[54]According to paragraph (1)(h), a group is defined as a group on the grounds of political opinion, nationality, ethnic origin, culture, religion, sex or any other reason. Membership of the group also assumes that the members of the group actually live in the same geographically demarcated place, forming part of the population together.[55]The act can often be accompanied by the pursuit of territorial interests. The legislature listed the criminal offences in eight points. The first conduct of the offence is murder, which is governed by Section 160 of Criminal Code IV.[56] The second act is forcing the civilian population, in part or in whole, to live under conditions threatening the demise of that population or certain members thereof. This should be understood as an influence that adversely alters the living conditions of the forced individuals without ensuring the satisfaction of elementary needs, thereby creating a risk of the destruction of the population or a part thereof. It can usually be achieved by physical violence directed against all or part of the population, some of its members, which predicts the horror of the extinction (death) of the population or of some of its members as set out in the definition of the crime.[57] The third conduct isordering the displacement of the civilian population, in part or in whole, from their rightful place of residence, which infringes the right to freely choose the place of residence. Basically, it can be achieved by relocating or forcibly abducting the population[58]. The fourth conduct is human trafficking and forced labour (§ 192[59]). Article 7(1)

50 Molnár, Gábor Miklós: Az emberiesség elleni bűncselekmények. In: Busch, Béla (szerk.): *Büntetőjog II., Különös rész.* Budapest, HVG-ORAC, 2016, p. 27

51 Polt, Péter: Az emberiesség elleni bűncselekmények. In: Blaskó, Béla (szerk.): *Büntetőjog Különös Rész I.* Budapest-Debrecen, Rejtjel, 2018, p. 18

52 AccordingtoSection 459(10) of Act C of 2012.

53 The concept of the population, see Molnár (2016) op. cit., p. 27

54 Ibid. 28

55 Molnár, Gábor Miklós: Az emberiesség elleni bűncselekmények. In: Busch, Béla (szerk.): *Büntetőjog II., Különös rész.* Budapest, HVG-ORAC, 2014, p. 26

56 Polt (2018) op. cit., p. 18

57 Hornyák, Szabolcs: Az emberiesség elleni bűncselekmények. In: Tóth, Mihály – Nagy, Zoltán: *Magyar Büntetőjog, Különös Rész.* Budapest, Osiris, 2014, pp. 23-24

58 Polt (2018) op. cit., p. 19

59 Section 143 (1) d) of Act C of 2012 was amended bySection 13 (c) of Act V of 2020.

(c) of the Rome Statute refers to enslavement.[60] The fifth conduct is the deprivation of another personof his or her personal freedom, or unlawfully maintaining his or her abduction. This corresponds to imprisonment under the Statute or other severe forms of deprivation of physical liberty.[61] Forcing others to commit sexual violence (§ 197) or to tolerate it, prostitution, carrying a fetus or discourse (§ 163).[62] Grievous bodily harm (with a duration of more than eight days under § 164) may be caused by assault or harm to health or psychological harm by assault or psychological distress.[63] Grievous bodily harm means serious damage to health, distortion, or serious damage to external or internal organs.[64] Psychological harm must be more than temporary damage, even humiliation. The psychological damage caused does not have to be permanent and irreparable, but, at the same time, it causes a serious disadvantage to the future life of the victim.[65] On this basis, examples of this behaviour include torture, grievous bodily harm, threats to life, interrogation with beatings, rape, or other forms of serious inhumane and degrading treatment.[66] The cause of serious physical or psychological harm must be covered by the perpetrator's direct intentions.[67] Deprivation of other persons of their basic rights for reasons of their affiliation with a group on the grounds of political opinion, nationality, ethnic origin, culture, religion, sex or any other reason.[68] Given the extreme seriousness of the act, the preparation of the offence is also punishable. The subject of the crime can be anyone, regardless of nationality, and the perpetrator belongs to the attacking group itself. Crimes against humanity are deliberate crimes. They can be achieved not only with a straight (dolusdirectus), but also with a possible (dolus eventual) intention. The fact that the perpetrator commits one or more elements

60 Polt (2018) op. cit., p. 19; Papp, Petra: A kényszermunka alapjai. In: Miskolczi Bodnár, Péter (szerk.): *Jog és Állam 29. szám, XVI. Jogász Doktoranduszok Országos Találkozója.* Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Patrocinium, 2020, pp. 217-224

61 Polt (2018) op. cit., p. 19

62 Ibid..; Hornyák (2014) op. cit., p. 24

63 According to Szabolcs Hornyák, the cause of serious psychological harm can be determined if the victim suffers a strong psychological and emotional shock that involves at least intermittent overturning of his psychological balance, manifests itself as a bad experience in later life, or his later lifestyle changes in a negative direction because of the shock. S. Hornyák (2014) op. cit., pp. 24-25; Polt (2018) op. cit., p. 20

64 IT-98-33-T par.543

65 IT-98-33-T par.513; IT-02-60-T par.645; IT-97-24-T par.516

66 IT-05-88-T par.812; IT-99-36-T par.690

67 IT-02-60-T0 par.645; Molnár (2014) op. cit., pp. 25-28; Kirs, Eszter: Népirtás az ICTY nagyítója alatt. In: Blutman, László – Homoki-Nagy, Mária (szerk.): *Ünnepi kötet Dr. Bodnár László egyetemi tanár 70. születésnapjára.* Szeged, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2014, p. 306 http://acta.bibl.u-szeged.hu/34799/1/juridpol_077_303-311.pdf (accessed 04 October 2021.)

68 Hornyák (2014) op. cit., p. 25; Polt (2018) op. cit., p. 20

of the definition of the crime on the same occasion and to the demeaning of one or more persons does not affect the order or result in a set of offences. In view of the additional condition set out in the definition of the crime that the conducts detailed therein are expressed as a comprehensive or systematic part of the offence against the population, crime against humanity is specific to all offences contrary to other definitions of Criminal Code IV, therefore their formal set is apparent and is classified exclusively in accordance with Section 143.[69]

V. Conclusion

"War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens,[1] but as soldiers, not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation."[70]

The category of crimes against humanity appeared after the Second World War and soon became an integral part of international criminal law. Although it has not yet been codified in a separate international treaty, it provides a comprehensive set of rules for the Rome Statute of the International Criminal Court. A significant part of the conceptual elements of crimes against humanity are found in customary international law, in the case law of international criminal tribunals. In this study, I have tried to point out that this basic category of international crimes has been present in national law for a relatively short period of time. A similar category of crimes, known as crimes against the people, which were created to hold the civilian population accountable, can be recorded as a precursor to similar crimes in post-World War II criminal proceedings. However, this does not identify the category of crimes against humanity. Act C of 2012 is a significant step in the right direction, as it largely eliminates the lack of coherence between Hungary's international legal obligations and its national legislation. However, this has not yet solved the fundamental constitutional concern of howto assess, transfer, suspend and reopen potential Hungarian cases under the complementary jurisdiction of the International Criminal Court in the absence of the promulgated Rome Statute. Substantive law is 'harmonised', but there is a high degree of legal uncertainty in the field of procedural law. If there were a Hungarian criminal prosecution for a crime against humanity, the Hungarian judge would be able to establish the facts from a substantive point of view, but he would not know what he should do with the case from a procedural point of view.

69 Molnár (2014) op. cit., p. 28; Karsai, Krisztina (szerk.): *Nagykommentár a Büntető Törvénykönyvhöz*. Budapest, Wolters, 2019, pp. 307-309

70 Rousseau, Jean-Jacques (ford.Radványi, Zsigmond): *Társadalmi szerződés, II. kiadás*. Budapest, Phönix-Oravetz, 1947.

Tóth J., Zoltán[1]

Statutory regulation on capital punishment in Act V of 1961 of the Hungarian People's Republic

I. Introduction

The year of 1961 was a turning point in the history of criminal law in Hungary not only because it was the year in which extraordinary jurisdiction was terminated once and for all,[2] but also because after 80 years (following the Code of Csemegi) the second coherent and comprehensive Criminal Code (Act V of 1961) of Hungary was created[3], which now (for the first time in the history of Hungary) regulated

1 University Professor, Department of Legal History, Jurisprudence and Church Law

2 For the history of capital punishment in Hungary, see, e.g.: Tóth J., Zoltán: A halálbüntetésrevonatkozóanyagijogiszabályok a feudalizmusMagyarországán. (Substantive criminal regulations on capital punishment in Hungary during the feudalism.) JogtörténetiSzemle, 2007/4., pp. 30-50.; Tóth J., Zoltán: A halálbüntetésirottjogiszabályozásaMagyarországon a felvilágosodástól a Csemegi-kódexig. (Statutory regulation of capital punishment from the Enlightenment to the Code of Csemegi.) De Iurisprudentia et IurePublico, 2008/3., pp. 81-101.; Tóth J., Zoltán: Rendkívülibüntetőjog és halálbüntetésaz 1910-es évekMagyarországán. (Extraordinary criminal law and the death penalty in Hungary in the 1910s.) Themis, June 2007., pp. 49-62.; Zoltán J. Tóth: Statutory Regulation of Capital Punishment in Hungary during the Horthy Era and World War II. Journal on European History of Law, Vol. 6, 2015, No. 2, pp. 23-28.

3 This course of creation resulted in a rather long process. In 1950 already, at the establishment of the General Part of the Criminal Code, there was a need for a new criminal code containing the rules corresponding to the spirit of socialism, however, the process of creating the new codex only began in 1953, when Decision no. 514/15/1953 of the Council of Ministers provided to set up a government committee led by the Minister of Justice, for the establishment of the socialist Criminal Code. The committee started its activity in January 1954, but their work was interrupted for one year by the events of 1956. The first draft was finally completed by June 1959 and following the comments made by the requested experts, a new committee of theoretical and practical lawyers completed the second revised version in 1960. This draft was subjected to a public debate by Government Decision no. 3131 of 1960 and by considering the ascertainments and using the results of this debate, the Minister of Justice presented the final version to the Parliament. [Cf.: Békés, Imre: A magyarbüntetőjogfejlődése (The history of the criminal law in Hungary), p. 45. In: Békés et al.: Magyar büntetőjog (Hungarian penal law), BM Könyvkiadó, Budapest, 1980, pp. 34-38.]

the full range of crimes (including crimes against the state and military crimes).[4] This comprehensive nature also meant that, with the entry into force of the new Criminal Code (with one exception),[5] all those legislations were overruled, which pronounced certain conducts punishable in separate laws and also set out criminal sanction for any act, while after this, with the exception of the Criminal Code, substantive criminal legislation was never again constituted in Hungary.

II. General provisions on the death penalty

The new Criminal Code, due to the circumstances of the period, did "naturally" know the death penalty (Article 35(1)), but never ordered it as an absolute sanction. For every special case that involved the death penalty for its execution, the alternative punishment was imprisonment from ten up to fifteen years.[6][7] The Criminal Code argued for the justification for the most severe sanction in a very similar method to that of the General Part of the Criminal Code, namely: "Socialist criminal law, for theoretical reasons in perspective, advocates against death penalty, however, as long as there is a direct and indirect harmful effect of the capitalist environment, a state building socialism cannot lack the most severe tool of criminal law."[8] The same

4 The law was published on December 22, 1961 and entered into force on July 1, 1962 by Law-Decree No. 10 of 1962.

5 The only exception was Act VII of 1945, more precisely, PM Decree No. 81 of 1945 (February 5) signed into law by the law and some of its provisions on war crimes and crimes against the people remained in force with the comment that the original forced labour for life and life imprisonment, would no longer be applicable. (Law-Decree No. 10 of 1962, Article 2(3)).

6 The Criminal Code did not recognize life imprisonment (with one exception); the ministerial reasoning explained this by the fact that if the offender could not be improved, the offender would have to be condemned to death as an exceptional punishment, but if the offender could be improved, it would be unjustified to deprive the offender of his/her freedom for the rest of his/her life. (This is also the reason why the Criminal Code usually did not include punishment for an undetermined period.) Even in the case of aggregated and cumulated sentence, the law (Article 37) provided twenty years as the maximum period of imprisonment, and it also set out twenty years for the cases when death penalty was modified due to mercy (Article 36(4)). The only exception in which life imprisonment (as an intermediate alternative between 10-15 years of imprisonment and death penalty) was among the special factual situations of the Criminal Code, was one of the cases of mutiny, set out in the second phrase of Article 316(4).

7 The Criminal Code, similarly to the General Part of the Criminal Code, did not distinguish between the different types of imprisonment, therefore, imprisonment (or "custodial sentence" as worded in the special part) had to be applied for everyone (which did not mean that prisons could not or did not use different rules on those who committed different crimes regarding their method of detention and guarding, their possibilities to act within the prison, etc.).

8 Detailed reasoning for Article 36

conclusion is drawn in the preamble when it discusses the purposes of punishment. Based on Article 34 of the Criminal Code, "the purpose of the punishment is to apply the penalty set out by law for the crime in order to protect society, to improve the behavior of the offender and to prevent the members of society from committing crimes". The ministerial reasoning explains all these as follows: "If the purpose of punishment is not only retaliation, but also correction, the proposal may only apply exceptionally retaliatory punishment...", however, "among the acts endangering society... there are those the abstract danger of which makes threatening by death penalty justifiable, considering the significance of the legal interest that needs to be protected. These legal interests are the state (our social, political and economic order), the life, the social property, as well as the discipline and fighting capacity of the armed forces, therefore, the proposal recognizes death penalty as a form of punishment, however, when imposing penalty, when it comes determining the degree of danger of the specific crime to society, it sets out for the judge: >>death penalty... can only be imposed if the purpose of punishment cannot be achieved with another punishment<< (Article 64(2))."

The exceptional nature of capital punishment was, in principle, applicable to several levels as well: in the regulation of Article 64 cited above as justification, which urged the judge to ponder the aggravating and attenuating circumstances[9] and allowed imposing such a sanction only if it was the exclusive way of fulfilling the purpose of the punishment (general prevention and, thus, the protection of society)[10]; in the formulation of certain specific partial facts that regulated death penalty as an alternative punishment without exception (alternatively with imprisonment of 10 to 15 years); in the right to modify death penalty to imprisonment of up to 20 years, as an act of mercy (Article 36(4)); and in the provision that "death penalty may only be imposed on a person who had reached the age of twenty when the offense was committed"[11] (Article 36(1)).[12] Finally, we have to mention, in the context of the General Part,

9 "The punishment, by considering its purpose (Article 34), should be imposed under the conditions set out by law in a way that it remains consistent with the danger to the society imposed by the crime and the offender, the degree of guilt, as well as other aggravating and attenuating circumstance." (Article 64(1))

10 As it can be seen from the wording of Article 34, special prevention is not generally assumed by the Criminal Code among the purposes of punishment, but it merely aims to valorize one of its modes, the so-called "moral education", that is the correction of the offender (but not the deterrence, the so-called "legal education" of the offender, nor rendering the offender harmless; the latter one can only be deduced from the purpose of the indirect protection of society in the context of individual prevention, while the latter is only considered by the Criminal Code from the aspect of general prevention.

11 This provision, however, did not apply for the people qualifying as soldiers (see Article 103(3)).

12 Even more specific rules apply to juveniles than this provision; who had already reached

the limitation of the punishability of the crimes punishable by death, as well as the limitation of the enforceability of the imposed death penalty, both of which periods were provided as twenty years (Article 31(a) and Article 58(1)(a)).

III. The extraordinary crimes punishable by death

The Special Part of the Criminal Code of 1961 set out[13] death penalty as an imposable punishment for 31 crimes[14]: 9 of these were crimes against the state, 2 crimes against humanity[15], 12 military crimes and 8 ordinary crimes. Accordingly, crimes against the state (Chapter 9) should be punished by death if those are considered[16] certain cases of conspiracy;[17] the qualified cases of rebellion[18];[19] damage resulting in serious

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the age of sixteen, but not the age of eighteen, could be sentenced to imprisonment of maximum ten years, while those who had already reached the age of fourteen, but not the age of sixteen, could be sentenced to imprisonment of maximum five years (Article 93); and, of course, no other legislation could impose more severe penalties to juveniles. (If we compare these conditions of punishments with the Hungarian law in force, we can see, somewhat surprisingly, that the Criminal Code of 1961 set out much lighter punishment for the crimes committed by juveniles than the present criminal code).

13 The delimitation of crime and offense still does not exist; therefore, I will avoid the use of these *termini technici* in respect of Act V of 1961, except for when the Criminal Code itself (showing some inconsistency) uses the term "offense" as the synonym of "crime".

14 Since the use of the death penalty, as stated earlier, was never mandatory, we have to ignore the reference to the fact that a total of ten years to fifteen years of imprisonment could be imposed on the person committing all facts as an alternative punishment (instead of death penalty).

15 The meanings of the concept of "*humanity*" or "*humanité*" included in the Criminal Code of 1961 and of 1978 did not conform to the category of "humanness" used today and generally accepted as its correct term, but they used the concept of "humanity" as the totality of the peoples of the Earth.

16 Conspiracy is an activity "aiming to overthrow, undermine or weaken the state, social or economic order of the Hungarian People's Republic" (Article 116(1)).

17 The initiator and leader of the conspiracy could be punished with death if they committed another crime in connection with conspiracy, which was punishable by imprisonment of more than eight years if the conspiracy seriously endangered the state, social and economic order and if the conspiracy was committed armed or in time of war (Article 116(3)). The same sanction could have been applied to the participant or supporter of the conspiracy "if the offender committed another crime in connection with conspiracy, which was punished by law with imprisonment of more than eight years" (Article 117(3)).

18 In accordance with Article 120(1) of the Criminal Code, rebellion is committed by someone "who organizes or leads a civil disturbance aiming to overthrow or weaken the state or social order of the Hungarian People's Republic".

19 Thus, rebellion was punishable by death if it led to the serious disturbance of public order and if it was committed armed or in time of war (Article 120(2)).

disadvantages, committed in time of war[20] (Article 124(2)); destruction resulting in particularly serious disadvantages, committed by endangering the public in time of war[21] (Article 125(2)); assassination;[22] high treason with serious consequences, by making use of state service or official mandate, committed in time of war[23] (Article 129(2)); supporting the enemy;[24] the qualified cases of committing espionage;[25] and all these acts even if they were not committed against the Hungarian People's Republic but another socialist state.[26] Those who committed crimes against humanity (Chapter 10) would also have been sentenced to death if they were guilty of the qualified cases of the offences of genocide[27] or war atrocity[28], however, no such acts

20 In accordance with Article 124(1), the delict of damage was committed by someone "who, in order to undermine or weaken the state, social and economic order of the Hungarian People's Republic, with their activity related to their official duties, services or public services, as well as by the failure to comply with or by inadequately performing their obligations, causes a significant disadvantage".

21 The person "who, in order to weaken the state, social and economic order of the Hungarian People's Republic, destroys, renders unusable or damages public utility, a facility of production, public transport or communication, public building or edifice, stock of production or crop, war material or other property with the same importance", commits the crime of damage against the state (Article 125(1)).

22 Death penalty can be imposed for assassination on a person "who kills a member of state body, a person in a leading position at a state body or social organization for their activity carried out in the interest of socialism" (Article 126(1)) and who causes lethal bodily injury to one of such people (Article 126(2)).

23 High treason is committed by the Hungarian citizen who, "in order to violate the independence, territorial integrity, political, economic, defense or other important interest of the Hungarian People's Republic, interacts, forms an alliance or cooperates with a foreign government or foreign organization, or their agent" (Article 129(1)).

24 "The person who, in time of war, in order to weaken the military force of the Hungarian People's Republic, interacts with or helps the enemy, or causes disadvantage to their own armed force or the ones belonging to their allies, can be punished with imprisonment of ten to fifteen years or death penalty."(Article 130(1))

25 The person "who obtains, collects or discloses data that can be used to the disadvantage of the Hungarian People's Republic, in order to provide them to a foreign government, foreign organization or the agent of these" (Article 131(2)), is punishable by death if they committed the crime in relation to state secrets, regularly, as the member of a spy organization or in time of war (Article 131(3)).

26 Crimes against other socialist state (Article 133 of the Criminal Code)

27 Article 137(1): "The person who, in order to partially or completely exterminate a national, ethnic, racial or religious group, a) kill the member of the group, b) forces the group into living conditions that threaten the group or some of its members with destruction, c) takes measures that aim to prevent births within the group, d) drags away the children of the group to another group, can be punished by imprisonment of ten to fifteen years, or death penalty."

28 The offenders of "war atrocity" were those "who, in time of war, by violating international

were carried out in Hungary, fortunately, neither under the Criminal Code of 1961, nor the current one.

The Criminal Code provided death penalty for 12 types of military crimes (Chapter 17). Such sanction could be applied for crimes against the obligations of military service if those were considered absconding in time of war[29] (Article 312(2)(b)), cases of absconding abroad,[30] and the delict of "abdication from performing military service"[31] (Article 315(1)). Among the factual situations of insubordination, certain cases of mutiny[32] could be punished with capital sanction;[33] the offender of "insubordination to order" who disobeyed the war command out of service commands (Article 317(3)); the offender of "violence against the superior and environment of service"[34] who committed this crime in a war situation and who also carried out intentional killing with this act (Article 318(4)). Death penalty was imposed for two crimes of service: the (deliberate) violation of the instructions of the guard,[35] if that was committed in battle and it resulted in a specifically great disadvantage

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legislation, treated inhumanly defenseless civilians, refugees, the wounded, the sick, members of the armed forces who had already laid down their arms, as well as prisoners of war" (Article 139(1)). This act was punishable by death if the crime caused death (Article 139(2)).

29 Absconding is committed by the person "who in order to abdicate from performing military service, deliberately leaves or stays away from their station" (Article 312(1)).

30 Accordingly, a death penalty could be imposed on the person who deserted abroad, armed, together with another soldier, by making use of their actions of service or in time of war (Article 313(2)).

31 According to Article 315(1), this crime is committed by the person "who, by mutilating their body or damaging their health, make themselves completely incapable of performing due military service and who, in order to abdicate from performing military service, feigns illness or uses other fraud".

32 According to Article 316(1), mutiny is committed by the person "who, together with more soldiers, is involved in an open opposition to the service order of their superior, or against service order or discipline in general".

33 Death penalty could be imposed on the initiator, organizer and leader of mutiny if the resisting had particularly serious consequences (Article 316(3)(a)); on the participant of mutiny, who, through his acts committed during the mutiny, caused the death of someone or had other particularly serious consequences (Article 316(3)(b)); on any offender of the mutiny during battle (a simple participant as well), and on the initiator, organizer and leader of mutiny committed in time of war, who, during the mutiny, committed a violent act against a superior or another person opposing the resisting (Article 316(4)).

34 This factual situation is carried out by someone "who uses violence or threatens of doing so, or shows physical resistance against a superior, guard or other environment of service" (Article 318(1)).

35 The violation of the instruction of the guard is committed by the person "who violated the general or extraordinary provisions related to the performing of service during guard service" (Article 326(1)).

(Article 326(3)), as well as the (deliberate) violation of the rules of standby duty,[36] under the same conditions (Article 327(3)). Finally, the crimes threatening fighting capacity could have also been punishable by death, in the case of "misconduct on behalf of the commander in battle";[37] the delict of "abdication from performing battle obligations"[38] (that is the factual situation named "cowardice" at the time); the classified cases[39] of endangering of battle station[40] and it could be imposed on the offender of violence against a military attaché who killed the military attaché or their accompanying person (Article 338(2)).

IV. The ordinary capital crimes

Lastly, we may divide common criminal offenses punishable by death into two groups. One of the groups (the smaller) includes the offences that are directly or indirectly against human life (or the important personal assets/physical integrity, freedom, etc. of others), while the other group includes the actions that primarily attack and endanger social property as a particular form of property in socialism. The previous category may include, on the one hand, murder, the legal subject of which is directly the human life and the classified cases of which[41] may be punishable by death, on

36 According to Article 327(1), this delict is carried out by someone "who violates the provisions relating to response, police, emergency, courier or other standby services".

37 Based on Article 331: "The person who, by violating their obligations of commander, a) surrenders or lets to be captured the armed force under his command, b) destroys the battle position, equipment, weapon or other war material delegated to him, or surrenders it to the enemy in a usable state, or c) does not carry out resistance against the enemy to the extent of his possibilities, can be punished by imprisonment of ten to fifteen years or death penalty."

38 "The person who abdicates from performing battle obligations a) by the arbitrary abandonment, concealment of or running away from their station, b) by deliberately causing, pretending the incapacity to participate in battle or by other deceit, c) by losing, destroying or failing to use their weapon, d) by the arbitrary surrender to the enemy, or e) by other serious violation of their service obligations, is punishable by imprisonment of ten to fifteen years or death penalty." (Article 331)

39 Accordingly, death penalty could be imposed on someone who endangered the battle station in time of war or in a situation of battle if the crime caused particularly great disadvantage on service (Article 334(2)).

40 According to Article 334(1), this crime is committed by the person "who directly endangers the battle station of the force, by neglecting to provide the necessary weaponry, battle equipment or other war materials, or to preserve these stocks, while violating service obligations", as well as by "unlawfully destroying, rendering unusable or withholding in other way from their purpose objects of weaponry or other battle equipment, or other important war material".

41 All classified cases of murder are punishable by death if they were committed with particular cruelty, premeditatedly, endangering the lives of many, for profit, for other vile reasons

the other hand, the classified cases[42] of prison mutiny[43], the offender of which attacks directly the social interest related to the order of prison and detention (executing the punishment imposed on criminals), while also endanger indirectly life, freedom, etc.

The other category only includes action that violate the existing order or property and the socialist form of collective property. The explanation of this particular protection was formulated in the ministerial reasoning of the Criminal Code: "In the process of building socialism, the assets under social property have a special role. The social property of productive assets ensures production without exploitation, socialist accumulation, expanded reproduction and the production of consumer goods in a quantity that allows for the distribution of consumer goods based on the laws of socialism, and later communism; the social property of consumer goods, beyond the distribution of the goods based on the laws of socialism and communism, allows for the proportionate distribution of national income for the construction of socialism."[44] As a result, the Criminal Code of 1961 did not consider threatening with death penalty serious, because it classified these acts that damage social property as the most dangerous act given the nature of protected legal interest, by placing them on the same level, from the aspect of their abstract danger, with the crimes against the state, life and military crimes, as we have seen. Thus, Article 295(3) of the Criminal Code imposed death penalty as an alternative sanction (in addition to the "regular" imprisonment of ten to fifteen years) on theft,[45] embezzlement,[46] fraud[47] and misappropriation[48] damaging

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and aims, against an official person during or because of their official procedure, targeting multiple people, or as a recidivist (Article 253(2)).

42 Prison mutiny is committed by the prisoner "who, together with others, participates in an open opposition against the order or discipline of the prison" (Article 186(1)).

43 Death penalty can be imposed, in the first place, on the initiator, organizer and leader of prison mutiny if the opposition had a particularly serious consequence, and, on the other hand, on the participator of the prison mutiny, whose action during the mutiny caused the death of another person, or had other particularly serious consequence (Article 186(3)).

44 The foundation of this is provided by the following quote (from the ministerial reasoning as well): "The higher ethical principles in the socialist society, the socialist living conditions require members of society to behave differently than the bourgeois society addresses itself to its members. In the criminal evaluation of certain conducts, these changed higher requirements should be taken into account."

45 "The person who takes away a foreign property from someone else to unlawfully possess it, commits theft." (Article 291)

46 "The person who unlawfully takes away or disposes of as his/her own the property entrusted to him/her, commits embezzlement." (Article 292)

47 "The person who uses deceit, deception, or trickery for unlawful financial gain and thereby causes damage, commits fraud." (Article 293)

48 "The person entrusted with the management of foreign property and who caused damage to this property by violating their obligations resulted from this assignment, commits misappropriation." (Article 294)

social property[49] if the offender committed this act within a criminal organization or as a recidivist, causing particularly great damage. Article 299(4) provided the same sanction for robbery,[50] if it caused a particularly great damage to social property; finally, under the aforementioned condition, the person committing reckless endangerment[51] was also punishable by death (Article 190(2)(b)).

The substantive regulations of the Criminal Code of 1961 were supplemented by Law-Decree N o. 8 of 1962 on the criminal procedure,[52] which, on the one hand, set out the method of execution, enforcing the existing rule that "the death penalty should be executed in a closed space, with a rope or by a firing squad" (Article 309), and, on the other hand, it provided the regulations of pardon. Among these latter rules, as the most important warranty provision, it set out that any death penalty can only be executed after the rejection of the petition for mercy and that the procedure of mercy had to be carried out in all cases (even if the convict did not ask for mercy). With regard to the submission of the petition for mercy and the decree on mercy, the Criminal Code of 1961 did not add a lot to the previous regulation, however, its merit was that, by arranging the chaotic state of the previous years and decades, it cleared and summarized the relevant rules in one single paragraph. According to this (Article 310), after the final judgment, the president of the judges' council asks the defendant whether he/she wants mercy and requests from the defense counsel to file a petition for mercy on behalf of the defendant (even in spite or regardless of his/her will). After obtaining the opinion of the prosecutor, the court making the final judgment will take a position on whether the convict is recommended for mercy and then the Supreme Court (unless they were the ones to make the final judgment) proceeds similarly after asking for the opinion of the general prosecutor, then sends all these recommendations, petitions and opinions together with the case files to the Minister of Justice in order to present them to the Presidential Council

49 According to the provision attached to Chapter 16 of the Criminal Code "the increased criminal law protection for social property includes the assets of the state, the cooperatives, the social organizations and the associations, as well as the foreign properties under their use, treatment or disposition, including the social property of other socialist countries that are on the territory of the Hungarian People's Republic" (Article 311(1)).

50 "The person who unlawfully takes away foreign property by using violence against someone, or threatens the life or physical integrity of someone, or places someone in an unconscious or defenseless state..." (Article 299(1)) "It is considered robbery when the thief caught in act, in order to keep the property, uses violence, or directly threatens life or physical integrity." (Article 299(2))

51 The crime of reckless endangerment is committed by someone "who causes public danger by arson, causing flood, or by producing the effect of explosive, radiant or other destructive material or energy" and "who obstructs the prevention of such a public danger, or the mitigation of its consequences. (Article 190(1))

52 The Law-Decree was entered into force by Decree No. 4 of 1962 of the Ministry of Justice (June 14), on July 1, 1962.

of the Hungarian People's Republic. The decision on mercy (regardless of the above-mentioned opinions) is made by the Presidential Council of the Hungarian People's Republic itself. If the Presidential Council of the Hungarian People's Republic pardons the person sentenced to death, then, in accordance with Article 36(4) of Act V of 1961, the death penalty is modified to imprisonment of up to twenty years (thus, even of a shorter period); but if it does not pardon the convict, the decision in this regard has to be promulgated by the court in the first instance (even if it did not impose death penalty), in the presence of the defendant, defense counsel and prosecutor in the first instance and the sentence will be executed on the next day. Another important element of legal certainty was the rule that a decision rejecting mercy could not be communicated to (and death penalty could not be executed on) a pregnant woman and a mentally ill person prior to their "recovery" and death penalty imposed on an absent defendant could only be executed on the basis of a final order concluded during the retrial. (With a slightly different wording, but essentially the same provisions were repeated a decade later by Article 399 of Act I of 1973 on criminal procedure, therefore, since they are in line with the previous provisions, we do not discuss these regulations of the Code of Criminal Procedure.)

V. Modification of the Criminal Code: the regulation of capital crimes under Law-Decree No. 28 of 1971

The Criminal Code of 1961 started to become obsolete over the years, so in the early seventies, a comprehensive reform of the socialist Criminal Code was introduced.[53] From the aspect of our subject, the most important measures of Law-Decree No. 28 of 1971[54] were that the general conditions for the application of death penalty were changed, as well as the fact that certain factual situations of the general part ceased to be punishable by death (however, new crimes punishable by death were introduced). In regard of the general provisions, perhaps the most important change was that life imprisonment was included among the sanctions and it could have been imposed as an alternative punishment when the law, as the punishment for a certain crime, ordered[55] death penalty or imprisonment of ten to fifteen years (or twenty years in the case of aggregated or cumulative sentences)[56].[57] The ministerial

53 Cf.: Nagy, Ferenc: A magyar büntetőjog általános része. (Special part of theHungariancriminallaw.) Korona, Budapest, 2001, p. 50.

54 It was published on November 4, 1971 and entered into force on January 1, 1972.

55 The term "offense" defined in Article 2(1) of Act V of 1961 was officially replaced by "crime" (see Law-Decree No. 28 of 1971 Article 92(1)).

56 The unity of imprisonment was also abolished, and it had to be executed, based on the nature of the crime and the conditions of committing it, in maximum security prison, medium security prison or minimum security prison.

