ESSAYS OF FACULTY OF LAW UNIVERSITY OF PÉCS
YEARBOOK OF 2012

STUDIA IURIDICA
AUCTORITATE UNIVERSITATIS PÉCS PUBLICATA

150

Essays of Faculty of Law University of Pécs Yearbook of 2012

Pécs 2012

Published by University of Pécs, Faculty of Law
H-7622 Pécs, 48-as tér 1. Hungary

Responsible publisher
Berke, Gyula (dean)

Linguistic supervision
Chadwick, Clifford Shepherd

HU ISSN 0324 5934 (Studia Iuridica Auctoritate Universitatis Pécs Publicata)

HU ISSN 2061 8824 (Essays of Faculty of Law University of Pécs)

Printed by Kódex Nyomda Kft.
Responsible manager Simon, Béla
H-7627 Pécs, Rigóder u. 29. Hungary

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Privacy in the Workplace[1]

BALOGH, ZSOLT GYÖRGY – POLYÁK, GÁBOR – RÁTAI, BALÁZS – SZŐKE, GERGELY LÁSZLÓ

ABSTRACT *The main objective of this essay is to map current national Hungarian regulations on privacy in the workplace. We will not deal with every single issue regarding data protection in employment: our research will focus on the regulation of technical surveillance in order to differentiate between legal and illegal monitoring or surveillance of an employee, which is a key issue both in Hungary and in the EU.*

Besides the relevant Acts we also summarise case law in the respective fields. We search for the recommendations of the Hungarian Data Protection Commissioner as well as for the relevant court decisions. Finally the legal literature is also examined in our research.

In the first chapter we are going to summarise the basic concept of privacy issues in Hungary, and then we analyse Hungarian regulations on different surveillance technologies which may be used in the workplace. The regulation, typically, does not distinguish between or among technologies, and so, for the most part, the same rules apply. This means that some subchapters will simply refer to another subchapter – but this is in order to avoid repetition. However, our choice of this technology-based structure is based on the fact that the practical problems usually arise concerning a single technology – and so the case law of the DPC and of the courts also focuses on different technologies.

1. Introduction

1.1 The employer' interest in monitoring the employee

Generally there is a legitimate interest on the employer's side to monitor the employee's work. Although the right to monitor is not expressly written in the Labour Code,[2] it is widely accepted by labour law experts:[3] The right to

[1] This essay is based on a country report on Hungarian regulation in the "PAW – Privacy at Workplace project". The Project is co-funded by the European Union's Fundamental Rights and Citizenship Programme

[2] Act XXII of 1992 on the Labour Code (hereinafter: Labour Code)

[3] Kiss, György: Munkajog, Osiris, Budapest, 2005. p. 180., Bankó, Zoltán – Berke, Gyula – Kiss, György: Bevezetés a munkajogba, JUSTIS, Budapest, 2004 p. 89., Arany

supervise means the right to monitor the employee's conduct and activity in connection with the employment, to state facts, to assess the employee's performance and compare it with the performance expected. The employee has to accept and tolerate the exercising of this right.[4] Academic papers deduce this right from §102(3) a) and b) and §104 (1) of the Labour Code, which state the obligation on both employer and employee. §102(3) a) and b) state that employers shall organise work so as to allow the employees to exercise the rights and fulfil the obligations arising out of their employment and shall provide the employees with the information and guidance necessary for carrying out their work.'[5] §104(1) says that "employees shall perform their work in accordance with the employer's instructions."[6] GYÖRGY KISS says, that the right to monitor is strongly connected to the right to instruct, which is based on these provisions.[7] The employer also has the right to monitor the equipment which he provided for the employee.

1.2 The boundaries of monitoring

In this essay we wish to draw a line between the legal monitoring of employees and illegal surveillance. The employer has a legitimate interest in monitoring an employee's work and to check whether a task has been completed or not, but the employer does not have the right to breach privacy by means of continuous (technical) monitoring. As we will see, the main problem is that it is hard to distinguish clearly between the official and private use of different technological equipment and between an employee's official and private conduct.

1.3 Mutual dependence

One of the most important general problems is the voluntary nature of the consent to data processing. In many situations the voluntary nature can be questioned due to the existentially dependent position of the employee, or the information and economic power imbalance in favour of the employer. It can be assumed that, during recruitment procedures, consent is more often voluntary,

Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, Bába és Társai, Budapest 2008 p. 235.

[4] Bankó, Zoltán – Berke, Gyula – Kiss György op. cit. pp. 89-90.

[5] Labour Code § 102(3) a), b);

[6] Labour Code § 104(1);

[7] Kiss, György op. cit. p. 180.

but the excess of labour on the job market is a form of defencelessness which makes that unlikely to be so.[8]

On the other hand – and this becomes relevant when monitoring employees – "inverted defencelessness" is also becoming more common: various employers' data are not safe as a result of the use of modern technologies and employees can cause considerable damage to the employer by disclosing confidential information to unauthorised persons. "The defencelessness of the employers is increasing in the information age with novel and significant factors. Employers are experiencing »the enemy attacking from within«, and the fear of this is justified under the circumstances of the widespread possession of information technology."[9]

2. Legal regulation

2.1 Relevant legal sources

Privacy in the workplace is a complex issue and many Acts contain provisions which are relevant in the field. The legal background has just changed in Hungary: many relevant Acts have been renewed in 2011 and 2012. We try – as far as possible – to analyse the new regulation also. (The case law of the Data Protection Commissioner and of the courts is based on the former regulation, of course).

Regarding the legal framework of privacy in the workplace, firstly, there are some fundamental rights in both the former Hungarian Constitution[10] and in the new Constitution[11] which affect the issue of privacy. The Hungarian Constitution defines the right to the protection of personal data as a fundamental right.[12] Besides the right to the protection of personal data there are certain other fundamental rights in the Constitution which serve as a means of privacy, namely, the right of respecting someone's private and family life, home, communication and good reputation.[13]

[8] This is the general view in the literature. Cf. Arany Tóth, Mariann: Hozzájárulás a munkáltatói adatkezeléshez a munkajogviszonyban, In: Munkaügyi szemle, 2004/11., pp. 15-17., Majtényi, László: Az információs szabadságok. Adatvédelem és a közérdekű adatok nyilvánossága, Complex, Budapest, 2006 p. 332., Hartai, Győző: Adatvédelem a munkahelyen, In: Munkaügyi szemle, 2003/1., p. 46., etc.

[9] Majtényi, László: Az információs szabadságok, p. 333.

[10] Act XX of 1949 The Constitution of the Republic of Hungary, (hereinafter: Former Constitution)

[11] Constitution of Hungary (2011. April 25) (hereinafter: New Constitution)

[12] The Former Constitution also did so. Former Constitution, § 59, New Constitution, Article VI.

[13] New Constitution, Article VI.

The main code in the field of privacy protection is the Data Protection Act of 2011,[14] which abrogates and replaces the former Act in this field: the Data Protection Act of 1992[15] from 1st January 2012.[16] Both the former and the new Act are harmonized with the relevant EU law, namely with the Directive 95/46/EC.[17]

We should mention that means of privacy protection other than the protection of personal data, such as the right to ones own image or the right of private correspondence are regulated by both the Hungarian Civil[18] and Criminal Codes.[19]

Another relevant code is, of course, the Labour Code. The preparation of a new regulation in this field started in summer 2011, and a totally new Labour Code[20] was adopted on 13th December 2011. The new Labour Code will take effect on 1st July 2012.[21]

We have to mention the special role of the Data Protection Commissioner.[22] The Commissioner had the competence to make recommendations in general, or to specific controllers. Since the recommendations of the commissioner often

[14] Act CXII of 2011 on information self-determination and freedom of information (hereinafter: New Data Protection Act, New DPA)

[15] Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (hereinafter: Former Data Protection Act, Former DPA)

[16] About the analysis of the New DPA see more Polyák, Gábor – Szőke, Gergely: Elszalasztott lehetőség? Az új adatvédelmi törvény főbb rendelkezései. In: Drinóczi, Tímea (ed.): Magyarország új alkotmányossága, Pécsi Tudományegyetem, Állam- és Jogtudományi Kar, Pécs, 2011 pp. 155-178.

[17] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive). We should also mention that the European Commission initiated consultation in 1999 on the development of an EU-level regulatory framework specially for the protection of workers' personal data. Finally no legal instrument was adopted. We also have to mention, that the Article 29 Working Party issues several documents on workplace privacy. The statements and opinion of the working party may affect the national regulation and case law in this field.

[18] Act IV of 1959 on the Civil Code of the Republic of Hungary (hereinafter: Civil Code)

[19] Act IV of 1978 on the Criminal Code (hereinafter: Criminal Code)

[20] Act I of 2012 on the Labour Code (hereinafter New Labour Code)

[21] There are other provisions which regulate data processing concerning employees in the public sector, but none contains any provisions on surveillance and so we do not examine them.

[22] Hereinafter: DPC

contain "rules", the cases of the Commissioner became real "law" [23] which is actually followed by employers.

2.2 General and sector-specific data protection regulation

The Act on Data Protection (both the new and the former Acts) prescribe general rules. There are special regulations (lex specialis) concerning personal data processing in certain fields, such as in public administration, in banking, insurance and the telecommunications industry, or concerning direct marketing or scientific research. These provisions (whether as an Act or as part of another Act) concretise the rules of the DPA and permit data processing.

One of the biggest problems in the field of privacy in the workplace is the lack of a lex specialis in Hungary. There are no specific and detailed rules in the Labour Code which regulate any privacy issues in connection with surveillance, and so the general regulation of the DPA apply in such cases. This situation will be changed once the new Labour Code comes into effect soon, on 1st July 2012. The new Labour Code contains some very provisions on the possibility and boundaries of employee's control and monitoring, which is shown in the next chapters.

2.3 The legal basis of data processing

2.3.1 Regulation of the DPA of 1992

According to the DPA of 1992, personal data could only be processed if the data subject gives his consent or it is ordered by an Act.[24] The Act on Data Protection did not recognise any other legal ground.[25]

It should be noted that the Directive on the Protection of Personal Data defines the legal basis of data processing more widely, and – among others – allow the data controller to process personal data if the processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party, except where such interests are overridden by the interests of the fundamental rights and freedoms of the data subject.[26]

[23] Sólyom, László: Az ombudsman „alapjog értelmezése" és „normakontrollja". In: Az odaátra nyíló ajtó, Adatvédelmi Biztos Irodája, Budapest, 2001 pp. 89-90.
[24] Former DPA § 3(1)
[25] Except in those quite rare cases, when the data subject is physically unable to or legally incapable of giving his consent for processing – in this case the processing of his personal data is allowed to the extent necessary to protect the vital interests of himself or of another person or in order to prevent or avert a catastrophe or emergency, cf. Former DPA § 3(8)
[26] Data Protection Directive, Art. 7. (f)

So the DPA of 1992 enabled data processing in a still tighter circle. The legal basis based on consideration of the interests of the controller and of the data subject, explained in Article 7 (f) of the Directive, did not exist in Hungarian law before 2012. According to relevant legal literature,[27] this strict regulation of the Data Protection Act did not run counter to the Directive, since the European Court of Justice declared the possibility of wider protection in the well-known Lindqvist case.[28] We think that conformity was not at all obvious,[29] and the new case law of the ECJ strengthen this concept.[30]

2.3.2 Regulation of the DPA of 2011

The new Data Protection Act changes this situation and also enacts the regulation of article 7 (f) of the Directive – although not as a general legal basis, but as a special legal basis on which data processing may be based.

First, personal data may be processed without the consent of the individual, provided that obtaining the consent is impossible or the expenses involved are disproportionate and

- the processing is necessary for the compliance with a legal obligation of data controller or
- the processing is necessary for the purpose of legitimate interests pursued by the controller or by the third party and such necessity is proportionate to the restriction of privacy.[31]

For one thing, initial indications are that the drafting around the legitimate interest condition actually requires a higher test than set out in the Directive. The data controller must be able to demonstrate that obtaining consent from individuals is impossible or disproportionally expensive before he can rely on the legitimate interest condition.

Notably that the New Data Protection Act does not provide for any interpretation of the above section, therefore, the exact meaning of “impossible” and “disproportionate expenses” will be clarified by the case-law of the Authority and the Court.

Second, if the collection of the personal data was based on the consent of the data subject, the data processing may be continued, if

- the processing is necessary for the compliance with a legal obligation of data controller, or

[27] E.g. Jóri, András: Adatvédelmi kézikönyv, Osiris, Budapest, 2005 p. 81.
[28] Case C-101/01 of the ECJ
[29] Polyák, Gábor – Szőke, Gergely op. cit.
[30] See C-468/10 and C-469/10 cases of the ECJ
[31] New DPA § 6(1)

- the processing is necessary for the purpose of legitimate interests pursued by the controller or by the third party and such necessity is proportionate to the restriction of privacy.[32]

In this case, this legal basis may be used to process personal data for other purposes than the purposes for which it was originally collected.

2.3.3 Consent to data processing

Consent is a data subject's statement which unambiguously signifies his agreement to personal data related to him being managed – without limitation or with regard to specific operations.[33] The data subject's consent can only be considered valid if it is freely given and determined, and also if it is based on proper information. Therefore, the data subject has to be informed before the data is collected about the most important features of data processing.[34] Consent is generally not dependent on formalities, and so can be given by written or oral means and even by means of some physical movement (for example, by answering a reporter's question). Sensitive data processing requires written consent.

Consent to data processing is considered as given when the data subject himself gives the information either during or for the purpose of his public appearance.[35] Similarly, consent to processing his data to the extent necessary is considered as granted in connection with any proceedings requested by the data subject.[36]

2.3.4 Data processing based on legal regulation

Personal data processing, even without the consent of the data subject, can be ordered by law in the public interest or by regulation of a local authority based on authorisation (obligatory data processing).[37] The Data Protection Act uses the expression "data processing is ordered by law" and "compulsory data processing"; it does not necessarily mean that the data processing based on law

[32] New DPA § 6(5)
[33] Former DPA § 2(6), New DPA § 3(7)
[34] Cf. Former DPA § 6(2); New DPA § 20. The given information has to cover the issue of processing as voluntary or compulsory, the purpose for which his data is required and the legal ground, the person entitled to carry out the management and processing, the duration of the proposed processing operation, the persons to whom his data may be disclosed, and the data subject's rights and remedies.
[35] Former DPA § 3(5), New DPA § 6(7)
[36] Former DPA § 3(6), New DPA § 6(6)
[37] Former DPA, § 3(1), § 5(3), New DPA § 5(1) b)

is always obligatory. The interpretation in practice is that data processing may be legal if a legal regulation allows it.[38]

2.3.5 The legal basis concerning data processing in the workplace

According to the Data Protection Act of 1992 the legal ground for processing personal data in the employment context, as under any other circumstances, could only be the consent of the data subject or authorisation by law. However, this seemingly simple system cannot work in practice, since the Labour Code and other laws applicable to employment relationships did not contain explicit authorisation for the processing of employees' personal data for monitoring purposes. At first sight, it may seem from the above that only the consent of the data subject could provide a legitimate ground for processing employees' data. This, however, cannot work in practice.

According to both the old and the new Data Protection Law, consent is the voluntary and determined declaration of the data subject, based on appropriate information, whereby the data subject unambiguously agrees to the processing of personal data relating to him or her with respect to every or merely certain types of data. In case of proceedings initiated by the data subject, consent to the processing of the required data has to be presumed, but the data subject has to be informed about this in advance. Consent can also be given in written form as part of the contract concluded with the data controller – so as to ensure fulfilment of the contract. In this case, the contract has to contain all information needed by the data subject in relation to the processing of personal data, most notably the clear determination of the data to be processed, the time and purpose of processing and transferring data and the use of entities other than the data controller for technical management of the data. The contract must contain the data subject's clear consent to the processing of his personal data as described in the contract by means of his signature.[39]

As we mentioned above, in many situations the voluntary nature of consent can be questioned due to the existentially dependent position of the employee, or the information and economic power imbalance in favour of the employer. In the domain of labour law the questions of the legitimacy of data processing before and during employment is distinguished in legal literature.

The voluntary nature of the data subject's consent before the establishment of an employment relationship is generally accepted in the literature. The legal basis of data processing in these cases is the consent of the data subject, which can be expressed in writing, orally or as a clear, conclusive act. In cases of presumed consent, when the data subject initiated the proceedings, the rules of the Data Protection Law relating to 'proceedings' need to be understood broadly

[38] Jóri, András op. cit. p. 165.
[39] Former DPA § 3(6), (7)

and according to the interpretation of the DPA. This (which is the predominant interpretation still) is far from unambiguous[40] and so the term 'proceedings' means not only formal legal proceedings, but any type of transaction initiated by the data subject. Accordingly, in our opinion, these rules also apply to job applications.

By contrast, it is our firm opinion that the legitimate ground for data processing during employment cannot be the employee's consent. Although consent can be given as part of the employment contract, it is unlikely that employment contracts can cover all aspects of data processing and provide all necessary information. Moreover during an employment relationship a need for further data processing may arise which could not have been foreseen by the parties at the time when the employment contract was concluded. Therefore, it is unlikely in respect of long-term employment relationships that the employment contract in itself can provide sufficient legal grounds for data processing.

However, there may be exceptions where consent may prove to be a firm basis for data processing during employment relationships, but the validity of consent will always be subject to debate in cases of controversy, and this factor should always be carefully evaluated.

We think, that the new Labour Code make the debates on the legal basis outdated, since the § 11 of the new Law may be the legal ground for the monitoring of employees. So the questions regarding the legal base seems to be answered once the new Labour Code comes into effect on 1st July 2012.

2.4 Data protection provisions in the Labour Code

2.4.1 The Labour Code of 1992

The Labour Code [§ 3(4)] says that employers shall be only permitted to disclose facts, data and opinions concerning an employee to third persons in the cases specified by law or with the employee's consent.[41] Another provision regulates data processing during the hiring process: the Code prescribes that an employee shall only be required to make a statement, fill out a data sheet, or take an aptitude test if it does not violate his personal rights and if it essentially provides information considered substantive for the purposes of entering into an employment relationship.[42]

There is little to be said about these provisions in connection with the legality of surveillance.

[40] Jóri, András op.cit. pp. 187-188.
[41] Labour Code § 3(4);
[42] Labour Code § 77(1);

We should mention, however, that the Labour Code contains some rules on the possible surveillance of employees in the field of teleworking. The Act says that the employer shall have the right to restrict the use of any computer and information technology hardware, and electronic equipment which it has provided to the person employed in teleworking. In justified cases the employer shall be entitled to monitor the completion of the work, but the employer shall not inspect any information stored on the computer or other information technology equipment which is not related to the rights and obligations arising from the employment relationship. As regards the employer's right of access, the data necessary for monitoring the restriction prescribed in the Act shall be considered to be related to obligations originating from the employment relationship.[43] Although we agree with the general principles laid down in these provisions, we have to bear in mind that these rules apply only to teleworking.

In total, there are not many data protection provisions in the Labour Code, which means that, in most cases, the general rules laid down in the Data Protection Act apply.

2.4.2 The Labour Code of 2012

The new Labour Code changes the former regulation on privacy protection in employment significantly only in one important field: regarding the possibility of employer's control/monitoring. The § 11. of the Code prescribes, that the employer may only control the employee's activity in connection with his employment. As a limitation, the Code also prescribes, that

- the means measures and methods of the control cannot breach the employees right to dignity, and
- the control/monitoring cannot affects the private life of the employees.[44]

The employer has to inform the employees about the technical measures that is used to control/monitor the employees activity (work).[45]

The new Labour Code does not contain any detailed rules in this field, so there is still no 'real' sectoral data protection regulation in this filed. Since the Labour Code of 1992 has not contain any provision on the possibility of monitoring, the new Labour Code has one strong effect on data protection regulation: the data processing in connection with control or monitoring of the employee shall not be based on the 'voluntary' consent of the employee's any more,[46] but, in our view, it will be clearly a data processing based on the provisions of an Act, namely on the § 11 of the new Labour Code.

[43] Labour Code § 192/G(3), (6);
[44] New Labour Code § 11(1)
[45] New Labour Code § 11(2)
[46] After 1st July, 2012, when the Code comes into effect.

On one hand, as we show it in chapter 1.3.3.3.4, we think that the doctrine of consent-based data processing is a mistaken in the field of workplace privacy, therefore, at least from the aspect of the legal ground of data processing, the new Labour Code clarifies this question.

On the other hand the new Labour Code does not contain detailed provisions on the limitation of data processing. The lack of these guaranties is quite problematic. It may results, that the details shall be worked out by case law of the new Data Protection Authority (which will take time, of course) and by legal experts. Since the employer has to provide detailed information to the employee both on the technical measures[47] and on the details of the data processing concerning the control and monitoring,[48] the new Law may strengthen the tendencies towards adoption of internal norms. It seems to be worth, at least for bigger employers, to adopt Code of Conducts or by-laws to regulate and clarify the details of the employee's monitoring.

3. The legal regulation concerning surveillance in the workplace

We have to mention, that the summary of the regulation and case law of the different surveillance technologies is based on the former legal framework, and the new Labour Code may change many statements of this chapter. One of the most important changes concerns the legal base of the monitoring of employee's activity. As it will be clear from this chapter the Data Protection Commissioner's case law is based so far on the 'consent-doctrine': any monitoring shall based on the employees consent. This 'starting point' will be changed once the New Labour Code comes into effect on 1st July 2012. The other statements of the Data Protection Commissioners mostly worked out the conditions of a fair control by the employers. These conditions may be still valid under the new regulation framework too.

3.1 The regulation of 'snail-mail'

The content of the mail, and the circumstances of writing, sending and receiving it (the name of the sender and recipient, the date of sending, of receiving, the place of posting) are personal data according to the Data Protection Act, and so the monitoring of traditional mail ('snail-mail') may raise privacy issues. We should also mention that mail which is sent from or received at a workplace is not only connected to the employee but also to a third party, who probably has no legal relationship with the employer. Another

[47] New Labour Code, § 11(2)
[48] New DPA § 20

problematic issue is to distinguish in practice between official and private mail: the first may be subject to the employer's monitoring and the latter not.

3.1.1 Legislation

The possible monitoring of mail is also limited by civil law rules and criminal law provisions. According to the Civil Code, any person who has violated the integrity of the mails or has come into the possession of a private or business secret and publishes such secret without authorisation or abuses it in any other manner shall be construed as having violated an inherent right.[49] Once the content of a (closed) mail is known without consent, the inherent right is breached, even if the content was not misused. This protection also covers electronic mail.[50]

The Criminal Code also contains provisions on this issue. The crime of "violation of the privacy of correspondence" is committed by any person who opens or obtains a sealed package containing a communication which belongs to another person for the purpose of gaining knowledge of the contents, or conveys such to an unauthorised person for this purpose, as well as by any person who 'taps' or 'hacks' into correspondence forwarded through telecommunications equipment.[51] Telecommunications equipment is equipment which enables the transmission of electronic signals. Tapping or hacking mean any activity which is intended to illegally access the content of the correspondence.[52] The Criminal Code prescribes stricter sanctions if the crime is committed in a professional or official capacity or is the source of serious loss.[53]

There is a special regulation in this field for public bodies. Government Decree 335/2005. (XII. 29.) on the General Requirements of Document Management Systems in Public Sector Bodies with reference to the opening and registration of consignments sent by post declares that the consignment can be opened

- by the addressee or
- by a person licensed in writing by the head of the central documentation system or
- by an employee of the unit designated for this task in the statute of the body or

[49] Civil Code § 81(1)
[50] Gálik, Mihály – Polyák, Gábor: Médiaszabályozás, KJK-Kerszöv, Budapest, 2005, p. 212.
[51] Criminal Code § 178
[52] Gálik, Mihály – Polyák, Gábor op. cit. pp. 213-213.
[53] Criminal Code § 178(2),(3)

- by the electronic mail processing system designated in the Code on the documentation management of the body.

The consignment shall be registered and delivered to the addressee without opening if

- marked as 'private and confidential',
- this was ordered by an authorised person.

In the case of a) and b) the addressee should register the delivered consignment as stipulated in the Code of the documentation management of the body. Before its amendment, the Decree also designated the addressee as the exclusively authorised person for opening the letter if the letter was addressed to a personal name and was obviously private. The amended Decree authorises the employer to make a local regulation on processing letters addressed to an employee. This mode of regulation may infringe certain constitutional principles, but, nevertheless, the case law of the Commissioner should influence local codification.

3.1.2 Case law of the Data Protection Commissioner

The case law of the Commissioner follows a restricted interpretation in respect of differentiation between private and official letters. Accordingly, "insofar as a presumably private letter is delivered to an office, the addressee is supposed to open it for the sake of legal guarantees. As soon as the letter is opened it can be decided whether it is official or private and, consequently, whether it should be registered or not." Another resolution of the Commissioner confirms this interpretation. "The letter addressed to an employee shall not be opened by officials of the employer unless the official character and content of communication can be clearly proven on the basis of the address or other indication." According to the consistent opinion of the Commissioner, the official character of the letter should be proved, and, in case of uncertainty, the private character shall be presumed. If the official of the employer casually opens a private message, the letter must be resealed and the addressee informed of who had opened the letter and when.

The Commissioner also stated that the employer has full legal right to monitor the letters sent from the office as the letter was written during office hours and using the employer's tools.[54]

3.1.3 Judicial case law

There is no judicial case law in this specific field.

[54] DPC, 120/A/2004. http://abiweb.obh.hu/abi/index.php?menu=beszamolok /2004/II/1/3/2 [27.05.2011]

3.1.4 Academic papers, scientific opinions

Most of the relevant sources mostly show and summarize the Commissioner's case law. We have to mention that referring to the case law of the Commissioner BULCSÚ HEGEDŰS remarks that the prohibition of private correspondence does not support the opening of private letters by the employer since the sender of the letter is not expected to know and respect this restriction.[55]

3.2 Regulations regarding the monitoring of e-mail

Writing an e-mail at a workplace is usually a part of normal workflow, and the form and content of an official communication is an important element of the function. However, email is also personal data – regardless of the private or official character of the communication – and it is not only personal data in respect of the employee, but also of the receiver or sender who is outside the employer's organisation, and for whom the application of the employer's regulation is at least questionable. Moreover, in practice, it is typical that the conditions of using electronic equipment and email for private purposes are unclear.

3.2.1 Legislation

There is no special regulation in this field, and so the general rules of the Civil Code, Data Protection Act and Labour Code are applicable.

3.2.2 Case law of the Data Protection Commissioner

The case law of the Data Protection Commissioner covers the issue of monitoring email, and although numerous recommendations were issued, their content was not totally consistent.

The case law of the Data Protection Commissioner distinguishes between emails sent and received. The commissioner says, generally, that the employer has greater rights to monitor e-mails sent by the employee since he has given consent to this by writing the email.[56]

[55] Hegedűs, Bulcsú: A munkahelyi hagyományos és elektronikus levelezés ellenőrzése. In: Munkaügyi szemle, 2006/1. p. 48.

[56] DPC, 120/A/2004, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2004/II/1/3/2 [27.05.2011], DPC, 1543/A/2004, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2004/II/1/3/2 [27.05.2011]

Later this distinction was repeated, and the issue of consent was also re-emphasised: if the employee is informed of possible monitoring by the employer, then consent is given by the very act of writing the email.[57]

In another case, in 2006, the Commissioner stated that an employer may look into an official e-mail sent or received in accordance with the employee's duties, based on the employer's instructions. In this case the privacy rights of the third person have to be protected. The document does not refer to any necessity for the employee's consent.[58]

Later, the Commissioner strengthened the need for consent and stated that, in order to "process [including monitor] e-mails, both the sender's and receiver's consent had to be obtained".[59] The statement is based on the assumption that there is no special legal provision for processing such data, and so the legal basis can only be consent. We should stress that, on one hand, the voluntary nature of the consent is questioned in an employment relation, and, on the other hand, once we accept that the consent is voluntary, consent would probably not be given by the employee if he had anything to hide and if monitoring might have serious consequences.

The recommendation also declares that the employer must inform all employees of the rules of monitoring, and then, once the employer writes an email, he must accept the possibility of monitoring. The commissioner does not expressly state this in this recommendation, but alludes to the fact that consent is regarded as having been given in this case by the writing of the e-mail.

The very same recommendation also states that "the employer has the right to ask the employee to print out the sent or received official e-mails. […] If the e-mail address is allowed for use solely for official purposes, the employer also has the right to monitor the heading of the e-mails […] and ask for a specific e-mail to look into".[60] The employee can only refuse to show this email if it breaches a third party's privacy rights, but, if the employee still refuses to show the e-mail written by him referring to the third party's right of privacy, the employer may impose labour law sanctions – states the recommendation.

In our opinion, for monitoring and examining an official email written by the employee no consent is needed; it is based on the labour law rules on the right to monitor and so derives from the employment relationship of the parties. Once

[57] DPC, 1722/A/2004, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2005/M/4/1&dok=1722_A_2004 [27.05.2011]
[58] DPC, 1393/K/2006, http://abiweb.obh.hu/abi/index201.php?menu=munkaugy&dok=1393_K_2006-5 [24.05.2011]
[59] DPC, 40/K/2006, http://abiweb.obh.hu/abi/index.php?menu=munkaugy&dok=11871 [27.05.2011]
[60] Ibid.

the monitoring of email is based on the employee's consent, this consent can be withdrawn without sanction – although in practice this would not work.

3.2.3 Judicial case law

There is no judicial case law in the specific field of monitoring e-mails in the workplace.

3.2.4 Academic papers, scientific opinion

Firstly, the relevant academic sources point out that the e-mail is also a subject of the protection of correspondence, similarly to the traditional mail,[61] and also a subject of the data protection regime if the e-mail address and/or the content can be attached to a natural person – as, in practice, it normally can.

Secondly, the relevant legal literature also emphasises that the content of the e-mail belongs to two parties and so is the personal data of both sender and receiver, one of whom may be a person outside the workplace. Hence the required legal basis for processing such personal data may be the consent of both parties.[62] We should add that, in practice, it would not be easy to obtain the third party's consent, which would need to be based on proper information provided about the data processing.

Thirdly, the official or private character of the email is also a key issue. Private emails cannot be monitored by the employer unless the employer and the third party give consent.[63] We think that, besides consent, a further requirement has also to be met: a legitimate reason to monitor private emails. In practice it is quite rare that the employer would have any legitimate interest and purpose in monitoring private email, except for one clear case: to separate the private from official e-mails in order to examine the latter. According to academic papers, the right to read the content of emails by the employer is still restricted even if it is an official e-mail address; it also has to be based on the

[61] Gálik, Mihály – Polyák, Gábor op. cit. p. 212., Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, p. 267, Hegedűs, Bulcsú: A munkahelyi hagyományos és elektronikus levelezés ellenőrzése, p. 47.

[62] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, p. 268., Hegedűs, Bulcsú: A munkahelyi hagyományos és elektronikus levelezés ellenőrzése, p. 48.

[63] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, p. 271., Hegedűs, Bulcsú: A munkahelyi hagyományos és elektronikus levelezés ellenőrzése, pp. 48-49., Majtényi, László: Az információs szabadságok, pp. 345-346.

consent of both the employer and the third party – consent is regarded as given if the employer knows of possible monitoring.[64]

Fourthly, academic papers also distinguish according to whether the e-mail was written by the employee or was received from a third party.[65] This distinction is based on the Data Protection Commissioner, and some authors agree,[66] whilst others do not: ARANY TÓTH expresses the view that e-mails should have been granted the same, or very similar, legal protection regardless of the parties.[67] Although we admit that the same principles apply to both categories of e-mail, we agree with the distinction since the legal basis is different in the case of e-mails written by the employee compared to those written by a third party. In practice, however, it is hard to realise this distinction.

Finally, MARIANN ARANY TÓTH mentions the issue of the traffic data of an email, and she suggests that, for processing these data, the principles of the Electronic Communications Act[68] should apply.[69] Although we agree that it is useful to use the provisions of the ECA, we should mention that an employer is not subject to the ECA even if he acts as a special 'service provider' of the Internet, e-mail, or as a host-provider. This is quite problematic, since the data processing attached directly to these services (e.g., traffic data) is not derived from the employment relationship, and so the legal basis of this data processing is at least questionable. Generally, the issue of the employer's legal position as a service provider is something of a black hole: neither the Data Protection Commissioner nor academic papers[70] deal with this issue at all.

By way of summary, it would seem that the issue of monitoring an employer's e-mails is quite contradictory both in respect of the Data Protection Commissioner and of academic papers, which are mostly based on the fact that the legal basis for such data processing are unclear.

[64] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, pp. 269-270., Hegedűs, Bulcsú: A munkahelyi hagyományos és elektronikus levelezés ellenőrzése, pp. 48-49.
[65] In other words, whether is it internal correspondence or communication between the workplace and a third party.
[66] Hegedűs, Bulcsú: A munkahelyi hagyományos és elektronikus levelezés ellenőrzése, p. 48.
[67] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, p. 270
[68] Act C of 2003 on Electronic Communications
[69] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, 2008, pp. 272-273.
[70] Except the one mentioned by Arany Tóth

3.3 Regulation of computer-usage

The regular use of an electronic computer generates a great deal of personal data. A set of electronic personal data comprises – beyond the personal files stored on the hard disk of the computer – several technical records such as a list of installed computer programs or data related to the use of particular files and programs. Monitoring and supervision by the employer may cover all the tools, implements and equipment and their use – casually for the sake of protection of confidential knowledge and information. Beyond the determination of the personal character of certain data and the extent of monitoring rights, the mode of supervision also poses problems in the field of data protection regulation.

3.3.1 Legislation

There is no special regulation in this field, and so the general rules of the Civil Code, Data Protection Act and Labour Code are applicable.

3.3.2 Case law of the Data Protection Commissioner

Seeing that there is no substantive legal regulation on the monitoring of Internet and computer access we can only consider the Commissioner's case law. On this basis the employer is not authorised to monitor the use of the personal computer made available to the employee without the consent of the individual concerned.

Case law in this sector also affirms that program and data files installed and/or stored on the computer and made available to an employee may not be monitored or supervised by the employer unless the computer was rendered exclusively for the aim of work and the employer was prohibited from installing programs for his/her own initiative. Beyond information and consultation the consent of employee is also inevitable requirement. The notion of "monitoring" covers access to and inspection of records stored on the computer. The enumeration and listing of programs installed on a computer itself can be a processing of personal data and the result of this monitoring cannot be transferred or published without the informed consent of the concerned subject.[71]

If the employee gives the computer back to the employer, he should either delete the personal and confidential files or, otherwise, the consent of the data subject shall be considered granted as it was he/she who transferred or made

[71] DPC, 866/A/2006, http://abiweb.obh.hu/abi/index.php?menu=Munkaltato&dok=866_A_2006-3 [24.05.2011]

accessible the data for another subject.[72] The principle of finality or purpose specification also should be taken into consideration. If the data controller found non-official or non-work-related data on the computer he/she should call the employee to remove them all. Monitoring itself can extend to the detection of forbidden and/or unlawful files – e.g., voice records, sound tracks and video records stored there. Beyond detection, however, the controller is not allowed to inspect the content of these files. Watching the video records or listening to the music files should be well outside the legal competence of monitoring.[73] The right to monitor does not entitle the employer to gain access to and knowledge of any private document stored on the computer used by the employee.[74]

The employer is prohibited from monitoring the use of the computer by spyware installed without the informed consent of the employee. As the Commissioner stated in 2005, this should be deemed that form of covert information-gathering operation which can be legally pursued only by leave of the court.[75] The Commissioner's statement also declared that there are pragmatic solutions for the monitoring of computer use, Internet browsing and workplace behaviour of employees which should respect the dignity and personal rights of the concerned subjects. Accordingly, the use of spyware constitutes disproportionate restriction.

A specific problem of monitoring computers has been revealed in a consultative case when an employee of a Hungarian affiliate of a German company turned to the Commissioner. The German parent company had ordered that the computers of employees should be fitted with a spyware program that enabled the central company management sitting in Germany to monitor literally all data: every file, record and transaction on the computers. This arrangement was objected to by employees and one of them asked the Commissioner about the legality of the company spyware. The Commissioner pointed out that, by this measure, the employer – in this case the head of the Hungarian affiliate – would become the data processor and the German parent company the data controller. Consequently, the rights of the employer would be transferred to the German company from the Hungarian subsidiary. This would infringe the rights of employees as Hungarian jurisdiction does not extend to Germany and has no influence on the decisions of the German parent company.

[72] DPC, 772/A/2000, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2000/III/1/2/1&dok=beszamolok_2000_III_A2 [10.05.2011.],
[73] DPC, 866/A/2006, http://abiweb.obh.hu/abi/index.php?menu=Munkaltato&dok=866_A_2006-3 [24.05.2011]
[74] DPC, 531/A/2004, http://abiweb.obh.hu/abi/index.php?menu=munkaugy&dok=11861 [27.05.2011]
[75] DPC, 1012/K/2005, http://abiweb.obh.hu/abi/index.php?menu=munkaugy&dok=11866 [24.05.2011]

This switching of responsibility for monitored data infringes the interests of Hungarian employees irrespective of the formal granting of their consent. It is important to stress that the Constitutional Court formulated the requirement of transparency in the context of data processing and declared that the concerned subject is qualified to assert his/her rights. In this case both requirements were infringed.[76]

3.3.3 Judicial case law

There is no judicial case law in this specific field.

3.3.4 Academic papers, scientific opinions

After analysing the case law of the Commissioner, BULCSÚ HEGEDŰS added some comments:

- In the case of private files, not only inspection but also copying and erasure are unlawful. The employer is not allowed to remove these files unless he unsuccessfully called upon the employee to carry out the deletion.
- As far as possible, the monitor of the computer shall not be carried out manually but by automated means.[77]

3.4 Regulation of Internet use and use of social networks

The use of the Internet is essential for many employees to do their job and the information gained through the Internet is very helpful in many workplaces. On the other hand, there is a rather high risk that employees use the Internet for private purposes in working hours, and so monitoring usage may be important for the employer, but may also breach the employee's privacy.[78]

We should add that the use of social networks such as Facebook may also raise data protection and labour law issues. A negative message sent on a social network may affect the loyalty of the employee or even damage the reputation of the employer. Besides this, the timing of a comment or any other activity

[76] DPC, 2511/K/2007, http://abiweb.obh.hu/abi/index.php?menu=Munkaltato&dok=2511_K_2007-3 [27.05.2011]

[77] Hegedűs, Bulcsú: A munkahelyi számítógép és internet ellenőrzésével kapcsolatos gyakorlat. In: Munkaügyi szemle, 2006/7-8. pp. 82-83.

[78] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme az internet munkahelyi használatának ellenőrzésekor, In: Infokommunikáció és Jog, 2008/4., p 170, Hegedűs, Bulcsú: A munkahelyi számítógép és internet ellenőrzésével kapcsolatos gyakorlat, p. 81.

may reveal the fact that the employee was using Facebook during working hours. Generally, this problem is not commonly met in Hungarian legal practice and legal literature – except in one new paper which focuses on the labour law issues of social networks.[79]

3.4.1 Legislation

There is no special regulation in this field, and so the general rules of the Civil Code, Data Protection Act and Labour Code are applicable.

3.4.2 Case law of the Data Protection Commissioner

There are some relevant cases of the Data Protection Commissioner which concern the monitoring of internet use by the employer.

Firstly, Data Protection has made it clear in several recommendations that the IP address and opened websites, the timing of a visit to a website etc. are personal data, since they can be attached to a natural person.[80]

The Commissioner also emphasises that monitoring Internet usage should be based on the employee's consent, consent which is based on accurate information.[81] Later, the Commissioner stresses the need for these conditions.[82] If private Internet use is forbidden and the employee was informed of the possibility of monitoring, then the employee's action in opening a website is

[79] Horváth, Linda – Gelányi, Anikó: Lájkolni vagy nem lájkolni? A közösségi oldalak használatának munkajogi kérdései. In: Infokommunikáció és Jog, 2011/2. The general privacy issues of social networks are discussed also in Hungary, of course (Cf. Polefkó, Patrik: Barátok és bizonytalanságok közt, avagy a közösségi oldalakról adatvédelmi szemszögből (1. rész). In: Infokommunikáció és Jog, 2010/3.) but workplace privacy issues are not.

[80] DPC, 693/K/1998, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/1998/M/1/1&dok=693_K_1998 [10.05.2011.], DPC, 750/A/2004, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2004/II/1/3/6 [24.05.2011] DPC, 1598/K/2004. http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2004/II/1/3/6 [24.05.2011]. We have to mention that it sometimes it is not possible to attach dates to a natural person, but both the Hungarian Data Protection Commissioner, and the general European approach to IP addresses are based on the assumption that normally they can be.

[81] DPC, 531/A/2004, http://abiweb.obh.hu/abi/index.php?menu=munkaugy&dok=11861 [27.05.2011]

[82] DPC, 800/K/2008, http://abiweb.obh.hu/abi/index.php?menu=internet1&dok=800_K_2008-3 [27.05.2011]

regarded as consent to monitoring.[83] Monitoring internet usage is not allowed if the employer allows it to be used for private purposes. If it is only allowed to be used for official purposes, then monitoring usage is only legal if the employer gives information about this possibility to the employee. It is forbidden to monitor the visited website in secret.[84]

3.4.3 Judicial case law

There is no judicial case law concerning the privacy issues of monitoring Internet usage, but there was a notable case in which the court had to decide whether the private use of the computer and Internet may be legal grounds for the unusual termination of the contract of employment or not. In this case, the employee visited – among others – erotic websites on the Internet, using both his own and a colleague's computer. The Supreme Court says that this behaviour can be regarded as a serious breach of the contract of employment, since private use was forbidden, and so this activity was a legal ground for terminating the contract of employment.[85] We should, however, mention that the judgement did not refer to how the employer obtained the information about the websites visited, and whether collecting this information was lawful or not.[86]

3.4.4 Academic papers, scientific opinions

Academic papers firstly distinguish between the official and the private use of the Internet in the workplace. Generally it is the employers right to determine the conditions of Internet use: he may allow or prohibit it. The main problem is that, in practice, it is usually unclear and the employee may use the Internet for private purposes with the tacit consent of the employer.[87]

If the employee may use the Internet for private purposes, the employer cannot monitor the websites opened.[88] If Internet use is only allowed for official

[83] DPC, 1767/K/2006, http://abiweb.obh.hu/abi/index.php?menu=Munkaltato&dok=1767_K_2006-3&nyomtat=1 [15.05.2011]
[84] DPC, 570/A/2001, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2001/M/1/1&dok=570_A_2001 [10.05.2011.]
[85] BH2006.64
[86] The employee admitted that he visited erotic websites – which is why the court did not need to deal with the circumstances of acquiring the information.
[87] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme az internet munkahelyi használatának ellenőrzésekor, pp. 170-171.
[88] Ibid. p. 172.

purposes, then the employer may monitor usage, but only if the employer gives his consent, and only if the employee was informed about potential monitoring. Other data protection principles, such as proportionality, should also be borne in mind.[89]

Besides the content of the websites visited, the monitoring of other relevant traffic data may also be important (e.g., too much traffic may mean illegal downloading and copyright infringement). There are no general rules concerning traffic data. Although ARANY TÓTH refers to the applicability of the provisions of the Electronic Communications Act,[90] we still think that the employer is not a subject of this regulation.[91]

Academic papers generally suggest other methods of restricting the private use of the Internet such as filtering some websites by keywords, or only allowing certain (listed) web pages to open.[92] Although these are privacy-friendly methods, we think that, in practice, they are complicated and rarely work well. Another way may be 'Anonym filtering' with which a message can be sent to all employees to stop private use[93] – this can work in practice.

3.5 Regulations concerning the use of voice telephony technology

It is usually necessary for the employer to be able to monitor the use of voice telephony (mobile or fixed) by employees, especially in cases where the cost of telephone usage is covered by the employer.

3.5.1 Legislation

There is no specific regulation concerning usage of the telephone by employees, although it is indirectly regulated by: a) the Civil Code; b) by the

[89] Hegedűs, Bulcsú: A munkahelyi számítógép és internet ellenőrzésével kapcsolatos gyakorlat, pp. 82-83.
[90] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme az internet munkahelyi használatának ellenőrzésekor, p. 173.
[91] Cf. with the same opinion in chapter 3.2. on e-mail
[92] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme az internet munkahelyi használatának ellenőrzésekor, p. 173, Hegedűs, Bulcsú: A munkahelyi számítógép és internet ellenőrzésével kapcsolatos gyakorlat, pp. 82-83, Jóri, András – Hegedűs, Bulcsú – Kerekes, Zsuzsa (eds.): Adatvédelem és információszabadság a gyakorlatban, Complex, Budapest, 2010, p. 288.
[93] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme az internet munkahelyi használatának ellenőrzésekor, p. 173

Law on Electronic Communications;[94] c) the Labour Code; d) the Law on Personal Data Protection.

The Civil Code gives protection to personal secrets, including the secrecy of communication, and it also provides protection against the voice recording of individuals as one element of general personal rights.[95]

Voice telephony services are regulated within electronic communications regulation, although there are no employment-specific rules. Service providers are obliged not to disclose traffic and location data without the consent of the user.[96]

The Labour Code provides the possibility for employers to limit the use of equipment provided for work purposes - which includes the possibility of defining the conditions for telephone usage.[97]

Telephone usage always involves the processing of personal data and so the rules laid down in the Law on Personal Data Protection also apply to the use of telephones by employees.

3.5.2 Case law of the Data Protection Commissioner

The processing of the personal data of employees relating to the use of voice telephony technology is a recurring issue for the Commissioner.[98]

The approach of the Commissioner can be summarised by the following factors:

1) Employers have the right to monitor the telephone usage of employees, although they do not have the right to access call history or to request service providers to provide data concerning the numbers of called and received telephone calls and their duration, since data concerning telephone calls are also the personal data of the employee and of the other party to the individual calls.
2) The same rule applies to cases when personal income tax-related rules handle in different ways the expenditure on personal and official calls.

[94] Act C of 2003 on Electronic Communications (hereinafter: Act on Electronic Communications)
[95] Civil Code, §§ 75-85.
[96] Law on Electronic Communications, § 156(14)
[97] Labour Code, § 103(1)
[98] DPC, 1767/K/2006, http://abiweb.obh.hu/abi/index.php?menu=Munkaltato&dok=1767_K_2006-3&nyomtat=1 [15.05.2011], DPC, 1672/K/2006, http://abiweb.obh.hu/abi/index.php?menu=Munkaltato&dok=1672_K_2006-3&nyomtat=1 [15.05.2011], DPC, 3362/P/2009, http://abiweb.obh.hu/abi/index.php?menu=Munkaltato&dok=3362/P/2009-3&nyomtat=1 [15.05.2011]

3) The Commissioner recommended sharing the cost of telephone usage between the employer and the employee at a pre-arranged rate, or by defining the maximal cost which an employer should pay, rather than by means of an item-by-item checking of all calls.
4) If an item-by-item review of official and private calls cannot be avoided, then the selection of private and official calls can only be done by the employee. In this case the employer shall be provided with the list of calls in a sealed envelope and the employee should mark the official calls, simultaneously making the numbers illegible.

3.5.3 Judicial case law

There is no judicial case law in this specific field.

3.5.4 Academic papers, scientific opinions

ARANY-TÓTH suggests the creation of specific Rules of Electronic Surveillance (e.g.: 'phone, GSM, camera, internet usage etc.) of employees within the framework of regulations relating to the employment relationship. Arany-Tóth argues that there is a need for such a regulation, since the current rules of law on Data Protection do not provide sufficient guidance as to the situations in which the processing of the personal data of employees is possible, and since, in employment relationships, the consent of the employee as the basis for personal data processing is always questionable.[99]

In the legal literature further summaries of the recommendations of the Commissioner can be found.[100]

3.6 Regulation of CCTV use

The installation and large-scale use of CCTV systems is a very common phenomenon in several fields of daily life such as business activity, crime prevention, traffic monitoring, transport safety and public or private security. The hardware and software of these systems are increasingly intelligent and the proliferation of these systems poses a major threat to the privacy of the inhabitants of industrialised countries. CCTV cameras are often regarded as Big Brother's electronic eyes.

[99] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, pp. 305-306.
[100] Cf. Székely, Iván – Szabó, Máté Dániel (eds.): A privacy védelme a munkahelyen, In.: Szabad adatok, védett adatok, BME GTK Információ és Tudásmenedzsment Tanszék, 2005 pp. 129-130; Hartai op. cit. p. 48; Hajdú, József: A munkavállalók személyiségi jogainak védelme, Pólay Elemér Alapítvány, Szeged, 2005 pp. 172-173.

The regular use of CCTV systems generates a great deal of personal data. This can be used to produce a personality profile of the employee. Monitoring and supervision by the employer may cover all the tools, implements and equipment (and their use) for the sake of protecting confidential knowledge and information, but, beyond determining the personal nature of certain data and the extent of monitoring rights, the actual mode of supervision also poses awkward problems in the field of data protection regulation.

3.6.1 Legislation

There are no specific rules in the Labour Code on the installation and use of CCTV systems in the workplace,[101] and so we can only refer to the general rules and try to draw rational conclusions for particular cases. The basic principles of data protection are interpreted by Data Protection Commissioners.

3.6.2 Case law of the Data Protection Commissioner

The crucial point of debate on the legitimate use of CCTV systems is the aim of surveillance. In business life and in the working world, the main purposes are the protection of property and the monitoring of employees. A further critical point, however, is the fate of video images. In real time systems, technical or security staff follow the images produced by the cameras, but nowadays this is relatively rare. Current CCTV systems are equipped with a mass storage device and video records are stored for a shorter or longer period. This mode of use implies a major threat to privacy.

Video surveillance in the workplace is admissible only for legitimate purposes and no departure from this rule is lawful. The Commissioner stresses that the current practice of unlimited recording and storing of video images does not comply with the Act on Data Protection. Employees should be informed of the installation of any such system and its purpose must also be declared. The Commissioner stressed that the information must also reveal whether or not the video images are recorded and stored. The employee is also authorised to see and examine any records made of him/her.[102]

Surveillance and video recording is legitimate if the employee has been informed and has consented. This also refers to the processing of personal data

[101] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, p. 277.
[102] DPC, 461/A/1998, http://abiweb.obh.hu/abi/index.php?menu=aktualis/archivum/ajanlasok&dok=9278 [10.05.2011.]

connected to this activity.[103] Consequently the operation of a hidden camera is a serious and extreme infringement of Employee Privacy.[104]

3.6.3 Judicial case law (Employment Tribunals)

In the Official List of Court Decisions we find total of 8 cases since 2007 in which the use of a CCTV system in the workplace had any relevance. These cases were disputes concerned with unfair dismissal and employment discrimination.

To date no employee has filed a suit against an employer because of the installation and use of such a system in the office, workshop or in any other place of work. Consequently we have no explicit court decision on the conditions of the legitimate use of video surveillance.

A common feature of these cases was that the video record was not a matter of dispute but merely a piece of evidence; both the court and the parties involved invariably accepted the record as proof.[105]

3.6.4 Academic papers, scientific opinions

The academic papers mostly shows the Data Protection Commissioner's view. LÁSZLÓ MAJTÉNYI has offered a few comments:

- The use of CCTV systems recording images is the basic problem of privacy in the workplace.
- Privacy is seriously infringed if the use of a video surveillance system is operated covertly without legal authorisation.[106]

3.7 Regulation of biometric identification devices

Biometrics involves techniques used to identify individuals based on a particular trait or physical characteristic unique to that individual. Any human physiological and/or behavioural characteristic can be used as a biometric characteristic as long as it satisfies the following requirements:

- Universality: each person should have the characteristic;

[103] DPC, 475/H/2000, http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2000/M/1/1&dok=475_H_2000 [10.05.2011.]

[104] Arany Tóth, Mariann: A munkavállalók személyes adatainak védelme a magyar munkajogban, p. 289.

[105] The list of the relevant cases: Fővárosi Munkaügyi Bíróság, 5.M. 394/2007/12.; Veszprémi Munkaügyi Bíróság, 2.M.341./2006./8.; Miskolci Munkaügyi Bíróság, 8.M.1286/2005/19.; Fővárosi Munkaügyi Bíróság, 31.M.3189/2002/55.; Pécsi Munkaügyi Bíróság, 3.M.1763/2005/15.; Nyíregyházi Munkaügyi Bíróság, 1.M.687/2005/12.

[106] Majtényi, László: Az információs szabadságok, pp. 347-348.

- Distinctiveness: any two persons should be sufficiently different in terms of the characteristic;
- Permanence: the characteristic should be sufficiently invariant (with respect to the matching criterion) over a period of time;
- Collectability: the characteristic can be measured quantitatively.[107]

A biometric system is a pattern recognition system that operates by acquiring biometric data from an individual, extracting a feature set from the acquired data, and comparing this feature set against the template set in the database. These systems acquire and use biometric information in four steps:

- a physical characteristic is scanned,
- the characteristic is converted into digital code,
- the code is stored in a database, and
- the database and digital code are accessed to identify the individual at a later time.

Biometrics systems can operate in two modes: a verification mode or an identification mode.

In verification mode, the biometric system validates a person's identity by comparing the person's biometric data with the stored biometric data previously collected and stored in the system database. Common non-biometric verification mode systems include the use of a PIN number, a user name, or a password. For example, when a person enters a password to log on to his or her computer, the computer conducts a one-to-one comparison to determine whether the claimed user is the correct person. The verification mode is usually used for positive recognition, where the goal is to prevent multiple people from using the same identity.[108]

A biometric system that functions in identification mode recognizes a person by searching all the users in the database for a match. In this case, the system conducts a one-to-many comparison to establish a person's identity. The identification mode is generally used for negative recognition, where the goal is to prevent a person from using multiple identities. Unlike systems that function in verification mode, which can use non-biometric data to meet its goals,

[107] McGuire, Lisa Jane: Banking on Biometrics: Your Bank's New High-Tech Method of Identification May Mean Giving Up You Privacy. In: Akron Law Review, 2000/3., pp. 441, 444.

[108] Jain, Anil K. – Prabhakar, Salil – Ross, Arun: An Introduction to Biometric Recognition, 14 IEEE Transactions On Circuits And Systems For Video Technology. In: Special Issue On Image And Video-Based Biometrics, 2004/4. http://biometrics.cse.msu.edu/JainRossPrabhakarCSVT-vl5.pdf [27.04.2005]

negative recognition can only be established through systems that use biometric data.[109]

3.7.1 Legislation

The basic regulation on processing of biometric data is the act XLVII. of 2009 on crime registration, and on national registration of sentences passed by courts of EU member states against Hungarian citizens and on registration of criminal and policy biometric data.

Other regulations of the Hungarian legal system refer to this Act and do not lay down any further rules. There is no particular regulation on collecting and processing biometric data in the field of work.

3.7.2 Case law of the Data Protection Commissioner

During recent years the Commissioner has had very few cases on processing biometric data and these mostly refer to Criminal Records, which is not relevant in the scope of our project.

On the subject of biometric data, the Commissioner generally affirms the principle of minimal amount of data. He stresses that, out of several equivalent processing methods, what should be chosen is that which involves less infringement or the restriction of self-determination and which results in less personal data collected.[110]

In another case the Commissioner also stressed that appropriate information should always be given to the data subject about the processing of biometric data. According to the Commissioner, the processing of such data can be accepted only under limited special conditions.[111]

3.7.3 Judicial case law

There is no relevant judicial case law.

3.7.4 Academic papers, scientific opinions

No significant academic essays on this matter.

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[109] Betzel, Margaret: Privacy Year in Review: Recent Changes in the Law of Biometrics. In: I/S: A Journal of Law and Policy for the Information Society, 2005/2-3., p. 520.

[110] DPC, 1454/K/2010, http://abiweb.obh.hu/abi/beszamolok/2010/beszamolo_2010.pdf [15.05.2011]

[111] DPC, 926/H/2010, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2011&dok=ABI-1642-9_2011_H [20.09.2011]

3.8 Regulations for using GPS and GSM technology for tracking the location of employees

GPS and GSM technology can be used for tracking the movement of employees, and the most common data protection problems relate to the use of GPS devices installed in cars or other vehicles driven by employees. More recently, the mobile ‘‘phones of employees equipped with GPS devices and the related applications have also raised personal data protection issues. Mobile ‘phone use-related location data processing by the employers also raised similar problems as the use of GPS devices.

3.8.1 Legislation

There is no specifically GPS or GSM technology-related regulation in Hungary. However, the use of location data that can be collected through the use of mobile ‘phone services falls within the scope of electronic communications-related data protection regulation. Section 156 subsection (13) and (14) of the Law on Electronic Communications states that electronic communication service providers (including mobile telephone service providers) can process location data only with the -permission of the subscriber (or user) and only for the purpose of the provision of value-added services.

3.8.2 Case law of the Data Protection Commissioner

The tracking of employees with the help of GPS or GSM technology (or with the combination of both) is a recurring issue in the Commissioner’s practice.[112]

[112] DPC, 559/A/2006, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2006&dok=559_A_2006-3&nyomtat=1 [15.05.2011], DPC, 1664/A/2006, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2007&dok=1664_A_2006-8&nyomtat=1 [15.05.2011], DPC, 920/K/2006, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2006&dok=920_K_2006-2&nyomtat=1 [15.05.2011], DPC, 663/P/2009, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2009&dok=663/P/2009-3&nyomtat=1 [15.05.2011], DPC, 1092/P/2009, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2009&dok=1092_P_2009-6&nyomtat=1 [15.05.2011], DPC, 415/K/2009, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2009&dok=415_K_2009-3&nyomtat=1 [15.05.2011], DPC, 636/K/2009, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2009&dok=636/K/2009-3&nyomtat=1 [15.05.2011], DPC, 857/K/2009,

The approach of the Commissioner can be summarised in the following factors:

1) The location of a person is his or her personal data and that of a vehicle is the personal data of the person using it.
2) If an employer installs location-tracking systems in vehicles or mobile 'phones used by employees, then the employer is considered to be a data processor.
3) Processing the location data of employers is not authorised by law. It is a misunderstanding for Section 103 subsection (1) point a) of the Labour Code to be regarded as providing a suitable legal basis for processing such data.[113] Hence, only the consent of the data subject can provide a suitable basis for data processing.
4) Only the location of those employees whose work makes location-tracking necessary (and where there are no other means available to monitor the proper performance of the employee) can be tracked by such systems.
5) Location tracking can only be used during working hours. The Commissioner has recommended on several occasions that it should be possible for the employee to switch off any location-tracking system installed.

3.8.3 Judicial case law

There is no judicial case law in this specific field.

3.8.4 Academic papers, scientific opinions

In the legal literature further summaries of the recommendations of the Commissioner can be found.[114]

4. Summary

The main objective of our essay was mapping the current Hungarian regulations on privacy in the workplace. We showed that the lack of the sector-

http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2009&dok=857/K/2009-3&nyomtat=1 [15.05.2011] DPC, 922/2/2010, http://abiweb.obh.hu/abi/index.php?menu=aktualis/allasfoglalasok/2010&dok=ABI-922-2_2010_K&nyomtat=1 [15.05.2011]

[113] This section of the Labor Code states that the employee shall appear at the place and time specified and spend the working hours performing work.

[114] Székely, Iván – Szabó, Máté Dániel op. cit. p. 130. Jóri András – Hegedűs Bulcsú – Kerekes Zsuzsa op. cit. pp. 289-290.

specific, detailed regulation in the field of workplace privacy has more or less filled up by the case law of the Data Protection Commissioner.

But the case law of the Commissioner was based on the fact that the monitoring of the employee's activity may be only based on his consent. We think that this idea caused inconsistency and sometimes unrealistic results – it seems that the new Labour Code will significantly change this situation, although the details of the boundaries of monitoring should be worked out by the case law.

Case differentiation in the Hungarian civil procedure

CZOBOLY, GERGELY

ABSTRACT *Preventing undue delay is one of the most common aims of civil procedural reforms. In several European countries some form of simplified procedure has been introduced to handle their mass of simpler cases. There are also countries where a special procedure exists for complex cases. In recent years the Hungarian civil procedure has been amended several times and a trichotomous system has been introduced. In this paper, I would like to examine the English civil procedure after the Woolf reform and compare it to its Hungarian counterpart. After the Woolf reform, English civil procedure also has a trichotomous system too, where three tracks exist in the first instance procedure. I examine why these civil procedures differentiate between cases. In my opinion, civil cases can differ a great deal by subject matter or complexity. The main question is: is there any correlation between complexity, length of procedure and undue delay? From the view of substantive law the answer is quite obvious: if a case is more complicated, more time is needed to decide it, and so the correlation is directly proportionate. However, what if we look at this not only from a substantial aspect, but from a procedural one? Is it so obvious that less complex cases require less time or not? In a system where parties and their legal representatives have the same procedural instruments in every case, the answer is rather uncertain. I will compare these systems to attempt to find answers to these questions.*

1. Introduction

In recent years the Hungarian civil procedure has been amended on several occasions. Although these reforms did not affect either the general principles or the central rules of the civil procedure, they should be regarded as *important milestones in the Hungarian civil procedural law*. The reforms from 2008 and 2011[1] broke the 60-year-old dogma of the uniformity of procedure. Though special procedures, such as that of labour disputes[2] had already existed before the reforms, the distinction had been based on the subject matter of the dispute,

[1] Act XXX of 2008 and Act LXXXIX of 2011

[2] Actions relating to contracts of employment and other similar legal relationships, Hungarian Code of Civil Procedure 349-359. §§

not on the financial value. Before the reform, the same procedural rules were applied in the first instance procedure to simple claims of low financial value and to complex cases also well. The new rules established three types of procedure: the small claims procedure, normal procedure and procedure for cases with prioritised significance. The *trichotomy of the procedure* is not unique in the European legal developments as the English system - after the Woolf reform - shows. However the method of case differentiation in these legal systems is not at all similar and the difference does not only arise from the different legal traditions. In my opinion, the reforms in these states differ from each other both in methods and in significance.

Despite the differences, the idea of case differentiation served the same purpose in both countries: to *prevent undue delay*. The theoretical basis of both was that it is inappropriate to use the same procedural rules to cases with different levels of complexity and significance. According to LORD WOOLF, it is necessary to depart from the old approach, where "time and money are no object" and to move to another, where human and other *resources are allocated effectively.*[3] These reasons can be found in the preamble of the Hungarian Reform Act also.[4] From this principle, it should logically follow that, in cases of lower financial value, fewer resources should be used than in cases with greater. The English reform aimed to develop a needs-oriented system to achieve the optimal resource allocation. Differential case management[5] was the main instrument in achieving this goal. Whilst in cases allocated to the small claims track the parties can only use restricted resources and the style of the trial is more direct than with cases allocated to the fast track or to the multi-track, this is not the case in Hungarian small claims procedure. It can be seen that the Hungarian legislator designated certain, well-definable areas of the cases, where the length of procedure can be shortened, sometimes at the expense of the normal cases, instead of applying a comprehensive reform. The Hungarian

[3] If "time and money are no object" was the right approach in the past, then it certainly is not today. The achievement of the right result needs to be balanced against the expenditure of the time and money needed to achieve that result". Lord Woolf Access to Justice, Interim Report, Chapter 4, Para 6.

[4] In small claims such a procedure should not be used, which financially burden the society more, than the financial significance of the case (on the one hand to the parties, on the other hand to the state, so indirectly to the society itself). Preamble of the Act XXX of 2008, General part, Para 2

[5] According to Holy Bakke and Maureen Solomon "Differential case management (DCM) is an attempt to define case-specific features which distinguish among cases as to the level of case management required. Thus, the essence of differential case management is recognition of the case-flow system to recognise explicitly that the speed and method of case disposition should depend on the case actual resource and management requirements (both court and attorney) not on the order in which they have been filed". in Bakke, Holy - Solomon, Maureen: Case differentiation: an approach to individualised case management, Judicature, 1989-1990/73. p. 18.

reform only limits the parties' autonomy, shortens the deadlines and applies priority treatment in certain cases. In my paper I would like to prove that the Hungarian reforms did not create a consistent system such as the Woolf reform in England, where every track has its own role, but only abolished one single procedure and generated preferred groups.

2. The reasons for case differentiation

Civil cases can differ in many ways by their subject matter or complexity. Presumably, therefore, there must be a question as to whether there is any relevance from the point of view of time if a case is complex or not? Is there any correlation between complexity, length of procedure and undue delay? From the view of substantive law the answer is quite obvious: if a case is more complicated, more time is needed to resolve it, so the correlation is directly proportionate. However, if we examine it not only from a substantial aspect , but from a procedural one, is it so obvious that less complex cases require less time? In a system where parties and their legal representatives have the same procedural instruments in every case, the answer is rather uncertain. Theoretically the same procedure is carried out in every case, which is obviously not true, because each procedure is different from any other at one point.