57 Article 91(2) of Law-Decree No. 28 of 1971

reasoning explained this by the fact that there was an irrationally wide gap between the longest period of imprisonment (15, respectively 20 years) and death penalty,[58] therefore, there was a need for an intermediate sanction, which can be imposed on those who seem to be unfit for being reintegrated into society, but the possibility of their improvement is not completely excluded and which can be used as a deterrence beyond individual prevention in order to achieve the general preventive goal of punishment.[59] By introducing life imprisonment, the regulation on mercy was obviously changed as well (Article 36(4) of the Criminal Code); accordingly, from that point on, death penalty could not only be modified to imprisonment of up to twenty years, but also to life imprisonment (depending on the discretion of the Presidential Council of the Hungarian People's Republic). Finally, tightening the penalties applicable for juveniles can also be seen as a substantial modification; in the case of crimes punishable by death penalty, a juvenile who had reached the age of sixteen, but not the age of eighteen, the maximum time of imprisonment became fifteen years compared to the previous ten and in the case of juveniles who had reached the age fourteen, but not the age of sixteen, the maximum imposable imprisonment became ten years compared to the previous five.[60]

Among special factual situations (only regarding death penalty), there were two significant modifications. The most important of these was the fact that the

58 General reasoning 1(b)

59 The same as stated by the ministerial reasoning: "The Criminal Code ignored the punishment of life imprisonment, because it argued that if the protection of society does not require the imposition of death penalty, the educating purpose of the penalty can still be realized. The achievement of the purpose was only possible by imprisonment for a determined period, based on its considerations. The Plan moves beyond this approach... The possibility of a choice between death penalty and imprisonment for a determined period... caused difficulties for the court; of course, there are significant reasons for the permanent exclusion of the convict from society, but it can still be assumed that there is hope for improving the sentenced person. In such borderline cases, imposing both death penalty and imprisonment for a determined time, may be problematic and ultimately it jeopardizes achieving the purpose of punishment. The Criminal Code in force only examined the institution of life imprisonment from the aspect of individual education, however, the need for general retention must also be considered, which is clearly in favour of the application of this institution. In order to resolve these contradictions within the system of penalties, the Plan introduced life imprisonment. In cases where, considering the purpose of punishment, the permanent exclusion of the offender from the society seems justified, but the possibility of re-education is not completely excluded, only this penalty provides a satisfactory solution. If the hopes related to re-education are fulfilled, the convict can regain freedom by conditional release, therefore, in the cases that do require it, the imprisonment does not last until the end of the convict's life." (Detailed reasoning of Article 5)

60 The rule that (with the exception of soldiers) death penalty could only be applied to those who had reached the age of twenty at the time of committing the crime, did not change.

punishability by death of offences committed against social property was abolished and the social property as a legal interest protected (with some justified exceptions) ceased to exist in general. Thus, Article 295 on theft, embezzlement, fraud and misappropriation damaging social property was completely annulled by the Novella,[61] while it also abolished the cases of robbery that caused serious damage to social property[62] and reckless endangerment[63] (and, of course, the threat imposed by death penalty).[64] A new factual situation punishable by death was introduced in Article 192 of the codex: the seizure of aircraft.[65] Based on the Novella (and on the Criminal Code after January 1, 1972), this is committed by the person "who unlawfully gains or practices control over the aircraft by violence, threat or placing someone in an unconscious or defenseless state on the board of the aircraft" (Article 192(1)), this act was punishable by death if the offender caused the death of others with this act (Article 192(2)).

With all these modifications, after the entry into force of the Novella, the number of crimes previously punishable by death, namely 31, was reduced to 26. And all this remained unchanged until the entry into force[66] of Hungary's new Criminal Code, i.e., Act IV of 1978, by which, in the course of repealing some of its statutory provisions by the Parliament and annulling others by the Constitutional Court, the death penalty would be abolished in Hungary.

61 More precisely, it aggregated it with Article 296. (Article 67 of Law-Decree No. 28 of 1971)

62 Article 70 of Law-Decree No. 28 of 1971

63 Article 42 of Law-Decree No. 28 of 1971

64 In the ministerial reasoning, all these were explained as follows: "The Plan, in line with the law in force, sustains death penalty only for the most serious crimes as an exceptional form of penalty. The socialist development of law is undoubtedly moving towards the narrowing and, ultimately, abolishing the application of death penalty. The Plan recognizes that this form of penalty is no longer needed for the crimes against property..." (Detailed reasoning of Article 42) "In today's socio-economic conditions... sustaining death penalty as an exceptional form of punishment is no longer justified among the crimes against property." (Detailed reasoning of Article 67) (The same applies for the ministerial reasoning on reckless endangerment.)

65 Article 43 of Law-Decree No. 28 of 1971

66 July 1, 1979

Loebs, Patrick[1*] – Csáki-Hatalovics, Gyula[2]**

Origins and applications of free speech in America

1. Free speech and the First Amendment

The American ideal of free speech has been a source of much contention and celebration in the 200+ years of the nation's existence. Though not outlined in the final Constitution, the statement now known as the First Amendment was among the first debated and was included as a part of the Bill of Rights, ratified by the 10th state (Virginia) on December 15, 1791, thus giving the amendments the 3/4 majority necessary to become part of the Constitution. The first amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The idea contained in the guaranteed freedom of speech is not original to the American experiment, though one might argue that it has found one of its furthest extensions within the American society. But the idea goes back centuries, with notable applications, such as when Socrates spoke to his jury, just before they sentenced him to death via poison hemlock: "'If you offered to let me off this time on condition I am not any longer to speak my mind... I should say to you, "Men of Athens, I shall obey the Gods rather than you" ("Timeline").

It seems reasonable to attribute the contemporary notions of free speech to the grains of wisdom uttered by Socrates. And these, in turn, wove their way into the western tradition, passed through the Greek democracies, through the Roman republic, into the English Bill of Rights of 1689[3]. Yet, *enshrining* the freedom of speech into the *American* constitution was never a guarantee. Tacit acceptance, and understanding of the generalities of free speech, seem to be the historical norm.

1 Ph.D., Grace College, Winona Lake, Indiana

2 Associate Professor, Department of Public Administration

3 Specifically, thefollowingclauses in the English Bill of Rights: "Thatit is theright of thesubjectsto petition theking, and allcommitments and prosecutionsforsuch petitioning areillegal;"…"Thatthefreedom of speech and debatesorproceedings in Parliamentoughtnotto be impeachedorquestioned in anycourtorplace out of Parliament;" …"And thatforredress of allgrievances, and forthe amending, strengthening and preserving of thelaws, Parliamentsoughtto be heldfrequently."

Therefore, rationale for the eventual Constitutional amendment, which, in American politics, ranks as the highest degree of legal occurrence, opens a fascinating foray into the happenings and circumstances of American thought: one that has ramifications even as the parameters of the amendment are debated today.

It is difficult to credit any one occurrence as being the impetus for confirming the liberty the press and free speech into absolute Constitutional right. As mentioned above, there was a long historical precedent from which to draw upon. Yet, this did not make passage of speech protections later found in the American Bill of Rights a certainty. Indeed, for most of American history, the contemporary understanding of right of free speech was one of nebulous application. One may look no further than the Virginia Declaration of Rights, which contains almost uncanny similarities to the eventual wording of the Bill of Rights, yet contains no mention of "speech."

Interestingly, however, though speech is not mentioned in this document, freedom of the press is. Section 12, specifically states "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments"("The Virginia Declaration of Rights").

Interestingly, the decision to add freedom of speech to the amendments was not necessarily obvious even to the original Constitutional framers. In fact, James Madison's original draft of the amendments, first introduced into the House of Representatives on June 8, 1789, lumped freedom of the press and freedom of speech into a single idea, written thusly: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable" (*A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875* 451).

Seen here, it is important to ask why neither the Virginia Declaration, nor Mr. Madison's original amendment did not determine the right of speech as worthy of stand-alone recognition. The answer, we believe, lies in the nature of the political landscape of the period, and this reveals an important aspect to understanding the philosophical rationalization of free speech. The lack of "speech" being mentioned in the Virginia *Declaration* may be explained by noting that the two aspects mentioned above: freedom of the press and freedom of speech, are, practically speaking, two sides of the same coin, and nearly inseparable from one another. One only need place themselves in the mind of an active, 18th century citizen to recognize that speech, without access to the press, was a largely useless guarantee. The inherent value of speech is directly tied to the ability to disseminate that speech to a wider audience. Similarly, the ability to distribute speech on the pages of a newspaper presumed that the speech had a right the be stated in the first place.

As newspapers proliferated thought the colonies, and presses became the preferred method by which individuals expressed their views about all things happening in the world, it was only natural that the right to free press would become conflated with

the right of free speech. For free speech, without access to the press, was futile. The press, after all, remained the sole mass media method for dissemination of public ideas.

It seems that this was an obvious correlation, to many living in that time. However, it was not sufficient for some. It may even be said that the amendments themselves would have never come to fruition but for the demands of a few discontents. It was the so-called "Antifederalists," a small but vocal group of individuals (later identified as Patrick Henry, Thomas Jefferson, Samuel Adams, George Mason, and others) who demanded Constitutional guarantees of certain freedoms before they would accept the Constitution as a whole. It took a rather heated and long-term newspaper debate between the Federalists (Namely James Madison, Alexander Hamilton, and John Jay) and the Antifederalists before the now enshrined amendments came to pass.

The Antifederalists took their writings and opinions to the pages of the American newspapers, arguing that the Constitution did not affirm the rights of the people to an adequate degree, and needed further, explicit, enshrined protections. Though there is no defined "canon" of writings which constitute the "Anti-Federalist papers," several books and collections have attempted to organize writings in some semblance of association. Antifederalist 9, dubbed thus by the Gilder Lehrman Institute of American History (*Gilder Lehrman*) contains an example of one method used by the anti-federalist writers to argue against the Constitution as it stood. In this clearly satirical piece, the author (writing under the pseudonym "Montezuma" takes on the persona of an aggrieved aristocrat, bemoaning the acceptance of the statement "that all men are born equal" and offering the rest of the piece as "defense of our monarchical, aristocratical democracy." The author goes on to argue that the Constitution as it stands is better without the Bill of Rights, because "this constitution is calculated to restrain the influence and power of the LOWER CLASS -- to draw that discrimination we have so long sought after" and making amendments would embolden and give power to the non-aristocrat, making it much more difficult "to check the licentiousness of the people by making it dangerous to speak or publish daring or tumultuary sentiments;"

Other, less satirical pieces take a more measured approach. Writing to citizens of Pennsylvania as "Centinel," one author correctly notes that although the Pennsylvania Constitution guarantees freedom of speech, among other rights, such rights have not yet been enshrined in the federal Constitution. Centinel writes

"From this investigation into the organization of this [proposed federal] government, it appears that it is devoid of all responsibility to the great body of the people, and that so far from being a regular balanced government, it would be in practice a *permanent* ARISTOCRACY. The framers of it, actuated by the true spirit of such a government, which ever abominates and suppresses all free enquiry and discussion, have made no provision for the *liberty of the press,* that grand *palladium of freedom*, and *scourge of tyrants*; but observed a total silence on that head" (Ketcham 236).

Here is found both the importance of enshrined rights, as well as the implied association of freedom of speech and freedom of the press: again, they are presented as two sides of the same coin.

After Pennsylvania adopted the new federal Constitution, twenty-one members of the minority signed a dissenting address, and argued the following:

"We entered on the examination of the proposed system of government, and found it to be such as we could not adopt, without, as we conceived, surrendering up your dearest rights." The minority then offered a series of amendments which, they determined, would address the flaws in the constitution. Among these amendments was number 6: "That the people have a right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States" (Ketcham 239–40).

Of note, here we see that freedom of speech is directly tied to freedom of the press. As explained by the author, freedom of speech serves as the foundation of freedom of the press. Notice the placement of "therefore" in the proposed amendment. In essence, free speech is the cause, and freedom of the press is the effect. One cannot exist without the other.

This sentiment was expressed, in other forms, by individuals up and down the eastern seaboard. George Mason of Virginia succinctly expressed his opposition to the Constitution as written. "There is no declaration of any kind, for preserving the liberty of the press…" (Ketcham 175).

On Nov 5, 1787, "John DeWitt's Essay III was published in the *Boston American Herald*, and noted that "Civil liberty, in all countries, hath been promoted by free discussion of publick measures, and the conduct of publick men. The FREEDOM OF THE PRESS hath, in consequence thereof, been esteemed on of its safe guards. That freedom gives the right, at all times, to every citizen to lay his sentiments, in a decent manner, before the people" (Ketcham 311).

Here again, there seems to be a stated fear that the Constitution as proposed by the framers and, in some cases already adopted by several of the states, was insufficient to guard the liberties thought most important to the existence in sustaining of free peoples; most notably, freedom of speech and freedom of the press. Once again, they are seen as inseparable.

Elsewhere in the debate over the Bill of Rights, James Wilson made the argument that an amendment guaranteeing freedom of the press was unnecessary, since the press is "a copious source of declamation and opposition, what control could possibly proceed from the federal government to shackle and destroy that sacred palladium of national freedom" (Wilson 63)? Arthur Lee replied that since Congress is empowered to define and publish offenses against the government, it is a near certainty that without amendment guaranteeing freedom of the press, Congress would declare all publications from the press against the conduct of government an offense against the government and thus punish them justly. (Lee)

2. The Zenger case

To be fair, this fear expressed by Lee and others was not totally unfounded. There had been instances earlier in American history that would have certainly weighed heavily on the minds of the anti-federalists as they argued for protective amendments. They would have remembered the blatant efforts, made in 1733, to prosecute John Peter Zenger when, under the pseudonym, "Cato" he published excoriating remarks against the standing New York colonial governor in his *New-York Weekly Journal*. Zenger was charged with libel. And, in what would become important legal precedent, Zenger's attorney made the case that truth stands as the ultimate defense against libel. Zenger's attorney argued:

"Every crime against the publick is a great crime, though there be some greater than others. Ignorance and folly may be pleaded in alleviation of private offences; but when they come to be publick offences, they lose all benefit of such a plea: We are then no longer to consider only to what causes they are owing, but what evils they may produce; and here we shall readily find, that folly has overturned states, and private ignorance been the parent of publick confusion.

The exposing therefore of publick wickedness, as it is a duty which every man owes to truth and his country, can never be a libel in the nature of things; and they who call it so, make themselves no compliment"("Trial of John Peter Zenger").

Though Zenger was eventually exonerated, his arrest and eight-month imprisonment stood as a red flag, warning of the tendency or potential of governmental despotism. And, though this case did not rewrite law, the verdict did lay the groundwork for future protections of press and speech freedom.

On the basis of these and other arguments, and through much deliberation in state houses, the Bill of Rights was eventfully approved by Congress on September 25, 1789, and ratified by the states on December 15, 1791. And there, in what has become known as the first amendment, is found the statement demanded by the anti-federalists: "Congress shall make no law… abridging the freedom of speech, or of the press…"

As contrasted with the above understandings of the right, it is notable that one of the most significant elements of the adopted version of the Bill of Rights was to take the idea of free speech, and apply it directly to the individual, connected to, but also separate from the freedom of the press.

This simple change has had long-term effects on the United States culture and law. Over time, the amendment has been interpreted to include not only speech, but freedom of expression. Consequently, the amendment has been used as the legal basis for allowance of pornography ("Jenkins"), opposition to censorship (Purdy), support of commercial speech (Brudney), and expressive conduct (e.g. flag-burning ("Eichman"), offensive gestures (Kutner), etc.).

3. "Classic" press vs. social media

Jumping ahead a few hundred years from the passage of the Bill of Rights, the United Sates finds itself at the crossroads of yet another struggle to define the parameters of free speech and governmental regulation. In this latest instance, it is Social Media that lives at the center of the disagreement.

Traditionally, the press (and other forms of media) have served an important role as a means of disseminating information from government, and to the government. In many ways, it was a symbiotic relationship. Government provided newsworthy events, and the press, through the nature of its business model, served governmental purposes. Media scholars acknowledge intentional manipulations of media through understanding such concepts as the Friday night news dump, the news hole, and the Sunday news reveal (Karpf).

Much changed, however, with the emergence of Donald Trump in the seat of American presidential power. Almost immediately, it was clear that Trumps relationship with the media would be strained. Only 100 days in office, Trump declined to attend the annual White House Correspondents Dinner (Palmeri), which came as no surprise for those political observers who had noticed growing animosity between Trump and the press. Accusations back and forth about the presence and spreading of "fake news" and a general unwillingness to work through the press to reach the people caused increasing tension. The press was accustomed to White House access. The Trump administration cut them off, largely ending press briefings, suspended some reporters from such briefings, and revoked the credentials of others. ("Press Briefing").

For the Trump camp, such a move seemed largely appropriate. From this perspective, the press was not a neutral entity, but existing in active opposition to the Trump administration (Borchers). And, to be fair, such a pattern of partisan journalism had been growing for years. In 2014, the *Washington Post* reported that fewer than 7% of journalists were Republicans (Cillizza). Consequently, trust of the media overall and for Republican voters especially, trust in traditional media, is at near historic lows (NW et al.)("Inverse"). Even some reporters are acknowledging the nefarious goals of the media and begging for admission of bias. ("Media Hate")

Given the perceived bias of media, perhaps it is unsurprising that rather than work through traditional media, Trump chose to speak to the American people through social media, specifically Twitter. This allowed him unfettered access to millions of smartphones, 24 hours per day. It connected Trump with his supporters (and opponents) in a direct manner.

As Trump's fanbase grew, so did his political opposition. Eventually, Trump grew fed up with receiving push back on his tweets. Mockery was not something Trump tolerated. Therefore, he simply blocked certain users from receiving his tweets or responding to his messages.

This blocking, though built into the Twitter system, caused a unique situation which raised questions about the nature of political speech and when, exactly, a public political figure's speech (or, in this case, the speech *to* a political figure) falls within the realm of first amendment protection. In this instance, Trump was "speaking" outside of official government channels. And, people reacting to Trump's speech were also outside those channels. No one doubts the legitimacy of Twitter to make policy decisions of its own choosing. The dilemma comes when a political figure uses non-governmental or, arguably, non-public modes of communication to communicate. In those instances, does a person have the right to restrict an individual's speech? In other words, is a person's right to free speech limited by being blocked from talking to the President on Twitter?

A lawsuit, filed in the Southern District of New York by the Knight First Amendment Institute at Columbia University, contended that the President's blocking of Twitter followers did indeed constitute a violation of first amendment rights. As the executive director of the Knight institute argued,

"President Trump's Twitter account has become an important source of news and information about the government and an important forum for speech by, to or about the president…" "The First Amendment applies to this digital forum in the same way it applies to town halls and open school board meetings. The White House acts unlawfully when it excludes people from this forum simply because they've disagreed with the president" (Wolf).

The court agreed and, in May 2018, Judge Naomi Reice Buchwald ruled that Donald Trump use of Twitter "fell under the "public forum" doctrine as defined by the U.S. Supreme Court. Blocking users from expressing their political views at a designated public forum violated their right to free speech, as set out in the First Amendment of the US Constitution"("Trump Ruling").

The ruling was appealed, but upheld by the a three-judge panel on the United States Court of Appeals for the Second Circuit. In even starker terms, the judges ruled that "The First Amendment prohibits an official who uses a social media account for government purposes from excluding people from an 'otherwise open online dialogue' because they say things that the official finds objectionable" (Savage).

Importantly, this ruling extends beyond the scope of Presidential speech and also applies to any other American political figure who seeks to "silence" the voices of their political opposition. (Csáki-Hatalovics)

Soon, this new standard had been put to the test. Not long after Trumps ruling, New York Democratic Congresswoman Alexandria Ocasio-Cortez was also sued for blocking a Twitter follower. After the suit was filed, Ocasio-Cortez backed down and offered an apology to the previously blocked user. She wrote, "Mr. Hikind has a First Amendment right to express his views and should not be blocked for them…" "In retrospect, it was wrong and improper and does not reflect the values I cherish.

I sincerely apologize for blocking Mr. Hikind" (*Alexandria Ocasio-Cortez Apologizes to Man She Blocked on Twitter*).

The same process has unfoldedelsewhere, in Colorado, for instance, where Republican Congresswoman Lauren Boebert blocked several political opponents (Goodland). If the past rulings are any indication, these, and the near certain future attempts to stem the ability of constituents to speak to their elected officials, will be halted. In short, Twitter and other social media platforms seems to have a recognized position in American politics a sort of "new public square" where the speech of the individual cannot be suppressed.

4. New parameters of the "public square"

The extended definition of public speech raises interesting questions. For instance, where are the parameters of the new "public square?" If, for instance, the reciprocal nature, including opposition comments, mockery, and other forms of speech are allowed, where does this open forum potential stray into territory of harassment? Especially in the modern era of discrimination of all kinds being on the forefront of public conversation, it's not terribly difficult to foresee a time where someone attacking a female politician, or transgender politician, over their policies could easily be accused of gender-based discrimination or hate speech. Of course, motives are never easy to prove. But the opportunity for accusations of "hate-based" opposition are high.

Also, though it must be acknowledged that none of this is necessarily new, and political opponents have long made a point of protesting in front of the homes or offices of elected leaders, what makes this situation different is the potential for anonymous and widespread opposition. In other words, through in this new definition of the "public square" and expanded definition of "speech", it's much easier for a person to verbally attack political figures by means of a few taps on a smartphone, than going to a place to protest in person. Furthermore, that difference raises questions of legitimacy. For instance, should a politician be subject to opposition, potentially harassing comments from a foreign source, governmental or otherwise? If not, how could it be known? What of bots, or fake accounts, or even U.S. citizens outside of his or her constituency?

Again, the idea of dealing with opposition is not new, but the nature of the opposition existing on such an ungoverned platform, where misinformation, false reporting, or outright lies, can be spread worldwide, and shared among millions, far faster than the platform can determine veracity, raises an interesting specter for the future of free speech in America.

Finally, as demonstrated above, the very nature of free speech has long been considered as corollary to freedom of the press (i.e., the free press is the way through which free speech is conveyed.) Viewed from on high, then, questions may be asked of what these rulings in the name of American free speech will do for the nature

of the American free press. For instance, what is a journalist? What responsibility does that journalist have to verify information before sharing it with an audience?

The reality is that, in the American system, any attempt to stifle or limit bad speech (or bad press) also opens the door to stifling good speech (or good press); for the definition of good speech or bad speech remains a wholly arbitrary determination depending on the view of the speaker and hearer. This conundrum has been noted by many, not least of which include James Madison. He recognizes, in Federalist Paper number 10, the messy nature of politics. Speaking specifically of factions, which one could easily argue may be created and maintained by undesired speech, Madison writes: "Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

Madison recognizes that liberty is inefficient. Yet, there is great trust placed in the belief that, given enough active citizens, a faction has potential to "clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution."

Perhaps one of the most apt explanations of America's relationship to its freedoms can be found in Alexis de Tocqueville's *Democracy in America* where he notes that the press (and therefore speech), is not wholly an institution for good, but is in fact, prone to creating dissention. In his words, "it is at the same time indispensable to the existence of freedom, and nearly incompatible with the maintenance of public order" (221). His query is, essentially, why, given the obstinate nature of freedom, representative democracy works in the United States, when it has failed so often elsewhere. Regarding freedom of the press, de Tocqueville concludes:

"The reason of this is perfectly simple: the Americans, having once admitted the doctrine of the sovereignty of the people, apply it with perfect consistency. It was never their intention to found a permanent state of things with elements which undergo daily modifications; and there is consequently nothing criminal in an attack upon the existing laws, provided it be not attended with a violent infraction of them" (221).

In other words, Americans are under no delusion that their system is perfect, but conversely, are very willing to modify laws as they are needed. And those modifications depend on a disorderly process in the press and in the public squares. The alternative would be to limit what could be said and by whom. This, however, is problematic, for he explains that courts are wholly incapable of policing the press, for the courts would undoubtedly decide in favor of limiting burdensome opposition.

Therefore, he concludes, that the American system recognizes that "there is no medium between servitude and extreme license; in order to enjoy the inestimable benefits which the liberty of the press ensures, it is necessary to submit to the inevitable evils which it engenders" (222).

The Federalists did not see the need for an explicit protection of free speech or a free press. Yet their objection to the amendment was one of practicality, not principle. Federalist paper 84, written by Alexander Hamilton, states "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."

Here we find a general truth, enshrined into the American form of government: that the American people, alone, are responsible for the maintaining their rights. Free speech, and free press are noble ideals, but are only guaranteed as long as they are not abused. For with abuse comes rationale for limitation: a limitation that would undoubtedly benefit the law makers.

This idea has been upheld, consistently, and perhaps no more powerfully and eloquently than by Supreme Court Justice Oliver Wendell Holmes, who in 1919, articulated the following in his dissent to Abrams vs. The United States:

"If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death… (*Abrams v. United States*)"

Though Holmes was on the dissenting side of this case, this idea resonated, and has since been used as sort of general understanding about the importance of debate and speech in the American system. We see Holmes' belief that, since certainty of truth cannot be absolutely known, the only legitimate alternative is competition of ideas, and that American ought to guard against any attempt to stifle outspoken opposition.

Holmes words seem to have struck a chord, for as courts have since understood and interpreted the First Amendment and applied "free speech," the general pattern

has erred toward expansion of the term. His conceptual "marketplace of ideas" has "been invoked hundreds if not thousands of times by the Supreme Court and federal judges to oppose censorship and to encourage freedom of thought and expression" over the past 100+ years. (Hudson)

5. Quo vadis "Free Speech"?

Arguably, speech in the United States is freer, and more widely defined now than it has ever been. Expansion of alternative media have created new outlets for users from all ideologies. Yet, what has been need not always be. Though the nation has generally enjoyed expansive freedom of speech, the nation is undoubtedly headed for a reckoning. Actions by citizens, and the resulting arguments against "hate speech" or "incendiary speech" ("Incitement to Violence Isn't Free Speech")(Hall) give fodder for laws limiting what can be said, and who can speak. Furthermore, as the range of "public square" expands, and becomes increasingly less defined, and the opportunity for abusive speech grows, there will undoubtedly be questions of who can speak freely, who can write boldly, and what can and should be said.

The United States of America stands as a unique peculiarity in the eyes of much of the rest of the world. It remains to be seen if the enshrined dedication to personal, speech-based freedoms can withstand the pressures, and potential abuses, of an interconnected, communicative planet.

Zsiros, Klaudia Viktória[1]

The impact of the Me Too movement

1. The movement that made violence against women an open topic of conversation

The Me Too movement started when Alyssa Milano posted a twitter message urging women who are victims of sexual harassment or assault to respond to her message with "me too". By the end of October 2017, Twitter had confirmed that the #MeToo hashtag had been used by more than half a million times in two weeks, a number that has only grown since then.[2] That tweet itself was a reaction to an article that spread quickly on the internet and everyone heard about it, even if they did not want to. On October 5, 2017, The New York Times published an article in which several women accused Harvey Weinstein of sexual harassment and said the man paid them a substantial sum in exchange for their silence, which, according to Weinstein's lawyer, is not proof of the truth of the stories, it was only a means of avoiding unnecessary, lengthy procedures.[3] The article mentioned, among other things, decade-old cases, where the man had made an offer to an actress at a morning meeting, called her to his room, asked her to massage him, or maybe if she would watch him take a shower, and then in 2014 he offered an intern to help the girl's career if she accepts his sexual approach.[4] In 2015, an Italian model called the police at a job-related meeting; the report stated that Weinstein grabbed her breasts after asking if they were real and then reached under her skirt.[5]

According to the statements of the victims interviewed, secrecy seemed to be the most appropriate step for them, as they feared the consequences and, since everything happened between the two of them, they thought they could not prove anything. This thought process was made even worse by the man's manipulation

1 lecturer, University of Debrecen, Faculty of Law

2 Respers France, Lisa: *#MeToo: Social media flooded with personal stories of assault*, CNN (2017) https://edition.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html (2022. 01. 19.)

3 Kantor, Jodi – Twohey, Megan: *Harvey Weinstein paid off sexual harassment accusers for decades*, The New York Times (2017) https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (2022. 01. 20.)

4 Kantor – Twohey*et al*

5 Mckinely Jr., James C., *Cy Vance defends decision not to pursue case against Harvey Weinstein*, The New York Times (2017) https://www.nytimes.com/2017/10/11/nyregion/cy-vance-defends-weinstein-decision.html (2022. 01. 19.)

and by – as a former employee expressed – the women questioning themselves and deeming their own behavior problematic, thinking they gave the man 'signs'.[6] The first article triggered an onslaught of cases, where actors, producers, men working in the film industry were accused of similar things, often not simply harassment but rape. After the publication of the first article, cases were constantly brought to light where actors, producers and men working in the film industry were accused of similar, often the most serious, rape.

So the answer to this was #MeToo, which wanted to make it clear that although society and a lot of people seemed surprised by what was revealed, that such sexual behaviors and acts are not newfound or never have happened before. One should not think that this is not happening everywhere in the world, that rape or sexual harassment are crimes and acts that happen to only a few. On the contrary; the movement has highlighted that this is happening to large numbers of women in all parts of the world, of which many cases never come to light, since, as we can see in Hungarian statistics as well, the latency is particularly high.

A victimology survey from 2002 shows that sexual crimes have the highest rate of latency out of all crimes, only one in seven victims reports the case, and in cases of male victims, the chances of remaining silent is even higher.[7] There may be differences in severity and detail, but the essentials are the same: victims are recipients of sexual offers, acts that are unsolicited, they are unwilling, clearly reject the other person, but the other person does not take this seriously or does not care. It can be conditional, threatening, violent, it can take as serious a form as rape, or it can be just a short sexually charged sentence which is not acted upon, but what is common in these is that they are against the freedom of sex and self-determination and the answer to these is simply 'no'.

Thanks to users of various social media platforms around the world, the initial scandal outgrew Hollywood and the film industry in a matter of days; there were women coming forward with stories who had nothing to do with Weinstein and the world of actors or actresses. Simple, ordinary people, young or older, from different countries, different cultures, who used the #MeToo hashtag to share stories of how they became recipients of unwanted sexual offers, or even victims of sexual harassment, coercion and rape.

2. Critics and skeptics

Naturally, there have also been criticisms of the movement, people who wish to distinguish between real, valid problems and extreme, unnecessary issues, and there were some who simply found the whole movement redundant.

6 Kantor – Twohey*et al*

7 Gönczöl Katalin – Kerezsi Klára – Korinek László – LévayMiklós: *Kriminolgia*, Budapest, Wolters Kluwer (2013) 362-364.

One such criticism is that a line should be drawn within #MeToo stories. There are acts and issues that really need to and should be talked about, like sexual coercion or rape, for example, the woman who shared her story saying once at a workplace gathering she was drugged and then raped.[8] And then there are acts that are just innocent little jokes, flirtation that needs to be accepted and not mentioned on par with the former as it has nothing to do with it.[9] There is rape and there are compliments, there is nothing tying the two together.

There might be people, even maybe a lot, whose own moral values do not really mind behaviors like a vulgar remark about their body or an unwanted touch, but that does not have to be the socially accepted norm that every woman should objectively endure, saying it is only a natural part of femininity. In terms of their severity, they really cannot be compared to sexual violence, but in terms of their impact, they can be; a violation of a woman's human dignity, a minor restriction of their sexual self-determination, which, according to the Hungarian regulations, may even constitute a crime of defamation.[10] To differentiate between these, to say that the story of some women is worth nothing compared to the story of another woman, simply because the former was whistled at by strangers as a teenager and the other was raped by her boss, ignores the former woman's completely real problem.[11] The two can coexist, are not unrelated, only they should be categorized differently.

Others have criticized the movement for tearing up painful wounds.[12] No one is obliged to share such an experience with the world on easily and openly accessible platforms like Twitter or Facebook, which is not a problem; whoever does not want to share does not share. Critics, however, say the situation is different when it comes to those who have experienced rape, and as much as they were able to, they processed it within themselves, and then one day accidentally are confronted by these posts, bringing back negative experiences they would rather forget.[13] It is simply the curse

8 *Had my life ruined for years*, Blind – Anonymous Work Talk (2018) https://www.teamblind.com/article/Had-my-life-ruined-for-years-z5ECMPni (2022. 01. 18.)

9 Pluckrose, Helen: *Are woman really victims?*, Quilette Magazine (2017) http://quillette.com/2017/11/22/women-victims-four-women-respond/ (2022. 01. 20.)

10 Section 227 (2) of the Hungarian Criminal Code: commits a crime of defamation and shall be punished in accordance with Section (1) who commits the defamation physically. Section 205 (3): a person who commits obscene conduct towards another and violates the human dignity of the victim commits the crime of defamation.

11 Charlston, Libby-Jane: *Why I'm not joining the #metoo hashtag even though I was sexually harassed*, Huffington Post (2017) https://www.huffingtonpost.com.au/libby-jane-charleston/why-im-not-joining-the-metoo-hashtag-even-though-i-was-sexually-harassed_a_23245315/?guccounter=1&guce_referrer_us=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_cs=I1ad07wLbBzTdv1x3yZWlQ, (2022. 01. 20.)

12 Wittes Schlack, Jullie: *#MeToo flared but won't endure*, Wbur (2017) http://www.wbur.org/cognoscenti/2017/10/18/metoo-flared-but-wont-endure-julie-wittes-schlack (2022.01.19.)

13 Lafuente, Cat: *Who is the woman behind the #MeToo Movement?,* The List (2017) https://www.

of social media; to read or see something that someone does not want. It is hard to avoid. This, though, should not mean that in order to protect such victims, no one should share any story.

There are two conflicting interests here; the victim who wants to talk about it, and the victim who does not, and the extent of their will's importance is very difficult to weigh. Perhaps what could tip the balance toward disclosure is that if everyone kept silent, it would be impossible for there to be any progress in this area, and it would be unattainable to prevent such attacks where the latent criminality is already extremely high. After all, if a problem is not talked about, how could it be a real problem.

In addition, many have questioned the credibility of women who came out with their stories from a perspective of up to 10-20 years. The negative side of social media and the internet in general is that anyone can say anything, the opportunity is given. It is almost irrelevant whether it is true or not, and (false) news, a story can spread in a matter of moments, and it is easily possible that no one checked its origins.