The frame of the procedure is the same in all cases and so the parties can use the same procedural instruments in every procedure to gain time, and judges have the same power to control it. This provides an opportunity for lawyers to use dilatory tactics. The final goal would naturally be that all cases would decided – *optimally, that is* - with optimal time and resource consumption. However, in my opinion, this cannot be achieved by means of a uniform procedure where the same rules are applicable to every case. My recommendation would be to accelerate the procedure as a whole, but not with a common method. In order to achieve optimal duration, it is important to *handle every case in the way necessary.* In this part of the paper I would like to demonstrate why it is important to treat different cases differently.

One important argument for abandoning the uniformity of procedure is to *increase access to justice*. In different cases the financial possibilities of the typical parties concerned differ a great deal. To one type of case commonly one type of party is linked. Whilst in small cases the parties are usually low-income individuals, or small businesses, in cases with a high financial value the typical party is wealthy individual or a financially strong company. For the first group cheapness and quickness of the procedure is of much importance, because they do not have enough financial resources to litigate for years. The small claims procedure can not by itself eliminate the social differences, but it can improve

the situation. In this context LORD WOOLF said: "I see the small claims scheme as the primary way of increasing access to justice for ordinary people".[6]

Another argument to distinguish between cases is the *different levels of social interest* in the outcome of cases. The judicial system is maintained by the taxpayers, a much larger group than the actual parties in a case. Society has a great interest in maintaining the rule of law, but there are cases where this interest is higher, and there are others where it is lower. In my opinion, the effect of a case worth a hundred million is not comparable with the effect of a small dispute. It is therefore acceptable that in smaller cases the resources and possibilities available to find out truth are more limited than in more important cases. This means for example the application of prima facie evidence, or the limited availability of expert evidence or the restriction of appellate remedies. It is important to have reassuring decisions in these cases, but the society is interested in a system where more resources will be allocated to cases with more impact on society.

In my opinion, one of the most persuasive reasons to use case differentiation is the *acceleration of civil procedure*. Every case has its own nature and they are most effectively decided in different types of procedure. Whilst, for example, in a simple case it is not good to hold a pre-trial review or a case management conference (as this may result in undue delay), in complex cases it is the opposite. As we will see later, English civil procedure varying degrees of case management and different judicial activity is required by the law depending on the track where the case was allocated to. For example, in a small claims court, standard directions are usually given, trials are usually heard by the district judge in an informal setting and his role is usually interventionist[7]. With multi-track, the court will consider whether it is desirable or necessary to hold a case management conference immediately or whether it is appropriate to give directions on its own initiative.[8]

As we can see now, there are significant arguments to differentiate between cases, but the question of "how" arises. In my opinion it is very important to define the *allocation factors* properly and to grant transit between them if circumstances so require. *Today, life has become both highly complicated and typical at one and the same time*, which is echoed in legal disputes also. A typical bank loan contract, many thousands of which have been concluded in recent years, is about 30-40 pages long and there are a dozen legal Acts which regulate it. Despite the complicated legal background, the disputes arising from such contracts are typical. Even so, there can be one case in a thousand which is truly complex, because, for example, it calls the fairness of the contractual term into question. If we allocate cases on a value basis only, then a small, but

[6] Lord Woolf op. cit , Chapter 15, Para 3.
[7] Loughlin, Paula – Gerlis, Stephen: Civil procedure, Cavendish Publishing Limited, London, 2004 p. 242.
[8] Ibid. p. 268.

complicated case will be treated as a simple one, and the whole of the reform process has achieved nothing since it will necessarily delay proceedings. On the other hand, a high-value case can also be typical, and in that dispute the procedure designed for complex cases will be inadequate. In my opinion case differentiation is important, but the inflexibility of allocation rules may have an adverse effect.

3. Case management in the English civil procedure

At the turn of the century one of the greatest reforms of English civil procedure was implemented. It is referred to as the Woolf reform after its originator LORD WOOLF. It significantly affected the adversarial system, party control, the role of the judge and case differentiation. Until the enactment of the *Civil Procedure Rules (CPR),* English procedure was based on the premise of the so-called "adversarial principle", or the "principle of party control". According to this principle, the parties and their lawyers controlled the pre-trial progress of the litigation. Since the enactment of CPR, however, the parties have much less opportunity to do so because the courts have been granted extensive "case management" powers and duties.[9] According to KENGYEL, the English reform was part of an overall convergence in the direction of the model of *social civil procedure.*[10] In the centre of the reform was case differentiation with an intensive and appropriate case management.[11] Lord Woolf made th judicial management of civil litigation the key-stone of his overall strategy.[12]

Before the Woolf reform, the civil procedure was perceived as the *battlefield of the parties* and their legal representatives, where everything was allowed. LORD WOOLF said: "Without effective judicial control, however, the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply"[13] In that battle factors such as cost and time played no role. This resulted in a system where many smaller cases paid more to the litigator than it did in compensation to the litigant.[14] At the same time that system facilitated the use of adversarial tactics which resulted in delay, because parties could use the same procedural instruments in all types of case, both

[9] Andrews, Neil: English Civil Justice and Remedies: Progress and challenges, Nagoya University Comparative Study of Civil Procedure Vol.1, SHINZANSHA Publishing Ltd, Tokyo, 2007 p. 12.
[10] Kengyel, Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben, Osiris Kiadó, Budapest, 2003. p. 302
[11] Lord Woolf op. cit, Chapter 4, Para 8
[12] Andrews, Neil: A New Civil Procedure Code for England: Party-Control Going, Going, Gone." In: Civil Justice Quarterly 2000/19.
[13] Lord Woolf op. cit, Chapter 3, Para 4
[14] Ibid. Chapter 3, Para 21.

simple and complex ones. The procedure was constructed to handle complicated cases, and so it gave good opportunities to lawyers to use delaying tactics and, hence, generate legal costs. LORD WOOLF saw the solution in changing the role of judge and the application of judicial case management. He commented that the previous system applied the same procedures to all cases regardless of financial weight, complexity or importance.[15] He wanted to change this and introduce case management, with the aim to divert cases to alternative methods of dispute resolution where this was likely to be beneficial.[16]

"*Judicial allocation of proceedings* is one of the main innovations of the Woolf reforms. Each claim is commenced by a claim form which, when defended, must be allocated to a case management track: the small claims track, the fast track or the multi-track"[17] The word “track” expresses the different ways of handling different cases. The judge allocates the case to a track, gives instructions, and the procedure can then move on its own way. This system works on the basis that the court, upon receipt of the defence, requires the parties to complete "allocation questionnaires". The case will then be allocated to one of the three tracks for hearing. Each tracks offers a *different degree of case management*.[18]

The judge has to consider *several factors* when allocating a case to a track. He collects the required information from the questionnaires filled in by the parties, And if the questionnaire does not provide the court with enough information to allocate a claim to a track, the court will order the party to provide further information about the case within 14 days of the order. If necessary, the court will order an allocation hearing on its own initiative before allocating a claim to a track.[19] The most prominent aspect of classification is the *value of the case*, but that is not the only one. Each track has its own financial limit and for claims falling within this limit the appropriate track is the normal choice, but this does not mean that value alone determines the allocation. It gives some guidelines to the judge and makes the system objective, but the use of only one factor would make it too rigid. To avoid this, the judge has the opportunity to choose another track rather than the normal one. Aspects to be considered are, for example, the likely complexity of the facts, law or evidence, the amount of oral evidence which may be required and, not least, the views expressed by the parties.[20] *The parties' views* will be treated as an important factor by the court when making its decision, but those views cannot prevent the

[15] Ibid. Chapter 4, Para 8.
[16] Ibid. Chapter 5, Para 17.
[17] Sherrard, Brian: Case management - the civil justice reform group's approach. In: Northern Ireland Legal Quarterly 2002/53. p. 110.
[18] Slapper, Gary – Kelly, David: The English Legal System, Routledge - Cavendish, New York, 2009 p. 345.
[19] Loughlin, Paula – Gerlis, Stephen op. cit p. 228.
[20] CPR 26.8 (1)

court from allocating the case to the track it considers most appropriate, even if all the parties have agreed on a different track.[21] In any event, a court cannot allocate a claim to a track if its financial value exceeds the normal limit of that track, unless all the parties consent to the allocation of the claim to that track.[22] Hence, if a claim would normally be allocated to a track due to its financial weight, the judge can change it to a "higher track", due to complexity, but not vice-versa, since he can only allocate the case to a "lower" track with the agreement of the parties.

The small claims track is the normal track for most claims with a financial value of no more than £5,000.[23] The rules applicable to this track aim to resolve disputes in a relatively *informal manner* with strictly limited possibilities of appeal. The ground for an appeal may be misconduct by the district judge or an error of law made by the court. The rules are drawn up with the interests of litigants in mind, and, in what is effectively a codified application of the overriding objective, many of the standard features of litigation are excluded.[24] The trial is more informal than in other tracks. In accordance with general rules and Art. 6 of the European Convention on Human Rights, a small claims hearing should be held in public. In practice, small claims hearings held in public are not attended by many members of the public since they normally take place in the district judge's room.[25] To accelerate the procedure and to save costs, the evidence is restricted, especially expert evidence. Expert evidence, oral or written, may not be given without permission of the court[26] and the usual direction permitting it provides for a single expert jointly instructed.[27] The court may also limit cross-examination and the judge may intervene, so that he can, for example, question the witnesses himself. If a party does not want to attend the final hearing, he can ask the court to take his statement into account and any other documents which he has filed and served. If he has not done so in the required manner, the court may sanction it. If the claimant does not attend the hearing and neither gives the needed notice, the court may strike out the claim. If the defendant or no other party attends the hearing and does not give the required notice, the court may decide the claim on the basis of the evidence submitted by the claimant alone.[28] Last but not least, one of the most important features of the small claims track is the so called *"no cost rule"*. This rule is an exception to the indemnity principle of the English civil litigation system, since

[21] Loughlin, Paula – Gerlis, Stephen op. cit p. 238.
[22] Ibid. p. 237.
[23] CPR 26.6
[24] Grainger, Ian – Fealy, Michael: The civil procedure rules in action, Cavendish Publishing Limited, London, 2000 p. 34.
[25] Loughlin, Paula – Gerlis, Stephen op. cit 245.
[26] CPR 27.5
[27] Gerlis, Stephen M: County court procedure – 3rd ed. – (Practice notes series), Cavendish Publishing Limited, London, 2001. p. 89.
[28] CPR 27.9

it inhibits the successful party from recovering the legal costs of a small claims case from his opponent (apart from specific limited costs). The policy behind this is to discourage the use of legal representatives who are felt to be inadequate for the matter being litigated.[29]

In accordance with one of the main principles of the Woolf reforms, the purpose of the *fast track* is to provide a streamlined procedure for the handling of moderately valued cases - those with a value of more than £5,000 but less than £15,000 - in a way which will ensure that the costs remain proportionate to the amount disputed.[30] Evidence is limited in this track as well. Although expert evidence on the fast track is generally limited to one expert per party, in reality expert evidence on the fast track is usually a written report from a single joint expert.[31] Directions for the management of cases on the fast track will be given at two principal stages – on the initial allocation to that track and on the filing of listing questionnaires. As far as possible, the court will attempt to restrict the giving of directions to those two occasions and, even then, will attempt to dispense with a hearing. Parties are encouraged to 'concentrate' their applications to these two points in the action and to attempt to agree directions in standard form.[32] Where the trial date is in jeopardy due to a party's failure to comply with the directions, the court will exercise its case management powers so as to ensure that essential steps are taken to prepare the case for trial within the shortest possible time, and impose a sanction for non-compliance. Such a sanction may, for instance, deprive a party of the right to raise or contest an issue or to rely on evidence to which the direction relates.[33] This kind of sanction is well known in the continental European systems as main instrument of concentration of the procedure, for example in German civil procedure. To avoid delay there are *fixed costs for the advocate* on the trial, varying between £350 and £750, depending on the amount awarded in relation to the claimant and the amount claimed in relation to defendant, but this is not dependent on the length of the trial.[34] Under these rules, advocates are no longer interested in delaying the procedure. Of course, the parties could still be interested in delay and their representatives will comply with their instructions, but the advocates themselves will no longer have any reason for delay.

The *multi-track* is intended to provide a flexible regime for the handling of higher value, more complex claims, that is, those with the value of over £15,000. This track does not provide any standard procedures, such as those for small claims or claims in the fast track, but, instead offers a range of case management tools - standard directions, case management conferences and pre-

[29] Loughlin, Paula – Gerlis, Stephen op. cit pp. 249-250.
[30] Slapper, Gary – Kelly, David op. cit p. 347.
[31] Loughlin, Paula – Gerlis, Stephen op. cit p. 255.
[32] Grainger, Ian – Fealy, Michael op. cit. p. 36.
[33] Loughlin, Paula – Gerlis, Stephen op. cit p. 263.
[34] Gerlis, Stephen M op. cit p. 99.

trial reviews - which can be used in a "mix and match" way to suit the needs of individual cases.[35]

As we have seen, the *extent of post allocation judicial case management* depends upon the designated track. The small claims track is the least managed, the clear expectation being that directions given on allocation will be sufficient. A more pronounced form of case management is a central feature of the fast track where on allocation the court will give directions for the management of the case and set a case management timetable. The most intensive form of case management is reserved for claims allocated to the multi-track. Upon allocation the court will give directions for the management of the case and set a timetable for the steps to be taken before trial. The allocation court may also fix a "case management conference" or a "pre-trial review.[36]

In summary the English reforms made a flexible system where the allocation to tracks depends on several factors, but with an objective starting point. The system is consequent because it allows fewer human and financial resources to be used in "lower" and more in "higher" track cases, and through case management the court can provide a procedure adapted to the real needs of the case.

4. Reform-established case differentiation in Hungarian civil procedure

The reforms mentioned represent a shift in Hungarian civil procedure compared to the previous rules, since they broke with the ideology of the single first instance procedure and introduced a differentiated one. By introducing separated procedures for smaller claims the legislator did not enter new terrain, since a *summary procedure* had existed from 1893. These rules were incorporated into the new Code of Civil Procedure[37] and the summary procedure was replaced by the procedure of the district courts.[38] This showed several differences from the procedure of the tribunals, which was the general first instance procedure. One example of such a change was that the parties contacted the court orally and also outside the trial. (In the district court procedure there was no pre-trial hearing).[39] The later Code of Civil Procedure (1952), which was built on socialist principles, *abolished the divergences* and established a new and single first instance procedure. The socialist civil

[35] Slapper, Gary – Kelly, David op. cit p. 347.
[36] Sherrard, Brian op. cit. p. 111.
[37] Act I of 1911 on Code of Civil Procedure
[38] Kengyel, Miklós: Magyar polgári eljárásjog, Tizedik kiadás, Osiris Kiadó, Budapest, 2010 p. 533.
[39] Magyary, Géza: Magyar polgári perjog. 2. kiad. Budapest, 1924, p. 66. id.: Kengyel, Miklós: Magyar polgári eljárásjog p. 533.

procedure treated the single first instance procedure as a dogma.[40] After the political changes in 1990, however, the legislator did not revert to the earlier (1911) rules, but modified the existing code and the single first instance procedure.

The reforms of 2008 and 2011 changed the previous status and - following both the Hungarian traditions and foreign examples - it divided the first instance procedure.[41] As a result of the reforms, there are *three type of first instance procedure*: the small claims procedure, the normal procedure and a procedure for cases with prioritised significance. The differentiation is restricted to actions for the enforcement of pecuniary claims and the only factor for allocation is the financial weight of the claim. On matters other than claims of a pecuniary nature, the rules of the normal procedure are applicable. Their limits are that: the small claim procedure is applicable to claims of no more than HUF 1 million, the normal procedure to claims between HUF 1 million and HUF 400 million, and the procedure for "prioritised significance" cases is applicable to claims above HUF 400 million. It follows from the jurisdictional rules that the small claims procedure is only used by local courts and that for prioritised significance cases can only take place in county courts.

Regarding cases of low financial weight, the legislator aimed to accelerate the procedure, so the reform limited the scope of party-control, introduced stricter rules for non-attendance at hearings and prescribed shorter deadlines to the court. In practice, limiting party-control means that the right to change the claim, to present motions to take evidence and to file a counterclaim is limited in time as compared to normal cases.

In the normal procedure the plaintiff can *change his claim* before the time when the hearing preceding the giving of judgment in the first instance is adjourned [146. § (1)], whilst in the small claims procedure the plaintiff can make changes to his claim on one occasion only after the defendant's counter-plea is presented on its merits during the first hearing [391/A. §]. In both cases the claim has to arise from, or relate to, the same cause of action as the original claim. In the small claims procedure the party can present his *motions for the performance of taking of evidence* in principle on or before the first day of the hearing [389. §]. To this rule a number of exceptions are allowed by law, but in principle this strict limitation does apply. Such a rigid limitation does not exist in other procedures, although in these cases the court must forego the ordering of the taking of evidence if the party has submitted the request for the performance of taking of evidence to be delayed for reasons within his control, or if the request is presented contrary to good faith [3. § (4)]. In the small claims procedure the defendant may file a *counterclaim* against the plaintiff in principle during the first hearing [391/B. §]. In other procedures the defendant may launch a counterclaim against the plaintiff before the time when the

[40] Kengyel, Miklós: Magyar polgári eljárásjog p. 533.
[41] Preamble of act XXX of 2008, General part, Para 2.

hearing preceding the giving of judgment in the first instance is adjourned [147. § (1)]. In small claims procedures, an objection to offsetting is very restricted. After the first hearing, it is only allowed if the claim requested to be satisfied by way of offsetting is recognised by the opposing party, or the claim requested to be satisfied by way of offsetting can be verified by means of an authentic instrument or a private document of full probative force, or if the claim requested to be satisfied by way of offsetting had expired after that time, or if the party had gained knowledge of the existence or expiration of the claim after that time and was able to substantiate it [391/C. § (1)].

To summarise: in small claims procedures *the control of the parties is restricted* compared to other procedures, but only in terms of time. The first hearing is very important since most possibilities of influencing the subject of the case are related to this, but there is an exception to these limitations: the consent of the opposing party. For example, after the first hearing, the defendant's consent is required for the plaintiff to make any changes in his claim before the time when the hearing preceding the giving of judgment in the first instance is adjourned [391/A. §].

Failure to appear at hearing in small claims procedure has more serious consequences. Although in other procedures, if neither of the parties appears at any hearing, or the party present does not wish to proceed with the hearing or refuses to make any statement, and the plaintiff being absent did not previously request the court to proceed with the hearing in his absence, in neither of these cases are proceedings suspended [147. § (1) b,], in the small claims procedure, the court shall dismiss the action [390. §]. In addition, in the event of any failure to appear in a subsequent hearing, the court may postpone the hearing only in exceptional and justified cases, while setting a new date in court at the same time, or - failing this - shall adjourn the hearing and render its decision relying on the information on hand [390. §]. In other procedures, if either of the parties fails to appear at a subsequent hearing - with the exception of a hearing set on account of a statement of opposition at which the defendant failed to appear - the court shall conduct the hearing at the request of the opposing party attending, or at the plaintiff's request submitted previously, if absent, or may set a new day in court [136/B. § (1)]. All three procedures carry the uniform sanction for failure of the first hearing: if the plaintiff fails to appear, the court shall dismiss the case at the defendants request; if the defendant fails to appear, the court shall issue - at the plaintiff's request - a court order against the defendant consistent with the claim disclosed in the writ of summons and shall order him to cover the plaintiff's costs [136. §].

With the procedure for cases with prioritised significance the legislator aimed to increase the efficiency of procedure in cases with financial weight above HUF 400 million.[42] To achieve this, the deadlines were shortened, the

[42] Preamble of Act LXXXIX of 2011

obligation of the courts to inform the parties was abolished and cross-examination was introduced.

In the procedure for cases with prioritised significance the court has to hear the cases in priority proceedings without the motion of the parties [386/B. §]. In this type of procedure some deadlines are shorter than in the others, for example the court must examine the statement of claim without delay, in no more than 8 days from the time of delivery to the court, and must set the date of hearing 60 days from the same time [386/C. §]. The law gives less time for the expert to prepare his report, and so he must give his report to the court within 30 days or 60 days in complex cases.

Under the new rules, the judge has to give a partial verdict or interlocutory judgment if the necessary conditions are met.[43] Cases above the financial limit are likely to be complex and compound, and so it will likely consist of several interrelated problems. To reduce the whole procedure it may be practical to separate the problems and decide these in the above way.

To decide a dispute, the court - contrary to other procedures, where it is obligatory - do not have to inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also the consequences of failure in the evidentiary procedure [386/J. §].

5. Comparative analysis of the English and the Hungarian reforms

The English and the Hungarian reforms *aim to accelerate civil procedure* also. These reforms differentiated between cases and to these groups they introduced new procedures, with variant rules. As a result, three types of first instance procedures can be distinguished in both systems. Although the conceptual basis of the examined reforms was the same, the solutions differ considerably.

Firstly, the reference point is different. Compared to the previous rules, in the English system the multi-track, which is the "highest" of the three tracks, is

[43] The court may resolve certain claims, or certain segments of an action claims that can be adjudged separately by means of separate judgments (partial verdict), if no further hearing is required in that respect, and if the hearing has to be postponed with a view to adopting a decision regarding the other claims or an objection to offsetting. The partial verdict may be abolished by a later decision if necessary with respect to the outcome of a hearing pertaining to an objection of imputation or a counterclaim, or may be modified as appropriate. [213. § (2)] Where the dispute is severable in terms of recognizing the right enforced by the action, and of the amount (quantity) of the claim to which the plaintiff is entitled on that basis, the court may recognize that right by way of a preliminary judgment (interlocutory judgment). In this case the hearing may be continued concerning the amount (quantity) of the claim only after the interlocutory judgment becomes final. [213. § (3)]

the most similar to the previous procedure, while in the Hungarian system the procedure applicable to "normal" cases, was not changed and two groups were separated. Remarkable differences can also be seen in the *method of allocation.* In English law the cases are allocated depending on several factors, one of which is the financial weight of the claim, although this is far from being the only one. In Hungarian law the only factor in allocation is the financial weight of the claim. Because of this *the Hungarian system is necessarily rigid*. Nothing shows this better than that rule which requires the court to dismiss the counterclaim by way of a ruling, not open to argument, as to the merits of the case, if filed non-exclusively for pecuniary claims, or filed for pecuniary claims valued over one million forints [391/B. § (5)]. The legislator's aim was probably to restrict the use of dealying tactics, and so the defendant has to sue separately. In practice this means that the original procedure can continue and it is not necessary to reallocate the case, but the defendant's claim opens a second procedure. This will increase the court's caseload which is probably the most significant cause of delay. In the end, this rule may cause more delay than it can prevent. Another difference in the allocation process is the role of the opinion of the parties. Whilst in the English system this is relevant, but not decisive, in the Hungarian system the parties can agree to reallocate the case.

The parties, by their jointly expressed will, can also exclude the effect of the limitations. This idea was based on the fiction that the opposing parties can and wish to prevent delay caused by the other party, and so their control can prevent undue delay. The two reforms differ in this respect also. LORD WOOLF wrote in his report, that, in a culture of delay, it may even be in the interest of the opposing side's legal advisers to be indulgent to each others misdemeanours.[44] Acting upon this presumption, the Woolf reform tried to reduce control by the parties. In my opinion it is unwise to allow the parties and their legal representatives to exclude the limitations and give them control over the whole process. Reducing delay can only be expected from the judge. I hold that giving too much control to the parties to use delaying tactics and too little power to the judge to prevent it, is one of the conceptual mistakes of the Hungarian reform.

It is remarkable how the two systems treat *the role of the advocates* in the civil procedure and how it changes from track to track within them. In the English system, there is no obligation to have an advocate in the procedure, but the procedure itself was so complicated that the parties were forced to have representation. The aim of the Woolf reform was to reduce legal costs and delay, and so it wanted to reduce the advocate's involvement in some tracks where it was disproportionate, for example in the small claims track. Indeed, the small claims track was designed to provide a simpler, quicker and more informal procedure to bring and defend a claim so that a litigant in person can deal with the matter himself. Therefore the policy behind the 'no-costs' rule is to discourage the instruction of legal representatives, whose use was felt to be

[44] Lord Woolf op. cit Chapter 3 Para 31.

disproportionate to the matter being litigated. However, it should be noted that there is no express restriction on legal representation for small claims.[45] After the political changes of 1990, the role of the advocates changed a great deal in Hungary. Professional representation has become obligatory in an increasing number of cases, which means that the motion of a party is invalid without the signature of his legal representative. Neither type of procedure restricts the involvement of advocates; on the contrary, in cases above HUF 30 million the law demands legal representation.

One similarity is that both reforms reduced the number and scope of appeals and extraordinary remedies in small claims.

The most significant difference between the examined reforms is that, while the English system tries to *allocate resources in an optimised way*, the Hungarian, in fact, does not. To achieve this, the English reform created very different rules for each track with respect to the preparation of the procedure, in the rules of taking evidence and in the rules of the trial. The Woolf reform saw the promise of efficiency in an intensive and appropriate case management. It requires a different degree of intervention and activity from the judge in every track. By creating significant differences between the various tracks, the English reforms resulted in a more efficient disposition of human and financial resources. In contrast, the Hungarian reform did not differ essentially between procedures. There is no difference between procedures either from the aspect of preparing the procedure or in the style of the trial. The parties can use the same evidence in every procedure and the judge has no obligation to be more interventionist or active in smaller cases. Instead of active case management, the reforms abolished the judge's task in the procedure for cases with prioritised significance to inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of failure to produce evidence.

In my opinion, the Hungarian reforms did not introduce a coherent system like the English one; the lawmaker has only created preferred groups of cases. The new rules have not made procedures better suited to the characteristics of the types of cases, therefore they have not improved resource allocation. The legislator have only utilized some acceleration techniques for a distinct group of cases *as a test ground*. So the legal practice can test it and give feedback on the operation of it. This method would not be unique in the history of Hungarian civil procedure, because Alexander Plósz, the developer of the Code of Civil Procedure of 1911, used the summary procedure in 1893 as a test ground to the reform of the normal procedure.[46]

Considering their significance, the English and Hungarian reforms do not belong to the same weight class. The English reform systematically changed the whole procedure and introduced a coherent system, whilst the Hungarian only

[45] Loughlin, Paula – Gerlis, Stephen op. cit p. 250.
[46] Kengyel, Miklós: Magyar polgári eljárásjog, p. 533.

created new rules to be applied to a limited selection of cases, but failed to construct a coherent system. By way of summary, I think that in English law, case differentiation has its place in the single and coherent system, so it can accelerate all cases in general, whilst in the Hungarian procedure the new rules can accelerate only selected cases which belong to the new procedures, and not others. In my opinion the correct characterisation of the two reforms can be made by the observations of OBERHAMMER: "In periods of great procedural codifications, mostly the focus is on the efficiency of ordinary procedures. In other periods, legal development - usually because many are dissatisfied with ordinary procedure and especially with its cost and duration - concentrates on special summary proceedings".[47]

[47] Oberhammer, Paul: Speeding up civil litigation in Austria: Past and present instruments In van Rhee, C.H.: The Law's Delay. Essays on Undue Delay in Civil Litigation, Intersentia, Tilburg, 2004 p. 219.

The Current Personal Income Tax Regime in Hungary

ERCSEY, ZSOMBOR

ABSTRACT *This paper analyses the recent trends and experiences of the Personal Income Tax system in Hungary, where a flat tax regime has been introduced for the declared purpose of making the system more effective by reducing the tax burden, and of simplifying taxation in general, but especially the areas of tax obligations and assessment. Accordingly, the various types of income and some of the most important related matters (e.g. the tax base, tax rates and tax credits) are reviewed quite basically, mainly from a perspective of fairness and efficiency. The issue of 'just taxation' and a 'just tax system' is, however, complex and needs to be examined by taking into account all types of tax and the relevant fiscal consequences. This, clearly, cannot be dealt with in any detail in this paper due to space limitations. Consequently, the study focuses on the question of a personal income tax regime which may achieve a higher level of fairness; it also, evaluates the argumentation and practice of the personal income tax regulation currently in force and, finally, it points to a number of closely related issues.*

'Just taxation' and an appropriate personal income tax regime are based on the 'ability to pay' principle - and on proportionality, both of which are laid down in Hungarian legislation. The key issue of this approach – according to the current Hungarian provisions - is the difference between progressive and flat tax regimes, in respect of which there is intense debate, due to budgetary issues and operative matters. The paper, therefore, looks at the advantages and disadvantages of the operation of the new system, highlighting its impact on public revenues and tax complying issues.

1. The concept of income and its types

The law distinguishes between different types of income according to the basic definition of the income itself.[1] According to the provisions, there are

[1] Personal Income Tax is defined in three ways depending on the form of revenue. Section 4 (1) of the law says that all taxable revenue received by a private individual from others shall be considered income, or that part of such income with those fixed-amount expenses as recognised by this Act deducted, or a given proportion as laid down in the Act**.**

certain types of revenue in respect of which related costs may be deducted.[2] The tax base of such revenue is reduced by the costs incurred directly in relation to the activity from which the income was derived. These costs can either be substantiated individually or can be accounted for in an agreed lump sum amount.[3] In other cases only a certain proportion of the revenue is considered as income, and so the tax base is lower than the income. This is the case, for example, regarding the income derived from the sale and purchase of property (real estate). Such income is taxed separately, and the tax base is determined by a decreasing tax base structure and the amount of tax due.[4]

This is completely contrary to the principal of horizontal fairness, according to which taxpayers[5] with the same income and source of income have to be treated equally. Therefore, salaries and other types of income – in accordance with the Hungarian regulation on Personal Income Tax contracted and separately taxed revenues – have to be taxed to the same extent and in the same way. Nonetheless, several contemporary Anglo-American authors feel that, due to its very nature, personal income tax basically distinguishes between taxpayers.[6]

The standpoint which takes double taxation into account is, in the legal sense, somewhat contradictory to this. For example, taxing income which was once already taxed as a salary (as earned income) and produced by it, is not only unfair, but would most likely be economically harmful.

According to Hungarian personal income tax law, under the principle of 'ability to pay', taxpayers with the same paying capacity are forced to pay the same, whilst higher-income taxpayers have to pay higher amounts.

Whether the tax regime of a particular country is fair or effective depends on the applicability of the principles of proportionality, progressivity and the

[2] The system of personal income tax in Hungary traditionally separates income earned in direct employment as a 'wage earner' and independently earned income which is taxed individually. These types of income and their subtypes can also be distinguished on the basis of the three income groups defined by law.

[3] Any cost can be considered only once, on one occasion and, with some exceptions, to a limit of the total income in question. Costs which are accepted without individual receipt (rather than specifically spent and receipted) can be calculated to the limit defined by law and these costs will be regarded as fully accepted in such cases. If a cost is defined either as a flat fee or as a certain percentage of the relevant income, the income cannot be reduced by any other cost.

[4] See Sections 62(4) and (6) of Act on Personal Income Tax.

[5] Cf. Tóth, István György: Gyermekek és eltartottak figyelembevétele a jövedelemadózásban. In: András Semjén (ed.): Adózás, adórendszerek, adóreformok. (Szociálpolitikai Értesítő – Különszám 1993/1-2). MTA Szociológiai Intézet, Budapest, 1993 p. 264.

[6] Cf. Vosslamber, Rob: How Much? Taxation on New Zealanders' Employment Income 1893-1984. In: New Zealand Journal of Taxation Law and Policy 2009/12. p. 302.

exemptions provided.[7] Based on the 'ability to pay' principle, higher taxes are levied on taxpayers earning higher income and the same amount should be paid by taxpayers with a similar ability to pay.

2. The debate: progressive vs. flat tax

2.1 Theoretical approach

As Professor Antal Ádám declared, for both the legislator and law practitioners, sustainable development and social fairness should be among the main goals of government.[8]

According to social fairness, tax systems should be fair – as should be each type of tax. This means, in terms of personal income tax,[9] that everyone should contribute to public expenses according to their income and wealth.[10]

The earlier system of personal income tax (which followed the progressive method) had a clear basis. The tax payable on income created a consolidated (calculated) tax base. If this figure did not exceed 5 million forints, then 17% of the consolidated tax base was payable; if the base was higher than 5 million forints, then what was payable was 850,000 forints plus 32% of the amount over 5 million forints.[11]

The criticism regarding the earlier regulation of progressive personal income tax is that it created an obstacle to revenue and wealth accumulation - process of becoming richer. In other words, a higher percentage of the income was taken from the wealthier. This raised the issue of social fairness for that group in society with higher levels of income: they played a bigger part in building and financing their society in that they provided a higher amount for public revenue both nominally and proportionally. However, they were entitled to fewer benefits and received less in the way of state funding, government subsidies or financial support than the poorer taxpayers, and so, in reality, they were paying the costs of maintaining society.

Taking into account these arguments, the opponents of progressive taxation stated that a flat tax system would be preferable, since all groups and taxpayers in society would take part at the same rate in contributing to public funds

[7] Deák, Dániel: Igazságos-e a magyar adórendszer? (Egy törvényhozási csapdahelyzet elemzése). In: Jogtudományi közlöny 1997/7-8. p. 317.
[8] Ádám, Antal: Észrevételek a magyar alkotmányozáshoz. In: Jura 2011/1. p. 194.
[9] See Section 1(2) of the Act CXVII of 1995 on Personal Income Tax, stating that the purpose of the act is to secure – in due observation of the principles of proportionality and equity – the tax revenues necessary for the fulfillment of State responsibilities, and in special cases, to promote the implementation of certain social and economic goals.
[10] Musgrave, Richard A. – Musgrave, Peggy B.: Public Finance in Theory and in Practice. McGraw-Hill Book Company, New York, 1989 p. 227.
[11] See Section 30 of the Act on Personal Income Tax in effect until December 31, 2010.

irrespective of their amount of income. Obviously their nominal contribution differs, and the wealthier pay more, but the same proportion, which might sound fairer than taking a greater proportion of their income. This could lead to a more balanced and proportionate tax payment system: those paying higher amounts of their income pay more anyway, playing their part in contributing to public funds according to their ability to pay, and receiving more indirect counter-services. A further strong reason for the government to introduce a flat tax would be that reducing the marginal tax rate promotes employment.[12]

The flat tax provides a stronger motive for taxpayers to earn a higher income, since they can achieve a higher amount after tax if they invest more energy in earning more. Hence, despite their tax being higher, a still higher amount can be used as they themselves decide.

In the progressive structure it is not worth the taxpayer investing more energy pursuing higher income, since the amount taken as tax is proportionally higher as well. In other words, it establishes a psychological limit to the activities from which income is derived. For instance, the taxpayer does not take an additional job and nor are any other grants[13] if they reach a higher tax bracket, and have to pay a higher percentage. At the end of the day, due to this deduction, they take home less money. The higher tax rate increases the level of redistribution, but decreases the employment rate. As JOHN STUART MILL stated in 1848: the progressive tax levies a higher rate of tax on higher income, and so it clearly punishes hard-working taxpayers.[14]

[12] Statement by Willy Kiekens, Executive Director for Hungary and Szilard Benk, Senior Advisor to the Executive Director January 18, 2012 pp. 3-4.; http://www.imf.org/external/pubs/ft/scr/2012/cr1213.pdf [2012.02.25.]

[13] Contributions paid to citizens with no tax burden have been stopped as of January 1, 2011. This used to be a type of revenue under the contracted tax base that also arose from its category and had to be considered when the total revenue was calculated or when the tax base and the calculated tax were defined. According to this, it was considered as taxable revenue, although the tax did not have to be paid. The text of the personal income tax law Section 34 (valid until December 31, 2010 but superseded by Law 123 Section 32(14) on January 1, 2011) said that the calculated sum, based on regulation on tax amounts referring to the total sum of contributions that were not taxed would reduce the calculated tax. However, it could move a taxpayer's total revenue to a higher level in a progressive structure. This would mean that tax liability also increased. After the change, however, such income became totally tax-free. The exception related to student earnings. These are taxable revenue of a taxpayer as income from non-independent activity and also part of the contracted tax base. It also enables the taxpayer to gain the right to tax reduction, other reductions and to social security contributions as well as counting as work status.

[14] Mill, John Stuart: Principles of Political Economy. Longmans, Green and Co., London, 1848 p. 78.

The theoretical base of progressive income tax is that "increasing income is connected to a declining margin of profitability".[15] Progressivity obviously favours those with a medium income level, although many think that it is a more justice system.[16] At the same time, it undoubtedly decreases the revenue of high-income earners at a higher rate. This, on the other hand, can also be achieved by appropriate tax reduction in a linear or flat tax system.

The recognition that progressive income tax has a negative effect on performance led to the practice of reducing and unifying tax rates, to the relatively low, near-proportionate taxation of income. One of the most effective ways to achieve this is by applying a flat tax rate.

Determining required tax revenues and their subsequent legal codification has long been accepted as vital for competitiveness in the developed world, and eventually general international trends emerged. The author believes this to be part of the universality and unification[17] process that has been marked and elaborated by ANTAL ÁDÁM as "some coordinated economic actions of developed countries as well as some important and well-designed financial activities of global or regional financial management concentration stimulators [which] deserve acknowledgement."[18]

The Hungarian tax system, including the personal income tax system, was characterised by progressivity and complexity.[19] The first signs of the introduction of the flat tax rate were already marked by the trends in reducing higher rates and broadening the tax base. The legislators, noting the examples of other East Central European countries (e.g. Slovakia, Estonia, Latvia and Romania) came to believe that tax-related goals would be easier to reach by defining a broader tax base and imposing lower tax rates. More people would be willing (or, at least, more prepared) to pay tax. Hence, not only the constitutional[20] principle of paying taxes, but also the basic principles of the personal income tax law[21] would apply at a much higher level and government revenues might also increase significantly.

[15] Streissler, Erich: Gazdaságelméleti kétségek a progresszív jövedelemadó ésszerűségét illetően. In: Közgazdasági Szemle 1990/1. p. 79.
[16] Cf. Heady, Christopher: The Conflict between Equity and Efficiency in Designing Personal Income Tax Systems. In: The Role of Tax Reform in Central and East European Economies. OECD, Paris, 1991 pp. 87-96.
[17] Cf. Ádám, Antal: A posztmodernitás jogi sajátosságairól. In: Társadalmi Szemle 1996/4. p. 19.
[18] Ádám, Antal: Bölcselet, vallás, állami egyházjog. Dialóg Campus Kiadó, Budapest-Pécs, 2007 p. 79.
[19] Cf. Hauwe, Ludwig van den: German income tax policy between equity and efficiency. In: European Journal of Law & Economics 1998/5. pp. 267-268.
[20] See Section 70/I (1) of Act XX of 1949 (former Hungarian Constitution).
[21] See Section 1(1) of the act on personal income tax.

2.2 Recent experience

Despite the huge criticism that is also acknowledged in this paper, the Hungarian government still believes that the flat tax personal income tax regime should remain in force and, in order to establish a system that is stable and calculable, should remain protected by the requirement for a two-thirds majority vote of the Hungarian Parliament. They asserted that the new regulation had achieved its goal; it provided a higher budgetary income (an extra 60 billion HUF, together with the related social security contribution), stimulating the economy, and promoting employment.[22]

However, applying a progressive tax regime may be more advantageous from the point of fulfilling state obligations. The projections of both the parliamentary opposition and the International Monetary Fund show that, contrary to government expectations, a huge drop will be experienced in the medium-term.[23] This argument seems to be correct if we examine the amounts collected via personal income tax payments. According to Act CXXXIII of 2011 on the Implementation of the 2010 Budget, 1,767,865 million HUF was collected via personal income tax payments.[24] In comparison, in Act CLXIX of 2010 on the Hungarian Central Budget of 2011,[25] planned revenue of 1,362,977 million HUF was indicated, which is significantly less than was actually realised in 2010. A sum of HUF 1,574,300 million is planned for collection for the tax year 2012 according to Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012.[26]

From the point of view of public finance, the additional argument and aim was to increase the revenue generated by consumption taxes, but this goal has in no way been achieved. Whilst in 2010 a total of HUF 2,313,582.1 million was collected from VAT payments, and HUF 856,524 million from excise duty,[27] these amounts did not increase significantly in 2011 when VAT revenue was expected to be 2,488,964.1 million HUF, and excise duty HUF 881,132.9 million.[28] These figures show that the measures taken by the Hungarian

[22] http://www.piacesprofit.hu/kkv_cegblog/penz/marad_az_egykulcsos_szja.html [2012. 04. 12.]
[23] IMF Country Report No. 12/13, p. 31. Available online: http://www.imf.org/external/pubs/ft/scr/2012/cr1213.pdf [2012.03.10]
[24] See Appendix 1 of the Act CXXXIII of 2011 on the Execution of the Budget of 2010.
[25] Please do note that the official figure of the amount collected from individual income tax in 2011 is not available yet, that will be enacted by the legislation in the annual accounts of the budget.
[26] See Appendix 1 of Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012.
[27] Appendix 1 of Act CXXXIII of 2011 on the Execution of the Budget of 2010.
[28] Appendix 1 of the Act CLXIX of 2010 on the Hungarian Central Budget of 2011.

government 'have led to less than optimal economic outcomes'.[29] According to the government's expectations and an ambitious budget, however, in 2012, 2,722,000 million HUF should be collected from VAT, and 913,850 million HUF from excise duties.[30] These amounts, if actually achieved in the 2012 tax year, could demonstrate success in modifying the tax system. In this respect, however, it should be mentioned that consumption tax rates have been increased for the 2012 tax year. The most important change which affects all taxpayers is the increase in the standard rate of VAT from 25% to 27%. This, in the author's opinion, together with the cut in personal income tax (e.g. removing from the tax base incomes below an annual level of HUF 2,424,000) might make the tax system more just.

It is a fact evident from recent experience that reducing the tax rate for personal income tax does not result in a serious increase in consumption. This was true in 2011, when the VAT rate did not change and the wealthier taxpayers earned significantly more - due to reductions in tax rates mainly benefiting higher earners[31] - and also in 2012 (not because of to the higher VAT rate, but because income earners will save at least some of the money which stays with them). It is of course likely that they would spend and consume more, but the total of their extra net income will not be spent in its entirety.[32] Recent results show that consumption did, in fact, decline sharply in the first quarter of 2012. According to Gfk Hungaria, the technical consumer goods market index fell radically.[33] These factors show that the system in place on the 1st of January 2011 encouraged savings and (mostly) low-risk small or medium size investments, but did not increase the level of consumption significantly.

In contrast to the previous progressive personal income tax system, this solution, i.e. the reduction of tax rates, competitive taxation and tax amounts,[34] is, on the one hand, in line with international trends, although a flat tax rate is a

[29] See IMF Survey online January 25, 2012; http://www.imf.org/external/pubs /ft/survey/so /2012/NEW012512A.htm [2012.01.30.]

[30] Appendix 1 of the Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012.

[31] Budgetary concept of LMP (the Hungarian Green Party, Politics Can Be Different). P.17.; http://lehetmas.hu/wp-content/uploads/2011/09/Az-LMP-2012.-%C3%A9vre-sz%C3%B3l%C3%B3-k%C3%B6lts%C3%A9gvet%C3%A9si-javaslata.pdf [2012.03.04.]

[32] As Dr. György Surányi highlighted in his presentation on May 19, 2011 at 6 pm at CIB Bank Zrt. headquarters, the rich also have one dinner, and so it does not matter if more money stays with them after tax payment, if they don't spend it.

[33] For more details see the latest Gfk survey: http://www.gfk.hu/imperia/md /content/gfk_hungaria/pdf/press_2012/press_eng/press_2012_03_16_eng.pdf [2012.04.05.]

[34] These government moves have been urged by several market players and analysts for many years. See e.g. Brother Layman: Az offshore halála. HVG Kiadó Zrt., Budapest, 2010 pp. 272-274.

preference of East Central European states and hardly used in Western countries.

The parliamentary opposition parties emphasise that a flat rate individual income tax system is harmful for fiscal growth and federalism, generates a huge budgetary deficit, and, moreover, makes the existence of millions in the lower classes much harder and decreases the employment rate.[35] Basically this has also been determined by the International Monetary Fund: Hungary's programme 'adds to bureaucracy, and over-burdens the most vulnerable'.[36] The flat tax rate system does indeed favour the wealthier strata in society. The current lower rate (16%) does not represent a serious decrease from the previous 17%, but there is a significant change when compared with the 32% of the previous higher rate, and so this statement seems to be justified. This decrease produced serious losses of tax revenue for the government budget side, and this was not balanced by reductions in allowances. In fact, as the current study later shows in detail, these allowances have even been increased; although the basic tax allowance has been eliminated, people pay taxes from the first forint they earn'.[37]

In this regard it is also important to note the solution which several employers have used recently. Using the advantages of the lower taxation level, the gross salary of employees was reduced and the company saved some of its business costs. By this method it was not personal income taxpayers who benefited from the amendment effective from January 1, 2011, but enterprises and market players who could take this chance. Likewise, it was not defenceless employees who enjoyed the advantages, but, due to work contracts amended by "joint agreement", it was actually employers who benefited, although they were not the target of the legal regulation. Naturally the business effect of the personal income tax decrease is undoubtedly positive even given this solution, also considering that the increase of employment and the decrease of unemployment to something below the EU average are only made feasible by the reduction of tax and contribution levels.[38] These practical solutions show a good example of the two options used in the European Union: high personal income tax and low contribution level (see e.g. the Danish model) or lower

[35] See for example: http://www.nepszava.hu/articles/article.php?id=464441 and http://adozona.hu/szja_ekho_kulonado/LMP_tobbkulcsos_adora_van_szukseg_UPU7YH [2012.04.10.]

[36] IMF Survey online January 25, 2012; http://www.imf.org/external/pubs/ft/survey/so/2012/NEW012512A.htm [2012.01.30.]

[37] IMF Survey online January 25, 2012; http://www.imf.org/external/pubs/ft/survey/so/2012/NEW012512A.htm [2012.01.30.]

[38] The average unemployment rate of the euro zone was 10% by surveys in December 2010, while the EU average was 9.6%. This figure in Hungary has been on the rise since December 2009, and it reached 11.7% by the December 2010 official survey (see more in detail: Eurostat Newsrelease, 2011/18).

personal income tax for employees and a high contribution burden for employers (e.g. in Germany and France).[39]

Based on these factors, it is obvious that the amount of personal income tax paid by Hungarians in the same economic position may greatly differ. The tax base of contracted revenues must be defined by a tax base extension (by adding 27% revenue, i.e. creating a gross revenue or, as Hungarians say, a "supergross" revenue for annual income exceeding the sum of HUF 2,424,000). Thus, the real tax payment level is 20.32 per cent for revenues in the consolidated tax base, not respecting whether those arise from independent or non-independent activities or other sources. Revenues taxed separately, but are not taxed under this tax base extension; the real calculated tax of such revenues is 16 per cent of the income.

Based on this, the difference is not only the accessibility of reductions or the 4.32% in figures, but also the opportunity to offset allowances[40] and the non-identical status of other contributions. The lawmaker taxes certain revenue types differently depending on the actual business activity and taxpayers have different chances above these to optimise tax payment.

2.3 Deductions and exemptions[41]

Some countries consider a taxpayer's family composition when personal income tax is calculated.[42] Thus, besides personal taxation (where taxpayers are individual income earners), the opportunity for a common tax payment (where the taxpayer is a family unit) is given as part of the fiscal sovereignty. The majority of countries provide some kind of personal income tax reduction for

[39] Cf. Lykketoft, Mogens: The Danish Model. A European success story. In: Internationale Politikanalyse 2009/12. p. 5.

[40] Taxpayers can deduct costs in several countries, even if the revenue was earned by non-independent activity. E.g. in Belgium the revenue can be reducedby a progressive flat amount (see more in detail: Boeijen-Ostaszewska, Ola van (ed.): European Tax Handbook 2010. IBFD, Amsterdam, 2010 p. 127.

[41] On the tax-free status of minimum subsistence and minimum wage see in detail Ercsey, Zsombor: Tax Exemption for Minimum Subsistence Income. In: Ádám, Antal (ed.): PhD tanulmányok 6. PTE ÁJK Doktori Iskola, Pécs, 2007 pp. 169-184.

[42] Some countries treat children and spouses separately (e.g. Austria, where children and spouses are taxed separately), other countries may pay special attention to children and spouse in a combined way. In France, for example, which the author believes to be one of the best examples of family taxation, personal income tax is levied on households and not on husband and wife individually. Married taxpayers have the chance to submit separate forms only in special cases determined by law. (See Boeijen-Ostaszewska, Ola van (ed.): European Tax Handbook 2010. IBFD, Amsterdam, 2010 p. 273.)

families with children, since the lawmaker respects the social necessity and advantages of children as well as the burdens they mean for families.[43]

Although there are various methods and countries choose different policies, families with children are usually wholly or partly subsidised financially through the tax system.[44] This is an important method of subsidy, but not satisfactory since taxpayers will not have more children in order to obtain more tax allowances and tax or tax base reductions will not stimulate couples to have more children. It is easy to understand that, in general, these reductions cannot be used by lower strata in society, since their income does not reach the threshold level: it remains close to the minimum wage or barely reaches the social minimum or subsistence level.

Hungarian regulations also work in this way. Those with higher incomes can use more allowances and find more opportunities to use the subsidies offered under the law. However, the amended Hungarian system also adopted the term "family taxation", since the new provisions introduced new features in terms of family allowances.[45] It can probably be regarded as a positive initiative of the legislator that, for the first time since the introduction of the family allowance in 1988, it can now be claimed for a single child and regardless of the level of the family income. This tax base allowance (instead of the previous tax allowance) can also be used by married couples entitled to family benefit together, if they are both income earners. The family allowance – depending on the number of children in the family – will be HUF 62,500 per child per month, if the family has one or two children and the sum of HUF 206,250 if there are three or more children.[46]

[43] As the number of children grows, the allowances grow in Belgium, Greece and Italy. The contrarian solution is, when the incomes of children are wholly or partly added to the parents' tax base (see in detail e.g. the Netherlands; Vording, Henk – Ydema, Onno: The rise and fall of progressive income taxation in the Netherlands (1795-2001). In: British Tax Review 2007/3. pp. 255-279.). In the majority of European countries (e.g. Belgium, France) children living in the same household are also differentiated by marital status. If the child in question is already married, a smaller allowance can be applied to him/her, (e.g., regarding the limit of the allowance, the total earned income maximum is relevant for the married child (a vital difference is that Hungarian law connects this issue to the point of the capacity to exercise rights).

[44] Bencsik, András: A gazdaság igazgatása. In: Fábián, Adrián – Rózsás, Eszter (ed.): Közigazgatási jog különös rész. PTE ÁJK, Pécs, 2011 pp. 134-135.

[45] Since its introduction in 1988 the Hungarian personal income tax system underwent serious amendment and development in this respect. At that time such reductions were available to a very limited extent only. Taxpayers had to have min. three children under 14 (or under 25, if that child was in full-time Higher Education) and the tax base reduction was HUF 12,000 per year per child.

[46] See personal income tax law Section 29/A. § (2).

The amount of the allowance can probably be criticised, since the principle of the economies of scale[47] is valid for families also and so the much higher amounts given to families with three or more children will not achieve what the legislator had in mind. Further the higher allowance for the third child cannot be applied to families with a low income. It is, however, to be welcomed in the new regulation that taxpayers who receive a Disability Allowance can also use the tax base allowance for themselves as subjects priorised by the law.

2.4 Tax planning, tax compliance, tax evasion

The response of business to taxes is hugely important: high and progressive taxes hamper performance and do not stimulate production.[48]

The recent study by CSABA SZILOVICS[49] shows that Hungarian taxpayers unilaterally vote against tax increases, especially those relating to VAT and Personal Income Tax (only 17% of those interviewed supported an increase in personal income tax). In this connection taxpayers have a limited range of options for planning their taxes, even though many authors express a contradictory opinion.[50] Public employees have even fewer possibilities to commit tax fraud.

Although personal income tax is regarded a direct tax, the Hungarian personal income tax system functions as an indirect type of tax in view of its operational mechanism. The tax to be paid, i.e. the foreseeable amount, is deducted by the employer when the salary is transferred to the employee and paid to the tax authority.[51] As a result, the taxpayer will only receive the net salary amount reduced by its tax content together with a certificate in which the employer states how much has been paid for the employee. The latter will then prepare his tax form in accordance with this data. Those who are involved in this process have few options to commit tax fraud, since they have no chance to avoid paying the tax or hiding income, due to the burden of proof and documented evidence.

[47] Mieszkowski, Peter M. – Pechmann, Joseph A. –Tobin, James: Is a Negative Income Tax Practical? In: Yale Law Journal 1967/1. p.8.

[48] Streissler, Erich: Gazdaságelméleti kétségek a progresszív jövedelemadó ésszerűségét illetően. In: Közgazdasági Szemle 1990/1. p.79.

[49] See more in detail Szilovics, Csaba: Adózási ismeretek és adózói vélemények Magyarországon (2002-2007). G & G Nyomda Korlátolt Felelősségű Társaság, Pécs, 2009

[50] Brother Layman says, for example, that today only 10 per cent is really paid for personal income tax, and large personal revenues have long been tax free due to offshore or domestic non-existing accounts, because the actual revenue, on which personal income tax should be paid, is extracted from companies in that way. See Brother, Layman: Az offshore halála. HVG Kiadó Zrt., Budapest, 2010 p. 331.

[51] Since January 1, 2011 the National Tax and Customs Office (NAV) has authority in personal income tax issues instead of APEH.

A single linear tax rate will be less encouraging to taxpayers to hide income (tax evasion) or, alternatively, to use legal, but expensive tax avoidance methods. In addition to discouraging activity, high tax rates encourage taxpayers to search for legal and illegal ways of avoiding the payment of taxes (back door methods such as permanent investment accounts,[52] creating cost invoices from individual entrepreneurs, or when real estate or other property is sold[53]). Tax planning is certainly not a damaging or negative activity, but it is much to be preferred that taxpayers should accept the tax law since they are happy with paying less tax, feeling either that they have that they have received more money or that more has stayed in their pocket. This, quite simply, means increased revenue for the state, or, in respect of personal income tax, for the central budget, or, ultimately, for the local authorities.[54] The alternative in high taxation regimes, will often involve fraudulent tax schemes, such as black or grey employment. In such cases either no revenue at all flows in or its level is significantly lower due to these illegal manoeuvres.

In line with this, it is also arguable that a business proprietor who is also an employee of his enterprise, e.g. a limited liability corporation, can even morally not be condemned if he works for a lower salary and takes the profit generated from the company as a dividend. As contributions are high in comparative European terms, less is deducted from him in this way. If the owner takes this sum as a salary, then, according to the above tax regulations, the real tax levied would be 20.32% for that proportion of the income over HUF 2,424,000 annually and 16% for that below. Alternatively, if the sum is taken as a dividend, it is taxed according to the rules applying to separately taxed income, which means that additional gross amounts will not increase the tax base and the real calculated tax will be simply 16% of the income. Staying with this same example, it can be fairly claimed that the taxpayer is not committing tax fraud, but reducing the calculated tax by planning, although it probably cannot be disputed that it would constitute tax evasion if the minimum wage were declared as the sole income contrary to the true situation. In respect of this, the IMF did point out that the increase in the minimum wage introduced by the government would reduce this form of tax fraud and should, therefore, be welcomed.[55]

[52] See Section 67/B. of the Act on Personal Income Tax.

[53] Current law has retained the taxpayers' ability to select from three cost types.

[54] Based on the 2011 budget of the Republic of Hungary, i.e. Act. CLXIX of 2010, Section 38(1) local authorities in total are entitled to 40% of the personal income tax declared for the year 2009 according to a taxpayer's permanent address. 8% of this sum based on administrative areas actually goes to the local authority.

[55] Statement by Willy Kiekens, Executive Director for Hungary and Szilard Benk, Senior Advisor to the Executive Director January 18, 2012 pp. 2.; http://www.imf.org/external/pubs/ft/scr/2012/cr1213.pdf [2012.02.25.]

The level of compliance with tax law may also rise if the method of tax obligations, i.e. the declaration liability is simplified. Preparing a tax form is in fact a serious challenge for the average taxpayer. The complicated preparation guidelines may well cause problems for experts, whilst they may be totally incomprehensible in some areas for lay people.

In practice, the option of the tax declaration is open from 2012, which really simplifies the preparation of a tax form.[56] From the tax year 2011 taxpayers may fulfil their declaration obligation by this instead of submitting a complete tax form. An individual may make a tax declaration according to the personal income tax law Section 11/A, if he/she has no liability or did not take any benefit which would require the preparation of a tax statement by an employer or a tax form.

In addition, the law highlights three further conditions.[57] The first is that, in a tax year, the individual's total income should come from a single employer who was also responsible for the tax advance, with the difference between the deducted tax advance and the real calculated tax to be paid would not be higher than HUF 1,000 in the tax year. The second requirement is that, in the tax year, the taxpayer may only have income from companies who did not surpass the limit of HUF 100,000 per payment. The third requirement is a combination of the first two - specifically, if, in the tax year, the individual received income from employer(s) who declared the tax advance in such a way that the difference between the deducted tax advance and the real calculated tax to be paid would not be higher than HUF 1,000 in the tax year, and, in addition, the individual only had income from other companies which did not exceed the limit of HUF 100,000 per payment.

[56] The declaration liability was to date possible by self-declaration (classical individual tax payment or simplified declaration with authority assistance) or by the employer's tax statement.

[57] These share the common conditions also in respect of the nature of the type of revenue that

- individuals have not / will not deduct expenses or a part of expenses (except for the 10% cost ratio) by an item by item calculation;
- deduction, family allowance from revenue or tax allowance or reduction has been registered with a single employer only, who also calculates the tax advance and the aforementioned are calculated only to the extent that the employer had considered them in respect of his tax advance statement;
- no declaration on voluntary pension fund tax payment or pension saving statement is prepared;
- tax and advance tax have been fully deducted and
- all of his/her revenue in the tax year has not exceeded the limit of tax allowance or no tax allowance has been or will be registered.

3. Summary

The Hungarian personal income tax system was a progressive scheme since its introduction, but became a flat tax rate system from the tax year 2011 in order to follow regional trends but primarily to keep the Hungarian economy competitive. The change was aimed at promoting employment, at raising government revenue by reducing the level of the black economy, and at generating production by expanding consumption. These factors could bring about higher levels of employment, as well as increased state revenue deriving from additional consumption taxes and corporate income tax payments.[58]

It is evident that every amendment of one type of tax affects the entire tax system, and should, therefore, be handled accordingly. Further, all the outcomes of such changes can be fairly judged only on a long-term basis. At this stage it is clear that, according to recent results and the criticisms reported, these goals have not yet been achieved through the new structure. In spite of this, it is also unquestionable that some of the changes – such as the reduction of the tax amount and the taxation level, as well as the simplification of the due tax performance – offer many advantages for taxpayers, which can be used mainly by higher income earners.

The author believes, therefore, that further measures and amendments are required by taking into account other types of tax, as well as fiscal matters. Despite the tax to be paid on labour, income has dropped. With regard to the provisions of a widened tax base it remained higher than the tax of capital revenues, and many taxpayers have contributed more than they were supposed to. Taking Hungarian characteristics into account and the special features of personal income tax operation in Hungary (but also analysing international experience), the system is worth modifying, and, in order to establish an optimal structure, greater emphasis should be laid on investigating levels of compliance, the possible ways of tax evasion, and, primarily, the operation of the entire tax system from the fiscal point of view.

[58] This projection of the Hungarian government can be seen in the budgetary act of 2012 (Appendix 1 of the Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012 indicates that in detail), in which the planned amount to be collected from corporate income tax is 356,200 million HUF, so much higher than in the previous years (an amount of 323,369.9 million HUF central budget revenue derived in 2010 according to Appendix 1 of Act CXXXIII of 2011 on the Execution of the Budget of 2010, which was reduced significantly to HUF 288,020.9 million in 2011 according to Act CLXIX of 2010 on the Hungarian Central Budget of 2011, so the tax cut of individual income tax was not compensated by the increase of the corporate income tax revenue either in 2011).

The current and future relevance of the ‘responsibility to protect’ doctrine – The case of Libya

HAÁSZ, VERONIKA

ABSTRACT *Several crisis situations worldwide have shown that governments and the international community often fail to prevent or halt serious crimes under international law. Recognizing this failure, world leaders made a historic commitment to protect populations from the most heinous crimes known to mankind at the United Nations (UN) 2005 World Summit. This commitment, which is known as the “responsibility to protect”, stipulates that the State carries the primary responsibility for the protection of its population. Insofar as a State fails to protect its population, or is in fact the perpetrator of crimes, the international community should use appropriate diplomatic, humanitarian and other peaceful means to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The international community must also be prepared to take stronger measures, including the collective use of force through the UN Security Council. The passing of UN Resolution 1973 meant that the Libyan civil war (2011) was the first occasion on which the Security Council activated the “responsibility to protect” doctrine to maintain international peace and security.*

1. Introduction

'In 2005, the UN heads of states and governments gathered at the global summit (2005 World Summit) to celebrate the UN's sixtieth anniversary and they there endorsed the 'responsibility to protect' (hereinafter referred to as R2P) principles.'[1] The participants affirmed that 'each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity'.[2] The basis was the recognition that the concept of sovereignty implies not only the corresponding obligation of states to respect every other state's sovereignty, but the 'primary responsibility of each

[1] Ducasse-Rogier, Marianne: Libya, the UN, the ICC and the Responsibility to Protect. http://www.clingendael.nl/cdsp/publications/?id=8353 [25.08.2011]
[2] UN General Assembly Resolution, World Summit Outcome. UN Doc. A/RES/60/1. (25.10.2005), para. 138.

state for the protection of its people' lying with the state itself[3] (the first pillar of the R2P). From the point of view of the other States, the right to intervene for human protection purposes was converted into the responsibility to protect. It means that the international community has a responsibility to assist States in fulfilling their responsibility (the second pillar). When a State, nevertheless, 'manifestly fails' to protect its population from the four specified crimes and violations, the international community must be prepared to take timely and decisive action to protect populations at risk (the third pillar). In the course of this they shall use appropriate diplomatic, humanitarian and other peaceful means to protect civilians and may take stronger measures, including the collective use of force approved by the UN Security Council (hereinafter the UNSC).

The case of Libya is a sample of the third pillar of the R2P, where the government not only manifestly failed to live up to its responsibilities to safeguard the basic rights of its citizens, but the regime was itself the author of the mass atrocities. The case is unique in more respects. This is 'the first instance where the norm [of the R2P] has been backed by a UNSC Chapter VII resolution and used as grounds for intervention in an ongoing crisis'.[4] It is unique in the history of post-cold war interventions that the will of the international community, the operational speed and the gold-plated legality converge.[5] The clarity of the case in relation to the Libyan government's actions, the strength of support for coercive measures on the part of the different regional and sub-regional stakeholders and the voting pattern in the UNSC make this case noteworthy.

[3] International Commission on Intervention and the State Sovereignty: Report. International Development Research Centre, Ottawa, 2001 p. xi.

[4] Bert, Benedetta – Lindenstrauss, Gallia: The International Action in Libya: Revitalizing the Responsibility. In: The Institute for National Security Studies, INSS Insight No. 250. http://www.google.de/url?sa=t&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.inss.org.il%2Fupload%2F(FILE)1301995826.pdf&rct=j&q=inss%20insight%20no.%20250&ei=SpFWTrr-O8PMtAbeyuHACg&usg=AFQjCNGRqlrisaF-gf5Vqe3UuAMT44GHUQ&cad=rja [25.08.2011]

[5] Dunne, Tim: Libya and the State of Intervention. In: R2P IDEAS in brief, Asia Pacific Centre for the Responsibility to Protect, APC R2P Brief, Vol. 1 No. 1 (2011). http://www.r2pasiapacific.org/R2P%20Ideas%20in%20Brief%20Libya%20%20Vol%201%20No%201%202011.pdf [25.08.2011]

2. The scope of the 'responsibility to protect' doctrine in the case

2.1 Background

Muammar Muhammad al-Gaddafi came to power in Libya after leading a military coup which overthrew King Idris in 1969 and established the Libyan Arab Republic.[6] The political protests by the civilian population's demand for an end to Gaddafi's 42 year-old regime began on 14 February 2011 in Benghazi, and spread across the country. In a speech one week later Gaddafi said that he 'would rather die as a martyr than step down' and called on his supporters to attack and 'cleanse Libya house by house' until protestors surrender.[7]

This shows very well his unwillingness to respond to the demands of the people and his intention to use force to break the rebellion. The conduct of the Libyan security forces[8] and the reports on gunfire in the capital[9] showed that the government had begun to carry out its threats. The Libyan government's actions included atrocities such as the persecution and mass murder of opponents and armed attacks on protesters. 'The indiscriminate and widespread use of force by Gaddafi's government against the Libyan population […] turned the situation into one where human rights violations constituted crimes against humanity, i.e. widespread and systematic attacks against civilian population, with the knowledge of the attack[10] one of the crimes included in the R2P framework'.[11]

[6] Online Oxford Dictionary, 'Gaddafi, Mu'ammer Muhammad al-(Mu'am|mer Mu¦ham|mad al-Gad|dafi)'. http://oxforddictionaries.com/definition/Gaddafi,+Mu%27ammer+Muhammad+al- [25.08.2011]

[7] Televised Speech, Al Jazeera English (23.02.2011). http://english.aljazeera.net/news/africa/2011/02/201122216458913596.html [25.08.2011]

[8] See e.g. Amnesty International: Death toll mounts as Libyan security forces target protesters. http://www.amnesty.org/en/news-and-updates/death-toll-mounts-Libyan-security-forces-target-protesters-2011-02-18 [25.08.2011]

[9] See e.g. 'Libya updates: Gunfire reported in Tripoli; Gadhafi's son issues warning'. http://news.blogs.cnn.com/2011/02/20/Libyan-ambassador-to-Arab-League-resigns [25.08.2011]

[10] Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S.3., entry into force: 1 July 2002, Art. 7.