The problem with this criticism is, that in addition to the trauma and stress sexual assault victims face, those who were violated by a rich and famous person feel even more pressure because the public might not believe them, so as a result, victims are driven to suppress the truth.[14] The basis of this skepticism is the assumption that there are many false accusations in court; that lot of women turn to the authorities with a made-up story, as Weinstein defended, only to seek revenge on innocent men, which is disproved by reality and statistics.[15] Even as #MeToo is shifting public awareness about how serious sexual harassment and rape is, many women, in addition to being the targets of these crimes, bear the burden of speaking out about it and continuing on what had always been asked of women: take the responsibility for preventing sexual assault—whether by being more chaste or by sharing their pain on social media.[16]

From a legal point of view, all the problems raised by the movement can be basically divided into two main parts: criminal law and criminal procedural law.

On one hand, the events told in the stories can be examined and interpreted on the basis of their quality, thus distinguishing between entries describing defamation, humiliation, and sexual coercion or rape, where the latter two are clearly criminal offenses, and then the stories which were described as sexual harassment, which is somewhere between the two abovementioned main categories.

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thelist.com/110186/woman-behind-metoo-movement/ (2021. 01. 18.)

14 Adurasola Alabi, Olabisi: *Sexual violence laws redefined in the „Me Too" era: Affirmative consent & statutes of limitations*, Widener Law Review Vol. 25:69 (2019) 85.

15 Kuszing Gábor:*A hamis vád és a „szülői elidegenítés szindróma" mítosza*, Nők Joga (2010) 1. http://nokjoga.hu/sites/default/files/filefield/vadaskodnak-e-nok-szexualis-eroszakkal-kg-2010.pdf (2022. 01. 10.)

16 AdurasolaAlabi*etal* 76.

On the other hand, we can talk about women who have been victims of a crime, who have not turned to the authorities, who have not reported their attackers, or if they have done so, they have not been convicted, which raises procedural issues such as the institution of private motion, the (mis)treatment of victims, or the difficulties of the investigation such as obtaining adequate evidence. These problematic aspects, moreover, are directly or indirectly influenced by the victim-blaming attitude of society towards the victims of sexual crimes.

3. Society's view on sex crimes in the Me Too era

These crimes still divide society to this day, and the Me Too movement has provided a good recent example. Victim-blaming, holding the victim partially or fully accountable for the act committed against them and the normalization of such acts contribute to the existence of a culture of rape that distracts from reality and its very real problems. For example, one woman shared her story on Facebook, gaining over ten thousand shares, where she speaks about how she feels like what happened to her was rape, even though there was no actual violence or force used, but she didn't fully consent.[17] She got a lot of backlash. People asked, Oh, is that all?" It happened, they said, because she did not read the situation properly. because she was too nice and accommodating to the person who assaulted her. They said it happened because she was not forceful enough. Or maybe she made it up.

In the 1970s, a term was born in the U.S., 'rape culture', that attempts to define this phenomenon. The main point of this is that society normalizes rape and any sexual or physical action of a sexual nature against women, which includes anything that downplays the behaviors expressed in the previous sections of the study.[18] This mentality, the objectification of women, the blaming of the victim, the traditional dominant male / subordinate female roles is worsened by social media platforms that can be used quite freely by anyone, even by a country's leader, who can tweet sexist jokes about women, that *boys will be boys*[19] and it is just *locker room talk*[20] between men.

There is a picture in society of a 'real victim' and a 'real rape' which is rooted in stereotypes that assume an unexpected, physical attack by a stranger in a deserted place and a moral, resilient woman who will have physical injuries, so the investigation

17 Gianino, Laura: *I didn'tsay no – butitwasstillrape* (2017) https://www.bustle.com/articles/135171-i-didnt-say-no-but-it-was-still-rape (2022. 01. 20.)

18 WAWAW Rape Crisis Centre, *What is rape culture?* http://www.wavaw.ca/what-is-rape-culture/ (2022. 01. 19.)

19 Bradner, Eric: *Melania Trump: Donald Trump was 'egged on' into 'boy talk',* CNN (2016) https://edition.cnn.com/2016/10/17/politics/melania-trump-interview/index.html (2022.01.20.)

20 Tweet of Donald J. Trump on the 10th of October 2016 https://twitter.com/realdonaldtrump/status/785286990153543681 (2022.01.20.)

will be simple and full of decisive evidence.[21]

The statistics refute this assumption. There is a survey that shows that the crimes that have become known were committed primarily by a person close to the victim, such as a relative or supervisor.[22] According to statistics conducted by the Ministry of Interior of Hungary (from the period of the second half of 2018), almost 80% of sexual violence was committed against women, almost half of it against children aged 0-13, while in the case of sexual coercion, the number of children or juvenile victims were almost equal to adults.[23] In the case of child victims, there is good reason to believe that under the supervision of a parent (or some other adult fit to supervise), not a stranger, but someone close to the victim had the opportunity to commit the crime.

The reasons for the existence of the culture of rape and the term 'real victim' can be found in socialization, such as the objectification of women, the blaming of the victim, the persistence of traditional dominant male / subordinate female roles all contribute to it. This mentality not only adversely affects women in society and in everyday life, but also indirectly affects the occurrence and legal perception of sexual violence and coercion. Even such a relatively simple thing as defining consent can be twisted by these presumptions. First, there was the slogan 'no means no' which placed the burden on victims, making it their responsibility to show resistance, and many mocked its presence. This turned into 'yes means yes', especially in the era of the Me Too movement, becoming the one slogan that protects victims and holds perpetrators accountable for their actions, which is also called an affirmative consent and creates a culture of *respect*.[24]

Many articles and posts on social media platforms, on the other hand, report non-criminal behavior where it is no longer about career guidance or other similar offers, but about actions that take place in everyday life, even in a matter of seconds. In the context of the Me Too movement, the term 'sexual harassment' is often used to describe these acts. Such an act is not known by Hungarian criminal law, thus the criminal assessment of sexual harassment is often questionable, whether in some cases it may be considered sexual coercion, defamation, simple coercion, or even sexual humiliation.

It should be mentioned here again (that had been brought to attention by critics of the movement in their own way) that we should differentiate between some of the #MeToo stories. There is a difference between an unsolicited remark, snooping, a humiliating, generally immoral expression or request, and sexual violence and sexual coercion as criminal offenses. Although they are not sufficient to establish

21 Szabó Judit – Virág György:*A nemi erőszak mítosza*, In: *Szexuális erőszak: mítosz és valóság, Kutatások a szexuális erőszakról*, szerk.: Parti Katalin, Országos Kriminológiai Intézet, Budapest (2017) 216-217.

22 Kovács Gyula: *Az erőszakos közösülés a számok tükrében*, Magyar Bűnüldöző 2. évf. 2011/3-4. 46-47.

23 Based on the Criminal Statistics System of the Ministry of Interior of Hungary (bsr.bm.hu)

24 AdurasolaAlabi*et al* 78-80.

sexual violence or coercion, the recipients of these acts feel that their sexual self-determination, sexual morality, human dignity and honor have been violated by said sexual act. As stated at the beginning of this essay, the Me Too movement showed that despite this violence, turning to the authorities is not common, which could be, for example, because of victim-blaming, the authorities' inadequacy or the trauma itself holding back the victim.[25] Social media is huge and the influence, or the potential to influence, it has on people, society is undeniable.

Another side of it is what became apparent during this movement: holding perpetrators of these crimes accountable for their acts in the absence of effective legal procedures. In this ad hoc process, journalists expose misconduct and employers, consumers, or professional organizations are called upon to remove the accused from a position of power and since the start of the Me Too movement in 2017, a number of survivors have used this informal process to report abuse, and, as a result, over two hundred accused individuals have lost high-profile jobs, roles, or positions.[26]

This extralegal process is not a rights-claiming system in which survivors make demands for justice, instead it is private in the sense that it is not enforced by authorities, but unlike many other forms of private administration, it is public in the sense that it is driven by and occurs in the spotlight of media coverage.[27] It is a process that harnesses the power of media, especially social media, and provides an alternative way to persecute perpetrators, which, even if it is somewhat successful, cannot replace an effective legal procedure, but it can supplement it when the latter fails the victim.

A great example of this, is how Weinstein's case continued and partly ended recently in 2021. Although it started with an online article and posts on social media, after several charges made by many women against him, Weinstein was indicted in New York in 2018 and in Los Angeles in 2021 on several counts of rape and sexual assault charges. He was sentenced to 23 years in prison after his trial in New York in 2020, and the trial in Los Angeles is still pending as of January 2022.[28]

Closingremarks

In my study, I considered it important to present the main events and points of the Me Too movement, which provoked reactions from people all over the world as it drew attention to a real, serious problem that is violence against women. Under the Hungarian Criminal Caw, many of the acts mentioned by the movement correspond

25 AdurasolaAlabi*etal* 86.

26 Clarke, Jessica. A.: *The Rules of #MeToo*, University of Chicago Legal Forum Vol. 2019 Article 3, 38.

27 Clarke *etal* 41-42.

28 *Harvey Weinsteintimeline: Howthescandalunfolded*, BBC (2021) https://www.bbc.com/news/entertainment-arts-41594672 (2022. 01. 20.)

to some of the crimes, but this does not guarantee that the perpetrator will be held accountable or that the damage caused to the victim will be amended in any way. Furthermore, the victim could be exposed to even more harm during the procedure because of society's victim-blaming tendencies.

As harmful as social media can be, the movement and its effect, with its positivity, negativity and everything in between, is undeniable. Facts are that women are subjected to sexual violence all over the world and something needs to be done about it both in society and law, and, hopefully, a sometimes-controversial social media movement was what the world needed for change to be set in place.

Civil and Commercial Law

Nochta, Tibor[1]

Private Liability in Hungarian Company Law – some current liability issues

A decade and a half ago I had a vision in my monograph, "The Ways of Private Liability in Company Law," which was soon fulfilled[2]. As I predicted, since then, domestic theory, legislation, and case law have found several new paths to civil liability in the context of corporate law breaches. At the same time, there are also popular company law groves and reserves for private law liability, which are based on centuries-old traditions. For example, the need to limit member liability, the recognition of a breach of liability as a sanction for unlawful conduct, the different directions of executive liability, the nature of the memorandum of association or, in some cases, the justification for joint liability and liability.

The authors have further developed the main directions of civil liability I have outlined in line with the requirements of economic and social changes, and expanded the liability dome created by the establishment and operation of companies, under which, in addition to civil law, there are several legal responsibilities. As a result, the cross-border problems of public and private law (including, in particular, criminal and civil law) liability have increasingly appeared in the domestic legal literature and case law in connection with the misconduct of members, senior executives and members of other corporate bodies. The social pathways of responsibility sometimes "branch out" and because of its danger to society, the conduct can also constitute a crime. Qualification issues arising from the interplay of different forms of legal liability have been constantly raised in legislation, case law and theory over the past decade and a half, indicating that liability law dilemmas are increasingly delimitation problems affecting certain branches of law[3].

The new Civil Code (Act V of 2013), which also integrates private economic law, has also opened new avenues in company law. In the Civil Code, the scope of liability for damages has been further expanded, and by separating contractual and

1 University Professor, Department of Civil Law and Roman Law

2 Tibor Nochta, The Ways of Private Liability in Company Law, Dialog Campus, Budapest-Pécs 2005

3 M. Tóth - G. Török: The Impact of the Changing Criteria of Bankruptcy Law on the Regulation of Criminal Law, in: Economic Criminal Law Studies, ed. Tóth M. - Gál I. L., Pécs 2005, Csőke A.: The Complex-CD Library Cstv. 33/A. Gula J. PhD: Certain aspects of the relationship between insolvency proceedings and insolvency offenses, in: Studies in honor of Professor Mihály Tóth's 60th birthday, Pécs 2011.

delictual (non-contractual) liability, the strands of liability in the direction of the company, members and third parties can be better separated. In addition, professional attention was paid to the corporate legal contexts of quasi-contractual and quasi-delictive liability forms.

In the last decade and a half, liability issues have not given equal weight to the various stages of a company's existence. An important change is that in the case of insolvent companies, the noisy route of liability to bankruptcy law, the diversity of responsibilities of senior executives, is surrounded by tremendous professional interest and attention. The expansion of liability breakdown cases, the strengthening of the risk-sharing role of liability, and the placing of expectations on an objective basis have become an increasingly important means of protecting the interests of companies' creditors.

I. Some trends that also affect corporate liability:

The examination of civil liability in the company law environment does not simply mean that we automatically apply its principles, institutions and general rules. Rather, it means the purposes for which and the protection of a legal person (company) operating as a business enterprise, the establishment of its organization, the establishment of its operation and the termination of its operation, and the sanctioning of illegal conduct. This connection links the general issues of liability with inseparable threads to the specific liability problems that also arise in company law. The following trends also play an important role in this interaction:

1. There has been an important paradigm shift in liability for damages, thanks to which the personalization of this liability created by natural law has been replaced by the distribution of technical and economic risks and, increasingly, by insurance. The imprints of this are also marked in company law[4].
2. The increasing economic definition of civil liability, the signs of which are clearly visible in terms of prevention, apportionment of costs and cost optimization, can hardly be disputed. The inevitability of an economic analysis of the effectiveness of the law of liability can be justified nowadays, especially in terms of business activity[5]. A trend that is increasingly characteristic of modern economic research is the recognition of mechanisms to reduce the likelihood of breach of contract in the context of illegality. Research and practice show that agreements in private sanctions and their enforcement, the analysis of benefits and costs sometimes lead

4 H. Kötz, Deliktrecht. Frankfurt am Main 1983. 19-20. old, Vö. Emmerich, Das Recht der Leistungsstörungen. 3.. Aufl. Verlag C. H. Beck. Munchen 1991, 88sk.

5 P. Behrens: *Die* ökonomischen *Grundlagen des Rechts*. J.C.B. Mohr (Paul Siebeck) Tübingen 1986. 310-312. G. Calabresi, *Some Thougths on Risk Distribution and the Law of Torts*, Yale L.J., 1961/70. 499-540.old, Hans-Bernd Schäfer-Claus Ott: *Lehrbuch der* ökonomischen *Analyse des Zivilrechts*. Berlin-Heidelberg-New York-London-Tokyo 1986 96-115.

to a reduction in breaches of contract in the same way as legal, judicial enforcement.

3. The examination of civil liability in the "external" (economic, social, sociological) dimensions sets an indispensable scientific direction. (socio-economic aspect). On the other hand, in order to preserve the "internal" consistency of private law, it is also important to ensure that the conditions of liability are free from dogmatic contradictions[6]. This imposes a dual task on theory, legislation and case law: it is necessary to ensure that the interactions between the "external" and the "internal" legal dogmatics of responsibility affecting responsibility are taken into account.
4. Causality in our age dissolves in crucibles of probability, frequency, predictability[7]. The premise of fair, just and resonable has become a real test of the risk-compensating compensation function, especially in the business contracts in which companies are also involved[8].
5. The current liability regime in Anglo-Saxon and Continental law is increasingly a tool for calculating and deploying risks. This is particularly clear in the assessment of the liability of senior executives in company law. Managers are particularly exposed to business risk. They must first and foremost recognize the risks of doing business (signs of bankruptcy, the pitfalls inherent in corporate transactions), because this is the only way to ensure the company's efficiency (compliance management system)[9]
6. Opinions are divided on the question of what to consider today as a central element of civil liability. The so-called behavioral approach focuses on illegality, while a results-oriented approach focuses on the outcome (harm) that occurs. Recent Hungarian private law research defines illegality as a measure of behavior, based on the teachings of the Martoni school, on the basis of which illegality classifies the perpetrator, while imputability classifies the perpetrator[10].

II. On some specific corporate liability issues

1) Is there correctness and / or liability in company law?

The new Civil Code distinguishes between duty and liability. This (more or less successfully) separates the facts of a liability for damages for unlawful damage from the facts on the basis of which a legal or natural person must be liable for a debt[11].

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6 F.Wieacker: *Privatrechts-Geschichte der Neuzeit*. 2. unveränderte Nachdruck, Göttingen 1996.

7 UN Convention on Contracts for the International Sale of Goods Art 82. 86 EKG. Schack: *der Schutzweck als Mittel der Haftungsbegrenzung im Vertragsrecht* JZ 86.206 fn.29. 507skk.

8 J. G Fleming, *The Law of Torts*. The Lawbook of Australasia, Sydney. The Law Book. 1965.

9 S. Grudmann: *European Company Law (Organization, Finance and Capital Markets)*. Intersentia, Cambridge-Antwerpen-Portland 2012, 44skk.

10 Landi B. Z.: Thinking Responsibly (Illegality as a Standard of Behavioral Review of Liability for Non-Contractual Damage), PhD Dissertation, Bp. 2014, 205-213.

11 The last published study: Peter Bodnár Miskolczi, entitled For the Debt of the Company,

Due to its sanctional nature, the obligation to comply is close to liability, but all the less so because liability is the excess that accompanies property (compensation) as a sanction for breach of an obligation[12]. So the penalty for liability for damages, which may be based on a breach of contract or imputability, is damages, the risk of liability, or a legal consequence of damages.

Liability is mostly separated from the obligation to comply by the fact that liability is always conditional on the omission or breach of a specific obligation that can be influenced by a sanction for damages (breach of the general prohibition of damages) (breach of contract)[13].

However, the standstill obligation is not a direct legal consequence of a breach of an obligation, but the secondary imposition on a member of the company of a risk arising from the non-performance of the primary obligor. In the case of business companies, the aim is to ensure the satisfaction of the property claims of creditors and third parties vis-à-vis the company, and at the same time to reduce the risk that this demand will remain unsatisfied.

The obligation of the members to comply is based on their contractual commitment, which also varies by type of company, in the case of the conditions specified by law, by signing the memorandum of association.

The multi-layered nature of civil sanctions can explain why we recognize the obligation to comply as a specific legal consequence. Approached from the company's creditors' point of view, the statutory statement that the member is liable for the company's outstanding debts (unless there is a breach of liability that results in a primary liability basis) creates the possibility that the primary debtor will be liable to a presumably performing person. The question is, is this enough protection for the company's creditors? Does it indicate that there is still a risk that the creditor's demand will remain unsatisfied because the member also has no (perhaps deliberately) assets, i.e. risk sharing (deployment) does not actually achieve its purpose.

2) Responsibility for breakthrough problem

In my opinion, it is not necessary to differentiate between the breakthrough of responsibility and the transfer of responsibility - although remarkable domestic theoretical work has also been done in this regard[14].

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was last published on the topic. Published by: PVRO PVRA DEFLVIT AQVA Festive Studies in honor of Professor Tibor Nochta's 60th birthday, edited by Benke J.- Fabó T. Pécs 2018, 197-201.

12 T. Lábady, General Part of Hungarian Private Law (Civil Law), Bp.-Pécs 2000, 278sk.

13 "liability arises if the consequences of failure to comply with a duty or obligation have to be settled". Marton G.: Civil Liability, Bp. 1993, 14skk

14 The problem was summarized mostly in Papp T.: Transfer of responsibility, breakthrough responsibility-quo vadis ius societatum. In. Legal entities in the new Civil Code, Miskolc

The limited liability member or shareholder of the company who has fulfilled his / her capital contribution - with the exceptions specified by law - has no liability towards third parties (creditors). Exceptionally, the rules imposing an obligation to satisfy the debts of the company in respect of such members are in fact liability rules because they are based on some unlawful and reprehensible conduct. In addition to Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings (Company Registration Act) and Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings (Bankruptcy Act), the Civil Code includes these cases of liability (transfer of liability, breach of liability)

The following shall be considered as breaches of obligations of a member establishing unlimited liability towards creditors:

- conduct of a member which abuses his or her own limited liability and thereby creditors' claims remain unsatisfied[15]
- conduct of a member which intentionally causes damage to the creditor, for which the member is jointly and severally liable to the creditor with the legal person[16]
- the controlled member who becomes insolvent as a result of the unified business policy of the group establishes the liability of the dominant member for the unsatisfied creditors (actually the dominant member's liability under the Civil Code).[17]
- The continuation of an unfavorable business policy is assessed by the legislator as conduct which establishes a duty of standing (in fact, liability) of a qualified majority or sole member[18].
- If a limited liability company is removed from the register of companies by way of involuntary de-registration procedure, the company's former member – registered at the time of de-registration – bears unlimited liability for the outstanding claims of the company's creditors, if found to have abused his or her limited liability. If there is more than one such member, their liability shall be joint and several.[19]
- If a limited liability company is removed from the register of companies by way of involuntary de-registration procedure, any former member who transferred his or her share within a period of three years before the opening of involuntary de-registration bears unlimited liability for the outstanding claims of the company's creditors if found to have abused his or her limited liability or acted in bad faith in transferring his or her share.[20]
- In the case of liquidation proceedings, if the debtor has accumulated debts in excess

Conferences 2012, Miskolc 2013, 167-185.

15 Civil Code, Article 3:2 (2).

16 Civil Code Article 6:540 (3)

17 Civil Code, Article 3:59

18 Civil Code, Article 3:324 (3) and Bankruptcy Act, Article 63 (2)

19 Company Registration Act, Article 118/A (1).

20 Company Registration Act, Article 118/A (3)

of 50 per cent of its equity capital, upon the request lodged by a creditor, the court may establish that a former member with majority control, who transferred his or her share within three years before the opening date of the liquidation procedure, is subject to unlimited liability for the debtor's outstanding liabilities[21].

3) The civil liability of senior executives of companies

a) Damage caused in the capacity of a senior official

According to the Hungarian legislation in force – also applicable to companies – a legal person is liable for damage caused by a senior official if the latter causes the damage by acting in this capacity. This is the so-called principle of knowledge.

In making a company liable for the damage caused exclusively by a senior executive, the mere classification of conduct is not the governing principle, but the relationship between the conduct of the senior executive and the authority of the senior executive, i.e. whether the senior executive's harmful conduct was conducted in the exercise of his or her functions as a senior official.

If the damage was not caused by the manager in the exercise of his or her functions as a senior official in the strict sense, but as a result of this legal relationship he was in a situation where there was a possibility of damage, the liability of the legal person shall be established. However, in the following cases, there is no place to hold the legal person liable: if the manager does not act in the interests of the legal person, does not perform his / her duties arising from his / her official duties, his / her activities are not related to his /her obligation to perform the tasks specified in his / her assignment contract or employment contract or in the law.

Thus, a senior official can be held personally liable if the harmful conduct cannot be classified as damage caused by the legal person due to its nature, or if the damage was caused intentionally, even by committing a criminal offense, acting in his / her managerial capacity.

b) The responsibility of the senior executive towards the company

In the Part entitled General Rules for Legal Persons (including companies in the same sense)[22], the Civil Code provides that the senior official shall be liable to the legal person for the damage caused to the legal person in the course of his / her administrative activities in accordance with the rules on liability for damage caused by breach of contract.

21 Bankruptcy Act, Article 63/A

22 Civil Code, Article 3:24.

The liability of a senior official in general, but in particular for claiming damages for breach of contract, has raised a number of legal interpretation problems in recent years. Today, there is a consensus that the relationship between the chief executive officer and the company is a contractual relationship and that the chief executive officer is therefore liable for the damage caused to the company under the rules of contractual liability[23].

By accepting the status, the senior executives of the companies undertake to act in the best interests of the company in the circumstances that would normally be expected in a given situation. Violation of this duty of care will determine whether liability can be established. The measure of increased managerial diligence is an objectified, in many respects risk-based, but reprehensible line measure. The diligence that can be expected in the conduct of a company's affairs must always be assessed in the context of a specific obligation. Failure to exercise due diligence in the performance of your administrative duties shall not constitute a breach of contract. A senior official will breach his / her contract if he / she fails to exercise the due diligence expected of persons holding such a position. Failure to do so does not in itself constitute a breach of contract if the senior official acted with the utmost diligence in general and as expected.

If the driver causes the damage by violating the obligation of the employee, the Labour Code shall apply. The Civil Code is applicable to the company for other damage caused by the breach of its non-employment obligation in accordance with the rules of liability of the Civil Code for damages caused by a breach of contract[24]. With the entry into force of the Civil Code, the question arose whether the liability of the senior official should be assessed under the Labour Code or the Civil Code, if the senior official holds this position under an assignment contract or in an employment relationship. In the latter case, as a senior employee, he / she is liable under the Labour Code[25].

If the company, excluding the case of liquidation, is wound up without a legal successor, the creditors may also, to the extent of their unsatisfied claim, claim damages against the company's senior executives under the rules of non-contractual liability, if the senior official has failed to take account of the interests of creditors after a situation threatening the company's insolvency has arisen.

Not only the Civil Code, but also the relevant provisions of the Bankruptcy Act and the Company Registration Act, as well as court decisions define the "threat of insolvency". According to those standards, from the date on which the company's management foresaw or, with the due diligence expected of a person holding such a position, the management should foresee that the company would not be able to satisfy its claims against it when due, the company is in such a situation. A debtor

23 Ádám Fuglinszky, Tort of law, Bp. 2015, 136sk.

24 István Kemenes, Liability of the Chief Executive Officer. Hungarian Law. 1/2017.

25 Mónika Csöndes, Should the liability of a senior official be assessed on the basis of the Civil Code or the Labour Code if he / she holds his / her position in an employment relationship? Hungarian Law, 5/2017, 280skk.

with a significant debt is in a situation of threat of insolvency if its income is radically reduced and it has no collateral to settle its debts. In such a case, the sale of the debtor's shareholding in another company to a relative for a fraction of the nominal value establishes the property liability of the debtor's manager. It is important that the manager is not responsible for the occurrence of a situation threatening insolvency, or for the bad economic decision that caused it.

Once the situation threatening insolvency has arisen, the chief executive officer must act in the interests of the company, but must also take into account the interests of the creditors. This is confirmed by the fact that the current Bankruptcy Act and Company Registration Act also declare the liability of senior officials (in the presence of other factual elements), if, after the occurrence of a situation threatening insolvency, they have performed their administrative duties not on the basis of the priority of the interests of the company).

c) The liability of senior executives of companies removed from the register of companies by way of involuntary de-registration procedure

If the court of registration has removed the company from the register of companies by way of involuntary de-registration procedure, the senior official of the company, including the senior official removed from the register before the involuntary de-registration procedure, shall be liable for unsatisfied creditors' claims to the extent of his / her contribution to the resulting loss, if found to have failed to properly carry out his / her managerial functions in the wake of any situation of imminent insolvency, in consequence of which the company's assets have diminished or prevented to provide full satisfaction for the creditors' claims.

A senior official shall be released from liability if he or she proves that the threat of insolvency occurred at a time other than his or her term in said executive office or for reasons other than his or her managerial actions, and to have taken all measures within reason, that is to be expected from persons in such positions, upon the occurrence of a situation carrying potential threat of insolvency so as to prevent and mitigate the losses of creditors, and to prompt the supreme body of the company to take action.

If the senior official failed to carry out - for reasons within his or her control - the requirement prior to or during involuntary de-registration for having to deposit and publish the financial report, or - in the case of dissolution - failed to comply with the obligations provided for in Section 98 (3) of the Company Registration Act, or did so improperly, he or she shall be required to evidence that no losses have occurred during his or her tenure in executive office or during his or her activities as a receiver.

The purpose of imposing this additional burden of proof is to prevent a senior official of a company from evading the company through an involuntary de-registration procedure in order to avoid liability.

Tran, Hien[1] - Boóc, Ádám[2]

COVID 19 Pandemic – A showcase for Electronic Arbitration to flourish

Introduction

The year of 2020 witnessed the unprecedented and unpredicted Coronavirus outbreak which put half of the world's population[3] under lockdown. Until May 2021, even when the vaccine came into existence and was put to injection, a number of countries still bore the restrictions at some levels and many activities continued to operate online to mitigate the physical contact among people. However, unlike other fields (trade transactions, administration procedures, etc.), the scepticism on resolving the dispute online persists due to the complication in the management system of the online platform and the statutory legal procedure. With the litigation, these matters are even harder to tackle owing to the country regulations and the possibility to immediately deploy the online operation. On the other hand, the alternative dispute resolution (ADR) mechanisms such as negotiation, mediation, and arbitration *per se* are more flexible and the institutions providing these services have been willing to conduct virtual mediation sessions or arbitral proceedings. The greater adaptation as such has undoubtedly helped the ADR processes work smoother with the least disruption during implementation of social distance methods. For example, during the first wave of the coronavirus pandemic in spring 2020, Hungary applied an extraordinary judicial vacation in respect of civil proceedings[4] according to Section 1 of Governmental Decree 45/2020. (III. 14.) while the arbitration proceeding was not affected (this was confirmed in Information Circular issued by the President of the Permanent Arbitration Court (PAC) on 16th March 2020). The procedural deadlines therefore were still normally running with no interruptions of the proceedings.

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1 LLM (Budapest), Compliance Associate Outcubator Vietnam (Hanoi Office)

2 University Professor, Head of Department of Civil Law and Roman Law

3 3.9 billion people (Euronews, „*Coronavirus: Half of humanity now on lockdown as 90 countries call for confinement*", 3 April 2020). Available at: https://www.euronews.com/2020/04/02/coronavirus-in-europe-spain-s-death-toll-hits-10-000-after-record-950-new-deaths-in-24-hou (last accessed: 25 May 2021).

4 For the comparative overview of the special measures introduced by the individual states in respect of the coronavirus pandemic see: Ungvári Á. – Hojnyák D.: *Az Európai Unió egyes tagállamainak koronavírus-járványra adott válasza, különös tekintettel a vizsgált* államok által *bevezetett különleges jogrendi szabályozásra.* Miskolci Jogi Szemle 1/2020. 122 – 138.

This article is meant to provide the insights into Electronic Arbitration (E-arbitration) and its rapid growth during the pandemic situation, which has become the lifeline for the contractual parties seeking a solution in the context of country's curfew, travel restrictions, court closures and court delays.

1. History

To begin with, a glance into the genesis of Online Dispute Resolution (ODR) and E-arbitration is briefly shown as follows. ODR first appeared in the 1990s following the presence of dispute arising while using Internet[5] in which the Virtual Magistrate (VM)[6] and the CyberTribunal[7] were the most notable projects on E-arbitration. Although both of them ended shortly after, they gave the developers clearer ideas on the application of the online process. After these two "pioneers", other organizations also provided for E-arbitration services, many of which are still operating currently such as Onlinearbitration.net, net-ARBitrationWorks, ADR.eu, etc. Having emerged for more than 20 years ago, and even though ODR has expanded and been involved in the process of resolving the traditional offline disputes, now still it is not fully recognized among the practitioners, the Governments and the businessmen. In 2019, only less than 10% of 195 countries gave access to justice online.[8] The reasons are manifold but mainly come down to the question whether the efficiency of such resolutions, the confidentiality, authenticity of the process is guaranteed without the parties physically meeting. Moreover, the issues of online management platform also raise many concerns. But as we can see, going online have saved the world from being completely shut down creating a once-in-a-lifetime chance for ODR in general and E-arbitration in particular to overcome its inherent challenges, and until just then, we came to the realization and acceptance of

5 in electronic commerce transactions. Only limited number of people used Internet when it appeared in 1969, so few disputes arose. See: Ethan Katsh: ODR: A look at history, in M. Abdel Wahab, E. Katsh, D. Rainey, eds.: Online Dispute Resolution Theory and Practice (Eleven International Publishing, The Hague 2012), p.10.

6 The VM was a pilot project of E-arbitration, sponsored by the National Center for Automated Information Research (NCAIR), first implemented by Villanova University School of Law in 1996, and by Chicago-Kent College of Law at the Illinois Institute of Technology in 1999. (See Mohamed S. Abdel Wahab: "ODR and E-Arbitration, Trends and Challenges" in Wahab, Katsh, Rainey, *op. cit.*, p. 400).

7 supported by the University of Montreal's *Centre de Recherche en Droit Public*. It's rules of procedure mainly based on the international commercial arbitration instruments: UN Commission on International Trade Law ('UNCITRAL') and the International Chamber of Commerce (ICC). The CyberTribunal solved over 100 disputes. (See Wahab, *ibidem* p. 401)

8 Mirèze Philippe: What Does It Take to Bring Justice Online? International Journal of Online Dispute Resolution 2019 (6) 2, p.184.

its numerous interests. Notably, institutions are presently interested in providing such services to adapt to the new realities. The general overview on E-arbitration is shown in the following section.

2. Definition & Advantage

It is worth noting that even though ODR's tool and systems are now being employed in any disputes incurred both online and offline, the term "ODR" does not have a unified definition worldwide, neither does online arbitration.

Dating back to the early history of ODR, it was conceived to be the electronic version of traditional ADR (online ADR) in which mediator and arbitrator were given a way to operate remotely through internet. It is said that ODR mimic the traditional mediation and arbitration process using modern technology. However, as an adjudication process, when being conducted online, some elements of traditional arbitration are subject to changes leading to the difference in the procedure itself, such as lack of face-to-face interaction, the involvement of innovative technology which can copy, record and save the information, etc.[9] The proceeding, thus, is not exactly the same as the original one. Many scholars opposed to this first understanding, alleging that it is superficial to construe online arbitration as the duplication of traditional one because *it "would similarly underestimate the transformative power of the technology".*[10] The invention of internet has been a breakthrough in human civilization and its role in arbitration has brought about the modification in the essence of parties' interaction and the new avenues for them to attain resolutions. It is therefore no longer correct to acknowledge E- arbitration to be the replication of the conventional one.