[11] International Coalition for the Responsibility to Protect (n.d.), The Crisis in Libya. http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya [25.08.2011]

2.2 UNSC Resolution 1970

'The basic requirement to trigger intervention under R2P is the given state's lack of ability or willingness to fulfil its duty to protect its civilian population, a requirement certainly met in the Libyan case where the state regime is ... the main perpetrator of the crimes against the civilian population'.[12] The incidents indicated apparently that the 'Libyan government [had] gone beyond the threshold of 'manifestly failing' to protect its own population'.[13] '[T]he level of violence ... was significant enough to prompt a reaction by the international community'.[14]

The UNSC determined that the action of the Gaddafi's government represented a clear threat to international peace and security. In response to this growing violence the Security Council invoked the UN Charter's Chapter VII to authorize appropriate measures by adopting unanimously UN Resolution 1970 under Art. 41 of the UN Charter. Within the Resolution it recalled 'the Libyan authorities' responsibility to protect its population', which is the first open referring to R2P. It also urged the Libyan authorities to take the appropriate measures to bring the violence to an end. It imposed an arms embargo on Libya, financial sanctions by asset freezing and travel bans against Gaddafi, his family members and senior officers of the regime. In parallel to these sanctions the Arab League suspended Libya's membership of the League and asked the UNSC to impose immediately a no-fly zone over Libya, as a 'preventive measure' whose chief goal is to 'protect Libyan citizens'.[15]

2.3 The ICC's role

Information on the atrocities spread, but verification was not so easy. Even though there was reasonable suspicion concerning the nature of the atrocities, some legal investigation was needed. According to the Rome Statute 'the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court'.[16] However Libya is not a State Party to the Rome Statute, '[t]he Court may exercise its jurisdiction … if [a] situation … is referred to the Prosecutor by the [UNSC] acting under Chapter

[12] Bert, Benedetta – Lindenstrauss, Gallia op. cit.
[13] Ndifuna, Mohammed: A call for up-scaling the 'Responsibility to Protect' mechanism in the Libya situation (Human rights Network – Uganda). http://responsibilitytoprotect.org/Hurinet%20Uganda%20LIBYA_%20Statement.pdf [25.08.2011]
[14] Bert, Benedetta – Lindenstrauss, Gallia op. cit.
[15] Arab League: Decision, Extraordinary session. http://www.washingtonpost.com/world/arab-league-asks-un-for-no-fly-zone-over-libya/2011/03/12/ABoie0R_story.html [26.08.2011]
[16] Rome Statute, Art. 15(1).

VII'.[17] In its Resolution 1970 the UNSC decided to refer the situation to the Court.[18] Following a preliminary examination of available information, Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court (ICC) reached the conclusion that an investigation was warranted and announced the opening of an investigation in Libya.[19] On 4 March 2011, the Presidency of the ICC decided to assign the situation in the Libyan Arab Jamahiriya to the Pre-trial Chamber I.[20]

Summing up, the international community assumed that crimes against humanity were likely to happen in Libya and committed by the Libyan Government itself, i.e. the Libyan Government was manifestly failing to protect its population. According to these premises, the case of Libya falls within the scope of the responsibility to protect doctrine. It is reasonable to say that the sanctions imposed - and the decision to refer the case to the ICC - were important steps, although they could not protect Libyan civilians. However, the ICC did not make its final decision and the community decided to activate the doctrine of responsibility to protect.

3. The activation of the doctrine

'The responsibility to protect is not only the question of whether the international community should intervene … for human rights purposes, [but] a broader responsibility to prevent, react and rebuild.'[21] In the case of Libya the international community activated the responsibility to react by responding to the situation with appropriate measures, which include both coercive measures (see sanctions and international prosecution) and also military intervention as a last resort. First, a range of non-military measures were adopted 'with unprecedented speed and decisiveness'[22] by the UN Human Rights Council, the

[17] Rome Statute, Art. 13(b).
[18] UN Security Council Resolution 1970 (2011), 26 February 2011, S/RES/1970 (2011).
[19] International Criminal Court: ICC Prosecutor to open an investigation in Libya. http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/statement%20020311 [26.08.2011]
[20] The Presidency of the ICC: Decision Assigning the Situation in the Libyan Arab Jamahiriya to the Pre-Trial Chamber I (ICC-01/11-1).
[21] World Federalist Movement – Institute for Global Policy, n.d.: Responsibility to Protect – Engaging Civil Society (Project), Summary of the Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty. http://responsibilitytoprotect.org/index.php/former-r2pcs-project/about-r2pcs?module=uploads&func=download&fileId=203 [31.10.2011.], p. 4.
[22] Davis, Ian: Libya: NATO must stick to R2P script (NATO Watch). http://www.natowatch.org/sites/default/files/Libya_-_NATO_must_stick_to_the_R2P_script.pdf [27.08.2011]

UN General Assembly, the UN Security Council, the Arab League, the African Union, the Gulf Cooperation Council, NATO and the EU.

The World Summit outcome affirmed that a wider range of collective action, even non-peaceful, can be invoked by the international community, if 'peaceful means [are] inadequate and national authorities are failing to protect their populations'.[23] Some previous cases showed that 'no strategy for fulfilling the responsibility to protect would be complete without the possibility of collective enforcement measures, including … coercive military action'.[24] When a state manifestly fails to meet its obligation, 'the UNSC bears particular responsibility for ensuring that the international community responds in a timely and decisive manner'.[25]

3.1 The UNSC Resolution 1973

On 17 March 2011, the UNSC adopted its Resolution 1973, in which it demanded 'the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians'.[26] It explicitly authorized military intervention by the UN member states, i.e. 'to take all necessary measures … to protect civilians and civilian populated areas under threat of attack'.[27] At the same time it expressly excluded 'a foreign occupation force of any form on any part of Libyan territory'.[28] This resolution manifests the first military implementation of the R2P doctrine containing a clear authorisation for military operations for civilian protection. Pursuant to the ICISS report the objective of a military intervention is 'the protection of a population, not the defeat of a state'.[29] In this case 'the military intervention [was] about protecting Libya's civilian population from attacks by its own government and was not concerned with occupying or dismembering [Libya]'.[30]

[23] World Summit Outcome op. cit. para. 139.
[24] UN Secretary General: Report – Implementing the responsibility to protect (A/63/677), para. 56.
[25] Ibid. para. 61.
[26] UN Security Council Resolution 1973 (2011), 17 March 2011, S/RES/1973 (2011), para. 1.
[27] Ibid. para. 4.
[28] Ibid.
[29] ICISS Report op. cit. para. 7.1.
[30] Kumar, Keerthi Sampath: Responsibility to Protect – The Case of Libya (Institute for Defence Studies and Analyses. http://www.idsa.in/idsacomments/ResponsibilitytoProtectTheCaseofLibya_kskumar_020511 [27.08.2011]

3.2 Military intervention in Libya

The ICISS formulated six criteria for military intervention in order to ensure that the operations remain defensible, workable and acceptable. The established principles are: just cause threshold, right intention, last resort, proportional measures, reasonable prospects and right authority.

Military intervention for human rights purposes is justified if there is such a serious and irreparable harm occurring to human beings, which implies large-scale loss of life or large- scale 'ethnic cleansing'. In the ICISS' view those crimes against humanity which involve large-scale killing are included by these conditions. In this regard the atrocities in Libya are covered by the just cause threshold principle.

'The primary purpose of a military intervention must be to halt or avert human suffering.'[31] The overthrow of a regime or occupation of one state's territory may be tools of military intervention, but cannot constitute right intention. In order to decide whether the intervention in Libya was undertaken with the right intention, what needs to be analysed is whether it took place on a collective or multilateral basis, whether, and to what extent, it was supported by the Libyan people and by other countries in the region. Considering that UNSC's attention was invoked by the statements of regional and sub-regional bodies, such as the African Union and the Arab League, the standpoint of the neighbour states seems to be clear. The intervention is based on a multilateral basis, as UNSC Resolution 1973 was adopted by ten affirmative votes and five abstentions. It is also likely that the Libyan people supported the operation at this stage. The objectives of the mission were declared in the Resolution - i.e. protecting civilians and enforcing specific sanctions without an occupation force, thus ensuring that the international community's intention was legitimate.

Pursuant to the last resort principle, other options must be used (or at least seriously considered) before military intervention is justified. In this case the UNSC adopted a prior Resolution (1970) containing repeated demands that the Libyan authorities meet their obligations and non-military sanctions. After this had failed, the UNSC activated the military intervention section of the responsibility to react doctrine.

As the case is still ongoing, it is difficult to ascertain whether the response of the international community is proportional and whether there are reasonable prospects for success. On the part of the US ally, Robert M. Gates, the US Secretary of Defence, asserted that 'the goal of Operation Odyssey Dawn, launched on 19 March, was limited in scope and scale'.[32] The duration of the air strikes campaign, the enforcement of the no-fly zone and the arms embargo was

[31] ICISS Report op. cit. para. 4.33.

[32] Gates, Robert M.: Statement on Libya. http://www.senate.gov/~armed_services/Transcripts/2011/03%20March/11-21%20-%203-31-11.pdf [28.08.2011]

planned by the NATO originally for 90 days,[33] although the head of the French armed forces had assumed that the mission would last weeks but, hopefully, not months.[34] After continuous operations, on 1 June 2011, NATO and its partners decided to extend the mission for another 90 days.[35] The scale and intensity of the operations during this period, as well as the level of success of the actual protection achieved, could be measured at the end of the intervention.

The principle of right authority is a crucial one. It determines who can authorise a military intervention. In the ICISS' opinion 'there is no better or more appropriate body than the Security Council to deal with military intervention issues for human rights protection'.[36] Practically, an UNSC authorization is needed in all cases, and, moreover, 'prior to any military intervention action being carried out'.[37] In the case of Libya, the UNSC Resolution 1973 'serves as a legal basis for military action … ensuring that the NATO-led operations – unlike in the Kosovo case – are in compliance with the R2P requirement of acting after specific UNSC authorisation'.[38]

Apparently, the UNSC Resolution 1973 serves as an appropriate basis to intervene in accordance with these principles. The question, however, is whether the engagement of the allies remains within this framework.

3.3 Prospects for rebuilding

The responsibility to protect does not end with military intervention, even if it has achieved its goals. The responsibility to rebuild is an integral part of the doctrine. According to the ICISS, this means 'full assistance with recovery, reconstruction and reconciliation'[39] in order to address the causes of the harm caused by the intervention. Rebuilding involves many humanitarian, legal and economic factors. It must grant security for the population, containing 'disarmament, demobilisation and reintegration of local security forces'.[40] It covers the restoration of the judicial system and facilitating the return of

[33] Abbas, Mohammed: West strikes Libya forces, NATO sees 90-day campaign. http://www.reuters.com/article/2011/03/25/us-libya-idUSTRE7270JP20110325 [28.08. 2011]

[34] Admiral Guillaud, Edouard (Interview): 'Exclusif: tous les détails sur les frappes françaises en Libye (chef d'état-major des armées)' (France info radio). http://www.france-info.com/chroniques-les-invites-de-france-info-2011-03-25-exclusif-tous-les-details-sur-les-frappes-francaises-en-libye-chef-d-524268-14-18.html [28.08.2011]

[35] NATO Secretary General: Statement on the extension of the mission in Libya. http://www.nato.int/cps/en/natolive/news_74977.htm?selectedLocale=en [28.08.2011]

[36] ICISS Report op. cit. para. 6.14.

[37] Ibid. para. 6.15.

[38] Bert, Benedetta – Lindenstrauss, Gallia op. cit.

[39] ICISS Report op. cit. para. 5.5.

[40] Ibid. para. 5.9.

refugees.[41] Sustainable development must be encouraged by ending coercive economic measures and by transferring responsibility to local leadership.[42]

The military mission is concluded during this period, and the international community has the responsibility to activate this third phase of the doctrine. The Arab League has already called on the UN and the countries concerned to 'unfreeze the assets and property' of Libya and the UNSC to rescind 'the decision to block the funds, assets and property of the Libyan state'.[43] The Arab ministers also asked the UN to admit the National Transitional Council, which is considered to be the sole legitimate government of Libya recognised by the US, European and Arab governments, as delegate member of Libya in the UN organisations.[44]

The international community has now the role to contribute to the ongoing international efforts to find a lasting solution to the situation in Libya. The Special Adviser to the UN Secretary General (UNSG) outlined three principles 'which the UN will apply in the post-conflict assistance to Libya'.[45] These are 'national ownership', which is attributed to the National Transitional Council; 'the speed of response and rapid delivery', i.e. responding 'in a swift manner to requests for assistance by Libyan authorities' and 'the importance of the effective coordination of international assistance in response to Libyan requests'.[46]

It will take time for Libya to achieve a smooth transition and sustainable peace throughout the country, and the international community has its responsibility to assist to this process.

4. Retrospect: the doctrine's shortcomings

The application of the responsibility to protect in relation to the Libyan civil war can be evaluated as a significant historical milestone. This was the first implementation of the doctrine since its acceptance. Taking into consideration the fact that Gaddafi, the dictator, who had apparently escaped, was captured (albeit then killed) and that the rebels took the capital – in other words, that the regime collapsed - the doctrine’s goal was achieved** and the serious human rights violations in the country were ended. Nevertheless, there were (and are)

[41] Ibid. paras. 5.13-5.18.
[42] Ibid. paras. 5.19-5.20.
[43] Arab League: Unfreeze Libyan assets. http://www.skynews.com.au/world/article.aspx?id=655196&vId=2664203&cId=World [28.08.2011]
[44] Ibid.
[45] UN Deputy Secretary-General: Deputy Secretary-General Spells out Principles for Post-conflict Assistance (DSG/SM/568, AFR/2231), 26 August 2011.
[46] Ibid.

still difficulties, and, even though these did not make it impossible for the doctrine to be implemented, its shortcomings were evident.

4.1 The crime

Although there was consensus within the international community that the situation in Libya had warranted military intervention, the legal process of determining precisely what had happened will last. On 27 June the Pre-Trial Chamber I of the ICC had issued three warrants for the arrest of 'respectively, Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for crimes against humanity (murder and persecution)',[47] since it found that there were 'reasonable grounds to believe that the three suspects committed the alleged crimes'.[48] In the absence of any formal legal decisions, the international community had to rely on different external opinions. In this case these warnings proved to be well-founded, but '[o]btaining fair and accurate information is difficult'.[49]

4.2 Timing

Timing is another complex question. The responsibility to protect demands the international community's timely and decisive action. The UNSC must decide rapidly whether there is a case for prevention or reaction, and, within its own reaction, it must make a solid, but swift decision on authorising military intervention. All of these situations may produce, on the one hand, premature action or, on the other hand, delay. According to the Special Adviser to the UNSG 'the concept of R2P rests on prevention'.[50] He explains that, in the case of Libya, the international community sought 'to intervene soon enough to prevent mass violence' without 'clinically' proving what happened.[51]

[47] International Criminal Court (Press release): Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi.
http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/pre_trial%20chamber%20i%20issues%20three%20warrants%20of%20arrest%20for%20muammar%20gaddafi_%20saif%20al-islam%20gaddafi%20and%20a [28.08.2011]
[48] Ibid.
[49] ICISS Report op. cit. para. 4.28.
[50] Luck, Edward C. (Interview with Andreas Ross, 28 March 2011): Council Action on Libya 'historic' Implementation to RtoP.
http://www.ipinst.org/news/general-announcement/224-luck-council-action-on-libya-historic-implementation-of-rtop-.html [28.08.2011]
[51] Ibid.

4.3 Voting

By the decision-making process within the UNSC, the five permanent members bear particular responsibility because of their power of veto granted under the UN Charter.[52] Therefore the ICISS requested the permanent members (by passing a resolution 'authorising military intervention for human protection purposes') not to use their veto if 'their vital state interests are not involved' and if, otherwise, the majority support the decision.[53] Similarly, the UN SG urged the permanent members 'to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect'.[54] In the Libyan case, by voting on Resolution 1973, two of the permanent members (China and Russia) abstained. Some argue that this raises doubts about the legitimacy of the decision, as, with the other three states who abstained (Brazil, Germany and India), they 'represent more than 40% of the world's population'.[55]

4.4 Right intention

As earlier discussed, the ‘right intention' of a military intervention is often a critical element. It is important 'not to undermine R2P by confusing civilian protection with other motives such as regime change or resource control'.[56] The mission in Libya reached its human rights protecting goal but, simultaneously, the regime collapsed, which was probably not the primary intention of the allies, but necessary to disable the regime’s capacity to harm its own people.

5. Conclusions

The crisis in Libya was a test case for the international community's commitment to the 'responsibility to protect' principles agreed to in 2005. The international community passed the test. Its timely and decisive action demonstrates that the UN member states are able to act promptly and in accordance with the R2P standards in order to protect civilians.

By passing Resolution 1973, it was the first time that the UNSC had activated the doctrine to maintain international peace and security. The

[52] UN Charter, Art. 27(3).
[53] ICISS Report op. cit. para. 6.21.
[54] UN SG Report op. cit. para. 61.
[55] Kumar, Keerthi Sampath op. cit.
[56] International Coalition for the Responsibility to Protect: Impact of Action in Libya on the Responsibility to Protect.http://www.responsibilitytoprotect.org/RtoP%20in%20Light%20of%20Libya%20FINAL.pdf [22.08.2011]

international response to the Libyan situation showed how to implement the theory of R2P in practice, whilst the military intervention followed R2P principles and reached its goal.

This is an important precedent – and not merely in respect of implementing the R2P doctrine. It sends a clear warning to other regime leaders that committing mass atrocities is 'unacceptable behaviour for a UN member state in the 21st century'[57] and that their crimes are likely to be punished.

[57] UN SG Report op. cit. para. 57.

DNA Analysis in Hungary

HERKE, CSONGOR – TÓTH, D. CSENGE

ABSTRACT *As new developments emerge in the field of DNA and continue to advance methods and means in the work of police forces, then courts, prisons and other organisations and the criminal justice system as a whole must face fundamental changes in forensic DNA testing. The technological advances in DNA analysis will provide the means to prevent and combat crime at a higher level.*

The authors would like to share some thoughts about the basic rules of DNA records, DNA analysis, the weight and structure of expert opinion on DNA and, last but not least, they would like to introduce a short case study where DNA testing was admitted as evidence. Technological findings regarding DNA and their strict regulation should be seen as ways to enable the authorities and to exclude the possibility of falsification and contamination of such evidence – in this way not allowing the strength, weight and admissibility of DNA evidence in legal procedures to be undermined.

1. Introduction

In terms of the changes which have taken place over recent years, one of the most telling scientific findings was that of DNA, which plays a huge role in forensic science as a material suitable for personal identification. The main consideration is that DNA can be found in every living cell through inheritance; the ratio is permanent within one single cell and it is characteristic of a given species - hence of humans. Within species, it is different and characteristic of every single individual, carrying its genetic information code (also known as the 'genetic fingerprint' in the words of the English geneticist, Alec Jeffreys, in 1985. DNA identification is commonly accepted in Hungary also, and the first DNA-polymorphism examination was conducted in 1993.

DNA analysis, as an element of crime detection techniques, serves the effective and professional use of scientific and technological means and methods in this field and the purpose of this study is to give an overview of the regulation of DNA analysis in Hungary. With this in mind, we would like to highlight (slightly arbitrarily) four topics:

1) the legal regulation of the DNA database
2) the determination of DNA profiles
3) expert opinion on DNA – as evidence
4) DNA analysis in practice – a case study

2. Legal regulation concerning the DNA database

There are now many DNA databases worldwide, and the largest ones are usually controlled by a government. The USA is reputed to have the largest in the Combined DNA Index System (CODIS) which is also used by the Hungarian authorities and which is compatible with the international data exchange system of the Prüm Convention. It contained over 9 million records in 2011.

In Hungary, the basic legal provisions regarding DNA are provided by Act XLVII of 2009 on Criminal Records.[1] This refers to a record of judgments against Hungarian citizens by courts of the Member States of the EU, records of biometric data from Hungarian police forces and other criminal biometric data (the Act). According to section 3 of the Act, the Hungarian system of records consists of personal identification data, photographs and criminal records.

The records of biometric data held by the police and criminal biometric data consist of dactyloscopy (= fingerprint) records and records of DNA profiles.[2]

According to section 36 of the Act, the Professional Records Department (DNA database of the Laboratory of the Department of Homogenetics of the Hungarian Institute for Forensic Science) must:

a) register immediately,
b) manage and forward to the legally authorised persons and organisations,
c) analyse and compare with the data kept in the records of biometric data of police and criminal biometric data

the samples sent for registration and the DNA profiles.

The Professional Records Department issues an internal identifier code, simultaneously with the registration of finger and palm prints and DNA profiles. These are to be sent immediately to the Criminal Records Department indicating in which record the internal identifier code can be found within the records of biometric data of police and criminal biometric data.

The aims of recording DNA profiles[3] is to identify the person

a) who cannot be connected to the perpetration of the crime due to the sample found at the crime scene or found on the object bearing a trace of perpetration of a crime,
b) who committed the crime, or
c) who is the unknown deceased in an administrative procedure due to extraordinary

[1] Ferencz, József: A bűnügyi nyilvántartás történelmi fejlődése. *[Historical development of criminal records]* In: Belügyi Szemle, Külföldi Figyelő Vol. 13.
[2] Czicze, József: Problémák a bűnügyi nyilvántartásban. *[Problems of criminal records]* In: Belügyi Szemle 1987/1.
[3] Viczkó, Eszter: DNS-adatbázisok a modern bűnüldözés szolgálatában. *[DNA databases at the service of modern law enforcement]* In: Studia Iuvenum Vol. 3, 2006. pp. 340-354.

circumstances surrounding the death.

The data of persons who were brought to justice

a) because of an intentional crime punishable by a prison term of five or more years,
b) because of a crime committed in a business-like manner or in conspiracy and punishable by a prison term of up to three years,
c) because of human trafficking (section 175/B of the Criminal Code), seduction (section 201 of the Criminal Code), misuse of banned pornographic recordings (section 204 of the Criminal Code), living on the earnings of prostitution (section 206 of the Criminal Code), pandering (section 207 of the criminal Code) and smuggling people (section 218 of the Criminal Code) and punishable by a prison term of up to three years,
d) because of drug abuse or the misuse of any other substance which is regarded as a drug punishable by more than two years imprisonment,
e) because of crimes committed with weapons, or
f) because of failing to file a denunciation concerning crimes against the state (Chapter X of the Criminal Code), terrorism (section 261 of the Criminal Code), violation of an international economic prohibition (section 261/A of the Criminal Code), the abuse of nuclear energy (section 264/B of the Criminal Code), money laundering (section 303 of the Criminal Code) and crimes pertaining to the support of an act of terrorism (section 261 of the Criminal Code)

must be kept in the records of DNA profiles of persons under criminal proceedings.

Records of DNA profiles consist of three sections:

a) DNA profiles found at the scene of a crime or on an object bearing some trace of the perpetration of a crime,
b) DNA profiles of persons undergoing criminal proceedings,
c) DNA profiles of persons finally convicted of a crime.[4]

If a legally authorised body initiates the registration of a DNA profile, the professional records department immediately compares this sample to the other DNA profiles already registered in their records. If this comparison establishes that the DNA profiles are the same, the department in which the same DNA profile was found shall inform the initiator accordingly.[5]

[4] Fenyvesi, Csaba – Herke, Csongor: The role of criminal records in criminalistics involving a DNA database. In: Tremmel, Flórián – Mészáros, Bence – Fenyvesi, Csaba (ed.): Orvosok és jogászok a büntető igazságszolgáltatásban. Dezső László emlékkönyv. *[Doctors and lawyers in criminal jurisdiction. Memorial Volume of László Dezső.]* Pécs, 2005. pp. 45-54.

[5] Kármán, Gabriella: A DNS kriminalisztikai célú alkalmazásának szabályai Németországban és Magyarországon. *[The rules of the use of DNA for forensic purposes in Germany and Hungary]* Krim. tanulm. Vol 43, 2006. pp. 265-289.

The data of persons whose DNA profile was determined from the sample found at the scene of a crime or on an object bearing some trace of the perpetration of a crime shall be kept in the records of DNA profiles found at the scene of a crime or on an object bearing some trace of perpetration of a crime, if these data cannot be connected to any other personal identifier data. The investigating authority or prosecutors' office conducting criminal procedure shall send the information concerning the criminal procedure and a sample suitable for the determination of DNA profiles in the case of any crime underlying registration to organisations designated by it or by the Government to examine this particular question.

The sample taken from the mouth (saliva) in order to identify a DNA profile shall be sent immediately to the professional records department by the prison where the sentence is being served.

According to Section 82 of the Act, the professional records department shall examine other samples sent by other member states of the EU, if authorised persons or organs have initiated the request, and it shall also compare these samples to the data contained in the records of biometric data of police and criminal biometric data. In case the competent professional records department establishes that the sample and the data kept in the records of biometric data of police and criminal biometric data are a match, then this fact and the data managed by the records of biometric data of police and criminal biometric data and the personal information related to these data must be sent to the requesting authority without delay.

The professional records department shall forward the copy of finger and palm prints as well as the DNA profile kept in the DNA profile records (and further data) to the investigating authority or the prosecutor - upon request - in order to investigate crimes and institute criminal proceedings.[6]

According to section 84 of the Act, the following may request data from the criminal records system and records of biometric data of police and criminal biometric data in order to forward them to Member States of the European Economic Area, third countries and international organisations:

a) on the basis of the Act on international criminal legal aid or criminal cooperation among Member States of the EU, the Hungarian authority authorised to fulfil the obligations of international criminal legal aid in order to accomplish the aims set forth by international treaty promulgated by law or binding provisions of the EU concerning scope of data determined by law, international treaty or binding provision of the EU;
b) on the basis of the Act on International Criminal Cooperation Centre and on international cooperation of investigating authorities, the Hungarian investigating authority authorised to exchange information directly, by

[6] Pádár, Zsolt: A DNS-vizsgálatok szerepe és szakértői problémái emberölési ügyekben. *[The role and forensic problems of DNA analysis in cases of homicides]* In: Belügyi Szemle 2005/1. pp. 13-29.

reason of international treaty created for the international cooperation of investigating bodies and promulgated by law, furthermore in order to exchange information according to binding provision of the EU concerning the scope of data determined by the Act on international cooperation of investigating authorities and international treaty,[7]

c) the SIS (Schengen Information System) may, according to the Act on cooperation and exchange of information within the scope of the Schengen Agreement Application Convention, require data from the records on convicts, persons under criminal procedure, persons under coercive measures and from records of biometric data of police and criminal biometric data in order to collect and forward additional information.[8]

Between certain countries (Belgium, Germany, Spain, France, Luxemburg, the Netherlands, Austria, USA) for the sake of requiring data according to the rules of an international treaty, the professional records department shall guarantee the opportunity of electronic comparison of finger and palm prints - in order to conduct criminal proceedings or prevent crimes – and DNA profiles - in order to conduct criminal proceedings - to the data kept in records of biometric data of police and criminal biometric data for the benefit of the designated national contact organisation of the cooperating Member State. If, as a result of comparison, it can be established that the compared finger or palm prints or DNA profiles are a match, the professional records department shall inform the national contact organisation of the cooperating Member State about this and forward automatically the identifier data related to this finger or palm print or DNA profile (as well as it shall indicate the fact, if the samples do not match).

Upon the order of the investigating authority, the organisation preventing terrorism - as determined by the Act on the Police- , the prosecutors' office or the court, the professional records department shall compare the finger and palm prints and DNA profiles kept in the records of biometric data of police and criminal biometric data through automatic data access to the finger and palm prints and DNA profiles registered in the records of the cooperating member state concerning an individual case.[9]

[7] Metenko, Jozef a kolektiv: Kriminalistické metódija moznosti kontroly sofistikovanej kriminality. Bratislava, Akadémia Policajného Zboru v Bratislave. Bratislava, 2004

[8] Fejős, István: A DNS vizsgálat Szerbia büntetőeljárásában. *[DNA analysis in the criminal procedure of Serbia]* In: Tremmel, Flórián – Mészáros, Bence – Fenyvesi, Csaba (ed.): op. cit. pp. 39-43.

[9] Nyíri, Sándor: A „DNS-ujjlenyomat"-adatvédelem. *[Dataprotection - DNA fingerprint]* In: Belügyi Szemle 1998/3.

3. Determination of DNA profiles

On the basis of the authorisation set out in Section 96 of the Act, Decree No. 19 of 2010 (30 April) of the Minister of Justice and Police (hereinafter Decree) on professional and methodological requirements of determination of DNA profiles, DNA profile determination may be carried out by the organisation authorised by Decree No. 282 of 2007 (26 October) of the Government on organisations entitled to give expert opinion exclusively or just in certain professional issues (hereinafter Institute), if it has at least two expert entitled to act on behalf of the Institute, registered as forensic experts in forensic genetics and who are are members of the Chamber of Forensic Experts (if their membership is not suspended).[10]

The corpus delicti to be examined and progeny extracted therefrom shall be protected from unauthorised access, physical destruction and other negative external influences.

The Institute shall carry out:

- the management and storage of a corpus delicti,
- the inspection of corpus delicti and securing of samples from residual materials,
- the DNA extraction and quantity determination,
- the amplification of polymorph DNA loci by chain reaction (hereinafter PCR amplification) and management and storage of amplified materials, furthermore
- the evaluation, report and administration
- on separate premises.

The Institute marks each material to be examined, corpus delicti and progeny individually, wrap and store them separately in order to guarantee the integrity of the authenticity-chain. The Institute has a data management system which ensures the specific protection as determined by the Act on the Protection of Personal Data and Publicity of Public Data of the data available for the laboratory. Further, the Institute takes part and performs also in the external experience control test regarding the determination of incident and personal DNA profiles, as well as the demonstration of professional skills and preparedness - organiaed by an international institute appointed by the European Network of Forensic Institutes.

The inspection of corpus delicti is carried out by at least two employees of the Institute and one of them must be a forensic expert registered in the field of forensic genetics and must be an active member of the Chamber of Forensic Experts. The Institute prepares a written work schedule for the inspection of corpus delicti, the security of samples and examinations. If there is any

[10] Lontainé, Santora Zsófia – Hollán Zsuzsa: A DNS-vizsgálatok helye a szakértői munkában. *[The role of DNA analysis in the work of forensic experts]* In: Belügyi Szemle 2002/11-12. pp. 55-62.

divergence from this schedule, the fact and the reason must be documented. In the documentation it must be stated whether the divergence has any effect on the determination of a DNA profile. The Institute prepares a digital photo or video recording about the inspection of corpus delicti and sampling. The Institution attaches an independent minute concerning the inspection of the corpus delicti to the documentation of the examination.[11]

Each corpus delicti may be inspected separately, and solely, one by one. The samples from the victim and the suspect, and, further, the samples and objects collected at the crime scene shall be separated according to place and time. The low and high copy number DNA samples shall be processed separately according to place or time. The Institute storages each corpus delicti one by one by marking them with an anonymous identifier, so excluding the possibility of changing or contaminating samples.

For the sake of determining a DNA profile, only one half of the sample may be processed, unless one half of the sample cannot give an adequate result. If more than half of the sample was used for the analysis then it shall be noted in the documentation of the examination.

The type and historic origin of the sample underlying incidental DNA profile determination need to be determined. The quantity determination of DNA components of human origin extracted from the corpus delicti must be completed in order to be able to determine the nature of the sample and to carry out further analysis successfully.

A biological sample of a known DNA profile (internal control) and sample not containing DNA (reactive control) shall be attached to every group of samples to be examined, which needs to be managed with the corpus delicti in the course of the whole laboratory process. Regarding analysis which leads to measurement results, other types of control (positive control, negative control, and calibration standard) can also be added.[12]

When DNA profiles are determined the following genetic markers set out by Annex 1 of the Decree must be established:

1) D3S1358,
2) FGA,
3) D8S1179,
4) HUMTH01,
5) VWA,
6) D18S51,
7) D21S11,
8) D2S1338,

[11] Lóránth, Ida: DNS-t is vizsgálnak a bűnügyi szakértők. *[Forensic experts also examine DNA]* In: De Jure 2004/4.

[12] Füszter, Erzsébet – Nyilasi, Tibor: Útmutató a DNS-vizsgálatok végzésére alkalmas anyagmaradványok felkutatásához és rögzítéséhez. *[Guide to identify and collect residues suitable for DNA analysis]* In: Főiskolai Figyelő Plusz. 1994/4. pp. 509-515.

9) D19S433,
10) D16S539,
11) AMEL.

If during the analysis of a certain sample it is established that further genetic markers need to be examined in order to reach adequate probative value then the Annex 2 of the Decree provides further genetic markers to be analysed:

1) D5S818,
2) D13S317,
3) D7S820,
4) TPOX,
5) CSF1PO,
6) D1S1656,
7) D2S441,
8) D10S1248,
9) D12S391,
10) D22S1045.

If the special question written in the assignment of the expert cannot be answered with the help of such genetic markers then further analysis, even other genetic markers, may also be examined.

If the corpus delicti needs to be examined for DNA and the first analysis did not produce a DNA profile and the quantity of the sample enables it, then the DNA analysis must be repeated. During the repeated analysis alternative analysing processes must be favoured. If during the evaluation very rare, new allele or alleles of abnormal number are detected then it must be corroborated with repeated analysis.[13]

The Decree says that identical personal origin of the biological samples, which contain sufficient amounts of DNA suitable for analysis, can be excluded, if there is a difference at least at two loci or at least at two mitochondrial DNA position. If the difference is only at one locus or one position it must be evaluated whether there is mutation, loss of alleles, heteroplasmy, degradation or any other genetic or technological reason therefore.

If the identical personal origin is not excluded, as a result of comparison of incidental and personal DNA profile, then the probative value shall be counted according to Bayesian analysis in order to prove the origin of the sample. The probability ratio (PR) must be determined according to Annex 3 of the Decree:

[13] Hautzinger, Zoltán: Néhány gondolat az emberi DNS kriminalisztikai vizsgálatáról. *[Few thoughts on human DNA analysis]* In: Tremmel, Flórián – Mészáros, Bence – Fenyvesi, Csaba (ed.): op. cit. pp. 67-70.

$$PR = \frac{\text{Probability (observed DNA profiles provided that origin exists)}}{\text{Probability (observed DNA profiles provided that origin does not exist)}}$$

In the course of the analysis of haploid genomes, the results shall be evaluated separately and genetic statistics shall be calculated separately. In case of DNA originated from more than one person, mixed and suitable for analysis the possibility of loss or incorporation of alleles should be taken into account when analysing low copy number biological samples.

These scientific questions cannot be answered by the investigating authority or the court since they require special knowledge and the judge cannot rely on his own expertise regarding such matters, therefore forensic experts need to be assigned to decide whether DNA identification can be admitted as evidence in court. Notwithstanding this, during the evaluation of DNA evidence a cautious judge shall not decide solely on genetic fingerprint evidence, if other factors raise doubt.

4. The expert opinion on DNA – as evidence

In the course of a criminal procedure numerous, difficult and complicated questions of fact may arise and so the collection of evidence and the establishment of an adequate and proper finding of fact requires special scientific knowledge which is presented by the expert.

If a person's DNA sample was found on the murder weapon or at the crime scene, it still does not mean that the investigating authority has incontrovertible evidence against this person. Should residues, not to mention DNA residue, be successfully taken from a crime scene, the next step is the forensic expert's examination.

The Hungarian Criminal Procedure Code (CPC) determines when it is statutory to employ an expert, such as:

- if the fact to be proven or the issue to be decided on is the mental disability of a person or the addiction of a person to narcotic substances,
- if the fact to be proven or the issue to be decided on is the necessity of involuntary medical treatment,
- if the identification is performed by way of biological tests,
- upon the exhumation of a deceased person. (section 99 of the CPC)

the court may assign a forensic expert listed in the register of experts, a business association entitled to give expert opinion, an experts' institute, or body, institute or organisation of the government as defined by separate laws, and, if this is not possible, a person or institution possessing adequate knowledge (section 102 of the CPC).

The essential obligations of the expert are to cooperate and to give an expert opinion which must be based on a professional examination. Today this mainly means by the use of state-of-the-art STR DNA technology. The examination should be conducted by using the tools, procedures and methods available according to the present state of science and modern professional knowledge. In order to be able to examine the subject in question, the expert is entitled to be acquainted with all data required in order to meet his obligations. He may inspect the documents of the case, be present at the procedural actions, and may request information from the defendant, the victim, the witnesses and the other experts involved in the proceedings, or even request further data, documents and information from the assignor (meaning to gain access to the criminal records as well, including the records of biometric data of police and criminal biometric data). Additionally, in order to enable the expert to perform an accurate DNA analysis the protection of the crime is vital to the protection of evidence and, hence, to the successful solution of a crime. Because extremely small samples of DNA can be used as evidence, special attention must be paid to contamination during identification, collection, preservation, and testing. The fewer people handle DNA evidence (and practically any kind of evidence), the better.

The expert submits his opinion under his own name in oral or written form, within the deadline set by the proceeding authority. The expert opinion shall include:

- information regarding the subject, the procedures and tools of the examination as well as the changes in the subject of the examination (diagnosis),
- a brief description of the examination method,
- a summary of professional assessments (professional assessment of facts),
- conclusions drawn from the professional assessment of facts and the answers given to the questions raised (opinion).

However, a paradoxical situation arises when the opinion submitted by the expert is evaluated by the court, since the court assigns an expert since the judge considers himself not sufficiently competent in the given scientific issue; but then, the expert opinion is still evaluated by the same judge.

In case the expert opinion is incomplete or contradicts itself, or it otherwise seems necessary, then the following five steps must be taken:

- primarily, the expert can be called upon to provide further information, and, if this information is still not enough, the expert has to complete the opinion,
- secondly, the expert giving the opinion shall be heard and questioned,
- thirdly, if the issue is still problematic, another expert shall assigned to examine the same fact beside the first one (this is statutory if the prosecutor or the investigating authority has assigned an expert in the course of the investigation and the accused or the defence counsel

submits a motion to this effect within 15 days following the delivery of the indictment),

- if the opinions of the experts differ on a professional issue which has a substantial bearing on a decision in the case, than the difference shall be clarified by concurrent hearing of the experts,
- at last, if none of the above mentioned possibilities is successful then the proceeding authority shall order to obtain a new expert opinion.

5. DNA analysis in practice – a case study

Technologies of DNA analysis have developed significantly in Hungary in the past years. In 2004 and 2008 in Baranya County there were two cases where DNA analysis was carried out, namely crimes which were committed with the use of hand grenades.[14]

In the expert opinion concerning Criminal Case No. 90/2004 the expert laid down that the DNA was extracted from the object in question (the safety pin of the grenade) by using the Chelex method as a procedure for obtaining a DNA profile. The DNA regions with short repeat units (called Short Tandem Repeats (STR)) were amplified by polymerase chain reaction (PCR). The PCR amplification products of different sizes were divided by automated X-ray fluorescence procedure and capillary gel electrophoresis.

In the case of 2004 the analytical result was determined on the following STR loci:

1) SE33,
2) D3S1358,
3) VWA,
4) FGA,
5) Amelogenin,
6) D8S1179,
7) D21S11,
8) D18S51,
9) D5S818,
10) D13S317,
11) D7S820.

The expert found various (in some places 6-7) DNA-characteristics.

Following this, DNA had been extracted and isolated with the same procedure from the blood samples of the victims, supposed perpetrators and other persons who might be connected to the criminal offence. As an interesting

[14] Pádár, Zsolt – Füredi, Sándor – Angyal, Miklós: Kriminalisztikai (DNS-) vizsgálati lehetőségek újszülöttmegölésekben. *[The possibilities of forensic (DNA) analysis in cases of infant homicides]* In: Belügyi Szemle 2001/1. pp. 69-72.

remark, it must be mentioned that the DNA found on the safety lever of the hand grenade was identical to the victim's DNA.

In this particular expert opinion the expert stated that it could not be proved that the sample found on the safety lever of the grenade originated from the examined persons; however, taking into consideration the quality of the micro-traces found on the safety lever (low copy number (LCN) sample) the expert could not exclude with complete certainty that the persons in question did not touch the safety lever.

In Case No. 164/2008, the expert completed a cleaning in order to extract DNA from the samples taken from the safety pin and the examined persons by using proteolysis, organic extraction and ultra-filtration. The concentration of the potentially present human nucleus DNA in the cleaned samples were determined by ABI Prism 7500 SDS device executing real-time PCR amplification (Quantilifer Duo DNA Quantification Kit, Applied Biosystems). In the samples 8 to 9 or in some case even 15 polymorph DNA regions (loci), and Amlogenin loci (determining gender identification, a.k.a. sex-typing) was examined with the help of a Minifiler Kis (Applied Biosystems). The DNA-characteristics (alleles) of the amplified by PCR were determined by an ABI Prism 3130 device.

According to the cleaned samples the following loci were examined:

1) D3S1358,
2) VWA,
3) FGA,
4) Amelogenin,
5) D8S1179,
6) D21S11,
7) D18S51,
8) D13S317,
9) D7S820,
10) D16S539,
11) CSF1PO,
12) D2S1338,
13) TH01,
14) TPOX,
15) D19S433.

As is evident, in the two DNA analyses of the two different cases, which took place four years apart, mostly the same loci were examined (D3S1358, VWA, FGA, Amelogenin, D8S1179, D21S11, D18S51, D13S317, D7S820). At the same time, in 2004 two more loci were examined which had not been in 2008 (SE33, D5S818). Further, there are six more loci which were found only in the latter examination (D16S539, CSF1PO, D2S1338, TH01, TPOX, D19S433).

If we look at the loci listed in the Annex to the Decree, the loci examined in the two expert opinions can be summarised in the following chart:

Loci to be examined according to the Decree	***2004 Case***	***2008 Case***
1. D3S1358	X	X
2. FGA	X	X
3. D8S1179	X	X
4. HUMTH01		X
5. VWA	X	X
6. D18S51	X	X
7. D21S11	X	X
8. D2S1338		X
9. D19S433		X
10. D16S539		X
11. AMEL	X	X
Loci which may be examined according to the Decree		
1. D5S818	X	
2. D13S317	X	X
3. D7S820	X	X
4. TPOX		X
5. CSF1PO		X
6. D1S1656		
7. D2S441		
8. D10S1248		
9. D12S391		
10. D22S1045		
Loci not mentioned by the Decree		
1. SE33	X	

6. Conclusion

Although 99.9% of human DNA sequences are the same in every individual, a sufficient part is different to make it possible to distinguish one individual from another (except for monozygotic twins). It must be regarded as one of the most important forms of evidence available due to its stability, since DNA can remain for hundreds of years and analysis can be conducted even on old bone residues. Furthermore, DNA can be found in almost any kind of biological

residue, and so it can be suitable for identification (or exclusion). In addition, DNA does more than simply identify the source of a sample in criminal cases; it can be used in searches for unknown people or may even give information about gender, race and eye colour of a person, or about the exact place of someone at the scene of a crime. It may disprove an alibi.[15]

Despite the great advantages which DNA evidence can offer, it is still far more costly than serological examinations, and the necessary special, thorough analysis requires a good deal of time and complex expertise. In addition, there are no commonly accepted standards in forensic DNA examinations. Moreover, it has been shown that it is possible to manufacture DNA in a laboratory, so falsifying evidence, and, in practice, enabling people to create crime scenes and throw suspicion on innocent people. In addition, the contamination of DNA evidence is quite easy since DNA testing requires only a very small sample of DNA.

In the near future, due to technical innovation, it is probable that new genetic systems will be identified and that they will require more, and increasingly developed, technological support. The next generation of DNA techniques may change fundamentally the nature of forensic DNA examination and may play a still greater role in taking evidence (especially in identification). The use of state-of-the-art technology may play a more significant role not only in criminal procedures, but also in other judicial and official proceedings.

[15] Szarka, Ernő – Palágyi, Tivadar: The Hungarian patent practice in examining applications concerning recombinant DNA procedure. In: Proceedings of the Hung. Group IAPIP. Vol. 19. 1992. pp. 51-56.

The theoretical approaches to the right of action – the implementation of right of action theories in legal practice

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ABSTRACT *In general, interaction between legal theory and practice raises numerous questions. From the aspect of legal practice, the question arises as to whether legal theories exert any influence at all on legal practice and, if they do, how this is manifested in judgments, or otherwise, in the resolution of cases. Can court judgments be explained by legal theoretical argumentation? From the point of view of legal theory, what role do solutions to specific cases play in practice in legal theoretical explications? Within the problematics of interaction between legal theory and practice, these questions seem to be too general and impossible to answer within the scope of this short study, and so it would seem reasonable to examine them in the context of the practical implementation of a specific legal institution of civil substantive and procedural law. My topic concerns right of action theories relating to a plaintiff's initiation of action. Right of action theories deal with rights and obligations relating to judicial protection, and the issue raised by legal dogmatics is: on the basis of what right can a plaintiff apply to the court? Is it, in fact, a right at all – that is, one which gives rise to specific obligations for the court - or is it a mere possibility with incidental consequences? The questions which various 'right of action' theories attempt to address concern*[1]*: (1)* the theory based on a private law approach, *(2)* theories based on a public law approach (*the abstract right theory, the actual right theory, the dual right theory)* and *(3)* modern theories (*the socialist theory, the claim to justice, the right of action and the right of access to the courts).*

1. The meaning of 'right of action' and related basic notions

The exercise of judicial power is necessitated by essential state interest, since the state cannot allow its citizens themselves to determine the limits of

[1]Kengyel, Miklós: Magyar Polgári Eljárásjog (Hungarian Civil Procedure). 9th revised edition, Budapest, Osiris 2008. p. 221.

their actions *vis-à-vis* others; nor can the state allow any institution to take such actions which are not a judicial institution authorised by the state.[2]

A party requests legal protection *within the framework of* a *civil lawsuit*[3] from the court[4], which – according to today's generally recognised view[5] - functions within the framework of a dual legal relationship defined by GÉZA MAGYARY: 'it consists of two public law relations conditional on each other between the state and each litigant, on the basis of which the state defines, at the request of one party and on hearing the other, how the parties should act within the framework of some private law relation.'[6]

The notion of *rights assertion* is connected with the legal protective role of the civil lawsuit. Accentuating this role of a civil lawsuit was 'fashionable' in academic legal literature in the first half of the 20th century,[7] and, according to this, the main instrument of the assertion of civil rights before the court was

[2] Magyary, Géza: A magyar polgári peres eljárás alaptanai (Fundamental Doctrine of Hungarian Civil Proceedings). In: A perbeli cselekmények tana, (The Study of Procedural Acts), Budapest, Franklin-társulat, (Franklin Publisher) 1898. p. 6.

[3] State jurisdiction or litigation was created to avoid people remedying their rights or injuries by taking the law into their own hands - which might lead to further rights injuries. The party alleging the rights injury turned with his complaint to someone with the authority to make a judicial decision (chieftain, king, tribal assembly) and asked for a legal remedy. The complaint starting the lawsuit (the action) emerged from this. In a process regulated by Roman law the procedure was started by the plaintiff presenting his claim and asking for the correct formula for the process. If the defendant wished to defend the action, the praetor or magistrate would formally granted permission for the action, appoint a judge, inform the parties of the formula and declare those present to be witnesses. This is recognised as the formal start of proceedins by the magistrate, or *litis contestatio*, in which both parties leave the decision in their case to a judge under the conditions of the formula. *Litis contestatio* is to provide a remedy for legal disputes between the parties. In: Hámori, Vilmos: Anyagi jog és kereset. (Sustantive Law and Actions). Jurisprudential Journal, 1978/ 10. p. 616.

[4]The government, under authorization of the law, can transfer the right of decision making to legal forums other than the court, for instance arbitration court, however, the arbitration decision, always presupposes two contracts: one between the parties, who agree that, instead of the state court, a third party will make the decision in their dispute, and one between the parties and this third person who makes the decision. These give rise only to private law relations and not public law relations. In: Magyary, Géza: A magyar polgári peres eljárás alaptanai p. 19.

[5] Kengyel, Miklós: Magyar Polgári Eljárásjog 2008 pp. 37-38.

[6] 'Dual legal relation theory'. In: Magyary, Géza: A magyar polgári peres eljárás alaptanai p. 11.

7 Jancsó, György: Magyar polgári törvénykezési jog (Hungarian Civil Procedural Law). Kolozsvár, Bookstore of Lepage Lajos, 1908. p. 3.; See also Falcsik, Dezső: A polgári perjog tankönyve (Textbook of Civil Procedure). Budapest, Grill Publisher, 1910, p. 12.; Magyary, Géza: Magyar polgári perjog (Hungarian Civil Procedure). Budapest, Franklin, 1913, p. 5.

constituted by the lawsuit itself. This was also referred to as a 'legal protective proceeding' by Hungarian procedural jurists in the 20th century.[8]

The civil legal protective proceeding is commenced by an *action*,[9] and the judicial means of legal protection is the judgment.[10] The lawsuit may be commenced by a person interested in the legal dispute and/or who becomes a plaintiff as a result of filing the action.[11] The action is a (justified) application to the court for legal assistance and for the exercise of judicial power by the state.

Claim is not a distinctly legal notion: it is a demand, a wish or a desire based on a presumed or existing right or justified need.[12] In academic legal literature one may find various definitions for the plaintiff's *claim* as a legal notion,[13]which may be divided in two main groups: *substantive law claims and procedural law claims*. The substantive law (private law) claim itself constitutes the subject of the legal dispute, which is identified with the legal title. Procedural law claims may themselves be divided into three groups[14]. The first is the '*claim to legal protection*' (Rechtsschutzanspruch), which was introduced into academic literature relating to civil procedural law by ADOLF WACH,[15] The second is the conception of the claim (prozessuale Anspruch), according to

[8] Magyary, Géza – Nizsalovszky, Endre: Magyar polgári perjog (Hungarian Civil Procedure). Third edition. Budapest, Franklin Publisher, 1939, p. 1.

[9] Hungarian legal literature differentiates between the subject-matter and the content of the action. The subject-matter of the claim is the substantive right to be enforced; the content is the express request for a decision to be made by the court, in consideration of the type of legal protection the party is asking for. Accordingly, we can differentiate between: actions for performance, declaratory and constitutive actions. Kengyel, Miklós: A polgári perrendtartás magyarázata (Explanation of the Code of Civil Procedure). In: Németh, János – Kiss, Daisy (eds.): Second revised edition, Budapest, Complex, 2006. p. 712.

[10] Falcsik, Dezső op. cit. p. 9.

[11] Kengyel, Miklós: Magyar Polgári Eljárásjog 2008 p. 217.

[12] Claim: 'Desire, demand something that is crucial in achieving a goal or result.' In: A magyar nyelv értelmező szótára (Hungarian Monolingual Dictionary), 3.edition, Budapest, 1970. P.451-452., See Hámori, Vilmos op. cit. p. 611. 'Neccessity appearing in a concrete form.' In: Tudományos és Köznyelvi Szavak Magyar Értelmező Szótára (Hungarian Scientific and Colloquial Monolingual Dictionary), http://meszotar.hu/keres/igény (22.05.2011)

[13] 'Claim' as a legal term was first defined by Windscheid, according to whom 'in Roman law, legal order is not a system of rights, but a system of enforceable claims and the action is an expression of this, although it is not the same as a rights claim.' In: WindScheid, Bernhard: Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts. Düsseldorf, 1856. pp. 2, 5, 46., See also Hámori, Vilmos op. cit. p. 611.

[14] Hámori, Vilmos op. cit. pp. 611-612.

[15] A private law claim is the same as a claim to legal protection against the state. In: Nizsalovszky Endre: Az alanyi magánjog és a perjog (Subjective Civil Law and Rules of the Court), Budapest 1942. p. 25.

which the plaintiff *applies to the court to protect his rights by passing a favourable judgment.*[16] Third is the procedural law claim (prozessuale Anspruch) which is distinguished from the substantive law claim and is the claim identified with the allegation of the right during the proceedings (Rechtsbehauptung). This constitutes the ground for the application for legal protection (Rechtsschutzgesuch), which already means the substantive law claim asserted within the framework of the legal proceedings.[17] Consequently, the *claim to legal protection* – according to the conception that has crystallised in academic literature over the decades – is the parties' claim against the state for a favourable judgment corresponding to their legal position - namely, a claim to an order of performance, a declaratory or a constitutive judgment, a claim to the enforcement of an assertion of a substantive law claim by way of judicial enforcement or a claim to the provision of security so as to ensure the satisfaction of claims by an order of attachment or the granting of a provisional measure.[18]

In the sphere of rights assertion, the legislator ensures that those interested have extensive possibilities for recourse to institutions administering justice (a court, notary public, mediator etc.) for settling their disputes, that is to say, it ensures the person seekng his rights the possibility of *access to the courts (or other authorities*). The *claim to the administration of justice* is essentially the parties' claim on the state to cary out the administration of justice (administering the law), which is a subjective public law right of parties founded on the Constitution. This is how the notion of rights assertion leads us to the examination of the question of *access to justice*. What does access to justice mean? – asks Blankenburg, before continuing: It means that law, substantive and procedural legal knowledge, must be made available and accessible for everybody.[19] The research 'Access to Justice' launched by MAURO CAPPELLETTI and BRYANT GARTH in the 1970s laid down as a basic proposition that the existence of any substantive or procedural legal right, as well as the commencement of a lawsuit, is meaningless without the possibility of the effective assertion of the right. Therefore, at the end of the 1970s, access to justice was defined as any possibility ensured to citizens – supported by the

[16] For example, Rosenberg, Leo; Lent, Friedrich; Stein, Friedrich represented this approach.

[17] Nikisch, Artur: Der Streitgegenstand im Zivilprozess, Tübingen, 1935. p. 91.

18 Rosenberg, Leo: Lehrbuch des deutschen Zivilprozessrechts (Lehrbuch), Berlin, 1927.p. 259. See in Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás-jogtudomány „termékeny tévedése' (The Claim to Legal Protection as the 'Productive Mistake' of Civil Procedural Science), (Official Journal of Jurisprudence), 1986/11. p. 550.

[19] Blankenburg, Erhard: The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid. In: Regan, Francis – Paterson, Alan – Goriely, Tamara – Fleming, Don (eds): The Transformation of Legal Aid. Comparative and Historical Studies. New York, Oxford University Press, First Edition, 1999. p. 131.

state – to assert their substantive legal rights.[20] Consequently, from this aspect, asserting rights is always a notion preceding access to justice, since asserting rights shows to whom and on what conditions the administration of justice is available, whilst access to justice is a category which presupposes the assertion of rights. Hence the difference between the notions of the assertion of rights and access to justice may be grasped in the fact that, with regard to access to justice, CAPELLETTI does not speak merely of rights assertion, but of '*making rights effective*'.[21]

2. Specific right of action theories

The *action* and *right of action* are not identical notions. The right of action means rights and obligations connected with legal protection by the judge, wilstction refers to the means of legal protection.

In procedural law, the foundations for the scientific examination of action – as the means of instituting legal proceedings – were laid by works dating from the 19th century, which provided a thorough analysis of the basic institutions of civil proceedings. Amongst these, one of the relevant topics was the legal nature of the action. With the exception of the Italian GIUSEPPE CHIOVENDA[22] and the Hungarian SÁNDOR PLÓSZ,[23] the proponents of right of action theories in the second half of the 19th century[24] consisted of German legal scholars. As a result of the political changes in the 20th century Hungarian and German socialist legal professional literature dealt with the claim to legal protection only at the level of the history of science. This was due to the expressly rejective stance of contemporary legal procedural science – itself due to the scientific prestige of those rejecting the theory and the weight of the arguments against it.[25]

[20] Cappelletti, Mauro: Access to Justice. Comparative General Report, III. Zugang zum Recht, Rabels Z40, 1976, pp. 673-674.
[21] Cappelletti Mauro – Garth, Bryant: Access to Justice as a Focus of Research. Windsor Yearbook of Access to Justice. Vol. 1, 1981, pp. X–XI.
[22] Chiovenda Giuseppe: Saggi di diritto processuale civile, Bologna, 1904., Nuovi saggi di diritto processuale civile, Napoli 1912.
[23] Plósz, Sándor: A keresetjogról (Right of Action), In Összegyűjtött dolgozatai (Collection of Essays), Budapest, Magyar Tudományos Akadémia Kiadó (Hungarian Academy of Sciencies Publisher) 1927.
[24] Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 550.
[25] See also: Farkas, József: Bizonyítás a polgári perben (Evidence in Civil Action), Budapest 1956. pp. 12-22., see Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 550.

2.1 The right of action theory based on private law:

The most famous proponent of this theory is FRIEDRICH KARL VON SAVIGNY, according to whom action originated from the breach of private law by a specific act, which gave rise to a new private law relation – of a contract-like character – between the injured party and the infringer, namely, the plaintiff and the defendant.[26] In his view, the right of action forms part of private law, whilst only the act relating to the action (Klaghandlung), and its conditions and form belong within the sphere of proceedings.[27] Therefore, Savigny, in his position, stressed that the precondition for the right of action is the existence of the plaintiff's subjective private law right, as well as the need for its protection, should the right be endangered or infringed. According to Savigny, a person has a right of action if he has a right under subjective private law, since it implies the infringed or endangered private law right and also the right to assert the private law interest by way of force. In his opinion the right of action is the subjective private law right in its 'dynamic state'.[28] This approach 'tied procedural law to private law like an umbilical cord'.[29]

SAVIGNY'S doctrine certainly deserves credit for providing clear and sharply distinguished notions. At the same time, according to SÁNDOR PLÓSZ, the infringement of a right does not constitute a legal ground for the action; it is merely its external cause which triggers it. Moreover, there are cases when the provisions of positive law allow action even prior to the infringement.[30]

In his book published in 1856, BERNHARD WINDSCHEID[31]– adopting a position contrary to Savigny's – referred to the right of action as a right to be asserted against the state, whilst referring to the right against the adversary as a

26 von Savigny, Carl Friedrich: System des heutigen Römischen Rechts, Berlin, 1841-1856, V. Band , pp. 4-5.

27 Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 550.

28 Plósz, Sándor op.cit. pp. 5.-6.

29 Kengyel, Miklós: A keresettől a bírósághoz fordulás jogáig. Tanulmányok Szamel Lajos tiszteletére (From the Action to the Right of Access to the Court. Studies in Tribute to Lajos Szamel), In: Ádám, Antal (ed.) Studia Juridica, Janus Pannonius University, Pécs, 1989. p. 1.

30 Plósz, Sándor op.cit.

31 Fries, Jakob Friedrich (1773-1843) stated even before Windscheid in his posthumous work entitled 'Politic': 'Laws defining people's rational and wilful acts in social life, establishing rules and obligations for the subjects with regard to the conduct of others. The right against another and my right constitute the claim granted to me by such laws'. In Gysin Arnold: Rechtsphilosophie und Grundlagen des Privatrechts, Frankfurt am Main, 1969, p. 230. Dernburg's the terms for claim, right of action, and action are merged, because according to him, claims emerged from action in a subjective sense, meaning the right to enforce the claim, and the request for enforcement. Dernburg, Heinrich: Pandekten I. Bd. 6. Berlin, 1900. p. 86. See Hámori, Vilmos op. cit. p. 611.=

claim.[32] Accordingly, rights and obligations relating to legal proceedings form a peculiar contract relation, the subjects of which are the parties and the court.[33] According to his position, the *actio* is a special Roman institution and it is not possible to speak of *actio* in connection with modern law.[34] By action, Winscheid – in the second half of the 19th century – understood an act relating to the action, which meant the right based on which an action can be commenced, although this could not be identical with the claim. He thought that, instead of right of action, one should speak of a claim, since this constituted the basis of the right of action, which was the consequence.[35] The distinction between *actio (substantive law)* and *claim (procedural law)* with regard to the notion of party contributed to the formation of two positions in academic literature. Aiming to the *material or substantive law notion of party*, only that person can be a party in a legal proceeding who appears as an obligee or obligor in the legal relation relating to the lawsuit or – based on a later modified version of the theory – who alleges this during the proceedings. The *processual or the procedural law notion of party* defines the person of parties much more generally: plaintiff is the person who by his action commences proceedings and defendant is the person against whom proceedings are commenced. In accordance with this, the notion of party is independent of whether or not the party really appears as a party in the substantive legal relation relating to the lawsuit.[36]

[32] Windscheid, Bernhard: Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts, Düsseldorf, 1856, pp. 222-223.

[33] Cristoph, Martin: Vorlesungen über die Theorie des deutschen gemeinen bürgerlichen Prozesses. Leipzig, Brockhaus 1855. p. 14.; Paulovits, Anita: A jogerő kérdése a perjogtudományban és a közigazgatásban (The question of legal force in civil procedural science and public administration), http://www.mjsz.uni-miskolc.hu/201001/6_paulovitsanita.pdf [10.05.2011.]

[34] Windscheid defines *actio*, as 'the right to enforce our will by way of judicial process'. In Roman law *actio* existed instead of rights (obligational is right), while in case of in rem actions it existed instead of claims relating to obligations. People won what was granted by the court (Gericht) and not what was granted by the right. So the action given by the magistrate mattered, who, standing above the law, granted or denied aid. In Windscheid, Bernhard: Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts, Düsseldorf, 1856, pp. 222-223. see in Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 550.

[35] Plósz, Sándor op.cit pp.14.-15.

[36] Kengyel, Miklós: Magyar Polgári Eljárásjog 2008 p. 139.

2.2 Right of action theories founded on public law

2.2.1 The abstract (independent) right of action theory

The public law approach had already appeared at the time of the criticism of the right of action based on private law'. However, the serious step beyond the private law approach was made in the second half of the 19th century by CARL FRIEDRICH VON GERBER' He declared that the claim of 'subjects' to legal protection was enforceable against the state, by which he laid the foundations for the interpretation of the right of action as a subjective public right.[37] This was followed by the perception of civil proceedings as a public law relation by OSCAR BÜLOW.[38] In his work published in 1868, Bülow elaborated the theory of procedural legal relation, in accordance with which the proceedings are an independent legal relation completely different from the substantive right (claim), which gives rise to mutual rights and obligations for the parties and the court.[39] However, the final break with the roots in private law of the right of action took place in the last third of the 19th century, when the proponents of the abstract right of action theory started to treat the right of action as independent from the litigated private right. Based on this, the right of action is only the citizen's abstract right against the state, which is independent of the substantive private right.[40] Accordingly, the right of action is a public law right against the state - in other words, the right to adjudication, which is completely independent of whether or not the plaintiff does have a private law right against the defendant. This will be decided within the framework of the lawsuit in the final judgment.[41]

The abstract right of action theory contributed to the development of procedural dogmatics by treating the right of action independently of the litigated substantive right; however, it did not provide a satisfactory explanation for the nature of the right to commence an action or the defendant's obligation[42]

[37] von Gerber, Karl Friedrich.: Über öffentliche Rechte, Tübingen, Lauppsche Buchhandlung, 1852.
[38] Kengyel, Miklós: Magyar Polgári Eljárásjog (Hungarian Civil Procedural Law), 10th revised edition, Budapest, Osiris, 2010 p. 221.
[39] Bülow Oskar: Zivilprozessualische Fiktionen und Wahrheiten. Activ für zivilische Praxis 62, 1879, p.1-96., See also Bülow Oskar: Die Lehre von Prozesseinreden und Prozessvorasusetzungen. Giessen, Emil Roth, 1868.
[40] Kengyel, Miklós: Magyar Polgári Eljárásjog 2010 p. 222.
[41] Paulovits, Anita op. cit.
[42] According to Degenkolb, the defendant should take part in the lawsuit not as a result of his relation with the court but because of his direct relation with the plaintiff, because the defendant's cooperation is necessary to achieve a decision. The plaintiff can demand this cooperation based on his personal right. The plaintiff can enforce the recognition of his personality by turning to the court, especially because lynch-law is forbidden. Hence the right of action arising from a personal right is a public right, since so is a personal

to enter the proceedings against the plaintiff.[43] The transposition of this theory into today's judicial practice means that, if the statement of claim meets the requirements of legal regulations, the court will be obliged to proceed in the case, regardless of whether the plaintiff has an assertable substantive right or not. In other words, the claim to legal protection against the state was extended beyond real rights injuries to alleged ones also. In case the plaintiff has suffered no real injury to his rights caused by the defendant, the court will dismiss the plaintiff's action in its judgment, which results in a *res iudicata*[44] from the perspecive of the legal dispute. The plaintiff's action or the defendant's cross-action against the plaintiff by means of the submission of a negative declaratory action/cross-action may be expressly aimed at the court requesting a judgment that there is no legal relation between the plaintiff and the defendant.

2.2.2 The actual right of action theory and/or the claim to legal protection

A decade after the abstract right of action theory, as a result of the arguments against it, a new theory was born: the actual right of action theory. Legal history tends to contrast the abstract and actual right of action theories with each other, although it would be more acceptable to consider them as supplementing each other.[45]

The proponents of the actual right of action theory agreed with the position which had crystallised concerning the abstract right of action. To this, even those are entitled who lack both the subjective private law right and the related legal protective interest against the state, but who consider the commencement of such an action as a possibility and not as a right. According to the representatives of the abstract right of action theory (ADOLF WACH,[46] PAUL LANGHEINEKEN,[47] KONRAD HELLWIG,[48] JENŐ BACSÓ[49]), one is entitled to a

right. However, the above obligation of the defendant should have preconditions: on the one hand, the plaintiff must be acting in good faith, and, on the other hand, the plaintiff must really have a legal interest or right against the defendant. Degelkolb does not examine the relationship of the state and the parties; he only notes that the state requires those making a statement to tell the truth. See Ibid.

[43] Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 551.

[44] Decisions made: The legal force of the final decision of the court prevents parties (or their legal successors) from initiating a lawsuit on the same basis or renewing the dispute. Code of Civil Procedure, § 229(1)

[45] Kengyel, Miklós: Magyar Polgári Eljárásjog 2008 p. 222.

[46] Wach, Adolf: Handbuch des deutchen Civilprozessrechts, I. Band, Leipzig, Duncker und Humbolt, 1855. Wach, Adolf: Defensionspflicht und Klagerecht, Grünhuts Zeitschrift, 1979. pp. 516-558., Wach, Adolf: Der Feststellungsanspruch. Leipzig, Dunker und Humbolt. 1889.

[47] Langheineken, Paul: Der Urteilanspruch. Ein Beiträg zur Lehre vom Klagerecht (Urteilsanspruch) Leipzig, 1899.

right of action if he has a real, actual substantive right, based on which the plaintiff may have a claim against the state (court) to a favourable judgment corresponding to his action.[50] According to this interpretation, the right of action corresponds to a subtype of the claim to legal protection, the judgment claim, which means the parties' right to a favourable judgment. Therefore, the notion of the claim to legal protection is wider than that of the right of action, as, apart from the legal proceeding and the judgment, there are also other means of legal protection by the state that serve to satisfy it (for example, execution or provisional measures).[51]

The proponents of the actual right of action theory recognised the defendant's claim to legal protection, which meant that, if one was to consider the commencement of action as the plaintiff's right, then – according to KONRAD HELLWIG – one was also to recognise the defendant's right to request the dismissal of the unfounded action (Freisprechungsanspruch). In both cases, both parties' claims were aimed at securing a favourable court judgment.

The representatives of the actual right of action. theory placed great emphasis on the definition of the conditions of the claim to legal protection, which – influenced by KONRAD HELLWIG – were separated by them from the preconditions of the legal proceeding. At the same time, codes of civil procedure do make no distinction between the preconditions of the lawsuit and those of legal protection, and so, in practice – in the absence of an explanation provided by positive law – this idea proved useless and became the most 'vulnerable' point of the theory.[52] Apart from the lasting and precise definition of notions, the most powerful counter-argument raised against the claim to legal protection is that the parties have no right to a favourable judgment against the state exercising judicial power. This is explained by the fact that no source of law can be found that would lay down such an obligation for the state or court.[53]

2.2.3 The dual right of action theory

Going beyond SAVIGNY'S private law approach, both the proponents of the abstract and actual theories accepted the public law nature of the action and gave similar explanations (renouncing self-help,[54] a claim to legal protection

[48] Hellwig, Konrad: Anspruch und Klagerecht. Beiträge zum Bürgerlichen und zum Prozessrecht, Jena, 1905. p. 8.
[49] Bacsó, Jenő: A jogvédelem előfeltételei a polgári perben (Requirements for Legal Aid in Civil Actions). Máramarossziget, 1910.
[50] Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 552.
[51] Ibid.
[52] Ibid. p. 555.
[53] Ibid.
[54] Degenkolb, Heinrich: Einlassungszwang und Urteilsnorm, Beitrage zur materiellen Theorie der Klagen inbesondere der Anerkennungsklagen Leipzig, (1877) pp. 31-32.

which everybody is entitled to.[55]) The public law right of action theory split into two branches within a short space of time. This can be explained by significantly different views which had evolved concerning the question: Who,[56] against whom,[57] to what extent[58] and on what preconditions[59] was entitled to legal protection deriving from the right of action? As a result of these views, the doctrine of the claim to legal protection moved to the centre of scholarly criticism in the first decades of the 20th century. Its critics contested

See also Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 551.

[55] Langheineken, Paul op. cit. p. 17.

[56] If we consider the commencement of an action as a right instead of simply an option of the plaintiff (as the representatives of the abstract right of action did), we also need to recognize that in case of an unfounded lawsuit, the defendant has the right to request the action to be dismissed. If the plaintiff's claim to a favourable judgment is unfounded, there is a claim for legal protection on the defendant's side, that is, the court needs to decide in favour of the defendant. In: Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 553.

[57] The claim for legal protection is primarily directed against the state (court), which – in certain cases – may be forced to carry out acts relating to the legal protection. According to Wach, the claim to legal protection can also be enforceable against the defendant, who has to endure the acts of legal protection. This opinion was rejected by academic literature, because the defendant's obligation to endure exists in relation to the state, not the plaintiff. According to Bacsó, it is unnecessary to state the obligations of the defendant, because the law in abstracto, the judgment in concreto binds the defendant regardless of his/her will or assent. The plaintiff turns to the state for legal protection, not to the defendant, who could not provide it, at best he could meet his/her obligation relating to legal protection. In: Wach, Adolf: Handbuch des deutchen Civilprozessrechts p. 19.
The detailed theoretical elaboration of the defendant's claim to legal protection is connected with Bülow, Oscar: Klage und Urteil. Eine Grundfrage des Verhältnisses zwischen Privatrecht und Prozess. Zeitschrift für deutschen Zivilprozess. Vol XXXI. 1910. pp. 23-24. Bacsó, Jenő: A jogvédelem előfeltételei a polgári perben, See also Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 553.

[58] Wach doubled the subject-matter of the lawsuit, one is the litigated substantive legal relations, the other is the plaintiff's and the defendant's claim for legal protection. According to him, the claim for legal protection is also valid, if there is no litigated right. As an example, he mentions the plaintiff's action for negative declaratory judgment, the aim of which is not to bind the adversary in connection with the subjective right, but to maintain the undamaged legal status of the plaintiff. In: Wach, Adolf: Handbuch des deutchen Civilprozessrechts pp. 19-23., Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 552.

[59] According to Langheineken, the assertion of a claim for legal protection depends on four conditions: the facts of the case, the legally significant nature of the claim to legal protection, and conformity with substantive and procedural rules. In: Langheineken, Paul op. cit. pp. 21-33.

both its practical importance and its theoretical value, and rejected it as 'scientifically improductive'. Its proponents negated that the plaintiff would have any right to a favourable judgment prior to the filing of the action, since the right to judgment arises only at the time of the conclusion of the trial – that is, when the court must decide the case either in favour of the plaintiff or the defendant.[60] Besides the rejection, however, there were also attempts to reconcile the abstract and actual right of action theories. These gave birth to the 'dual right of action theory'[61] as professed by the Hungarian GÉZA MAGYARY. He claimed that the person whose private right had been infringed or endangered clearly had a right of action. On the other hand, the person who had suffered no injury was also entitled to this right, because he was to receive equal treatment under the law.[62] Everyone is entitled to the right to institute proceedings, without the provision of security, since, if it was conditional on the provision of security, it would render the plaintiff's situation rather difficult. This could also lead to the plaintiff not receiving legal protection. Therefore, the law rather tolerates the initiation of unfounded lawsuits than deprive those genuinely injured or endangered of the right of protection. Accordingly, MAGYARY thinks that everyone has a right of action, so anyone may initiate legal proceedings without the provision of security. All plaintiffs receive the same treatment, regardless of the extent to which their action is well founded. All this serves the purpose of avoiding adverse effects on the person whose right has really been infringed or endangered.

The practical significance of this theory lies, on the one hand, in anticipating the basic right of access to the courts, and, on the other hand, in separating the preconditions of the legal proceeding and those of the claim to legal protection (the successful action).

2.3 Modern right of action theories

The abstract and actual right of action theories were heavily criticised, and neither was acceptable for legal dogmatics, although the influence of both may be detected in modern right of action theories.[63] According to JOSEF KOHLER,[64] the legal proceeding constitutes a legal relation exclusively between the parties, because in legal proceedings rights and obligations arise only for the parties. The court participates in the proceeding as an element of public law, but this does not involve the court in a public law relation, because the court is not legally interested in the lawsuit. The legal proceeding does not give rise to

[60] Kengyel, Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése" p. 554.
[61] Kengyel, Miklós: Magyar Polgári Eljárásjog 2008 pp. 222-223.
[62] Magyary, Géza – Nizsalovszky, Endre op. cit. p. 353.
[63] Kengyel, Miklós: Magyar Polgári Eljárásjog 2008 p. 223.
[64] Kohler, Josef: Der Prozess als Rechtsverhältnis. Mannheim, 1888.

rights for the parties against the court in any other way either, since the state – by the administration of justice – merely performs its duty toward the parties. According to Kohler, the idea that people are not entitled to legal protection from the state is proven primarily by the fact that no-one considers legal protection an acquired right.[65] JULIUS WILHELM PLANK holds a differing view[66]: the legal order confers the power of deciding legal disputes on the state and, for this purpose, it establishes a special organ: the court, and it forces citizens to settle their disputes before the court. In accordance with this, one may speak, on the one hand, of a public law obligation of the court, and, on the other hand, of the public law rights of parties. As a result, a legal relation is formed between the court and the plaintiff, and, maybe, between the court and the defendant, insofar as the defendant objects to the application of force requested by the plaintiff.[67] It follows from PLANK'S view that the action is a right in relation to the court, since, based on the principle of party control, the initiation or non-initiation of proceedings depends exclusively on the plaintiff, by which he recognises the public law right of action, distinguishing between its procedural law and substantive law sides. The procedural law side means that the defendant – based on the plaintiff's action – may be forced to become engaged in the lawsuit; on the other hand, the material side is constituted by the fact that the defendant can be ordered to satisfy the claim.[68]

The representatives of modern civil procedural science usually agree that the action, apart from the substantive right, also comprises the assertion of the right or lawful interest.[69] With respect to this, LÁSZLÓ GÁSPÁRDY divides the notion of rights assertion into two: a clear distinction must be made between the abstract possibility of somebody becoming the initiator of a civil judicial proceeding ('right of action') and the actual situation where the person initiating the proceeding is in possession of the conditions of success ('right of actionability').[70] The right to commence an action means the right to legal proceedings, while the right of actionability means the right to the enforceability of the claim. The right to commence an action can essentially be considered the modern expression of the abstract right of action, while the right of actionability can be regarded as that of the actual right of action.[71]

[65] Paulovits, Anita op. cit.
[66] Plank, Julius Wilhelm: Lehrbuch des deutschen Zivilprozessrechts. Band III. Zivilprozessrechts. Band III. Nördlingen, C.H. Beck, 1887.
[67] Ibid p. 199. See also in Paulovits, Anita op. cit.
[68] Paulovits, Anita op. cit.
[69] Kengyel, Miklós: Magyar Polgári Eljárásjog (Hungarian Civil Procedural Law). 6th revised edition Budapest, Osiris 2005. p. 212.
[70] Gáspárdy, László: A jogérvényesítést elsegítő és akadályozó körülmények vizsgálata a magyar polgári igazságszolgáltatásban (Examining Factors Promoting and Preventing the Prosecution of a Right in Hungarian Civil Justice), Budapest, Hungarian Academy of Sciences Publisher 1985, p. 4.
[71] Kengyel Miklós: 2006. op.cit.n. 9. pp. 718-719.

Having regard to the dual nature of the notion of right assertion, 'the ability to initiate proceedings' must be separated from the conditions of 'winning the lawsuit'. The ability to initiate proceedings, in other words, the assertion of legal self-interest or its absence is always the result of a subjective opinion, behind which there is always the underlying influence of various factors.[72] The conditions for winning the lawsuit, however, are always connected with the possibility to realise equal opportunities.

2.3.1 Socialist right of action theory

The liberal approach of the 19th century to legal proceedings required civil proceedings to resolve legal disputes in the 'shortest, simplest and most certain' way. The legal proceeding was regarded as the realisation of individual interest. At the end of the century it was supplemented with the further legal political requirements of the 'protection of legal peace' and 'the protection of the legal order as a whole'. In the socialist procedural law of the 20th century – in contrast with the earlier liberal approach to legal proceedings – the main task of the court was to 'explore the real rights of litigants and their relationship to each other', therefore, the Act on the Code of Civil Procedure[73] - following the pattern of the Soviet Code of Civil Procedure – defined the aim of the socialist civil proceedings and the task of the court as the revelation of the material truth. It became the duty of the court to reveal, through active participation, the real facts, the parties' real rights and their relationship, in other words, the objective truth.[74]

Socialist civil procedural science makes a distinction between the *right of action* and the *right to commence an action*, as well as right of action taken in a

[72] 'Factors influencing the individual predictions of a subject of law from an objective aspect: possible costs of the legal action, estimated time, access to legal aid (representation, counselling), enforceability of the judgment containing an order against the defendant, and geographical availability of the authority. Factors in the subjective aspect: conforming to social customs, personal affectedness (stimulus threshold) of the legal entity making the decision, opinions on the success or failure of the potential legal action, the actions required to be taken and the gauge of the psychic burden, opinions concerning the deciding authority, anxiety caused by the retorsion of the adversary – or its lack – expected reactions to the possible lawsuit, the potentials of self-expression.' In: Gáspárdy, László op. cit. p. 4.

[73] Hungarian Code of Civil Procedure Act III. of 1952, 3.§.

[74] Farkas, József – Kengyel, Miklós: Bizonyítás a polgári perben (Evidence in Civil Proceedings), Budapest, 2005. pp. 15-19. See also Bacsó, Jenő: A polgári eljárás, mint a társadalmi igények érvényesítésének eszköze (Civil Procedure as a Means to Assert Social Claims), Jogtudományi Közlöny (Official Journal of Jurisprudence), 1974/9 p. 484.

substantive and *procedural law* sense.[75] According to the proponents of this theory (ABRAMOV, GURVICH, KLEINMAN, YUGYELSON), distinction should be made between right of action taken in a procedural and substantive sense.[76] In a procedural law sense, the right of action means the right to commence an action, in other words, the plaintiff's right to apply to the court, which is preconditional on the parties' capacity to sue and also to be sued, in compliance with the content requirements of the statement of claim. Based on the right of action taken in a substantive legal sense, the court may be required to allow the action, a condition of which is the existence of a right requiring protection.[77]

2.3.2 "Claim to justice" theory

As a result of the influence of modern state law theories, the complete rejection of the claim to legal protection gave way to a more subtle evaluation of this theory. As the claim to legal protection does not merely mean the right to a favourable judgment but also the parties' claim against the state taken, in a wider sense, to acts of legal protection, this proved compatible with the state's general obligation to provide legal protection. This recognition rendered it possible to accept the idea that both parties had a right directed at the performance of legal protection taken in a general sense and assertable against the state. This means that the court, as the organ of state applying the law, is bound to apply the substantive law with regard to the proceeding and decide the legal dispute – in accordance with it – in favour of the plaintiff or defendant.[78] According to the proponents of the claim to justice theory (Justizanspruch) (JAMES GOLSCHMIDT,[79] KARL HEINZ SCHWAB,[80] WALTER HABSCHEID,[81] LEO

[75] See also Lábady, Tamás: A keresetindítási jog, különös tekintettel a III. Ppn. új perelőfeltételeire' (The Right to Bring an Action, with Special Regard to the New Requirements of the Third Novel of the HCCP), Magyar Jog (Hungarian Law Journal), 1975/8. p. 445.

[76] Abramov, Sz. N.: Szovjet polgári eljárás (Soviet Civil Procedure), Moscow, 1952 p. 155., Klejnmann, A.F.: Szovjet polgári eljárás (Soviet Civil Procedure), Moscow, 1954 p. 24. See also Gurvics, M. A:, A keresetjog (The Right of Action), Moscow-Leningrád, 1949, Jugyelszon, K. Sz.: A bizonyítás problémája a szovjet polgári eljárásjogban (The Problem of Evidence in Soviet Civil Procedural Law) Moscow, 1951. See Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 556.

[77] Kengyel, Miklós: Magyar Polgári Eljárásjog 2010 p. 223.

[78] Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 555.

[79] See Goldschmidt James: Zwei Beiträge zum materiellen Justizrecht, München und Leipzig, 1914, Der Prozess als Rechtslage. Eine Kritik des processualen Denkens, Berlin, 1925 Zivilprocessrecht, Berlin, 1929.

[80] Schwab, Karl, Heinz: Zur Wiederbelebung des Rechtsschutzanspruchs, Zeitschrift für Zivilprozess. Vol. 81. 1963. p. 420.

ROSENBERG[82]), this claim of the parties against the state to carry out the activity of administering justice (administering law) is not merely a possibility but a subjective public right founded on the Constitution.[83]

2.3.3 Linking of the right of action with the right of access to the courts

A third type of modern right of action theories is *the linking of the right of action with the right of access to the courts:* The right of access to the courts may be regarded as a modern expression of the right of action. It is narrower than the claim to justice, because it refers only to legal protection by the court,[84] but it also includes the right to commence an action and the claim to a court decision on the merits. With regard to its content, it is, on the one hand, more than the possibility to commence an action formulated by the abstract right of action theory, and on the other hand, it is less than the right to a favourable court judgment presumed in the actual right of action theory.[85]

Many[86] international documents state that the court shall decide about citizens' rights and obligations within the framework of just or fair and public proceedings. Since the French Revolution, publicity has been one of the most important principles of criminal and civil procedure. At the same time, the requirement of justice or fairness has a semblance of natural law, which may be accepted and approved as a declaration (or the indication of an objective to be achieved), but its practical implementation – resulting from the nature of civil proceedings – runs into difficulties. In order to resolve the obvious conflict between the basic principle and practice, the notion of justice should be used in a social and not in a philosophical sense, in other words, social justice should prevail in proceedings conducted by civil courts.[87]

The right of the parties' to the fair conduct of lawsuits is implemented by way of a procedure that ensures the realization of basic principles during the

[81] Habscheid, Walter: 'Besprechung von Fasching, Kommentar zu den österreichischen Zivilprozessgesetzen', Zeitschrift für das gesamte Familienrecht. 1967. p. 61. Kengyel Miklós: A jogvédelmi igény, mint a polgári eljárás–jogtudomány „termékeny tévedése' p. 556.
[82] Rosenberg, Leo: Lehrbuch des deutschen Zivilprozessrechts, Berlin, 1927
[83] Rosenberg, Leo – ScHwab, Karl Heinz – Gottwald, Peter: Zivilprozessrecht, München, 1993. pp. 13-14.
[84] Jurisdiction is not only exercised by the courts but also by: courts of arbitration, economic and employment arbitration committees, conciliatory bodies, etc.
[85] Kengyel, Miklós: Magyar Polgári Eljárásjog 2010 p. 224.
[86] Article 10 of the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948; Article 6 of the Rome Convention on the Protection of Human Rights and Fundamental Freedoms promulgated on 4 November 1950; The Charter of Fundamental Rights of the European Union Article 47 para (3).
[87] Kengyel, Miklós: 1989 loc. cit. n. 29 p. 142.

proceeding. Within this framework it is the duty of the court to assist the parties in the assertion of their rights relating to the adjudication of their legal dispute, the fair conduct of the lawsuit and its resolution within a reasonable time. The assertion of this right during the lawsuit means, on the one hand, that the court cannot decline to decide legal disputes which have been referred to it for civil litigious or non-litigious proceedings and, on the other hand, that it is obliged to ensure the conditions necessary for enabling the party to assert his right (for example, exemption from costs, the appointment of an advocate, recording the party's orally presented petition in the records etc.)[88] If the court fails to do so, the party may claim compensation.[89]

Accordingly, based on the most general interpretation of the right of access to the courts, in the interest of the assertion of their rights, everyone is entitled to initiate a judicial or other right assertion procedure.[90] At the same time, however, this does not actually mean that everyone can apply to the courts concerning their disputes, since a person who is financially weak may not be able to afford the costs of the proceedings.

3. The implementation of right of action theories in legal practice

Why is there a need to formulate legal theories; why is there a need for legal philosophy besides legal dogmatics? – asks GYULA MOÓR in one of his monographs.[91] He answeres his own questions by: 'Statutory law contains norms, it lays down rules to be followed concerning human conduct; therefore, it sets objectives for human activity. This is how statutory law leads us into the world of objectives. The order of the world of objectives, the connection between the means and aims, however, does not merely constitute a causal relation, but the idea of 'value' is also attached to it. In other words, the law sets aims for human activity, by which it creates a value idea, as a result of which it has a stable value.'[92] Legal dogmatic problems raised by right of action theories – from the aspect of present-day legal practice as well – may be grouped around several questions of key importance, the most important of which – in my opinion – include: (a) apart from real rights injuries, the actionability of presumed injuries as reflected in the doctrine of the preconditions of the lawsuit; (b) the plaintiff's right to a favourable judgment against the defendant, within framework of the legal protective task of the state (court); (c) the purpose

[88] Hungarian Code of Civil Procedure, Act III. of 1952, § 7 (1)-(2)
[89] Hungarian Code of Civil Procedure, Act III. of 1952, § 2 (3)
[90] Kengyel, Miklós: A keresettől a bírósághoz fordulás jogáig p. 137.
[91] Moór, Gyula: Bevezetés a jogfilozófiába (Introduction to Legal Philosophy), In: Philosophical Books Serial, Pfeifer Ferdinánd Publisher, 1923. Budapest p. 9.
[92] Ibid.

and social evaluation of civil proceedings; (d) the nature of the (private law, public law) legal relation between the court-plaintiff-defendant; (e) the notion and actionability of the claim.

(a) In present-day legal practice one of the most important – still unresolved – problems is whether only the real rights injury should be actionable or the state should set in motion its machinery of justice in the case of alleged rights injuries also, based on an excessively wide interpretation of the right of access to the courts? With regard to this, TAMÁS LÁBADY draws attention to the significance of the rules relating to the preconditions of lawsuits.[93] These rules serving the purpose of the simplification and acceleration of civil proceedings restrict the unfolding of proceedings destined to fail. In Lábady's view, the aim of the commencement of action, as an institution of procedural law, is to ensure legal protection. Legal protection, however, is attached only to the existence of some real right, and so it is not possible to regard the lawsuit initiated without cause as conflicting with the aim of civil proceedings, since, in the absence of a substantive right, there may be no question of real legal protection.[94]

Considering the present regulation in force, the courts are in a very difficult situation concerning the 'sifting out' of lawsuits started without good cause. Although the Code of Civil Procedure requires the plaintiff to 'specify in the statement of claim the right to be asserted, together with the presentation of the facts on which it is founded, and the supporting evidence',[95] the court may 'remedy' this situation only by issuing an order for completion and not by dismissing the statement of claim without the issue of a summons.[96] Completion may take place several times during the proceedings, since, in accordance with judicial practice, the statement of claim can be dismissed only if the deficiencies are such as to render it impossible to adjudicate the statement of claim.

(b) The plaintiff's right to a favourable judgment against the defendant is connected with the parties' legitimacy relating to the lawsuit (right of actionability, right to claim enforcement). This is basically a question pertaning to substantive law and falling outside the notion of the right to institute legal proceedings and the parties' capacity to sue and to be sued. It refers to the substantive legal relationship between the party and the subject matter of the lawsuit. I, in other words, it means whether the plaintiff is entitled to the right asserted by the action against the defendant. The regulation in force relating to this question is problematic in legal practice. The situations in which the statement of claim may be dismissed without the issue of a summons[97] are limited to cases where the group of persons entitled to commence proceedings (plaintiff) and to be sued (defendant) are specified unambiguously – in

[93] Hungarian Code of Civil Procedure § 130 (1), § 157.
[94] Lábady Tamás op. cit. p. 449.
[95] Hungarian Code of Civil Procedure, Act III. of 1952, §121 (1) (c)
[96] Hungarian Code of Civil Procedure, Act III. of 1952, §130 (1) (j)
[97] Hungarian Code of Civil Procedure, Act III. of 1952, § 130 (1) (g)

accordance with the regulation.[98] Otherwise, the court is to apply the rule, according to which, 'determining whether the plaintiff has the right to assert his claim' (right of actionability) against the defendants specified by him is a question pertaining to the merits of the case relating to substantive law, about which the court must decide by passing a judgment. In this case the court can neither dismiss the statement of claim without the issue of a summons, nor can it discontinue proceedings.'[99] Should there be a lack of legitimacy relating to the lawsuit, the action must be dismissed. This does not mean a favourable judgment for the plaintiff and, before this may be declared by the court in its decision on the merits, it must conduct a long evidentiary procedure in order to clarify legitimacy relating to the lawsuit. Hence, it is not possible to avoid a series of trials, even though they are unnecessary for the passing of judgment.

(c) Concerning the aim and social evaluation of civil proceedings, it must be pointed out that the Code of Civil Procedure containing the rules relating to the 'litigious' is basically required to guarantee legal security as well as the realisation and enforceability of fundamental rights and principles.[100] The essence of the problem lies in the disappearance of 'truth' from civil proceedings. As the court does not take evidence *ex officio*,[101] it is obvious that the revelation of truth cannot be guaranteed, the court is merely charged with the task of ensuring that 'the parties may assert their right relating to the adjudication of legal disputes, the fair conduct of lawsuits and their resolution within a reasonable time.'[102] 'By this distinction, the difference between the justness of the decision and the justness of proceedings has become critical. The Amendment to the Act[103] 'exempted' the court from its obligation to establish the facts in the judgment in accordance with the actual facts. The author does not consider – in this agreeing with DAISY KISS – that the requirement for a just decision is outdated and 'has had its day'. The parties' dispute cannot be decided without thoroughly investigating the facts, without discovering and examining the causes giving rise to the rights injury, weighing the social context and taking into account the parties' personal circumstances. If the requirement for 'justness of decision', which lies in the above, is rejected, right-seeking

[98] For example: actions relating to status, compulsory joinder of parties.
[99] Court decisions 388/ 2001., 201/ 2001.,182/ 1999. See also Kengyel, Miklós: A polgári perrendtartás magyarázata p. 802.
[100] Kiss Daisy: Hol az igazság? Kételyek és aggályok a Polgári perrendtartás utóbbi módosítása kapcsán (Where is Justice? Doubts and concerns regarding the latest modification of the Code of Civil Procedure), http://www.kissdaisyestarsa.hu/pub/daisy_holazigazsag.pdf. (19.05.2011.)
[101] Exception: lawsuits relating to status
[102] Hungarian Code of Civil Procedure Act III. of 1952, § 2 (1) See also Kiss, Daisy: 2011. loc. cit.n.100
[103] Act CX of 1999 amending the Hungarian Code of Civil Procedure Act III. of 1952.

citizens will lose the possibility of the court deciding to provide a real solution to their disputes instead of leading to more tension.[104]

(d) The problem of the legal relation of 'court-plaintiff-defendant' is evident in present-day legal practice. In the relationship between the parties and the state (court), it must be clarified unambiguously whether the judge is expounding the content of the rules of some statutory law or whether he intends to comply with legal political requirements. These indicate trends in legal development or declare generally applicable doctrines. Any intermingling of these may generate a process endangering legal development, as the aim is to perform different tasks: firstly, to set out the content of legal regulations, in the other case, to examine the consequences of legal regulations.

On the other hand, based on the legal relation between the parties and the state, the extent of the plaintiff's obligation to produce evidence (the principle of adversarial hearing) and of the defendant's obligation to engage himself in the lawsuit is problematic. With regard to the question as to how detailed a specification the plaintiff should provide in the statement of claim of the factual basis of the action, the academic literature distinguishes between the *principles of the individualisation and substantiation of the action*. In accordance with the former, the action is not founded on facts, but on the allegation of a right, and so the statement of claim shall primarily define the right to be asserted, whilst the specification of allegations of fact and evidence is not certain to be necessary. Accordingly, the plaintiff is required to present in the statement of claim only what is necessary for clearly distinguishing the right to be asserted from any other right. As opposed to this, the principle of substantiation lays down that, in the statement of claim, the plaintiff is required to present the facts necessary for the revelation of truth.[105] The Hungarian Code of Civil Procedure in force follows the *principle of substantiation*.[106] The legislator, in order to prevent lawsuits being drawn out, does, in fact, hold out the prospect of a sanction. This would result in losing the right (which means the making of a decision without waiting for the presentation of the party) if either party delays presenting their allegations of fact, statements or evidence without good cause - and if the omission is not rectified after the court requires him to do so.[107] However, without the *ex officio* taking of evidence, the scope of this cannot be defined, since the Act lays down only that presentation should be made in due time for the careful conduct of the lawsuit furthering proceedings.[108] In practice, therefore, judges avoid applying this sanction. This, in fact, is meant to restrict, within the confines of the given regulation, the possibility of the negligent conduct by the plaintiff and the protraction of the lawsuit by the defendant, but

[104] Kiss Daisy op. cit.
[105] Kengyel, Miklós: A polgári perrendtartás magyarázata p. 713.
[106] Hungarian Code of Civil Procedure Act III. of 1952. §121 (1)
[107] Hungarian Code of Civil Procedure Act III. of 1952.§141 (6)
[108] Hungarian Code of Civil Procedure Act III. of 1952. §141 (2)

unfortunately, this aim is not achieved. Where the judge's opportunities for a real exploration of the legal dispute weaken during the case – or, in other words, where the scope of the public law legal relation between the court and the parties decreases - it is more satisfactory to strengthen the public law relation between the parties by holding out the prospect of various sanctions.[109] László Névai's statement that an important factor in simplifying and accelerating civil proceedings is that the parties seriously concentrate on their case,[110] is correct and the legislator must try to achieve this by all possible means.

(e) Right of action theories have drawn attention to the important question as to what extent the claim can be considered identical in its content with the party's substantive right or obligation. In today's world of legislative 'dumping' – mostly done with no vision – both the appliers of law and right-seeking citizens are in a very difficult position, since, based on the principle of party control,[111] there is great uncertainty in judicial practice concerning the question of legal title – specified by the parties. The starting point is that, based on the legal regulation in force, the parties are the 'masters of the case', it is the parties who define the subject-matter of the lawsuit and, by this, the scope of action of

[109] In my opinion the English 'payment-into-court' system or the American Michigan Mediation mechanism is a good example of this.
The 'payment-into-court' system: The defendant offers a certain amount of money to the plaintiff. If accepted, the lawsuit comes to an end. If rejected, and the amount awarded to the plaintiff is smaller at the end of the procedure than what the defendant offered before, the plaintiff pays for his/her own plus the defendant's expenses incurred from the day of the offer. If the plaintiff is awarded a larger amount, then it is regarded as if the defendant had mae no offer. In: Cappelletti, Mauro op. cit. p. 708.
The Michigan system: If the plaintiff does not accept the compensation offered by the defendant in a suit for damages, he/she is entitled to 110 % of the offered amount at the end of the procedure in order not to be the losing party in terms of procedural costs. If the plaintiff loses (is given less than 110 % of the offered amount) he is obliged to pay the costs of the proceedings plus the fee of the opponent's attorney. If the plaintiff makes an offer which is declined by the defendant, and the plaintiff is given 90% at the end of the procedure, the defendant is obliged to pay the above costs. So the Michigan system 'punishes' the defendant as well as the plaintiff if they do not accept a fair deal. The Michigan system provides a preliminary calculation of the possible costs, which makes it possible for the parties to rely on an objective opinion in terms of procedural costs. In: Capelletti, Mauro op. cit. p. 709.

[110] Névai, László: A polgári per hatékonyságának problémái a gazdaságirányítás új rendszerében (The Problems of Effectiveness of Civil Proceedings in the New System of Economic Managment). Jogtudományi Közlöny (Official Journal of Jurisprudence), 1970/10. p. 522.

[111] 'The parties' and the court's relation to the subject-matter of the lawsuit is best expressed by the principle of party control out of the fundamental principles of civil procedural law. The court – unless a provision is made to the contrary - is bound by the parties' claims and the declaration of rights.' Hungarian Code of Civil Procedure, Act III. of 1952 § 3 (2)

the judicial proceeding.[112] It must be remembered that the cause of action (substantive law) and the claim (processual claim) are closely interconnected. It is, therefore, not possible to speak of an enforceable claim without establishing the legal ground for the action and of a legal ground in the absence of an enforceable claim. This also raises important questions in respect of the judgment, the legal force attached to it and its scope.[113]

During the analysis of the impact of the individual right of action theories on legal practice, the author has outlined how they could be utilised during the resolution of legal disputes. The answers to the questions posed in the introduction have led – apart from several legal problems of key importance awaiting resolution – to two main conclusions. One of these is the question of interaction between legal theories and legal practice, based on the examination from which the author concluded that legal theory applied in legal practice shapes social consciousness, which motivates the legislator to find even better solutions. Legal theories in practice constitute some type of constructive criticism, which is vital for legal development. However, objectivity in legal theorising is extremely important, since abstract solutions far removed from reality do not have a positive impact on legal practice and so they cannot exert a long-term influence on the legal culture. In the author's view, legal theories formulated in academic literature – aiming to concetrate on the development of a particular legal institution – must expound all useful arguments in very many ways to exert the necessary influence on legislators and those applying the law. On the other hand, this requires the latter to be familiar with legal theory to the same extent as the representatives of legal theory are required to be familiar with legal practice. Effectiveness can only be guaranteed based on the principle of reciprocity.

The other question concerns the social role-playing of those applying the law – in particular that of judges – and of the representatives of legal theory. The work of judges must be seen as an activity reaching beyond the implementation of current political aims such as are seen in judgments relating to individual cases. At the same time the work of legal scholars must be seen as a productive activity in that it creates studies, essays and scientific analyses laying the foundations for legal or, rather, universal human culture.[114] These activities build a bridge between legal theory and legal practice in the interest of the more effective realisation of social values. This, translated into procedural law, means simplifying and accelerating procedure, increasing both its effectiveness and its closeness to social expectations.

[112] Kengyel, Miklós: Magyar Polgári Eljárásjog 2008 p. 76., «Ne eat iudex ultra petita partium.»
[113] Hámori, Vilmos op. cit. p. 619.
[114] Szabadfalvi József: Viszony az elődökhöz [Relations to Predecessors], Világosság 'Clarity' Journal, 2004/4 pp. 5-21., See also Horvath, Barna Bevezetés a jogtudományba (Introduction to Jurisprudence), Szeged, Szeged Városi Nyomda és Könyvkiadó (Szeged Town Publisher), 1932.

The Human Rights Council and the Universal Periodic Review: Is it more than a public relations exercise?

KOMANOVICS, ADRIENNE

> *"Even if he can vote to choose his rulers, a young man with AIDS who cannot read or write and lives on the brink of starvation is not truly free. Equally, even if she earns enough to live, a woman who lives in the shadow of daily violence and has no say in how her country is run is not truly free. Larger freedom implies that men and women everywhere have the right to be governed by their own consent, under law, in a society where all individuals can, without discrimination or retribution, speak, worship and associate freely. They must also be free from want — so that the death sentences of extreme poverty and infectious disease are lifted from their lives — and free from fear — so that their lives and livelihoods are not ripped apart by violence and war."*[1]

ABSTRACT *The creation of the Human Rights Council in 2006 was a major step towards the promotion of human rights in terms of the changes introduced in the appointment of the Council as well as its broad mandate, including the Universal Periodic Review (UPR), an innovative system for assessing the human rights records of all UN Member States. Nevertheless, the efforts to overcome the deficiencies of the Commission on Human rights by the newly established Council depend primarily on the attitudes of Member States. The high visibility of the mechanism has shed light on the apparently political nature of the process, such as the active participation of "friendly States", or the politicisation of the recommendations. Whereas the UPR has genuinely helped encourage countries of all development levels to improve human rights, the relatively weak implementation mechanism means that no consequences*

[1] Kofi, Annan: Larger Freedom: Towards Security Development and Human Rights for All', Report of the Secretary General of the United Nations, September 2005. Doc A/59/2005, paragraph 15.

beyond embarrassment have been developed to enforce the implementation of recommendations.

1. Introduction

The promotion and protection of human rights is one of the fundamental aims of the United Nations. Several methods have been developed in the UN to address human rights challenges, including the creation of so-called Charter-based and treaty-based bodies. The main difference between them is that, whilst the Charter-based bodies owe their establishment to provisions contained in the Charter of the United Nations, the latter were created by provisions contained in a specific legal instrument. Whereas the Charter-based bodies hold broad human rights mandates, including mechanisms to address either specific country situations or thematic issues[2] in all parts of the world, as well as the novel Universal Periodic Review (UPR), the powers of the treaty-bodies are limited insofar as the scope of their mandate is restricted to States parties to the specific human rights instrument which provided for their creation and to the catalogue of rights listed therein.

In line with our chosen field of research, further examination will be restricted to Charter-based bodies, more exactly to the Human Rights Council (HRC). The Council, an inter-governmental body within the UN system made up of 47 States, was created by the UN General Assembly in 2006[3] with the main purpose of addressing situations of human rights violations and making recommendations concerning these. The Council has replaced the Commission on Human Rights, a subsidiary body of the Economic and Social Council of the UN, set up in 1946. Whilst the Commission undoubtedly achieved a great deal in standard-setting and also addressed some of the most important political issues, such as colonialism, apartheid, racial discrimination and women's rights, in its last years it had to face allegations of politicisation, selectivity and the use

[2] Thematic special procedures are mandated to investigate the situation of human rights in all parts of the world, irrespective of whether a particular government is a party to any of the relevant human rights treaties. In the case of country mandates, mandate-holders are called upon to take full account of all human rights (civil, cultural, economic, political and social).

[3] UN General Assembly, resolution A/RES/60/251, March 15, 2006. Four States voted against (the USA, Israel, the Marshall Islands and Palau); three abstained (Iran, Venezuela, Belarus). See Terlingen, Yvonne: The Human Rights Council: A New Era in UN Human Rights Work? In: Ethics & International Affairs; 2007, Vol. 21 Issue 2, pp. 167-178, at p. 168.

of double-standards. The Council[4] was intended to offer a fresh start to international human rights protection.[5]

Nevertheless, a large degree of continuity was retained by the preservation of the 1235 and 1503 procedures, which are regarded as one of the major contributions of the Commission to the protection of human rights.[6] In addition, a mechanism named the Universal Periodic Review (UPR) was introduced with a view to assessing the human rights records of all States.[7]

The objective of this paper is to give a critical assessment of the UPR, a mechanism set up to complement the work done by treaty bodies. The Review of Hungary, which took place in May 2011, and was closed by the adoption of the outcome document in September 2011, will serve as an illustration of the process. Statistical data provided by various UN and NGO sources will be used to help in determining the effectiveness of the UPR in encouraging human rights reforms. Both the achievements and the shortcomings of the mechanism will be addressed. Finally, the new modalities to be applied in the second cycle of the UPR (2012-2016) will be analysed.[8]

[4] UN General Assembly, resolution A/RES/60/251, March 15, 2006. Four States voted against (the USA, Israel, the Marshall Islands and Palau); three abstained (Iran, Venezuela, Belarus). See Terlingen op. cit. p. 168.

[5] See e.g. Rahmani-Ocora, Ladan: Giving the Emperor Real Clothes: The UN Human Rights Council. In: Global Governance; 2006, Vol. 12 Issue 1, pp. 15-20; Vengoechea-Barrios, Juliana: The Universal Periodic Review: A New Hope for International Human Rights Law or a Reformulation of Errors of the Past? In: Revista Colombiana de Derecho Internacional; 2008, Issue 12, pp. 101-116; Viégas-Silva, Marisa: El nuevo Consejo de Derechos Humanos de la Organización de las Naciones Unidas: Algunas consideraciones sobre su creación y su primer año de funcionamiento. In: Revista Colombiana de Derecho Internacional; 2008, Issue 13, pp. 35-66; Matiya, Jarvis: Repositioning the international human rights protection system: the UN Human Rights Council. In: Commonwealth Law Bulletin; 2010, Vol. 36 Issue 2, pp. 313-324; Davies, Mathew: Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations in: Alternatives: Global, Local, Political; 2010, Vol. 35 Issue 4, pp. 449-468; Edwards, Martin S. – Scott, Kevin M. – Allen, Susan Hannah – Irvin, Kate: Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission. In: Political Research Quarterly; 2008, Vol. 61 Issue 3, pp. 390-402; Rahmani-Ocora op. cit. p. 16, Redondo, Elvira Domínguez: The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session. In: Chinese Journal of International Law; 2008, Vol. 7 Issue 3, pp. 721-734.

[6] Viégas-Silva op. cit. p. 43 and 52-55. See also Annex to HRC Res. 5/1, II. (Special Procedures) and IV. (Complaint Procedure).

[7] On 18 June 2007, the Council adopted Resolution 5/1 setting out the framework of its functioning [providing elements to guide its future work].

[8] See also Komanovics, Adrienne: Keresztűzben Genfben, avagy Magyarország emberi jogi helyzetének értékelése az ENSZ Emberi Jogi Tanácsában. In: Föld-rész (Nemzetközi és Európai Jogi Szemle), 2011/2 (not yet published).

2. The Universal Periodic Review: General Features

As noted above, the UPR was introduced in 2006 as part of a major reform of the United Nations Human Rights system. During the negotiations of the modalities of the UPR, the term "peer review" was used, although this was later replaced by "periodic review" in order to emphasise that the "UPR is not exclusively an intergovernmental process but one which is based on reliable information from a variety of sources".[9]

The objective of the UPR is the promotion of the universality, interdependence and interrelatedness of all human rights.[10] The UPR is, however, not intended to review completely and exhaustively the human rights situation of the States. This is clear from several provisions of HRC Resolution 5/1: the review should not be overly burdensome to the concerned State or to the agenda of the Council, should not be overly long, should not absorb a disproportionate amount of time, human and financial resources, and should not diminish the Council's capacity to respond to urgent human rights situations.[11]

2.1 Basis of the review

The UPR assesses the extent to which governments respect human rights including their obligations as set out in the following, legally binding as well as non-legally binding, documents.

- The Charter of the United Nations;
- The Universal Declaration of Human Rights;
- Human rights instruments to which a country is party (i.e. human rights treaties which have been ratified by the country);
- Voluntary pledges and commitments made by countries (which could include national human rights policies and programmes); and
- International humanitarian law which applies to the country.[12]

[9] Domínguez Redondo op. cit. p. 725.
[10] HRC Resolution 5/1, Annex, Section IB.1.
[11] HRC Resolution 5/1, Annex, Section IB.3, points (h), (i) and (j).
[12] HRC Resolution 5/1, Annex I.A 1-2. – The inclusion of IHL is interesting; e.g. the UK was asked about the overseas deployment of its troops. Domínguez Redondo op. cit. p. 727. See Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland, UN doc. A/HRC/8/25 (2008), paragraph 36. – The Council recognised its complementary nature to human rights law. See also Françoise Hampson and Ibrahim Salama: Working paper on the relationship between human rights law and international humanitarian law. E/CN.4/Sub.2/2005/14

2.2 Preparagraphtions for the review (Phase 1)

Since the Council had to establish a clear difference between the reporting mechanisms of human rights treaty bodies and the UPR,[13] the UPR is not exclusively based on national reports but complemented by other reliable information submitted by other relevant stakeholders. Thus, the review is based on the following three reports.

First, *the State report* (a maximum of 20 pages) should include information on the consultation process followed in preparing the national report. State reports should describe the normative and institutional framework, the major achievements and challenges in the promotion of human rights, the key national priorities and initiatives to overcome challenges and constraints and improve the human rights situation and, beginning in the second cycle of review in 2012, information on the follow-up to previous reviews. The national report is submitted to the UPR process six weeks prior to review by the UPR Working Group.[14]

Second, *the UN information* is compiled by the Office of the High Commissioner for Human Rights[15] from the documents prepared by the treaty bodies (Human Rights Committee, CESCR, CEDAW, CAT, CRC, etc.),[16] the UN High Commissioner for Refugees, the ILO Committee of Experts, as well as that of the special rapporteurs created under the special procedures. This report should not exceed 10 pages.

Third, *stakeholders*, such as regional intergovernmental organisations (e.g. Council of Europe, OSCE), NGOs, women's groups, national human rights institutions (NHRIs), labour unions, church groups, are invited to send their submission to the Office of the High Commissioner in one of the six official UN languages. The deadline for NGO submissions is usually around 5-6 months in advance of the relevant UPR session. The compilation of stakeholder contributions should not exceed 10 pages.[17]

2.3 The Review by the Working Group of the HRC (Phase 2)

Phase 2, comprising the interactive dialogue and the adoption of the outcome report, is based on the three reports listed above. The Review is prepared by

[13] Paragraph 5(e) UNGA Resolution 60/251 states that "such a mechanism shall complement and not duplicate the work of treaty bodies."

[14] On the content of these reports, see HRC Decision 6/102 of 27 September 2007, A/HRC/DEC/6/102, setting forth a series of guidelines for the States. http://ap.ohchr.org/documents/E/HRC/decisions/A_HRC_DEC_6_102.pdf [31.10.2011.].

[15] http://www.ohchr.org/EN/Pages/WelcomePage.aspx [31.10.2011.].

[16] See the list of abbreviations at footnote 45.

[17] See also Technical guidelines for the submission of stakeholders' information to OHCHR (as of 1 July 2008). http://www.ohchr.org/EN/HRBodies/UPR/Pages/TechnicalGuide.aspx [31.10.2011.].

groups of three States, the so-called *troika*, drawn by lot, who act as rapporteurs. (Each State has a different troika.) The State under review (SuR) may request that one of the Rapporteurs be from its own Regional Group[18] and may also object to a selected Rapporteur; however, *it may do so only once*. The States selected as part of the troika may request to be excused from a particular country review, in which case another State will be selected.[19] There is no set limit to the number of times a Rapporteur may request to be excused.[20]

The troika is mandated to facilitate the interactive dialogue: they cluster questions submitted in advance to the State under review, they are responsible, together with the UPR Secretariat and the SuR, for drafting the outcome report, and they are one of the main targets for NGOs to ensure that their recommendations are integrated. The troika rapporteurs may collate issues and questions for transmission to the State under review no later than 10 days before the review. The State under review may address these questions during its presentation to the UPR Working Group.

The review of all UN Member States takes place in the *UPR Working Group*, composed of the 47 Members of the Council, and chaired by the President of the Council. Each Member of the Council will decide on the composition of its delegation to the UPR Working Group, which may include human rights experts. A key part of the review is the *three-hour interactive dialogue* in the UPR Working Group between the State under review and other UN Member States. The dialogue takes place at the UN Office in Geneva. During the dialogue Member States are able to raise issues or to ask questions of the State under review. NGOs may only attend the dialogue and may not take the floor.[21]

Following the dialogue, a report is compiled by the troika rapporteurs, the UPR Secretariat, and the State under review. The report includes a record of issues brought up for consideration during the dialogue and lists the recommendations made by other States with an indication of which of these enjoy the support of the State under review.

[18] Members of the General Assembly are arranged in regional groups, see e.g. http://www.un.int/wcm/webdav/site/gmun/shared/documents/GA_regionalgrps_Web.pdf [31.10.2011.].

[19] E.g. Pakistan declined to serve on the troika reviewing India (2008), Domínguez Redondo op. cit. p. 727.

[20] On the list of troikas, see http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx [31.10.2011.].

[21] The three hours dedicated to the review start with the statement of the SuR, presenting its report, and answering questions submitted in advance. In the next phase (two hours), Members of the HRC (three minutes to each speaker) and Observer States (two minutes to each speaker) can ask more questions and make recommendations. Accordingly, the average number of speakers can be 40-45. The dialogue is closed by the concluding remarks of the SuR. The SuR's overall speaking time throughout the session of the WG is of 60 minutes.

The outcome report is adopted in two stages. The first stage takes place in the UPR Working Group and the second in the Council plenary session (see Phase 3). The report of the outcome of the review is adopted by consensus in the UPR Working Group at least 48 hours after the interactive dialogue. Thirty minutes are allocated for the adoption of each report in the Working Group. The report summarises the presentation of the SuR, the issues and questions raised, together with the responses, as well as a list of recommendations. The reviewed State may indicate which recommendations it supports, and these will be identified as such in the report. Other recommendations will be noted in the report. In practice, however, this is not always the case: in some instances the State under review does not provide a clear answer as to whether it accepts or rejects a given recommendation, or whether it considers specific recommendations "already implemented or in the process of implementation".

2.4 Plenary session of the HRC (Phase 3)

At a subsequent regular session, the Council plenary adopts the final outcome of the review, including further responses from the State under review. Up to one hour is set aside for the adoption of each outcome report. Contrary to the Working Group meetings, relevant stakeholders may participate in the plenary session and can make general comments.[22]

Phases 2 and 3 are summarised in the following flowchart.

[22] The one hour available for the consideration of the UPR is organized as follows: the SuR will have up to 20 minutes, Member States and observer States of the Council will have up to 20 minutes, and, finally, stakeholders will have up to 20 minutes to make general comments. See Eighth Session of the Human Rights Council. Universal Periodic Review Segment (9-13 June 2008), http://www.upr-info.org/IMG/pdf/NV-UPR.pdf. See also Amnesty International, http://www.amnesty.org/en/library/asset/IOR41/033/2008/en/1478d09a-7dcc-4225-a317-15cdb770b946/ior410332008en.html [31.10.2011.].

Working Group of the Human Rights Council	Interactive Dialogue ▪ Presentation by the State under review ▪ Questions and comments by Member and Observer States ▪ Replies and conclusions by the State under review ↓ Report of the Working Group ▪ Section I: Summary of the interactive dialogue ▪ Section II: Conclusions and/or Recommendations made in the course of the discussion ↓
Plenary session of the Human Rights Council	Consideration of the outcome ▪ Statement by the State under review, including replies to questions or issues that were not sufficiently addressed during the interactive dialogue and/or voluntary commitments of the State concerned. ▪ Views expressed on the outcome by member and observer states ▪ General comments by other stakeholders ↓ Outcome document ▪ Section I: Summary of the proceedings of the review process ▪ Section II: Conclusions and/or recommendations ▪ Section III: Voluntary commitments and pledges made by the State under review

Figure 1. UPR Flowchart: Review by the WG and the HRC plenary session

2.5 Follow-up mechanism

The Follow-up of UPR recommendations is a most significant phase of the whole UPR process. UPR recommendations, more exactly those which have been accepted by the SuR, should be primarily implemented by the State reviewed, and, as appropriate, by other relevant stakeholders. The implementation of recommendations serves as a basis on which the subsequent review is carried out. In cases of persistent non-cooperation with the UPR mechanism, the Council will “address” such situations. This has not yet been the case since the level of cooperation by States in the review process has been good.

Many States have already engaged in the follow-up. These include the development of National Plans of Action including all the accepted UPR recommendations (Bahrain), or the submission to the Council of midterm reports (e.g. Argentina, Bolivia, Colombia, Ecuador, Finland, France, Japan, Mauritius, the Netherlands, Poland, Romania, Switzerland, Ukraine, the UK).[23]

2.6 The role of civil society

Whilst the burden of the implementation of the UPR outcome is principally placed on the State concerned, NGOs have a number of opportunities to contribute and participate in the UPR. They take part in the national consultation prior to the development of the national report; they submit information which serves as a basis of the stakeholders' report; they lobby governmental delegations to raise pertinent human rights issues, to support key recommendations or to ensure that the final outcome adopted adequately reflects key human rights issues in the SuR; they participate in the implementation of the recommendations of the outcome report.[24] Even so, their role is still weak and could be strengthened through more active participation. The opportunity to do so was, however, missed during the 2011 HRC review of the UPR.[25]

3. The Review of Hungary

Hungary has been involved in the HRC in several respects: as a member of the Human Rights Council (2009-2012), it served several times as a troika rapporteur,[26] it has been active in making recommendations to other States[27] and, most importantly for our purposes, Hungary was reviewed on 11 May 2011. France, Gabon and Ukraine were selected as the rapporteurs (the troika)

[23] See http://www.upr-info.org/-Follow-up-.html [31.10.2011.].
[24] See Amnesty International: Questions & Answers on the Universal Periodic Review of the Human Rights Council: Updated June 2008. http://www.amnesty.org/en/library/asset/IOR41/033/2008/en/0adbac45-b14f-47bb-a171-f1f877512532/ior410332008en.pdf [31.10.2011.].
[25] General Assembly Resolution 60/251 requested the Human Rights Council to undergo a review of its work and functioning within five years after its establishment in June 2006. See further below in Chapter 5.
[26] E.g. troika member to *Mauritania* (Ninth Session of the Working Group, November 2010), to *Nauru* (Tenth Session of the Working Group, January–February 2011), to *Latvia* (Eleventh Session of the Working Group, May 2011), to *Swaziland* (Twelfth Session of the Working Group, October 2011). See http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx [31.10.2011.].
[27] The database of the UPR-info is an excellent source of information in this regard, consult http://www.upr-info.org/database/ [31.10.2011.].

to lead the review. This chapter analyses the three reports submitted and the issues raised during the interactive dialogue.[28]

3.1 The three reports

3.1.1 National report

Due to the timescale of the UPR, the first national report could not deal with the provisions of the new constitution. Hungary was in the process of redrafting its constitution at the submission of the report (16 February 2011). The situation is very similar in respect of the highly contentious Media Law, attracting intense criticism from national and international sources.[29] Since these important Acts were passed in April 2011 and the last two months of 2010, respectively, stakeholders did not have the possibility to reflect on the Law.[30]

There are a variety of particular issues which cannot be addressed within the constraints of this paper. Consequently, the areas of concern listed below are addressed in a summary fashion. In its report, Hungary referred to the following *challenges*.

- Segregation and hidden segregation.[31]
- Violence against women. Hungary argued that inserting domestic violence as a *sui generis* crime in the Criminal Code and thereby duplicating the statutory provisions did not seem necessary.[32]

[28] All documents are available on http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CHUSession11.aspx. The webcast is accessible at http://www.un.org/webcast/unhrc/archive.asp?go=110511#am1 [31.10.2011.].

[29] See e.g. the Opinion on the New Constitution of Hungary, adopted by the European Commission for Democracy Through Law (Venice Commission) at its 87th Plenary Session (Venice, 17-18 June 2011), http://www.venice.coe.int/docs/2011/CDL-AD%282011%29016-e.pdf, and the Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media, Strasbourg, 25 February 2011. CommDH(2011)10, https://wcd.coe.int/wcd/ViewDoc.jsp?id=1751289 [31.10.2011.].

[30] Civil organizations submitted their contributions in November 2010, i.e. six months before the review actually took place. The Hungarian media legislation, consisting of Act CIV of 2010 on the freedom of the press and the fundamental rules regarding media content (the "Press and Media Act", passed 9 November 2010), and Act CLXXXV of 2010 on media services and mass media (the "Mass Media Act", passed 21 December 2010), were adopted later. Similarly, the new Constitution was adopted by the Hungarian Parliament on 18 April 2011 and signed by the President of Hungary on 25 April 2011. The new Constitution shall take effect on 1 January 2012. Other "stakeholder" organizations – CoE bodies – sent even earlier documents – dating from 2008 and 2009.

[31] Paragraphs. 15-16.

- The legal gap in the regulation of homebirth was being dealt with by the drafting of the necessary professional, medical and technical minimum requirements.[33]
- The issue of forced sterilisation: taking into account the recommendations of the CEDAW Committee, the legislation on sterilisation has been amended.[34]
- Clearly, one of the principal issues was the Roma community: the gradual removal of disadvantages concerning them in the fields of economy, employment, culture, health care, living conditions and social services.[35]
- The other principal issue was the poor conditions of detention. The main challenges are overcrowding in detention facilities, the situation of the mentally ill, the use of excessive force and abusive language during arrests and interrogations.[36]
- The chapter describing the new media legislation is silent on the intense reaction which it attracted from the EU and many civil society organizations. Any criticism levelled against the Media Act is perceived by the Hungarian government as an issue "where genuine human rights concerns are often intermingled with political considerations both domestically and outside Hungary".[37]
- The national report indicates the precarious situation of an association known as the Hungarian Guard (Magyar Gárda) committed to extreme nationalism.[38]
- Direct parliamentary representation of minorities in an institutionalised fashion has not yet been achieved, but is expected to come into effect during the next General Election due in 2014.[39]

The reader of the national report cannot be but astonished at *the lack of reference* to other important issues. By way of example, the national report blatantly fails to address the anomalies of the health care system, including the disproportionate territorial distribution of health care facilities, access to the health services, long waiting lists or the so-called 'gratitude money'.[40]

[32] Paragraph 24.
[33] Paragraph 27.
[34] Paragraph 28.
[35] Paragraphs. 38-54.
[36] Paragraphs. 58-70.
[37] Paragraphs. 77-80.
[38] Paragraph 82.
[39] Paragraphs. 85-86.
[40] In Hungarian "hálapénz" (literally, 'gratitude money'), is a symbol of everyday corruption in non-market- based health care. The name itself is misleading, as the money is not always be given after the medical service; in many cases it is used to bribe providers to offer both better and earlier care and services. See e.g. http://www.economist.com/node/10553357 [31.10.2011.].

Similarly, the controversies surrounding the unilateral takeover of private pension funds are omitted.[41]

On a positive note, Hungary indicated its willingness to uphold a standing invitation for mandate holders of human rights special procedures, and stated that it was keeping the deadlines with respect to the submission of periodic reports to the UN human rights treaty bodies. In addition, Hungary made a commitment to ratify the Optional Protocol to CAT.[42]

Unfortunately, on factual grounds we simply cannot agree with the Hungarian government's contention on the timely submission of national reports. Hungary is and has been late with the submission of several periodic reports. For example, the fifth periodic report under ICCPR was due in April 2007, but was submitted only in March 2009, the combined seventh and eighth report under CEDAW was due in September 2010, but submitted only in June 2011, whilst the second periodic State party report under CRC due in November 1998 was delayed by six years and was submitted only in February 2004. Even worse, the twentieth report under CERD was due in January 2008 but has still not been submitted – precisely as the combined fourth, fifth and sixth report under ICESCR which was due in June 2009.[43]

Core human rights treaties[44]	Date of ratification or accession	Report / State Party report due on ...	State Party report submitted on ...

[41] Paragraph 97.
[42] Paragraphs. 102-104.
[43] AsofNovember 2011.See http://www.ohchr.org/EN/countries/ENACARegion/Pages/HUIndex.aspx Menu item: Reporting Status [31.10.2011.]
[44] The following abbreviations have been used in this document:

- CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and also denotes the Committee Against Torture
- CED International Convention for the Protection of All Persons from Enforced Disappearance.
- CEDAW Convention on the Elimination of All Forms of Discrimination against Women, and also denotes the Committee on the Elimination of All Forms of Discrimination against Women
- CESCR Committee on Economic, Social and Cultural Rights
- CRC Convention on the Rights of the Child; and also denotes the Committee on the Rights of the Child
- CRPD Convention on the Rights of Persons with Disabilities
- HRC Human Rights Council
- ICCPR International Covenant on Civil and Political Rights

ICERD	4 May 1967	20th report → 4 Jan 2008	Not yet submitted
		19th report →4 Jan 2006	Not yet submitted
		18th report → 4 Jan 2004	Not yet submitted
		Combined 14th, 15th, 16th and 17th report → 4 Jan 1996	28 Jan 2002
ICESCR	17 Jan 1974	Combined 4th, 5th and 6th report → 30 June 2009	Not yet submitted
		3rd report → 30 June 1994	29 Sept 2005
OP-ICESCR	Not a Party	—	—
ICCPR	17 Jan 1974	6th report → 29 October 2014	Not yet due
		5th report → 1 April 2007	16 March 2009
ICCPR-OP 1	7 Sep 1988	Not relevant (individual communications)	
ICCPR-OP 2	24 Feb 1994	According to Article 3, the States Parties to this Protocol shall include in the reports they submit to the Human Rights Committee information on the measures that they have adopted to give effect to the present Protocol.	
CEDAW	22 Dec 1980	Combined 7th and 8th report → 3 Sep 2010	3 June 2011

- ICCPR-OP 1 Optional Protocol to ICCPR
- ICCPR-OP 2 Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty
- ICERD International Convention on the Elimination of All Forms of Racial Discrimination
- ICESCR International Covenant on Economic, Social and Cultural Rights
- ICRMW International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- OP-CAT Optional Protocol to CAT
- OP-CEDAW Optional Protocol to CEDAW
- OP-CRC-AC Optional Protocol to CRC on the involvement of children in armed conflict
- OP-CRC-SC Optional Protocol to CRC on the sale of children, child prostitution and child pornography
- OP-CRPD Optional Protocol to CRPD
- OP-ICESCR Optional Protocol to ICESCR

		6th report → 3 Sep 2002	15 June 2006
OP-CEDAW	22 Dec 2000	Not relevant (individual communications)	
CAT	15 Apr 1987	Combined 5th and 6th report → 31 Dec 2010	10 Nov 2010
		4th report → 25 June 2000	16 June 2004
OP-CAT	Not a Party	—	—
CRC	7 Oct 1991	Combined 3rd, 4th and 5th report → 5 May 2012	Not yet due
		2nd report → 5 Nov 1998	17 Feb 2004
		1st report → 5 Nov 1993	28 June 1996
OP-CRC-AC	24 Feb 2010	According to Article 8, each State Party shall include in the reports they submit to the Committee on the Rights of the Child any further information with respect to the implementation of the Protocol.	
OP-CRC-SC	24 Feb 2010	According to Article 12, each State Party shall include in the reports they submit to the Committee on the Rights of the Child any further information with respect to the implementation of the Protocol 1st (comprehensive information) → 24 March 2012	Not yet due
ICRMW	Not a Party	—	
CRPD	20 July 2007	1st report → 3 June 2010	18 Oct 2010
OP-CRPD	20 July 2007	Not relevant (individual communications)	
CED	Not a Party	—	—

Table 1. Hungary's reporting status[45]

[45] See http://www.ohchr.org/EN/countries/ENACARegion/Pages/HUIndex.aspx, Menu item "Reporting Status" [31.10.2011.]. Due to length limits, the table only indicates the last instances of reporting obligations, with the aim of highlighting delays. The term "not relevant" refers to the fact that the instrument (optional protocol) provides for individual communications, thus not requiring periodic reports. Delays in submission are indicated with letters in italic. Abbreviations of the various instruments are listed at the end of this article.

3.1.2 UN Summary Report

As far as *the scope of international obligations*[46] is concerned, Hungary's record is satisfactory. From among the treaties Hungary is *not* a party to, the International Convention for the Protection of All Persons from Enforced Disappearance (CED) is probably less pertinent, whereas the country intends to ratify OP-CAT. However, treaty bodies have encouraged Hungary to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and the Optional Protocol to ICESCR on the competence of the Committee to receive and consider communications submitted by individuals or groups of individuals.