In modern time, the notion on ODR and electronic arbitration are still in disagreement. Even in the UNCITRAL Technical Notes on ODR, adopted in 2016, the scholars in the field could not agree on a final definition of such method. Regarding arbitration, some authors consider it technology-assisted dispute resolution, while it is perceived by many people as the technology-based dispute resolution schemes.[11] However, in the author's opinion, neither of these approaches alone can fully describe the meaning of online arbitration, instead, both schemes are E-

9 Ethan Katsh, Orna Rabinovich-Einy: Digital Justice_Technology and the Internet of Disputes, Published 2017, Oxford University Press, p.33.

10 Julia Hornle: Cross-Border Internet Dispute Resolution, Cambridge University Press, 2009, at p. 86; See also Farzaneh Badiei: Online Arbitration Definition and Its Distinctive Features, ODR, volume 684 of CEUR Workshop Proceedings, p. 87. CEUR-WS.org, (2010).

11 The idea is applied for the ODR in general. (See Mohamed S. Abdel Wahab: ‚Online Arbitration: Tradition Conceptions and Innovative Trends', in Albert Jan Van den Berg (ed): International Arbitration: The Coming of a New Age?, ICCA Congress Series, Volume 17 (© Kluwer Law International; ICCA & Kluwer Law International 2013), p. 654. See also Wahab, Katsh, D. Rainey, *op. cit*., references number 3).

arbitration but in the different stages of development. When the traditional process is first moved to online world, ODR is seen by a lot of people as a tool to provide ADR when the direct communication is not feasible (technology-assisted dispute resolution method), which again underrates technology's advanced characteristic and its role. The magnitude of such innovative development in online arbitration and ODR generally was argued by Prof. Katsh* and Rifkin metaphorically to be the "fourth party"[12] in dispute resolution. Rifkin even functioned technology as an ally, collaborator and partner of the arbitrator, in charge of numerous communications between parties and information processing, leading to the implication in many parts of the process.[13] On that ground, technology is an active participant, which assists, enhances, and completes the arbitrator.[14] Therefore, it is equally true that these developments changed the methods by which disputes are being solved, which bring in a new paradigm of dispute resolution.[15] Besides, it should be mentioned that the mere involvement of technology such as using e-mail to communicate while the rest of the procedure are still in physical form would not be enough to call it E-arbitration. According to Professor Wahab*, a procedure qualifies an E-arbitration when the utilization of ICTs is not limited to an information communication tool but it is "*integrated and embedded into the process itself and indispensable for its proper functioning and administration*"[16], meaning that the extensive part or the entire proceeding take place in the virtual world. This would encompass the act of filings, submissions, hearings, and rendering the award online.[17]

On the other hand, the current reality of online arbitration has not yet reached the stage when it is a technology-based mechanism, *where a fully-fledged application*

12 *) Ethan Katsh: Professor Emeritus of legal studies, University of Massachusetts Amherst; Director at the National Center for Technology and Dispute Resolution; and 2014-2015 Research Affiliate at Berkman Center for Internet and Society, Harvard University. He is even regarded as the father of online dispute resolution.
Ethan Katsh: Welcome to the Party, The Resolver - The Quarterly Magazine Of The Chartered Institute Of Arbitrators, November 14th, 2014, p. 93. See also E. Katsh, J. Rifkin: Online Dispute Resolution: Resolving Conflicts in Cyberspace (San Francisco: Jossey-Bass, 2001), p. 93.

13 Janet Rifkin: Online Dispute Resolution: Theory and Practice of the Fourth Party; Conflict Resolution Quarterly Journal, Volume 19 2001, Issue 1, p.121.

14 Katsh, *loc. cit.*, p.12.

15 Julia Hörnle: IT Law Unit, CCLS, (Queen Mary, University of London), Online Dispute Resolution-The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration, 17th BILETA Annual Conference 2002, p.1.
*) Mohamed S. Abdel Wahab: Associate Professor of Law, Faculty of Law, Cairo University; Founding Partner and Head of International Arbitration Group, Zulficar & Partners Law Firm; and Vice Chairman, Chartered Institute of Arbitrators (Cairo University)

16 Wahab, Katsh, Rainey, *op. cit.*, p. 400.

17 Ibidem, p. 402.

of cutting-edge technology is utilized to resolve disputes.[18] This view alleged that the arbitration procedure can be completely computerized with the application of Artificial Intelligence (AI)[19] playing the role of E-arbitrator supplanting the human nature in decision-making affair. The ongoing question for this approach is whether the arbitration process can be fully automated in which technology absolutely substitutes human arbitrator in the context that this factor has been *pivotal*[20] and *normative*[21]. From the technical point of view, the answer is yes. Technology has already been embodied in many professional services such as journalism or medicine and even in legal sphere. For example, in 2014, an AI system was designed to predict verdicts of the individual justices of the US Supreme Court across 7,700 cases with 70.9% accuracy, compared to leading academics' accuracy rate of 59%.[22] In another project conducted by researchers at UCL, the University of Sheffield and the University of Pennsylvania in October 2016, a machine learning algorithm was developed that predicted verdicts of the European Court of Human Rights with 79% accuracy (461 out of 584 cases).[23] Based on the practical evidences, Ms. Nappert*, Prof. Katsh, and

18 Wahab in Albert Jan Van den Berg, *op. cit.,* p. 654. See also Wahab, Katsh, Rainey, eds., *op. cit.*, p. 666.

19 In its communication "Artificial Intelligence for Europe" in April 2018, The European Commission defined AI as the "*systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals*" (AI for Europe {COM (2018) 237 final}; p.1). AI is said to have the capability to perform cognitive functions and the self-learning ability.

20 Mohamed S. Abdel Wahab, Ethan Katsh (2018): 'Revolutionizing Technologies and the use of Technology in International Arbitration: Innovation, Legitimacy, Prospects And Challenges' in Maud Piers, Christian Aschauer (eds), Arbitration in the Digital Age: The brave new world of Arbitration, Cambridge University Press, p.51.

21 Wahab, *idem*. See also Wahab, Katsh, Rainey, eds., *ibidem*, p. 658.

22 Maud Piers, Christian Aschauer (2018), Conclusion, in Piers, Aschauer (eds), *op. cit.*, p. 291; See also D. M. Katz, M. J. Bommarito II & J. Blackman, Predicting the Behaviour of the Supreme Court of the United States: A General Approach, 2014.

23 *Idem*; See also N. Aletras, et al.: 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective', (2016) 2:e93 Peer J Computer Science; Sophie Nappert presentation in Miami International Arbitration Society's event in February, 2018: The Challenge of Algocracy in Arbitral Decision-Making; Irene Ng (Huang Ying) —Valeria Benedetti del Rio: ,Chapter 8: When the Tribunal Is an Algorithm: Complexities of Enforcing Orders Determined by a Software under the New York Convention', in Katia Fach Gomez—Ana M. Lopez-Rodriguez (eds), 60 Years of the New York Convention: Key Issues and Future Challenges, (© Kluwer Law International; Kluwer Law International 2019), p.123.

*) Sophie Nappert is an arbitrator in independent practice, based in London. She is dual-qualified as an Advocate of the Bar of Quebec, Canada and as a Solicitor of the Supreme Court of England and Wales, who has been a vocal embracer of the impact of new technologies on arbitration.

Prof. Wahab all supported the idea that in the not-too-distant future, a computer would be able to perform as an arbitrator.

Notwithstanding the strong progress of the technology every day, regulatory laws in general normally fall behind and E-arbitration is not an exception. Almost all existing laws provide that an arbitrator is required to have the necessary impartiality, independence and ability to adjudicate[24] which indicate the human nature. Article 1450 of the French Code of Civil Procedure promulgates that "*Only a natural person having full capacity to exercise his or her rights may act as an arbitrator…*". This provision clearly states that an arbitrator cannot be but a human[25] which can be inferred that French law does not allow an AI to serve as an arbitrator. Approaching from the individual's capacity of civil act in Civil Code applied to human beings only, having full capacity to exercise civil rights and obligations by themselves is the first criterion for being an arbitrator entailed by Vietnamese Arbitration Law 2010. The same idea is adopted by the Arbitration Acts from Peru (Art. 20), Brazil (Art. 10), Ecuador (Art. 19) and Colombia (Art. 7 – domestic arbitration).[26] With a less strict regulation, Hungarian Arbitration Act[27] makes a reference to the nationality, age, professional qualification of the arbitrator when it comes to arbitrators' appointment (paragraphs (1) and (7) of Section 12). Likewise, under the English Arbitration Act 1996, Art. 26 deals with the event of the arbitrator's death. Meaning that these countries' rules undoubtedly admit that an arbitrator is intrinsically a human. More examples of the law implying that arbitrators are human can be found in UNCITRAL Model Law on International Commercial Arbitration 1985, amended in 2006 (Model Law)[28], US Federal Arbitration Act[29] and Swiss Private International Law.[30] The Model Law and the laws of these countries use the pronouns associated to human when regulating on arbitrators. Therefore, it seems to be a universal presumption that the arbitrator or the tribunal is/are human. As a result, while the technology is on the way, the governing law does not yet welcome the service of an E-arbitrator. However, this situation is likely to change in the near future. For instance, the European Parliament made a legislative proposal to the European Commission for a legislative regulation providing civil law rules on the liability of robots and AI in February 2017[31] including creating a specific legal

24 Wahab in Albert Jan Van den Berg*, op. cit.,* p. 654. See also Wahab, Katsh, Rainey, eds., *op. cit.*, p. 658

25 *Ibidem.*

26 José María de la Jara, Daniela Palma, Alejandra Infantes, 'Machine Arbitrator: Are We Ready?', Kluwer Arbitration Blog, May 4 2017, p. 2 (last accessed: 31 May 2021)

27 Act LX of 2017.

28 Article 11

29 Section 50

30 Article 180 (2)

31 Library of Congress, Regulation of Artificial Intelligence: Europe and Central Asia, Available

status for robots in the long run - as electronic persons - who can be held liable for their actions.[32] This is actually a positive and strong step forward from the biggest economic community in the world that made the AI arbitrator and the traditional arbitration process come closer together.

On top of that, one other major problem that the fully-automated arbitration process was/is and probably will be still facing in the future is the distrust from the stakeholders. Despite the superior expertise, fairness (no bias feeling toward one party), rapidity, great enhancement, we did not believe that a computer could decide the outcome of a case as well and as accurately as a human does. It lacks the other intangible values: emotions, empathy and the ability to explain its decision. Hence, parties, especially when a huge amount of money is at stake, still resist to choose this mechanism. Therefore, the author assumes that AI will not be used in the near future, within 5 to 10 years. However, it is highly expected that it will soon be used commonly in the decision-making phase as a tribute to human arbitrators where they can consult with it for supplement in suggesting solutions, or to crosscheck their decision.

To briefly summarize, the writer is of the opinion that electronic arbitration is one form of arbitration and it cannot preserve its validity without the traditional basis with a strict due process following a broad spectrum of principles that must be relied on and met at some levels. Consequently, E-arbitration can be defined as the combination of the traditional procedure and the cutting-edge technology in an equally important way, in which the interaction of human and machine plays a key role. This is also the most intriguing and unique characteristic of it. For now, online arbitration is more applied to dispute resolution in its first period of development, but in the long term it can help to upgrade the offline process to be a more effective method, giving parties flexible options to settle their disputes in the modern world. E-arbitration, therefore, should be construed as an improvement rather than a replacement of traditional arbitration.

Acquiring such special features, E-arbitration offers a great number of advantages over other dispute resolution methods (both online and offline) and over the traditional procedure itself. The first and also the most noticeable pro of this mechanism is the convenience that it gave to the parties of the dispute. With the communication through email or video-conference, etc. the parties can quickly and easily reach the others. Furthermore, the possibility to get access to all the documents anytime, anywhere also contributes to a more efficient and effective procedure, making it not only swifter and more cost-effective (no copy fee and postal charge incurred), but also more environment-friendly (cutback of paper using). In addition to these benefits, video applications have actually made it feasible for the parties to synchronously

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at: https://www.loc.gov/law/help/artificial-intelligence/europe-asia.php (last accessed: 22 February 2021).

32 María de la Jara, Palma, Infantes, *loc. cit.,* p.2.

perform their duties (participating in the hearing or witness-examination), even when being in a different part of the world, eliminating schedule-conflict, saving time and cost spent on travel. The substantial/whole online sessions will also facilitate the participation in the proceeding of the parties with special situations such as disability, people with medical problems or from a rural/remote area[33]. This is what Prof. Hörnle*) called the *overcoming distance*[34] advantage, making such processes cheaper, quicker and more accessible.

The second advantage brought by online arbitration relates to the expert aspects of the procedure, since current technological inventions allow the computer to assist the arbitrator in almost all of his/her tasks including the evaluation, explanation, discussion, clarification of the problem; scheduling, assigning, monitoring of hearings; proposing, creating solutions; exchanging, circulating, publishing information; etc.[35] Notably, the high speed of access and processing a large amount of information with greater precision not only helps the arbitrator in fact-finding and situation assessment, but also supplements the adjudicator's decision-making. This indeed shortens the time spent on case study, saves on human labour costs and boosts the efficiency of the procedure.

Armed with these marvellous strengths, E-arbitration actually increases the accessibility to justice. When it becomes a more rapid, less expensive and less complicated-demanding process, the more people with limited resources, who are usually *deterred from seeking dispute resolution due to high costs and geographical distances,*[36] can easily get access to it. This enables the process itself to eradicate any pre-existing imbalance between the parties leading to a fairer arbitral proceeding.[37] Subsequently, it will have positive impacts on the encouragement of E-commerce transactions due to the enhancement of confidence and trust in the online world. All of these are noted as the motivation behind the promotion of ODR scheme by The Organization for Economic Co-operation and Development (OECD) which expects such mechanism to be the "*inexpensive, fair and effective redress.*"[38]

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33 Philippe, *loc. cit.*, p.187
*) Julia Hörnle, Professor in Internet Law, Queen Mary University of London.

34 Hörnle, *loc. cit.*, p.87.

35 Wahab and Katsh in Piers, Aschauer (eds), *op. cit.*, p.34; See also Katsh, *loc. cit.*, p.12.)

36 Herboczková, Jana. "Certain Aspects Of Online Arbitration." (2008), p.4. Available at: https://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/herboczkova.pdf (last accessed: 22 February 2021).

37 Hörnle, *loc. cit.*, p.90

38 Chinthaka Liyanage, Online Arbitration Compared To Offline Arbitration And The Reception Of Online Consumer Arbitration: An Overview Of The Literature, (2010) 22 Sri Lanka Journal of International Law, p.174; See also OECD, Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a More Responsible and Inclusive Globalisation, ADR Online Mechanisms for SME Cross-Border Dispute, 2nd OECD Conference of Ministers Responsible for Small and Medium-Sized Enterprises (SMEs), 2004, at p. 13.

The year of 2020 with the unexpected pandemic has become a showcase for all of these benefits of E-arbitration. The following section will dive into the functioning of online arbitration in the current legal framework, especially its evolution in the current practical world. Electronic Arbitration Agreement (EAA) – the foundation of the process will firstly be presented as follows.

3. Electronic Arbitration Agreement.

Playing the role of physical evidence reflecting the true intention of the parties to settle the dispute by arbitration, it comes as no surprise that most international and national instruments on commercial arbitration stipulate that the arbitration agreement shall be in writing. Written requirement was first enshrined in Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC), in which the term "agreement in writing" "*include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*". Since it is not uncommon that many contracts are now negotiated and closed in virtual world by electronic communication[39], arbitration agreements, included in or attached to the contract as such are also not in paper-based form. An arbitration agreement concluded online by using technology to interact as such can be considered an electronic one. Two opposite views were proposed toward the validity of the EAA. The first idea claimed that only the exclusive list of communication stated under Article II can be deemed in writing[40], meaning that other means of electronic communication such as e-mail or EDI, etc. would not be recognized, leading to the nullity of the arbitration agreement concluded by such means. However, considering the context when the Convention was created[41] as well as the purpose and objective[42] of it ("*contribute to increasing the*

39 The UN Convention on the Use of Electronic Communication in International Contracts (2005) defined electronic communication as "*any communication that the parties make by means of data messages"*. And "Data messages" is the *"information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy."*

40 Prof. Jan van den Berg supported this view. See in Albert Jan van den Berg, The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas, ASA Special Series No. 9 44, (1996), p. 22; See Christian Tautschnig: ‚Chapter I: The Arbitration Agreement and Arbitrability, Legal Challenges and Opportunities for the Next Generation of Online Arbitration', in Christian Klausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration 2015, Volume 2015 (© Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2015) p.90.

41 11 years before the invention of Internet (1969) and 3 decades before the first Internet Service Provider appeared (1992) (See Wahab, Katsh, Rainey, eds., *op. cit.*, p.22). The legislator did not confront with the online communication and thus could not foresee the future of the Internet age as today when the electronic exchanges have become a new normal.

42 To revert to the purpose and objective of the NYC is an application of analogy from public

effectiveness of arbitration in the settlement of private law disputes"[43]), the omission of electronic form in the clarification of "agreement in writing" in Article II (2) was not intentional and therefore the provision should be perceived as the general recommendation of written form leaving the room for the national law to decide based on their observation on what is "in writing". Furthermore, since telegram was the most modern form[44] of communication back then, Prof. Schellekens alleged that NYC "*does take into account the needs of legal practise*" because the inclusion of telegrams in its text was to "*make sure that arbitration could be agreed upon using the most modern means of communication*". It can be inferred that the recognition of telegrams in its text, *de facto* shows the openness of the NYC toward modern technology[45]. This is also the second view, identifying the clause in a non-exclusive manner, which is advocated by many eminent scholars: Prof. Born, Prof. Lew and Prof. Mistelis.[46] Drawing from both logical and legal reasoning, the non-exhaustive explanation of Article II is more plausible and EAA, consequently, should be recognized as in compliance with the requirement of written form.

The broader interpretation of the phrase "in writing" is also supported by UNCITRAL. The amended Model Law in 2006 removed the ambiguities regarding the requirement of written form, with Article 7 providing 2 options for the definition of arbitration agreement. Both of them are open to the electronic form. Notably, in the same year, UNCITRAL issued a Recommendation[47] which suggested the Contracting States should take a liberal approach to interpreting Article II of NYC according to which the requirement of written form for arbitration agreements shall be met by the e-communication. On another note, it is worth stressing that the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce

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international law system: Article 31 of The UN Convention on the Law of Treaties, Vienna 1969, UNTS, vol 1155.

43 Section 16 of the Final Act of UN Conference on International Commercial Arbitration.

44 Mohamed S. Abdel Wahab: ‚The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution', Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2004, Volume 21 Issue 2) p.154; See also Gabriela Kubicová: Electronic Form Of Arbitration Agreement, LL.M thesis in International Business Law, Central European University, p.26.

45 M. Schellekens: "Online Arbitration and E-commerce" (2002) 9 Electronic Communication Law Review 113, p.120; See also Morek (R.) (2008), Online Arbitration, Admissibility within the current legal framework, https://www.academia.edu/30536877/Online_Arbitration_Rafal_Morek?email_work_card=view-paper (last accessed: 24 February 2021)

46 See Born, G.: International Commercial Arbitration, Kluwer Law International, Hague, (2009); Julian D. M. Lew—Loukas A. Mistelis: Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration (2007), p. 130; See also Klausegger, Klein, *et al. (eds)*, *op. cit*., p. 90

47 The Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the New York Convention (Recommendation)

(Model Law on E-commerce) suggested that electronic form can be considered as the modern "functional equivalent" of the original one.

To sum up, the international regime tends to stipulate in favour of the EAA. Nonetheless, because most of the instruments are just a soft source without any binding effect on state courts and the interpretation of NYC is still disputed, the recognition of EAA, therefore, much depends on the perspective of national legislation.

The good news is that, over the last few decades, there has been an increasing trend in national laws towards the acceptance of electronic contracts in general and even the abolition of the requirement of written form.[48] On the regional level, it is not an exaggeration to say that the European Union is a proponent of E-agreements. Directive 2000/31/EC obliges the Member States to remove the restrictions on the use of electronic means for the conclusion of contracts.[49] Article 17 specifically addresses the out-of-court dispute settlement, stating that MS' legal system shall not hamper the use of out-of-court schemes for dispute settlement, including appropriate electronic means. That is also the reason why Prof. Schellekens drew a conclusion that "*In Europe little problems are to be expected with regard to [arbitration agreements concluded online and] national legislation on arbitration*".[50] For example Article 1031(1) of the German Code of Civil Procedure (ZPO) leaves room for the acceptance of future developments in communication by including "*other means of telecommunication which provide a record of the agreement*" in the legal form of arbitration agreements. Then paragraph (5) plainly states that electronic form can replace the written form demanded in paragraph (1), section 126a of the Civil Code ("Bürgerliches Gesetzbuch - BGB"). Interestingly enough, under Article 1507 of the French Code of Civil Procedure, the "writing" requirement is even excluded with respect to international arbitration agreements though it is not applied for domestic ones. Although officially left the Union since 2020, it is worth noting that the English Arbitration Act all along gives e-documents the same value as paper-based ones when Section 5(6) defines "writing" as inclusive of "*being recorded by any means*".[51] Notably, in 2014, the England and Wales Court of Appeal (Civil Division) pointed out in the case of *Lombard-Knight v Rainstorm Pictures Inc.*[52] that the communication through email is nowadays *the same as* fax messages and telexes in the early days and it is not rare to find the arbitration agreement in the exchange of emails[53], thus validating the arbitration agreement concluded therein.

48 Wahab, *loc. cit.*, p.155.

49 Art.9 (1).

50 Schellekens, *loc. cit.*, p. 119; See also Morek *loc. cit.*, p. 21.

51 Wahab, Katsh, Rainey, *op. cit.*, p.407.

52 [2014] Bus LR 1196, [2014] 2 Lloyd's Rep 74, [2014] BUS LR 1196, [2014] EWCA Civ 356.

53 Ibid, para.34.

Outside the European area, observing electronic documents as "written" is also commonplace. According to Article 6(a) of US Federal Uniform Arbitration Act, a valid arbitration agreement is the one *contained in a record* which is the *"information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form".*[54] The more clear-cut view supporting the use of emails can be seen in a case law when the Supreme Court of the State of New York ruled in 2004 in *Rosenfeld v Zerneck*[55] that a contract which is set up by email as the means of communication shall be accepted and validated.[56] Coming to the laws of Asian countries on this matter, the validity of EAAs is sometimes explicitly acknowledged under the law,[57] while in other cases, countries will leave the rule open.[58]

In conclusion, the majority of the global legal framework is becoming more and more open to the requirement of written form of EAAs. Based on the above analysis, a small concern should be raised regarding the validity of such an agreement simply because it was concluded in the virtual world, rather it would be well-accepted as a basis for an arbitration procedure and for serving as evidence of the recognition and enforcement phase. Given the fact that everything has gone online during this unprecedented status of global pandemic, the prosperity of electronic contracts in general and EAAs in particular is highly expected.

4. Electronic arbitration proceeding

If the use of technology was optional in the past, the Covid-19 crisis and its consequences have recently made online techniques become indispensable in arbitration proceedings. This section examines the e-proceedings to understand its pertinent concerns, and especially its current working mechanisms adopted and implemented by international institutions.

First of all, it should be noted that despite being an adjudication process, arbitration in general is based on the agreement of the parties. The fundamental principle of party autonomy which is recognized in both international and national legislation allows two parties to a dispute to agree on using electronic means to conduct arbitral proceedings.[59] Therefore, as long as the parties have given their full consent, there

54 Article 1, US Federal Uniform Arbitration Act.

55 4 Misc.3d 193 (2004), 776 N.Y.S.2d 458, 2004 N.Y. Slip Op. 24143.

56 Omar Husain Qouteshat, Kamal Jamal Alawamleh: The enforceability of EAAs before the DIFC Courts and Dubai Courts, Digital Evidence and Electronic Signature Law Review, 14 (2017), p. 56.

57 E.g. Article 19 of Hong Kong Arbitration Ordinance; UAE Federal Law no 6 (2018) on Arbitration, Article 7(2)(a) (More details can be found in Qouteshat, Alawamleh, *idem*).

58 Article 4 (4), 5(5) of Singapore Arbitration Act.

59 E.g. Article 19(1) of the Model Law; Article 182 (1) of Swiss Act on Private International Law 1987.

can be no objection solely to the electronic form of the proceedings. However, being a form of arbitration, a number of principles must be followed when conducting e-proceedings. The most important of which are the requirements of confidentiality (an advantage of arbitration required by the parties' agreement or by the institutions[60]) and due process (vital to the fairness and integrity of the proceeding). To ensure that swiftness and cost-effectiveness achieved by simplifying the procedure do not lead to the violation of the said elements, electronic arbitration must make good use of technology while securing the right of the parties of equal access to all information relating to the proceedings, the right to be heard, to be able to submit evidence and counterclaims in an equal ground, and to be notified about the submission of other parties; safeguarding the security of information flows while communicating through internet due to the fact that online data can easily be *intercepted, monitored, altered, accessed, downloaded or even destroyed*.[61] It is therefore essential that the arbitrator(s) and the rules of international institutions balance these *competing considerations* to create an efficient online arbitration process that ultimately results in an enforceable arbitral award.

It is not an overstatement to say that the Covid-19 situation has a great impact on the arbitral institutions' determination to get rid of any remaining resistance and hesitation about providing online services. Since the parties to the disputes were unwilling or unable to wait for the crisis to subside, the institutions therefore had to take the lead in the arbitration community and take action immediately. In April 2020, together with the International Federation of Commercial Arbitration Institution, 12 arbitral institutes issued a joint statement on *Arbitration and Covid-19* emphasizing that they would work together to resolve pending cases without undue delay and suggesting that the parties and the tribunal should cooperate to find possible solutions, with particular emphasis on the use of digital technologies (including virtual hearings). During the situation as such, numerous international institutions issued a guidance to the parties and the tribunals and even adopted new rules enhancing the role of online techniques in the arbitration procedure.

60 E.g. Article 30.1 of London Court of International Arbitration (LCIA) Arbitration Rules 2014. State Court decisions also supported the confidentiality of the arbitration process: in *Dolling-Baker v. Merrett & Anor* [1 W.L.R. 1205, March 21, 1990]; in *Esso Australia Resources Ltd. v. Plowman* [128 A.L.R. 391, April 7, 1995]; See Klausegger, Klein, *et al. (eds)*, *op. cit.*, p. 101. The 2018 International Arbitration Survey of Queen Mary University of London: The Evolution of International Arbitration revealed that 87% of participants believe that confidentiality in international commercial arbitration is of importance and should rather be an opt-out (p. 3).

61 Wahab in Wahab, Katsh, Rainey, eds., *op. cit.*, p.412.

4.1. E-communication

Communication is the backbone of arbitral proceedings ranging from the case-filing to the delivery of the arbitral award, which should normally be done by a courier service or registered mail to ensure that a record of receipt can be presented when needed. The failure to effectively exchange information among parties can create a ground for annulment of the award or for the refusal to recognize and enforce it on the basis that the parties have not been given proper notice of the arbitral proceedings. Since technological communication has developed strongly and rapidly in the last decades, the majority of the arbitration institutions included in their rules the sending of written communications via electronic means such as facsimile, email, etc. provided that a proof of transmission (sending) is generated.[62] In the midst of the lockdown and curfew, the traditional communication is sometimes impossible causing challenges for parties to initiate the arbitration process. Namely, the request could not be submitted in hardcopy due to the parties' wish or, in some cases, the requirements of the institutions.[63] The guidelines and protocols issued by the institutions endorsed the electronic form of any of the parties' submissions. For instance, in the urgent communication and the Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, ICC *strongly advised that all the communications with the Secretariat of the ICC be conducted by email* including requests for arbitration (Requests) and other related documents. Though both of these are just recommendations as measures in the extraordinary situation, a stronger move was made in October 2020 when ICC unveiled the 2021 ICC Arbitration Rules, entering into force in January 2021. Accordingly, the presumption that the submission must be done by hardcopy[64] was eliminated, instead, no specific form was stipulated and the traditional submission *by delivery against receipt, registered post or courier* now becomes optional when requested by the parties. Likewise, American Arbitration Association-International Center for Dispute Resolution (AAA-ICDR)

62 Article 3 ICC Rules of Arbitration 2017; Article 4 LCIA Arbitration Rules 2014; Article 5 German Arbitration Institute (DIS) Arbitration Rules 2018; Article 2.16 Hong Kong International Arbitration Center (HKIAC) Administered Arbitration Rules; etc. See Erik Schäfer, 'Case Study: The Institutional Perspective' in Pier, Aschauer (eds), *op. cit.*, p.89. See also Article 3, Rules of Procedures of the PAC attached to the Hungarian Chamber of Commerce and Industry (HCCI).

63 E.g. Article 3, Swiss Rules 2012 of Swiss Chambers' Arbitration Institution (SCAI); See also Article 4.3 of Arbitration Rule 2013 of Finland Arbitration Institute (FAI). However, the new 2020 rules taking effects on 1st January 2021 provides that the documents can be submitted in hardcopy or by electronic means provided that a record of the transmission can be presented (Article 4.1); DIS Arbitration Rules 2018, Article 4.2.

64 Article 3 of the 2017 Rules required that documents "*shall be supplied* ***in a number of copies*** *sufficient to provide one copy for sent to each party, plus one for each arbitrator, and one for the Secretariat*"

also expressly asked for the electronic-only submissions of Requests and other initiating documents.[65] Not staying out of this trend, in an effort to response to Covid-19 situation, LCIA also announced that all new Requests should be filed through its online filing system or by email.[66] Notably, an update to LCIA Arbitration Rules has been released, coming into effect on 1st October 2020, demonstrating *the shift to electronic communications as the norm, rather than just an option*[67]. Specifically, Article 4 of the 2020 Rules unequivocally requires the submission of any written communication to be done electronically and the communication in alternative methods are only utilized when permitted by LCIA or by the Arbitral Tribunal. The International Center for Settlement of International Dispute (ICSID) even took a further step to reduce the reliance on paper-filing in their cases by applying the new "*default rules*" since 16th March 2020, requesting electronic-only submission of the documents and any accompanying details.[68] Online filing will be performed by email and secure document sharing platforms (Box)[69] that are available to the parties and Tribunals in ICSID cases. Paper-copies were only required if requested by a party, meanwhile, arbitrators were also encouraged to use electronic filings.

Notwithstanding the acceleration of a more digitalized proceeding, one other extremely useful online technique for arbitration - the electronic file management - is claimed to remain lacking.[70] Online case management can help achieve the security of information exchanged including data confidentiality, integrity (i.e. no unauthorized changes to the documents) and availability (i.e. data are available to authorized persons whenever needed). With this electronic file repository, all the pertaining details of the case will be stored in a systematic order where the parties, arbitrator(s) and administrator can easily view, browse, search, cross-reference, compare, annotate,

65 See https://go.adr.org/covid19-flattening-the-curve.html; (Last accessed: 19 December 2020)

66 See https://www.lcia.org/lcia-services-update-covid-19.aspx (Last accessed: 19 December 2020)

67 Meyerlustenberger Lachenal, Christian Fischer, Urs Boller: The LCIA Updates its Arbitration Rules, Available at: https://www.lexology.com/library/detail.aspx?g=5dc589df-5fe9-41ab-92d1-0f383c90550f&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2020-12-10&utm_term. (Last accessed: 19 December 2020)

68 Available at: https://icsid.worldbank.org/news-and-events/news-releases/icsid-makes-electronic-filing-its-default-procedure?CID=359 (Last accessed: 19 December 2020)

69 The Parties are asked to contact ICSID Secretariat for the creation of a folder on Box and access instructions before sending the Requests via email.

70 Working Group on LegalTech Adoption in International Arbitration, Protocol for Online Case Management in International Arbitration, p.5. Available at: https://protocol.techinarbitration.com/p/1 (Last accessed: 18 June 2021)

retrieve, display or print out the documents.[71] It is handy especially for complex cases with a large number of documents, making it faster when searching for information and also avoiding the need to carry heavy bundles of paper back and forth. Moreover, the authentication of the information sent and received by the parties is better ensured by this tool compared to that of email communication. Though the idea of this tool is not new[72], at present only few providers offer the platform as such. For example, the World Intellectual Property Organization (WIPO) first introduced its Online Case Administration Tools (eADR) in 2005, enabling parties and neutrals (mediators, arbitrators and experts) to share and access case-related information through a single and secure portal. WIPO's eADR system is used in some 30% of WIPO Arbitration and Expedited Arbitration cases.[73] AAA-ICDR also launched a secure online platform where parties and arbitrators were able to file case documents even prior to the pandemic (AAA WebFile). Other notable services that can be mentioned are the digital platform of Arbitration Institute of Stockholm Chamber of Commerce (SCC)[74], and thevdigital case management system of the Russian Arbitration Center at the Russian Institute of Modern Arbitration 2017 (The English version has been instituted in October 2018).[75]

Regarding the deliberations, practice shows that it has already taken place via email, telephone, and even video-conferencing, if needed.[76] For example, Italian Code of Civil Procedure expressly states in Article 837 that *"the award shall be deliberated … in personal conference or in video conference*…". The Swiss Supreme Court also held that arbitrators are free to conduct deliberation by electronic means with certain conditions.

With respect to the delivery of the final award to the parties, the issue of electronic delivery does not pose any complicated challenges toward the procedure since communication by electronic means throughout the process is now welcomed and has become commonplace all over the world.

Broadly speaking, the shown examples indicate that a transition to electronic communication as a norm is now widely adopted by the laws of most countries and the regulations of eminent arbitral institutions. The change in the rules of the

71 Hörnle, *loc. cit.*, p.3.

72 This matter has already been analyzed by Prof. Hörnle in 2002, and ICC actually launched its innovative case management product called "NetCase" in 2005 though it is no longer offered.

73 https://www.wipo.int/amc/en/eadr/ (Last accessed: 20 December 2020).

74 From May 2020, SCC provide free Ad hoc Platform during the pandemic

75 Sven Lange, Irina Samodelkina (Busse Disputes), Digital Case Management in International Arbitration, Kluwer Arbitration Blog, August 13, 2019. Available at: http://arbitrationblog.kluwerarbitration.com/2019/08/13/digital-case-management-in-international-arbitration/ (Last accessed: 20 December 2020).

76 Wahab, Katsh (2018) in Piers, Aschauer (eds), *op. cit.*, p.38.

institutes which turn electronic communication from an alternative method to the default one has manifestly demonstrated their strong determination and intention to continue promoting this "green concept". Since the role and advantage of online arbitration have been tested and observed during the time of global crisis, parties now are more open to that method and are increasingly adapting to its use. This fact leads the writer to the conclusion that, even when the pandemic has passed and traditional communication becomes available again, this paradigm shift is likely to remain and flourish in the future. It should be noted that the Working Group on LegalTech Adoption in International Arbitration[77] alleged that the adoption of an electronic case management in an appropriate manner especially in filing and archiving information would further enhance the safety, efficiency and consistence of arbitration procedures. This can give the institutions, service providers, and the state courts plenty intriguing food for thought.

4.2. E-hearing

In this paper, online hearing, virtual hearing or remote hearing and electronic hearing will be used interchangeably, construed as the use of ICTs to simultaneously connect the parties located in different places when conducting arbitral hearings. From a legal point of view, it should be noted that most national laws and the rules of arbitration institutions provide for, in their regulation, the possibility to conduct an online hearing, either in a specific way or in an open way.[78] There is no restriction imposed by the current regulatory framework on conducting E-hearings so it depends on the parties' agreement and the tribunal's decision in individual cases.

One possible situation during the virus outbreak with travel restrictions is when the parties have agreed in advance to hold the hearing offline and insist on doing

77 The Working Group was the collaboration of 6 big law firms including Herbert Smith Freehills, Ashurst, CMS, DLA Piper, Hogan Lovells and Latham & Watkins, the protocol of which issued in the beginning of December 2020 aims at promoting a global comprehensive approach toward online case management.

78 E.g. Article 1071.b(4) of the Dutch Code of Civil Procedure (DCCP) (See also Maxi Scherer (2020), Chapter 4: The Legal Framework of Remote Hearings, in Maxi Scherer, Niuscha Bassiri, Mohamed S. Abdel Wahab (aut[s]; ed[s]), International Arbitration and the COVID-19 Revolution, Kluwer Law International, p.73); Both 2020 and 2014 LCIA's Arbitration Rules explicitly allow the hearing to be held virtually *by conference call, video conference or using other communications technology*… ;See also Article 25.1 of the Arbitration Rules of Vietnam International Arbitration Center; SIAC Rules 2015 does not directly address the remote hearing but it provides the possibility for the Tribunal to hold meetings with parties in any other means. (See Michael Ostrove, et.al., A Review Of Key Developments In Response To Covid-19-Online Arbitration Hearings, DLA Piper, September 2020, p.5. (DLA's second study on virtual hearing)).

so, while the tribunal want to order an online hearing to ensure the efficiency and expedition of the proceedings.[79] It is submitted that in this case, party autonomy prevails and the tribunal should support the preference for no online hearing rather than prioritizing swiftness.[80] On the other hand, more contentious issues arise where there is a lack of agreement between the parties, where one party requests an online hearing and the other party opposes it, alleging that the virtual hearing does not satisfy the requirement of a hearing. This assumption may stem from the wording of the regulation. For example, Section 1047 of ZPO states that the Tribunal shall decide to hold an *oral hearing* subject to the agreement of the parties. Or Section 24 of the Swedish Arbitration Act provides that "*the arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally".* However, a virtual hearing can fulfil the most important factors that a traditional hearing has. During an online hearing, presentations of the cases are also made orally and all the communication including legal arguments, evidence introductions, witness testimonies are performed simultaneously, with the mere difference of the involvement of technology to transfer the messages to the other parties through audio or video.[81] Furthermore, the objecting party may invoke the right to a hearing and to be treated equally to argue that the online hearing would be viable only if all parties agree on it. Yet, would the right to a hearing be understood as a physical hearing? The answer could highly be negative. In September 2020, a study on the subject "*Does a Right to a Physical Hearing Exist in International Arbitration*"[82] was formally launched by Co-editors Giacomo Rojas Elgueta, James Hosking and Yasmine Lahlou, in collaboration with the International Council for Commercial Arbitration (ICCA). The recently released report from Italy[83] and Australia[84] manifestly show that there is no right to a physical hearing in arbitration under their *lex-arbitri* jurisdiction. In the United States, neither the Federal Arbitration Act (FAA) nor the state laws on international arbitration provide for the right to a physical hearing. The same approach was clarified by ICC recently because the wording of its 2017 Rules caused a debate on the need of a physical hearing. Namely, Article 25 (2) regulated that "…*the arbitral tribunal shall hear the parties together in person if any of them so requests or…*". The phrase "*in person*" was used by the opposing party to call for a

79 This duty is imposed on the tribunal in the rules of many institutions. For example: Article 22.1, ICC Rules 2021; Article 14.1 (ii), LCIA Rules 2020; Article 19.1 SIAC Rules 2016; Article 20.2, AAA-ICDR Rules 2014, etc.

80 Scherer (2020) in Scherer, Bassiri, Wahab (aut[s]; ed[s]), *op. cit.*, p.77

81 *Ibidem*, p.75.

82 For more reports from the project which have been updated, see https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration (Last accessed: 28 February 2021).

83 *Ibidem*, Italy report

84 *Ibidem*, Australia report.

physical hearing. ICC Guidance Note confirmed in Section III, paragraph 23 that the language of the provision meant to provide the parties with the opportunities for "*a live, adversarial exchange*" and did not mean to exclude hearings held by virtual means.[85] To avoid any remaining doubt, ICC 2021 Rules on hearings provide that they *will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*.[86] Hence, it can be concluded that holding an E-hearing does not violate the right of the parties to be heard.

The remaining question is: can the tribunal order a virtual hearing if the parties have conflicting views on it? At both the international and national levels, without a choice of the parties, an arbitral tribunal has the power to conduct an arbitration in a manner that it considers appropriate.[87] Under the rules of the institutions, a tribunal is typically conferred with wider discretion to ensure the integrity and efficiency of the proceedings without undue delay.[88] Notably, two recent state court decisions have plainly affirmed the courts' jurisdiction to conduct a virtual hearing even if one party opposes it. The first one is the decision of the Austrian Supreme Court (*Oberster Gerichtshof,* "OGH") made on 23th July 2020. The court rejected the respondent's objection to the virtual hearing ordered by the arbitral tribunal holding that the court retained discretion to conduct the hearing and that the virtual hearing was commonplace which satisfied the right stated in Article 6 of ECHR.[89] The court ruled that the provision not only guaranteed the right to be heard but also effective access to justice in order to enforce or defend rights. This decision established the Austrian court's view that due process can undoubtedly be achieved during a virtual hearing, and this case was the first national supreme court decision worldwide to address this issue.[90] The second remarkable case is the one decided by the district court in Illinois, U.S in the case of *Legaspy v. Fin. Indus. Regulatory Auth., Inc*[91], where the respondent opposed to the virtual hearing decided by the

85 ICC Guidance Note, p.5.

86 Article 26.1, ICC 2021 Rules.

87 Article 19.2 Model Law, Article 182.2 of Swiss Private International Law

88 See e.g.: Article 22.2 of ICC 2021 Rules; Article 25.1 of Arbitration Rule of Vietnam International Arbitration Center; Article 19.1 SIAC Rules; Article 21.1 of Australian Centre for International Commercial Arbitration (ACICA) 2016 Rules; Article 19.2 of LCIA Rules 2020 even encourages the tribunal to make the best of technology by giving them the "*fullest authority*" to command a remote or virtual hearing, or a combined form.

89 See Fox Williams LLP - Peter Ashford, Ben Giaretta: Zoom is the new normal! Available at: https://www.foxwilliams.com/2020/10/29/zoom-is-the-new-normal/ (Last accessed: 24 December 2020).

90 Maxi Scherer, et. al.: 'In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns', Kluwer Arbitration Blog, October 24 2020, (last accessed 3 March 2021).

91 No. 20 C 4700, 2020 WL 4696818 (N.D. Ill. Aug. 13, 2020).

court and sought for preliminary injunction from the court. The court overruled its submission and recognized that the court was entitled to decide on procedural matters of the process. Not only in this case, the U.S. Courts have generally held that the arbitrators have broad discretion to decide on the hearing, including the necessity and the form of the hearing, unless otherwise agreed by the parties.[92] In fact, a study showed that 71% of the courts and tribunals questioned upheld procedural fairness during remote hearings.[93] In Hungary, nonetheless, even though some of the hearings were already held online in the spring of 2020, the ongoing valid consistent customary law of the HCCI requires that all of the arbitrators and parties should have given a prior voluntary consent to E-hearings. According to the evolving practice, it is useful to ask the parties already in the procedural order, whether they agree to a potential online hearing in the future.

In addition to the relevant legal framework, some practical issues should also be highlighted. The first issue is the choice of a suitable platform for an E-hearing to be based, which plays a vital role in achieving a safe and efficient outcome. Institutions can provide the parties with the service developed by themselves (SIAC and Maxwell Chamber worked together to create a virtual ADR service) or a wide range of platforms offered by neutral suppliers can also be used. The second issue related to virtual hearings that has appeared so far is the reliance and effectiveness of the witness testimonies. It is alleged that the documents used by the witness are not checked (e.g. Austrian case mentioned above). A spectrum of solutions has been raised to eliminate this issue. For instance, in the Austrian case mentioned above, the OGH suggested that the witness was required to look directly to the camera, to use the wide angle camera showing the entire room and/or keep their hands visible at all times to avoid being coached by the counsel standing in front of the screen. Another possible solution to consider is to send a representative of the parties or a member of the tribunal to the place of the investigation. This can hardly be done under the travel restrictions at the current time but in future cases the parties and the tribunal can take it into consideration since it would still be more economical than having a full team of lawyers come to the venue of the physical hearing. Moreover, it may be a reasonable option to use a neutral facility provided by a trusted third party such as an arbitration institution hearing room, a court room, a law firm or a notary firm.[94] The third issue identified is timing. Since the parties might be in different locations, even on different continents of the world, a difference in time zone may

92 See *supra* note 87, U.S Report, p. 3-4.

93 Jean-Pierre Douglas-Henry, Ben Sanderson: Virtual hearings: Empirical Evidence from our global experience, DLA Piper, 13 May 2020, p.10 (DLA Piper's first study on virtual hearing).

94 Hörnle, *loc. cit.*, p.4.

cause some problems such as the time of the hearing may be too early or too late[95]. This matter entails the tribunal's close attention when establishing a remote hearing to ensure fairness to the parties. In short, E-hearings have some problems but they are not insurmountable. In each case, it requires the cooperation of the parties and the court to come up with the most appropriate method.

5. Electronic Arbitral Award

The electronic arbitral award presented in this section is the one that is rendered online and digitally signed. In practice, there is no doubt that an enforceable award is the final and highest goal of the parties when choosing arbitration to solve their dispute. When the losing party does not voluntarily perform its obligations, recourse to state court for the recognition and enforcement of the arbitral award is a must on the understanding that some requirements should be met. The first matter that needs to be considered is the form of the award which is stipulated in the law of the seat of arbitration. A few states leave this matter for the parties to decide,[96] while the laws of most countries require that the award shall be in writing and the signature of the arbitrator(s) must be included[97]. However, since EAA is now widely used and is alleged to be a functional equivalent to the paper-based one, the same liberal approach should apply to arbitral awards and no concerns shall arise with respect to its electronic form. The second condition that has already been mentioned is the signatures of the arbitrators affixed to the award. In the international context, this requirement is enshrined in Article IV (a) of NYC which calls for the *duly authenticated originals or duly certified copies* of the award when a party applies for recognition and enforcement. Though physical signature of the award is not explicitly required, the paper-based form with the signature of the arbitrator(s) is the global norm. The signature of the arbitrators not only meets the requirement of being "original" but also the requirement of being "duly authenticated". It serves as the endorsement of the integrity of the content of the text at the time of signature[98] meaning that the

95 In the Austrian case mentioned above, the respondent claimed that they suffered a significant disadvantage because the hearing took place at an early hour in their time zone.

96 E.g. Section 52(1) of the English Arbitration Act 1996; Article 189(1), Swiss Private International Law Act.

97 See for instance Article 31 (1) of Canadian Commercial Arbitration Act; Article 1057 (2) of DCCP; Article 1054 (2) of ZPO; Art. 823 (incorporated into Title VIII of Book IV of the Italian Code of Civil Procedure by the Italian Arbitration Law (1994)); Art. 43(1) of the Egyptian Arbitration Act (1994); and Art. 31(1) of the Russian Arbitration Act (1993). See also Wahab, *loc. cit.*, p.164. This is also stated in Article 31(1) of Model Law and Article 34(2) of UNCITRAL Arbitration Rules.

98 Schäfer (2020) in Piers, Aschauer (eds), *op. cit.*, p.154.

information stated therein remains complete and unaltered[99]. It also guarantees the authenticity of the award by indicating the identity of the signatory, which is the arbitrator.[100] The question here is whether the electronic arbitral award could fully substitute a physical signature in achieving the goal and purpose that signature was required. The concept of electronic signature is defined in Article 3(10) of the European Union Regulation on electronic identification and trust services for electronic transactions in the internal market[101](e-IDAS) that electronic signature "*means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign*". Additionally, Article 25.2 manifestly recognizes that "*a qualified electronic signature shall have the equivalent legal effect of a handwritten signature*". Based on these provisions, an electronic signature can verify the authorship of the arbitrators in the same way as a physical one, confirming that the arbitrator decided on the matter specified therein and thus fulfilling the purpose of authentication. In Asia, an electronic signature is also accepted by many countries to have the same legal status as a traditional one (if certain requirements are met). For example, Article 6 of the Hong Kong Electronic Transaction Ordinance provides that an electronic signature satisfies the requirement of a person's signature on a document. [102] As per the requirement of being "original", it should be mentioned that according to Article 8 of the Model Law on E-Commerce, a requirement to present information in its original form *can be met by an electronic data message* if a reliable assurance is provided and it is capable of being displayed to the concerned person. It is submitted that an electronic certificate added by a computer system to the electronic award can be regarded as if it was a stamp certifying the originality of the e-award.[103] Consequently, a digital signature can ensure the originality of an electronic award. In conclusion, an electronic award with the arbitrators' electronic signatures can definitely certify that the content is original and authenticated, thus, fulfilling the requirements of Article IV of NYC. Notwithstanding this, once again, the acknowledgement of the equivalent effect of a digitally signed E-award depends on the jurisdiction where the arbitration is seated and the law of the country of enforcement. In fact, many countries have gone a long way in recognizing digitally signed electronic arbitral awards. For example, the U.S. Federal Arbitration Act provides that "*an arbitrator shall make a record of an award. The record must be signed or*

99 Article 8.3(a) of UNCITRAL Model Law on E-Commerce 1996.

100 Morek, *loc. cit.*, p. 37.

101 Regulation 910/2014/EU of The European Parliament and of The Council, repealing Directive 1999/93/EC.

102 Other examples: Chapter III.5, Indian Technology Act 2000. See also Vietnamese Law on Electronic Transaction 2005, Article 24; Law of The Republic of Indonesia Concerning Electronic Information and Transactions, Article 11; etc.

103 Wahab in Wahab, Katsh, Rainey, eds., *op. cit.*, p. 427.

otherwise authenticated…"[104], which affirms the possibility for the use of e-signature. DCCP also states under Article 1072b(3) that the award can be made in electronic form providing that an electronic signature, complying with the conditions of the Civil Code, is included. In addition, ZPO stipulates that the written form can be replaced by the electronic form with a qualified electronic signature. Though it is not explicitly stipulated, this conclusion can be inferred from the provisions of law (Section 1055, Section 130b).[105] Besides, since English law leaves the matter for the parties to decide, the LCIA Rules 2020 also provides in Article 26.2 that "*any award may be signed electronically*". It can be seen that almost all the provisions states that only qualified electronic signature satisfies the conditions stated above. The arbitrator, as a result, must be cautious when using such technology to avoid being denied the validity of the electronic signature.[106] By and large, the use of electronic arbitral awards is expected to become commonplace in the near future, since many jurisdictions have joined the trend to legalize the validity of electronic documents and electronic signatures.

6. Conclusion

Discussed throughout the present article, the idea of combining the cutting-edge technology and the dispute settlement methods in general and arbitration in particular was raised a long time ago, but it was not until the sudden appearance of the Covid-19 pandemic that the need for such a mechanism was best demonstrated. During the global crisis, electronic mechanisms have come to our life in a natural way, demonstrating the great benefits that they could bring to the traditional procedures regardless of our wishes and have actually salvaged the operation of the dispute resolution industry. Drawing from practice, the faster the adaptation, the less interruption and the more likely it is that institutions can provide their services as usual without any delay. In addition to the establishment and consolidation of its position, the greatest success that E-arbitration has achieved in the less-than-one-year period is the recognition of the arbitration community and the adoption in arbitration institutions' working system. As discussed above, a number of institutions provided guidelines or protocols regarding online proceedings and even revised their rules officially acknowledging e-communication, virtual hearing, etc. On the

104 Section 19.1 of U.S. Federal Arbitration Act, intended to be compatible with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. § 7001 (Wahab, *ibidem*, p. 426; See also Reinmar Wolff (2018), 'E-Arbitration Agreements and E-Awards: Arbitration Agreements Concluded in an Electronic Environment and Digital Arbitral Awards' in Piers, Aschauer (eds), *op. cit.*, p.169.)

105 *Ibidem,* p.158

106 E.g. Article 32 of e-IDAS regulates the requirements for the validation of qualified electronic signatures.

other hand, this is also a great opportunity for institutions, parties and arbitrators to explore, examine and be accustomed to E-proceedings. By sharing information and finding solutions, all the stakeholders have gained experience, confirming the possibility of conducting online arbitration procedures. Moreover, it encourages them to continue taking advantage of the power of technology to manage and promote the efficiency of arbitration.

Since the interest in utilizing ICTs in arbitration proceedings is increasing, the digitalization of the method will undoubtedly continue. In fact, when asked, almost all the eminent institutions noted that the arbitration practice is *not likely to return to pre-pandemic state* but the issued policies and procedures will *remain in place*.[107] In Hungary, the pandemic situation has already contributed a lot to the development of the application of several online techniques and tools in Hungarian arbitration, and the President of the PAC has also underlined that during the state of emergency, the preparatory rehearsals, and the online case management conferences, the experiences are *generally good*, therefore he suggested that these measures should be maintained for the sake of *the faster conduct of procedures*. This leads to the conclusion that electronic arbitration is expected to flourish and become a new normal in both wholly online and hybrid mechanisms everywhere.

107 Patricia Louise Shaughnessy (2020), Chapter 2: Initiating and Administering Arbitration Remotely, in Scherer, Bassiri, Wahab, *op. cit.*, p.46.

Osztovits, András[1]

In the web of technology - the present and possible future of private enforcement

Introduction

Societal expectations of justice vary in space and time. Yet, looking back over the history of mankind, several constants emerge that have almost always been present in the way courts operate: to reach a just (i.e. not arbitrary) decision, preferably as soon as possible. It is precisely the latter, the time factor, which evolves with social and economic changes. Perhaps one of the best-known and most striking examples of the concept of time is that of the medieval cathedral builders, who began their work in the knowledge that they would never see the end of it, the finished work. From then on, one of the common effects of change is a shrinking sense of time.[2] As the time spent travelling, producing goods and getting communication to its destination becomes shorter and shorter thanks to each invention, the members of society become increasingly impatient.

This process has been given a new impetus by the Industrial Revolution of the 21st century, modelled on the Industrial Revolution of the 17th century. The digital revolution of the early 21st century, in which the ever smarter devices and services available have fundamentally redefined the concept of time: if a message sent to a smart device does not receive a reply within minutes, we are puzzled, whereas before the digital revolution, before the advent of email, we were content to receive a reply to a letter sent by post in a week.

The state (the branches, subsystems and service providers that carry out state functions) must recognize these changes, understand the reasons for them and respond accordingly. This is also the case with the judiciary, perhaps the most complex and specific of all state functions, and the initial question to be asked in this context is: what are the most important social and economic expectations of the judiciary in the first half of the 21st century, what should be preserved from the organisational

1 University Professor, Department of EU Law and Private International Law

2 Almost all disciplines deal with the concept of time, but here we only refer to Sören Kierkegaard's Critique of Time, published in 1845, in which the Danish philosopher distinguished between the actual passage of time (objective time) and its human perception (subjective time). The same duration may seem long to one person and short to another, taking into account their preconceived expectations of the event in question.

and procedural principles that have been established over the past centuries, and how can its service character be enhanced?

The effects of the changed circumstances are clearly visible in the area of adjudication: for years now, fewer and fewer cases have been coming before the courts, while at the same time the number of ADR platforms and the number of disputes brought before them is growing at an accelerating pace. In our study, we seek to answer the "whys" of this process, starting from the hypothesis that the judiciary as a public function has reached a crossroads: is it renewing itself or is it becoming secondary to ADR platforms, steadily losing its importance? To this end, Chapter I outlines the current key features and shortcomings of private enforcement. In Chapter II, we will examine the information technology solutions already known, from the point of view of which ones could already now or in the near future substantially increase the efficiency of the administration of justice, reduce the duration of litigation and adapt to the changed expectations and challenges. In the Synthesis, concrete proposals are made, in the hope that they can serve as a starting point for further academic debate.

I. The present of private enforcement

In this chapter, we could not attempt to describe all the procedural organizational models known in the 21st century, but we will highlight - without claiming completeness - the common features that can be found in the judicial systems of almost all developed countries. We concentrate primarily on the difficulties and problems which the developments in information technology presented in the next chapter may provide solutions to.

1. Judicial and procedural principles have become dogma

These principles are contained and safeguarded by norms at the highest level of the legal hierarchy: international conventions, constitutions and procedural laws. Thanks to the practice of regional courts and national constitutional courts, respect for these principles is so deeply rooted in legal thinking that the first question to be asked in the event of any change of organizational or procedural model, or even of any amendment to legislation, is whether the new provision is compatible with and can be integrated into this system of principles and frameworks.[3] There is a

3 A good example of this is Act CXXX of 2016 on the Code of Civil Procedure, the ministerial explanatory memorandum of which states that the aim of the new Code of Civil Procedure is to comply with international and national constitutional requirements. In the German-language legal literature in particular, the title of some sources already indicates whether certain changes related to information technology can be integrated into the current

lack of analyses of the systemic functioning of the judiciary that approach possible new procedural and organisational changes from the 'user's side', looking at how they serve the interests of legal entities and how much more 'attractive' it will be for them to use the judicial route.

2. The courts are cumbersome and time-consuming

The unconditional respect of the principles mentioned in the previous point necessarily results in the cumbersome and time-consuming nature of litigation and non-litigious proceedings before the courts: if every single rule of guarantee must be respected in every single procedure, then, regardless of the specific dispute or substantive issue, only a protracted procedure can lead to a decision on the merits.

Another specific feature of court proceedings is the fact that the service is linked to a place or building. The main purpose of the strict rules on jurisdiction and competence, which are linked to the right to a legal judge as one of the most important principles of justice, is to make it possible to determine which court has the power and the obligation to hear a particular dispute. If we add to all this the constitutional requirement for each judge to judge each case independently and impartially, we find a contradiction in the meaning of the right to a judge under the law: does it matter whether one court or another is involved in the case, are the judges in one court or another more independent, can a different decision be expected here than there. From the parties' point of view, the question of the court to be seised is primarily reduced to the geographical distance, i.e. as close as possible to them, so that it becomes less and less of a problem to be in the courthouse in person in time. The importance of this aspect diminishes if the proceedings are conducted partly or entirely online, in which case the rules on jurisdiction and competence are also partly irrelevant.

At this point, it is worth mentioning the question of the organization of the judiciary, which in most countries is held together almost exclusively by respect for historical tradition. Generally speaking, the smaller the geographical area of a country, the less fragmented its judicial organization.

3. New competitors in the justice market

There is a clear tendency for large service providers and e-commerce companies to seek to provide efficient and quick solutions to disputes related to their services, primarily through dispute resolution procedures on their own platforms. These include E-bay and Alibaba. These providers have quickly recognized that offering a

fundamental principle environment, see e.g. Anne Paschke, Digitale Gerichtsöffentlichkeit - Informationstechnische Maßnahmen, rechtliche Grenzen und gesellschaftliche Aspekte der Öffentlichkeitsgewähr in der Justiz. Duncker & Humblot, 2018, Berlin.

fast and efficient solution to disputes over contracts on their websites can increase the number of visitors to their websites and the number of users of their services.[4] They were also helped by the fact that all the data on the contract was available and retrievable on the platform: when the contract was concluded, with what content, between whom, so that the parties did not have to spend time gathering evidence. One of the lessons learned from the development of the E-bay platform was that the first version was simplified years later in an update to reduce the number of questions and data that parties had to answer in order to start the procedure. This simplification has led to a surge in the number of claims, suggesting that the simpler the means of accessing an enforcement procedure, the more attractive and accessible it becomes to more parties.[5]

The data on the success of these platforms lead to a number of conclusions, one of which is that parties need a specific solution to their private legal dispute, not necessarily a court judgment.

4. Diverging roles and interests between the legal professions and between the various actors in the process

The current model of civil litigation is, in a very simplified way, as follows: the judge's task is to decide the dispute, the legal representative (lawyer)'s task is everything else: to fill in the party's lack of legal knowledge, to think through the possible outcome of the case, to consider the tactics, to collect and submit evidence, etc. In the litigation process, the judge also has different tasks in relation to the representation, which in the models of different countries varies from passive to active. Everywhere, the judge has a duty and a legal obligation to conclude the case within a reasonable time. It is interesting to note that there is no such requirement in relation to legal representation, at most a similar obligation can be derived from the requirement of good faith. The remuneration of the lawyer also works against a speedy conclusion, a connection which is also rich in legal literature.[6]

5. Difficult to plan duration, difficult to predict substantive decision

It is generally accepted in the field of criminal science that the greatest deterrent to committing/repeating a crime is exposure - the greater the proportion of offenders

4 Ethan Katsh - Orna Rabinovich-Einy: Digital Justice. Oxford University Press, 2017, New York; pp. 155-157 - hereafter Katsh-Rabinovich

5 Katsh-Rabinovich p. 160.

6 Gergely Czoboly: The protraction of civil lawsuits. In: András Jakab - György Gajduschek (eds.) The state of the Hungarian legal system. Hungarian Academy of Sciences Research Centre for Social Sciences, 2016, Budapest; pp. 758-776.

who fear being convicted, the more they will consider whether it is worth the risk. The same applies to temporality: the closer in time the offence and the punishment are, the greater the deterrent effect of the latter.

The situation is similar in civil disputes, especially in property disputes, where the debtor knowingly and willingly does not pay, but is only interested in stalling and in the disappearance of his assets on which the enforcement is based. If the civil proceedings are concluded as close as possible to the date of the debt's expiry, in a predictable manner and with a predictable outcome, this will at least force the debtor to reach an agreement. The timeliness and duration of civil proceedings is also of paramount importance, and is directly proportional to the effectiveness of enforcement.[7]

The lack of uniform, predictable case law on a particular legal issue may also act as a deterrent to resorting to the courts. The development and implementation of uniform case law, which is a cornerstone of legal certainty, is a task typically for national supreme courts, which have different means and methods for achieving this. What they have in common is that, as time goes on, more and more previous decisions and guidelines have to be kept in mind, their coherence maintained or revised because of changes in the law. In countries where precedent or quasi-precedent exists, it is a task beyond human capacity to cull the relevant judgments from tens of thousands of decisions, without precise methodology and technical assistance.

6. Lawsuit on paper

In civil litigation, everything is done on paper, and the fact that communication (service) between the parties and the court is now largely done electronically has not changed this. Judges still have to read through towers of papers several metres high before preparing for a hearing or passing judgment. Since, with the exception of a few countries, a judge almost always has to hear several cases in parallel, the paper-based administration of justice is a major limitation on the efficiency of judicial work. At present, therefore, what and how the judge has noted from the information in the case file depends solely on his or her individual capacity to absorb and remember, which in itself makes the outcome of the case a matter of chance.

II. The possible future of private enforcement

Thinking about the future does not necessarily mean thinking about the difficult-to-predict distant future. Indeed, information technology, at its current stage of development, already offers solutions that could provide realistic help in overcoming or at least alleviating the difficulties outlined in the previous chapter. Although it is

7 For a scholarly analysis of the temporality of civil proceedings, see László Gáspárdy, The time dimension of civil proceedings. Akadémiai Kiadó, 1989, Budapest.

difficult to schedule each individual development - its implementation and realisation depend on many factors - the following proposals could be implemented within this decade if there is professional consensus and political will. In other words, this chapter seeks to give a sense of what justice could look like in 2030 with the help of information technology.

1. Information technology is not the solution for every type of problem or case

At the outset of the consideration of each proposal, it should be noted that the IT solutions known today are not a solution for every type of problem or case. The key to digitalisation is automation, i.e. information technology can only be used for cases and legal issues that can be well typified. It is worth noting here that in the case of so-called complex disputes, there is a greater willingness on the part of the parties to settle, for which there are already several well-known and well-established platforms (Cybersettle, Inter-Settle, e-Settle, Click N'Settle, etc.).[8] The human factor, the human judge, will therefore not disappear from civil litigation (certainly not until 2030), but his or her role and the knowledge required will change. However, this change is not radical, as the judge's role is already to transmit information during the trial. The parties provide information to the judge, which is transformed into a trial and the end of the proceedings (judgment) and an information. Judges have to learn how to structure this information into data that IT can evaluate.

2. Data-based lawsuit

Most information technology solutions, and in particular the use of artificial intelligence, require data to be structured and given a legal interpretation. Currently, most of these systems involve the post-structuring of court judgments. For an AI to be able to assist in the delivery of a judgment, pleadings would need to be pre-coded in a similar way (the first step is to develop forms, which has already been done for example for applications for an order for payment and for a statement of claim.) This coding would seem to be easy to achieve in actions of a simpler type, but it would fundamentally change the role and function of the judge in civil enforcement, as he or she would be responsible for structuring the parties' pleadings.

3. Using blockchain technology

The evidence phase is a central part of litigation. The availability of evidence, its transparency and the examination of its origin are of decisive importance. At present,

8 Graham Ross: What's Good for ODR? AI or AI. In: International Journal on Online Dispute Resolution 2021/1. pp. 21-22.

in the era of paper-based litigation, the question of how parties can present evidence and prove facts to the court months later in disputes where every element of the legal relationship has been conducted online is still unresolved. This can be helped by blockchain technology, which works through pre-written, immutable, tamper-proof software, where information (evidence) is downloaded to computers (legal representatives, court) operating on nodes in distributed networks. When a change is made to the database, it is checked by software running on all the computers in the network and then updated. This method excludes the possibility of evidence tampering.[9]

4. Court platform - all in one place

Perhaps the most visible, but certainly substantial, change from current enforcement would be for the parties to have a well-designed, easy-to-use and transparent platform to get answers to all their relevant questions and information, and for the parties to a dispute to be able to contact each other through that platform. Such platforms already exist in a number of countries and the experience has been positive. In the United States of America, researchers at the University of Michigan developed an online service called Matterhorn, which was first launched in 2017 in a Michigan district court and is now operating in more than 40 courts in 8 different states. The system was originally designed to help courts and citizens communicate more effectively with each other. It is available 24 hours a day via smartphone and is primarily used for small claims and family law disputes. The parties receive the court's decision through this platform. Another online court was launched in 2018 in Utah for disputes under $11,000. Through this platform, parties can attempt to reach a settlement without the involvement of the court or with the help of a case manager who will answer their basic legal questions and mediate to reach a settlement. The administrator will also assist in the submission of the necessary documents following an unsuccessful settlement attempt. If the parties so request, the administrator may decide without a hearing, on the basis of the documents submitted, or refer the case to a judge, who may order a hearing of the parties.[10]

According to Susskind, the best known and most advanced online dispute resolution system is currently in British Columbia, Canada, called the Civil Resolution Tribunal. Launched in mid-2016, the service is available for property disputes up to $5,000, and from 2019 it will be available for claims involving traffic accidents up to $50,000. There are four parts to the service. The first will help users understand

9 Nelson M. Rosario: Introduction to Blockchain and Cryptography. In: Katz - Dolin - Bommarito (eds.): Legal Informatics, Cambridge University Press, 2021, Cambridge, pp. 114-119.

10 Richard Susskind: Online Courts and the Future of Justice, Oxford University Press, 2019, Oxford, pp. 174-176 - hereafter: Susskind

their legal situation, the second will seek to create an informal settlement between the parties. If this fails, an administrator steps in in the third part and tries to get the parties to reach an agreement. Finally, if this is unsuccessful, a member of the civil arbitration tribunal (who is not a judge) will issue a decision.[11]

It is important that this is not just an information site with templates describing different options, but an intelligent and secure site where the parties can get a personalised response to their specific problem. It should also be ensured that settlements reached through this platform have the same two key features of the decision ending the procedure, i.e. a judgment and enforceability. It is clear from the examples mentioned that human involvement is essential in these platforms: court administrators or judges can be involved at a stage where this may be justified. The development of such a platform would also bring about an important change of mindset, from courts waiting for parties to enter their premises to opening their doors and allowing anyone to deal with their court case from home using a smart device. It is also important to stress that this is unlikely to trigger a new influx of cases already in the courts, but rather new disputes that have so far been out of the courts' reach would be brought and resolved through the platforms, creating a new type of caseload for the courts.