On *legislative and human rights infrastructure*, UN bodies claimed that the direct applicability of ICESCR rights in the national courts are not guaranteed, and were concerned on the lack of a national human rights institution.[47] The major *substantive issues* of concern listed in the UN report are:

- *The situation of women*. The report noted the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and in society, the occupational segregation of women and men in the labour market, the wage gap between women and men, the discrimination in hiring women of childbearing age or mothers with small children, sexual harassment in the workplace, domestic violence and spousal rape and the fact that women continue to be underrepresented in public and private spheres of life.[48]
- *The Roma population*. The problems are: discrimination in respect of education, employment, health and housing, disproportionately high levels of extreme poverty, the segregation of Roma children in schools, the overrepresentation of Roma among prison inmates and the widespread anti-Roma statements by public figures and the media.[49]
- *Persons with disabilities*. The report pointed at the very high percentage of unemployment among them, as well as the lack of an inclusion policy and integration mechanisms for children with disabilities.[50]
- *Migrants, asylum-seekers, refugees*. The report noted the living conditions of asylum-seekers and refugees, the strict administrative detention regime, the problems of integration of refugees and the fact that Hungary does not fully ensure the principle of non-refoulement.[51]

[46] The core international human rights instruments can be accessed on http://www2.ohchr.org/english/law/index.htm#core [31.10.2011.]
[47] Paragraphs. 2 and 3.
[48] Paragraphs. 10-13, 21-32 and 46.
[49] Paragraphs. 30, 41, 43, 48, 55, 58-61.
[50] Paragraphs. 49 and 64.
[51] Paragraphs. 25-28, 68-71.

- *Torture and administration of justice*. Here the report mentioned the alleged ill-treatment by custodial or prison staff and the limited number of investigations carried out in such cases, prison overcrowding, the fact that pre-trial detainees under and over 18 years are accommodated in the same cell, and that a high number of people with *ex officio* defence counsel remain without actual assistance from their attorney in the investigation phase.[52]
- *Social security and adequate standard of living*. The report noted the inadequate level of the net minimum wage and social benefits, the poor mental and physical health status of the population, the inequalities experienced in respect of the health care system and the high suicide and abortion rates.[53]

3.1.3 Stakeholders' Report

The stakeholders' report,[54] to a large extent, reiterates the issues specified in the UN Summary Report. Thus, the Hungarian Helsinki Committee contended that the new Government started to prepare a new Constitution without giving proper reasons as to why it was necessary.[55] The report referred to the rise in serious, sometimes deadly, attacks against the Roma population since 2008, and the inadequate handling of racially motivated crimes.[56] The independent medical examination of persons who claimed to have been ill-treated by officials was not guaranteed and free defence attorneys usually made little effort

[52] Paragraphs. 19-30, 37-38.
[53] Paragraphs. 50, 52, 54-57.
[54] See http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRHUStakeholdersInfoS11.aspx [31.10.2011.]. The following *civil society organizations* made contributions: Amnesty International, Hungarian Helsinki Committee, Human Rights First, Joint Submission 1 (Chance for Children Foundation (CFCF), European Roma Rights Centre (ERRC), Foundation for the Women of Hungary (MONA), Hungarian Association for Persons with Intellectual Disability (ÉFOÉSZ), Hungarian Civil Liberties Union (HCLU), Hungarian Helsinki Committee (HHC), Legal Defence Bureau for National and Ethnic Minorities (NEKI), Minority Rights Group International (MRG), People Opposing Patriarchy (PATENT), The City is For All (AVM)), Joint Submission 2 (The Hungarian Helsinki Committee and Menedék – Hungarian Association for Migrants), Soeurs du Bon Pasteur and the Society for Threatened People. *Other stakeholders* which sent submission to the UN are all linked to the Council of Europe: Advisory Committee on Minorities, Commissioner for Human Rights, Committee for the Prevention of Torture, European Commission against Racism and Intolerance, European Committee of Social Rights and GRECO.
[55] Paragraph 2.
[56] Paragraph 9.

in these underpaid cases.[57] Several incidents against LGBT (Lesbian, Gay, Bi-sexual and Transgender) persons and Jews were classified by the police in the past few years as "common" crimes instead of hate crimes.[58] The Committee on the Prevention of Torture (CPT) of the Council of Europe (CoE) stated that Hungary had not amended the legislation to ensure access to a lawyer as from the very outset of deprivation of liberty, as recommended by CoE CPT in 2005.[59]

The report also highlighted how people with disabilities were hindered in their full enjoyment of the right to vote: polling stations were not accessible for persons with disabilities, election materials were not available in easy-to-read format and the ballot counting committee could not communicate properly with persons with disabilities.[60]

Whereas NGOs rightly pointed out that the Public Service Broadcasting Television and Radio and the National Media and Telecommunication Authority were not independent from the Government with respect to the nomination process and financing,[61] the stakeholders regrettably did not mention the discrimination suffered by women including, *inter alia*, the wage-gap and the marked underrepresentation of women in public and private spheres of life. The only reference to that can be found in Joint Submission 1, where the submitting organisations encourage the Human Rights Council to recommend in its concluding observations that Hungary promotes the breaking down of prejudice against the social equality of genders in the educational system.

3.2 Interactive dialogue[62]

The interactive dialogue took place in May 2011.[63] During the interactive dialogue, forty-eight delegations made oral statements. The Group of East European States, taken together with the Group of West European and other States (WEOG), represented 54.2% of the States which made statements in the course of the dialogue.

[57] Paragraphs. 16 and 33-34.
[58] JS1, paragraph 4.8.
[59] Paragraph 34.
[60] Paragraph 48.
[61] Paragraph 42.
[62] See the Report of the Working Group, available at http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CHUSession11.aspx, or http://www.upr-info.org/IMG/pdf/a_hrc_18_17_hungary_e.pdf [31.10.2011.]
[63] Nine countries (Sweden, Belgium, the Czech Republic, Denmark, Slovenia, Switzerland, the UK, Netherlands and Norway) submitted advance questions to Hungary.

Group of African States	Group of Asian States	Group of Eastern European States	Group of Latin American and Caribbean States	Group of Western European and other States
Algeria Egypt Morocco	India Indonesia Pakistan Iran China Thailand Uzbekistan Republic of Korea Palestine Afghanistan Bangladesh	Russian Federation Slovenia Poland Czech Republic Slovakia Azerbaijan Republic of Moldova Belarus	Ecuador Honduras Brazil Uruguay Mexico Chile Argentine Guatemala	France Switzerland Greece Austria Finland Australia Norway Italy Germany Netherlands Canada USA Belgium Spain Denmark Sweden UK Holy See[64]

Table 2. List of States making oral statements

The initial presentation was delivered by the Minister of State for Social Inclusion at the Ministry of Public Administration and Justice. Similarly, the questions posed were answered solely by him.[65] The concerns raised by other States focused on the issues identified earlier. These included the fact that Hungary had not acceded to CED and ICRMW, the situation of the Roma,[66] the

[64] The Holy See is not a member of the UN but was granted observer status in 1964. In 2004 it was accorded the rights and privileges of participation in the sessions and work of the General Assembly except the right to vote or to put forward candidates in the General Assembly. A/RES/58/314, Participation of the Holy See in the work of the United Nations, 16 July 2004, http://www.undemocracy.com/A-RES-58-314.pdf [31.10.2011.]. For our purposes, I put it into WEOG.

[65] The language skills of the head of delegation were, with respect, not of the highest quality. The answers, which were presented solely by him at the end of the interactive dialogue, were given in Hungarian (!). See the webcast, http://www.un.org/webcast/unhrc/archive.asp?go=110511#am1 [31.10.2011.]. It is highly unusual in the short history of the UPR to use a language other than the working languages of the UN (English, French, Russian, Spanish, Chinese and Arabic). Another exception was Mozambique (with Portuguese), reviewed in the 10th session.

[66] In his answer, the head of the delegation announced the evidently very optimistic "breaking news" (his very own words) that the Government would create 100 thousand jobs for the Roma within 4 years.

lack of a NHRI, domestic violence, migration, prison overcrowding,[67] racially motivated violence, the situation of migrants and asylum-seekers, to name just a few. To our disappointment, notwithstanding the numerous remarks by speakers, in its answer the Government addressed the topic of *gender equality* in the most cursory fashion.

Several countries raised the issue of *the new Constitution*.[68] Pakistan inquired how Hungary intended to build national consensus on it, Slovakia referred to provisions of the new Constitution that Hungarian citizens not residing in Hungary may participate in Parliamentary elections.[69] Germany asked about the Government's plans to seek international expertise regarding the new Constitution.[70] A few countries expressed their hope that the implementation of the newly adopted Constitution would be in accordance with Hungary's international obligations.[71] In its answer, the Hungarian delegation referred to two pillars guaranteeing the compatibility of the Constitution with human rights: firstly, it cited existing constitutional provisions which stipulate that Hungary ensures that Hungarian law is in conformity with international law, secondly, the Constitutional Court was mandated to examine and compare domestic legislation with international agreements for the identification of possible conflicts.[72]

France observed that the new constitution did not explicitly outlaw the death penalty and discrimination on grounds of sexual orientation. The Hungarian delegation explained that the new constitution contained a non-exhaustive list of grounds for discrimination; further, the case-law of the Constitutional Court prohibited discrimination based on sexual orientation. The Hungarian delegation added that, notwithstanding the constitutional protection accorded to the embryo and the foetus, there was no need for passing more stringent legislation on abortion.[73]

Germany, as well as Italy, raised the issue of the *competence of the Constitutional Court*. Hungary argued that these restrictions were due to the serious economic situation, and were of a minor and temporary nature.[74]

Brazil, Austria, Australia, Germany, the Netherlands, the US, Belgium and Mexico expressed concerns regarding *the new media legislation*: they argued that the new media law still contained elements incompatible with international human rights standards and asked if the Government was considering revising

[67] The Hungarian delegation spoke of the target set by the Government to reduce by 39% the occupancy of prisons.
[68] E.g. Ecuador, Pakistan, Slovakia, Brazil, Norway, Germany, Sweden, the UK and the Holy See.
[69] Paragraphs. 38 and 45, respectively.
[70] Paragraph 59.
[71] Ecuador and Norway, paragraphs. 35 and 57 respectively.
[72] See Article Q(2), Articles 24(2)f) and 24(3)c) of the new constitution. Paragraph 78.
[73] Paragraphs. 31, 79 and 80.
[74] Paragraphs. 58, 59 and 84.

the media legislation in the light of those concerns.[75] Norway was concerned about possible restrictions in the freedom of the press by mandatory content requirements and "public morality" standards, whereas Italy was interested in the provisions aimed at guaranteeing the impartiality of the Media Council.[76] The UK asked how independence of the Media Authority and the Media Council was guaranteed.[77] The Hungarian delegation's answer was evasive: they simply reaffirmed the readiness of Hungary to cooperate with international organisations which expressed concerns about the new media legislation,[78] but did not address the substantive issues.

A total of 148 *recommendations* were made, of which 113 were accepted, six rejected (by Hungary), whilst in the case of the remaining 29 recommendations, decisions were postponed[79] until the September 2011 HRC plenary session.[80] Hungary *rejected* acceding to the ICRMW (recommended by Egypt, Argentina, Iran, Guatemala, Algeria), and revoking the condition which requires a minority group to have lived in the county for at least one hundred years in order to be considered a national minority (Russian Federation). The *pending recommendations* related to accession to several international human rights instruments, to the issues of freedom of expression and the media law, gender equality, domestic violence, minorities and asylum-seekers. Norway recommended that Hungary reconsider the relevant provisions of the new constitution in order to ensure keeping access to abortion as a safe and legal option, and to ensure that the same protection and rights apply to every person regardless of their sexual orientation; and to reconcile policies related to ethnic Hungarians abroad with neighbouring countries' primary responsibility for minority protection.[81]

Many of the *recommendations accepted* are relatively weak,[82] requiring a low level of commitment, but this is not unique to this particular country: a great percentage of recommendations formulated during UPR are not clear or specific enough.[83] More robust obligations include accession to OP-CAT and

[75] Paragraphs. 47, 49, 54, 59, 61, 63, 64 and 65.
[76] Paragraphs. 57 and 58.
[77] Paragraph 74.
[78] Paragraph 86.
[79] These recommendations needed more careful examination by the Hungarian authorities.
[80] Approximately 76.4, 4.0 and 19.6 per cent respectively.
[81] Paragraphs. 95.14 and 95.23.
[82] Formulations such as: Hungary is recommended to consider accession to a treaty, continue to revise certain legislation, strengthen its current law, consider adopting a certain law, take steps to ensure, consider the possibility of establishing, intensify efforts to combat, take steps to bring about a change, confirm its commitment to, take all appropriate measures, etc.
[83] Brett, Rachel: A Curate's Egg. UN Human Rights Council: Year 3. 2009, p. 23.

CED, creating a NHRI in accordance with the Paris Principles,[84] adopting measures to combat all forms of discrimination, establishing a plan of action to prevent racist attacks, maintaining the standing invitation to mandate holders of human rights special procedures, eliminating the backlog of reports to the human rights treaty bodies and the responses to thematic questionnaires of HRC Special Procedures, ensuring the implementation in practice of the prohibition of corporal punishment in schools and ensuring that, in detention, minors below 18 should be separagraphted from adults.[85]

3.3 The HRC Plenary Session

According to the report[86] adopted by the plenary, the number of accepted recommendations has grown from 113 to 122, whilst of the pending 29 recommendations 20 were rejected. Thus, of 148 recommendations, Hungary accepted 82.4% (122) and rejected 17.6% (26). With regard to the latter, the delegation pointed out that the suggested course of action in these recommendations had already been completed.

The delegation indicated that the ratification of OP-CAT and CED was in process and expressed the readiness of Hungary to examine accession to OP-ICESCR, whilst emphasising that this would take some length of time. However, Hungary clearly wished to stay out of the ICRMW, arguing that its legislative framework was fully in line with its international and regional obligations.[87] The delegation maintained that, "in the view of the Government", the new media legislation was in conformity with its human rights obligations, but that, nevertheless, Hungary remained ready for dialogue.

[84] Principles relating to the Status of National Institutions (The Paris Principles). General Assembly resolution 48/134 of 20 December 1993, http://www2.ohchr.org/ english/law/parisprinciples.htm [31.10.2011.].

[85] Paragraph 94.

[86] At the time of going to press, only the draft report of the HRC plenary is available. See Report of the Human Rights Council on its eighteenth session. Advance Unedited Version, A/HRC/18/2 (10 October 2011). http://www2.ohchr.org/ english/bodies /hrcouncil/docs/18session/A-HRC-18-2.pdf [31.10.2011.]. The relevant paragraph hgraphs are 594 to 621.

[87] "European countries received many recommendations related to the ratification of the *International Convention on the Protection of All Migrant Workers and Members of their Families* (CMW). However, none agreed to ratify this convention as most governments claimed the rights therein were already enshrined in their legislation and guaranteed by the European Convention on Migrants. States appear to be fearful that opportunities to change migrant policy will be reduced if they ratify the CMW, particularly the implications this may have for being able to remove migrants who lose or leave the employment for which permission to enter the country was granted." Human Rights Monitor Quarterly, 2011/3, http://www.ishr.ch/component /docman/doc_download/1245-uprhrmq32011 [31.10.2011.], p. 12.

Slovakia expressed its worries over the Hungarian legislation granting citizenship to persons living in neighbouring countries without a genuine link to the person concerned. The US contribution related to the improvement of combating trafficking, and its concern about the new constitution, the new media legislation as well as the laws regarding judicial independence. The European Region of the International Lesbian and Gay Federation noted with concern that prejudice and discrimination were widespread against lesbian, gay, bisexual and transgender (LGBT) people, whilst Amnesty International observed that officials often failed to apply the relevant legislation on hate crimes.

In its concluding remarks Hungary argued, in our view incorrectly, that the adoption of the new constitution was preceded by a broad national consultation process.[88] On a more positive note, Hungary expressed its intention to submit a midterm report.[89]

[88] TASZ (Hungarian Civil Liberties Union), argues that the open public debate of the new Constitution was missed completely. The public debate on the Constitution was conducted by two, in their opinion, deceptive tools. The first was the creation of a website (the "Constitution blog") that provided the opportunity for everyone to make his opinion heard on the matter. It was, however, unclear whether the answers were processed, and if yes, how and who was charged with the process, and what impact it was meant to have on the overall process. The second substitute of a real open debate was the 12-question questionnaire. Some of the questions were loosely related to the constitution-writing process; however, others were a populist wish-list. The questionnaire did not cover the important questions that must be answered in a constitution-writing process. The questionnaire also ignored those questions that have already emerged as dilemmas in the ongoing process: e.g. whether the term "God" should be in the Constitution, the separagraphtion of church and the state; the powers of the Constitutional Court. Furthermore, the draft Constitution was submitted to the Parliament within two weeks after the dispatch of the questionnaire, clearly indicating that answers could not have been meaningfully taken into account when finalizing the text. See Hungarian Helsinki Committee, TASZ, Eötvös Károly Policy Institute: Comments on the Process of Framing the New Constitution of Hungary. 10 March 2011, http://tasz.hu/files/tasz/imce/2011/comments_on_the_process_of_framing_the_new_constitution_of_hungary_eki_hclu_hhc.pdf [31.10.2011.], pp. 5-6.

[89] Report of the Human Rights Council on its eighteenth session. Advance Unedited Version, A/HRC/18/2 (10 October 2011), http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-2.pdf [31.10.2011.], paragraphs. 594 to 621.

4. Evaluation of the first UPR cycle[90]

The UPR can boast of 100 percent participation by States, which is a great achievement when compared with the reporting obligations of States to treaty bodies. Further, the UPR covers all UN members, thereby providing a worldwide scrutiny of human rights protection.

During the interactive dialogue, most States were represented by high-level delegations, ranging from 2 (e.g. Micronesia, Fiji, Saint Lucia) to 35 representatives in the case of the US, and 37 in the case of Kuwait. For the most part, States under review responded with scripted answers. Whereas States in general had one member who answered all questions (including Belarus, Austria, Hungary and Belgium), some delegations ensured that representatives with the most relevant expertise on the subject answered questions (e.g. Armenia, Laos, Georgia, Australia, Latvia). The number of States submitting written questions in advance remained low.

States making the highest number of recommendations include Canada (649), Mexico (537), Brazil (480), Algeria (475) and France (466 recommendations). Overall, Western States formulate the majority of recommendations. Whereas the top five recommending States include only one European State, an analysis of the whole list reveals an over-representation of our continent: of the top fifteen recommending States ten are European, whereas it is 14 from the top thirty.

On the receiving end, we can find the United States (receiving 280 recommendations), Iran (212), Iraq (179), Kyrgyzstan (175) and Viet Nam (172).[91] Obviously, the length of speakers' list remains largely dependent upon the profile of the State examined: countries such as the US, Iraq or Iran attract great interest, whereas smaller countries (e.g. Andorra, Finland, the Czech

[90] The statistics in this chapter are based on the following sources: Human Rights Monitor Quarterly, accessed on http://www.ishr.ch/quarterly and http://www.ishr.ch/quarterly/previous-editions [31.10.2011.]; as well as the website of UPR-Info, a non-profit and non-governmental organisation based in Geneva, Switzerland, http://www.upr-info.org/database/statistics/ [31.10.2011.] This website contains the accumulated data of sessions 1 to 9.

[91] L. http://www.upr-info.org/database/statistics/, menu item "State under Review" [31.10.2011.] – Note on the actual number of recommendations. "While some Working Group reports listed recommendations individually followed by the State who proposed the recommendation, other Working Group reports clustered similar recommendations by several States into a single item, and some reports used a mix of these two systems. ... With such inconsistent formatting of the reports, the total number of recommendations (and the number accepted, rejected, or otherwise) remains a rather rough tool for a comparison of State reviews." Human Rights Monitor Quarterly, July 2010, pp. 21-22.

Republic) are faced with limited participation.[92] In addition, there is a clearly discernible trend towards increased participation of States belonging to the same regional group as the SuR.

Sessions inevitably reflect the *political nature* of the review, with several politically charged recommendations. Bilateral relations are exposed, such as the display of the long-standing tensions between Armenia and Azerbaijan, and Turkey and Cyprus in the 8th session, or between Georgia and the Russian Federation[93] in the 10th session. Politicisation is also discernible by the active participation of "friendly States". Such States make supportive statements, praising the areas of progress or simply encouraging the continuation of measures already undertaken by the State under review, thus filling the time with favourable comments and, consequently, taking the time away from making valid criticism.

The top five issues raised during the dialogue were ratification of or accession to a given international instruments (2709), women's rights (2495), rights of the child (2222), torture (1141), and justice (1089).[94]

As far as *NGO engagement* is concerned, whereas international NGOs actively contribute to the stakeholder compilation, in several cases there was a worrying absence of *local* stakeholder information (e.g. Libya and Mauritania, 9th session). NGO contribution varied to a great extent depending on the SuR. The UPR manifests wide disparities in the level of engagement by NGOs, with the US attracting a record 103 submissions, whilst small countries, such as San Marino, Grenada, received just three.

Regrettably, numerous States tend to avoid or completely ignore contentious questions. In a similar vein, it is common that States provide no justification when a recommendation is rejected. If they do provide, States under review have cited a great array of *explanations for not accepting recommendations*. Thus: the right invoked is not an internationally recognised human right; the recommendations are inaccurate and/or factually incorrect; or they are "either inapplicable or irrelevant". Quite often, States under review consider many recommendations as "already implemented" or "in the process of

[92] It was no surprise that, during the review of the US many States on the speakers' list were unable to take the floor due to high demand – 80 States had signed up to participate, but only 56 were able to speak. By contrast, a lack of strong interest in the reviews of Andorra, the Marshall Islands, and Micronesia, caused these reviews to end one hour short of the allocated three hours. HRMQ January 2011, p. 9. Nevertheless, the author of this article was surprised that Ukraine received only 44, the UK 35, and Indonesia merely 13 recommendations.

[93] Georgia provides a very interesting example in this regard, see the final outcome, especially paragraphs. 25 and 32, as well as footnotes 1 and 2. See http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/118/21/PDF/G1111821.pdf?OpenElementor http://www.upr-info.org/IMG/pdf/a_hrc_17_11_georgia_e.pdf [31.10.2011.]

[94] The order presumably remains the same by the end of the first cycle. See. http://www.upr-info.org/database/statistics/, menu item "Issue" [31.10.2011.]

implementation". Other excuses included those related to cultural relativism,[95] unfavourable public opinion, and lack of financial resources. Frequently, States reject recommendations in blatant contradiction of their international legal obligations. Thus, Qatar, Gambia, Kuwait and Guinea-Bissau rejected several recommendations that contradict international human rights standards, particularly in the areas of women's rights.

Some States based their rejection on the untenable argument that domestic law took precedence over international obligations, in clear disregard of obligations under the Vienna Convention on the Law of Treaties.[96] Thus, numerous recommendations were refused by Myanmar because it considered that they were infringing Myanmar's sovereign rights.[97]

Overall, States generally accept the great majority of recommendations. A remarkable exception is North Korea which refused to accept any of the 161 recommendations provided at its UPR session.[98] On a positive note, various States (e.g. Colombia, Costa Rica or San Marino) have decided to provide detailed substantive justifications for their rejection of recommendations. In many cases, however, States do not to clearly indicate whether a recommendation is accepted or rejected, leading to the unconstructive practice of "noting" a recommendation.

Adoption of draft reports of the UPR Working Group by the HRC plenary is, for the most part, highly procedural with Working Group members only commenting to make small technical edits to draft reports. Yet, the adoption of reports on Egypt and Iran became a forum for debate on procedural and more substantive issues.

The success of any review mechanism depends largely on the *follow-up*: whether States have taken steps to implement the recommendations made to them. According to UPR-Info, several States have actually acceded to human rights treaties, changed their domestic legislation, developed National Plans of Action including all the accepted UPR recommendations, issued invitation for

[95] Liberia and Mauritania attributed their reservations to CEDAW to Sharia law and defended harmful traditional practices, such as female genital mutilation, as deeply entrenched values. Andorra refused to change its strict abortion policy since the right to life was enshrined in its constitution. Latvia cited the protection of national identity as its reason for promoting Latvian over minority languages, such as Russian. Singapore was blunt in its refusal to ban corporal punishment, claiming it to be necessary to ensure national security and stability.

[96] Article 27 of the Vienna Convention on the Law of Treaties states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[97] Pakistan and Iran also argued similarly. See http://www.upr-info.org/+Myanmar-rejects-22-recommendations+.html and http://www.upr-info.org/IMG/pdf/myanmar_plenary_statement_2011.pdf [31.10.2011.]

[98] http://www.demcoalition.org/pdf/pdf/DCP%202009-2010%20HRC%20Report.pdf [31.10.2011.]

Special Rapporteurs to visit the countries, established national human rights institutions[99] or issued reports on the state of implementation (midterm-reports).[100] However, regional allies predominantly make recommendations that require a low level of commitment by the State under review, which threatens the effectiveness of the UPR.[101] Overall, the Council is not provided with strong means in order to encourage a State to cooperate with the UPR mechanism: paragraph. 38 of HRC Resolution 5/1 simply states that the Council "will address, as appropriate, cases of persistent non-cooperation with the mechanism". As of November 2011, the HRC had not taken any such action.

With the UPR approaching the end of its first cycle, time has come to summarise the 0achievements and the failures of the mechanism.[102] *The achievements* include full coverage of the UN Member States, and the fact that the UPR is not limited to one particular set of human rights, but strives to demonstrate the full picture of the human rights situation in the SuR. Through UPR, the Council has examined country situations that are rarely spotlighted in international forums. The HRC has likewise shed light on human rights concerns in otherwise democratic States with generally strong human rights performance where such issues would otherwise have been overlooked. The three reports on which the review is based bring together different aspects, thus providing a more comprehensive overview of the SuR. Finally, for the first time in the UN system, the Office of the HCHR is producing documents offering a systematic compilation of human rights related information on individual countries. Moreover, the interactive dialogue as well as the adoption of the final report is webcast.

Time constraints can be identified as one of the major *challenges* of the UPR: only a limited number of speakers can take the floor due to the limited speaking time. In addition, this limited time is frequently taken over by the so-called "friendly States" of the State under review, which is thus able to avoid critical assessments.

Another weakness of the UPR is that Troika rapporteurs do not necessarily have the (human rights) skills to carry out the review. Lack of expertise is also manifested by some recommendations formulated by governments, urging or

[99] UPR-Info: Analytical Assessment of the UPR, 2008-2010 (2010), p. 12.

[100] E.g. Argentina, Bahrain, Bolivia, Chile, Colombia, Ecuador, Finland, France, the Netherlands, Romania, Ukraine, the United Kingdom, Switzerland, Japan, Mauritius, Poland, Canada. See http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx, http://www.upr-info.org/+Japan-Mauritius-and-Poland-present+.html and http://www.upr-info.org/+Side-event-on-mid-term-reporting+.html [31.10.2011.].

[101] HRMQ January 2011, p. 10. See also http://www.upr-info.org/-Follow-up-.html [31.10.2011.]

[102] These are excellently compiled in UPR-info: Analytical Assessment of the UPR, 2008-2010 (2010), pp. 13-17 and Human Rights Watch: The 2011 Review of the HRC, upon which the analysis below is based.

advising steps which are inconsistent or contrary to international human rights norms.

Regarding the recommendations, both their quantity and their quality are problematic. For smaller States, the mere number of recommendations can be discouraging. Furthermore, the increasingly large number of recommendations had inevitably affected their quality: as noted earlier, some are contrary to certain human rights standards, whereas several recommendations are too broad or too general, requiring minimal action from the SuR.

The absence of clear responses by some States under review to recommendations, coupled with the not infrequent rejection of recommendations on irrelevant grounds inevitably undermines the UPR's effectiveness.

Finally, some States have a wrong perception of the UPR mechanism and wrongly suppose that the process comes to an end with the adoption of the report by the HRC plenary, and no actual follow-up is planned by them. In fact, this is a misconception of the UPR, although, unfortunately, this may validly occur inasmuch as currently there is no specific mechanism to assess the implementation of recommendations. States should be encouraged to submit midterm reports and to develop plans for implementation.

5. The way forward

In resolution 60/251, the General Assembly required the HRC to review and report on its work and functioning after its first five years.[103] The working group set up for this purpose met for two substantive sessions in October 2010 and February 2011. On 17 June 2011, the Human Rights Council adopted Decision 17/119[104] containing the new UPR modalities for the second cycle (2012-2016). The major innovations are:

- The periodicity of the UPR cycle will be changed to four-and-a-half years, with 42 States reviewed each year. It is not quite clear at the moment how South Sudan, which became the 193rd member of the UN,[105] will be accommodated.
- The order of the review established for the first cycle will be maintained for the second and subsequent cycles with 14 States to be reviewed per WG session (as compared to 16 in the first cycle). As there will be only 14 States reviewed per session, several States will be moved from their "original" place to the following session.

[103] GA Res. 60/251 at operative paragraph 16.
[104] Decision A/HRC/DEC/17/119, http://www2.ohchr.org/english/bodies/hrcouncil/17session/docs/A-HRC-DEC-17-119.pdf [31.10.2011.]
[105] South Sudan was admitted as a new Member State by the GA on 14 July 2011, A/RES/65/308.

- The issue of time constraints was also addressed. The duration of interactive dialogue will be extended to three hours and thirty minutes. The SuR is given 70 minutes, whereas other States will have 140 minutes.
- List of speakers. In order to ensure the equal participation of all delegations, if necessary, the time per speaker will be reduced to two minutes for each (or even further) to accommodate all speakers. The exact method for drawing up the list of speakers is set out in paragraph 8. Speaking time limits will be strictly enforced, including cutting off the microphones of those speakers who exceed it.
- The guidelines for the drafting of the three reports are slightly modified, with greater emphasis on the implementation of the accepted recommendations and the development of human rights situations in the SuR.

6. Conclusions

By way of conclusion, it should be pointed out that the UPR is not a rigorous technical review of the human rights situation in a country. UPR only provides a general picture of the human rights situation; peer review cannot substitute for the expertise which] treaty bodies and special procedures display.

Having said that, a deeper analysis of the mechanism reveals that the UPR has failed to achieve even this modest goal. The majority of countries acted "as a mutual praise society, misusing the process in order to legitimise human rights abusers, instead of holding them to account."[106] States are not required to indicate clearly which recommendations they accept or reject, nor does the UPR provide for a tangible sanction in case of persistent non-cooperation. In addition, the role of NGOs is still marginalised.

Apparently, without a change in the attitudes of Member States, the Council is in no better position than its predecessor to actually further compliance with human rights. In a similar vein, the UPR's ultimate goal of improving the human rights situation on the ground cannot be achieved without the cooperation of the reviewed States. Even though the UPR has been effective in advancing human rights in the short term, only time will tell whether the Council will be able to overcome the constraints and flaws of the Commission.

[106] UN Watch, A Mutual Praise Society, 2009, at p. 2. Accessible: http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/Mutual%20Praise%20Society.pdf [31.10.2011.]

Punitiveness and fear of crime in Hungary in the past 30 years

KULCSÁR, GABRIELLA

ABSTRACT *When stricter criminal policies are introduced, policy-makers often refer to society's demand for more severe punishment. Are such references really valid? How punitive is Hungarian society and is this related to society's fear of crime? This survey seeks answers to these questions and provides a survey of research carried out before and after the political transition (including related research by the author). The survey revealed that people felt safe in the socialist regime, although obviously at the expense of some limitation of their freedom. The situation changed significantly with the change of regime. Political power was no longer to be feared, but at the same time the situation in terms of crime deteriorated dramatically. People underwent these changes at some cost - on the one hand with an increasing fear of crime, and, on the other hand, by thinking in a more punitive way. Nevertheless, it cannot be stated with any certainty that Hungarian society's demand for punishment to be increased grew immediately following the political transition. By the mid-90s, by approximately 1998, the crime situation had deteriorated sharply and people faced an ever-growing feeling of insecurity and fear. The new millennium brought further changes, and a decline in criminal tendencies was visible not only in Hungary but also across Europe. Surveys carried out in the early 2000s showed that fear of crime had decreased, albeit slightly. This has shown itself in a lower demand for greater punishment. However, the last few years have seen an increase in job insecurity, and the world economic crisis, whose impact has been felt intensively in Hungary due to country-specific problems, has exacerbated the value and moral crisis whose intensity has been fluctuating since the change of regime. It still remains unknown how these new difficulties will harden the radical mentality in connection with the punishment of crime –and there is still the open question of how closely criminal policy will follow public opinion.*

1. Introduction

According to LÁSZLÓ KORINEK[1] and KLAUS BOERS[2], the system of attitudes toward crime is composed of social and personal elements. Social elements include the judgement of crime and public security, penal policy, the willingness to report a crime and confidence in criminal investigation and

jurisdiction, whilst personal elements include victimisation, personal risk assessment, fear of crime and avoidance behaviour. It is essential for politicians and other professionals who deal with criminality to be aware of people's attitudes, although the opinions, dispositions, fears and feelings of people in connection with crime have become the object of scientific research in Hungary only in recent years. In order to show the development curve of this process, it seems important to examine not only those surveys carried out after the political transition, but to return to the beginning and start from a summary of the surveys carried out in the 1980s, which are milestones of research into latency and attitudes toward crime.[3]

2. Surveys carried out prior to the political transition

In the 1980s the first significant research into latent crime, which also covered the system of attitudes toward crime, was a survey led by LÁSZLÓ KORINEK in 1982-83. The survey itself was limited to one county (Baranya), and used a mail, self-survey questionnaire. This was based on models used in Baden-Württemberg and Texas, where surveys concerning the same field were carried out concurrently with the survey in Hungary,[4] although, naturally, the

[1] Korinek, László: Félelem a bűnözéstől. Közgazdasági és Jogi Könyvkiadó, Budapest, 1995 p. 87.

[2] Boers, Klaus: Crime, fear of crime and the operation of crime control in the light of victim surveys and other empirical studies. Council of Europe, Strasbourg, 7 Oktober 2003 Cited by: Lévay, Miklós: A bűnözéssel, a bűnözéstől való félelemmel és a bűnözéssel szembeni fellépéssel kapcsolatos nézetek alakító tényezői – ahogy azt az Európa Tanács 22. Kriminológiai Tudományos Konferenciájának előadói látják. In: Korinek, László – Kőhalmi, László – Herke, Csongor (Ed.): Emlékkönyv Ferencz Zoltán Egyetemi Adjunktus halálának 20. Évfordulójára. Studia Iuridica Auctoritate Universitatis Pécs Publicata, Pécs, 2004 pp. 199-203.

[3] There was some research undertaken before the '80s concerning people's attitudes towards criminality, criminal policy and sentencing, such as one conducted in 1976-77 by the Hungarian Academy of Sciences, another carried out by András Sajó, which aimed at revealing the legal awareness of the population and a survey by József Vígh and István Tauber in 1978. Cited by: Vókó, György: A közvélemény a büntető törvényekről és a bűnözés elleni harcról. Ügyészségi Értesítő 1985/4. pp. 53-57.

[4] On the comparison of the Hungarian, German and American findings see: Korinek, László – Arnold, Harald: Victimisation, Attitudes Towards Crime and Related Issues: Comparative Research Results from Hungary. In: Kaiser, Günther – Kury, Helmut –

questionnaire under discussion was tailored to conditions in Hungary. Out of the 3,600 questionnaires sent by post, 2,448 produced information which could be assessed and processed.[5] The survey attempted to collect data on latent criminality, not only by asking persons who had fallen victim to a crime, but also by asking about criminal acts occurring in the respondents' field of acquaintance. Hence, it was a mixed victim-respondent inquiry. KORINEK came to certain conclusions concerning the system of attitudes of the population in comparison with the West German and American findings: the Hungarian population could be characterised by a relatively strong feeling of safety. According to KORINEK, this might stem from a myth of invulnerability according to which many people think that they cannot fall victim to any kind of impact, be it a crime or a natural disaster, and consequently they do nothing to protect themselves. However, the relatively high level of public safety typical of socialist countries may also have contributed to the high level of a feeling of security. In reply to one of the questions aimed at revealing the attitude toward crime and which asked about the methods of crime prevention, the respondents found decreasing alcohol consumption to be the most appropriate in addition to increasing the severity of punishment and improving family upbringing. As regards ideas of penal policy, 93.2% of the respondents considered the death penalty to be necessary in serious cases, 35.5% wanted to have all persons released from prison placed under supervision and 60.5% approved release from prison before serving the full term of imprisonment. Interestingly, among the functions of prison, re-socialisation was considered to be important by the majority of respondents.[6] There was a noticeable lack of confidence in probation, and nearly half of the respondents rejected this solution in cases of crimes against both persons and property.[7] Most of the respondents found the work of the police satisfactory, approved of the judicial practice of courts and found the work of prisons in the area of rehabilitation adequate.

In respect of the personal elements of the system of attitudes towards crime, the fear of crime in the Baranya sample was found to be the most realistic in

Albrecht, Hans-Jörg (Ed.): Victims and Criminal Justice. Max Planck Institut, Freiburg, 1991 pp. 100-110.; Korinek, László – Arnold, Harald – Teske, Raymond: Viktimisierung, Verbrechensfurcht und Einstellung zur Sozialkontrolle in Ost und West. Ergebnisse vergleichender Opferbefragungen in der Bundesrepublik Deutschland, den Vereinigten Staaten und Ungarn. In: Kaiser, Günther – Kury, Helmut – Albrecht, Hans-Jörg (Ed.): Kriminologische Forschung in den 80-er Jahren. Max Planck Institut, Freiburg, 1988 pp. 909-942.; Korinek, László – Arnold, Harald: Kriminalitätsbelastung in der Bundesrepublik Deutschland und Ungarn. Ergebnisse einer international vergleichenden Opferbefragung. In: Böhm, Alexander (Ed.): Kriminologie in sozialistischen Ländern. Studienverlag Brockmeyer, Bochum, 1985 pp. 65-125.

[5] Korinek, László: Rejtett bűnözés. Közgazdasági és Jogi Könyvkiadó, Budapest, 1988 pp. 45-55.

[6] Ibid. pp.165-166.

[7] Korinek, László: Félelem a bűnözéstől, p. 126.

comparison with the other two countries (in other words they were most fearful of what in reality threatens them). At the same time, most respondents showed some level of disconnected or diffused anxiety.[8]

In 1987 LÁSZLÓ KORINEK carried out another small-scale survey of victimisation and people's demand for punishment in a sample of 923 respondents in Pécs. The survey was conducted in parallel with a survey carried out by KLAUS SESSAR[9] in Hamburg, which made some comparison of data possible. Punitivity was found to be clearly greater among the inhabitants of Pécs in that 55% of the Hungarians chose punishment over restitution (40% in the German sample) and 36% would have insisted on punishing the perpetrator even if the perpetrator had repaired the harm or damage caused (in Hamburg 21%). Another interesting finding was that, in this respect there was no significant difference between those who had already been victimised and those who had not - in the samples of both Pécs and Hamburg. No strong fear of crime was found in the Pécs sample, with three-quarters of the respondents feeling either almost or totally safe after dark.[10] According to the Hungarian findings from this research, age and related experience are important factors in the feeling of security. These are in addition to gender, as women are usually more afraid than men. Likewise, people living alone, those with few social contacts or who are discontented with their neighbourhood, and those with less education showed greater fear.[11]

In the same year ANDRÁS SAJÓ also conducted a survey using a sample of 1,650 respondents in Budapest, which he compared with the sample of SESSAR in Hamburg. On the basis of the findings concerning punitivity, people living in Budapest also had a stronger demand for punishment than people living in Hamburg (although people in Budapest were less victimised). However, younger respondents were more willing to accept settlement than were older respondents, and the degree of strictness was influenced by the seriousness of the crime. It was typical of the inhabitants of both Budapest and Pécs, especially in the case of ex-victims, that many would not have let the perpetrator off, even after restitution. [12]

[8] Korinek, László: Rejtett bűnözés, pp. 134-152.
[9] Sessar, Klaus – Beurskens, A. – Boers, Klaus: Wiedergutmachung als Konfliktregelungsparadigma? Kriminologisches Journal. 1986/18. pp. 86-104, in Hungarian: Sessar, Klaus: Büntetés helyett az okozott kár jóvátétele? Vizsgálódások e gondolat lakossági fogadtatásáról. Jogtudományi Közlöny. 1987/8. pp. 433-442.
[10] Korinek, László – Arnold, Harald: Victimisation, Attitudes Towards Crime and Related Issues: Comparative Research Results from Hungary. pp. 111-117.
[11] Korinek, László: Félelem a bűnözéstől. p. 40.
[12] Sajó, András: Az áldozattá válás 1986-87. évi vizsgálatának néhány tanulsága. Belügyi Szemle, 1989/11. pp. 17-32.

3. Surveys carried out after the political transition

After the political transition the first survey concerning our theme was carried out by the 'Szonda-Ipsos Media, Advertising, Market and Opinion Research Institute' at the request of the Ministry of the Interior. This was in December 1990. Its theme was to judge the work of the police and the Ministry of the Interior. In respect of punitivity, it was found that 75% of the respondents thought that the rapid increase in crime could be prevented by imposing far more severe punishment.[13]

An opinion poll was carried out by IVÁN MÜNNICH and ANDRÁS VÁG with a representative sample of 1,000 respondents in co-operation with the Társadalomkutatási Informatikai Egyesülés [Association for Social Research and Informatics] in 1991. Its questions addressed the issue of the sense of being threatened including whether respondents were afraid of falling victim to a violent crime or to a crime against property. Women were found to have a greater fear of violent crime, whilst both sexes were found to be afraid of crime against property. Respondents were also asked what they would do in order to reduce crime. 34% would impose more severe punishment; improving living conditions came second with 19%; 17% would increase the size of the police force, and 14% would improve the relationship between the police and civilians. A profound dissatisfaction with the working of the police was also amongst the findings of the research, and 7% of respondents would have re-introduced the death penalty. Further questions based on situational examples concerning the severity of punishment were also asked; the answers revealed that older respondents and respondents with lower education had harder opinions. [14]

In 1992 LÁSZLÓ KORINEK repeated the survey carried out in Baranya County in 1982. The survey was carried out at national level by PÁL DÉRI,[15] but, as the data did not show significant difference from the data of the survey at county level, only the findings of the latter are described here. In the course of the KORINEK survey of 1992, 2,069 persons returned questionnaires containing answers which could be used. The range of topics was as wide as it had been in 1982, but we have restricted the data selected to issues closely linked to our theme.

In the course of analysing the social elements of the system of attitudes toward crime and comparing the results, it was found that the public feeling of security had substantially deteriorated in comparison with the situation in 1982 at both national and local level (some 70% felt that the situation had

[13] Kertész refers to this survey without any detailed citation. Zvekic, Ugljesa – Kertész, Imre: Bűncselekmények áldozatai a rendszerváltás országaiban. UNICRI – BM Kiadó, Róma – Budapest, 2000 p. 97.
[14] Münnich, Iván – Vág, András: Közvélemény, deviancia, bűnözés. In: Pusztai, László (Ed.): Kriminológiai és kriminalisztikai évkönyv. IKVA, Budapest, 1993 pp. 295-310.
[15] Déri, Pál: Bűnözési statisztika és a valóság. In: Belügyi Szemle 1995/10. pp. 27-31.

deteriorated). A further interesting finding was that, despite genuinely deteriorating public safety and increasing crime, the attitudes of the respondents toward crime and punishment or their penal policy perceptions did not change significantly. However, a slight change could be noticed in the answers given to the question concerning the measures people regarded as he most appropriate for crime prevention. Though more severe punishment was named by the majority - just as in 1982 - it appears that, after the political transition, the perception that crime is a social problem had become stronger and so certain social measures were thought to be essential also. (This category used to be the last but had risen to second over ten years). The public attitude toward placing the offender under supervision after release from prison and conditional discharge did not, in practice, change. In relation to the opinion about probation, the survey claimed the existence of a complex process of change in toleration. According to this, on the one hand, total intolerance was gradually decreasing together with the number of those showing disapproval, whilst, on the other hand, there was an increasing group among those who were tolerant who had become so lenient that they would have granted probation even in the most serious cases. There was a marked change in the judgement of the branches of law enforcement. The number of those discontented with the working of the police had become approximately 1.5 times larger, and nearly 60% of the respondents thought that courts were too lenient toward criminals. (In 1982 the rate had been 42.2%). Discontent with rehabilitation in prison was also shown. However, it should be noted that there remained a massive group which regarded the working of all three branches to be satisfactory, even if not good.[16]

In terms of the personal elements in attitudes, a clear deterioration was seen in comparison with the situation before the political transition started. People had a greater fear in 1992 and believed it more likely that they would fall victim to a crime in the future, and the use of security fittings and locking premises became more common.[17]

A further survey with the name ‘Metropolvizsgálat’ [Metropolitan Survey] was conducted in some major cities of the former socialist countries (Berlin, Warsaw, Prague, Budapest, Sofia and St. Petersburg) in the spring of 1993, in the course of which 500 people living in Budapest were interviewed, again under the direction of KORINEK. The survey was initiated by the Research Centre for Criminology of the Institute for Criminalistics of the Humboldt University of Berlin. The survey revealed that the feeling of security of the population had deteriorated markedly after the political transition. People had most fear for their property but also had a fear of physical violence, even though this was less strong. The answers also revealed that 10% of the respondents had already been victims of fraud, theft in the workplace or in the street (also totalling 10%). Stealing car-parts featured often, as did sexual harassment and

[16] Korinek, László: Félelem a bűnözéstől, pp. 108-126.
[17] Ibid. p. 173.

rape committed against women (13%). Hence personal experience seems to have contributed largely to the growth of fear. In addition, communications in the press (mainly on TV and in the radio) together with information gained through personal contacts and acquaintances also had an impact on the feeling of security.[18]

In November and December 1993 ANTAL BŐHM and LENKE SZŐGYI carried out a questionnaire-based research project in co-operation with the Institute of Political Science of the Hungarian Academy of Sciences, commissioned by the Scientific Committee of the Budapest Police Department (BRFK), to determine the opinion of the residents of Budapest about public security. Perhaps due to the relatively small sample (329 respondents), its findings differ from those of similar surveys in a number of respects. The finding was that 80-90% of the respondents had noticed an increase in crime. This was attributed firstly to poverty and job insecurity, and secondly to unemployment. After these came others such as the inflow of foreigners and lenient penalties. These results were quite similar to those of other surveys, but no difference was found in terms of feelings o being threatened of men and women - except in a few specific cases. (Women naturally fear rape more than do men, and they also fear pickpockets, whilst men fear economic crimes and corruption more). Further surprising findings were that middle-aged people thought it more likely that they would fall victim to a crime and these respondents also had a more positive picture of the police.[19]

The survey was repeated by ANTAL BŐHM, ERIKA JUHÁSZ and LENKE SZŐGYI (with minor modifications) in 1995. Then 750 respondents were approached - in Pécs, Nyíregyháza and in three districts of Budapest (Districts 3, 8 and 22).[20] The comparison of the data of the '93 and '95 surveys showed a slight improvement in relation to judging public security, but, even so, the 'grade' was less than satisfactory. This positive trend, despite the steady increase in crime, might be explained by the fact that people had been through the first shock caused by the alarming increase in crime after the political transition. A further contributing factor could be the slowing down of the increase in the crime rate by 1995. Compared with the earlier survey, the only change in the assumptions concerning crime was that the inflow of foreigners had been replaced by the appearance of foreign mafia groups. A further task of the respondents was to decide to what extent they agreed with certain statements. The answers revealed that respondents agreed mostly with the statements that penalties were too lenient, that major thieves could 'get away with it', whilst small-time thieves suffered the consequences, and that the death

[18] Korinek, László: Félelem a bűnözéstől, pp. 40-44.
[19] Bőhm, Antal – Szőgyi, Lenke: Fővárosi állampolgárok a közbiztonságról. Research report, manuscript. 1994 Cited by: Korinek, László: Félelem a bűnözéstől. pp. 46-48.
[20] Bőhm, Antal – Juhász, Erika – Szőgyi, Lenke: A szubjektív biztonságérzet I. rész. Belügyi Szemle 1996/6. pp. 53.

penalty should be re-introduced. These answers showed a high level of punitivity - that is, a strong desire to apply severe punishment. In respect of the fear of crime, deteriorating social and economic circumstances had impaired the feeling of personal security or safety and, at the same time, had increased the fear of crime.[21]

A further survey, dating from Spring 1994 and carried out at the request of the National Police Department (ORFK) and the Rendészeti Vezetőképző és Kutatóintézet [Institute for Police Executive Training and Research] used a representative sample of 1,200 respondents and dealt with the topic of the subjective feeling of security. This was credited to the name of ANDRÁS VÁG, who has already been referred to. The techniques of structured questionnaires and face-to-face interviews were used in this survey. According to the results relating to public security in Hungary as compared to the situation in Europe, 24.9% of respondents were of the opinion that it was slightly worse, 14.5% thought it far worse than in Western Europe, 28.1% thought that the situation was the same, whilst 16.1% thought it slightly better and 1.3% thought it far better. 14.1% could not give an answer. When comparing the situation with East European countries, 43.9% regarded the situation as far better in Hungary, 15.9% as slightly better, 17.9% as the same, 4.8% as slightly worse and 1.3% as far worse. 16.4% did not give an answer. Comparison with the countries of the former Soviet Union was omitted from the survey as there were no relevant comparative data available for analysing the relationship between the answers and the real situation. Although it was not easy to judge at that time, it might be claimed that, in 1994 the situation was indeed slightly better in Hungary than in the rest of Eastern Europe and even in some West European countries. This was, by and large, reflected in the answers, although the data showed a certain level of self-depreciation in respect of West European states. In respect of the domestic situation, respondents found villages to be much safer, regardless of whether they were village or town dwellers - which corresponded to the situation shown by statistics. In relation to the answers concerning security in the eastern and western parts of Hungary, respondents were unequivocally of the opinion that the situation in the western part was better - which again corresponded with the facts of the statistical data. As regards the fear of crime, it was found that women had a markedly greater fear than did men. For example, women are less brave in terms of going out after dark, although the difference was smaller when their fear of property crime was directly questioned – for instance, what were the chances of their falling victim to petty larceny within a year?[22]

[21] Bőhm, Antal – Juhász, Erika – Szőgyi, Lenke: A szubjektív biztonságérzet II. rész. Belügyi Szemle 1996/7-8. pp. 62-73.

[22] Korinek refers to this survey without any detailed citation. Cited by: Korinek, László: Félelem a bűnözéstől. pp. 48-55.

In 1994 a survey was carried out by the Working Committee on Criminology and Criminalistics of the Debrecen Regional Committee of the Hungarian Academy of Sciences led by KATALIN NYÁRI and ILDIKÓ MARTANOSINÉ JESZENYI in Jász-Nagykun-Szolnok County. The survey aimed at revealing the feelings of 2,056 respondents towards public security. On the basis of the answers, approximately half of the respondents found the level of security appropriate at their place of residence, one-third were dissatisfied and 7% found the situation very bad. The survey verified the assumption, already confirmed several times, that differences could be observed between the different age, sex, and occupational groups of the population in respect of the level of the fear of crime. Although differences were not profound, women, unemployed persons, pensioners, and those over 55 were found to have the greater fear.[23]

In 1994 a survey on public security and the police was carried out by the Medián Public Opinion and Market Research Institute at the request of the Ministry of the Interior. The sample of 1,200 respondents was asked by standard questionnaire and by interview. In respect of the fear of crime, the survey found that, although the respondents had less fear of crime than of poverty, illness or war, in comparison with the data from 1991 and 1993, a distinct upward trend could be perceived. At the same time, it was observed that those marking a high level of fear of any of the dangers listed, had a greater than average fear of other sources of danger as well. Therefore they may have had a high level of general anxiety. Through analysing the answers concerning the general level of anxiety and the fear of crime it was found that women and respondents with a low education had a higher level of anxiety and a greater fear of crime than men and respondents with higher qualifications. Oddly enough, the level of anxiety was shown to be higher in villages, whilst the fear of crime was smaller there than in towns. The index of anxiety and of the fear of crime also showed a difference in the case of the different age-groups as the 60+ age-group had the greatest fear of crime, while the level of general anxiety was the highest in the case of the 40-60 group. These differences might be attributed to the fact that, on one hand, the anxiety level is influenced by several factors in addition to the fear of crime; on the other hand the fear of crime does not depend only on the level of general anxiety but on actual personal experience also.[24]

In 1994 a survey led by ILONA GÖRGÉNYI was undertaken in Miskolc on victimisation, and the issue of the fear of crime was also addressed. The small (350) but representative sample showed that those who had been the victim of a

[23] Nyári, Katalin – Martanosiné Jeszenyi, Ildikó: A közbiztonsági közérzet aktuális állapota Jász-Nagykun-Szolnok megyében. Szolnok, 1995 Cited by: Korinek, László: Félelem a bűnözéstől. pp. 55-56.

[24] Medián Közvélemény- és Piackutató Intézet: A rendőrség képe a közvéleményben. Budapest, 1995 pp. 1-46. Cited by: Korinek, László: Félelem a bűnözéstől. pp. 56-59.

criminal offence were more likely to avoid allegedly dangerous places in their neighbourhood after dark than those without such experience.[25]

Between 1992 and 1995 another piece of research was conducted in Miskolc concurrently with research in five other European towns (Plymouth, Salford, Mönchengladbach, Warsaw and Lublin), it focused on the circumstances of burglaries and the impact of burglaries on their victims. The survey showed that long-term traumatic effects and a steady increase in the fear of crime could be caused by falling victim to such a crime. The most negative effects were found in Hungary and Poland. Women, the older and those living in poor financial circumstances were found to have a higher level of fear.[26]

The research conducted by BŐHM, JUHÁSZ and SZŐGYI in 1995 has already been described, and so the next survey is that one carried out by VALÉR DÁNOS and colleagues in May/June 1995. This was a national representative survey with a sample of 1,000 respondents on people's view of the police. In addition to judging public security, which was regarded to be satisfactory at national level and good at local level, factors contributing to the improvement of people's feeling of security were also asked about. The respondents felt that imposing severe punishment on criminals and a professional police force would be the most useful in this respect. Answers concerning the death penalty were rather extreme, which showed that the issue of capital punishment was still an issue of debate for the general public.[27]

In 1995 a small-scale survey led by LÁSZLÓ TIBOR NAGY was carried out on car theft - a great problem at that time. Altogether 201 questionnaires completed by car-owners were processed and in respect of the issues of our concern it was found that respondents judged the situation of public security to be, at best, bearable or, rather, to be bad. They considered court sentences to be too lenient, and, typical of popular feeling, several respondents would have requested the punishment of the perpetrator even if he had voluntarily provided restitution for the damage caused. The first and second most effective means to prevent car theft was imposing stricter punishments and patrolling public places more actively.[28]

A major step forward was taken in 1996, when Hungary took part in the UN survey on victimisation for the first time. The UN had formerly conducted ICVS surveys (International Crime Victim Survey) in 1989 and 1992-94, and so

[25] Görgényi, Ilona: A viktimológia alapkérdései. Osiris, Budapest, 2001 pp. 87-88.
[26] Ibid. pp. 108-110.
[27] Dános, Valér: Rendőrség és közvélemény. In: Domokos, Andrea (Ed.): Kriminológiai közlemények 54. Magyar Kriminológiai Társaság, Budapest, 1996 pp. 9-17.
[28] Nagy, László Tibor: Közvéleménykutatás a gépjárművekkel kapcsolatos vagyon elleni bűncselekményekről. A mediáció esélyei Magyarországon egy empirikus vizsgálat tükrében. In: Irk, Ferenc (Ed.): Kriminológiai és Kriminalisztikai Tanulmányok XXXIII. Országos Kriminológiai és Kriminalisztikai Intézet, Budapest, 1996 pp. 66-85.

Hungary joined the third round in 1996-1997. The survey, conducted through face-to-face interviews based on the UNICRI (United Nations Interregional Crime and Justice Institute) questionnaire, was carried out in Budapest in May/June 1996 (when 756 persons were interviewed), and in Vas County (involving 1,096 persons). Special permission from UNICRI was given, which made it possible to compare the capital with the provinces, where the crime situation was better. The research data yielded by the ICVS enabled international comparison, not only in the area of victimisation but also in the areas of fear of crime and punitivity - the prime concerns of this study. The scale and scope of international comparison can be judged better with the knowledge of the fact that more than 130,000 persons were interviewed during the three rounds of ICVS in most parts of the world.[29]

Obviously, this study is confined to studying the findings concerning attitudes toward crime. In respect of the fear of crime, worrying data were yielded as people living in countries in transition felt themselves least safe on the streets after dark worldwide. Naturally, the assessment is subjective and so this does not mean that the situation was the most dangerous in these countries. The result is rather attributable to trends, or, in other words, to the fact that people had felt a negative change in respect of public security. The feeling of deteriorating security was also supported by the other Hungarian surveys. According to the actual data of the UNICRI survey, 36.6% of people living in Budapest and 26.8% of those living in Vas County avoided certain places after dark. The observation that women and older people had a greater fear was re-confirmed, and, in addition, a higher level of fear was shown by those with a lower education, lower income and without a job.[30]

Questions were also asked in connection with how much punishment people proposed by means of the example of a crime. In this a man of 21 had committed burglary for a second time, stealing a colour TV set. This was important since this case induced less passion in respondents than, for example, a crime against life would have. The fewest respondents in Western Europe suggested imprisonment as adequate punishment, whilst countries in transition came second. In Hungary community service was suggested by most respondents (41.1%), and 32.7% regarded actual imprisonment to be the most appropriate. In respect of this result, Hungary aligned with the answers given in West European countries rather than with those from the countries in transition. A further additional survey was carried out in this connection – namely, the opinions of lay people were compared with those of judges and prosecutors in Hungary. Although the sample was relatively small, it became clear from the answers that there was no big difference between the opinions of the general public and those of the legal profession. It can be highlighted, however, that

[29] Zvekic, Ugljesa – Kertész, Imre: Bűncselekmények áldozatai a rendszerváltás országaiban. pp. 3-39.
[30] Ibid. pp. 87-92.

respondents in Vas County suggested less severe punishment (more suspended sentences and shorter terms of imprisonment), although there were no respondents in Budapest who suggested very severe (more than 3-year) sentences. Such punishment was, in fact, suggested by very few lay respondents.[31]

The findings of the two surveys conducted since then are described here for the sake of compatibility. The fourth ICVS round was carried out in 2000 and the fifth in 2004-2005. A part of the data from the fifth round came from the EU ICS (European Crime and Safety Survey) conducted in parallel. In respect of a fear of crime, an increase was perceived in 2000 (52% of the respondents living in Budapest found it unsafe to walk in the streets after dark)[32] and then a certain decrease could be noticed again (39%). In terms of punitivity, there is a continuing trend that fewer and fewer people regard imprisonment as an adequate form of punishment in the case of property crimes and, accordingly, community service came first in the two most recent surveys also. In respect of this result, Hungary deviates only slightly from the average of the more developed countries of the EU. It is interesting to note, however, that the prison population of Hungary is well above the European average, and so sentencing practice seems to be more severe than public opinion, at least as far as this crime is concerned.[33] The last ICVS, in 2009-2010, was a pilot project with only six participating countries (Canada, the Netherlands, Germany, U.K, Sweden, Denmark), and the aim was to look particularly into the use of mixed mode interviewing (including the internet) to minimise survey costs.[34]

Another survey conducted in 1996 should also be referred to here. It was carried out by ANDREA TÜNDE BARABÁS in order to reveal how open people would be to the introduction of an alternative sanction such as mediation in criminal procedure (mediation was actually introduced as of 1st January 2007). The perpetrators (147 persons) and victims (39 persons) of petty and medium crimes against property and person were interviewed and it was found that nearly all perpetrators showed willingness to restitution, whilst victims were more hesitant, although they did not reject it in theory. Mainly those appeared more open who had already been the victim of a crime and those living in better

[31] Zvekic, Ugljesa – Kertész, Imre: Bűncselekmények áldozatai a rendszerváltás országaiban. pp. 97-108.
[32] Alvazzi del Frate, Anna – Van Kesteren, John: Criminal Victimisation in Urban Europe. Key findings of the 2000 International Crime Victims Survey. UNICRI, Turin, 2004 pp. 19-20.
[33] Van Dijk, Jan – Van Kesteren, John – Smit, Paul, Tilburg University, UNICRI, UNODC: Criminal Victimisation in International Perspective: Key Findings from the 2004-2005 ICVS and EU ICS. Ministry of Justice, WODC, The Hague, 2007 pp. 127-151.
[34] http://62.50.10.34/icvs/About_ICVS_2010/History_and_new_pilot [27. 11. 2011]

financial circumstances.[35] No high level of punitiveness was shown here either, although the sample was so small that it made the sample non-representative.

JÓZSEF KÓ, GYULA FÜLÖP and their colleagues carried out an opinion poll in a representative sample of 971 respondents to reveal public attitude towards crime and crime prevention in the summer of 1997. The methodology applied was face-to-face interviews based on a questionnaire. In respect of this study, rhe most important findings are that most of the population were unaware of the number of crimes committed annually, even though, at the same time, everyone considered the number to be too high - regardless of whether they had under- or over-estimated the number. This simply shows popular feeling, which also revealed itself in the answers given to the question as to how people judged the crime situation in Hungary in comparison with that in other European countries. Whilst international data showed that Hungary belonged to that one-third of countries least tainted with crime, only slightly more than 1% of the people thought the situation to be better than in other countries. Similar answers were given to the questions concerning domestic public safety. Altogether 7-8% assessed the situation to be good or very good, and the greatest deterioration was perceived by people who were living in Budapest, those who had high qualifications and those in older age-brackets. Yet an analysis of the answers concerning the fear of crime revealed that it was not this which people regarded as their main concern: a shortage of money and unemployment were claimed to be far bigger problems. As regards punishment, that sentences were too lenient was the general opinion. Punishment for crimes of violence against the person was expected to be tightened the most severely, whilst opinions about drug-related crimes were the most varied, since some respondents wanted less severe punishment. This can be attributed to the fact that some respondents did not even regard these as crimes. Village residents and those with limited education all had opinions harsher than the average in respect of all crimes. Most criticism directed at the various branches of 'Law and Order' was also related to this and mainly concerned excessively lenient sentencing practice and a lack of severity.[36]

In 1998 TAMÁS KOLOSI and GÁBOR POLONYI carried out a TÁRKI (Social Research Institute) survey covering public opinion on public safety at the request of the Ministry of the Interior. According to the findings relating to their fear of crime, two-thirds of the respondents stated that there were places in their neighbourhood where they were afraid to walk alone after dark, and in terms of

[35] Barabás, Andrea Tünde: A mediáció esélyei Magyarországon egy empirikus vizsgálat tükrében. In: Irk, Ferenc (Ed.): Kriminológiai és Kriminalisztikai Tanulmányok XXXIII. pp. 142-157.

[36] Kó, József: Vélemények a bűnözésről és a bűnmegelőzésről. In: Domokos, Andrea (Ed.). Kriminológiai közlemények 57. Budapest: Magyar Kriminológiai Társaság, Budapest, 1999 pp. 129-191.

punitivity, the findings were also alarming, since 79% of the respondents would punish perpetrators more severely.[37]

In 1999 KLÁRA KEREZSI, GÉZA FINSZTER, JÓZSEF KÓ and GÉZA GOSZTONYI launched a survey at the request of the Ministry of the Interior in three Districts of Budapest (Districts 5, 9 and 22) entitled 'Working out an experimental model of regional crime prevention'. The survey was carried out by analysing documents and statistical data and by interviewing people, but only those findings concerning residents' fear of crime are dealt with in this study. The interviews showed that crime was a serious problem for people living in District 5 but not so serious as to influence their lifestyle significantly. Walking in their neighbourhood did not mean a frightening situation to most of them, although most of them would have liked to see more policemen on the streets. District 9 had been hit by crime to a greater extent and residents seemed to be aware of this. Crime-related problems were far more serious than in District 5 and fear of crime was also found to be greater - mainly among those who had already been victims and especially women aged from 51 to 60 (but not among the oldest!) Crime was regarded as a major problem even in the relatively safe District 22, although fear of crime was a lesser problem there. All of the above correlations could also be seen there, and so people who had already been victims of crime, together with women and people aged 51-60 had most fear, and all three Districts showed a greater fear of crime against the person than against property.[38]

Subsequent to the ICVS survey of 2000 (referred to above) two further TÁRKI surveys relevant to our theme were carried out in 2001 and 2002 for the Hungarian Prime Minister's Office – as part of a comprehensive survey on changes in general public attitudes between 1992 and 2002.

A survey covering popular opinion on public security and capital punishment was carried out in Hungary (with 1,525 respondents), the Czech Republic, Poland and Lithuania in June 2001. The Czechs were found to be the most positive in respect of public security, whilst in the case of Hungarians, who came second, the index turned negative, in that 52% did not regard public security as good. Data in respect of the place of residence were more promising, in that the Czechs were the most contented - again followed by the Hungarians, but this time with a positive index, 73% regarding their neighbourhood as safe. Lithuanians were the least happy in respect of both issues. As regards the death penalty, its supporters were in the majority in all four countries. The majority was the smallest in the Czech Republic (58%), with Hungary again second

[37] Kolosi, Tamás – Polonyi, Gábor: A közbiztonságról. TÁRKI közvélemény-kutatás. Manuscript, 1998 Cited by: Zvekic, Ugljesa – Kertész, Imre: Bűncselekmények áldozatai a rendszerváltás országaiban. p. 90 and p. 97.

[38] Kerezsi, Klára – Finszter, Géza – Kó, József – Gosztonyi, Géza: Nagyvárosi bűnözés. Bűnmegelőzés Budapest V., IX. és XXII. Kerületében. Országos Kriminológiai Intézet – Bíbor Kiadó, Budapest, 2003 pp. 11-16, pp. 82-88, pp. 185-197 and pp. 310-323.

(68%) followed by Poland (72%) and Lithuania (76%) in favour of capital punishment. Researchers studied certain correlations in respect of punitivity in Hungary and found that the younger the people (below 60), the higher their qualifications and the more content they were with the Law and Order situation, the more strongly they disapproved of the death penalty. In contrast, supporters of the death penalty were found in the greatest numbers among people belonging to political extremes (regardless of whether left- or right-wing).[39]

One year later, in June 2002, a further TÁRKI survey was conducted with practically the same questions, although this time with the inclusion of Russia. The results showed that Czechs and Hungarians judged the safety of their home neighbourhood very similarly (some 74% of the answers being positive, closely corresponding to the previous year's data). Hungary led the way in respect of assessing safety over the whole country with, on this occasion, a positive figure of 52%, the ranking order of the other countries being the Czech Republic, Poland, Lithuania and, finally, Russia). In respect of the death penalty, the majority of respondents in all five countries declared their support. The order had not changed with the number of supporters the smallest in the Czech Republic (56.1%), followed by Hungary (59.8%), Lithuania and in Poland (both some 73%) and Russia, where 78.7% of the respondents were in favour of capital punishment. In relation to the Hungarian data, the proportion of supporters had decreased in one year, and concerning the background correlations, it was again clear that the older generation and those living in smaller settlements supported capital punishment more strongly. The proportion of opponents was above average among the wealthiest.[40]

A further survey led by PÁL DÉRI was also carried out in 2002. Its purpose was to survey latent crime by questionnaires in five small regions (Fehérgyarmat, Kunszentmárton, Budapest District 10, Szentendre and Veszprém). Although the sample was relatively small, it was interesting to compare its findings with those of the KORINEK survey of 1982 and the KORINEK and DÉRI survey of 1992. In respect of the fear of crime, a markedly growing trend could be observed between 1982 and 1992 - parallel with the actual growth of crime. However, this trend had eased by 2002 as people adapted themselves to some extent to these new circumstances and became more careful, with the effect that their fear of crime decreased. Unfortunately, no comparison in time was made in respect of punitivity, but, according to the

[39] Gábos, A.ndrás: Elemzések a gazdasági és társadalompolitikai döntések előkészítéséhez 26. TÁRaKI, June, 2001 http://www.tarki.hu/adatbank-h/kutjel/pdf/a053.pdf [26. 03 2010] pp. 31-34.

[40] Bernát, Anikó: Elemzések a gazdasági és társadalompolitikai döntések előkészítéséhez 38. TÁRKI, June, 2002 http://www.tarki.hu/adatbank-h/kutjel/pdf/a102.pdf [27. 11. 2011] pp. 40-43.

data of 2002, the majority of people named leniency in the law and in sentencing to be the cause of the higher crime rate.[41]

The first large scale (10,000 respondents) victim survey was conducted in Hungary in 2003-2004 by the National Institute of Criminology. It was again found that Hungarians regarded public safety as being worse than it was in reality. This, as already mentioned, is due to the fact that Hungary, although belonging to the safest one-third of the countries in Europe, nevertheless had a majority of its population who believed that the country was one of the ten most dangerous in Europe. At the same time the number of those considering the situation to be clearly bad had decreased when compared to the earlier surveys, whilst the number of those judging the situation satisfactory had increased (between 50% and 60% in 2002-2003). The proportion of those judging the situation good was 14%, which corresponds to the findings of earlier surveys. The phenomenon of problem-distancing,[42] according to which everybody judged their own neighbourhood as being safer, could be seen again. However, it should be added that, when questions were asked concerning the country's most serious problems, it was mainly difficulties with earning a living which took precedence over crime (as experienced with other surveys also). In order to improve public safety, most people would like to see a greater police presence on the streets. However, widening the powers of the police, tougher police responses (ca. 11%), the improved administration of justice and more severe laws (ca. 10%) were also mentioned. All of these point n a more repressive direction.[43]

In relation to the fear of crime, the phenomena already known were found again. People had a greater fear at night than during the day; people living in the capital regarded their neighbourhood as least safe at night (48% felt themselves safe, while this proportion could even reach 78% in the country); women had a greater fear than men.[44] Certain correlations were revealed by research in respect of persons who had earlier been a victim of crime. Victims judged the rate of crime higher and the security of their neighbourhood worse. Moreover, crime had a bigger impact on their lives and they were more likely to think that they might fall victim to another crime. Asking them to recall the criminal ac induced a variety of emotions in them such as anger, helplessness, anxiety, and

[41] Déri, Pál: Kísérleti felmérések a bűnmegelőzés rendszerének kialakításához. Statisztikai Szemle 2005/1. pp. 45-60.
[42] Korinek, László: További szempontok a magyar rendőrség megítéléséhez. (Hozzászólás Szikinger István és Dános Valér előadásához. In: Domokos, Andrea (Ed.): Kriminológiai közlemények 54.: Magyar Kriminológiai Társaság, Budapest, 1996 pp. 48-49.
[43] Dunavölgyi, Szilveszter: Közvélemény-kutatás a közbiztonságról és a rendőrségről. In: Irk, Ferenc (Ed.): Áldozatok és vélemények. Országos Kriminológiai Intézet, Budapest, 2004 pp. 85-120.
[44] Kó, József : A bűnözéstől való félelem. In: Irk, Ferenc (Ed.): Áldozatok és vélemények. pp. 82-83.

defencelessness - in addition to fear – and even after a period of several years.[45] This also indicates that examining only fear is a simplification of the issue, although it is obviously extremely difficult to reveal the complexity of emotions through commonly used forms of survey.

A further piece of research into crime prevention and crime-related fear (surveying the demand for punishment was not among its purposes), which was led by KLAUS SESSAR and included five European cities, was completed in 2004. The so-called InSec research was carried out in two special districts of each of the following five cities: Amsterdam, Vienna, Cracow, Hamburg and Budapest, so making possible comparisons within and among cities also. The data were obtained in 2001-2002, subsequent to which only supplementary work was performed, and so findings should be analysed accordingly. The methodology applied was many-sided and thorough: in addition to residents' questionnaires, both residents and experts were interviewed and statistical figures and other data were analysed.[46] A detailed comparison of three cities, Cracow, Budapest and Vienna, which have a common history in many respects, was carried out.[47] It was found that, although crime rates were almost the same in all the three cities, residents reacted to this situation differently. Residents in Vienna accepted the appearance of deviance and the recent changes in values with the greatest acquiescence, which might be due to the fact that the inhabitants of this city trusted most in their official institutions - which did not hold for Cracow or Budapest. The negative trends occurring after the political transition were suffered with difficulties in both cities; at the same time, due to the lack of confidence in state organs, people expected no help from them. However, while residents in Cracow actively tried to improve the situation, residents in Budapest showed less initiative in respect of prevention.[48] It is interesting to note that the generally negative atmosphere showed itself in the fact that, although there was a significant difference between the crime rates of

[45] Barabás, Andrea Tünde: Általános viktimológia, látencia. In: Irk, Ferenc (Ed.): Áldozatok és vélemények. pp. 196-197.

[46] Barabás, Andrea Tünde – Irk, Ferenc – Kovács, Róbert: A bűnmegelőzés, a bűnözéstől való félelem. In: Barabás, Andrea Tünde – Irk, Ferenc – Kovács, Róbert (Eds.): Félelem, bűnözés és bűnmegelőzés Európa öt nagyvárosában. Országos Kriminológiai Intézet, Budapest 2005 p. 9.

[47] Vienna and Budapest used to belong to Habsburg territories for centuries and the connection became even closer after the establishment of the Austrian-Hungarian Monarchy. Poland and Hungary are interlocked at several points (among others the well-known strong friendship of the nations can be attributed to this) from a few common monarchs in the Middle Ages to the events after World War II, when both countries became members of the socialist block.

[48] Irk, Ferenc: Városi biztonság, nagyvárosi bűnmegelőzés. In:: Barabás, Andrea Tünde – Irk, Ferenc – Kovács, Róbert (Eds.): Félelem, bűnözés és bűnmegelőzés Európa öt nagyvárosában. pp. 147-176.

the two Districts surveyed in Budapest, the fear of crime was as high or even higher in the District with the better crime situation.[49]

KLÁRA KEREZSI carried out a survey almost concurrently with the third round of ICVS 2004-2005 (described above). This took place in 2005 in a representative sample of 1,200 residents and a sample of 512 prosecution experts. The survey was conducted in connection with the planned entry into force of a new Act on (criminal) mediation procedure as of 1st January 2007 - which actually happened. On this account, Kerezsi asked about people's attitudes towards abiding by the law, opinions about the trends in the crime rate, the duties and operation of criminal justice administration and attitudes towards criminal legal sanctions. It emerged that, despite declining crime rates, people thought crime to be increasing. The number of violent crimes was especially overestimated. A lack of adequate knowledge concerning sentencing practice was also found, in that people believed it to be more lenient than it in fact was. Although a good deal of research had proved the opposite, people, also wrongly, thought that there was a connection between the leniency of sentences and the increase in crime. The finding of the survey concerning the attitude of residents towards punitivity, which nevertheless showed some openness towards restorative justice, might be attributed to this. According to KEREZSI, this openness may be strengthened through the dissemination and widening of knowledge. The concept of restitution was clearly supported in the answers provided by the prosecution experts.[50] Referring to findings of foreign research, Kerezsi adds that people are willing to express punitive attitudes when answering general and abstract questions, but, if they have more information, they can form less simplistic opinions also taking into consideration the more complex nature of the problem. This should always be kept in mind when evaluating surveys concerning punitivity.[51]

In 2007 HELMUT KURY, SASHA LYSOVA, VASILI POKLAD and GABRIELLA KULCSÁR carried out an international joint research project in the Eastern and Western parts of Germany, Russia, Ukraine and Hungary. Within the questionnaire-based research, university students were asked about personal experience and feelings concerning victimisation, fear of crime and punitiveness. The results placed Hungary somewhere in the middle between

[49] Barabás, Andrea Tünde – Irk, Ferenc – Kovács, Róbert: A bűnmegelőzés, a bűnözéstől való félelem. In: Barabás, Andrea Tünde – Irk, Ferenc – Kovács, Róbert (Eds.): Félelem, bűnözés és bűnmegelőzés Európa öt nagyvárosában. pp. 85-95.

[50] Kerezsi, Klára: A közvélemény és a szakemberek a helyreállító igazságszolgáltatásról. Büntetőjogi kodifikáció 2006/2. pp. 9-20.

[51] Ashworth, Andrew – Hough, Mike: Sentencing and the Climate of Opinion. Criminal Law Review, 1996 pp. 776-787, Doob, Anthony N. – Roberts, Julian V.: Public punitiveness and public knowledge of the facts: some Canadian surveys. In: Walker, Nigel – Hough, Mike (Eds.): Public Attitudes to Sentencing. Surveys from Five Countries. Aldershot, Gower. 1988. Cited by: Kerezsi, Klára: A közvélemény és a szakemberek a helyreállító igazságszolgáltatásról, p. 16.

Western and post-Soviet states on the punitivity scale. This is not so surprising, since, even during the socialist era Hungary was already much more willing to open towards the West than the majority of the Eastern bloc. A separate question referred to the attitude towards capital punishment. On the basis of the answers given, the death penalty in Hungary is more heavily supported than in Germany, but less than in Russia or Ukraine where old Soviet 'traditions' still have some effect. The approach to capital punishment totally depends on whether it still exists in a country, or the length of time since its abolition. In addition, political pronouncements and media publicity concerning unusual crimes significantly influence the common attitude.

4. Summary

In the light of the above surveys and of the actual practice of sentencing and criminal policy certain conclusions can be drawn:

Surveys carried out prior to the political transition show that people felt safe in the socialist regime – although obviously at the expense of some limitation of their freedom both in a spiritual sense and in practice. This is shown, *inter alia*, by the fact that in the socialist era judges could impose the death penalty. This became a tool of totalitarianism (although this was more typical of the 'hard dictatorship' of the '50s). Therefore, the fear of crime was not strong, which was in itself related to markedly lower crime rates. It does not mean that people's lives were totally free of fear, but no surveys were (could be) conducted to measure fear of the power of the state.

The situation significantly changed together with the change of regime. Political power did not have to be feared any longer, and people could influence how they were governed - through free elections. At the same time the crime situation dramatically deteriorated. People were unprepared for new types of crime and they could easily be cheated anywhere and at any time by fraudsters who quickly recognised the opportunities hidden in the new situation. Several methods of organised crime flourished, such as organised car theft, 'oil bleaching' (decolourising untaxed fuel oil to sell as (heavily taxed) diesel), the housing mafia and pyramid schemes. People experienced these changes at some cost, and the reactions took the form of an increasing fear of crime or in a highly punitive way of thinking. Nevertheless, it is not so clear that the Hungarian population's demands in respect of punishment grew after the political transition. On the one hand, surveys did indicate that people had regarded the sentencing practice of courts as being too lenient even during the socialist era; on the other hand, the overwhelming majority of people (over 90% according to the survey led by KORINEK) approved of the death penalty. After the change of regime the death penalty was abolished and at the same time it became clear to many citizens that this was the correct way. There are, of course, still a number of people who would like to re-introduce capital

punishment and this opinion gains strength whenever a brutal, violent crime against a person is given wide press coverage.

By approximately 1998, the crime situation was at its worst – as can be seen from residents' surveys. People had increasing feelings of insecurity and fear, which was clearly shown by the ICVS survey of 1996. According to the findings of this international comparative research project, people felt least safe in the countries in transition, including Hungary. Personal feelings of safety are obviously subjective, and there are countries with a worse security situation. However, people always react to trends and the situation certainly was deteriorating in Hungary at that time. It should be added that any growth of fear is often a reaction to a general deterioration of socio-economic circumstances and not merely to an increase in crime. People declared in a number of surveys that they regarded poverty and unemployment as more serious problems than crime, but uncertainty in the area of earning ones livelihood always strengthens extremist opinions and increases the demand for punishment, and this was the case in the second half of the '90s. It is a long-observed phenomenon that, although research may prove the opposite, people relate the growth of crime to lenient laws and sentencing practice. In this case criminal policy was in harmony with public demand and legislation also took a turn for a more repressive direction.

The new millennium brought new changes. The decline of criminal tendencies could be seen not only in Hungary, but across Europe also. Surveys carried out in the early 2000s showed that the fear of crime had slightly decreased, which may have been due to the fact that in a decade people had adapted themselves to the new conditions and recovered from the early shock; the situation had not improved significantly, but fear was eased. This revealed itself also in a decrease in the demand for punishment – something which ICVS surveys also showed. This did not mean a clear turning aside from the repressive direction mentioned (for instance, many would still have liked to re-introduce capital punishment); it was, rather, shown in a greater openness towards the means of restorative justice. Similar changes could also be detected in criminal policy.

Recent years have brought a further increase in uncertainty in terms of earning ones livelihood. The world economic crisis, whose impact could be felt quite heavily in Hungary due to country-specific problems, has exacerbated value and moral crises, whose intensity has been fluctuating since the change of regime. Although no surveys have been conducted to date, popular feeling suggests that extremist opinions concerning the demand for punishment have gained strength yet again. It can only be hoped that sound socio-economic circumstances will be re-created and that, in addition to adequate, short-term crisis management, Hungary will be able to work out long-term strategies, tempering public passion and confirming an open, European way of thinking followed by many even today.

Developing broadband in the European Union: Digital Agenda sand other endeavours of the Commission

MESTER, MÁTÉ

ABSTRACT *Global ICT competition has, in the last decade, entered a new phase. Whilst in the 1990s the European Union was a pioneer in some areas of the sector, this advantage has since disappeared. By creating the conditions for competition, the EU was able to achieve a leading position, and the sector-specific electronic communications regulations, built on liberalisation and harmonisation as proposed by the European Commission, have been a great success over the last two decades and have undoubtedly become a benchmark fostering the common goals of the European Union. Global challenges, however, have significantly changed, and the erstwhile leading position has now disappeared. The European Union lost its ability to initiate market and user trends, so achieving a high level of world leadership and likewise decreasing economic power.*

This negative trend is also recognised by recent European Union strategies and by the European Commission advocating that one of the most important factors of the desired change is the accessibility of superfast broadband networks for more and more Europeans. Accordingly, the Digital Agenda for Europe proposes that every European should have basic broadband by 2013 and broadband with 30Mbps or higher speeds by 2020. In order to achieve these goals, the European Commission initiated a Broadband Package consisting of three reinforcing measures aiming to encourage investment both into fixed and mobile broadband networks.

In the light of the above, the paper analyses the policy tools of the European Commission in encouraging investment into broadband networks. First, the strategic vision and goals behind broadband development are assessed, following which the paper looks into the concrete action plans and measures of the Broadband Package of the European Commission and their expected effects. Finally, in the conclusion attempts are made to evaluate the measures and explore the benefits which they may bring to European operators and users.

1. Introduction – the role and importance of broadband networks

Being the engine of the information society, the evolution of Information and Communication Technology (hereinafter: ICT) sector is highly dependent on borderless megatrends. ICT today is global; consumers and businesses develop and shape cross-border user, service, value chain and technological trends. These trends interact and set the common paths of evolution in the ICT sector and society. This evolution will further accelerate in the future, due to the rapidly growing data and mobility needs of users who must also be supported by converging services and end devices. The increasing choice of full-fledged IP-based applications and emerging machine-to-machine communication demand high capacity from network providers, and, without constantly developing networks, this need cannot be satisfied. Hence broadband networks play a key role in shaping user trends.

Information society and ICT development is mainly determined by the users' information, comfort, entertainment and budgetary needs or preferences, although this is no longer restricted to fixed services. Nowadays mobility and universal connectivity, that is, the facility to connect everywhere and at all times via any device, is a core need of information society users. Divergent user needs generate more and more personalised services and *vice versa* leading to a constant evolution of applications and an increase in data traffic. Intelligent and permanently accessible data services which further generate capacity needs will also be critical in the knowledge-based information society of the future. Presumably, content will remain the core part of these services and business models will continue to be built accordingly. However, those who can provide not only the content, but also the infrastructure conveying it, will be able to deliver personalised services more quickly and more efficiently. In addition to offering personalised services, main service and platform providers will be keen to enter the market for end-devices (e.g. smartphones) and telecommunications infrastructure also.[1]

Superfast, efficient and state-of-the-art fixed and mobile networks are a prerequisite for supplying the increased data traffic. The expansion of optical and other high-speed networks is therefore necessary for additional growth in the ICT sector. Efficiency will be dominant next to speed, allowing network management techniques to develop further. The extent and quality of broadband networks are keys to economic improvement, but investing in these networks puts operators into a very difficult situation, not only in these times of economic crisis. Although installing superfast optical networks requires more resources

[1] See Google's network plans (http://www.businessweek.com/technology/content/feb2010/tc20100211_381119.htm [2011.10.05]) , the Android mobile operating system and the Nexus One smartphone

than do the copper-based, demand is steadily growing, as data traffic increases at a higher rate than penetration. This requires operators to deliver highly data-consuming services with lower revenue due to competition. As result, from an economic point of view, a return on the investment also takes longer for such networks. Building networks further is therefore a very serious business decision for operators who only can and will invest into those areas where they expect returns within a reasonable time.

By contrast, for EU policy-makers and legislators, the social factors important for global competitiveness ignore business interests.[2] According to the European Commission (the Commission), the lack of business opportunities will result in a lack of services, so jeopardising the EU's global competitiveness.[3] It comes as no surprise that both private and public stakeholders currently emphasise the importance of public involvement aiming to encourage broadband investment. Targeted regulation, planning, coordination and decreasing risks are just a few tools which can significantly help market players to invest, so contributing to the take-up of high-speed broadband. Moreover, in order to achieve the common EU targets in time of economic downturn, there are cases where investment is impossible without utilising public and private resources jointly. The next part of the paper introduces these common targets entailing EU and domestic regulation encouraging investment.

2. EU 2020 and the Digital Agenda

At the beginning of the economic crisis, the EU had to face the fact that continuous growth must be set on new foundations. EU policy-makers chose to cope with the crisis by drafting an overarching strategic vision in order to ease short-term downside effects and initiate long-term growth in jobs. Hence came the Europe 2020 strategy for smart, sustainable and inclusive growth (hereinafter: EU 2020 Strategy).[4] This basic document of economic growth set principal targets for 2020. The employment rate of those in the 20-64 age bracket should be 75% and Member States are required to spend 3% of their GDP on research and development. A further goal is to reduce greenhouse gas emissions by 20% and to produce 20% of energy from renewable sources. Early school-leavers should not exceed 10% while those completing tertiary education

[2] European Broadband: investing in digitally driven growth – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Brussels, 20.9.2010, COM(2010) 472 final, p.3.

[3] A Digital Agenda for Europe - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Brussels, 19.05.2010, COM(2010) 245, p.5.

[4] EU 2020 A strategy for smart, sustainable and inclusive growth – Communication from the Commission – Brussels, 3.3.2010, COM(2010) 2020

should exceed 40%. The ICT sector and high-speed broadband networks play a key role in achieving these goals by directly leveraging growth to the economy in general.

Nothing can prove more the significance of smart information society than the fact that the Digital Agenda for Europe (hereinafter: the Digital Agenda) was the first flagship initiative of the EU 2020 Strategy adopted.[5] According to the Digital Agenda the ICT sector is worth €660 billion per year, so providing only 5% of the common GDP but 20% of growth. Nevertheless, the main EU information society indicators are lower than those of the U.S., Japan and South Korea, and clearly the sector's performance is even more important during an economic crisis.

Similar to the interaction of the above user trends, the Commission suggests that the digital economy is self-reinforcing. Attractive content increases the demand for better networks whilst also encouraging new investment, opening the door for innovative services triggering higher take-up. This development may in the long-term lead to an increasing number of jobs.

The Digital Agenda sets concrete common broadband targets for the European ICT sector and the information society. Every European citizen should have basic broadband by 2013 (100% coverage). A more ambitious goal is to give every European access to broadband with 30Mbps or higher speeds by 2020, with 50% of households having access to 100Mbps or higher. This basically means that 'universal broadband' should be available to every European citizen. A solid improvement is needed, even though the internet in 2009 was accessible for an average of 94% of European citizens (although the number was 80% in less-populated areas). The main reason for this is that there is great diversity among Member States as well as areas of high- and low-density population - and remote areas - within the Member States.[6]

Other information society goals which may not be achieved without broadband are also worth mentioning. Besides universal broadband targets, 50% of Europeans should be online, 33% of SMEs should buy or sell online and 20% of electronic commerce should be cross-border by 2015. Concerning digital literacy, 75% of Europeans should use internet regularly and the number of those who never use it must be halved by 2015. The take-up of e-Government services by citizens must reach 50% and the most important services should be available cross-border. Public investment into ICT research and development should also double, according to the Digital Agenda. Finally, by 2020, electronic communications networks may also be utilised to have energy used for lighting reduced by 20%.

Having the goals so clearly listed should mean that they are recognised as so ambitious that they cannot be met without further investment into state-of-the-

[5] A Digital Agenda for Europe: op. cit. p. 4.

[6] Vandystadt, Nathalie: Three initiatives to guarantee broadband for all, EuroPolitics, N°4046/2010, p.1.

art, high capacity broadband networks. This is the reason why the Commission recently became involved in actively encouraging broadband development, launching many initiatives to attract public and private stakeholders to participate in the Digital Agenda. The first initiative was the 'Digital Agenda Stakeholder Day' during which the Commission called for private stakeholders and European citizens to propose action plans which may contribute to the achievement of the Digital Agenda goals.[7] Another was the start of the annual Broadband Workshop where public and private stakeholders were given direct information that could be useful in receiving financial support.[8] Perhaps, however, the most important new event in Brussels in respect of the Digital Agenda is the so-called Digital Assembly, which arranges structured discussions for EU institutions, Member States, private stakeholders and European citizens for taking stock of the goals achieved.[9]

Besides organising such events, more emphasis is now placed by the Commission on monitoring Member States' action implemented to achieve the common Digital Agenda indicators. National action plans and their success are evaluated by the Commission through the new Digital Agenda Scoreboard - accessible online to all. Moreover, high-level representatives, decision-makers and experts visit Member States on a yearly basis under the 'Digital Agenda Going Local' initiative.[10] To summarise, the Commission scrutinises the implementation of the Digital Agenda more stringently than ever before and makes serious efforts to achieve the goals and indicators which it has set. However, this is only one part of the Brussels mechanism of implementation.

After focusing on privatisation and liberalisation in the last two decades, the Commission, and hence EU legislation, is now led by harmonisation, creating a Digital Single Market. In this connection the Commission is clearly trying to further strengthen its powers in respect of policy-making and implementation. Implementing the Digital Agenda and achieving its broadband targets in particular are areas where the Commission envisages a much greater role than before. It is not surprising, therefore, that this topic is now considered as highly important in Brussels. The Commission intends to foster investment into

[7] Stakeholder Day: My big idea for the Digital Agenda http://ec.europa.eu/information_society/events/dae/2010/programme/index_en.htm [2011.10.05.]

[8] European Broadband workshop: http://ec.europa.eu/information_society/newsroom/cf/news-dae.cfm?subject=DAE&section=News&pillar_id=201&action_id=0&page=2 [2011.10.05.]

[9] 1st Digital Agenda Assembly: http://ec.europa.eu/information_society/digital-agenda/daa/index_en.htm [2011.10.05.]

[10] A Digital Agenda for Europe: op. cit. p. 36. and Digital Agenda Scoreboard 2011: http://ec.europa.eu/information_society/digital-agenda/scoreboard/index_en.htm [2011.10.05.]

broadband, either by direct binding measures or through recommendations to Member States and National Regulatory Authorities (hereinafter: NRAs).

3. Measures proposed by the Commission

Initiating a broadband package consisting of three reinforcing measures in September 2011 – that is, only three months after the Digital Agenda was adopted - is a clear sign of the special efforts by the Commission relating to broadband targets.[11] The Communication on European Broadband: investing in digitally driven growth (Broadband Communication), being the first element of the package, is designed to encourage public and private investment into fast and superfast broadband, whilst also showing guidelines on efficiency in investment.

The second measure is the Commission Recommendation on regulated access to Next Generation Access Networks (NGA) setting common principles for NRAs in respect of the imposition of wholesale broadband access obligations (NGA Recommendation).[12]

Whilst the first two measures are intended to lay down basic principles for fixed networks, the third focuses on mobile broadband. This is because the Commission believes that, in order to achieve 100% broadband coverage, a more harmonised approach concerning spectrum management and the freeing-up of certain bands for mobile broadband is necessary. This is even more vital for remote areas where there is no fixed network or where building such networks is economically infeasible. As a result, the Commission also proposed that the European Parliament and the Council adopt a Radio Spectrum Policy Programme (hereinafter: RSPP) for Europe.[13] The next part of the paper introduces these measures in detail.

3.1 Broadband Communication

Whilst elaborating on this document, it must be emphasised that communications from the Commission are not binding on Member States or any other stakeholder. Such documents primarily outline the position and principles of decision-making of the Commission in certain areas. Therefore, communications may envisage the future treatment of particular cases and have

[11] Digital Agenda: Commission outlines measures to deliver fast and ultra-fast broadband in Europe, IP/10/1142, Brussels, 20 September 2010

[12] Commission Recommendation on regulated access to Next Generation Access Networks (NGA), Brussels, 20/09/2010 C(2010) 6223

[13] Proposal for a Decision of the European Parliament and of the Council establishing the first radio spectrum policy programme, Brussels, COM(2010) 471 final - 2010/0252 (COD)

direct influence on national regulatory principles.[14] The purpose of the Broadband communication is to provide guidance for Member States and national authorities on how Digital Agenda broadband targets may be achieved by 2020. According to the Commission, €38-58 billion should be invested to deliver 30 Mbps for every citizen and another €181-268 billion to make 100 Mbps available in 50% of the European households.[15] Today the Broadband Communication summarises how the Commission plans to encourage broadband investments and reduce costs for operators. Apart from that, the Commission calls for Member States to set national broadband targets in line with their domestic market and adopt national strategies for broadband development.

In order to promote investment, the Commission proposed a list of actions in the Broadband Communication. By 2011, in cooperation with the European Central Bank, the Commission should present a proposal on financing and adopt guidelines for regional and local authorities to fully utilise EU funds. By 2012, the Commission plans to review cost reduction practices, for instance, in respect of building and administrative costs, in Member States. Then, by 2013, the Commission should reinforce and rationalise the use of current EU funding for broadband development. Finally, guidance on resources from private public partnerships (PPPs) should also be provided by the Commission with no deadline specified.

The Commission is of the view that national and local measures in the first place should reduce investment costs. Conversely, it suggests that Member States require the installation of new passive infrastructures and in-building wiring during planning. Passive infrastructures are physical cable networks, mainly in placed in ducts, enabling alternative operators to install their cables or wires regardless of the technology used. In addition to this, the Commission suggests making the planning of in-building wiring so that it is capable of transferring data without further modification. The Commission encourages local authorities to require disclosure of the existence and condition of local access infrastructure from operators, and in particular the availability of ducts and other local loop facilities. This would allow alternative operators to deploy fibre networks under the same and equal conditions with the incumbent and share civil engineering costs.

[14] Member States adopt non-binding Council Conclusions on Commission Recommendations. However, these documents are reference points for the Member States' positions and actions concerning a certain topic. For private investors, however, are more depending on a Member State's action plan and funding scheme. Council Conclusions thus are rather important for the checks and balances of EU institutions.

[15] European Broadband: investing in digitally driven growth, p. 6.

Last but not at least, the Commission asks Member States to implement the 2009 regulatory framework[16] as soon as possible – and, in addition, set and review national broadband plans to ensure that they are in line with the common EU targets set by the Digital Agenda. Member States should implement the NGA Recommendation and adopt the an RSPP without delay. The monitoring of NGA deployment will also be strengthened by the Commission in order to obtain a more detailed picture of investment in the EU. Further, the annexes should assist investors by enlisting broadband technologies and their maximum speeds, national broadband targets and Member State expenditure on broadband, whether planned or committed.

In general, the Broadband Communication can be regarded as a good approach towards broadband investment and its constructive proposals should be followed by Member States. However, the reaction of Member States should also be checked. The Council adopted conclusions on the Broadband Communication in December 2010, emphasising that the actions proposed by the Commission are well balanced, supporting almost all of them.[17] The only issue where the Council would like to see a different approach is in respect of national broadband plans, as Member States prefer the Commission only to help in reviewing them rather than actually carry out the review itself.[18]

The Broadband Communication does not satisfy all the needs of citizens, according to the European Parliament, the other key institution in Brussels and which adopted a resolution on the issue in July 2011. Contrary to the Council, this document supplements and further specifies some actions proposed by the Commission. It also proposes several intermediate benchmarks both at national and EU level for the period until 2020. The European Parliament underlines that

[16] 1. Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office; 2. Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337/11, 18.12.2009.); 3. Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ L 337/27, 18.12.2009.)

[17] European Broadband: investing in digitally driven growth - Council Conclusions, 16836/10, Brussels, 25 November 2010

[18] European Broadband: investing in digitally driven growth - Council Conclusions, op. cit. point 5. b), p. 7.

neither the Digital Agenda nor the Broadband Communication defines the speed of basic broadband.[19] Consequently, under basic broadband, the European Parliament proposes that 2Mbps should be made available for 100% of European citizens by 2013 in remote areas but higher everywhere else. It also proposes setting an intermediate benchmark for 2015 to make the 100 Mbps superfast broadband accessible for 15% of citizens. Although this resolution points out where the Commission should fine-tune the action, the Communication could still be regarded as a major step forward. Its strength lies in cleverly balancing actions (without directly touching upon Member States' competence) and in setting up a clear agenda for the Commission's administration.

The first outcome of this clear agenda is the Commission's recent proposal aiming to involve more private funds for infrastructure investments, including broadband, in cooperation with the European Investment Bank (EIB). Public consultation was launched by the Commission in early 2011 on the EU 2020 Project Bond initiative, by which EU support could be given for project companies providing financial background for investment by issuing bonds.[20] The Commission would take a key role together with the EIB by sharing the risks with companies enabling them to provide guarantees or loans to support the bonds, and so no issuance will be required by Member States or by the EIB alone. Based on the conclusion of the public consultation the Commission plans the rapid adoption of a legislative proposal in order to have the bonds in the market as rapidly as possible.

3.2 NGA Recommendation

The second measure of the Broadband Package is the NGA Recommendation, which has a different legal status from a Communication. Recommendations may be issued by the Commission according to the 2009 regulatory framework. Such documents are not binding, but NRAs must take them into account when carrying out market analyses.[21] In the NGA Recommendation on regulated access to new generation networks the Commission thus asks Member States to ensure that NRAs take the principles set by the recommendation into account. In case an NRA decides to deviate from a Recommendation it shall notify the Commission by specifying its reasons. This in practice means that such documents directly influence NRAs in

[19] Broadband in the EU is now only defined as 128 Kbps (Eurostat).

[20] Consultation Paper on the Europe 2020 Project Bond Initiative, Brussels, 28 February 2011

[21] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 24.4.2002, L108/33), Article 19.

applying the sector-specific regulation since the Commission will refer to them when scrutinising national market definition and analysis.

In the light of the above, the NGA Recommendation sets common principles for NRAs in regulating 'Market 4' regarding wholesale physical network infrastructure access (including shared or fully unbundled access) at a fixed location (hereinafter: Market 4) and on Market 5 regarding wholesale broadband access (hereinafter: Market 5).[22] In order to avoid regulatory divergence within Member States, the principles in the NGA Recommendation aim to ensure regulatory certainty for investors. According to the NGA Recommendation, NGAs are 'wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks' and which usually are 'the results of an upgrade of an already existing copper or coaxial access network'.[23]

The Commission suggested that finding Significant Market Power (SMP) in these markets may not be warranted in geographical markets where infrastructure competition is sufficient due the joint deployment of fibre to the home (FTTH) networks based on multiple fibre lines by several co-investors. In such cases NRAs should examine whether each co-investor enjoys strictly equivalent and cost-oriented access, whether the co-investors are effectively competing on the downstream market and whether the co-investors install sufficient duct capacity for third parties to use and grant cost-oriented access to such capacity. Based on the outcome of the above examination on Markets 4 and 5, NRAs should impose the obligations of cost-orientation, equal treatment and reference interconnection offer in line with the detailed NGA Recommendation, but in some cases may allow for a risk premium.

Moreover, it is suggested that NRAs use a sound 'margin-squeeze' test over an appropriate time-frame where SMPs use pricing schemes in consideration of the risks associated with the NGA investment. They may only approve long-term access pricing (discounts) if there is no margin squeeze over the applicable timeframe and the discounts reflect the investors' reduction of risk only. Volume discounts may only be approved if calculated over a relevant area, apply on an equal basis to all access seekers, if there is no margin squeeze over the applicable timeframe and the discounts reflect the investors' reduction of risk.

[22] Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, C(2007)5406 (OJ 28.12.2007 L344/65)

[23] Commission Recommendation on regulated access to Next Generation Access Networks (NGA), p. 10.

With regard to migration, the NGA Recommendation suggests that NRAs require SMPs to inform alternative operators before de-commissioning an interconnect point. This requirement may be disregarded should the SMP and operators having a regulated access agree on an appropriate migration path or the SMP provides fully equivalent access at the point of interconnection. NRAs should ensure that the systems designed by the SMP allow alternative operators switching to NGA-based access products. In addition to that, in order to allow alternative operators to adjust their networks to the SMPs, NRAs should also ensure that they receive all necessary information about the SMPs' roll-out plans.

Apart from these requirements, the NGA Recommendation lays down further principles. One of these is that the deployment of parallel copper networks should not be required where fibre is deployed to 'white' areas with no existing infrastructure. The different levels of competition must be examined in order to see whether sub-national geographic markets should be defined or differentiated remedies should be imposed. It is suggested that NRAs cooperate with other authorities to establish an open database on the location and the capacity of building infrastructures available.

The NGA Recommendation is expected to be less successful than the Broadband Communication. Although the above suggestions are important for NRAs in applying the law and clearly show the Commission's position in certain aspects, their non-binding nature questions their practical effects. This weakness is reinforced by the European Parliament, Member States and the Body of European Regulators of Electronic Communications (hereinafter: BEREC), all of whom are of the opinion that the NGA Recommendation is too detailed and does not leave room for NRAs to manoeuvre. As a result, NRAs may not take these rules fully into account if they wish to adjust regulation to local market conditions.

Naturally, the Commission is not satisfied with the application of the NGA Recommendation in Member States and warned that, after the 2009 regulatory framework comes into effect, it will initiate proceedings as set out regarding remedies.[24] As long as investment continues at the current level, the targets set in the Digital Agenda may not be achieved according to the Commission. Threats may not be the best tool to change legal application. NRAs are not fully bound to the position of the Commission and, since they still will be able to choose remedies freely, the Commission's powers are not enough to change regulatory approaches centrally. Given that this balance of power is not expected to change soon, the NGA Recommendation will only be able to

[24] Neelie Kroes Vice-President of the European Commission responsible for the Digital Agenda The right regulatory environment for rolling out Next Generation Networks Fibre to the Home Council Europe Conference, SPEECH/11/93, Milan, 10 February 2011

encourage NGA investment to a limited extent, reinforcing the importance of self-action by market players.

Therefore, the Commission, besides giving a clear signal to Member States, invited the CEOs of the largest private stakeholders to a roundtable discussion in March 2011 on possible action encouraging NGA deployment.[25] Although the outcome was not made public, it is certain that the industry leaders had made their lists of recommendations and had delivered them to the Commission. A second roundtable meeting was held in June 2011 elaborating this issue.[26]

All of these prove the unusual impetus and ambition of the Brussels administration to encourage the broadband investment necessary to achieve the Digital Agenda targets by 2020. The two measures elaborated above will contribute to this success, although in a different way and with different results, in highly populated metropolitan areas. None, however, will help to deliver broadband and information society services to remote territories. The third measure of the Broadband Package is then aimed at tackling this problem, proposing pioneer ideas in harmonising Radio Spectrum at EU level.

3.3 RSPP

Spectrum is a key but scarce commodity in today's telecommunications industry and will be even more important for growth and innovation in the sector in the near future. In order to utilise it best, coordination, competition and efficiency will be top concepts in managing the spectrum needs of the next era of the telecommunications industry and information society. Only in this way will the spectrum be able to satisfy the increasing data needs of information society services. The political masters in the EU discovered the importance of spectrum. They also realised the necessity to shift the focus from technical spectrum efficiency to an optimisation in terms of the value to society of the services underpinned by the spectrum. In past years spectrum regulators were competent to develop technical issues, but failed to anchor the policy and economic dimensions sufficiently. However, it is crucial for the EU to free sufficient spectrum for broadband services.

The 2009 regulatory framework allows the Commission to propose an RSPP. The legislative proposal is aimed to set out the strategic planning and harmonisation of the use of spectrum for 2011-2015. One of its main goals is to make spectrum available for mobile broadband services in the light of the Digital Agenda targets. RSPP is a normnal legislative proposal for the European

[25] Digital Agenda: Vice-President Kroes hosts CEO Roundtable on investment in broadband networks to sustain internet growth, MEMO/11/135, Brussels, 3 March 2011,

[26] Digital Agenda: second CEO Roundtable on broadband investment to sustain internet growth, Brussels, 13 July 2011, MEMO/11/508

Parliament and the Council and, once adopted, will be directly binding on Member States. Besides setting broadband goals for mobile broadband, RSPP reinforces already existing policy goals such as the efficient and flexible use of spectrum, service and technology neutrality, promoting the least burdensome authorisation procedures, promoting competition by not allowing spectrum hoarding and avoiding harmful interference.

Apart from that, an RSPP represents the Commission's dynamic approach in common spectrum policy. Member States should establish authorisation and allocation procedures which promote developing mobile broadband services. They also should encourage collective and shared used of spectrum according to the RSPP. Moreover Member States should ensure that authorisation and allocation procedures ensure the effective use of spectrum. The RSPP also suggests that Member States have to allocate sufficient spectrum to ensure that wireless applications contribute effectively to achieve the target of 30 Mbps by 2020 for all European citizen. The Commission also emphasises the importance of trading spectrum licences in harmonised bands. More spectrum should be made available for mobile broadband by freeing up bands for satellite services covering the whole territory of the EU. Last but not least, the Commission proposes to create an inventory and monitor existing spectrum use and need in the range of 300MHz to 3GHz.

Although these goals are again quite ambitious, those familiar with legislation in Brussels know that they so far only preview possible outcomes in the final text. This is because both the EP and the Council should discuss the RSPP, and the text adopted will represent a compromise and differ in some respects from the original proposal. Even after the first reading, the positions of the institutions are quite different on a few critical points. One important issue is how and under what conditions should more spectrum be made available for mobile broadband. The EP, in its first reading in May 2011, proposed that, altogether, 1200 MHz of spectrum should be freed up for wireless broadband by 2015 ensuring the EU's leading position.[27] MEPs would like to see a reference to the audiovisual sector in many instances and put greater emphasis on the social, cultural and economic aspects of spectrum.

Member States, on the other hand, took a much more conservative standpoint in the Council Progress Report of May 2011.[28] They would like to see much more reference to the 2009 regulatory framework in the RSPP and to

[27] European Parliament legislative resolution of 11 May 2011 on the proposal for a decision of the European Parliament and of the Council establishing the first radio spectrum policy programme [COM(2010)0471 – C7-0270/2010 – 2010/0252(COD)] [P7_TA-PROV(2011)0220 First radio spectrum policy programme (A7-0151/2011 - Rapporteur: Gunnar Hökmark)]

[28] Progress Report from the Presidency to the Council on the Proposal for a Decision of the European Parliament and of the Council establishing the first radio spectrum policy programme - 10295/11, 2010/0252 (COD) Brussels, 19 May 2011

the principles set out there. In essence, Member States are quite hesitant to further harmonise the valuable and state-owned spectrum and would prefer to defer the issue. In some cases Member States also refuse to transfer spectrum management competences to the Commission. This then questions whether enough spectrum will be available for wireless broadband services in a required quantity and within the time-frame set by the Commission. Certainly the RSPP is a clear sign of a change of paradigm in regulating common EU spectrum management, contributing and delivering wireless broadband and promoting wireless broadband networks. No matter what might be the consensus among EU institutions, spectrum will undoubtedly play a key role in achieving the broadband targets of the Digital Agenda.

4. Conclusion

Taking into consideration the decreasing importance of the EU in the ICT sector, the paper briefly introduced the measures put forward by the Commission during the last year and gave a rapid view of the directions of broadband development. On the whole, every endeavour of the Commission promoting investment into broadband networks is welcome. In case the EU continues to lag behind global ICT competition even more than today, it may not see the economic development which it wishes. Decreasing revenues produce less innovation and investment, which may have a multiple negative effect on the competitiveness of the EU. This danger can only be avoided if decision-makers, both at EU and Member State level, are aware of it. However, to convince decision-makers to invest in times of economic crisis (generating higher taxes and less public spending) is not an easy task.

The measures introduced by the Commission, the Broadband Package in particular, set a good direction for regulation and may indeed promote investment into broadband. However, no measure can be successful without the support of Member States and the industry. Whilst the latter is in a constant and constructive dialogue with the Commission, both publicly and privately, Member States still regard every initiative as an attack against their powers and competences. Member States may not be totally mistaken, but the only question is whether giving up competences is worth while and, if yes, whether users benefit.

If followed by Member States, balanced measures, such as the Broadband Communication, may significantly promote investment into broadband networks by increasing efficiency and saving costs. The Commission correctly points out that, besides providing direct funding and allowing regulatory holidays, there are numerous tools that may promote broadband services. Open infrastructures built on public grounds and regulations promoting efficient and reasonable building, such as requiring the installation of new passive infrastructures and in-building wiring during planning, may significantly reduce

investments costs. What is more, such measures are widely supported by players in the industry also.

By contrast, regulatory principles set by the NGA Recommendation may have a lighter effect due to the general resistance of Member States and NRAs.[29] The main reason is that NRAs, required to apply regulation fully in line with local market conditions, would like to have more flexibility and thus might promote different principles, and so,although its endeavours are welcome, the tools and methods chosen by the Commission may not always be the best. Still, this approach might not jeopardise broadband developments if market decisions taken by NRAs ultimately have a positive effect on the market. The only danger might be differences in expertise and independence among NRAs, and so Member States and BEREC may best promote broadband networks if they provide total support for NRAs to make expert decisions.

Last but not least, proposals in the RSPP, the improved harmonisation of spectrum at EU level in particular, also set a good direction for regulation promoting mobile broadband. The biggest advantage of the proposal is that the more that spectrum is harmonised at EU level, the more will Member States be able to utilise this scarce resource according to their interests at global level. Even though it is not expected that spectrum becomes a common property of the EU, when it becomes even more important in the regulatory toolbox, EU institutions will try to strengthen their role in managing it permanently. In the long term, regulatory ideas and directions will prove to be useful in delivering mobile broadband services to more and more citizens, since the commercial benefits of technical standardisation and policy harmonisation will play into the EU institution's hands in this respect.

After all, one must also realise that, due to already relatively high penetration and the economic crisis, network deployment and internet take-up has slowed down recently. Cost-efficiency, cost-effectiveness and safe returns have become the ultimate investment condition for network operators. This trend is reinforced by the ever-increasing number of Commission initiatives and measures, which are most welcome under such economic circumstances. A decreasing number of investments are made based on one single business case only. This is particularly true in 'white' areas with no existing network - which is detrimental to the achievement of the Digital Agenda targets and, ultimately, to the competitiveness of the EU. However, increasing financial resources are necessary to invest in broadband networks.

From the perspective of the information society's evolution, it would be good for the Commission to try to extend its powers at the expense of Member States' competences and to involve the industry in creating broadband

[29] Adopting the NGA Recommendation in fact took two years and 3 versions. The European Parliament, Member States and BEREC all believes that the NGA Recommendation is too detailed,not leaving enough discretion for NRAs to use the best regulatory tools necessary for the specific local market.

measures, in case this would reduce the cost of broadband development. Then arises the ultimate question of who pays for network development? We should not forget that, ultimately, users pay both privately (by paying for accessing the network, the content and the services) and publicly (via taxes and other levies) for networks. In the light of this, almost every measure of the Commission introduced in this paper is beneficial in the long-term since, by promoting investment arising from competition and reducing investment costs for the industry, they also contribute to the reduction of the costs which arise by the user wishing to join the modern information society.

Linguistic Diversity and Language Rights in Spain[1]

NAGY, NOÉMI

ABSTRACT *The issue of Spanish linguistic policy is worth examining, not only because a quarter of the population of Spain speaks a minority language, but also because, after four decades of dictatorship, Spain succeeded in developing a reasonably well functioning system to accommodate its linguistic plurality. The current Constitution links the issue of linguistic minorities to that of the territorial organisation of the administration. Political power is shared between the centre and 17 autonomous communities which retain a significant degree of autonomy in different fields such as – in the case of the bilingual regions where the principle of 'co-officiality' is applied – the teaching of its own language. Although, after 35 years of democratic development, the Spanish "State of Autonomies" is almost unanimously considered successful, regional politics continue to dominate the Spanish constitutional debate and gain increasing weight on the European Union's agenda also.*

After a short introduction, the second chapter of this paper traces the historical background of three national minorities - namely, Catalonia, the Basque Country and Galicia. Linguistic regulation is covered in the third and fourth chapters on the bases of the current Spanish Constitution and the Laws of Linguistic Normalisation of the three autonomous communities respectively. Finally some comments are offered on the current situation of multilingual Spain.

1. Introduction

How to accommodate linguistic diversity in post-modern societies is one of the most important and most difficult tasks of contemporary linguistic policy, since Western states still heavily rely on national identities based mainly on one specific language. The issue of Spain is of particular interest, since it is home to very significant linguistic minorities.[2] In fact, some 25%[3] of Spaniards have a

[1] The research presented in this paper was supported by the Research Institute for Linguistics, the arian Academy of Sciences and the Faculty of Law of the University of Pécs.

[2] Ruiz Vieytez, Eduardo J.: New minorities and linguistic diversity: Some reflections from the Spanish and Basque perspectives. In: JEMIE 2007/2. p. 1. and 6.

mother tongue different from Castilian, the official language of the state.[4] However, there is probably still an attempt on the part of central government to show Spain in the media and in politics as a monolingual state.[5] The National Statistical Institute of Spain, for example, does not publish linguistic data on its website, although the census questionnaires have contained questions concerning language use since 1986.

Even today, more then three decades after the end of the Franco dictatorship, its negative effects are still alive in the language attitudes of minority speakers in Spain. The notion that a language is a unifying symbol of regional identity to resist Spanish hegemony is valid. "Nationalistic fervour and a sense of empowerment" continue to rise concomitantly with the increasing number of Catalan, Basque and Galician speakers.[6] In spite of its widely admired constitutional arrangement, the *Estado de las Autonomías*, Spain still struggles with the issue of national minorities[7] which provides the topicality of this paper.

The aim of the paper is three-fold: first, to reveal the historical background of the national / linguistic minorities in Spain, second, to elucidate the linguistic

[3] According to one of the most reliable (independent) linguistic databases, the Ethnologue – which, unfortunately, contains data from different periods –, there are 11.200.000 Catalan, 3.170.000 Galician and 580.000 Basque speakers in Spain. See, www.ethnologue.com (search by language). The problem with language statistics is that they measure various things (e.g. mother tongue, usual/first language; competence of comprehension, speaking, reading, writing etc.) and so they can be interpreted differently, in accordance with what is to be proved. Different data are received depending on who undertook the surveys which, as the final blow, were made at different times. Nor is there any consensus in the academic world.

[4] The 'standard' language of Spain, Castilian is itself not unified. Its main dialects are Aragonese, Leonese, and Andalusian. See, Keefe, Eugen K.: Area Handbook for Spain, Chapter 5, Ethnic Groups and Languages pp. 119-123. http://home.heinonline.org/ [27.10.2011.]

[5] Burgueño, Jesús: El mapa escondido: Las lenguas de Espana. In: Boletín de la A.G.E. 2002/34. p. 172.

[6] Bostrom, Jay Gordon: Which Way for Catalan and Galician? The University of Montana, Missoula, 2006. p. 2. http://etd.lib.umt.edu/theses/available/etd-03212007-110729/unrestricted/BostromJay.pdf [27.10.2011.]

[7] The term 'minority' is rather ambivalent and contested in Spain, as it does not refer to a locally confined group on the margins of the majoritarian society, but to one of Spain's equal 'nationalities'. Therefore, it is more appropriate to consider Catalonia, the Basque Country and Galicia as minority nations, rather then national minorities. Trenz, Hans-Jörg: Reconciling Diversity and Unity: Language Minorities and European Integration. In: Ethnicities 2007/7. p. 170. Furthermore, minority nations are not "displaced ethnic groups" having ties to another, kin state. Puig i Scotini, Pau: Exercising self-determination without jeopardizing the rights of others: the Catalan model. In: St. Thomas Law Review 2001-2002/14. p. 397. It somehow follows from this (and from the territorial nature of these languages, see footnote 7) that academia prefers to use the expression 'regional language' rather than 'minority language'.

regime of Spain on the bases of the current Spanish Constitution and the *Leyes de Normalización Lingüística* of certain autonomous communities and, third, to offer some evaluation on the current situation of multilingual Spain.

2. The historical background of linguistic plurality of Spain[89]

2.1 Nations and the State

During the long centuries of the Middle Ages, the linguistic plurality of the Iberian Peninsula was almost untouched. The language of the central government (from 1492) and official contacts was Castilian, but, otherwise, the use of other languages was not hampered. Hans-Jörg TRENZ explains this phenomenon with the thought that, after the *reconquista*, the Spanish monarchy was mainly engaged in the mission of Catholic restoration on the inside and expansion towards the outside. The Spanish language was exported to the New World, where a surprisingly high level of language standardisation was achieved' At the same time the consolidation of the territory of the home state and the political and cultural unification of the country were largely neglected. The situation, however, changed radically after the loss of the American colonies, and the political centralisation of Spain, which entailed majority nationalism, brought Castilian linguistic supremacy into conflict with the existing national languages of the territory.[10]

The nineteenth century found a constitutionally unstable[11] Spain with *golpes de estado, pronuncamientos*, and civil wars. Peripheral nationalism against the centralising efforts of the state, had, by the 20th century, led to deep cleavages in Spanish society, to the dictatorship of *Miguel Primo de Rivera* from 1923-1929,

[8] Due to limitations on the length of this paper, the author has confined himself to the communities of the three main minority languages of Spain, i.e. Catalan (*catalán*), Basque (*vascuence, euskera*) and Galician (*gallego*). These can be considered as territorial languages, since their speakers are concentrated mainly (but not exclusively) in Catalonia and Valencia, the Basque Country and Navarra, and Galicia, respectively. For the same reason the history and linguistic regulation of only three autonomous communities, namely Catalonia, the Basque Country and Galicia are studied. However, where appropriate, further details regarding the other minority languages/linguistic communities of Spain are offered, with the exceptions of the Gypsy minority and the issue of immigrants.

[9] This section deals with only the period before 1975, the death of General Fransisco Franco.

[10] Trenz, Hans-Jörg op. cit. pp. 168-169.

[11] The first Spanish Constitution adopted in 1812, Cádiz was followed by three others (1837, 1845, 1876) during the 19th century.

then culminated in a bloody civil war from 1936-1939.[12] The Franco regime could only bring about a temporary, authoritarian stand-off in respect of the unresolved language question. The dictatorship was based on the principles of total centralisation and monolingualism: the autonomies were abolished, and the territory of the country was divided into eight regions where power was exercised by delegates from central administration. The use of the three national (minority) languages was not only prohibited in education, in the media and in administration, but it was also attempted to prevent their use in everyday life.

The suppression of linguistic minorities during the four decades of the Franco dictatorship[13] laid the grounds for militant nationalism which is not only strongly politicised but also institutionalised: it is not limited to cultural associationalism, but has succeeded in establishing influential regionalist parties.[14]

2.2 Catalonia

As PUIG I SCOTINI wrote, "Catalonia dates from the Marca Hispanica of the Empire of Charlemagne, when the north-eastern corner of the Iberian Peninsula was politically separated from Moslem Spain." Catalonia flourished as a trading nation of the Mediterranean Sea in the Middle Ages and early modern times. In the medieval era, it was the dominant part of the Kingdom of Aragon, a confederate state which, between the early thirteenth and mid-fifteenth centuries, became a Mediterranean empire. It consisted of four provinces – Aragonia, Catalonia, Valencia and the Balearic Islands – all of which had their own parliaments and governments (*Generalitat*). The kingdom was integrated into the Spanish monarchy in the 16th century, but its political position was marginal from the beginning. Under Habsburg rule, Catalonia maintained its political autonomy; it lost its ancient charters only in 1714 as a result of its participation in the British-led coalition against the victorious Bourbon dynasty in the War of the Spanish Succession. The Catalan losses were limited to the

[12] Ehrlich, Charles E.: Ethno-cultural Minorities and Federal Constitutionalism: Is Spain Instructive? In: Illinois University Law Journal 1999-2000/24. pp. 302-303.

[13] See, for example, the announcement of the military governor, Alfonso Velarde, 16 April 1937; the announcement of General Franco, 29 May 1937; Order of 8 May 1938; Order of 21 May 1938. Reported by Abellán, Manuel L.: Censura y literaturas peninsulares. Amsterdam, Rodopi, 1987, pp. 90-92.

[14] Trenz, Hans-Jörg op. cit. p. 169. In Catalonia, *Convergència i Unió* was the majoritarian party in government between 1980-2003; it regained power in 2010. In the Basque Country, *Euzko Alderdi Jeltzalea* (Partido Nacionalista Vasco, PNV) dominated the politics during thirty consecutive years, until the 2009 elections. "Galician nationalism has never been as strong as Basque or Catalan nationalism, perhaps because of Galicia's relatively poor economic position with regard to the rest of Spain." See, Block, Andrew Justin: Language Policy in the Basque Autonomous Community: Implications for Nationalism. In: Michigan Journal of Political Science 2005/4. p. 50.

fields of political institutions and culture, e.g. the public use of the Catalan language was forbidden. Nevertheless, the 18th century was a period of material growth and progress for Catalonia which, by the second half of the 19th century, had become the 'Factory of Spain'. Nationalism emerged at the end of the 19th century, nurtured by middle-class intellectuals, politicians and industrialists dissatisfied with their lack of influence in Spanish politics. In 1914 the four provincial councils of Catalonia were allowed to create a joint 'Catalan Office', *la Mancomunitat de Catalunya*, which was dissolved in 1923 by the military dictatorship. The wide regional autonomy conceded to Catalonia by the Second Republic in 1931 did not last too long: General Franco abolished Catalan autonomy in 1939 and this did not return until 1978.[15]

2.3 The Basque Country

The Basque Country (*País Vasco, Euskadi*) straddles the border between France and Spain in the Western Pyreneesnd traditionally is comprises seven provinces, three in France and four in Spain. The history of the Basque people dates back almost two thousand years, but the origin of their race and language, which has no connection to any other Indo-European language, remains a mystery to this day. Although the Basque people never existed as a single political entity prior to their integration into Spain, they have always maintained a unique identity.[16] As early as the 10th century, when the Basque country belonged to the Kingdom of Navarra, the Basques developed local governing bodies called *biltzarrak* which were founded on the legal equality of their representatives, i.e. the *etxeko-jaunak*, the heads of households. A system of local customary laws developed in the Middle Ages. Originally an oral tradition, foral law came to be codified, and by the mid-twelfth century, written *fueros* were common throughout the Basque country. When the Castilian state sought to bring various Basque provinces under its control in 1512, the Basques were allowed to govern themselves in exchange for political loyalty to the Spanish monarchy. The *fueros* were abolished in 1876 as a consequence of the Second Carlist War.[17]

The final decade of the 19th century witnessed the birth of Basque nationalism founded by *Sabino de Arana y Goiri* under the motto of "God and the ancient law". The Basque nationalists attempted several times in the 1930s to establish an autonomous government. In 1936, the Republican *Cortes*, hoping for military assistance from the Basques, enacted an autonomy statute. Only three years later, as a result of Franco's victory, the Basque government was

[15] Puig i Scotini, Pau op cit. pp. 399-400.
[16] Murphy, Lindsay: EU Membership and an Independent Basque State. In: Pace International Law Review 2007/19. p. 337.
[17] Carter S., Michael: Ethnic Minority Groups and Self-Determination: The Case of the Basques. In: Columbia Journal of Law and Social Problems 1986/20. pp. 66-70.

forced into exile.[18] The Basque militant organisation ETA[19] came into existence in 1959 in response to the brutal repressive policy of the Franco dictatorship but continued its terrorist activities almost to the present day.[20]

2.4 Galicia

The people living in the northwest part of the Iberian Peninsula lready composed a homogeneous cultural unity at the end of the Iron Age. They were originally a Celtic people whom early Greek and Latin authors called *Gallaeci*. Their political organisation was based on independent states formed by several hill forts (the common way of inhabiting a territory in the 'Castro Culture') and headed by a local king. After the collapse of the Roman Empire, Galicia was the first kingdom to emerge in the Iberian Peninsula. The Galician Kingdom was founded by Suebi invaders in 411 and then ruled by the Visigoths from the end of the 6th century. The territory was occupied by the Moors in 711, although Alfonso I of Asturias soon recovered it. The kingdom was known as the Kingdom of Asturias until the beginning of the 10th century when it became the Kingdom of León. In 1037, the Kingdom of León (including Galicia) became part of Castile. The southern part of Galicia, the County of Portugal separated in 1128. After short periods of independence, in 1230 Galicia was finally integrated into the Crown of Castile in which the individual kingdoms continued as administrative entities under the rule of a single monarch.[21] From that time, Galicia was controlled by the central government.

Galician nationalist movements arose in the 19th century, and after the Second Republic was declared, Galicia became an autonomous region in 1936. During the dictatorship of Franco, as was the case with other minority nations in Spain, Galicia's autonomy and the use of the Galician language were suppressed.

3. The linguistic regime of the Spanish Constitution of 1978

After forty years of fascist dictatorship, Spain evolved into a stable democracy. The unique solution applied by the current Constitution is that it links the issue of (linguistic) minorities to that of the territorial organisation of the administration and the decentralisation of power.[22] It is impossible to

[18] Carter S., Michael op. cit. pp. 70-73.
[19] *Euskuadi Ta Askatasuna* = Basque Homeland and Freedom
[20] Murphy, Lindsay op. cit. pp. 338-340.
[21] Risco, Vicente: Historía de Galicia. Editorial Galaxia, Vigo, 1952. pp. 15-120.
[22] Szajbély, Katalin: Kisebbségi kérdés Spanyolországban. p. 695.
http://epa.niif.hu/00400/00462/00020/pdf/03tan03.pdf [27.10.2011.]

understand Spanish linguistic reality without considering the regional factor, and *vice versa*.

By virtue of the Spanish model of the *Estado de las Autonomías*, political power is shared by the central state and 17 autonomous communities enjoying a significant degree of autonomy in different fields. This system is similar to a federal structure but corresponds most closely to a decentralised regional-state model. It mainly differs from a federal solution in that the competences within the state of the territories holding autonomy are different. The Spanish Constitution does not determine the extent of autonomy for the national communities, but ensures the opportunity for them to define the limits and content of their autonomy *themselves* - naturally, within the framework of the Constitution.[23]

According to Art. 143-144, bordering provinces with common historic, cultural and economic characteristics, insular territories and provinces with a historic regional status may form self-governing communities. Furthermore, in the national interest, the Spanish Parliament (*Cortes*) may grant autonomy to those territorial units which cannot comply with the above criteria.

The Constitution establishes two procedures for achieving autonomy. The condition of creating an autonomous community in both cases is a Statute approved by the Cortes. The general route (Art. 143.2, 148.2) means that the autonomous community can assume only the powers listed in Article 148, and must wait five years to extend them. By contrast, in the case of Summary Proceedings (Art. 151.1), the autonomous community can immediately assume the powers which it wants, except the exclusive competences of the Spanish state (Art. 149.1).[24]

The Constitution technically *recognized* the regions rather than *constituted* them, thus acknowledging their right to autonomy. Nevertheless, the unity of the Spanish State is strongly emphasized, denying any right to self-determination in the traditional sense of sovereignty:[25]

> *The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions[26] of which it is composed and the solidarity among them all.*[27]

[23] Szajbély, Katalin op. cit. p. 697.

[24] See, Abad i Ninet, Antoni – Rodés Mateu, Adria: Spain's Multinational Constitution: a Lost Opportunity? In: Constitutional Forum constitutionnel 2008/1. p. 18.

[25] Ehrlich, Charles E. op. cit. pp. 306-309.

[26] The dominant Spanish constitutional doctrine draws no legally relevant conclusion from the distinction made between 'nationality' and 'region'. However, we have to agree with ABAD I NINET and RODÉS MATEU that the two terms have different meanings. 'Nationality' implies a higher level of consciousness of collective identity than 'region' which describes mere historic and cultural or common economic links. According to the authors, this deliberate ambiguity is due to that the Constitution

The main linguistic rules are situated at the very beginning of the constitutional text. After the Preamble declares the will of the Spanish state to "protect all Spaniards and peoples of Spain in the exercise of human rights, of their culture and traditions, languages and institutions", Article 3 lays down the rights and duties associated with Spain's multilingual heritage:

1) Castilian is the official Spanish language of the State. All Spaniards have the duty to know it and the right to use it.
2) The other Spanish languages shall also be official in the respective self-governing communities in accordance with their statutes.
3) The richness of the different linguistic modalities of Spain is a cultural heritage which shall be specially respected and protected.[28]

The first paragraph of Article 3 makes a key distinction between Castilian and the regional languages: Spaniards have a duty only to know Castilian, but no such duty is imposed regarding the other co-official languages. In fact, the Constitutional Court, in its judgment of 23 December 1994, held that Article 3 *prohibits* the imposition of a duty to know any language other than Castilian.[29]

Through the second paragraph of Article 3, the State establishes the system of co-officiality in the bilingual regions. Furthermore, in practice it delegates the right to rule (in some aspects of) the linguistic question – in the framework of the Constitution, of course – to the competences of the autonomous communities. In the enumeration of the competencies that the autonomous communities may assume, the promotion of culture and research and the teaching of the Self-governing Community's language is explicitly stated (Art. 148.1.17). However, by this wording, the Constitution only prescribes a duty for

"attempted to combine two opposing traditions: one upholding a single Spanish nation, governed from the centre, the other claiming the existence of different nationalities with the right to self-government." See, Abad i Ninet, Antoni – Rodés Mateu, Adria op. cit. p. 23.