It is worth noting that the design of such platforms is the subject of an almost independent research direction, legal design: thinking about and analysing how to create simpler, more efficient and smarter interfaces for non-legal users, which will not discourage them from using the platform, but will endear them to the legal subjects.[12]

5. The effective exercise and extension of the right to justice

It is almost an axiom in the legal literature that the use of technology helps to ensure the right to justice.[13] This seems to be true even as other sources in the legal literature warn that any innovative solution must be guaranteed to be accessible to generations less open to information technology and to societies where internet-based services themselves are not yet as widespread or as developed.[14]

11 Susskind pp. 168-169.

12 Among the publications on legal design, Amsler - Martinez - Smith (eds.) Dispute System Design: Preventing, Managing and Resolving Conflict, Stanford University Press, 2020, Stanford.

13 Daniel Rainey - Larry Bridgesmith: Bits and Bytes and Apps - Oh My! Scary Things in the ODR Forest. In: International Journal on Online Dispute Resolution 2021/1. p. 6 - hereafter referred to as Rainey - Bridgesmith

14 Dory Reiling: Courts and Artificial Intelligence. In International Journal for Court Administration 2020/2. art. 8, pp. 7-8.

At the same time, the meaning of the right to justice is necessarily expanding, precisely because of changing social and economic expectations: this fundamental right no longer means only the right to a judicial decision, but also the right to fair administration, problem solving and information. Still others distinguish between five components of the right to justice in dispute resolution using information technology tools in the online space: diagnosis, negotiation, mediation, interpretation of the law, decision.[15]

6. Using artificial intelligence

Artificial intelligence is the holy grail of information technology, and the expectations are much higher than what it can do now and in the near future. What it does well at the moment is that it can process much more data much faster than a human, and it never gets tired, its work is continuous. Artificial intelligence finds patterns and repetitions in the data series, a property that is also used for so-called predictive programs. It is also worth noting that the greatest development and competition in the field of artificial intelligence is currently not in law, but rather in the much more profitable fields of pharmaceutical, medical and military research. Even here, however, these programmes have not yet reached the level of general artificial intelligence, i.e. they do not yet have all the capabilities that the human brain has. It[16] follows that in the field of justice, artificial intelligence is unlikely to replace human intelligence in the foreseeable future. It is therefore worth concentrating on the areas where it can make a meaningful contribution to the work of the judiciary.[17]

The first of these is e-discovery, which can be used to identify and select from a large volume of documents the relevant data needed to resolve a dispute. It is already in use and is particularly useful for reviewing large volumes of e-mail correspondence and communications. The second is the so-called legal expert systems, the development of which could be given a new impetus by the spread of chatbots, which are capable of structuring the information received into data in the form of questions and answers. Finally, the best-known uses of AI are the so-called predictive models, which are based on the growing amount of partially structured legal information. They are mostly used in the field of criminal procedure law, among which the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) software, which has been used for years with public satisfaction by several courts in the United States of America, stands out.

15 For a summary of the different ideas, see Rainey - Bridgesmith p. 7.

16 György Tilesch - Omar Hatamleh: Art and Intelligence. Libri, 2021, Budapest; p. 19.

17 The following division is given by Daniel Martin Katz: AI + Law - An Overview. In: Katz - Dolin - Bommarito (eds.): Legal Informatics, Cambridge University Press, 2021, Cambridge, pp. 90-93.

In practice, the reception of COMPAS is a good example of the legal enforcement issues that can arise in the case of AI-based decision-making. There are currently more than 60 similar automated systems in the US, of which COMPAS is used in four states (New York, Wisconsin, California, Florida). It was developed and is operated by the private company Northpoint (now Equivant) and is used by state agencies (police, prosecutors, courts) for a subscription fee. The software works with public data on crime, which it processes together with the specific defendant's answers to a 137-question questionnaire to produce an estimate of the likelihood of re-offending. This programme is used at the investigative stage to decide on the use of coercive measures (pre-trial detention or bail), the level of the sentence and the decision on parole. The result of the COMPAS assessment is not binding on the prosecuting authority or court, but experience shows that when it is used, it is almost always used as a basis for a decision.

Following the programme's enthusiastic reception, COMPAS has come in for increasing criticism. The most common of these is a problem known as the "black box": the developer treats the exact specification of the software as a trade secret, so that prosecutors have virtually no control over its operation. The software was designed to eliminate subjectivity and human error, but now the automated decision that replaces it is the focus of controversy. So far, the Wisconsin Supreme Court has addressed these issues in the most detailed way, in its 2016 ruling in State v. Loomis (the federal Supreme Court has yet to rule on this). The facts of the case were not extraordinary: Eric Loomis was charged with five felonies in connection with a car chase, two of which he pleaded guilty to and entered into a plea bargain. The court of first instance used the COMPAS analysis to determine the sentence, which showed that the risk of re-offending was very high, and that the defendant posed a high risk to society. The court therefore imposed a maximum sentence of six years' imprisonment for the two offences.

Loomis appealed the decision to the Wisconsin Supreme Court, arguing, among other things, that his right to a fair trial was violated because he was not allowed to know how the software worked and thus could not verify the accuracy of the results. The latter, in his view, is also a concern because COMPAS works with group data, so the imposition of the penalty is not specific. The Supreme Court did not find the appeal to be well-founded, but ruled that the analysis carried out by COMPAS was only one of the possible criteria for determining the level of the penalty and could not become exclusive. It did not, however, respond to the arguments relating to the intelligibility of the functioning of the software. In the US, there has since been increasing pressure on the courts to uncover the 'black box'.

III. Summary

Public justice in developed countries is at a crossroads: either it adapts to the challenges of the digital revolution and becomes attractive and realistic, winning the competition against the online dispute resolution platforms of the big private providers, or it is relegated to the reservoir of legal history. The challenge is complicated by the fact that there is no end to the development of information technology, which means that some solutions could easily become technologically obsolete after 5-10 years. It is particularly difficult for lawyers who are attached to principles and predictability to accept that the model of law enforcement, which has been in place for almost 200 years, needs to be fundamentally rethought and that courts need to be allowed to innovate. Dogmas have to be rewritten, new issues and technological concepts that go beyond law have to be introduced and familiarised at user level. It is also safe to say that the country the lawyers and legislators of which are the first to recognise all this and are able to provide the right answers will have a serious competitive advantage over other countries, given that an efficient and predictable judicial system is an important prerequisite for the functioning of the economy and for social peace.

EU Law

Muzsalyi, Róbert[1]

Do Member States have procedural autonomy? - Questions and answers on the national framework for the enforcement of EU law

Introduction

The framework for the enforceability of EU law in the Member States can be examined through the pair of principles developed by the Court of Justice of the European Union (hereinafter: CJEU), the principles of equivalence and effectiveness. These principles represent both the minimum and the yardstick for the requirements of procedural rules, and the national legislative competence they limit is often referred to as the procedural autonomy of the Member States.[2] However, many in foreign[3] and domestic[4] legal literature are sceptical about this concept, questioning its existence and its dogmatic basis. For many decades, the CJEU did not even use this concept, it was only used in the references of the parties, in the observations of the Member States, the Commission and the Advocate General. Later on, this terminology appeared in the reasoning of judgments and is also frequently used in Hungarian court decisions and legal literature, but its content and meaning is, in my view, unclear. For this reason, I consider it appropriate to briefly review how procedural autonomy has become a concept accepted by the CJEU and what critical views have been expressed

1 Assistant Professor, Department of Civil Procedure Law

2 For a detailed analysis of the two principles, see Róbert Muzsalyi, The impact of EU law on civil procedure. Akadémia Publishing House, Budapest, 2020.

3 See. Bart Krans - Anna Nylund: Procedural Autonomy Across Europe, Intersentia, Cambridge, 2020, Michal Bobek: Why There is No Principle of "Procedural Autonomy" of the Member States? Bruno de Witte - Hans Micklitz: *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Antwerp, 2011. ill. Diana-Urania Galetta: *Procedural Autonomy of EU Member States: Paradise Lost?* Springer, Heidelberg-Berlin, 2010. 7-32., Constantin N. Kakouris: Do the Member States Possess Judicial Procedural "Autonomy"? *Common Market Law Review*, 1997/6. 1405-1406.

4 Zoltán Nemessányi: The impact of the European regulation of unfair contract terms on the principles of national civil procedural law, Scienta Iuris. 2012/1-2. 38., Katalin Gombos: Harmonisation of Procedural Law vs. Procedural Autonomy of the Member States, *Studia Iuridica Cassoviensia*, 2018/6. [hereinafter: Gombos (2018)] 26., and András Osztovits: The most important theoretical and practical issues of preliminary ruling procedure. KJK-Kerszöv, Budapest, 2005 [hereinafter: Osztovits (2005)] 37.

against it. In the first part of the paper, I will examine the doctrinal background to procedural autonomy: its framework at the level of primary EU law sources, and the procedural provisions at the level of regulations and directives. In the second part of the paper, I will analyse the jurisprudence of the CJEU in relation to the concept of procedural autonomy, in a separate chapter I will show the diversity of the jurisprudential understanding of this concept, and finally I will critically point out inconsistencies and misinterpretations in the use of the term.

1. The dogmatic background to procedural autonomy

According to the first sentence of Article 5(1) of the Treaty on European Union (TEU), "[t]he Union's competences shall be delimited in accordance with the principle of conferral". Article 5(2) states, on the one hand, that "[in accordance with that principle] the Union shall act only within the limits of the powers conferred by the Treaties on the Member States to achieve the objectives set out in the Treaties" and, on the other hand, that "any powers not conferred on the Union by the Treaties shall remain vested in the Member States".

Article 81(2)*(f) of* the Treaty on the Functioning of the European Union (TFEU) confers legislative powers on the European Parliament and the Council, in particular where necessary for the proper functioning of the internal market, to remove obstacles to the smooth functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. Article 81(2), however, only allows legislation for the purposes set out in paragraph 1, namely in the area of judicial cooperation in civil matters having cross-border implications. Within the framework of such cooperation, measures aimed at approximating the laws and regulations of the Member States may be adopted.

Articles 114 and 115 TFEU, which provide the general basis for harmonisation, give the EU legislator the power to approximate laws, regulations and administrative provisions of the Member States which have as their object or direct effect the establishment or functioning of the internal market. [5]

The European Union therefore has no legislative competence in the field of national procedural law. This statement is shared by the majority of the legal literature,[6] but there is more controversy as to whether it also means that the Member States have

5 The subject matter of the two articles is the same, but there is a procedural difference: Article 114 gives the European Parliament the right of co-decision, as opposed to Article 115, according to which it only has a consultative role. The latter explicitly allows only for the adoption of directives. Réka Somssich, Article 115 TFEU. In András Osztovits (ed.) *Commentary on the European Union and the Treaties on the Functioning of the European Union*. Osztrosis (in Hungarian).

6 See, for example, Nemessányi i.p. 40, Osztovits (2005) i.p. 162, Galetta i.p. 9-10, Bobek (2011) i.p. 167-168, Gombos (2018) i.p. 26.

'*procedural autonomy*'. According to *Osztovits,* the fact that the European Union currently has legislative competence only with regard to cases with a cross-border element in the Member States, which "(...) means that the EC will not be in a position for a long time to develop rules affecting the whole of national procedural law, i.e. Member States have a *high degree of autonomy* in developing their own enforcement models" (*emphasis* mine). *Galetta's* analysis of the Treaties also leads her to the conclusion that neither the general nor the specific harmonisation provisions provide a basis for approximation of the procedural laws of the Member States. On the basis of these Treaty provisions, it has been argued in the legal literature that, since the EU has no legislative competence, the Member States have procedural autonomy in the development of procedural rules. In my view, this concept is not very fortunate, as it opens the door to misunderstandings. In the early stages of the case law of the CJEU, in all cases where the enforceability of EU law by Member States was raised, the starting point for its reasoning was always the principle of loyal cooperation. This is a principle enshrined in Article 4(3) TEU, whereby Member States have a duty to assist, to act and to tolerate. The obligation to comply with the principle of loyal cooperation extends to all bodies of the Member States, including the courts, in the exercise of their judicial functions.

2. Procedural provisions in secondary EU law

As the CJEU is known to say, "In the absence of relevant EU legislation, it is for each Member State's internal legal order to determine the competent courts and to lay down the procedural rules for judicial remedies to ensure that individuals can rely on the protection of rights derived from EU law."[7] The fact that the CJEU usually begins its reasoning with the reference to "*in the absence of relevant EU legislation*" also points out that there may be procedural provisions at the level of secondary sources of EU law and that national rules are to be applied in the explicit absence of such provisions.[8] The framework of procedural autonomy should therefore be examined not only in the light of the above rules on jurisdiction, but also in the light of the extent of procedural provisions in EU law at the level of regulations or directives.

2.1. Orders

The policy areas covered by the area of freedom, security and justice, for example, contain a significant amount of procedural law provisions at the level of regulations.

7 See, for example, ÖBB Personenverkehr judgment, C417/13, EU:C:2015:38, paragraph 61, and Fiamingo and Others judgment, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 63, and the case law cited therein.

8 I will discuss this reference to CJEU judgments in more detail later.

Among these, regulations to facilitate judicial cooperation between Member States in civil proceedings are significant. EU legislation in this area is explicitly aimed at facilitating access to justice for EU citizens in other Member States in cross-border disputes, in line with the Treaty objective.[9][10]

Generally speaking, these regulations in most cases only provide for the right to an effective judicial remedy, or only set out requirements for the exercise of the right in principle, leaving the details to the Member States. An example is the EU General Data Protection Regulation,[11] which provides in general terms for the right to an effective judicial remedy [(141) Recital 78, Articles 78-79], which in Hungary may mean an administrative procedure (challenging a decision of the NAIH in court) or a separate action on the basis of a claim by the complainant under the law of personality.[12] Interestingly, as a separate legal remedy, the Data Protection Regulation gives the data subject the right to bring an action against the supervisory authority, inter alia, if it fails to inform the data subject within three months of the procedural developments concerning the complaint or of the outcome of the complaint [Article 78(2)]. In addition to the above[13], the Data Protection Regulation also contains,

9 In the course of the integration process, regulatory legislation in the field of civil judicial cooperation has accelerated under the mandate of the Amsterdam Treaty. One of the most important innovations of the Amsterdam Treaty was the transfer of the task of judicial and legal cooperation in civil matters from the third pillar to the first pillar. Article 65 of the EC Treaty set two limits to judicial cooperation in civil matters: the scope of EU rules must cover only civil matters having cross-border implications and must be confined to the proper functioning of the internal market. Article 81 TFEU now only contains the first limitation and, in paragraph 2, only refers to the need to adopt Union rules in order to achieve the objectives set out therein, in particular where this is necessary for the proper functioning of the internal market. See András Osztovits, Limits to EU competence. In András Osztovits (ed.) *Explanation of the Treaties on the European Union and on the Functioning of the European Union. Otavon, OTP and the functioning of the Treaty and the Treaties of the European Union.*

10 It does not therefore aim to "unify the laws of the Member States across the board", nor to create a "European civil procedural code". See Viktória Harsági. Osiris Publishing House, Budapest, 2006, 38.

11 Regulation (EU) 2016/678 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Regulation (EC) No 95/46/EC (hereinafter the "Data Protection Regulation").

12 Andrea Klára Soós: The procedure of the courts, control of judicial data processing operations. In András Jóri (ed.). HVG-ORAC, Budapest, 2018, 437-448.

13 See Article 81(1) to (2) of the Data Protection Regulation.

for example, procedural rules on jurisdiction[14] or representation,[15] grounds for suspension of proceedings and cooperation between courts in parallel proceedings.

Another example in the field of immigration and asylum policy is the Dublin III Regulation,[16] which contains quite detailed procedural rules on appeals against transfer decisions. In addition to stating the requirement of judicial protection [Article 27(1)], it provides, for example, for the need to provide free legal assistance [in this respect, it specifically lays down the requirement of equivalence with requests from nationals of the country concerned, see Article 27(6)] and also expands the content of this to include the preparation of the necessary procedural documents and representation before the courts.

Because of their direct applicability, regulations do not require a specific legislative act to become part of national law. Legislating by means of a regulation creates uniform procedures in the Member States, so that the task of the national legislator is "merely" to create a legal environment for the proper application of the regulation, which may involve the creation of detailed implementing rules and additional rules. Thus, even in the case of a relevant regulation, EU and national rules must be applied in parallel, with national legal provisions and judicial practice necessarily supplementing the issues not covered by the regulation. An example of this is regulations governing legal relationships with a cross-border element. The Hungarian application of the Insolvency Regulation[17], for example, is necessarily complemented by the relevant provisions of, inter alia, the Cstv.[18] and the Pp.[19] [20] Even if the regulation does not contain rules on the enforcement of the right in question, the relevant procedural rules of the Member States must necessarily be interpreted

14 According to recital 145 of the Data Protection Regulation, proceedings may be brought, at the choice of the data subject, either in the courts of the Member State where the controller or processor is established or in the courts of the Member State where the data subject is domiciled. See Péter Buzás, Remedies, liability and sanctions in the GDPR. In Péter Buzás - Attila Péterfalvi - Balász Révész (eds.). Wolters Kluwer, Budapest, 2018, 352-353.

15 In this context, the Data Protection Regulation stipulates that non-profit (rights protection) bodies, organisations and associations may also represent data subjects in damages actions, see Article 80.

16 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

17 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

18 Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings

19 Act CXXX of 2016 on the Code of Civil Procedure

20 See in this context: Andrea Csőke - Nicoleta Mirela Nastasie - Róbert Muzsalyi: Commitment: mystery or reality? How does the institution of commitment created by Regulation 2015/848/EU work in Romania and Hungary? *Economy and Law*, 2020/1. 23-28.

in accordance with EU law. In fulfilling this obligation, however, the national court is restricting the procedural autonomy of the Member States.[21]

2.2. The guidelines

Directive legislation has a specific role to play in this area, as it is an important instrument for approximating legislation, including in the field of civil procedural law, but it is not intended to supersede or replace it. In this respect, *Krans* notes that EU directives may contain procedural provisions, even if their regulatory nature is of a substantive nature. In his view, a closer look at the EU directives reveals that the number of procedural rules they cover is far from negligible.[22] The most typical areas are the directives on consumer protection, competition and the enforcement of intellectual property rights. As a first example, the Competition Damages Directive,[23] which, among its many procedural provisions (see for example the rules on the discovery of evidence in Chapter II of the Directive), specifically mentions the principles of effectiveness and equivalence as limits to the rules and procedures of Member States for the enforcement of damages claims. The Directive thus sees the procedural rules of the Member States as a complementary instrument for those issues that it does not specify for the enforcement of damages and confirms the proper enforcement of EU law in this area by explicitly setting out these two principles (Article 4).[24] In addition to the enforcement of damages claims under competition law, the EU Directive[25] on the coordination of procedures for review procedures concerning the award of public contracts also contains a number of procedural provisions, laying down the principle of equivalence [Article 1(2)] and the principle of effectiveness [Article 1(1)]. In recital 34 of its preamble, the Directive states that the need for regulation is based on the fact that the improvement of the effectiveness of review

21 See in this respect Folkard Joshua, The effect of Rome II on national procedural law, *Cambridge Law Journal*, 2015/4, 37. Another regulation containing a relatively large number of procedural rules is Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the Union Customs Code.

22 Bart Krans: EU Law and National Civil Procedure Law: An Invisible Pillar. *European Review of Private Law*, 2015/4. 572.

23 Directive 2014/104/EU of the European Parliament and of the Council on certain rules concerning actions for damages under national law for breach of the competition laws of the Member States and of the European Union.

24 Another example of an EU directive with relatively many procedural provisions is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

25 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

procedures for the award of public contracts cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community.

The Directive[26] on the enforcement of intellectual property rights requires that the procedures and remedies regulated by the Member States must not be unduly complicated, costly or result in unreasonable time limits or unjustified delays [Article 3]. In addition to these general requirements, the Directive regulates in great detail the evidentiary procedure to be followed before the court (Section 2), what provisional and precautionary measures may be taken (Section 4), what the court may decide (Article 11), and what criteria must be taken into account when determining the amount of damages (Article 13). In terms of its scope, the procedures provided for in the Directive apply not only to infringements of Community law but also to any infringement of an intellectual property right under the national law of the Member State concerned. The Directive is therefore not limited to the settlement of disputes with an EU or cross-border element, but also applies to infringements of intellectual property rights under purely national law. Some argue that these Directives are evidence that the EU can also achieve great results in approximating Member States' procedural law through its so-called sectoral legislative powers. Obviously, this kind of harmonisation is fragmented, and Member States have a great deal of leeway in transposing the Directive, but there is no doubt that the result is that, for example, provisional measures can be sought under uniform procedural rules in cases of infringement of intellectual property rights and that all national courts must consider the same criteria when assessing damages claims.[27]

From the above brief overview, it is clear that at the level of secondary EU law, although territory-specific, procedural law is sometimes quite extensive and diverse. These provisions always prevail over the application of national rules when pursuing claims based on EU law.

3. The concept of procedural autonomy in the legal literature

It is rather difficult to pinpoint when the term procedural autonomy started to be used in the literature. One cornerstone could be the *Rewe/Comet* judgments, since it is clearly identifiable that studies published in the 1990s[28]and 2000s[29] already referred

26 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

27 Magdalena Tulibacka: Europeanization of Civil Procedures: In Search of a Coherent Approach, *Common Market Law Review*, 2009/5. 1546., Anna Wallermann: The Impact of EU Law on Civil Procedure, *Tidschrijt voor Civiele Rechtspieging*, 2013/3. 2.

28 Ari Afilalo, Towards a "Common Law" of Europe: Effective Judicial Protection, National Procedural Autonomy, and Standing to Litigate Diffuse Interests in the European Union, *Suffolk Transnational Law Review*, 1999/2. 358-359., Prechal (1998) op. cit. 681-706.

29 Van Gerven, Walter op. cit. 501-536.

to the principle of "*procedural autonomy*" *as formulated in the Rewe judgment.* The first report that can be found comes from a joint conference of the Europa Institute of Leiden University and the British Institute of International and Comparative Law, held on 28 May 1980. In his lecture, *Professor G. P. R. Vandersanden*[30] identified the principle of procedural autonomy as a possible limit to the direct applicability of EU law, as developed by the CJEU in the *Rewe/Comet* decision and then refined somewhat in the *Salumni* and *Denkavit* judgments.

The literature on "*procedural autonomy*" can be divided into two groups: one group considers that Member States have no procedural autonomy at all, while others - albeit with reservations and with a different meaning than the strict meaning of the term - recognise the existence of the concept.

One of the strong representatives of the first group was *Kakouris*[31], who was firmly of the view that Member States do not have procedural autonomy. He also draws attention to the fact that it is no coincidence that the judgments of the CJEU begin with *"in the absence of Community legislation*";[32] or, in other words, but with a similar meaning, *"in the absence of relevant Community provisions*";[33] and later "*where the (particular) area is not governed by Community law".* Furthermore, it is worth noting that in recent decisions, the CJEU has already used the words "*in the absence of harmonisation*"[34] or "*in the absence of detailed procedural rules for the enforcement of a right provided for in EU law".*[35] These formulations, according to *Kakouris*, cannot be interpreted as meaning that, until such time as legislative competence in the area of procedural law is established in the Treaty. On the contrary, the expression means that the European Union has the power to establish its own procedural system, but until it does so, national law must be applied to the enforcement of claims based on EU law in the absence of a Community rule. When a national court applies EU law, it is acting as an EU body, as an EU court, and therefore, in its view, the European Union has the power to lay down the procedural rules necessary to fulfil this function. The same conclusion is reached by *Gombos*,[36] who argues that the wording of the judgments implies that the Member States do not have exclusive competence in the area of civil procedural law.

30 Professor of Law at the Brussels Free University. Conference Report [notes] *Common Market Law Review*, 1981/1. 99.

31 He was a judge at the CJEU from 1983 to 1997. Kakouris i.m. 1389-1412.

32 Rewe judgment, C-33/76, point 5, Comet judgment C-45/76, point 13,

33 Brasserie du pêcheur SA judgment in Case C-46/93, paragraphs 83 and 90.

34 See, for example, Asociación de Consumidores Independientes de Castilla y León, judgment C-413/12, paragraph 30.

35 Rudigier judgment C-518/17, ECLI:EU:C:2018:757, paragraph 61.

36 Katalin GOMBOS, Harmonisation of Procedural Law vs. Procedural Autonomy of the Member States, Studia Iuridica Cassoviensia, 2018/6 [hereinafter: GOMBOS (2018)] 26.

In the light of this, national procedural law applies where there is no relevant EU procedural rule, so it plays a complementary and subordinate role. As a complementary rule, it applies only to the extent that it is compatible with the objectives of the uniform and effective application of Union law and to the extent that it guarantees the rights of the parties deriving from the direct effect of Union law. Where Member States' procedural provisions do not ensure the proper enforcement and application of Union law, such rules should not be applied.[37]

Secondly, *Kakouris* also points out that the CJEU itself never uses this concept (which was true in 1997, when he wrote his study, since the CJEU started using it only after the *Wells* judgment[38] in 2002). Finally, *Kakouris* explains that the Member States can at most speak of institutional autonomy, since it is clear that the structure of the judiciary, the rules of organisation and jurisdiction of the courts remain part of the sovereignty of the Member States. *Osztovits* agrees that the term "*Member State procedural autonomy*" is incorrect and imprecise, and that the term "*Member State institutional autonomy*" is a more appropriate and more appropriate term to reflect the current structure of the EU.[39]

Other authors - sharing *Kakouris*' view - point out that if by this concept we mean that Member States are "free" from all EU legal restrictions and ECJ scrutiny in the field of procedural law, then there can be no question of autonomy in this area.[40] If '*autonomy*' is to be understood literally, it should mean a freedom in the area of procedural law which would allow the rules to be drawn up without any control. However, there is no such area, since procedural law is not a '*domaine reservé*' in the current EU constitutional set-up, in which EU law cannot intervene.

Compared to the above, there is also a more moderate group that tries to interpret the concept of procedural autonomy - once the CJEU has adopted it in its terminology - as having a content that can be placed in the division of competences between the Member States and the European Union.

In *Prechal*'s[41] approach, the problem lies mainly in the definition of the term. If procedural autonomy is seen as a manifestation of national sovereignty, he can agree to a large extent with *Kakouris*' position. In his view, however, procedural autonomy can also be interpreted as a shorthand for sovereignty, so that if (and to the extent that) there is no Community legislation, Community law has little choice but to rely on national legislation.

37 Kakouris i. m. 1390., Van Gerven op. cit. 502.

38 Wells judgment C-201/02, ECLI:EU:C:2004:12, paragraphs 65, 67 and 70.

39 Osztovits (2005) op. cit. 37.

40 Bobek op. cit. 318.

41 Since 2010, he is currently a judge at the CJEU. Sacha Prechal: Community Law in National Courts. *Common Market Law Review*, 1998/3. 681-706.

W. Van Gerven[42] also sees the need to abandon the notion of procedural autonomy, and believes that instead *the procedural competence of* the Member States can be discussed. For as long as there is no EU legal provision to this effect, or as long as there is no direct EU legal competence, the Member States will remain primarily responsible for defining procedural rules. The same inaccuracy is also pointed out by *Trstenjak* in an Opinion of the Advocate General. In his view, the principle of 'procedural *autonomy*' does not confer real autonomy but rather a degree of discretion on the Member States in relation to procedural rules deriving from EU law for rights the judicial enforcement of which is not regulated in detail by EU law.[43] Trstenjak also pointed out in his submission that the "*procedural* autonomy" of the Member States in the case law of the CJEU was not limited to procedural issues, but also extended in part to substantive rules relating to rights derived from EU law. Thus, as *Nemessányi* and *Gombos* point out, the concept of procedural rules must not be understood in terms of the definition known in national law, but must be given an autonomous European content.[44]

In his opinion, Advocate General *Trstenjak* explains, on the same basis, that national procedural law is not, in principle, subject to harmonisation, nor does it fall within the general legislative competence of the EU, and that accordingly EU law recognises the autonomy of national procedural law.[45]

In his monograph on the subject, *Galetta*[46] completely contradicts *Kakouris*' position. In his view, the literal interpretation of the CJEU's wording, "in the absence of Community legislation", does not imply that the EU has competence in the field of procedural law. Even after the entry into force of the Lisbon Treaty, no legal basis can be found that would give the EU competence in procedural matters. In *Galetta*'s view, the procedural autonomy of the Member States is due to the fact that the European Union has no competence in the area of procedural law. Nevertheless, the principle of *effet utile* and the principle of direct effect of EU law allow the EU legislator to have recourse to national procedural law in order to achieve its objectives.

According to *Bobek*, the application of this concept is not very fortunate, as it implies that Member States have a choice in the implementation of EU law, which is factually untrue. Member States do not have a free margin of manoeuvre when

42 From 1988 to 1994 he was Advocate General of the CJEU. Van Gerven, Walter op. cit. 501-536.

43 While the notion of "*autonomy*" seems to refer to the broad discretion that Member States have in setting procedural rules, such an absolute discretion does not exist according to the case law of the CJEU. Advocate General Trstenjak's Opinion in Littlewoods, C-591/10, ECLI:EU:C:2012:9, paragraphs 23-26.

44 Nemessányi ibid. 3, and Gombos (2018) ibid. 27.

45 Opinion of Advocate General Trstenjak in Case C-137/08, ECLI:EU:C:2010:401, paragraph 65.

46 Galetta op. cit. 10.

implementing EU law. EU legislation in the area of procedural law is purpose-bound and limited and territory-specific. By contrast, the CJEU's interpretation of the law is unlimited: it can rule on any procedural rule of a Member State that affects the implementation of EU law if it is referred to it for a preliminary ruling. All stages of the litigation procedure and all legal institutions can be examined for equivalence and compliance with the requirements of effectiveness: the right of access to the courts, costs, legal representation, the validity of decisions, etc. From this point of view, it is quite wrong to speak of procedural autonomy for Member States, especially if by autonomy we mean the ability to act and take decisions freely and without control.[47]

In the Hungarian legal literature, too, the term "procedural autonomy" is often used without necessarily consciously identifying its content.[48] In his critical approach, *Osztovits* agrees with Kakouris' position and considers it an accurate use of the term to speak of institutional autonomy in this context. At the same time, he notes that the misuse of the term does not lead to erroneous legal conclusions, such as the *acte clair doctrine that* has taken root in Hungarian legal literature. According to *Gombos*, national procedural autonomy is itself an autonomous concept, since it includes substantive rules in addition to classical procedural rules, and he stresses that it "*only applies in conjunction with the principles and limits of EU law.*[49]"

4. The concept of "*procedural autonomy*" in the case law of the CJEU

Generally speaking, until the early 2000s, the concept of "*national procedural autonomy*" was not included in the legal reasoning of the Court in CJEU decisions. In the course of the analysis, I have examined several linguistic versions of the CJEU's decisions: the English equivalent of "*procedural autonomy*", the German equivalent of "*Verfahrensautonomie*", or the French equivalent of "*du l'autonomie procédurale des* États *membres*" have not been used in the language of CJEU. Even in the landmark judgments which, according to some authors[50], have fundamentally influenced the perception of the procedural autonomy of the Member States in the application of EU law, the CJEU has not used this term. In this context, one can mention the

47 Michal Bobek: The Effect of EU Law in the National Legal Systems, in Cahterine Barnard - Steve Peers: *European Union Law*, Oxford University Press, 2017. 169.

48 See e.g. Katalin Gombos: Levels and stages of judicial remedies under EU law. *European Law*, 2011/5. 35-45., Zsófia Varga. *European Law*, 2016/6. 1-18., Mátyás Császár: *European Law*, 2014/2, 17-21, Mátyás Császár: The impact of EU sources of law on the general part of private international law. *Hungarian Law*, 2013/11. 669-679.

49 Katalin Gombos: Member State procedural autonomy - a principle with limits and question marks. *European Mirror*, 2019/3. 35-50.

50 Michael Dougan: *National Remedies Before the Court of Justice*, Hart, Oxford, 2004, 227-229, Prechal op. cit. 681-706.

Rewe/Comet judgments[51], or the later *Emmott*[52], *Factortame* and *van Schijndel*[53] cases, which are known from a much more active and decisive period in terms of the introduction of the CJEU into national procedural law. Until the early 2000s, the concept of '*procedural autonomy*' was mainly known in the legal literature, used and coined by the literature analysing the CJEU's judgments on procedural issues, and much less present in the language of the Court.

Of particular interest is the use of the term "*procedural autonomy*" in the question posed by the national court that initiated the preliminary ruling procedure, while the CJEU continued to refrain from using it in its reply.[54] Subsequently, it has been regularly used in the observations[55] of the Commission and the parties, and increasingly in the Advocate General's Opinions.[56]

For the first time, the CJEU used the concept of procedural autonomy in the *Wells*[57] case, essentially linking it to the previously known and regularly cited principles of equivalence and effectiveness in procedural matters.

The significance of the *Wells* case was much less procedural in nature, but more important in terms of the collateral, horizontal legal effect of EU directives. There is a type of (vertical) litigation against the state, public bodies, where a decision potentially based on an EU directive may have an impact on another private party not involved in the dispute. In this form of vertical litigation, a private party challenges a public measure which at the same time confers a right on a third private party not involved in the proceedings.[58] In the *Wells* case, the plaintiff challenged a public authority's decision to allow mining activities without an environmental impact assessment. According to the CJEU judgment, Directive 85/337/EEC, which requires such an impact assessment, can be directly invoked against the State, even though the impact assessment may lead to the cessation of mining activities, thereby prejudicing other private parties not party to the proceedings who have acquired the right to carry out mining activities.

51 Rewe judgment, C-33/76, ECLI:EU:C:1976:188.

52 Emmott judgment, C-208/90, ECLI:EU:C:1991:333.

53 Van Schijndel judgment, C-430/93, ECLI:EU:C:1995:441.

54 Judgment in Case C-28/05 G.J. Dokter and Others, ECLI:EU:C:2006:408, judgment in Joined Cases C-222/05 and C-225/05 Van der Weerd and Others, ECLI:EU:C:2006:586, paragraph 28.

55 See, for example, European Commission v. Slovakia, judgment, C-507/08, ECLI:EU:C:2010:802, points 30 and 38, Willy Kempter, judgment, C-2/06, ECLI:EU:C:2008:78, point 53, European Commission v. Italy, judgment, C-423/08, ECLI:EU:C:2010:347, point 30, Tele2 Polska, judgment, C-375/09, ECLI:EU:C:2011:270, point 16.

56 Opinion of Advocate General Saggio in Eco Swiss, C-126/97, ECLI:EU:C:1999:97, Opinion of Advocate General Mischo in Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein, C-427/97, ECLI:EU:C:1999:253, Opinion of Advocate General Léger in Shirley Preston and Others, C-78/98, ECLI:EU:C:1999:410.

57 Wells judgment, C-201/02, ECLI:EU:C:2004:12, paragraph 70.

58 Blutman op. cit. 229-230.

Subsequently, the CJEU has increasingly stated in its judgments that "*in accordance with the principle of procedural autonomy*" it is for the domestic legal order of each Member State to determine the procedural rules, provided that they respect the principles of equivalence and effectiveness, and has in fact endorsed this definition. [59]

5. Conclusions on the concept of procedural autonomy

Procedural autonomy is not "procedural", as EU procedural law covers a much wider scope than what is considered procedural under Hungarian procedural doctrine. Many provisions which are substantive in nature under national law are procedural rules for the purposes of EU law. The CJEU classifies as procedural all legal provisions which are intended to enforce substantive law in the broad sense, which determine the conditions for doing so: before which forum, within what time limit, who is entitled to bring proceedings, and anything which limits or excludes the enforcement of claims.

The choice by many Member States to use the unfair contract term in consumer contracts as a sanction for voidness should be considered as a substantive provision from a national perspective, but as a procedural provision from an EU perspective.[60] The conditions for the enforcement of EU law claims can be contained and limited not only by procedural but also by substantive rules. A good example is that in damages actions, the obligation to remedy or prevent damage may exclude or limit the enforcement of claims. In the same group are cases where the CJEU has examined the causal link or, for example, the victim's contribution on the basis of the principles of equivalence and effectiveness.[61] In some jurisdictions limitation is considered a substantive rule, in others a procedural rule, but from the point of view of EU law it excludes the enforcement of a substantive claim and is therefore always considered procedural by the CJEU.[62]

59 From the subsequent case law, see for example, Adeneler and Others v ELOG, C-212/04, ECLI:EU:C:2006:443, paragraph 95, ENEFI, C-212/15, ECLI:EU:C:2016:841, paragraph 30, Nike, C-310/14, ECLI:EU:C:2015:690, paragraph 28, Kušionová, C-34/13, ECLI:EU:C:2014:2189, paragraph 50.

60 Article 6 of Directive 93/13/EEC provides that Member States shall provide that unfair terms used by a seller or supplier in a consumer contract shall not be binding on the consumer under the provisions of their national law (...) From the EU perspective, nullity is therefore a procedural rule. Nemessányi ibid. 40. The same statement has been made in Hungarian case law: '*From the point of view of EU law, the nullity of unfair contract terms is also procedural in nature.*' See, for example, Budapest-Capital Regional Court of Appeal (in Hungarian: Fővárosi Ítélőtábla) Order No 5.Pf.22.086/2013/5, Order No 5.Pf.22.036/2013/3.

61 Brasserie du pêcheur and Factortame judgment, C-46/93 and C-48/93, ECLI:EU:C:1996:79, 65, paragraphs 83-84. For a further list of provisions classified as procedural law in the field of damages, see Mark Brealey - Mark Hoskins: *Remedies in EC Law*. Sweet & Maxwell, London, 1998. 108.

62 Comet judgment, C-45/76, paragraph 18, Emmott judgment C-208/90, ECLI:EU:C:1991:333.

Secondly, it can also be observed that the CJEU is always concerned with two areas of procedural autonomy. It is for the internal legal order of each Member State to 1) designate the courts having jurisdiction and 2) lay down the procedural rules for legal entities to bring actions to ensure the protection of rights derived from Community law.

The first part of the national task is the designation of competent courts, usually referred to as *institutional autonomy.* In this respect, all the legal literature agrees that it is entirely for the Member States to determine the courts and their powers, their composition and the conditions for the appointment of judges. This aspect of autonomy has therefore remained intact.

When implementing EU law, Member States do not have the freedom to set their own procedural rules. This can be supported by several approaches. Firstly, it is important to refer to the EU procedural rules that can be found at the level of regulations and directives, as illustrated in Chapter 2. These rules always prevail over national rules, and the national legislator cannot lay down contradictory or counterproductive procedures in this area.

Secondly, if the question is whether the CJEU, in its interpretative function, can give a judgment that requires a Member State's procedural rule to be disregarded or interpreted in accordance with EU law, or perhaps provide for a procedure that has not yet been provided for in that jurisdiction, the answer is yes. Although the EU legislator has limited competence in relation to procedural law, this is not the case for the CJEU. As the institution responsible for the uniform interpretation of EU law in the European Union, which has direct contact with all national courts through the preliminary ruling procedure, it has a duty to defend and promote the enforcement of EU law and to provide the necessary guidance to the requesting court. The requirement of equivalence and effectiveness implicitly implies that the procedural provisions of the national legal systems are not exempt from review by the CJEU.

Thirdly, if autonomy is understood as the free, uninfluenced right to decide to do something - in our case, to create and apply procedural rules - and if it is made conditional on compliance with the principles of equivalence and effectiveness, then autonomy is impracticable. Procedural autonomy is affected not only by decisions which declare a Member State's procedural rule to be inequivalent or to make it impossible to enforce EU law, but also by decisions which merely examine it.

But, as I have pointed out, the Member States do have institutional autonomy, by which I mean the establishment of the judicial system, the designation of the competent courts. It is not institutional, but this autonomy also includes the fundamental principles that define the legal system of the Member States, such as legal certainty and the principle of equal treatment in court. These are also protected at EU level, and the CJEU does not require that EU law be applied in violation of these principles.

'*Procedural autonomy of Member States*' is a misleading term to describe the impact EU law can have on national procedural law. The requirement of equivalence and effectiveness implicitly implies that the procedural provisions of Member States' legal systems are not immune from review by the CJEU. Among the divergent views in the literature, I agree most with *Bobek*'s approach that Member States do not have a free margin of manoeuvre in the implementation of EU law. EU legislation in the area of procedural law is purpose-bound and limited, as well as territory-specific. By contrast, the CJEU's interpretation of the law is unlimited: it can take a position on any procedural rule of a Member State that affects the implementation of EU law if it is referred to it for a preliminary ruling. All stages of the litigation procedure and all legal instruments may be examined for equivalence and conformity with the requirements of effectiveness. The Member States have procedural autonomy as long as it is not challenged by one of their judges before the CJEU.

Prieger, Adrienn[1]

The UYAP-system - A noteworthy progress in the European integration process of Turkey

Introduction

The current SARS-CoV-2 pandemic has revolutionized the whole world, on the other hand, accelerated the process of digitization and significantly extended the application of digital techniques to almost every area of life. In this context, the Council of the European Union adopted conclusions on 3 October 2020, stressing the importance of investing in digital assets as a result of the Covid-19 crisis.[2]

However, as more and more public services and more and more transactions are implemented in cyberspace using IT systems, the protection of these IT systems is becoming more and more important, as criminals adapt to the new situation and move their activities to cyberspace. One element of protection is the use of increasingly modern systems, which clearly benefit countries that have already been committed to the digitalisation of public services, such as Turkey, which has been making significant efforts to build and operate the UYAP system for years.

As far as the UYAP is concerned, it has been carried out by the Ministry of Justice since 2000 and all the judicial units and agencies use it in their daily processes, so we can see how important this system is. UYAP currently has 34,250 users and 24,714,923 files stored. Nearly 50,000 new files are being entered into the system daily.[3]

Turkey has been seeking for the highest possible degree of integration since one of Mustafa Kemal Atatürk's main objectives was to make Turkey part of the family of European people. The accession process that started in 1998 has still not been completed, but it can be easily seen to what extent the aspect of being accessed contributed to the modernisation of the country, including justice, as the country has regularly been confronted with European standards by the reports of the Committee and the resolutions of Parliament. The main problem of the Turkish justice system -

1 Assistant Professor, Department of EU Law and Private International Law

2 Council of the EU, 'Digital justice: Council adopts conclusions on digitalisation to improve access to justice' (Press release, 13 October 2020) <www.consilium.europa.eu/en/press/press-releases/2020/10/13/digital-justice-council-adopts-conclusions-on-digitalisation-to-improve-access-to-justice/> accessed 8 March 2021.

3 Ali Riza Cam, 'Turkey's eJustice system (UYAP)' (*Justice, Law and Security*, 11 June 2007) <https://joinup.ec.europa.eu/collection/justice-law-and-security/document/turkeys-ejustice-system-uyap> accessed 1 July 2021.

just like the Hungarian one - is the issue of excessive caseloads which often leads to protracted cases and is manifested in condemnations of Turkey in Strasbourg as well.

In order to ease this burden, the reform of the judicial system has been realised, especially in the regular court system by setting up district courts and by the re-organisation in the public administration court system. Furthermore, since the millennium, a great deal of increase in resources and staff expansion have been accomplished and procedures in smaller councils have also resulted in the reduction of average caseloads of court councils. The wide application of computer equipment, IT networks and electronic procedures, which preceded the development of similar Hungarian systems, also made communication between parties and court, the court and other state bodies and courts between each other significantly faster and more efficient. The creation of the electronic database of court decisions helps to explore and integrate case law.[4]

UYAP is an e-justice system, part of the e-government, which was developed to ensure a fast, reliable, adequately functioning and accurate judicial system. As a central network project, it includes all the courts, offices of public prosecutors, prisons and other judicial and state bodies. UYAP is the most significant information system of Turkey which was prepared and created by the Ministry of Justice in order to correct the functioning and adequacy of justice and to create a more efficient and less bureaucratic judicial system for the people and the institutions concerned.[5]

If we examine the Ministry of Justice Strategic Plan 2010-2014[6], and the High Council of Judges and Prosecutors 2012-2016 Strategic Plan[7] and the Ministry of Justice Strategic Plan 2019-2023,[8] we can see that all of them had a main ojective to develop the UYAP system until at the present as well.

4 Adrienn Prieger, 'The impact of European integration on Turkish judiciary' (Doctoral dissertation, KRE, 2018) 241.

5 Ministry of Justice, IT Department, 'UYAP - National Judiciary Informatics System' (ACA-Europe, Seminar in Istanbul on 1 October 2009) 3. <www.aca-europe.eu/seminars/Istanbul2009/ist09_uyap.pdf> accessed 12 January 2021.

6 Ministry of Justice, 'Strategic Plan 2010-2014' (Strateji Geliştirme Başkanliği, 2010) <https://sgb.adalet.gov.tr/Resimler/SayfaDokuman/24122019093411StrategicPlan.pdf> accessed 13 July 2021.

7 High Council of Judges and Prosecutors, '2012-2016 Strategic Plan' (2012) <www.cjp.gov.tr/Eklentiler/Dosyalar/d5f1624b-0f04-4db3-9e19-e82987de7302.pdf> accessed 15 July 2021.

8 Ministry of Justice, 'Stratejik Plani 2019-2023' (Strateji Geliştirme Başkanliği, 2019) <https://sgb.adalet.gov.tr/Resimler/SayfaDokuman/27102020154519Stratejik%20Plan%20(2019-2023)%2023.10.2020.pdf > accessed 15 July 2021.

History of UYAP

The first studies about making the judicial system electronic were made in 1998. At the end of the year 1999, the Information Technology Department was created within the Ministry of Justice to realize the modernization of the justice system.

Later, technological companies were involved in deciding which information technologies should be used, and it was decided to have the whole modernisation covering all the judiciary units.

The project, National Judiciary Informatics System (UYAP), started as part of the e-government in 2000.[9]

The accession partnership between Turkey and the EU was adopted on 8 March 2001 and the Government of Turkey has prepared the National Programme for the Adoption of the Acquis (NPAA) so as to achieve the purposes stated in the Accession Partnership. The basic priorities of the Accession Partnership and NPAA include the modernisation of justice and penal reform. The aim of the legal harmonisation process is not only to make the necessary modifications to the existing legislation but also to strengthen institutions responsible for executing or applying new procedures. So, in order to realize these prospects, UYAP was created to make a network covering all the courts, offices of public prosecutors and law enforcement agencies together with the central agency of the Ministry of Justice.[10]

UYAP was created in two phases. First, the central organization was established in Ankara: the objective of the first phase was to automate the central agency and the subordinate units of the Ministry. The phase ended in 2002.[11] It was followed by the nation-wide automation of the UYAP provincial units.[12] By 2003, the infrastructure and software were installed in the provinces[13] and the relationship was created with the Ministry Center of Ankara.[14] In 2004, all judges and prosecutors and also all the meeting rooms were equipped with computers, and judges and prosecutors received an IT training[15]. (In Hungary, this must be achieved by 2020).[16] Following

9 Commission, '2001 Regular report on Turkey's Progress Towards Accesion', SEC (2001) 1756, 84.

10 UYAP, 'UYAP History' < https://www.e-justice.gov.tr/UYAP-History> accessed 14 August 2021.

11 Commission, '2002 Regular Report on Turkey's Progress towards accession' COM(2002)700 final 21

12 UYAP (n 9).

13 About the administrative division of Turkey, see: Prieger (n 3). 145. n 746.

14 Commission, '2003 Regular Report on Turkey's progress towards accession', COM(2003) 676 final, 21.

15 Commission '2004 Regular Report on Turkey's progress towards accession', COM(2004)656 final, 26.

16 'Digitalisation significantly transforms the work of courts. - Digital Open Day in Debrecen'

the enactment of the Law No. 5070 of 15 January 2004 on Electronic Signature, the Ministry of Justice reached an agreement with the public e-signature provider about the delivery of e-signatures for all judges, prosecutors and staff.[17] (Just to note, this has still not been achieved in Hungary.) By 2005, UYAP was functioning in several courts and penitentiaries, enabling several tasks, like court procedures, which were formerly paper-based, to be carried out electronically. Court records could be accessed through network by judges and prosecutors, and most of Turkey's courts and the offices of public prosecutors were now connected.[18] The database of the Court of Cassation and the Council of State was created and connected to the network in 2005.[19] It was necessary and this is what makes this sequel so important, because formerly Turkey had been criticised by the Committee for the following 'Day to day practice shows differences in the interpretation of the law in practical cases. As a result, there is a lack of clarity, transparency and legal certainty. There is evidence that in some cases the judge, invoking the same law provisions, decided to grant an acquittal while in other cases the opposite decision was taken. This in turn raises the question of the predictability of interpretation of the law.'[20] By 2006, the main courthouses[21], all judges and prosecutors had been provided with notebooks and Internet access. By this time, it was planned to have e-suits and case law accessible on network and the connection of jurisdiction with all state institutions.[22] In March 2007, the lawyer portal was integrated to the network, thus lawyers became able to follow their pending cases electronically, initiate new cases, send documents concerning their cases to courts and pay duties or advance litigation costs all electronically.

In May 2007, the Ministry of Justice signed two protocols with the Telecommunication Institute and the Chamber of Notaries about sharing information.[23] The second phase of the project had been finished by the end of 2007, and judges and prosecutors already gave positive feedback about the functioning of the system

(Birosag.hu, 13 December 2018) <http://projektjeink.birosag.hu/hirek/20181213/digitalizacio-jelentosen-atalakitja-birosag-munkajat-digitalis-nyilt-nap-debrecenben> accessed 12 January 2020.

17 UYAP (n 9); Ministry of Justice, IT Department, 'Fast, transparent and effective justice system - UYAP national judiciary informatics system' [pdf.], (ACA-Europe, Seminar in Istanbul on 1 October 2009) 22. <www.aca-europe.eu/seminars/Istanbul2009/ist09_uyap.pdf> accessed 18 January 2019.

18 Commission, 'Turkey 2005 Progress Report' COM(2005)561 final, 105

19 Ibid.

20 COM(2002)700 final, 21-22.

21 In Turkey, several courts use one court building, which is known as courthouse in English terminology and which may be the equivalent of the old Hungarian expression "törvényház-courthouse' (Today, the Hungarian language no longer distinguishes between the court as an organization and as a building).

22 Commission, 'Turkey 2006 Progress Report' COM(2006)649 final, 59.

23 Commission, 'Turkey 2007 Progress Report', COM(2007)663, 59.

and the goals achieved.[24] The Ministry of Justice issued a regulation and according to it documents would not move physically between institutions after 1 July 2008. All documents need to be sent electronically, verified by e-signature, correspondence between legal institutions is to be done by e-signature.[25] (This must be achieved also in Hungary by 2020.[26])

Legal institutions and agencies use infocommunication technologies in everyday practice. All court procedures, cases and suits have been transferred into electronic circumstances.[27] The judicial system and all other institutions concerned have a completely integrated and automated process among each other on the e-signature infrastructure of UYAP. This created an electronic office atmosphere with no paperwork needed.[28] In most courts, cases are distributed by an automated information technology system which provides lawyers and parties with secure access to essential information concerning court procedures and which is also used as a statistical data provision.[29] In 2015, the first quality surveys which were made by involving the public, the parties concerned and the bar associations showed that the IT system responsible for signing needed further development. Resolutions of the Constitutional Court, the Court of Cassation and the Council of State are accessible by a separate system, but they are difficult to search as no key words are added and no short summaries are attached which impede the creation of an integrated judicial practice of the country.[30]

Another project meant to be accomplished within the framework of UYAP is 'The Development Programme of Expertise System Portal' the objective of which is to develop a web-based expertise system portal. In this project, users will have access to information on how to go on, how much fee to pay and how much money is meant to be paid during the lawsuit for damages.[31] According to an agreement with the mobile phone service providers, informative text messages can be sent to clients

24 Ibid.

25 UYAP (n 9).

26 'Digitalisation significantly transforms the work of courts. - Digital Open Day in Debrecen' (Birosag.hu, 13 December 2018) <http://projektjeink.birosag.hu/hirek/20181213/digitalizacio-jelentosen-atalakitja-birosag-munkajat-digitalis-nyilt-nap-debrecenben> accessed 12 January 2020.

27 UYAP (n 9).; Commission, 'Turkey 2015 Progress Report' COM(2015)611 final, 15.

28 UYAP (n 9).

29 COM(2015)611 final, 15.

30 Ibid.

31 The system enables users, potential court clients to access formerly delivered court decisions in similar cases by providing keywords and parameters necessary which will appear on screen about the lawsuit concerned. Reports on similar cases will be extracted with relating statistical information, such as the number of lawsuits in the given area, the duration of suits, the number of accepted, partly accepted and denied demands, the cost of suits, the number of changes of claim and amount of money paid to the defendant. L.: UYAP (n 9).

to warn them about their appointment to appear in court. Users may request to be notified either by e-mail or text message, if any event specified by them is about to take place.[32] Furthermore, after the test phase was finished, courts and other judicial institutions were provided with "video- and voice recorders" and "videoconference systems".[33] Connection with other national and international institutions' and organizations' databases is being planned in the way to the accession to the EU also within the framework of UYAP. Connections between central databases of the EU and EU members states are also being sought.[34]

The structure of UYAP

Basic features of UYAP

UYAP has a central file system and structure, all servers are in Ankara. This saves money, hardware and staff. The processing of all data in the UYAP database is real-time, so all data is integrated, factual, reliable and up-to-date. The software is designed with complete flexibility to be comfortable to use in any court, regardless of size, type of work or intensity. Data is stored and transmitted within a single system, so data will not be cluttered or duplicated.[35]

During the design of the system center, the size of the system, the speed of technological changes, the goals of the system development, the warranty process of the system, the cost of the services and the maintenance after the warranty were considered. This, according to IBM and ORACLE, which are experts in this field, is unique in Europe in terms of capacity and capability: the capacity of the center is enough for more than seventy thousand users and can be developed if necessary.[36]

UYAP consists of different modules that are interconnected, with separate user interfaces for each module.

The modules are as follows:

- criminal law system, civil law system
- administrative legal system
- prosecution system
- the Court of Cassation system
- probation supervision system
- decision support system

32 Ibid.
33 Ibid.
34 UYAP (n 9); Ministry of Justice, IT Department (n 16).
35 UYAP, 'Infrastructure' <http://www.e-justice.gov.tr/Infrastructure> accessed 15 August 2021.
36 Ibid.

- lawyer information system
- enforcement and insolvency system
- penitentiary system
- citizen information system
- personal management system, financial and care system
- training management system
- document management system
- forensic system
- general support system

The system is also linked to a legal database, giving judges and prosecutors access to up-to-date legal sources online, in particular, legislation, regulations, circulars, case law, studies, form and template texts, model decisions.[37] There is also an electronic mail system connected to UYAP, which has 55,000 active users. There are virtual discussion forums within the judiciary that allow for the sharing of information. Each user can share their own experiences, problems, and ideas with other users and ask others questions, find solutions to their problems.[38]

The UYAP is designed to be linked to other public institutions and organizations. In this sense, the link with the personal data and address register as well as the criminal record was first provided, and it was certain that it would provide an opportunity to query personal identification and criminal records. This integration continued with other projects, such as the deployment of POLNET (Police, Gendarmerie) and TAKBIS (Land Office).[39] Driving licenses and the land register can be queried immediately by the judge at the hearing. Prosecutors may, in accordance with their limited powers, examine driving licenses and title deeds. On the other hand, posts can be tracked immediately by court users.

UYAP is a structural unit

The e-Justice portal is available to users for UYAP applications, distance learning, Help Desk, database, e-mail and forum, e-signature and information security features, which are the main features of the UYAP system. However, the e-Justice Portal is also there to provide information on issues such as maintenance notifications and updates. They are published on the portal for expert lists, sunny hours, weather forecasts and interest rates, etc. information.[40] In Hungary, the Electronic Administration Portal

37 UYAP (n34); Ministry of Justice, IT Department (n 16).

38 UYAP (n34); Ministry of Justice, IT Department (n 16), 9.

39 In Hungary, from 1 January 2018, the law also allows courts to have direct access to public credit registers (cf. Section 112 of the Code of Civil Procedure).

40 UYAP, 'Projects' <www.e-justice.gov.tr/Projects> accessed 29 August 2021.

(https://e-ugyintezes.birosag.hu/) plays a similar role, enabling the electronic submission of complaints, the preliminary estimation of the duration of proceedings, access to the case file, the Court's Electronic Information and Alert System.

The Citizens' Portal provides citizens with access to executive offices, all ordinary and administrative courts. This service is provided by the Ministry of Justice. The Citizens' Information System has been developed to ensure rapid access to justice and to make the best possible use of judicial services. Citizens can access the portal via the Internet using an e-government password, e-signature or mobile signature. This allows citizens to follow their own affairs.[41]

With the help of the **Lawyer Portal** (https://avukat.adalet.gov.tr), lawyers can open online cases and online enforcement procedures (e-tracking) via UYAP via e-signature, mobile signature or e-government password and online connection within office hours. Lawyers can see their pending and closed cases within the scope of their power of attorney. Lawyers may view other cases without power of attorney with the approval of the competent judge. Lawyers can request a copy of the case file electronically, submit electronically signed documents to cases, learn about the status of the case, view the date of the hearings, and pay the fee and costs electronically. Lawyers can also subscribe to the SMS notification system to be notified of their cases immediately. Lawyers may also inquire at the enforcement offices of the debtors' registered address, if they make a deposit with their chamber card or Vakıfbank account.[42]

The **UYAP Institutional Portal Information System** is a service offered by the Ministry of Justice for both public and private institutions. Through the institutional portal, institutions can track their cases online, which are completed or pending before ordinary and administrative courts and bailiffs.[43]

The **Expert Portal** is a service provided by the Ministry of Justice for experts working in court cases. With this service, experts can track their files electronically without going to court. In this project, the user will have access to information on how to proceed, how much fee to pay, and how much money he will pay during the lawsuit, given the lawsuit for damages involved.[44]

UYAP is a very noteworthy system, because it directly or indirectly has influence and impact over the daily life of 5,951 judges and 3,739 public prosecutors, 818 administrative judges, 30,000 auxiliary court staff, 1,159 trainee judges, 300 high court members, 66,000 lawyers (aprox.), 58,000 detainee and prisoners, 31,000 prison staff.[45]

41 UYAP (n 39); Ministry of Justice (n 16) 10.

42 UYAP (n 39); Ministry of Justice (n 16) 11.

43 UYAP (n 39).

44 The system allows users (potential court clients) to access decisions made in similar cases by entering keywords and the necessary parameters that will appear on the screen in relation to the lawsuit in question. Reports of similar cases will be extracted together with the relevant statistical data. UYAP (n 9); Ministry of Justice (n 16) 23.

45 Çam (n 2).

UYAP is very important because of the prevention of corruption. Destruction of files are impossible because of electronic recording and all the activities are logged in the system.[46]

Conclusion

The Turkish judiciary has certainly made a great stride in the EU accession process. Turkey's judicial system has been largely harmonized with judicial systems of EU countries. With the reform of the appeal system, substantial progress has been made in ensuring the right to an effective remedy and changes of criminal law rules, procedural laws, court rules, and through the development of financial and human resources, as well as judicial infrastructure, especially IT systems, have led to significant efforts to ensure a fair process, particularly in terms of equality of arms and the timely assessment.

During its way to proceed to the accession to EU and as a reply to its requirements, the Turkish goverment is paying high attention to the National Programme for the Adoption of the Acquis Communautaire. Modernising jurisdiction is a basic priority of the programme, so UYAP, which has been developed in the eras of different governments, was fully supported by all the competent authorities.[47] Despite the indisputable results so far, the development of UYAP is far from complete. Other national and international institutions' databases are planned to be integrated into UYAP as the country is proceeding to the accession to the EU.[48]

So, the UYAP database can be connected to the central databases of the EU or the Member States, thus creating an extended network that can also benefit the European courts. In the nearest future, it will be possible to connect UYAP to such backbone networks as TESTA (Trans-European Services for Telematics between Administrations) and other systems of EU Member States. Achieving this goal will result in the secure and fast transmission of international requirements (like applications for legal aid, extradition cases and deliverance of convicted persons). In addition, the UYAP's case and document manager system, as well as text editor software was designed to be independently used by other judicial systems. There is therefore no obstacle to these main components being taken over by other European courts, as they have already been transferred to other relating institutions in Turkey.[49]

46 UYAP (n 39).

47 Ali Rıza Çam, 'Turkish IT project UYAP' (CCBE, 17-18 February 2009), 3-4. <https://www.ccbe.eu/document/E-Justice_Portal/17-18_02_2009/Abstracts/13_Abstract_-_Turkish_IT_project_UYAP-_Ali_Rza_Cam.pdf>, accessed 18 August 21.

48 Ibid.

49 Ibid.

The establishment of the UYAP system fully meets the strategy of the EU E-Plus, the objective of which is to create a high-level information society and fill the gap between judiciary staff and legal aid seekers. An article about UYAP was published in the edition of May 2008 of the European Journal of ePractice, which discusses the principles of the EU in the area of modernising justice, with particular reference to the role and function of UYAP in this process and to the demonstration of the potential of the Turkish judicial system.[50]

Having overviewed the history and the presently working functions of UYAP, it is apparent that the Turkish judiciary becoming electronic preceded the digitalisation of the Hungarian judicial system with years or, in some cases, even with a decade. UYAP is probably one of the most advanced nation-wide court justice systems in the world and an excellent example of best practices for national courts. For this reason, the Turkish example can be instructive for the Hungarian system as well as for other European countries' systems. It is not only about the advantage of time, as John Hunter, leader of the IT Department of the European Court of Human Rights concludes in his study for the EU and the European Council: 'UYAP is probably one of the most advanced nation-wide court justice systems in the world and an excellent example of best practice for national courts. We can only congratulate the Turkish Ministry of Justice for accomplishing UYAP and the advantages it provides to Turkish national courts and the rule of law'.[51]

The coronavirus pandemic was a significant stimulus for the digitalization of the Hungarian court organization as well and for the expansion of the electronic service of the Hungarian court organization. Indeed, the correlation is partly optical, as the digital developments affecting the Hungarian judicial system were largely completed by the beginning of 2020, so the coronavirus pandemic can be considered a stress test of these systems rather than an urgent reason for digitalization. Rather, the role of the coronavirus pandemic is to point out possible directions for the further development of this system and to make the use of non-personal electronic administration more widespread than planned. In this development process, the UYAP system can provide excellent examples and valuable experiences for the Hungarian court organization.

50 Ibid.

51 John Hunter, 'Expert report on the UYAP System (National Judicial Network Project) - Project on Support to the Court Management System in Turkey,' 17 October 2008, SCMS/EO.005 <https://1library.net/document/zglmo56q-october-scms-expert-report-national-judicial-network-project.html> accessed 7 July 2021.

Law of Economics

Balog, Ilona Ida[1]

Forms of accumulation and economic growth in European countries

1. Introduction

Accumulation is an economic activity which has been practised since ancient times. It means that certain economic value is put aside and not consumed in a short period of time. The aim of such consumption delays is to ensure future subsistence or welfare. Basically, this accumulated value is interpreted by economic tradition as production factor or capital of different forms (Yashin, 2020). However, it is not ensured that accumulation always fulfils its purpose. If economic value is not put into the right forms, it may evaporate before it can be used or in case of adverse external circumstances it cannot create additional values. Even so, it seems that survival or improvement of life are still impossible without accumulation activities.

Keeping notes of economic activities is also important for prudent provision for future needs, as notes may help in understanding the effects of events past, present or future (Vanoli, 2005). It is therefore crucial whether we can keep records of accumulation activities and properly account for their effects on future economic welfare and performance. In modern times economic statistics are the means of such recording for macroeconomies. Modern statistics provide detailed and structured figures on accumulation activities.

It still remains a question, whether these figures can give a satisfactory explanation of economic growth. At microeconomic levels, it is widely accepted that investments are done in order to forge future development (Davidson, 1968). Mostly this is a preconception at the macroeconomic level, as well. However, it is rarely verified accurately whether the measured accumulation activities really have a significant effect on economic growth.

The aim of this paper is to find relationship between the most aggregated accumulation statistics and GDP growth in the case of European countries. Calculations were done through panel regressions on data available through Eurostat. The first part of the paper details the importance of accumulation for economic growth in theory. The second part shows calculations on the relationship between the recorded accumulated wealth and the growth of GDP per capita in European countries. The conclusion tries to find answers to the question whether it is possible to demonstrate economic development through accumulation in these countries with the help of statistical data.

1 lecturer, Department of Economics

2. The theory of accumulation

Accumulation is a complex economic activity. The process includes some more simple operations, like savings and investments. Though the ultimate aim of these operations is the same, that is to sustain or increase future wealth, they are different in content and value (Yashin, 2020). Savings constitute the starting point of accumulation, as it is the decision of putting aside a certain value instead of consumption. Investment on the other hand puts the saved amount into specific forms of production factors or capital, therefore is a decision on how the amount would be utilized in the future. Since this latter operation needs a considerable amount of expertise, saving and investment activities are done by different actors in the modern economy. Also, it needs time and effort to find the most efficient place for every saved amount, and some amounts may be piled up in the transmitting financial system, therefore the value of savings and investments will not be equal in the short run. There are some more reasons for the difference between savings and investments, as it is possible to finance investments from newly created credits, as well, and the modern financial systems are also inclined to inflate economic value without any real performance behind it. Notwithstanding this complexity, accumulation contains both savings and investments, though being closer to the ultimate purpose logically, investments are more likely to be connected to economic growth and wealth than savings. For this reason, accumulation is interpreted mostly as investment in this paper.

The importance of accumulation for future subsistence and development seems to be self-evident for all beings, even not only for humans. This can be clearly observed for example in the habits of squirrels. When squirrels create deposits of nuts, they do it in order to have some food reserves when harder times come to their survival. Clearly, this can be described as an economic activity, still it is rather primitive from many aspects. First, its purpose is sheer survival, not development. Second, it does not involve longer time periods, the nuts are to be consumed within some months. This activity therefore can be best described as only saving.

Human behaviour became more sophisticated than that of squirrels also in the field of accumulation at an early stage of development. Agriculture and the altered way of life it brought about meant a different and more complex accumulation method. Seeds deposited in the earth on purpose, multiply themselves and their value. This means that agriculturalists can achieve more wealth and higher living standards than hunter-gatherers. In the case of husbandry or tree cultivation, economic value is stored for a long period of time and also considerable amount of effort is put into these accumulation activities, which requires large scale cooperation from the individuals of the society. Savers and investors are not necessarily the same, and the capital put aside requires regular attention. This contributed to a large extent to the start of the development of human societies.