[27] Spanish Constitution of 1978, Article 2. http://www.senado.es/constitu_i/indices/consti_ing.pdf [27.10.2011.]

[28] This text is very similar to that of the 1931 Constitution which is the first Spanish constitution to reflect a non-unitarian state and to contain linguistic rules. Specifically, its Art. 4 set out the following: "Castilian is the official language of the Republic. All Spaniards have the duty to know it and the right to use it without prejudice to the rights that the laws of the State recognize for the languages of the provinces and regions. Except as provided in special laws, no one shall be required to know or use any regional language." (*translation mine*) See the original text: http://www.congreso.es /docu/constituciones/1931/1931_cd.pdf [01.11.2011.]

[29] Kasha, Jeremy R.: Education Under Catalonia's Law of Linguistic Normalisation: Spanish Constitutionalism and International Human Rights Law. In: Columbia Journal of Transnational Law 1996/34. pp. 659-660.

the authorities, but does not ensure a fundamental language right for the members of linguistic minorities which they could rely on before the courts.[30]

Finally, the third paragraph of Article 3 incorporates a guiding principle for public authorities, in line with the Preamble, which points out the need for building positive techniques to protect the wealth of the different linguistic modalities of Spain.

The linguistic regime adopted by the Constitution is a *mixed* one: It is neither entirely territorial, since it excludes the priority of the territorial language (except, of course, in the case of the Spanish-speaking territories), nor entirely personal, because it does not extend the exercise of individual linguistic rights, derived from the citizenship of a bi- or multilingual autonomous community, to all citizens wishing to exercise them regardless of location.[31]

4. *Leyes de Normalización Lingüística*: the renaissance of minority languages

The concept of linguistic normalisation is used in Spain to refer to the "recuperation by minority languages of their presence in the public space and giving them equality with the state language".[32] This concept recognises a disadvantage on the part of these languages that require correction by public bodies in the public and the private spheres alike. For this reason, regional legislation does not focus strictly on the regulatory development of co-officiality, but also on establishing measures for the promotion and protection of the use of the regional language to overcome this actual inequality.[33]

In accordance with the constitutional framework and their respective Statutes of Autonomy, six of Spain's seventeen autonomous communities currently have a regional co-official language. The six are: Catalonia, Valencia, Galicia, the Basque Country, the Balearic Islands, and Navarra.[34] For the reason already explained in footnote 7, this paper limits its scope to the introduction of the linguistic policy of Catalonia, the Basque Country and Galicia. Before that a brief overview of the origin and the situation of the regional languages themselves is given.

[30] Ruiz-Rico Ruiz, Gerardo: Los derechos de las minorías religiosas, lingüísticas y étnicas en el ordenamiento constitucional espanol. In: Revista de Estudios Políticos (Nueva Época) 1996/91. pp. 116-117.
[31] Milian i Massana, Antoni: Los derechos lingüísticos en la enseñanza, de acuerdo con la constitución. In: Revista Española de Derecho Constitucional 1983/7. pp. 365-366.
[32] Ruiz Vieytez, Eduardo J. op. cit. p. 7.
[33] Ruiz-Rico Ruiz, Gerardo op. cit. p. 122.
[34] Kasha, Jeremy R. op. cit. p. 659.

4.1 Catalonia

4.1.1 The Catalan language and its speakers

The Catalan language is spoken in Catalonia, the Balearic Islands, Valencia,[35] some parts of Aragon[36], Roussillon (France), Andorra, in an archaic form in the city of Alghero (Sardinia), and in the Americas by numerous expatriates. Catalan has always had a strong literary tradition, at first represented by southern French troubadours, later by 14th century chroniclers. The integration of Catalonia to the Spanish monarchy in the 16th century did not stop the use of Catalan as a mother tongue or in religious instruction. A literary revival in the 19th century promoted, and since the 1960s has continued to promote regional aspirations.[37]

According to the most recent data gained from the 2008 survey of language use in Catalonia, the vast majority (95%) of people living in Catalonia understand Catalan, although the level falls to 67% in terms of perfect understanding. As for the ability to speak, 78% of Catalans say that they can speak the language, but in terms of the highest level of knowledge, this figure drops to 49%. The highest rate of proficiency in Catalan in all skill areas is found among the younger people - from 15 to 24 – since they are the first generation to be totally educated in Catalan.[38]

4.1.2 The legal framework

In accordance with the constitutional framework, the Autonomy Statute of Catalonia, promulgated as the *Organic Law 4/1979*, 18th December,[39] made Catalan an official language and guaranteed its right of use (Article 3):

[35] Valencia maintains that *valenciano* is a separate language, although it is generally considered to be a dialect of Catalan. See, the (reformed) Statute of Autonomy of the Valencian Community (especially Article 6): http://www.cortsvalencianes.es/cs/Satellite/Layout/Page/1260974741713/EstatutodeAutonomia.html?lang=en_GB& [27.10.2011.]

[36] According to the preamble of the *Ley 10/2009, de 22 de diciembre, de uso, protección y promoción de las lenguas propias de Aragón*, "Aragon is an Autonomous Community where – together with Castilian which is the majoritarian and official language in all its territory – in certain areas, other languages are spoken, i. e. the Aragonese and Catalan, all three with their own linguistic modalities of Aragon." (*translation mine*) http://www.boa.aragon.es/cgi-bin/BOAE/BRSCGI?CMD=VEROBJ&MLKOB=478436853737 [27.10.2011.]

[37] Keefe, Eugen K. op. cit. pp. 123-124.

[38] Language Policy Report 2010 of the Generalitat de Catalunya, pp. 240-244. http://www20.gencat.cat/docs/Llengcat/Documents/InformePL/Arxius/IPL2010_EN.pdf [01.11.2011.]

[39] http://www.gencat.cat/generalitat/eng/estatut1979/index.htm [01.11.2011.]

1) The [own] language of Catalonia is Catalan.
2) The Catalan language is official in Catalonia, as also is Spanish, which is official throughout the Spanish State.
3) The Government of Catalonia will ensure the normal and official use of both languages, will take the measures necessary in order to ensure knowledge of them and will create the conditions which make it possible for them to achieve full equality in terms of the rights and duties of citizens of Catalonia.[40]

The *1983 Law of Linguistic Normalisation*[41] further evolved the linguistic rules of the Statute of Autonomy. It emphasized the character of the Catalan language as a sign of the cultural identity of Catalonia and secured the prohibition of linguistic discrimination (Art. 2). With regard to the regulation of official use, it established the habitual use of Catalan as the sole language of the different Catalan administrations (Art. 5), it gave legal validity to texts written in this language (Art. 6-7) and accepted Catalan as the language through which the citizens could relate to the different Catalan administrations (Art. 8). Furthermore, it determined that the Catalan toponymic forms would be the only valid ones in the whole region – except the Aran Valley, where the valid ones would be those in Aranese (Art. 12). As for the educational system, it founded the bases for the habitual vehicular use of the Catalan language, explicitly forbade the separation of students for reasons of language (*model of language conjunction* or *integral bilingualism*), and made Catalan the language of the educational system, as well as guaranteeing the presence of Castilian and the knowledge of both official languages by all students when they have finished their compulsory education (Art. 14-20). It also made Catalan the normally used language of the media (Art. 21).

The law was controversial from the beginning, especially concerning its educational provisions, and it was challenged several times on constitutional grounds. The 1994 decision of the Spanish Constitutional Court[42] served as a guideline for the future in respect of the linguistic policy of other bilingual autonomous communities, and so it is worth examining in details. The four challenged provisions provide that (i) children in *primary* education have the right to be educated in their customary language (Art. 14.2); (ii) children must be able to use both Castilian and Catalan fluently by the end of their studies

[40] Article 3, par. 4. sets out that the *Aranese* language – which is a standardised form of the Pyrenean *Gascon* variety of the *Occitan* language spoken in the Val d'Aran – will be taught and will be the subject of particular respect and protection. The detailed rules of this protection are included in the *Ley 35/2010, de 1 de octubre, del occitano, aranés en Arán*.

[41] *Ley 7/1983, de 18 de abril, de normalización lingüística en Cataluña*: www.parlament.cat/activitat/llei/c7_1983.doc [01.11.2011.]

[42] *Sentencia 337/94, de 23 de Diciembre, del Tribunal Constitucional*: http://www.vozbcn.com/extras/pdf/1994-337-Constitucional.pdf [01.11.2011.]

(Art. 14.4); (iii) diplomas will not be awarded to pupils who do not meet a minimum proficiency level in both languages (Art. 15); and (iv) schools must make Catalan the vehicle of normal expression both for internal activities, including administration, and for external relations (Art. 20).

The objection to Art. 14.2 was that it implies that children *do not have the right* to receive their education in their usual language in the *later* years of education. In the Constitutional Court's view, the Constitution does not guarantee the right to choose one's language of education; nor does Article 3 include a right to be educated solely in Castilian. The Court found that the regime created by the Constitution and Catalonia's Statute of Autonomy establish a reasonable goal of linguistic development, with Catalan as the "centre of gravity". In respect of Art. 14.4, the objection was that Article 3 of the Constitution only imposes a duty to know Castilian. The Court made a distinction between an obligation on behalf of the authorities to *teach* the regional language, and an obligation on behalf of the students to *know* it. The Court concluded that Art. 14.4 merely establishes a *goal* to be reached by the authorities, and does not impose any duty on the students. Art. 15 has, on the one hand, to do with the previous reasoning of the Court, whilst, on the other, it raises the question of unconstitutional impingement on the central government's exclusive control over the granting of diplomas. According to the Constitutional Court, since the Catalan authorities can require the teaching of Catalan in schools, and since the receipt of a diploma is dependent on completion of all requirements, the challenged provision can be interpreted as not adding any *new* requirements for the issuing of diplomas. Art. 20 allegedly violated the Constitutional Court's previous contention that individuals have the constitutional right to address the public authorities in either of the official languages within an autonomous community. However, the Court pointed out that the challenged provision merely prescribes that Catalan will be the *usual* language of the administration, but it *does not exclude* the use of Castilian.[43]

In the author's opinion, the reasoning of the Constitutional Court is not convincing at several points, and this is not because the Constitution itself includes contradictory articles. The intentional ambiguity of the constitutional text is a result of its nature, which is that of a political compromise.[44]

The prevailing Catalan legal framework concerning linguistic rights includes the *Language Policy Act 1/1998*, dated 7 January[45] (reform of the Language Normalisation Act 7/1983) and *Organic Act 6/2006*, dated 19 July[46] (reform of the Statute of Autonomy). The 1998 law follows the line of action established in the previous one, but is more extensive and precise. The concept of 'own

[43] Kasha, Jeremy R. op. cit. pp. 661-669.
[44] See the Conclusions.
[45] http://noticias.juridicas.com/base_datos/CCAA/ca-l1-1998.html [01.11.2011.]
[46] http://www.parlament-cat.net/porteso/estatut/estatut_angles_100506.pdf [01.11.2011.]

language' is more developed, and the law specifies that the language has preference in administration, business and public services and those that offer services to the public. It ensures the right for all the citizens of Catalonia to know of, to express themselves, and be attended in any of the two co-official languages, in a context which does not discriminate on linguistic grounds. It lays down that all civil servants and people working in the public sector (including the administration of justice) must be able to use both official languages. We can find references to the unity of the Catalan language, the documents and civil and mercantile contracts, industries of the language and information technology, client services in businesses, consumer information, signposting and publicity, and the relationship with other regions which speak Catalan, as well as the exterior projection of the language. With reference to the media, the Language Policy Act sets quotas for the number of radio stations, TV channels, and cinemas which must broadcast in Catalan and prescribes that all signs must at least contain Catalan. It is important to note that this applies to private media also.[47]

The new Statute of Autonomy also contains much more detail and emphasises even more the role of the Catalan language than did its predecessor. Article 6 lays down that Catalan, as the own language of the Autonomous Community, is the language of *normal and preferential*[48] *use* in public administration bodies and in the public media, and is the language of *normal use* for teaching and learning. Art. 6.3 refers to the duty of the 'Generalitat' to undertake the necessary measures to obtain official status for Catalan in the European Union, and Art 6.5 makes the Occitan language official in Catalonia. The recognition of Catalan sign language (Art. 50.6) is also of paramount importance and this has led to the enactment of the Catalan Sign Language Act 17/2010, dated 3 June.

4.2 The Basque Country

4.2.1 The Basque language and its speakers

The Basque language is spoken in the three provinces of the Basque Autonomous Community (Bizkaia, Gipuzkoa, Álava), the Autonomous Community of Navarra, and in the western half of the French Département of Pyrénées-Atlantiques, i.e. Labourd, Lower Navarre and Soule. This is the only one among the languages of Spain that does not belong to the Romance languages; linguists classify it as an isolated language. Thousands of years of

[47] Milian i Massana, Antoni: Comentarios en torno de la ley del Parlamento de Cataluna 1/1998, de 7 de Enero, de política lingüística. Revista de Administración Pública, 2002/January-April pp. 337-366.

[48] The phrase „preferential" was annulled by the decision of the Constitutional Court dated 16 July 2010.

isolation have ensured the division of the Basque language into numerous dialects and some twenty-five subdialects. A standardised form of the Basque language, called *Euskara Batua*, was developed by the Basque Language Academy in the late 1960s, and this is taught and used as a teaching language at most educational levels.[49]

According to the most recent data, elaborated by the Basque Statistics Office in 2006, 59.5% of the population aged over 2 in the Basque Autonomous Community understand or can speak Basque well or with occasional difficulty, which means a four percent increase in relation to 2001. A distinction is made between the 775.000 Basque speakers who understand and speak Basque well, and the 459.000 near-Basque-speakers with a good or medium level of comprehension but with difficulties when speaking.[50]

4.2.2 The legal framework

The Statute of Autonomy of the Basque Country, promulgated as *Organic Law 3/1979*[51], was adopted on the same day as its Catalan counterpart. Article 6 contains its most important linguistic provisions:

1) «Euskera», the language of the Basque People, shall, like Spanish, have the status of an official language in Euskadi. All its inhabitants have the right to know and use both languages.
2) The common institutions of the Autonomous Community, taking into account the socio-linguistic diversity of the Basque Country, shall guarantee the use of both languages, controlling their official status, and shall effect and regulate whatever measures and means are necessary to ensure knowledge of them.
3) No-one may suffer discrimination for reasons of language.

Furthermore, Article 35 prescribes that, in the course of the appointment of judges, magistrates and secretaries, the knowledge of the Basque language shall be a qualification for which preference shall be given.

The Basque parliament passed the *Basic Law Normalising the Use of Basque*[52] in 1982 which contains the details of how co-official status for Euskera is to be achieved. The preamble recognises the Basque language "as the

[49] Keefe, Eugen K. op. cit. pp. 122-123; http://www.kondaira.net/eng/Euskara.html [01.11.2011.]
[50] http://www.eustat.es/elementos/ele0004700/ti_The_number_of_Basque_speakers_grows_by_118000_between_2001_and_2006/not0004712_i.html#axzz1cNbYMDO3 [01.11.2011.]
[51] http://www.basques.euskadi.net/t32-448/en/contenidos/informacion/estatuto_guernica/en_455/adjuntos/ estatu_i.pdf [01.11.2011.]
[52] *Ley 10/1982, de 24 de noviembre, básica de normalización del uso del euskera*: http://noticias.juridicas.com/base_datos/CCAA/pv-l10-1982.html [01.11.2011.]

most visible and objective sign of the identity" of the Basque community, and lays down that "the character of Euskera as the own language of the Basque people and as an official language together with Castilian should not in any case prejudice the rights of those citizens who, for various reasons, cannot use it" (*author's translation*). Title I ensures the linguistic rights of citizens: the right to know and use the official languages, both orally and in writing; the right to relate in Euskera or Castilian to the administration (Article 8 specifies that it applies also to the administration of justice); the right to be taught in both official languages; the right to receive periodicals, radio and television programmes and other media in the Basque language; the right to carry out professional, labour, political and trade union activity in Euskera; and the right to speak Euskera in any meeting. Title II regulates the actions of public authorities. Chapter I deals with the use of Euskera in public administration (registration of documents, publication of legal provisions etc.), empowers the government and local authorities to establish the official place names in the region, and provides for the progressive Basquisation of personnel in public administration. Chapter II regulates the use of Euskera in education. It recognises the right of all students to be taught in Euskera, and prescribes the compulsory teaching of the non-elected official language. Chapter III deals with the use of Euskera in the media, while Chapter IV refers to the social use and other institutional aspects of the Basque language.

The normalisation process, as also as in the case of Catalonia, takes place mainly through the educational system. Whilst in Catalonia the education is based on integral bilingualism, the Basque Country follows the *model of linguistic separation*. As a basic principle, parents are free to choose the linguistic model (A, B or D) they want for their children. Model A corresponds roughly to Spanish-speaking teaching, having Basque as a compulsory subject. Model B combines Basque and Spanish as vehicular languages on a balanced basis. Model D means that Basque is the language of instruction for all subjects, except Spanish language and literature.[53] Since 1983, Model A has been losing student numbers progressively in favour of Model B, whilst today more than half of all students study in Model D.[54]

The government's most recent comprehensive language policy is contained in the *General Plan for the Promotion of the Use of Euskera*, approved in 1998. The document reviews the accomplishments and shortcomings of previous policies, and also makes further recommendations. BLOCK summarises the language revitalisation strategy in seven points: to normalise the use of the language, to frame the use of Euskera as a right, to promote the integrative value of Euskera, to increase the instrumental value of Euskera, to invoke the

[53] Ruiz Vieytez, Eduardo J. op. cit. pp. 7-8.
[54] Languages in the European Information Society – Basque. META NET White Paper Series. META-FORUM, Budapest, 2011. p. 13.

rhetoric of bilingualism, to create demand for goods and services in Basque, and to focus on infants and youth.[55]

4.3 Galicia

4.3.1 The Galician language and its speakers

The geographical territory of the Galician language (*gallego*) is delimited by the Autonomous Community of Galicia, the western areas of Asturia,[56] León and Zamora, and three small places in Extremadura. Galician belongs to the family of Roman languages, and it is a result of the evolution of Latin introduced by the Romans. Linguists tend to treat it in conjunction with Portuguese, from which Galician separated in the middle of the 14th century. The oldest literary document we know is the satirical ballad *„Ora faz ost'o senhor de Navarra"*, written in the late 12th century by *Joam Soares de Pavia*. Gallego was not used in writing during the 16th-18th centuries, which were known as *Los Sécuros Escuros* (the Dark Ages). The Galician cultural renewal movement, the *Rexurdimiento*, took place throughout the 19th century, and it was at that time that the first Galician grammar and dictionary appeared. However, the consolidation of the language did not occur until the 20th century.[57]

According to the 2008 survey of the Galician Statistical Institute, 56.4% of the Galician population speak more Galician than Castilian, of which 30% speak only Galician. It is only 10.9% who cannot speak Galician at all. As for understanding the language, 66% understand it very well and a further 28.8% understand it quite well.[58] It is important to note that, in contrast to Catalan and Basque speakers, the number of Galician speakers shows a decline - due to the fact that the majority of Galician speakers are members of the older generation.

4.3.2 The legal framework

The Statute of Autonomy of Galicia[59] contains very similar linguistic provisions to that of Catalonia and the Basque Country. Article 5 sets out that

[55] Block, Andrew Justin op. cit. pp. 27-30.
[56] However, Asturia considers *bable* and not Galician as its traditional language. See, *Ley 1/1998, de 23 de marzo, de uso y promoción del bable/asturiano*: http://noticias.juridicas.com/base_datos/CCAA/as-l1-1998.html [01.11.2011.]
[57] http://www.xunta.es/a-lingua-galega [27.10.2011.]
[58] http://www.ige.eu/estatico/pdfs/s5/notas_prensa/com_galego_2008_es.pdf [01.11.2011.]
[59] *Ley Orgánica 1/1981, de 6 de abril, Estatuto de Autonomía de Galicia*: http://noticias.juridicas.com/base_datos/Admin/lo1-1981.html# [01.11.2011.]

1) The own language of Galicia is Galician.
2) The Galician and Castilian languages are official in Galicia, and everyone has the right to know and use them.
3) The public authorities of Galicia shall ensure the normal and official use of both languages, foster the use of Galician in all spheres of public, cultural and informative life, and provide the necessary means to facilitate its knowledge.
4) No one shall be discriminated against on the ground of language. (*author's translation*)

The preamble to the 1983 Linguistic Normalisation Act[60] emphasises, perhaps even more solemnly than its Catalan and Basque counterparts, the role of own language as a "vital core" of the Galician identity. The Act prescribes that both Galician and Castilian are official languages of the institutions and administration of the region (including justice), the local government, and public entities dependent on the Autonomous Community (Art. 4 and 7). For this purpose, the authorities promote the progressive training in the use of Galician of the personnel assigned to public administration and companies of public character (Art. 11). The laws and official decisions should be published in both languages (Art. 5). The official version of geographical names is the Galician one (Art. 10). Galician is an official language of education at all education levels (Art. 12). As in Catalonia, children have the right to receive primary education in their mother tongue, and students cannot be separated into different schools for linguistic reasons (Art. 13). However, Art. 14 only stipulates that Galician is a compulsory subject at every non-university education level, but does not say a word about the language of instruction. At the end of their studies, students must have equal proficiency in both official languages.[61] Galician is the usual language of radio, television and other media managed by the institutions of the Autonomous Community (Art. 18). The Galician government provides financial and material support to the media which, in addition to the above, use Galician on a regular and progressive basis (Art. 19).

Throughout the near thirty years of implementation of the Linguistic Normalisation Act, crucial progress has been made in the process of the

[60] *Ley 3/1983, de 15 de junio, de normalización lingüística*: http://noticias.juridicas.com/base_datos/CCAA/ga-l3-1983.html [01.11.2011.]

[61] The Galician educational legislation constantly emphasises this equality of language competences instead of promoting the knowledge of Galician. The most recent law for example divides the subjects into two groups. In the first group (social sciences, geography, history, natural sciences, biology, geology) the language of instruction is Galician, in the second (mathematics, technologies, physics and chemistry) the language of instruction is Castilian. See, *Decreto 79/2010 para el plurilingüismo en la enseñanza no universitaria de Galicia*: http://libertadlinguistica.com/index.php?option=com_content&view=article&id=374&Itemid=29 [01.11.2011.]

normalisation of Galician. Knowledge of Galician is a requirement for entry into public employment, as established in the Civil Service Act; likewise, its status has been enhanced through the 1997 passing of the Local Government Act and other Acts on the linguistic rights of consumers, product labelling, etc.[62]

5. Concluding remarks

After three and a half decades of democratic and constitutional development, the Spanish 'State of Autonomies' is almost[63] unanimously considered by academia as innovative and generally responsive to minority demands, as a successful example of ethnic accommodation within a multinational state.[64] Citing the words of HANS-JÖRG TRENZ, "the story of language minorities in Spain goes from violent confrontation and resistance to enhanced cooperation, tolerated diversity and enforced, but not yet peaceful, coexistence. Instead of the unilateral recognition of the minority by the majority, we can speak of a case of multilateral recognition of different nationalities within the new framework of the Spanish multinational state, where all sides are involved in collective learning processes. Despite ongoing violent expressions of regional nationalism and unresolved conflicts between national government and autonomous regions…, the consolidation of Spanish democracy has contributed to a redefinition of majority-minority relations and the growth of… trust in a multilingual Spanish society."[65]

Nevertheless, it would be too optimistic to say that "the battle about the status of minority languages has been won",[66] since regional politics continue to dominate the Spanish constitutional debate and gain more and more weight on the European Union agenda[67] also. KEATING's assertion that there is a constant

[62] http://www.xunta.es/linguagalega/an_overview_of_the_galician_language [01.11.2011.]

[63] For an opposite opinion, see Abad i Ninet, Antoni – Rodés Mateu, Adria op. cit. p. 17: "[T]he possibilities offered by the Spanish Constitution to recognise and accommodate the multinational character of the Spanish state have been lost."

[64] Paoletti, Jorge Martínez: Rights and Duties of Minorities in a context of Post-Colonial Self-Determination: Basques and Catalans in Contemporary Spain. In: Buffalo Human Rights Review 2009/15. p. 159.

[65] Trenz, Hans-Jörg op. cit. p. 168.

[66] Ibid. p. 170.

[67] Spain did not bring out its cultural and linguistic diversity during the negotiations of the Accession Treaty, but only in 2004, due to the pressure of Catalan political forces. (However, the European Parliament, having regard to the petitions of the Catalan Parliament and the Parliament of the Balearic Islands, accepted a *Resolution on Languages of the Community and the Situation of Catalan*, as early as 1990.) The Spanish government claimed that "these [Catalan, Basque and Galician] are living languages in the fullest sense of the term, widely used by several million citizens (a

tendency to outbid by minority nationalist parties, whilst central government – fearing the dissolution of the country's territorial integrity and the separatist ambitions of the minority nations – would undo whatever concessions were made[68] is attractive. SZAJBÉLY points out that the effective participation of autonomous communities in the state legislature is unresolved, and the lack of financial autonomy also remains an ongoing concern.[69] Other authors claim that those communities which had enjoyed a greater degree of historical autonomy should have been granted more power under the constitution.

In respect of legislation of the autonomous communities, all of the three linguistic policies examined share the goals of normalising the use of the language and increasing linguistic competency. In the regulation of the education system, which is the most important area of language normalisation, policies in Catalonia reflect the greater preponderance of regional language speakers in that Community. The Basque three-model system produces slower progress in language acquisition, but responds more adequately to the Basque Country's demographic profile. Seemingly, the least successful is the moderate Galician linguistic policy. Another difference among the three policies is the extent to which each government regulates language use in the private sphere. The Catalan government is more interventionist than its Basque and Galician counterparts; let us simply think of the regulation of the private media.[70] This is one of the main arguments of the opponents of this system. Moreover, according to them, the normalisation process often results in an opposite tendency, i.e. when the language of the 'minority' is the official language of a region, regional language politics create 'minorities within the minority', repressing the non-speakers of minority languages. On the other hand, if we consider that the speakers of minority languages cannot use their own language in communications with central state institutions, we see that they are still at a disadvantage compared to the monolingual Castilian-speakers.

Indeed, there are shortcomings and contradictions in the constitutional text which, according to EHRLICH, were necessary in order to gain a political consensus and, in fact, we should be happy that the Constitution was adopted at all.[71] Furthermore, the successful examples of autonomous legislation show

quarter of Spaniards employ them regularly in their daily lives)". Finally, the official use of regional languages in the European Union was authorised on the basis of an administrative arrangement concluded with Spain. Morata, Francesc: European Integration and the Spanish "State of the Autonomies". In: Zeitschrift für Soziologie der Erziehung und Sozialisation 2006/4 pp. 519-521.

[68] Keating, Michael op. cit. p. 23.

[69] Szajbély, Katalin op. cit. p. 695.

[70] Block, Andrew Justin op. cit. p. 52.

[71] "Whether the Constitution of 1978 works or not is largely – if not completely – irrelevant… [T]he process which created the constitution resulted in a functionally stable democracy in a country which did not have a history of a stable democratic

that, even in such constitutional basis, language rights of citizens in the bilingual communities are strengthening, and the prestige of minority languages – at least in their respective autonomous communities – is growing.

government, and that… should be deemed a success." Ehrlich, Charles E. op. cit. p. 315.

The post-war political and legal system of Hungary and its restitution policy regarding Holocaust survivors (1945 to 1948)

NÁTHON, NATALIE

ABSTRACT *The paper deals with the post-war political and legal situation in Hungary, giving a short overview of its restitution policy regarding Holocaust survivors from 1945 to 1948. One of the most interesting and still topical questions of the period, which has been debated ever since, relates to its character: whether there was a transition to democracy or not immediately after the war. The essay tries to systemise the facts, data, available archives and literature whilst taking into account the international environment, the activities of the Great Powers and diplomatic steps. After World War II zones of influence were created by the victorious Great Powers in Europe, which had a decisive impact on the new state structures to be established. For about three years in this unique situation Hungary thought it likely that democracy and the rule of law would be introduced. In the meantime the government also had a major task to abolish not only anti-Jewish legislation, but to re-establish the civil rights and legal equality of the Jews and to adopt appropriate laws and decrees to improve the survivors' economic condition. In spite of serious efforts at the beginning, the final outcome was that moral and financial restitution and compensation failed to be realised. These issues are still at the centre of a variety of debates and discussions.*

1. Introduction

This essay attempts to deal with the political and legal situation of post-war Hungary and its relation to the Holocaust survivors and deportees, especially regarding restitution policy. This is an interesting and exciting period - still posing topical questions - in Hungarian history, but, although it is well documented from political, sociological and historical perspectives, there are – in my opinion – blank areas concerning its legal approach.

When I started my research three years ago, I did not expect that this period would be in the centre of such a debate as we currently have in Hungary. The policies inherited from the coalition period change from day to day and there is

still a political connotation, especially by the light of the adoption of the new Hungarian Constitution which comes into force in 2012.

I have no wish to be involved in any political discussion and so I will follow the facts from the end of World War II until 1948. Having given a short overview of the post-war situation, the establishment of a new state structure, the reconstruction of the administration and the attempt at a transition to democracy, I will turn to a short analysis of the Jewish community, their legal situation, fate, prospects and finally – briefly – to the absence of any moral and financial compensation and/or restitution. The limitations of space, of course, mean that this topic cannot be thoroughly covered, and so I will try to give a compact but accurate overview.

2. Hungary and the end of World War II (1944-1948)

Autumn 1944: Hungary lay devastated; fighting within the Axis Alliance had resulted in a catastrophic situation within the country with several hundred thousand deportees and prisoners of war, the transport and communication infrastructure in ruins, and numerous bridges destroyed (among them all those in the capital, Budapest). 40 % of the nation's assets had been destroyed, along with its railway network. There was a shortage of livestock and of cereals and the damage caused to agricultural land put the food supply of the whole country at risk. The administration was in ruins, public transport did not work and chaos was stating to develop.

Hungary and the Horthy regime had lost the war in 1944, not only from the historical point of view, but it had suffered total defeat.[1] The possibility of a new political order, a democratic transformation and a rebirth gave hope to the country and to its inhabitants. In the beginning the main objective was to build a new nation from the ruins of a destroyed and – physically and mentally - broken country, breaking totally (starting from the roots) with the dark past. It was, however, a slow process; it took many years, and finally failed to produce the results hoped for. The post-war political order began to take shape in October 1944 in the eastern part of Hungary. At that time the country was divided into two - one nation, but two opposed sides fighting on its territory. Until March 1945 the Arrow Cross Party led by FERENC SZÁLASI held power with the support of Hitler and prevented the country from surrendering to the Allies.

In the Eastern part of the country the Red Army reached the borders of Hungary in September 1944 and its decisive role in the rebuilding of Hungary was based, among other things, on the discussions and agreements made during the war at several diplomatic conferences of the Allies. In October 1944 STALIN and CHURCHILL meeting in Moscow reached an agreement regarding

[1] Litván, György: Koalíciós közjáték, 1945–1948. Rubicon, 1996., Vol. 7., No. 1-2., http://www.rubicon.hu/magyar/oldalak/koalicios_kozjatak_1945_1948/ [31.12.2011]

the spheres of influence of the Allies in South-Eastern Europe, which placed Hungary in the Soviet Union's zone. That agreement was confirmed – informally - in Yalta in February 1945.

On December 22, 1944, a provisional government emerged in Debrecen made up of an elected Provisional National Assembly, and a cabinet. The provisional government concluded an armistice treaty with the Allies on January 20, 1945, while fighting was still going on in the Western part of the country and before the end of the year, reforms started. The armistice established an Allied Control Commission, consisting of Soviet, American, and British representatives, which exercised complete sovereignty rights over the country.

The rapid establishment of a new legal order was essential for the functioning of the country, and so a provisional coalition was put together, consisting of members of the Smallholders', Social Democratic, Communist and National Peasant Parties. Among these, the Communists were the strongest and had a major influence in the development of a new state in post-war Hungary.

The provisional government had a great deal to do, starting with the stabilisation of the economy, the conclusion of the armistice, the restoration of the justice system, political consolidation, the change of the form of government and the establishment of a democratic state and its institutions. The new legal order, the re-establishment of the rule of law, the lack of written law in several branches of the legal system,[2] general chaos and confusion – and hence the importance of case law - made this period unique in the history of Hungary.

[2] As Károly Szladits mentions in 1942, in its essay concerning the development of Hungarian private law (civil law), even following several efforts (1861, 1895 and 1928), the codification regarding private law has not been realised. For this reason the importance of the so-called 'judicial law' (in the Anglo-Saxon countries we would say 'common law', although we shall not confuse the two of them) constantly developed and the importance of the principles and of case law became more and more important in everyday practice. As he says "the written law became unwritten law". The judicial law helped to cross the difficulties and the judges – if possible and above the case law – used the dispositions of the draft law of 1928 during the civil procedures as well; the latter was considered as not a "reform codex, but the systemisation of the unwritten law". Of great help were also the Volumes of Judicial Decisions (*Polgárjogi Határozatok Tára, PHT*), which included the so called legal unity (*jogegységi határozat/Rechtseinheit*) decisions issued only by the *Kúria* (Supreme Court). The PHT also included decisions issued by the *Kúria*, which differed from the previous case law (*teljesülési határozat*). The above was introduced by Act 54 of 1912, which regulated the entry into force of Act 1 of 1911 on Civil Procedure. According to Dr. Szladits those decisions had the force of written law ("a PHT intézménye […] kifejezetten írott jogszabályi erővel ruházták fel") (Szladits, Károly: A magyar magánjog jellegváltozásai az utolsó száz év alatt: 1840-1940 [The changing character of the Hungarian civil law during the last hundred years] In: Viski Illés József emlékkönyv, Budapest, 1942.). The important role of the *Kúria* is supported also by the fact that until 1936 it issued 600

As mentioned above, the fate of Hungary was decided primarily by the Soviet Union and only secondarily by agreements among the Allied Powers or by the proposals of domestic political forces. The three Great Powers constituting the anti-fascist alliance - the United States, the Soviet Union and the United Kingdom – had, of course, appeared to agree that the new Europe should consist of independent states with a democratic form of government.[3]

On January 20, 1945, the Hungarian Armistice Agreement was signed in Moscow by the provisional government. The Allied Control Commission[4] (the ACC, whose members were the United States, the United Kingdom and the Soviet Union) was to monitor the execution of the Armistice Agreement, including the activities of the new government. Although all the Allied Great Powers were represented on the ACC, everything was, in practice, decided by its Soviet chairman, Marshall KLIMENT VOROSHILOV.[5] The Armistice Agreement concluded by the Allies with Hungary contained provisions relating to the activities of the Allied Control Commission, and in the case of Hungary it was the Soviet Union, the Red Army, which was given full powers.[6] However, Hungary had ceased to be a hostile or enemy country and her international isolation eased – at least to some extent. It should be stressed that similar structures were set up not only in the neighbouring countries, but in all defeated countries. The division of Europe between the major powers and their influence in different levels in the structure and rebuilding of certain European countries were both similar and totally different at the same time.

In April 1945, after the Soviet troops had rid Hungary of the Nazis, the government moved from Debrecen to Budapest, and a second, expanded Provisional National Assembly was established. In the immediate post-war period, the government started with economic reconstruction and, most importantly, land reform. Considering its emotional importance, land reform was carried out almost without resistance, as most of the owners of big estates had left the country, had died during the war, had been deported or killed.

decisions included in the PHT, and the wording and form of the decisions – although all of them concerned a given case and was theoretically obligatory only for the courts – was more abstract law, than decisions. It contained general phrasing, so it was obvious that it concerned not only the given case.

[3] Central and South-East Europe, 1945-1948, R.R. Betts (ed.), Royal Institute of International Affairs (1950)

[4] The ACC's mandate lasted until September 15, 1947. For further information *see* Palasik, Maria: Demokrácia, választások, újjáépítés 1945-47. In: Fordulatok évei, küzdelem a demokráciáért, Akadémiai Napok (conference), May 17, 2004.

[5] President of the Soviet Mission until Summer 1946.

[6] "For the whole period of the armistice there will be established in Hungary an Allied Control Commission which will regulate and supervise the execution of the armistice terms under the chairmanship of the representative of the Allied (Soviet) High Command..." (Article 18, Armistice Agreement with Hungary http://www.yale.edu/lawweb/avalon/wwii/hungary.htm) [28.11.2011.]

During the war fifty per cent of the country's livestock had been lost, the inhabitants were starving and famine would have swept the whole country if the land had not been sown in the spring. In March 1945, the long awaited land reform was decreed[7] and implemented.

By the end of 1945 it had become necessary to change the provisional status of the state administration and so elections were held. First came the municipal election in Budapest on October 7, where the majority of seats were won by the Smallholders' Party. The general election followed on November 4 and again resulted in the victory of the Smallholders' Party with 57 per cent of the parliamentary seats.

Having achieved an overwhelming victory during the elections, the Smallholders' Party decided to establish a grand coalition government - partly under pressure from the ACC, and partly because the party wanted to share responsibility in the establishment of the new public administration and in the reconstruction of the country. On November 15, 1945 the new government was constituted with members from every party.[8]

On February 1, 1946 Hungary was declared a Republic. ZOLTÁN TILDY became her first president and FERENC NAGY was named prime minister. The National Assembly did not adopt a new constitution, though Act I of 1946 on the Form of Government of the State was tantamount to a constitution, since it defined the responsibilities and relations of the president, the legislature and the government. The shape of a democratic, independent Hungary seemed to be emerging in 1946-1947, if not in every respect.

As can be seen from this, a democratic state structure was coming to life step by step, albeit with difficulties, contradictions and conflicts. From the beginning the need to establish a multi-party system was unquestioned and there was a general belief that Hungary would become independent and finally regain sovereignty.[9]

The democracy that emerged from the 1945 elections did not last long. Most of the influential local government positions (mayors, town clerks, local "national" committees[10] etc.) went to the Communists and, to a lesser extent, to

[7] Central and South-East Europe, 1945-1948, op. cit., p. 103.

[8] The new government consisted of : nine members from the Smallholders', 4-4 from the Social Democratic and the Communist Parties and one from the National Peasant Party.

[9] Referring to different archives Mária Palasik argues that from a strategic point of view Hungary was not as important to the Soviet Union after the war and planned to stay in Hungary for 10 to 15 years. This was for the purpose that it strongly supported the Hungarian Communist Party not only for ideological, but for geo-strategic reasons as well since it would need a strong and solid background when it left the country.

[10] 'Nemzeti Bizottságok' – grassroots organisations first made up by the local representatives of the coalition parites, which – in the absence of local authorities - managed the day-to-day administration of the communities. Their activities were suspended in 1948.

the Social Democrats.[11] A succession of coalition crises started from March 1946 until the resignation of Prime Minister FERENC NAGY a couple of months later. The Smallholders and the Communists both tried to strengthen their positions in the coalition and to make further progress. However, general distrust characterised the months until the end of 1946, and the crises steadily narrowed the scope for Hungarian democracy.

General elections took place again in Hungary in August 1947. The four-party coalition duly won the elections, but, even so, it did not become a unified political force. Substantive political decisions were taken at small, unpublicised, informal meetings of coalition-party leaders, known as inter-party meetings. The Communists, better informed and supported by the Soviet Union, applied methods of pressure, blackmail and political bargaining.[12] Finally the young multi-party system disappeared, and from the middle of 1947 the Smallholders' and the Peasant parties were eliminated from power and the Social Democrats were merged forcibly with the Communist Party. In the summer of 1948 a new and, it can be said, a monolithic party was born, the Hungarian Worker's Party, and in this way the one-party system was born.

3. The establishment of the rule of law: success and failure

The re-establishment of the rule of law – especially after the world war – gave hope and strength. Several defeated countries started the reconstruction of their state *de facto* from zero, and so the situation of Hungary was not unique.

A totally devastated country could, for the first time, have had its own state structure, with no outside influence, or could simply be a country founded on the basis of the free will of its inhabitants. Naturally, this was no more than a dream: Hungary, being the "last ally" of the defeated Germany, was placed under the control of the ACC, in which – as mentioned previously – the Soviet Union had the greatest single influence – and in the broadest sense.[13]

The whole country needed to be rebuilt, but, towards the end of the war, the Allies had concluded[14] that, in the "newly born" countries (some of them with new borders) a democratic system should be established. There was no dissent within the ACC regarding this, and accordingly, the main objective was to establish the rule of law and take every necessary measure to ensure that it functioned.

[11] http://www.rev.hu/history_of_45/ora1/index.htm [30.10.2011]
[12] Ibid. [28.11. 2011.]
[13] Under the so called 'percentage agreement' on the spheres of influence in Eastern Europe and the Balkans concluded between Churchill and Stalin in October 1944, the Soviet Union would enjoy a 75 to 80 per cent influence in Hungary
[14] There were several meetings of the Allies: Common Allied policy was developed in a series of summit meetings, most notably at Tehran in December 1943, at Yalta in February 1945, and at Potsdam in August 1945.

Hungary, similarly to Germany,[15] had had some experience with some form of democracy in the years prior to World War II. It had had a parliamentary government with active political parties, although it should be noted that, post-World War I, the Austro-Hungarian Monarchy had ceased to exist. A short period as a Democratic Republic (*Magyar Népköztársaság*) led by Count MIHÁLY KÁROLYI was followed by a failed attempt to institutionalise a Soviet-style Republic (*Tanácsköztársaság*). Finally, however, the state reverted to the form of a kingdom which was established in 1920 under the leadership of MIKLÓS HORTHY, who adopted the title of ''His Serene Highness the Regent of the Kingdom of Hungary".

Post-war reconstruction had already started in December 1944, and after the war the objective was to establish the rule of law, although the notion *per se* was never mentioned during the judicial and non-judicial processes. The concept of the rule of law refers to the "principle of governance in which all persons, institutions and entities, public and private, including the State itself are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated". Each transitional process of justice building is unique and implemented in a specific societal context, often marked by broken institutions, exhausted resources, diminished security and a distressed and divided population.[16]

As MÁRIA PALASIK mentions, during the coalition years (1944-1947) Hungary had the possibility of establishing a democratic state.[17] Although, since the changes of 1990 in Hungary, a serious debate is still ongoing concerning this period, there is no doubt – in my opinion – that for some two years or so a breath of fresh air blew through the severely damaged country. With the help of new energies and hopes, the founding of the rule of law started – under the supervision of the ACC.

Parliamentary institutions[18] were restored, a new election law was approved and the republic was proclaimed. Institutional reforms and national consultations started in conformity with the discussions and agreements concluded with the Allied powers. This power and state structure was not intended to be temporary, and the laws adopted were all meant to remain in force for several decades.

[15] *See* concerning Germany: Dobbins, James et al., America's Role in Nation-Building: From Germany to Iraq, RAND Corporation (MR-1753), 2005.

[16] United Nations Rule of Law, Transitional Justice.
http://www.unrol.org/article.aspx?article_id=29 [1.12. 2011.]

[17] Palasik, Mária: A jogállamiság megteremtésének kísérlete és kudarca Magyarországon (1944-1949) [The Attempt and Failure of the Establishment of the Rule of Law in Hungary], Politikatörténeti füzetek, XVII. Napvilág Kiadó, Budapest, 2000.

[18] *See* Law No. XI of 1945. Draft law regarding the provisional arrangement of the State Power (Törvényjavaslat az államhatalom ideiglenes rendezéséről).

The long process started, but the conditions were chaotic, and so it was completely disorganised. Nevertheless it included truth-seeking aims and prosecution initiatives (e.g., the People's Tribunals) which were to ensure a fair trial for those accused of committing crimes, and reparation programmes which were to provide a range of material and symbolic benefits to victims (e.g., the National Jewish Reconstruction Fund which ultimately failed to fulfil its goal)[19] and institutional reform.

4. The constitution of the new legal and judicial structure

The tasks of post-war reconstruction concerned the judicial system and other tasks were to be implemented within the country under the auspices of the ACC. The function of the justice system within a state is to promote an orderly social life as an institution of the state. That is accomplished by applying laws enacted by the government of the state, which organises and governs the judicial organisation with its interest.[20] It is said that restoring justice will put an end to impunity and, in doing so, will make a decisive contribution to the return to peace, national reconciliation and state sovereignty. Stabilising the country was above all the most important task before and after the first elections.

A radical change of system was possible, and the enactment of Act I of 1946 on the Form of Government built up the central government in accordance with Parliamentary principles,[21] under which the legislative, executive and judicial powers were separated. It was an important document in post-war Hungary which hence abolished authoritarian rule. This Act of Parliament (or of the National Assembly) functioned as a basic law and was also referred to as "the Small Constitution of the Republic". It contained provisions on the observation and protection of human rights[22] through the criminal law.

As noted earlier, the Parliamentary system operated as a multi-party system with a coalition government. However, with the gradual ascendancy of the Communist Party, the "Small Constitution" soon lost its importance by the

[19] There was still fighting going on in Hungary when the new Provisional Government repealed the anti-Jewish laws and attempted to restore, at least on paper, the assets that had previously been confiscated or seized from the Jews. A series of decrees were issued which, however, were never implemented. *See* Dr. Feldmájer, Péter: Bitter restitution, Szombat, 1998, Hungarian Jews: An Overview.

[20] Szanajda, Andrew: The restoration of Justice in postwar Hesse 1945-1949, Lexington Books, 2007.

[21] Pokol, Béla: Separation of powers and parliamentarism in Hungary, East European Quarterly, Spring 2003.

[22] Constitutional Law in Hungary - Dezső, Marta - Somody, Bernadette - Vincze, Attila - Bodnár, Eszter - Novoszadek, Nóra - Vissy, Beatrix (ed.), Kluwer Law International, 2010.

adoption of the first ever written Constitution of Hungary in 1949, which was mainly based on the Soviet Constitution of 1936.

The judiciary organisation of the coalition period, although this might seem odd, did not change very much. In establishing a fully functioning judicial system it was important to restore the judicial organisation, where ordinary civil and criminal courts continued to function, and new, specialised courts were set up. The reconstruction of the justice system was an integral part of the reconstruction of the country. The Courts of First Instance the so-called *járásbíróság* (144 in number) and *törvényszék* (21) continued; the Court of Second Instance (acting as the Court of Appeal) was the *ítélőtábla* (5), and the Supreme judicial body was the *Kúria*. Next to the *Kúria*, as a parallel body, an Administrative Court (*Közigazgatási Bíróság*) functioned with the specific task of dealing with legal remedies as a Second Instance body, although these procedures were conducted against decisions made by the administrative authorities. One of the most important new types of court was initiated on January 25, 1945 by Prime Minister's Decree 81/1945 which established the People's Courts (*Népbíróság*) and their appeal forum (*Népbíróságok Országos Tanácsa*) for the purpose of bringing war criminals to justice. A special People's Prosecution system was also established.[23]

During that period the reorganisation of the judicial structure also started. Formally, the judicial system was independent from the executive, and independent judges were installed, although membership of political parties was not prohibited. In 1948 Act No 22 of 1948 was adopted, which authorised the Minister of Justice to transfer any judge – without his consent – from one court to another or to dismiss him. Following this regulation more than a thousand judges lost their posts over the next eight years.[24]

5. Jewish Holocaust survivors and their relationship with Hungary

The Hungarian Holocaust was survived by 260-285,000 Hungarian Jewish citizens out of the approximately 840,000 living in the enlarged territory of Hungary between 1938 and 1945, which means that about 67 % of the Jewish population perished during WWII, 40% of those in the capital (Budapest) and

[23] „Hungary will cooperate in the apprehension and trial, as well as the surrender to the governments concerned, of persons accused of war crimes." Art. 14., Armistice Agreement with Hungary,
http://avalon.law.yale.edu/wwii/hungary.asp [2.12. 2011.]

[24] Marjanucz, László: Az igazságszolgáltatás 1949-1956, In: A magyar állam története 1711-2006, PTE Bölcsésztudományi Kar.
http://nti.btk.pte.hu/dogitamas/BHF_FILES/html/14Szabo_Marjanucz/html/8_5.htm [1.12. 2011.]

60% in the provinces. According to the census of 1945/46, the Jewish population amounted to 165,330 persons.[25]

Already in 1944 the provisional government had declared the abolition of all legislation concerning Jews, and consequently on March 17, 1945 adopted the Prime Minister's decree 200/1945, which repealed all anti-Jewish legislation enacted during the Horthy era (1920-44).[26] In addition to re-establishing the civil rights and legal equality of the Jews, the government adopted several laws and decrees to improve the survivors' economic condition.[27] It mandated the return of property – as shops, offices, apartments and personal belongings; under certain circumstances they could also have reclaimed agricultural and forest land. The restart of private enterprises was encouraged and several were willing to go back to follow their original professions, although in most cases their personal belongings were dispersed and seldom were money, jewellery and other valuable tangible items which had been entrusted to non-Jewish neighbours and friends returned.

With all anti-Jewish laws annulled and the new government also trying to improve the condition of the Jewish population, in the post-war situation the general uncertainty and fear of the future, the efforts towards reconstruction, poverty and the dread of Jewish "revenge" all contributed to the rise of anti-Semitism and sporadic pogroms took place in several towns. A general indifference and apathy characterised the non-Jewish population towards the survivors. As Jewish citizens had played no part in the crimes of WWII, they were considered as uncompromised and trustworthy, especially because most of them were committed to and supported the democratic transition of Hungary. All the new democratic parties considered them as potential allies and as participants in a new regime- and opened doors for them.

Survivors, deportees and the family members of the deceased wished to continue or restart their life as soon as possible. They wanted to take part in rebuilding the country and help in its reconstruction, but in the meantime they also wanted to recover from the remains what they had lost personally: their livelihood, their profession and their property. To succeed in this, a long and painful road awaited them, with as many difficulties and obstacles as could be imagined.

The indemnification of the Jewish population was not mentioned at all in the Armistice Agreement of January 20, 1945,[28] except in Article (5), which states

[25] Haraszti, György: Lejtmenetben (A magyarországi zsidóság vészkorszak utáni első 12 éve), Múlt és Jövő Új Folyam, XVIII. évfolyam, Budapest, 2007/4., pp. 4-29.
[26] In total twenty-one anti-Jewish laws and several hundred decrees were annulled.
[27] Szász–Stessel, Zahava: Wine and Thorns in Tokay Valley: Jewish Life in Hungary. The History of Abaújszántó. 1995, pp. 226-227.
[28] Agreement concerning an armistice between the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of

"[t]he Government of Hungary will take all necessary measures to ensure that all displaced persons or refugees within the limits of Hungarian territory, including Jews and stateless persons, are accorded at least the same measure of protection and security as its own nationals".[29] Paragraph 15 of Decree 525/1945 declared the safety and protection of the Jews as equal to any citizen of Hungary, but did not mention the question of restitution.

In order to promote restitution, the Prime Ministerial decree 727/1945 established[30] the so-called Abandoned Properties Commission,[31] which functioned from March 11, 1945 until 1948.[32] Its main aim was to help those who – among others – were deported because of the war and the German occupation, and whose homes, properties, belongings or wealth had been damaged, perished or lost; it wished to help the survivors, as well as to re-distribute those abandoned properties as indemnity where the proprietor had died without heirs.[33] Its duty was also to search for the deportees and to help them return home; it was also to take care of abandoned land, commercial and industrial companies, apartments and furniture. One part of its budget was funded by the revenues of those companies it had put in operation. The Commission's work was assisted and controlled by the parties of the Hungarian National Independent Front (MNFF, Magyar Nemzeti Függetlenségi Front), by the Ministries, by the Trusteeship authorities, by the Trade Union Council and the Presidential Council, which consisted of the agents of the guardianship/trusteeship division of the Ministry of the Interior.

It should also be mentioned that the above concerned not only Jewish property and Jewish victims, but related to all who had suffered and/or died during the war. Prime Ministerial decree 2490/1945 made the reporting of

America on one hand and Hungary on the other.
http://avalon.law.yale.edu/wwii/hungary.asp#art15 [18.12. 2011.]

[29] Promulgated by Prime Minister's Decree 525/1945.

[30] Melléklet a 116. számú irományhoz. Indokolás: „Az elhagyott javak kérdésének rendezéséről" szóló törvényjavaslathoz (Annex to the document No. 116. Motivation of the draft „Settlement of the abandoned properties")

[31] The Commission started its functioning on March 31, 1945. Its first Commissioner was Dr Rudolf Legéndi (May 4, 1945). It should be also mentioned, that according to an article published in 1960 all archives and documents of the Commission – held in the National Archives –, perished in a fire in November 1956; this article is based on an historical overview written before the fire and on information received through contacts with several authorities, thus enabling a reconstruction of its functioning, *see* Kardos, Kálmán: Az Elhagyott Javak Kormánybiztossága, 1945-1949, pp. 53-64, Levéltári Híradó, 1960, 10/2.

[32] Elhagyott Javak Kormánybiztossága (1945 – 1950), Hungarian National Archives (XIX-A-5)

[33] Cseh, Gergő Bendegúz: Az Országos Zsidó Helyreállítási Alap létrehozásának körülményei és működése (1947-1989). In: Levéltári Közlemények 65, I-II (1994), pp. 119-120.

abandoned property obligatory, since in several villages and towns tangible and intangible properties had been stolen or seized, even those owned by the State. For that reason all unidentified property had to be declared within eight days in Budapest and thirty days in the provinces, starting from the day the decree entered into force.[34]

In 1948 a new debate started in the National Assembly concerning this regulation and the fate of the abandoned properties. Admitting that it was still a crucial question to be resolved, the mainstream in the country wanted to close this chapter, which was both an important factor for the reconstruction of the country and, at the same time, an unsolved problem. It was recognised that the abandoned properties represented significant value in the national economy, especially when a considerable part of the country's real estate had been destroyed or seriously damaged during the war. There was an important interest in saving, restoring and using them, and all of this would help in the reconstruction of the country.

Act XXVIII of 1948[35] narrowed the notion of abandoned property substantially. According to its directions, only those goods were to be considered abandoned where the owner had left the territory of Hungary between September 2, 1939 and April 4, 1945 and had gone to Germany or to any country occupied by Germany or, due to his/her pro-fascist attitude, had left for a third country and had not returned before October 31, 1945.

Concerning the above, paragraph 1 contained several exceptions, among others, those cases in which the owner had left the country or had been deported because of anti-Jewish laws or due to his/her left-wing political views; which meant that in those cases their property was not to be considered as abandoned.

After having been reorganised several times,[36] the Abandoned Properties Commission operated until February 1948. It was Government decree 1800/1948 which ordered its termination. Several sources mention that, because of the constant reorganisation of the institution, the work of the Commission was not effective at all.[37] Already at the beginning there was an imperative need

[34] Szendiné Orvos, Erzsébet: Az Elhagyott Javak Kormánybiztossága iratai a Hajdú-Bihar Megyei Levéltárban. In: Hajdú-Bihar Megyei Levéltár Évkönyve XXII - pp. 213-214.

[35] 1948. évi XXVIII. törvény az elhagyott javak kérdésének rendezéséről (Act regarding abandoned goods), 1§ (1) (Magyar Közlöny - Rendeletek Tára 1948. III. p. 1868)

[36] Among others with Prime Minister's Decree 10 490/1945, relating to the restructuring of the Commission, the management and exploitation of the abandoned properties and restitution of the properties to the returning citizens (10 490/1945 M.E. rendelet az elhagyott javak Kormánybiztosáról és a Kormánybiztosság elnöki tanácsáról)

[37] The initial organization of these new administrative authorities was confronted with many difficulties, starting to find an adequate place, personnel (who had to get a certificate from the so-called national committees concerning their political reliability) with expertise or competence. All local commissions had the duty to investigate all abandoned property in their territory, and determine whether it should be considered as

– a reference to which can be found in the minutes of the National Assembly – to make available all information concerning its functioning and results to the public. The administration was slow; sometimes it took between 3-6 months to close a file. The centre in Budapest coordinated the work of 83 (at the beginning), and finally of 65 agents.

The Commission's functions were taken over by the Division of Liquidation of Abandoned Properties in the Ministry of Finance.[38] Its cessation is due also to the fact that there was heavy pressure to transfer the remaining goods to the public, as common property. This is supported by the fact that, in 1947, Decree 10 560/1947 was issued regarding the Suspension of the Enforcement of Claims.[39]

The work of the Abandoned Properties Commission was taken over by the National Jewish Restitution Fund, founded in 1947. After the Abandoned Properties Commission was discontinued, all Jewish properties managed and handled by them were transferred to the newly established National Jewish Restitution Fund following Government Decree No 13 160/1947.

The restitution of Jewish properties was regulated by two legislative Acts. Paragraph 10 of Prime Minister's Decree No 200/1945 empowers the government, without any concrete guidelines, to settle the question of Jewish assets. The other regulation was Act XXV of 1946 of November 15, 1946,[40] by which the state granted, first of all, moral compensation to the remaining Jewish community. The law was declaratory in nature and said little about indemnification/restitution. It stated that the government would create a Fund to channel money to the community in cases in which either the original property owners or their heirs were not alive or could not be identified. Paragraph 2 of the same section lists the persons who fall under the purview of the law. These are persons of the Jewish faith who perished on account of injury or other health damage related to persecution between June 26, 1941 and December 31, 1946. Section 3 of the law mandated that, with the exception of properties whose origin cannot be determined by the Ministry of Finance, all property which was

abandoned or not. It was also their duty to manage the office and the properties and, if possible, to rent them, preserve them and exploit them in the interest of the national economy. According to Szendiné Orvos Erzsébet, who researched the situation of one county (Hajdú-Bihar megye), the clients of these commissions requested principally everyday goods, as for example furniture.

[38] Szendiné Orvos, Erzsébet, op. cit. p. 215

[39] Az Elhagyott Javak Kormánybiztossága tevékenységéből eredő [a kincstár ellen támasztott] követelések érvényesítésének felfüggesztése tárgyában. Hungarian Official Journal 196. VIII. 30.

[40] Law XXV: Law on Condemnation of the Persecution that befell Hungarian Jews and on the Mitigation of its Consequences (1946. évi XXV. törvény a magyar zsidóságot ért üldözés megbélyegzéséről és következményeinek enyhítéséről). Source: The Central Registry of Information of Looted Cultural Property (1933-45) http://www.lootedart.com/MFEU4G30379_print;Y [13.12. 2011.]

taken abroad and returned to Hungary proper, must be given to the Fund. The Fund was endowed with legal personality by the law.

Although the process of returning confiscated assets was regulated, no ministerial decree was ever issued to lay down the manner in which "lawful owners" under Act XXV of 1946 were to be determined. We should not forget Act XVIII of 1946 either, according to which some dispositions regarding inheritance were modified and restricted. According to its paragraph 1, the rules in force should be modified in such a way that, without testament, inheritance by collateral relatives is not possible. The Act was valid for all procedures initiated after April 30, 1946, regardless of the fact that a court ruling ad already determined the date of death at a previous date.[41]

Decision 16/1993 of the Constitutional Court[42] determines that Decree 1600/1944 of the Arrow Cross Government ordered the Jewish population in Hungary to register all its valuables above a certain figure. The registered assets were to be sequestered and deposited in bank safes. The minister of Finance was authorised to draw up an inventory of the contents of these safes and to deposit there cash and other paper assets as well as jewellery and other valuables. This confiscation was remedied by Act XXV of 1946. Nevertheless, the items seized under Decree 1600/1944 fell outside the purview of the National Jewish Restitution Fund since most of these assets had been taken to the West by the fleeing Arrow Cross Government (cf. the infamous "gold train") and they were still abroad,[43] pending a decision on their return.

Under Article 27(1) of the Paris Peace Treaty[44] Hungary assumed the responsibility for restoring the possessions, legal rights and interests, or, if restoration were impossible, the payment of appropriate compensation to the Jewish people affected by the confiscation. In case of no heir or beneficiary, any such unclaimed assets were to be transferred to the Fund by the Hungarian Government. Thus Jewish assets abroad and assets without heir or beneficiary were transferred to the State, and were later nationalised, which means that Hungary failed to comply with this provision of the Paris Peace Treaty.

Uncertainty and controversy also characterised the question of the inheritance tax, which was to be paid on the estates returned. Again it was unquestionable that it should not be paid, but MÁTYÁS RÁKOSI[45] himself

[41] „ (…) rendelkezését azonban az 1946. évi április hó 30. napja után folyamatba tett eljárás során holtnak nyilvánított örökhagyó hagyatékára akkor is alkalmazni kell, ha a bírói határozat a halál idejéül a jelen törvény hatálybalépését megelőző napot állapított meg"

[42] Decision 16/1993 of March 12, 1993 on the restitution of Jewish Possessions

[43] There was a debate concerning the assets held abroad, which according to the Minister of Justice István Ries could amount to several million Forints. Being afraid of the rising, already existing anti-Semitism, he was against full restitution of assets.

[44] The Treaty was promulgated by Act XVIII of 1947

[45] Mátyás Rákosi, himself a Jew, Secretary-General of the Hungarian Communist Party was acting as Minister without portfolio (államminiszter) at that time.

argued against the tax-free solution, being afraid of the reaction of the non-Jewish population.

All administrative proceedings connected to inheritance procedures, and those related to the declaration of death procedures – which were connected in several cases – were slow. So much paperwork, certification, evidence were needed from the claimants that it took years and years to close a case. There was even a tendency to slow down the process intentionally.

In 1949 a decision taken by the Hungarian Workers' Party rejected all claims concerning the restitution of jewellery and other valuables and ordered the Government to act accordingly. The valuables were transferred to the State, including those returned from abroad (the valuables taken in the "gold train" [Aranyvonat] were never transferred either to the Fund, or to the heirs or beneficiaries). Until the summer of 1954 the Fund examined about 18,000 inheritance cases.[46] In the 50s the competence of the Fund was gradually narrowed and it was finally merged with a newly established institution, the National Office of the Churches (Állami Egyházügyi Hivatal) in 1955.

The Fund participated not only in inheritance procedures, but also investigated abandoned Jewish properties on the territory of Hungary. One of its tasks was also to initiate declaration of death and inheritance procedures, to procure data and information on Jewish assets, to sell inherited estates, to manage and handle the properties. By January 1975 about 95% of the estates handled by the Fund and later by the National Office of Churches[47] had been sold. The remaining assets were transferred to the State as a gift, as no financial resources were left to manage them further.

The political changes in the early '50s led the government to abandon and deal no more with restitution and compensation. Private property disappeared, nationalisation started, stayed or on-going procedures were terminated. We can find a few procedures regarding declaration of death or inheritance, but most of these were soon closed. The issue that Hungary had not complied with the conditions of the Paris Peace Treaty was raised only after the changes of 1990. Although the violation of the international treaty was declared and there was hope that some steps would be taken to resolve the question of Jewish restitution, we can conclude that restitution was only partial. After more than sixty years we can hardly find survivors; documents and archives have been damaged, lost and most of theses are incomplete.

Another factor which makes estitution more difficult – and is also a ground for refusal in case of claims – is that the original deadlines have passed or are confused. For example, the deadline for claiming tangible properties expired – according to the Prime Minister's Decree 300/1946 – on January 1st 1950.

[46] Cseh, Gergő Bendegúz op.cit. pp. 124-126.

[47] Which terminated its functions in 1956 and its role was taken up by the Office of the Churches in the Ministry of Culture. In 1959 the office restarted its functions under its original name

Meanwhile we know that, even in 1949, there was a tendency to refuse the restitution of jewellery and other property and we should not forget that already in 1945 there was a moratorium in connection with the initiations of certain procedures.[48] As can be seen, what is faced is constant uncertainty as to which is valid not only for the coalition period, but also for the present.

6. Conclusion

The post-war political and legal situations in Hungary, and especially the civil, penal and administrative procedures, still feature unexplored territory. Whilst many studies have dealt with this topic, we have to conclude that, in the field of restitution policy, there are far fewer papers available, especially documents relating to specific procedures and their outcomes. Even then, many documents and archive materials are not available to the public. Hopefully, this situation will change and an increasing volume of information will be revealed.

[48] Dr. Kende, Péter: A zsidótörvények ma is hatályosak? Népszava, 13. 10. 2007.