In modern times, accumulation developed further. Economic actors better understood economic value and became able to account for it in the forms of intangible assets, too. Different financing forms were elaborated and the phases of accumulation were distinguished also in the records of transactions. Now, savings and investments are done by different people and the concept of investment is continuously broadening, including newer and newer activities, whose capacity to foster economic growth is realized.

All these mean that the concept of accumulation is closely tied to economic growth by definition (Lequiller-Blades, 2014). There is no point in accumulating anything if it cannot improve our future life, or only replicates the existing regularities at the same living standard. It seems that keeping up subsistence is just a minimal expectation towards accumulation activities and achieving growth and improvement is equally required from them. If an investment does not bring positive profits, only returns at the margin, it will hardly be deemed to be economically feasible (Davidson, 1968). Therefore savings, investments and all kinds of accumulation are utilized effectively if only they ultimately generate an increase in economic performance and wealth, greater than the value consumed by this utilization.

The beneficial effect of capital accumulation on economic growth that way was emphasized throughout the classical era of the science of Economics. However, neoclassical models applied the rule of diminishing returns on investments, as well, stating that the effect of accumulation on growth drops, when the economy approaches its optimal point of the accumulation rate. This view also includes the belief in a stationary equilibrium situation, which is characteristic to the economy.

The existence of such a stationary equilibrium point, however, has been questioned in Keynes' time. First, Keynesianism emphasized the time dimension of the relationship, stating that savings actually may cause lower growth in simultaneous time, because higher saving rates mean lower consumption rates and consumption drives demand, which can generate economic growth. Therefore, in the years of parsimony economic performance would stagnate (Villalobos Céspedes, 2020). However, if savings are efficiently transmitted to investments, their beneficial effect can come in subsequent years when investments start to produce adequate returns. As investments can be financed from other sources than savings it is also possible to keep up growth continuously, though the extra source of financing investments has to be found.

The nature and effects of accumulation were then further elaborated on in economic models, such as the Solow-model. However, this model only calculates with physical capital investment as true accumulation. Other important factors, human capital and technological development were regarded as exogenous, not investments done on purpose, though at least they were already realized as existing factors (Solow, 1957).

The evolution of the System of National Accounts (SNA) gained momentum in the 1950s, approximately at the same time as the development of the Solow-model (Stone, 1986). In this statistical framework, the figures of accumulation play an important role,

as data has to be provided for the analysis of economic growth and its most important factors. Consumption and accumulation (later called investments in the macroeconomic terminology) constitute the main uses of created economic value in a year and are presented as the third way of grouping GDP in an SNA framework.

In the second half of the 20th century, research on growth factors and refinement of the statistical framework in order to provide data for analysis proceeded simultaneously. From 1968, inclusion of balance sheets in the SNA has been considered and finally, in 1993, the statistics of assets appeared in it. This was an important step from the point of view of accumulation, because accumulated value is embodied in balance sheet assets. In principle, keeping records of balance sheet items enables us to track the way of saved amounts into real investments and find the causes of their difference (Yashin, 2020). However, the balance sheets drawn up by statistics are still far from being complete. There are ongoing debates on the types of assets to be included in the balance sheet and therefore universally accepted as accumulation. Expenditures, which are not spent on a balance sheet asset, are considered to be consumption, therefore we lose the opportunity to connect them numerically with our future development. In 1993, the SNA balance sheets consisted of only physical assets and some intangibles in a very limited number (Vanoli, 2005). In 2008, Research and Development assets were capitalized after a longish debate. The most important rationale behind this gradual broadening of the asset circle is to identify and account for as many types of accumulated growth inducing factors as possible.

3. Question, data and methodology

Is it possible to show the relationship between overall accumulation and economic growth on the latest available data? Generally, a positive relationship is assumed in the literature between accumulation and growth while examining a range of specific issues (Guellec-Pottelsberghe, 2001), but aggregate level data from the SNA framework for the representation of accumulation are not yet used. The purpose of this paper is to verify on recent data, what kind of relationship can be detected using these aggregates. For this purpose, the basic model of Bassanini et al. is used with modifications. First the standard equation used by Bassanini et al. was estimated again with newer European data, then a new level variable is added in order to use newly available stock data (Bassanini et al., 2001).

Data were extracted from the Eurostat database. Though the longest available time series run from 1995 to the present, this range is available only for three countries, therefore a shorter period was chosen. Finally, 20 European countries were examined between 2000 and 2019. The extracted data are summarized in Table 1.

Table 1: Location of data used, European countries 2000-2019

Data	*Sheet*	*Full name*	*Unit*
Nass and 13 asset types	nama_10_nfa_st	Total fixed assets (net) and various asset types (net)	million euro, previous year replacement cost
GCF	nama_10_gdp	Gross capital formation	current price million pps
GDP	nama_10_gdp	GDP at market price	current price million pps
GDPc	nama_10_pc	GDP at market price per capita	current price pps

Source: Eurostat

Following Bassanini et al., for economic growth the yearly difference in the logarithm of GDP per capita was used. For GDP and related flow type data (gross capital formation) measurement at current prices in pps was chosen. For the stock type balance sheet data of total net fixed assets and different types of assets the evaluation of previous year's replacement cost was chosen in million euros. The chosen measurements were closest to real values, which also can ensure the comparison between countries, as best as possible.

In order to demonstrate the relationship between accumulation and economic growth, panel regressions were done. The panel regression seems most appropriate in this case, because there is considerable heterogeneity between the units. There were no missing data within this range of analysis.

The variables included in the regression equations were put together by some modifications of the extracted data. These are summarized in Table 2, as follows:

Table 2: Variables applied in the regressions

Variable	*Name*	*Calculation*
dLGDPc	GDP per capita growth	yearly difference in lg (GDPc)
LGCFGDP	Gross Capital Formation per GDP	lg (GCF/GDP)
LNA_1 and Asset types_1	Net Fixed Assets and Asset types	lg (NAss) with 1 year lag and lg (Asset types) with 1 year lag
LGDPc_1	GDP per capita	ln (GDPc) with 1 year lag
dLcap	population growth	yearly difference in ln (GDP/GDPc)

Source: own construction

For the variables, calculated values (GDP per capita) were applied directly from the database where such data were available. In order to get the scales of measurements closer, logs were taken. Finally, the gross capital formation % was calculated as the logarithm of the percentage of GDP in order to get the proportional value of asset investment comparable to other countries and time periods. Due to that the difference variables were not calculated in the database the length of the examined period in the economic software was only 19 years, though data used cover 20 years. For the calculations the GRETL software was applied.

The growth of GDP per capita represents economic growth in the calculations, as for GDP per capita is a universally accepted measurement (Bassanini et al., 2001). It is true, however, that GDP and its derivatives do not capture improvement in life in its entirety. For the purpose of this paper, it is still acceptable, as accumulation in its present interpretation serves primarily the provision of tangible requirements of a society. The per capita version of the figure was applied as to make it meaningful and comparable in space and time.

Accumulation can be represented by various variables. Per capita versions are mostly suitable to compare to GDP per capita based variables and dividing by the number of population is also good to get comparative data. However, a more meaningful measurement can be obtained by dividing the measured value of accumulation by GDP, which shows the relative importance of the accumulation activity within the economies (Bassanini et al., 2001). Both methods ensure comparability in space and time, here the latter was applied in accordance with Bassanini et al. Accumulation can be measured by a flow figure, the value of gross capital formation in a time period. The measurement applied here gives the value of capital formation for a whole year and as an aggregate of the SNA, measures capital formation in the form of all assets accepted as storage of economic value for the future.

Another possibility to capture accumulation is the application of a stock figure from the SNA, which is Net fixed assets in the balance sheet in the most aggregate form. This figure is measured at one point in time, more specifically at the end of a year. As a stock figure, it represents all the economic value accumulated in previous periods, which have not yet disappeared, therefore can be utilized in the examined and future periods. Though this variable was not included in estimates previously, for the purpose of this paper it is important to see its effect separately from the capital accumulation of the year when growth occurs. Assuming that the level of accumulated capital affects future growth, this stock type variable was included in the estimated equation with one year lag. For the sake of further analysis, the various types of accumulated assets were also taken into consideration, all measured as stock type variables with a 1-year lag.

4. Calculating the effect of accumulation on economic growth

On the basis of economic knowledge compiled so far, it is highly likely that a relationship exists between accumulation and economic growth. The direction and strength of this relationship, however, are less straightforward. Most of the researchers agree, that the relationship should be basically positive, as the inherent purpose, the very raison d'etre of accumulation is growth, even if it could be necessary only for survival in hard times of decreasing wealth, as well (Lequiller-Blades, 2014).

Negative relationship may exist in case of crises, when even basic economic activities' performance can drop, as they are not necessarily due to a generally high volume of accumulation done earlier, which is visible in high values of asset stock variables. Also, accumulation may even be harmful, as far as it diminishes consumption and demand, which may cause a deepening crisis. In case the neoclassical model of diminishing returns on investment holds, accumulation also may cause a decrease in economic growth if the economy is near to or over of its equilibrium point of optimal capital accumulation. Finally, increased growth will not be driven by unproductive investments.

In normal cases, however, we expect that accumulation generates growth in the future and at least in the long run. If we take into consideration the dynamic aspect of the relationship, it is expected that accumulation of the previous periods has a positive effect, while accumulation may cause lower economic performance in its simultaneous year due to a possible limiting of instantaneous demand. If so, accumulation of a certain year may lower economic performance in its period, while increases it in subsequent years. This would reinforce a higher growth between present and future, therefore a positive relationship could be reinforced in the dynamic approach this way. The effects are shown in Figure 1.

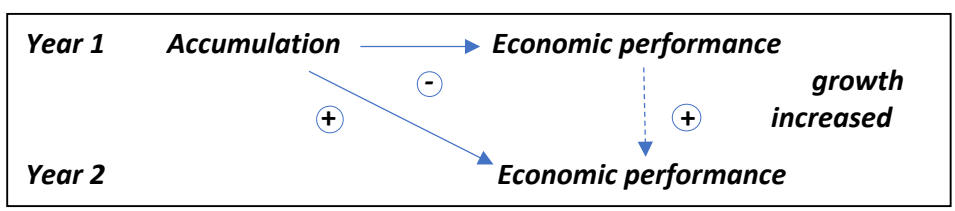

Figure 1: The effect of accumulation on economic performance
Source: own construction

However, it is important to remark, that simultaneous negative effect of accumulation on performance can be neutralized by demand-oriented economic policy. If the government is determined to keep up demand for example by monetary tools, accumulation is possible to boost without squeezing demand for consumption, thus increasing both

investments and economic performance in the examined year. This policy, however, may cause inflation and or government indebtedness later on, therefore careful implementation is necessary.

On the basis of the above, here first the standard equation of an earlier study was reproduced and estimated with newer data (Bassanini et al., 2001.):

$$dLGDPc = LGCFGDP + LGDPc\_1 + dLcap \qquad (1)$$

In equation (1) *dLGDPc,* the GDP per capita growth representing economic growth is the dependent variable. *LGCFGDP* stands for accumulation. It is measured in the year, when the dependent variable was measured. It has to be remarked that this is a flow type variable, and its effect is examined only in the same year when the dependent variable, still its value is regarded to be representative of all time accumulation in this basic equation. Its impact was significant and positive in the study, which was taken as the basis of this paper, though it also could be negative on the above theoretical basis. *LGDPc_1* is a control variable in this point of view. It is included here, because it is widely assumed that countries with higher GDP per capita will produce lower growth due to the higher level from where they start. As the main variable of interest here is capital accumulation regardless of the GDP per capita level obtained before, the inclusion of this variable is justified. It was also part of earlier studies to measure the rate of slowdown in growth at higher GDP per capita levels.

Equation (2) attempts a modified approach to measure the effect of accumulation on economic growth and the following equation was constructed to estimate the dynamic relationship described above on the data:

$$dLGDPc = LGCFGDP + LNA\_1 + LGDPc\_1 + dLcap \qquad (2)$$

In this equation, the dependent variable is *dLGDPc,* the growth of GDP per capita, just like in the case before. Accumulation is represented by *LGCFGDP,* which shows the relative importance of accumulation spending in the year of the dependent variable. Higher values of this variable could lower economic growth of the year, though in previous studies its coefficient was positive. The growth of GDP is also assumed to be affected by previous accumulation, which is *LNA* with a one-year lag in this model. This is a stock type variable containing the accumulated economic strength, which may induce and make possible potential economic growth in the subsequent periods. It is lagged because it is expected to have a positive impact later than accumulation. The nature of a stock type variable ensures that there is no need to include earlier values, because all the relevant accumulation of previous years is included. *LGDPc_1* is a control variable of the GDP per capita level of the country and period when the observation was made. Similarly to equation (1), the expected sign of its coefficient is negative.

The equations were tested by fixed effect panel regressions. There are two versions of the model. Time dummies were included to filter out effects which may have an impact on all units in the same time. This version also enhances the effect measured in the cross-section dimension. This was important for getting valuable information, because the time span includes the years of the global financial crisis, which started in 2008 lowering the growth rates of all countries and altering the nature of the mechanisms significantly. HAC robust standard errors were applied to address autocorrelation and heteroskedasticity problems. The Hausman test indicated in both cases that fixed effect regressions were preferred to the random effects methods.

The countries included were: Belgium, Bulgaria, Czechia, Germany, Estonia, Greece, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia and Finland. These were the countries for which detailed and comparable data were available on Eurostat. The choice of this sample seems suitable as nine countries are from the Eastern European region with a past experience of soviet type economic organization, while eleven countries always belonged to the group of market economies. There is also a wide range of size in the examined sample of countries.

The results of the regression estimations are summarized in Table 3, 4 and 5.

Table 3: Regression results for the estimation of the effect of capital formation on economic growth in 20 European countries, 2000-2019

Fixed effect panel regression, dependent variable: *dLGDPc*				
Variable	***Coefficient***	***Std. error***	***p-value***	
LGCFGDP	0,08	0,02	0,0002	***
LGDPc_1	- 0,1	0,01	0,0000	***
dLcap	0,17	0,44	0,7017	
Hausman test: χ^2 = 34,1 p = 0,0000 Durbin-Watson: 1,48				

Source: own construction

Table 4: Regression results for the estimation of the effects of accumulation level and capital formation on economic growth in 20 European countries, 2000-2019

Fixed effect panel regression, dependent variable: *dLGDPc* Result with time dummies				
Variable	***Coefficient***	***Std. error***	***p-value***	
LGCFGDP	0,07	0,02	0,0006	***
LNA_1	- 0,05	0,02	0,0048	***
LGDPc_1	- 0,06	0,01	0,0000	***
dLcap	0,18	0,43	0,6770	
Hausman test: χ^2 = 52,6 p = 0,0000 Durbin-Watson: 1,57				

Source: own construction

Table 5: Regression results for the estimation of the effects of accumulation level and capital formation on economic growth in 20 European countries, 2000-2019

Fixed effect panel regression, dependent variable: *dLGDPc* Result without time dummies				
Variable	***Coefficient***	***Std. error***	***p-value***	
LGCFGDP	0,1	0,03	0,0016	***
LNA_1	0,02	0,03	0,4462	
LGDPc_1	- 0,06	0,03	0,0281	**
dLcap	- 0,47	0,85	0,5852	
Hausman test: χ^2 = 21,4 p = 0,0003 Durbin-Watson: 1,56				

Source: own construction

The results of the regression analysis are very straightforward and expressively show the opposite conclusions to expectations. Simultaneous flow type variables of investments and accumulation have a positive effect on economic growth of the same period in this sample, contrary to the concerns. The sign agrees with that in the earlier study, while the coefficient is much lower (0.08, while it was 0.39 earlier), though still significant statistically (Bassanini et al., 2001). This may be due to the fact that investments are not financed exclusively from the households' savings, therefore it is possible to keep up consumption and demand when investments are growing. Another explanation for this result may be that the figure of GDP contains the value of newly produced investment assets, as well, therefore consumption demand does not have to increase to boost this figure of economic performance.

The coefficient of *LNA_1,* the stock type variable of accumulation is negative, which is in contradiction with expectations. This, however, is true only for the version with time dummies, which means that the negative sign is true only for the cross-country dimension. Explanation of this result is more difficult than in the previous case because it is the most important reason for making investments at all, that economic performance should increase due to their impact in the long run. It seems to work in time comparison but does not hold between countries. Here are some possible explanations for the negative sign of the *LNA_1* variable.

According to the neoclassical view of accumulation, after a certain time at higher economic development levels the returns to investments start to diminish. As the economy approaches higher and higher levels of relative capital endowment, their overall growth rate slows down. Being at a high economic development level, European countries may be in a situation, where high levels of accumulated capital is still beneficial, generating further growth, though the increase in economic performance is smaller than at lower development stages. Once the development level is high enough for the issue of diminishing returns to be present, higher accumulated capital levels may produce lower growth rates in case of the same GDP per capita level.

Some investments also may be unproductive in the long run. Even if investment decisions are done through careful calculations on future returns, many of them may have finally a slower payback than thought before, even if their value is corrected for prospective returns annually. Also, in those countries with relatively high living standards luxury spendings are more frequent. Some luxury fixed assets have high market values as reserves, even though they will never generate economic growth.

Table 6 summarizes the results of a series of regressions done with the help of detailed data from the SNA statistics. In order to gain more information on net assets, the stock values of different types of accumulated net assets were regressed with economic growth and the other control variables described above. The coefficients of the various asset types reveal how the different assets relate to economic growth and which of them played prominent roles in showing a negative sign between accumulated assets and the change in the GDP per capita.

Table 6: Regression results of different asset types regressed to economic growth in European countries, 2000-2019

Fixed effect panel regressions, dependent variable: *dLGDPc*

Asset types	L Net asset type_1	LGCF/ GDP	LGDPc1	dLcap	L Net asset type_1	LGCF/ GDP	LGDPc1	dLcap
	with time dummies				without time dummies			
Total assets	-0,05***	0,07***	-0,06***	0,18	0,02	0,10***	-0,06**	-0,47
	(0,02)	(0,02)	(0,01)	(0,43)	(0,03)	(0,03)	(0,03)	(0,85)
Construct	-0,04**	0,07***	-0,07***	0,16	0,02	0,10***	-0,06**	-0,45
	(0,02)	(0,02)	(0,01)	(0,41)	(0,02)	(0,03)	(0,02)	(0,86)
Dwelling	-0,04***	0,08***	-0,07***	0,06	-0,02	0,09***	-0,02	-0,59
	(0,01)	(0,02)	(0,01)	(0,38)	(0,02)	(0,02)	(0,02)	(0,83)
Other buildings	0,00	0,08***	-0,10***	0,17	0,03**	0,11***	-0,08***	-0,50
	(0,01)	(0,02)	(0,01)	(0,45)	(0,01)	(0,03)	(0,02)	(0,87)
Machines weapons	-0,04*	0,07***	-0,06***	0,25	-0,03	0,09***	-0,01	-0,45
	(0,02)	(0,02)	(0,02)	(0,51)	(0,03)	(0,03)	(0,03)	(0,88)
Transport equip.	-0,03***	0,08***	-0,06***	0,55	-0,03*	0,10***	-0,00	-0,09
	(0,01)	(0,02)	(0,01)	(0,57)	(0,02)	(0,02)	(0,02)	(0,91)
ICT equip.	-0,01	0,08***	-0,09***	0,11	-0,03**	0,10***	-0,02	-0,71
	(0,01)	(0,02)	(0,02)	(0,47)	(0,01)	(0,02)	(0,01)	(0,85)
Computer hardware	-0,01	0,08***	-0,09***	0,12	-0,02*	0,10***	-0,02*	-0,62
	(0,01)	(0,02)	(0,01)	(0,47)	(0,01)	(0,02)	(0,01)	(0,90)
Telecom. equip.	-0,00	0,08***	-0,09***	0,12	-0,00*	0,07***	-0,02	-0,27
	(0,01)	(0,02)	(0,01)	(0,44)	(0,00)	(0,01)	(0,01)	(0,50)
Other machines	-0,01	0,07***	-0,08***	0,15	0,01	0,10***	-0,06*	-0,47
	(0,02)	(0,02)	(0,02)	(0,43)	(0,02)	(0,03)	(0,03)	(0,87)
Bio resources	-0,01	0,08***	-0,09***	0,17	-0,01**	0,10***	-0,03***	-0,93
	(0,01)	(0,02)	(0,01)	(0,51)	(0,01)	(0,02)	(0,01)	(0,78)
Intellect. property	0,01	0,08***	-0,11***	0,12	0,06***	0,11***	-0,15***	-0,66
	(0,01)	(0,02)	(0,02)	(0,39)	(0,01)	(0,02)	(0,02)	(0,60)
Research & Dev.	0,01	0,08***	-0,11***	0,24	0,04***	0,12***	-0,12**	-0,12
	(0,01)	(0,02)	(0,02)	(0,41)	(0,01)	(0,02)	(0,02)	(0,83)
Software, databases	0,01	0,08***	-0,11***	0,08	0,03***	0,11***	-0,10***	-0,83
	(0,01)	(0,02)	(0,02)	(0,36)	(0,01)	(0,02)	(0,02)	(0,59)

Source: own calculations on the basis of Eurostat data

According to the calculations, net assets can be divided broadly into three groups. In the first group buildings, structures and real estates can be found. These represent a large portion of net assets and determine the sign of the total net assets coefficient in the regressions. The second group consists of machinery and other portable tangible assets. Their share in the total value of net assets is significant, their coefficients' sign in the regressions is generally negative. The third group is the group of intangibles. They are only a small part of net assets, but their coefficients' sign is positive.

On the basis of Table 6, the following findings can be formulated: the main contributors of the negative sign of the coefficient of net assets are dwellings and transportation equipment. These are assets representing big value and are the main parts of the infrastructure. The infrastructure consists of assets which are necessary even for the very basic level of economic operation, but normally do not stimulate fast growth directly in themselves. This may explain a reversed relationship between the value of these assets and economic growth. Some luxurious dwellings or comfortable vehicles may increase the value of accumulation, still the increase in the GDP per capita is lower, as they are not as productive as expensive. Still, this is true primarily in the cross-section context, as higher valued infrastructure may show less productivity between countries rather than in time in the case of a specific country, where productivity may not change as fast as the value of net assets.

It is also true, that apparently intangible assets may generate growth most. Their coefficient is significantly positive both in the time and cross-country dimension. The products of research and development and other intellectual operations directly motivate growth through providing more productive means for the economies. In the postmodern era, these are those assets of which the classical economic concept of accumulation contemplates, signifying that intangibles took over the place of tangible assets in today's economic development.

Another important finding is that machinery, together with the most up-to-date telecommunication equipment and hardware are not the basis of further fast development. The more "iron" we have around us, which depreciates rapidly, the more we pollute our environment without any detectable development. It seems still true that tangible welfare is only a necessary "evil", needed for development, but their quantity should be minimized in order to boost productivity. This is also true for biological resources, that is cultivated land.

Another group of explanations may be technical in nature. This means, that the variables applied to represent economic concepts do not cover sufficiently the meaning attached to the concept in economic models. This is true primarily for GDP and GDP per capita. Investments may well be useful, still their beneficial effect is not captured by the measurement of GDP. GDP does not contain a range of useful activities which may be productive and facilitated by earlier investments. If an economy conducts such activities to a great extent, then all the effects of the fixed assets supporting them will

not be seen in GDP growth, still the value of the fixed assets is part of the value of total fixed assets in the SNA balance sheet. Therefore, an increase in the value of such fixed assets (similarly to the infrastructure) may not facilitate a measured growth activity as anticipated in the general theory.

Another measurement problem arises in connection with accumulation. Total fixed assets contain a number of truly unproductive (still valuable luxury) items, as explained above. On the other hand, there are important intangible assets which are not accounted for in this figure and generate tangible economic growth (e.g. practical knowledge). In the latter case, the accumulation of knowledge is not recorded in the assets category, still its continuous effect is measured in increased GDP (Vanoli, 2005). In this case we can see higher growth rates along with the lower accumulated value of fixed assets. This also indicates that there are a lot of different growth generating assets which are still not captured by statistical measurement properly.

5. Conclusion

Economic thinking relates the future changes in positive directions to investments and accumulation in the present. In fact, future improvement is the only purpose and raison d'etre of accumulation, as it requires sacrifice in the preceding periods of time. If improvement is not to come, accumulation becomes unjustified.

Measurement of accumulation and its effect is therefore a vital point of Economics. Still, in spite of the universal meaning of the concept, theories of accumulation seem to be born to explain only some specific phenomena of economies. These theories may be right under certain circumstances, still their universal application seems to be problematic (Temple, 1999).

In this paper, I attempted to find the beneficial effect of accumulation on economic growth. However, using the most aggregate and easily available figures for this purpose, this attempt was not successful. According to the findings, the measured values of earlier accumulation affected GDP growth in a negative way between 2000 and 2019 in the majority of European countries.

The main reason behind this is that assets used for production have great variability. The highest valued assets, like real estates or transport equipment are mostly necessary, but less productive and do not generate faster growth at higher levels of economic development. The truly growth motivating intangible assets (like intellectual property) represent only a small part of the measured accumulated value.

All these indicates that economic research has not found yet the way to monitor the true drivers of economic growth, though it is likely that these factors should be looked for among intangible assets.

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Abstracts

Public Law

Papp, Petra (Assistant Lecturer, Institute of Criminal Sciences)

History and existing provisions of substantive legislation on crimes against humanity in Hungary

The focus of the study is on crimes against humanity. This is an international crime, the regulation of which can also be found in the Hungarian legal system. The regulation of crime has a particularly interesting historical history, which can be examined and presented in several aspects. In this study, I would like to highlight, on the one hand, the importance of regulating crime from a constitutional point of view and, on the other hand, to draw particular attention to the international and domestic legislation on criminal offences.

Tóth J., Zoltán (University Professor, Department of Legal History, Jurisprudence and Church Law)

Statutory regulation on capital punishment in Act V of 1961 of the Hungarian People's Republic

In Hungary, the death penalty was used in several extraordinary procedural regimes after 1945. It was possible to impose capital punishment in the course of people's tribunals, military tribunals, usury courts and courts-martial. Between 1950 and 1953, these were phased out of the Hungarian legal system, but in 1956, the special councils of the people's tribunals and the system of martial law administration were reintroduced. This was only brought to an end by Act V of 1961, which ended the system of exceptional criminal law in Hungary with its entry into force on 1 July 1962. This paper presents the offences for which the death penalty was imposed by this Act, Hungary's second complex Criminal Code (including both general and special part), and the changes introduced by the 1971 Criminal Amendment (Law-Decree No. 28 of 1971), which remained in force until the entry into force of Act IV of 1978, Hungary's renewed Criminal Code.

Loebs, Patrick (Grace College, Winona Lake, Indiana) – Csáki-Hatalovics, Gyula (Associate Professor, Department of Public Administration)

Origins and applications of free speech in America

The American idea of free speech has been highly contentious from its early days. Furthermore, since its codified entry into the United Sates Constitution, the ideal has been, redefined, expanded, and allocated. Originally applied to the press, the term now covers almost all instances of performative action, spoken and unspoken. But now, the internet, and social media, are casting new doubt upon the ability of "free speech" to remain in a position of an absolute right. This paper outlines the philosophical origins of the term and traces its changing application through the two centuries of the American system. It then examines free speech in the contemporary lens of social media, and the changing definition of "public square." Finally, it argues that ultimately, continued existence of this right requires the public acceptance of messy, robust, and sometimes uncomfortable process. It remains to be seen if dedication to this principle can withstand an increasingly hostile social environment.

Zsiros, Klaudia Viktória (lecturer, University of Debrecen, Faculty of Law)

The impact of the Me Too movement

The Me Too movement is about all types of (sexual) violence against women, it started in October 2017, and it received a wide range of reaction from society. Along with a brief outline of the major events of the movement, I examine how can media, especially in this day and age, social media indirectly influence the adjudication of these crimes. I focus on presenting different forms of victim-blaming that is based on stereotypes which negatively influence the procedure. I show how social media can be both a positive and negative factor in holding perpetrators accountable for violence against women.

Through various articles and posts, I will demonstrate why this movement has grown so much and so fast on social media, which indicate the importance and novelty of researching this topic not only from a social but also from a legal point of view. I examine violence against women as a social phenomenon, and when it comes to victim-blaming, I address the culture of rape and the concepts of "real rape" and "real victim". The aim of my research is to show through the reactions to the movement, how difficult the situation is for the victim, with or without the added factor of (social) media.

Nochta, Tibor (University Professor, Department of Civil Law and Roman Law)

Private Liability in Hungarian Company Law – some current liability issues

In The Ways of Private Liability in Company Law, published in 2005, the author examines the evolution of private liability trends concerning the fifteen years of experience since the publication of the monograph.

The treatise discusses the growing economic determinacy of civil liability in company law, examines the question of the central element of private liability, and looks specifically at the rules of correctness and liability in relation to company liability and the development of responsibility for breach of contract.

The evolution of senior executive officer's liability towards the company, the tort of tort, and the chief executive's liability of companies in compulsory liquidation are also discussed.

The study presents the current trends in private law liability in company law, with a special emphasis on the most evolving issues of particular interest to practitioners.

Tran, Hien (Compliance Associate Outcubator Vietnam, Hanoi Office) – Boóc, Ádám (University Professor, Head of Department of Civil Law and Roman Law)

COVID 19 Pandemic – A showcase for Electronic Arbitration to flourish

The last few decades have seen the strong expansion of electronic transactions becoming commonplace in both domestic and international business market. It is no longer luxurious to conclude a contract online and have the product delivered to your assigned place. In this modern world, dispute resolution methods, especially arbitration should not stay out of the rapid development of technology. The germ of online mechanisms has been around for a long period and the year of 2020 appears to be the right time for this plan to grow and make a big progress.

With the aim to give a general overview of E-arbitration and its operation recently, the article will start with the context of the current situation which have had a great impact on the development of it in the last 1 year.

Next, the history, definition and advantages of electronic arbitration will be briefly shown based on the eminent scholars' theories and the conclusion drawn by the author. The main content of the article will focus on the rapid change of this method and bring on the table the on-going working mechanism of E-arbitration according to international, domestic regulatory framework and institutions' regulations and also the anticipation for its future.

Osztovits, András (University Professor, Department of EU Law and Private International Law)

In the web of technology - the present and possible future of private enforcement

Probably the most remarkable consequence of the increasing use of modern technologies is that both individuals and economic stakeholders have a reduced sense of time and patience for the services provided. The state-run administration of justice is facing a growing challenge: in order to remain competitive comparing with online dispute resolution forums, which are increasingly using modern technology, it needs to radically innovate. The most time-consuming aspects of judicial proceedings are the judicial and procedural principles that international and national legal sources require to be respected in all proceedings. Some examples from abroad already show that the introduction of currently known applications of modern technologies into judicial procedures does not break traditional principles and greatly increases customer satisfaction. The paper describes this process and concludes that the model of justice delivery that has been in place for almost two centuries needs to be fundamentally rethought and innovation should be allowed into the courts.

EU Law

Muzsalyi, Róbert (Assistant Professor, Department of Civil Procedure Law)

Do Member States have procedural autonomy? - Questions and answers on the national framework for the enforcement of EU law

This paper examines two principles developed by CJEU, the principles of equivalence and effectiveness. Both represent the minimum and the yardstick for the requirements of procedural rules, and the national legislative competence they limit is often referred to as the procedural autonomy of the Member States.

The paper briefly reviews how procedural autonomy has become a concept accepted by the CJEU and what critical views have been expressed against it. The first part of the paper examines the doctrinal background to procedural autonomy: its framework at the level of primary EU law sources, and the procedural provisions at the level of regulations and directives. The second part of the paper analyses the jurisprudence of the CJEU in relation to the concept of procedural autonomy, a separate chapter shows the diversity of the jurisprudential understanding of this concept.

Prieger, Adrienn (Assistant Professor, Department of EU Law and Private International Law)

The UYAP-system - A noteworthy progress in the European integration process of Turkey

The current SARS-CoV-2 pandemic accelerated the process of digitization and significantly extended the application of digital techniques to almost every area of life, as well as the use of increasingly modern systems, which clearly benefit countries that have already been committed to the digitalisation of public services, such as Turkey, which has been making significant efforts to build and operate the UYAP system for years. UYAP is an e-justice system, part of the e-government, which was developed to ensure a fast, reliable, adequately functioning and accurate judicial system. As a central network project, it includes all the courts, offices of public prosecutors, prisons and other judicial and state bodies. The Turkish example can be instructive for the Hungarian system as well as other European countries' system.

Law of Economics

Balog, Ilona Ida (lecturer, Department of Economics)

Forms of accumulation and economic growth in European countries

This paper examines the relationship between aggregate measures of accumulation and economic growth. Calculations are based on the data of 20 European countries in the time period of 2000-2019 and use panel regressions. Results show that simultaneous flow type accumulation indicators are in a strong positive relation with economic growth measured by the GDP per capita, which is in accordance of findings of earlier studies. However, stock type, level measurements of previously accumulated wealth have mostly a negative effect on economic growth. A more detailed investigation into the available values of asset types reveals that the accumulated values of tangible assets tend to have negative signs, while accumulated intangibles are more likely to generate positive growth. Nevertheless, a lot of intangible assets and processes are not accounted for in economic statistics, therefore development of their measurement is desirable.