Civil crisis management in the Balkans and especially in Kosovo

NÉMETH, CSABA

„The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world..."[1]

„…brennt der Balkans, und wenn der brennt, brennt auch bald etwas ganz anderes; nähmlich Europa. Dann werden Millionen Menschen zur Mitte Europas fliehen und wir haben die Konflikte auf unseren Straßen."[2]

ABSTRACT *In Kosovo, crisis management is currently handled by the European Union. The EU replaced the UN mission*[3] *in Europe's youngest state in December 2008, when EULEX Kosovo (the European Union Rule of Law Mission in Kosovo) represented was a further step by the EU in its activity in the Balkans. This had started in Bosnia and was one means by which the EU was attempting to salve its own conscience, having failed so often over the years. We can perhaps modestly call the Balkans one of the most important scenarios of the so-called ESDP (European Security and Defence Policy) of the EU, and Kosovo has particular significance. This small state merits this appraisal (at least in the opinion of the author) on two counts: firstly, it was precisely the Kosovo war of 1999 which led to the birth of the ESDP, and, secondly, EULEX is the largest civil crisis management mission which the EU has ever maintained. However the activity of the EU in Kosovo has a number of features which distinguish EULEX as very special among crisis missions. The aim of this essay is to paint a picture of the activity of the EU in the Balkans, and particularly in Kosovo, by summarising the legal and historical*

[1] See article 21.1 of the consolidated form of the Treaty on the EU amended by the Lisbon Treaty (hereinafter: EU Treaty).

[2] Gespräch mit Hans Koschnick, EU-Administrator, Mostar, 26.6.1995.
Reichel, Sarah: Anspruch und Wirklichkeit der EU-Krisenbewältigung: Testfall Balkan. Aktuelle Materialien zur Internationyalen Politik. Band 78. Herausgegeben von der Stiftung Wissenschaft und Politik. Berlin 2005. p. 77.

[3] UNMIK-United Nation Mission in Kosovo.

background. It should be born in mind that this essay has not been written to outline the institutional system, decision-making mechanism and budget inside the Common Foreign and Security Policy (CFSP) of the EU or the military crisis management activities of the EU.

1. Introduction

Currently, crisis management duties in Kosovo are handled by the EU. The EU replaced the UN mission[4] in the youngest state of Europe in December 2008. EULEX (the European Union Rule of Law Mission in Kosovo) was a further step by the EU in its in the Balkans. This had started in Bosnia and was one means by which the EU was attempting to salve its own conscience, having failed so often over the years in the Balkans. We can perhaps modestly call the Balkans one of the most important scenarios of the so-called ESDP (European Security and Defence Policy) of the EU, and Kosovo has particular significance. This small state merits this appraisal (at least in the opinion of the author) on two counts: firstly, it was precisely the Kosovo war of 1999 which led to the birth of the ESDP, and, secondly, EULEX is the largest civil crisis management mission which the EU has ever maintained. However the activity of the EU in Kosovo has a number of features which distinguish EULEX as very special among crisis missions. The aim of this essay is to paint a picture of the activity of the EU in the Balkans, and particularly in Kosovo, by summarising the legal and historical background. It should be born in mind that this essay has not been written to outline the institutional system, decision-making mechanism and budget inside the Common Foreign and Security Policy (CFSP) of the EU or the military crisis management activities of the EU.

2. CFSP, ESDP & Civil Crisis Management

2.1 The birth and development of the CFSP

Which came first, the chicken or the egg? The question can also be raised in connection with the ESDP and the CFSP. Which of these working concepts is the broader? In any event, what does crisis management mean? There is one thing, however, which all three have in common: none was mentioned in the Founding Treaties.

In simple terms, the CFSP is the biggest, since inside this particular format can be found the ESDP. The narrowest is crisis management. The CFSP was

[4] UNMIK-United Nation Mission in Kosovo.

created from the EPC (European Political Cooperation).[5] The EPC started in 1970, but first came the Single European Act, which institutionalised it in 1986. The CFSP was created by the Treaty of Maastricht,[6] in the form of the so-called 'second pillar'. The timing of its birth cannot be regarded as merely accidental, in that it coincided with the fall of the Socialist systems in Central- and Eastern Europe, and, due to the new challenges (for example, the war in Yugoslavia) new solutions and measures were needed, which were available on the EU side.[7] The CFSP became operational on 1st November 1993, and, although it was not, in fact, an activity of the European Community, the EC generally kept this significant weapon in their armoury. The member states committed themselves by the Treaty of Maastricht in the spirit of mutual loyalty and solidarity to cooperate within the framework of the CFSP, not to work against the interests of the EU and not to harm the EU as a coherent power.[8] The key CFSP measure termed 'joint action' was also introduced by the Treaty of Maastricht, by which the aims of the CFSP could be implemented. Among these aims it is important that we mention at this point the development of democracy, the rule of law, respect for human rights and fundamental freedoms.[9] As mentioned earlier, the CFSP came into being to support these aims in other parts of the world. Inside the CFSP the balance of the main EU institutions - Council, Commission, Parliament - is not applicable, which has damaging consequences for the CFSP and ESDP, as is shown in the next chapters. However, the importance of the European Parliament (EP) must be stressed in view of the fact that the budget lies within its competence. The European Council and the Presidency of the Council of the EU led by the given member state also have a significant influence on the CFSP.

The functioning of the CFSP has also been influenced by the other Amending Treaties since, as time passed, the weaknesses of the CFSP came to light and these demanded serious solutions. Among the innovations of the Treaty of Amsterdam concerning the CFSP, particular attention should be paid to the introduction of Qualified Decision-Making (Qualified Majority Voting or QMV) in respect of executive resolutions and to the importance of 'Constructive Abstention' for reaching agreement.[10] The creation of the position

[5] The aim was to coordinate the national point of view in the field of foreign policy in order to reach a consistent action by EU member states. Its simplicity shows that it was nothing more than a debating club.
Reichel, Sarah op. cit. p. 35.

[6] Treaty on the European Union before the Lisbon Treaty (hereinafter: EUSz) V. Titel.

[7] Becsey, Zsolt: Az Európai Közös Kül- és biztonságpolitika céljai. In: Európai Tükör 2003/4-5. szám. p. 42.

[8] Article 11.3 of EUSz.

[9] Article 11 of EUSz.

[10] We have to appreciate this since, by the CFSP, the member states waived one part of its sovereignty even if the CFSP is said to be just an intergovernmental cooperation. Notwithstanding this, it is the advantage of Constructive Abstention that the member

of High Representative for CFSP (to make the CFSP coherent and the EU more significant on the international scene)[11] was also important. Another breakthrough in the Treaty of Amsterdam was that the operational (not merely administrative) expenditure of the CFSP was now covered by the EU budget (except for military and security costs).[12] The same Treaty introduced the post of Special Representative who can be assigned by the Council to a specific geographical area.[13] To summarise these changes, the Treaty of Amsterdam can certainly be seen – at least in respect of the theme of this essay – as a major step towards an operational CFSP.

We also need to mention the Treaty of Nice, as this introduced enhanced cooperation inside the CFSP and integrated the PSC (Political and Security Commission) into the EU Treaty.

The Treaty of Lisbon, although it abolished the pillar system, did not change the intergovernmental character of the former second pillar, and neither did it extend the possibility of qualified decision-making,[14] although it regulates its conceptual possibility in the EU Treaty.[15] The most relevant improvement of the Treaty of Lisbon was the creation of the High Representative of the Union for Foreign Affairs and Security Policy and the European External Acton Service.[16] The High Representative is to coordinate the activities of the EU and ensure the harmony of the internal and external policy of the EU.[17] At this point, it seems to be an extremely good starting point that the High Representative is a member both of the Council and of the Commission,[18] i.e. it will represents the whole external activity of the EU in future. The Lisbon Treaty gives initiation power to the High Representative instead of to the Commission,[19] and Parliament has no serious rights in determining the direction of the CFSP.[20] The legal acts, which can be carried out under the CFSP were heavily amended in Lisbon by regulating general guidelines, international agreements and decisions, instead of

state has no need to vote against joint action, even if it does not agree with its regulations.

[11] This person however does not posses any detailed competences by virtue of 26 of the EUSz, which lead to competence troubles.

[12] EUSz, article 28.2., 3.

[13] EUSz, article 18.5.

[14] The EU Treaty regulates qualified decision-making also in future: article 31.2.

[15] See the so-called special transferring clause. Horváth, Zoltán – Ódor, Bálint: Az Európai Unió szerződéses reformja. HVG-ORAC Lap- és Könyvkiadó Kft, Budapest 2008. p. 294.

[16] EU Treaty, article 18.1., article 27.3.

[17] EU Treaty, article 26.2., article 27.2.

[18] EU Treaty, article 18.3., 4.

[19] The Council is entitled to hand over important tasks to the Commision by virtue of article 38 of the EU Treaty.

[20] Horváth, Zoltán – Ódor, Bálint op.cit. p. 299. Except for the adoption of the budget.

joint strategies, actions and points of view.[21] The Treaty of Lisbon upholds the financial regulations on CFSP mentioned earlier, introduced by the Treaty of Amsterdam.[22]

2.2 The creation and development of European Crisis Management

After the change in UK foreign policy in December 1998 in Saint-Malo, the EU reached the next milestone which led to the birth of the ESDP. According to the declaration issued in this French city, the EU has to have an independent, legitimate military capacity. The summit in Cologne on 4th and 5th June 1999, which was the next and decisive step in creating the ESDP, was preceded by the bloody events in Kosovo, and this most certainly provided the final impetus towards the birth of the ESDP. The so-called 'Petersberg tasks' were taken over by the declaration of Cologne, which meant that, from then on, the EU had to carry out new tasks in the sdope of the CFSP.[23] On the 10th and 11th of December 1999 in Helsinki, building on the foundation laid in Cologne, the first commitments[24] were made by the member states. These were to create a Rapid Reaction Force – of 60,000 men - which could be deployed within 60 days and stationed for at least one year[25] (if needed) for crisis management purposes, and led under the national chain of command. At this summit new institutions were created, among which the PSC was the most significant. It was tasked with political leadership and strategic guidance in the field of crisis management.[26] However, in Helsinki NATO was simultaneously declared to have the leading role in crisis management and any crisis management actions of the EU and the ESDP should not endanger the role of NATO. On 19-20th June 2000, in Feira, the member states made another "capacity commitment" by undertaking to

[21] EU Treaty, article 25.
[22] EU Treaty, article 41.1.2.
[23] The West European Union handed over the tasks of Petersberg at its summit in Marseille on 13th November 2000.
Reichel, Sarah op. cit. pp.197.
[24] These offers have continued since 2003-2004. By virtue of the Headline Goal of 2010, squads consisting of 1,500 persons have to be deployed in 15 days.
Horváth, Zoltán-Ódor, Bálint op. cit. p. 303.
Remek, Éva: Az Európai Unió civil válságkezelési képessége. In: Európai Tükör 2007/6. június. p. 95.
Szabó, Erika: A válságkezelés története az EU szemszögéből. In: Európai Tükör 2010/7-8. p.104.
[25] That was the first so-called Headline Goal.
[26] It is deemed the most important organ of the CFSP and the ESDP in which high-ranking diplomats in Brussels represent the member states. It is convened monthly, monitors the political situation and sends reports to the Council or European Council on its own or at the request of the Council.

create a police force cocomprising 5,000 personnel by 2003, 1,000 of whom could be deployed within 30 days. It is worth mentioning also in respect of this paper that the commitment of the member states in the field of the rule of law in 2004 amounted to a judicial contingent comprising 631 personnel.[27] The Council adopted the civil capacity development plan on 12th December 2005. This proceeds inside the so-called CHG-2008 process (Civilian Headline Goal), based on the questionnaires on capacity offered and circulated among the member states and prepared by the Secretary General of the Council.

Civilian Crisis Management was considered likely to become more and more significant after the ex-Socialist bloc countries joined the EU, since the new member states of 2004 would be able to contribute to EU action in the area of crisis management rather than to other forms of EU action - taking into account their population, military power and financial limitations also.

It is important to stress the creation in 2003 of the European Defence Agency, which is mandated to develop defence capabilities in the area of crisis management in the EU.[28] Another player on this scene, the Commission for Civilian Aspects of Crisis Management created in May 2000 should also be mentioned; this is engaged in civil crisis management and is one of the working groups of the Council.[29]

The European Security Strategy (ESS) was adopted on 12th December 2003 declaring that the EU is willing to involve itself in international politics and to feel itself responsible for global security.[30] It seems to be clear in this document that the usual EU measures – e.g., the SAP – Stabilisation and Association Process – is not enough in terms of external action. In cases concerning countries situated in the Balkans, economic development requires, first of all, security inside the country. The EU mentioned, in relation to the ESS, that, among the greatest threats to development are: regional conflicts (1), failing states (2) and organised crime (3). All are visible in the Balkans: (1) Yugoslavia, Serbia, (2) Yugoslavia, Serbia, Kosovo, (3) Kosovo, Albania. ‘‘Fighting against organised crime requires a strong police force’’, declares the ESS (quite correctly) - a statement well illustrated by the tasks of the EU in the Balkans.

Speaking briefly of the financing of crisis management action, we must admit that many problems arose earlier in this field among EU institutions.[31]

[27] Reichel, Sarah op. cit. pp. 237.
[28] This organisation will be institutionalised by the Treaty of Lisbon, see article 42.3 of the EU Treaty.
[29] Remek, Éva op. cit. p. 94.
[30] Remek, Éva op. cit. pp. 87-97.
[31] See an answer to this problem - the agreements concluded by the Council-Commission-Parliament dated 1 January 2000 and 17 May 2006. Reichel, Sarah op. cit. p. 254.
Reichel, Sarah op. cit. p. 254.

The Lisbon Treaty is deemed to be a step forward in this respect since, from this point on, the amended EU Treaty makes it possible to finance the urgent costs arising in this area on the EU's account. The Council is entitled to decide this issue, which means that operating crisis management will be much more secure than before. For this reason the Lisbon Treaty created a starting fund to finance those costs which will not be borne by the EU's budget. By initiating crisis management missions, the CFSP budget was increased. For example, in 2004 it totalled €62.7m and in 2005 €73.2m.[32] Another breakthrough concerned the development of future staff quality through the European Security and Defence College established in June 2005. This organ is a network of institutions and academies of the member states aimed at mediating at strategic level in national administration and civil and military EU staff by means of lectures clarifying the essence of the ESDP.[33] Finally, we should recognise the Civil Planning and Operating Team established in August 2007 supporting the civil crisis management activity of the EU every day of the week inside the Secretariat of the Council.[34]

2.3 Military crisis management

The Pleven-plan, the West European Union (WEU) and the coordination between NATO and the EU are not discussed in this paper due to limitations of length and to the fact that these are linked to Military Crisis Management rather than to Civil Crisis Canagement.

Despite this, it is worth mentioning the WEU since this organisation can be regarded as the cradle of the ESDP. The Council of Ministers of the WEU 19th June 1992 in Bonn decided the so-called 'Petersberg' tasks which are:

- humanitarian and rescue work,
- peace-keeping,
- the tasks of combat forces in crisis management, including peace-keeping.[35]

We can see that the deployment of the combat forces aimed originally at military operations ('military units') in respect of the role of NATO.

[32] Reichel, Sarah op. cit. p. 141.
[33] Reichel, Sarah op. cit. p. 229.
[34] Reichel, Sarah op. cit. p. 231.
[35] Horváth, Zoltán: Kézikönyv az Európai Unióról. Hatodik- átdolgozott kiadás. Hvgorac Lap- és Könyvkiadó Kft, Budapest, 2005. p. 538.
Petersberg Declaration II.4.
http://www.weu.int/documents/920619peten.pdf (02.11.2011.)

3. Crisis management on the Balkans

3.1 The problems of crisis management

The primary problem of crisis management in the EU is that the crisis management activities affected all three pillars before Lisbon, and this kind of problem still seems to exist post-Lisbon. This is especially appropriate in respect of this paper since, with the missions to the Balkans, stabilisation and integration are the two aims which the EU wishes to achieve. However, whilst stabilisation is typically linked with short-term crisis management, integration lasts for years. This means that what starts as an ESDP mission, will, in all probability, turn into a pre-Accession process in the Balkans countries. From this follows the problems of which measures should be applied and when should the mission be led by the Council and when by the Commission. Moreover, instead of coordinating their activities, both the Council and the Commission are expanding their own competencies to those of the other organ.[36] The original formula is easy to understand: the Council is responsible for the short-term (strengthening the capacity); the Commission remains responsible for the long-term (institution building). The broad drafting of its crisis management responsibilities allows the Council to increase its competencies. (Here the author is referring to the Petersberg tasks and the ESS). The relation between the Council and the Commission has been appropriately described in the scientific literature as negative (!) coordination, which means reverting to the status quo by the Council and the Commission.[37] The competence problems between the Council and the Commission culminated in the case of a crisis management mission in the fact that neither uniform, effective decision-making nor a command chain exists. The problem between the Council and the Commission was, in fact, a consequence of the failure to regulate the responsibilities of the Commission in respect of the CFSP.[38]

The EU elaborated many strategies to strengthen coordination between the various actors in crisis management activity: one was the "Procedures for coherent, comprehensive EU Crisis Management" hallmarked by Javier Solana: this proposed some form of mechanism for coordinating civil and military crisis

[36] The Commission 'securised' major development and commercial budgets, see for example the European Initiative for Democracy and Human Rights.

[37] The legal defence of the Commission against the expansion of the Council is remarkable: in the opinion of the Commission, the Council infringes by its acts ex article 47 of the EU Treaty. Case C-91/95 Commission v Council.
Emerson, Michael – Gross, Eva – Ioanniedes, Isabelle – Juncos, Ana E., – Schroeder, Ursula C.: Evaluating the EU's Crisis Missions in the Balkans. Centre for European Policy Studies. 2007. pp. 36-37.
www.ceps.be/ceps/download/1368 (15.11.2011.)

[38] EUSz, article 27.

management. The other initiative of this kind was the civil-military coordination promoted by the Danish Presidency of the Council in 2002, which tried to address the relevant EU players and to shape the culture of the coordination. The third initiative was the creation of the Crisis Response Coordination Teams to ensure the coordination of the military and the civilian parts of a crisis management mission. All failed and none was able to create a new atmosphere for inter-institutional (Council-Commission) coordination.[39]

The next problem is linked to the mandate of the given mission. Insofar as advisory duties do not grant executive rights (and in this way harm the authority and impact of a mission) excessive executive rights could give the illusion that the "receiving country" were an EU protectorate. It is, therefore, easy to understand why the balance could be so hard to find.

A further problem is also that training for the mission's staff at EU level is lacking, which means that the staff carrying out the mission's aims, will not be adequately prepared,

Problems can arise with determining the real aim of the mission. If ambiguous definitions are stipulated in the text of the given joint situation, for example, 'reaching European standards', it will be hard to explain where exactly the whole activity of the mission is heading.

The author totally agrees with the (highly apposite) statement made by ISABELLE IOANNIDES about the Balkans, and this will lead us at the same time to the next part of this paper, since in the Balkans there were many international players by the time that the EU arrived, which is why the area can be called an overcrowded scene.[40] For this reason the legitimacy of the EU mission is always hard to estimate because, during or after the mission, the results seen are not necessarily due to the work of the EU, but may be those achieved by NATO or the UN.

3.2 The scene of the EU's crisis management: the Balkans

The importance of the Balkans was increased by the Accession of the 10 new member states situated in Eastern and Central Europe in 2004, since the expansion meant that the Balkan states became the EU's new neighbours, and so their stability gained high-priority[41], a factor which should not be overlooked.

It is a characteristic quality of EU crisis management action, compared to missions launched by other international organisations, that EU activities have a strong civil element.[42] This means that the EU is willing to handle the problems

[39] Emerson, Michael – Gross, Eva – Ioanniedes, Isabelle – Juncos, Ana E., – Schroeder, Ursula C. op.cit. p. 27.
[40] Ibid. p. 11.
[41] Becsey, Zsolt op. cit. p. 52.
[42] Szabó, Erika op. cit. p. 104.

of society, such as the economy, public administration, modernisation of the police or the development of justice and the rule of law. It is another characteristic of EU missions in the Balkans that the commitment of the EU is permanent, since the final aim in this region is European integration. The perspective of European integration is vital to achieve stabilisation and democracy. After the fall of the socialist systems in the '90s the EU crisis management missions have concentrated on local problems and unstable regions which are currently the main danger to peace, and the EU can in this way be an authentic actor in international politics.

In this context there are six comments to be made in connection with the Balkans:

1) the Balkans is the birth-place of the ESDP,[43]
2) Kosovo is one of the most complex challenges for the EU,
3) the experience gained by the missions launched by the EU in this area will be useable in other parts of the world,
4) the Balkans is the active side of the EU-NATO partnership,
5) the EU can be an authentic player only by virtue of its successes in the Balkans, since, if it fails here, it will be scarcely imaginable that it could undertake to solve in the problems of the African continent, for example,[44]
6) with the Balkan states, the most effective medication is to make integration into the EU a serious and achievable prospect.

It might also be helpful at this point to remind ourselves of a few recent events to demonstrate the importance of the Balkans in respect of European crisis management. It was the place where the EU launched its first crisis management mission (Mostar), its first police mission (Bosnia and Herzegovina), its first military mission (Macedonia) and its largest-ever civil crisis management action (Kosovo). Further, in 2007 most of the crisis management missions took place in the Balkans.[45][46]

1. Mostar: The first crisis management action of the EU was the mission to Mostar. This took place from July 1994, after the war in Yugoslavia, in this historic Bosnian city with its population of 124,000. The mission had a staff comprising 70 civilian experts, 6 EU advisers, 162 police officers and 300 local

[43] „The outbreak of conflict in the Balkans was a reminder that war has not dissapeared from our continent."
European Security Strategy. p. 1.

[44] Országgyűlés Külügyi Hivatala: Az EU koszovói válságkezelési küldetésének jelentése és hatásai. In: Európai Tükör 2008/5. Május. p. 97-98.

[45] Emerson, Michael – Gross, Eva – Ioanniedes, Isabelle – Juncos, Ana E., – Schroeder, Ursula C. op. cit. p. 5.

[46] The EU had already had different kinds of mission (not crisis management), which were involved in Yugoslavia; see, for example, the European Community Monitoring Mission of 1991., Reichel, Sarah op. cit. p. 29.

employees in its main phase.[47] This mission bore many of the characteristics of later EU missions: it was led by the head of the mission, operated in an ethnically fragmented area, the principle of its operation was support to the local community and it arrived by virtue of a request from the "receiving city".[48] The mandate for the mission was to administer Mostar for two years, and the core aim of this mission from the outset was urban development and the resolution of humanitarian problems, with no military involvement. The first cost estimate for the mission had been 15m ECUs, and this was provided from the EU's budget – together with further funding to produce a grand total of 32m ECUs. The remainder of the actual total cost – amounting to 144m ECUs - was borne by the member states in proportion to their GDP.[49] The mission can be regarded as a success, Mostar becoming a liveable city again by 1995. However, one weakness of the mission was that it had no executive powers, and it had certainly not been appropriately prepared.

The EUPM mission: On the 1st January 2003 the EU launched its first police mission in the form of the EU police mission in Bosnia (EUPM). Also, the first so-called fact-finding mission was launched in connection with the EUPM in Bosnia and Herzegovina in November 2001. The need for approval by the European Parliament for an increase in the CFSP budget made it difficult to launch the mission since the staff had no computers, cars or mobile phones at the beginning.[50] The EUPM replaced the UN body known as the IPFT (International Police Task Force). The mandate was, in fact scheduled to end on 31st December 2005, but finally it was extended to the end of 2007. Serious concerns arose in respect of the leadership of the mission, which harmed its work and reputation.[51] The mission made an effort to cooperate with the Commission (the CARDS programme) during its work and so a Joint Coordination Group was created where the parties could discuss their actual and planed activities. In spite of this, cooperation between the Council and the Commission was not at all perfect.[52] Cooperation with EUFOR Althea proved to be another difficulty in harmonising civil and military crisis management. The task of the EUPM was to instruct, advise and monitor the local police forces, and it is clear that, for the three-year mandate originally estimated, the aim of the mission to bring European standards to the work of the Bosnian

[47] Reichel, Sarah op. cit. p. 68.
[48] The legal basis of the mission was the Memorandum of Understanding concluded between the representatives of the EU member states and the heads of the local authority and the Croatian and Bosnian representatives of the federal state. Reichel, Sarah op. cit. p. 71.
[49] Reichel, Sarah op. cit. p. 80.
[50] Emerson, Michael – Gross, Eva – Ioanniedes, Isabelle – Juncos, Ana E., – Schroeder, Ursula C. op. cit. p. 50.
[51] Ibid. p. 56.
[52] See for example the duplicity of the police experts at the local organs. Ibid. p. 58.

police was unrealistic.[53] Additionally, the operation was taking place in a political unstable country. However, one lesson learned during this operation was that a thorough fact-finding mission is needed before an ESDP mission. The EUPM did not have a strong mandate and it was not an "executive mission" – which means that the EU experts were not there to supervise police action and had no have executive rights.[54] The main result of this mission was a good deal of experience quite evident when looking back at the mistakes made. Following this mission and in order to facilitate planning in the future, a framework participation agreement and a model participation agreement were drafted for the participation of those non-member states which regularly or occasionally join a crisis management action launched by the EU. These non-member states will now have the necessary information about the operational details of the mission without having to agree them one by one before each mission.[55]

2. Former Yugoslav Republic of Macedonia: The role of the EU was facilitated here by the Ohrid Framework Agreement, which provided the international community with the mandate to organise the required international help for Macedonia.[56] A special representative was appointed to Macedonia to coordinate the activity of the EU. The first military mission of the EU (named Concordia) took place between 31st March and 31st December 2003 in Macedonia and cost €62m.[57] The EU's military mission was followed by the EU's police mission (Proxima) in Macedonia. The police mission was preceded by a joint fact-finding mission led by the Commission and the Council and the General Secretariat of the Council,[58] by which the EU assessed the conditions and needs of the local police and so the tasks of the future ESDP mission. The task of the Proxima mission was support and advice for the senior police officers and related monitoring. The weakness` of the mission was that it operated only in working hours,[59] and so the mission was not able to carry out its main tasks against organised crime.[60] To achieve the aim of the mission the result-based activities were organised in a time frame and improvements were monitored weekly - which was a serious development in relation to the EUPM mission. Another development occured in the intergovernmental coordination

[53] „You cannot change the police culture in three years. You are lucky if you (can) do it in fifteen years." Ibid. pp. 36-37. Derived from an interview with an EUPM official in Sarajevo, 2005. Ibid. p. 68.
[54] Ibid. p. 69.
[55] Ibid. p. 76.
[56] Ibid. p. 83.
[57] Ibid. p. 129.
[58] It happened for the first time in the history of the crisis management actions of the EU.
[59] From 9 a.m. till 5 p.m.
[60] Emerson, Michael – Gross, Eva – Ioanniedes, Isabelle – Juncos, Ana E., – Schroeder, Ursula op. cit. p. 95.

on the weekly meetings headed by the special representative. Intergovernmental "competition" did not disappear – either inside the EU or in Macedonia. The legitimacy of EUPOL PROXIMA was attacked by other international actors, because this was the last organisation which arrived in Macedonia.[61] Another related problem was certainly the broad mandate of Proxima,, which made the EU suspect in the eyes of other international playerss as if it were trying to intervene in competences. EUPOL Proxima can be called as an Europeanising mission, too because beyond the aim of the Proxima – to move closer the Macedonian police to the European standards – the long-term task was escorting Macedonia on the path towards the EU membership. The lesson of EUPOL Proxima should be – at least in the opinion of the author – that quiet and successful work is not profitable in itself, the mission has to prove to ordinary people also that the mission works, achieves significant changes in their life, to sum it up: a mission has to take care of its image.[62] Proxima was changed by the EU Police Advisory Team (EUPAT), having been operative between December 2005 and 14 June 2006. The new element of EUPAT was the consultation mechanism by which EUPAT informed the Macedonian government about the results and the deficiencies in the Macedonian police. It is important feedback for the EU and a success for the EU missions in this country that, according to the Macedonian Albanians and the the opinion polls, Macedonians and Albanians are beginning to trust the Macedonian police.[63]

3. Finally, we should highlight Althea which was a military crisis management mission costing €1.7 million. This mission became operational on 2th December 2004 and changed the NATO mission. By virtue of the resolution 1948 (2010) of the UN Security Council its mandate will expire in November 2011.

4. EU crisis management in Kosovo

4.1 The predecessor of EULEX: the activity of UNMIK[64]

The predecessor to EULEX was UNMIK - based on Resolution 1244 (1999) of the UN Security Council. The EU was also linked to the activity of UNMIK

[61] Ibid. p. 105.
[62] Ibid. p. 114.
[63] Ibid. p. 118.
[64] More information about UNMIK and the transition from UNMIK to EU governance in:
Németh, Csaba: Volt egyszer egy Ahtisaari-terv. A nemzetközi közösség változó álláspontja a koszovói függetlenség kérdésében. In: Ádám, Antal: Phd tanulmányok 9. Pécs 2010 pp. 528-532.
Németh, Csaba: Az Európai Unió szerepvállalása Koszovóban. In: Ádám, Antal: Phd tanulmányok 8. Pécs 2009 pp. 428-431.

since it formed the fourth pillar of UNMIK, being responsible for reconstruction and economic development.[65]

4.2 The direct prehistory of EULEX: the EU Planning Team (EUPT)

The High Representative of the CFSP and the Commission submitted their report entitled 'The Future EU Role and Contribution in Kosovo" to the Council on 6 December 2005, which raised the issue of the need for a future ESDP mission in Kosovo. Between February 19-27 2006 the Commission and the Council launched a joint fact-finding mission[66] to Kosovo aiming at providing the EU with information to nable it to decide about its future tasks in Kosovo. The Special Representative of the Secretary-General of the UN to Kosovo asked the EU on 4 April 2006 to deploy the EUPT to Kosovo, and, in addition, the Provisional Institutions of Self-Government in Kosovo also welcomed the future EUPT mission. The mandate of the mission was not clear however, and numerous ambiguous definitions were included in the text of the Joint Action (e.g., European standards, monitoring, mentoring, inspecting). Taking into account the deficiencies of the mission, it would be progress if crisis management action had a high-quality professional benchmarking system to increase the efficiency of carrying out the duties and to produce a better decision-making system. Another problem was that the member states did not keep their promises in terms of providing staff and, secondly, the composition of the staff on site changed very frequently, which damaged the quality of the work. This quality was also hindered by the lack of uniform training at EU level.

The EU decided in April 2006 to begin preparation for a future crisis management mission to Kosovo. The EU's decision coincided with that of the UN to abandon its leading role in Kosovo. The aim of the EUPT was to prepare the area for a future ESDP mission and make the transition of power from UNMIK to the ESDP mission easy. Its task was, amongst other things, to plan the future ESDP mission's mandate and to assess staff requirements and the necessary budget. Its task also included ensuring a logistics basis for EULEX, i.e. acquiring infrastructure and storage capacities.[67] The structure of the EUPT was similar to that of EULEX and would comprise the head of the mission and three components: police, judicial and administrative groups. The costs of the staff of the EUPT mission were to be borne by the sending EU institution and the member states.[68] The EUPT mission was planned to start on 1 September

[65] Reichel, Sarah op. cit. p. 169.
[66] Ibid. p. 245.
[67] See article 4 paragraph 3 of the joint action 2008/124/CFSP.
[68] Joint action No. 2006/304/CFSP, article 4, point 4.

2006, and to end on 31 December 2006, although this was extended to 31 March 2008 by virtue of the Joint Action No. 2007/778/CFSP. The obligation to inform and the hierarchy were also similar to the regulation regarding the EULEX. The head of the mission reported to the High Representative of the CFSP and was instructed by the High Representative also, but political control and the strategic leadership were carried out by the PSC, which received reports from the head of the mission. The PSC was obliged to report to the Council. The EUPT made it possible for third countries to join a mission's operations.[69] The planned budget of the EUPT totalled €3,005,000. The mission concerning the EUPT expressly stipulated the obligation of the Council and Commission to coordinate with each other.[70]

4.3 About the circumstances of the acceptance of the EULEX mission

The acceptance of joint action under EULEX No. 2008/124 was a common success for all 27 member states, since Cyprus was the only one who did not vote for its acceptance, but it used its right to Constructive Abstention, so not allowing the joint action fail.[71] A joint action had been adopted before Lisbon when the operative action of the EU was needed.[72] Simultaneously with the acceptance of the joint concerning EULEX, the Council appointed a special representative (EUSR) by joint action No. 2008/123/CFSP to Kosovo. The special representative is responsible for the coordination of the EU's activities[73] and is also the International Civilian Representative,[74] and thus familiar with the Kosovan Constitution and the Ahtisaari Plan. The International Civilian Representative operates under the supervision of the High Representative of the CFSP and it is instructed in the political sense by the PSC.

4.4 Legal basis of EULEX mission; Council Joint Action No. 2008/124

It is a clear advantage of EULEX that it is a mixture of executive and non-executive mandates. The international basis of this Joint Action is Resolution Nr. 1244 (1999) of the UN Security Council.[75] On 14 December 2006 the Council accepted the operative plan for future crisis management action, and on

[69] Ibid. Article 6.
[70] Ibid. Article 12.
[71] Országgyűlés Külügyi Hivatala op. cit. p. 99.
[72] EUSz, article 14.1.
[73] Joint action No. 2008/123/CFSP, preamble, paragraph 6., article 3.d, article 12.
[74] Ibid. Preamble, paragraph 7.
[75] See article 13 and 17 of the resolution of the Security Council.

14 December 2007 the European Council declared the EU ready to play a leading role, including the ESDP mission to Kosovo. The Secretary-General of the UN accepted this offer.

The aim of the EULEX mission is to create a rule of law in Kosovo, i.e. a multiethnic justice, police, and custom service able to operate without political influence and complying with European standards. The decisive character of EULEX in carrying out monitoring, advisory and mentoring functions means support from the local community in the area of the rule of law, but the mission has also executive functions (a mixture of an executive and a non-executive mandate).[76] A further point to be mentioned is the mission's task concerning international justice, which has enabled EULEX to deploy international judges and prosecutors in Kosovo which is a unique characteristic of the EU's activity in Kosovo.[77] The mission's tasks are not regulated in a completely detailed manner, which means that the expansion of the competence of the EU is given by virtue of joint action.[78] The EULEX mission consists of the head of the mission and three components, one police, one judicial and one customs group or team. The head of the mission is instructed by the civilian operations commander and works under the political authority of the PSC and the High Representative. The head of the mission is responsible for the mission; all instructing and controlling rights belong to him and these have been handed tohim by the civilian operations commander. He is responsible for the regular budget of the mission, excercises discipline over the staff and represents the EU in Kosovo. The PSC is the most important actor in the mission's political leading, although the Council decides on the aim and conclusion of the mission,[79] and the PSC reports to the Council. The mission makes it possible for third states to join the operation, their rights and obligations being the same as those of the member states. The cost of the mission of the joint action was estimated at €205m for 16 months, and these costs will fall within the cope of the EU'S budgetary regulation. The costs concerning EULEX staff are borne by the given EU institution or member state providing the staff.[80] Further, this mission obliges the Council and the Commission to cooperate. The joint action originally stipulated a term of 28 months for the mandate,[81] but, in spite of this, the amended mission lengthened the mandate until 14 June 2012.[82] There were

[76] Joint action No. 2008/124/CFSP, article 3, point a.

[77] Ibid. Article 3, point d.

Detailed information in: Böröcz, Miklós – Németh, Csaba: Az Európai Unió jelenléte a koszovói igazságszolgáltatásban és rendőrségben. In: Közjogi szemle. Harmadik évfolyam, 2010. december. pp. 42-49.

[78] Joint action No. 2008/123/CFSP Article 3, point h.

[79] Joint action No. 2008/124., article 3.

[80] Ibid. Article 9.

[81] Ibid. Article 20.

[82] Council decision No. 2010/322/CFSP.
http://www.eulex-kosovo.eu/docs/info/20100608council%20decision.pdf (02.11.2011.)

2,857 personnel working in EULEX in July 2011, 1,637 international and 1,187 local staff.[83]

5. The EULEX results and Conclusion

Firstly, it must be a high priority for the civil crisis management to show an attractive picture to European citizens in the light of the euro crisis and bureaucratic Europe to overcome their disappointment and revive their faith in the importance of European integration.[84] According to the opinion polls, the most important future task of the EU should be to maintain peace in Europe.[85] It is evident that it will be a difficult test for the EU to handle the Kosovo problem from the point of view of international law and to solve the problems of the minorities living in Kosovo. Success would make Kosovo a a superb precedent to follow in the political and legal sense.[86] We should, finally, refer to two documents which describe the results and the deficiencies of EULEX in Kosovo: one of these is the EULEX Programme Report[87] which is issued by EULEX annually, and the second is the Report of the Special Representative of the Secretary-General of the UN (SRSG) on the activity of EULEX and which is published quarterly. According to the latter, dated 12 August 2011, the professional standard of the Kosovo Police Force improved in respect of the arms trade, the trade in body parts and the war against corruption and money-laundering. This result is linked with the activity of EULEX.[88]

Finally, the author would like to highlight one speciality of EULEX which helps a mission's success, and that is the benchmarking system. This process began with the completion of a map representing a starting-line for EULEX concerning the deficiences of the rule of law in Kosovo. EULEX reviews its activity and results against this line annually. This benchmarking system is operated by separate personnel inside EULEX and monitors – legally and financially – the efficiency of the mission by drafting questionnaires. The questionnaires will be filled out by the staff carrying out the operative tasks and,

[83] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo. 12 August 2011. S/2011/515. Annex I. 2.
[84] Javier Solana called it appropriately legitimation based on action.
Remek, Éva op. cit. p. 97.
[85] Emerson, Michael – Gross, Eva – Ioanniedes, Isabelle – Juncos, Ana E., – Schroeder, Ursula C. op. cit. p. 5.
[86] Országgyűlés Külügyi Hivatala op. cit. p. 100.
[87] Last report: Eulex Programme Report 2011.
http://www.eulex-kosovo.eu/docs/tracking/EULEX%20ProgrammeReport%202011.pdf (15.11.2011.)
[88] Report of the Secretary-General ont he United Nations Interim Administration Mission in Kosovo. 12 August 2011. S/2011/515. VI.30.

after the answers arrive, supervisors draft proposals aimed at ensuring a more efficient operation of the mission.

All of the three components of EULEX more or less achieved the required results[89] but, nevertheless, more work is needed by EULEX, since the report addresses serious crime in the area of corruption, organised crime, war crimes and trade in body parts.[90]

EULEX has until Summer 2012 to achieve its aims and the further extension of the mission's mandate is still an open question.

[89] EULEX Programme Report 2011. pp. 8-12.

[90] See the case against Sabit Geci- Riza Alija regarding war crimes, privatisation fraud in Gracanicai Cadastral Office and the Medicus case regarding the war against organised crime.

Ottoman state reforms from the eighteenth century to the Hatt-i-Sharif of Gülhane

RÁCZ, ATTILA

ABSTRACT *During the 14th-16th centuries the Ottoman state was based on a very well organised military and a highly centralised administrative system, and the borders of the Ottoman Empire grew rapidly. Profitable expansion, however, was halted by the long and exhausting wars at the end of the 16th century, and by the 17th century the Empire had started on a long, slow period of decline. From the first part of the 18th century several efforts were made to rejuvenate the diminishing power of the Empire, and it should be no surprise that the first attempts were so clearly derived from its historic military organisation system. In reality, the Ottoman government had been an army before it was anything else and Army and Government were still one.*

Initial attempts were directed at reorganising the military system of the Empire in the hope of returning to the Golden Age, when the power of the Ottoman Empire culminated as it controlled a huge territory stretching from the Near East to Central Europe - even threatening Vienna.

The Ottoman Empire had to face two main challenges. The internal challenge came from the search for autonomy in the provinces, the weakening power of central government and the declining effectiveness of its army, a series of conflicts and demands for order, security and regulatory action often couched on moralistic and religious grounds. By contrast, advancing technology, economic systems relying increasingly on industry, new forms of government and administration which generated military power constituted the backbone of the external challenge.

The aim of this paper is to pursue the developments of the attempts at reform during the 18th century and up to the promulgation of the Hatt-ı Sharif of Gülhane in 1839.

1. The fundamental characteristics of the Ottoman state

From the beginning the Ottoman state, including both central government and local administration, was based on a military organization. At the end of the eleventh century AL-GAZALI, one of the most important theorists of Islamic philosophy and statehood and who flourished in Bagdad, wrote: "Government today is a consequence solely of military power, and whosoever he may be to

whom the holder of military power gives his allegiance, that person is the caliph."[1] The existence of a highly developed Ottoman chancery using many Persian administrative and Ilkhanid financial terms during the reign of ORHAN GAZI[2] can be traced back to its Persian-Ilkhanid or Seljuk origin.[3] Military prominence in public life has a long and strong tradition in the Ottoman Empire. "The Ottoman government had been an army before it was anything else … in fact, Army and Government were one. War was the external purpose, Government the internal purpose, of one institution, composed of one body of men."[4]

According to the Ottoman theory, all subjects and lands within his realm belonged to the Sultan. This principle abolished all local and inherited rights and privileges in the conquered territories. It had been formulated in order to confirm the absolute authority of the ruler and to give expression to the concept that all rights were derived from the will of the Sultan. Nevertheless, the Sultan could elevate a *ra'iyyet* (commoner) into the *'askeri* (military class) by edict in such cases when certain qualifications had been met such as performing an outstanding military exploit or proving devoted in the service of the Sultan.[5] The *'askeri*, the members of the military class, were not an aristocratic caste with historically established rights, and in the same way the Sultan could deprive an *'askeri* of his status by edict.[6]

In fact in the Ottoman Empire there were two principal classes: the class of common subjects (re'aya) and the members of the military order ('askeri). The main group of 'askeri consisted of mounted soldiers known as 'sipahi'. In the conquered lands they were granted 'timars' (holdings of land) in lieu of salary - a form of fief. In practice, the outright owner of the land was the state, but utilisation rights belonged to the owner of the 'fief'. One of the most significant benefits of the system was taxes in kind. These taxes could be collected and used by the timar-holder (also 'timariot') in return for certain services and obligations. For instance the timariots who possessed comparatively large timar lands were required to provide the army with fixed numbers of fully armed mounted soldiers. The number of these groups varied according to the rank of the timariot and the size of the timar which he held, and in the Kanunname (Legal Edict) of SÜLEYMAN I the obligations for the number of soldiers and

[1] Gibb, H. A. R. - H. L. Bowen, Islamic Society and the West, London, 1950, p. 31.
[2] Orhan Gazí came to power after his father, Osman Bey, the founder of the Ottoman Dynasty and Empire, and established a highly developed central administration after occupying Bursa.
[3] İnalcık, Halil: Ottoman Methods of Conquest, Studia Islamica, No. 2 (1954), pp. 103-129, 110.
[4] Lybyer, A. H.: The Government of the Ottoman Empire in the Time of Suleiman the Magnificent, Cambridge, Mass., 1913, pp. 90-91.
[5] İnalcık, Halil op. cit p. 114.
[6] Ibid. p. 113.

their equipment were laid down in detail.[7] In most cases the military class included not only the army, but also all the members of their households. In this way the fief system allowed the Ottoman Empire to have a large fully equipped mounted army. These troops were ready for war on a permanent basis and this established a powerful force spreading even to the villages like a net within the wide borders of the Empire. The conquered territories were divided into comparatively small territories called *sancak*, which were the real administrative and military units of the Empire. The head of a *sancak* was a *sancak beyi* and he was the commander of the timariots in his *sancak*. A *Sancak beyi* was obliged to lead timariots residing in his *sancak* to war, to establish public order and to execute legal and governmental decisions.[8]

In addition to state forces a new military organization had grown up in the early period of the Ottoman Principality. The sovereignty of the Sultan required an executive body with total loyalty.[9] The *Kapikulu Army*, that is to say "the Army of the Slaves of the Porte" or "the Door-Keepers Army", was the personal fighting force of the Sultan and acted under his command during military expeditions. The first *kul* (servant) origin units of the Sultan were probably formed from prisoners of war and slaves as a result of the sultan taking his traditional one-fifth share of his army's booty[10] in kind rather than in specie.

From the reign of SULTAN MURAD I these infantry units were created from Christian male children levied through the *devşirme* system from conquered countries. The corps began to be called Janissaries, meaning New soldiers.[11] This formed the conscription of non-Turkish children, notably Balkan Christians. Jews were never subject to *devşirme*, nor were children from Turkic and Armenian families.[12] Every five years Ottoman administrators would scour their regions for the strongest sons of the sultan's Christian subjects. These boys, usually between the ages of 10 and 12, were then forcibly taken from their parents and enrolled in Janissary training. The recruit was immediately converted into the ways of Islam.[13] In return for their loyalty and their fervour in war Janissaries gained privileges and benefits. In the first place they received a quarterly salary. Further, they received a share of booty during wartime and enjoyed a high living standards and a respected social status. In the early stages they had to live in barracks situated in Istanbul and Edirne, and could not marry

[7] Ibid. p. 121.
[8] Ibid. p. 108.
[9] Ibid. p. 113.
[10] Fodor, Pál: A janicsárok törvényei (The statutes of Janissaries 1606), MTA Orientalisztikai Munkaközössége, Budapest, 1989, p. 7.
[11] Ibid. p. 3.
[12] Ibid. p. 7.
[13] Ibid. p. 6.

until retirement, or engage in any civil trade.[14] A few of the best-looking among them were retained in the Palace as bodyguards. The brightest of the Janissaries were sent to the *Enderun* (Palace Institution) for education,[15] where they might be attracted by the possibility of a glittering career - perhaps even as high a position as that of Grand Vizier, the Sultan's powerful chief minister and military deputy. In this way a distinctive social group was formed as personal servants of the Sultan. Janissaries quickly became the most important and influential ruling group of the Ottoman Empire, displacing the Turkish origin ruling states. According to the traditional construction of the Ottoman bureaucracy the ruling class was divided into *Mülkiye* (Imperial Institution), *Askeriye* (Military Institution) *Maliye* (Financial Institution) and *Ilmiye* (Religious Institution). The "Servants of the Sublime Porte", the instrument of the central power, was strengthened and gained significance in the governance of the state. Devoted servants of the Sultan were entrusted with important military and administrative appointments and shared governmental responsibilities. They were sometimes given timar-lands and appointed to important posts, even as governors in the provinces.[16] Inside the mechanism of the body of military and administration the absolute power of the potentate was ensured by the "*kul system*."

2. The emergence of the Eastern Question

The Ottoman Empire, at the height of its power controlled a huge territory from the Near East, through Asia Minor to South-East and Central Europe. The power of the Ottoman Empire culminated in 1683 when they lost the Battle of Vienna. Peace, the Treaty of Karlowitz of 1699, was made much later and represented a pivotal moment in the balance of power between the Ottoman Empire and its Western adversaries.[17] The Ottoman Empire was forced to cede many of its Central European possessions, including Hungary. Since the westward expansion of the Empire was arrested, the Ottoman Empire never again posed a serious threat to Europe and Austria.

[14] Ibid. p. 26.
[15] Ibid. p. 14.
[16] İnalcık, Halil op. cit. 120.
[17] Tuck, Christopher: 'All Innovation Leads to Hellfire': Military Reform and the Ottoman Empire in the Eighteenth Century. In: The Journal of Strategic Studies, Vol. 31, No. 3 (June, 2008), pp. 467-502, p. 467.

The Eastern Question[18] emerged as the power of the Ottoman Empire began to decline during the 17th century. Nevertheless the Eastern Question did not truly come to light until the Russo-Ottoman Wars of the 18th century. The first of these wars, which began in 1768, came to an end in 1774 with the Treaty of Küçük Kaynarca.[19] The treaty can be interpreted as permitting Russia to act as the protector of Orthodox Christians under the sovereignty of the Ottoman Sultan. Moreover, this allowed Christian national movements in the Balkan region culminating in the founding of Serb, Bulgarian and Greek national states in the following century. Another Russian-Ottoman conflict began in 1787. Russia entered into an alliance with Austria, thereby alarming many European powers, especially the United Kingdom, France, and Prussia. Austria was forced to withdraw from the war in 1791, and after the Treaty of Jassy, signed in 1792, Russia's domination of the Black Sea increased still more. The forced opening of the Black Sea to Russian trade through the peace treaties of Küçük Kaynarca and Jassy, coupled with the loss of territory along the northern shores of the Black Sea, deprived the Ottoman state of its major economic base.[20]

3. Responses to the Eastern Question

During the 14th-16th centuries the Ottoman state, based as it was on a very well organised military system and by means of the highly centralised administrative system, grew rapidly. Profitable expansion, however, was halted by the long and exhausting wars at the end of the 16th century, and by the 17th century the Empire had started on a long, slow period of decline.[21]

[18] The Eastern Question covers a wide range of political and diplomatic problems in Europe set by the decline of the Ottoman Empire. The term does not refer to any one and only particular problem, but instead includes a variety of issues raised during the 17th, 18th, 19th, and 20th centuries, including instability in the European territories ruled by the Ottoman Empire. As the dissolution of the Ottoman Empire was believed to be imminent, the European powers engaged in a power struggle to safeguard their military, strategic and commercial interests in the Ottoman domains. Russia stood to benefit from the decline of the Ottoman Empire. Austro-Hungarian Monarchy and the United Kingdom deemed the preservation of the Empire to be in their interests. The Eastern Question was put to rest after World War I, one of whose outcomes was the collapse of the Ottoman Empire.

[19] Shaw, J. Stanford: The Origins of Ottoman Military Reform: The Nızam-ı Cedid Army of Sultan Selim III, In: The Journal of Modern History, Vol. XXXVII. No. 3. September, 1965. pp. 291-306, p. 291.

[20] Kemal H., Karpat: The Transformation of the Ottoman State, 1789-1908. In: International Journal of Middle East Studies, Vol. 3, No. 3 (Jul., 1972), pp. 243-281, p. 246.

[21] Toker, Hülya: Turkish Army from the Ottoman Period until Today, In: International Review of Military History, No. 87. pp. 105-123., p. 107.

The Ottoman Empire had to face two main challenges. The internal challenge came from the search for autonomy in the provinces, the weakening power of central government and the declining effectiveness of its army, a series of conflicts and demands for order, security and regulatory action often couched on moralistic and religious grounds. By contrast, advancing technology, economic systems relying increasingly on industry, new forms of government and administration which generated military power constituted the backbone of external challenge.[22]

3.1 Reform attempts in the early 18th century

From the beginning of the 18th century several attempts were made to stop the decline of the power of the Empire, and it should not be surprising that the first were related to the organisation of the military system. The first serious reform in the military field occurred in the era of SULTAN MAHMUT I (1731-1754). Firstly, the basic military organisation was assessed with a view to renewing the entire state organisation, but it was decided that the Empire could overcome its difficulties by establishing an army similar to the European model.[23] MAHMUT I called in military advisors from the West, mainly French, but their ability to enact change was limited, and few had any serious effect. The Count of Bonnoval reorganized the private artillery corps of the Sultan, named the *Humbaracı* Unit, by dividing it into companies, battalions and regiments as in Europe.[24] Unfortunately it was almost impossible for him to reorganise soldiers from the regular army into new units.

During the era of SULTAN MUSTAFA III (1757-1774) a French officer of Hungarian origin, namely FRANCOIS, BARON de TOTT, was able to achieve limited success. He was assigned to reform the Artillery Unit and started to train six hundred artillerymen in accordance with European methods. He did succeed in having a new foundry built to make artillery in *Kagithane*. He also directed the construction of a new naval base and producing more modern plans for the defence of the Dardanelles. [25] However, the new ships and guns which entered service were too few to have much of an influence on the Ottoman army and could not change the main structure of the Ottoman military system.

3.2 The military reforms of SULTAN SELIM III

This early period of reform was marked by a critical event when the Ottoman Empire and Russia signed the Treaty of *Küçük Kaynarca*. It became

[22] Kemal H., Karpat op. cit. p. 245.
[23] Toker, Hülya op. cit. p. 107.
[24] Ibid.
[25] Ibid. p. 108.

clear to at least some Ottoman statesmen that something had to be done in order to recover and return to the Golden Age of the Empire. A new understanding of its problems and fresh solutions would have to be found in order to overcome the crisis.

This realisation, however, did not fully manifest itself until 1789 when a new Sultan, SELIM III (I789-I807) ascended the throne in the same year in which the French Revolution began. SELIM III realised that the Empire needed radical reform, and his efforts to create a modern army could be attributed not merely to his desire to strengthen Ottoman military power to fight outside enemies, but also – and chiefly - to the unavoidable necessity of asserting the authority of the central government. The Ottoman Sultans had to face periodic revolts and assassination attempts from within their own military, and especially from the bloated Janissary corps. Seeking ways to revive a military with unquestionable fidelity and to end the cycle of palace coups, SELIM III requested a series of *layiha*s (reports) from some of his leading senior bureaucrats in order to review the condition of the army and make recommendations to improve it. The reports stated that the existing military forces were obsolete and ineffective. The Janissary Corps in particular was criticised on the grounds that most members were concentrating on their own commercial activities and so were unable and unwilling to provide adequate service during campaigns.[26] In addition, the experts highlighted the fact that traditional military institutions and their methods are not capable of reform and must, therefore, be abolished altogether and modern methods introduced. Imperial possessions were alienated from the possession of the imperial treasury and assigned to agents as tax farms (*iltizam*) or to salaried employees (*emin*) as agencies (*emanet*) for collecting taxes.[27]

The revenue created by SELIM through the tax-farming system allowed him to achieve his goals. He prepared for remodelling the army to European standards and tried to reorganise the available units as much as possible.[28] The most significant achievement of this period was to establish the *Nizam-ı Cedid* Army, that is the 'New Order' which was divided into companies, battalions and regiments, the first regiment being established in 1794.[29] The need to keep the *Nizam-ı Cedid* independent of the Janissaries was clear because of the corruption and degeneration of the latter.

In addition to training with foreign officers, SELIM sent officers to military schools throughout Europe to learn new tactics and weaponry, with emphasis upon learning how military and naval schools were established. There began to emerge also a small group of men acquainted with Western languages and the

[26] İnalcık, Halil - Quataert, Donald: An Economic and Social History of the Ottoman Empire, 1300-1914, Cambridge University Press, Cambridge, 1994, p. 645.
[27] Shaw, Stanford J. op. cit. p. 296.
[28] Toker, Hülya op. cit. p.108.
[29] Shaw, Stanford J. op. cit. p. 297.

sciences.[30] In order to lessen the diplomatic isolation of his state, the Sultan established permanent embassies in the major European capitals such as Paris, London, Vienna and Berlin.[31]

The most serious opponents of the *Nizam-ı Ceddid* were the *Ulema* (Islamic academia) who saw the changes implemented by Selim as a violation of Islamic law, and the Janissaries, whose existence was threatened by the New Army. This led to open opposition against SELIM's policy and reforms were swept away by the Janissary revolt in I807.[32] The Sultan was forced to place command of the *Nizam-ı Cedid* in the hands of his opponents, and finally he was pressed to abdicate in favour of his cousin. According to the analysis by S. J. Shaw "the entire *Nizam-ı Cedid* was too limited in scope and concept for it to achieve real success. The new army was no more than an enlarged and modernised model of the rifle and cannon corps created in Istanbul during the eighteenth century by the Count de Bonnoval, the Baron de Tott and others. It was created outside the established army and had almost no effect on it."[33]

The reign of SULTAN MUSTAFA IV (1807-08) was short-lived and he can be merely seen as a puppet of the conservatives who had placed him on the throne. MUSTAFA IV ordered the army to be dismantled and all of the schools and institutions associated with it to be destroyed also. All the reforms implemented by SELIM III were replaced by traditional models.

3.3 Reforms in the reign of SULTAN MAHMUD II

SULTAN MAHMUD II (I808-1839) rose to the Sultanate after great disturbances in Istanbul which had claimed the lives of his cousin, SELIM III, and his elder brother, MUSTAFA IV. During the initial years of his reign he was dominated by his Grand Vizier MUSTAFA BAYRAKDAR. Since it was BAYRAKDAR who had occupied Istanbul with his own troops, he was able to control the capital for several months, bring MAHMUD II to power and elevate him to the throne.[34] Controlling all the power, BAYRAKDAR reinstated the *Nizam-ı Cedid* under the name of *Sekban-ı Cedid*, but he kept the new military regime largely out of sight. Yet soon enough the Janissaries again became enraged over the creation of a Western-style military force which threatened their power, position and existence, and once again they revolted. The end result was the death of not only BAYRAKDAR himself, but the elimination of the *Sekban-ı Cedid* as well.[35] A most serious disadvantage of the Sultan lay in the

[30] Kemal H., Karpat, op. cit. p. 253.
[31] Ibid.
[32] Ibid.
[33] Shaw, Stanford J. op. cit. p. 305.
[34] Abu-Manneh, Butrus: The Islamic Roots of the Gülhane Rescript. In: Die Welt des Islams, New Series, Vol. 34, Issue 2 (Nov., 1994), pp. 173-203. p. 179.
[35] Toker, Hülya. op. cit. p.108.

fact that he lacked a supportive cadre to implement his reforms. They antagonised many of his state offices and he was severely criticised also by those who had vested in the *status quo ante*.

After this development MAHMUD II was careful not to openly advocate reforms which would lead to resistance from the *Ulema* or the Janissaries. He bided his time, moving carefully on the introduction of any new policies, until he was able to decisively confront the conservative forces opposed to a policy of non-traditional reform. The most impressive reforms implemented by MAHMUD II were those made to the military despite the revolts of the Janissaries. MAHMUD II had great changes in his mind for reorganising the military system, but he could not implement any until the Janissaries were suppressed once and for all. MAHMUD II had the opportunity and did not fail in his attempt to reform the military according to Western ideas of training and equipment, as SELIM III had attempted. MAHMUD II believed that the military was the fundamental component to reform in order to bring the Empire back to prosperity. MAHMUD II received permission from the *Seyhülislam*, the highest religious official in the Ottoman Empire after the Sultan,[36] and the *Ulema* to carry on with these reforms. Even though MAHMUD II received support from a majority of the people, the Janissaries were upset by this attempt to replace them. Contrary to the last revolt of the Janissaries in 1807, however, on this occasion governing officialdom did not support their cause. On 15th June, 1826, the Janissary corps came together to *Etmeydanı*[37] and rebelled against the Palace and the new system once more, but this time the new artillery units of the Sultan opened fire on the Janissaries and the short war ended their rebellion.[38] In order to ensure that the Janissaries would never again revolt, all the remaining members of the Janissaries were hunted down and executed throughout İstanbul and the Empire. This event ironically became known as the 'Auspicious Event'.[39]

Since SULTAN MAHMUD II was in full control over the government he could begin to implement the reforms which his brother SELIM III had begun during his reign. According to STANFORD J. SHAW, MAHMUD II realised that reforms, to be successful, had to encompass the entire scope of Ottoman institutions and society, and not only a few elements of the military system.

One of the most significant ideas of MAHMUD II was his concept of the Ottoman state. The Ottoman Empire was comprised of many ethnic and religious groups. However, not all people were treated equally by the Ottoman

[36] Katsikas, Stefanos: European Modernity and Islamic Reformism among Muslims of the Balkans in the Late-Ottoman and Post-Ottoman Period (1830s–1945), Journal of Muslim Minority Affairs, Vol. 29, No. 4, December 2009., pp. 537-543. p. 540.
[37] Etmeidani, literally Place of Meat, was so named from the old custom of where cutting up and distributing to the Janissaries their daily rations of meat.
[38] Toker, Hülya op.cit. p. 108.
[39] Freely, John: A szultánok magánélete, General Press, Budapest, 2006. p. 275.

government. MAHMUD II embraced the radical idea that all people within the Empire should have sovereignty - in contrast with the medieval concept of the Islamic Empire. This concept was based on the Islamic religion and a social structure which was composed of distinct orders and estates. Mahmud's wish to change this concept was to become one of the most important debates of the era - how to allow all people within the Empire, irrespective of race, religion, or language, the same rights and freedoms. In order to achieve this goal of creating an equal society, MAHMUD II realised that he had to abolish the *millet* system. This system was the way in which the Ottoman Empire organised its Muslim and non-Muslim subjects into separate communities, all headed by their respective religious leader.

The *millet* system of the Ottoman Empire allowed non-Muslim communities a fairly liberal practice of their life styles and social and religious traditions. However the non-Muslims from time to time were subject to many visible distinctions such as having to paint a wall of their houses a darker shade, or wear certain coloured shoes, wear a trade-mark on their head gear, even having to walk on the street rather than the pavement.[40]

These communities were quasi-autonomous in that they administered their own educational and judicial systems. Before the engagement of Turkish civil law there were three types of religious law in effect in the Empire: Islamic, Christian and Jewish. Sharia Courts took care of Islamic conflicts, the Church took care of Christian issues, and the Synagogues handled Jewish law.[41] In return for this quasi-autonomy the *millets* collected taxes for the Ottoman government and helped to enforce social discipline.

Furthermore, Mahmud also wanted to establish a new system of government administration and used European examples as models. One of the positions MAHMUD II attempted to reform was the office of the *Seyhülislam*, who headed the *Ulema*, the body of experts on Islam law. This title first appeared in the late tenth century, well before the Ottoman Empire was established. The *Seyhülislam* was the chief of the most high-ranking jurisconsults and the head of the body of the *Ulema*. Among his duties was the issuing of *fatwa*s, written legal opinions based on Islamic legal tradition. In addition to his religious and legal duties, the *Seyhülislam* was also an advisor to the Sultan, making the position very important in religious and political terms. Mahmud reduced the role of the *Seyhülislam* in respect of government affairs by restricting his functions to religious affairs only.

In addition to the institution of the *Seyhülislam,* MAHMUD II also wanted to modify the position of the Grand Vizier. The Grand Vizierate, the real seat of

[40] Akgün, Seçil: The emergence of the Tanzimat in the Ottoman Empire, http://dergiler.ankara.edu.tr/dergiler/19/834/10541.pdf [11. 10. 2011.] p. 6.
[41] Oguz, Arzu: The Role of Comparative Law int he Development of Turkish Law, Pace International Law Review, Vol 17., Issue 2, Article 9. http://digitalcommon.pace.edu/pilr/vvol17/iss2/9 [20.06..2010] p. 376.

Ottoman administration, was divided into ministries of Civil Affairs and Foreign Affairs and the Grand Vizier became Prime Minister. The establishment of a Ministers' Council, along with the creation of a Military Council and a Judicial Council, was followed by the establishment of committees for public works, agriculture, trade and industry, some of which later became ministries.[42] MAHMUD II also made reforms with regard to how the bureaucrats were paid. The system which had been in place for centuries was that officials were paid a fee by those who used their services. Mahmud eliminated this by instituting a system of direct salaries paid from the central treasury, which he hoped would involve less corruption than the previous system. The school system established under MAHMUD II also aimed in essence at training personnel for government service.[43]

The reforms established by Mahmud were the beginning of later reforms and led to a public announcement in the form of an imperial decree which inaugurated the *Tanzimat* Era.

4. The Hatt-ı Sharif of Gülhane

The *Hatt-ı Sharif* of *Gülhane*, literally the Imperial Edict of the Rose Chamber, was the first of many edicts which stressed the importance of modernising the political, social, military, and educational systems of the Ottoman Empire. This document ushered in a new era in the history of the Empire, a period known as the *Tanzimat* (New Order) Era, which began with the announcement of the *Gülhane* Edict in 1839 and ended with the promulgation of the first Western-style constitution in 1876.[44] The *Hatt-ı Sharif* of *Gülhane* was proclaimed on November 3rd in 1839 only a matter of months after MAHMUD II had died and his son ABDÜLMECID I (1839-1961) had taken over the Sultanate.[45] The Edict was announced by Prime Minister MUSTAFA RESID PASHA to an audience which included all Ottoman notables. Statesmen and dignitaries together with representatives of foreign states, ambassadors, the Greek and Armenian Patriarchs and the Chief Rabbi of the Jews were invited to the ceremony. After its proclamation, the Edict was published in the official state gazette and a French translation was sent to various European states and their embassies in Istanbul.[46]

MUSTAFA RESID PASHA had started his bureaucratic career at the age of sixteen and had served in various positions at the Sublime Porte. He was one of the first Ottoman bureaucrats to receive some European education. He developed his knowledge and understanding of the West during his

[42] Karpat, Kemal H. op. cit. p. 255.
[43] Ibid.
[44] Akgün, Seçil op. cit. p. 1.
[45] Karpat, Kemal H. op. cit., p. 258.
[46] Akgün, Seçil op. cit. p. 1.

ambassadorships in Paris and London, served s Grand Vizier six times and as Foreign Minister twice. In addition, between 1835 and 1839 MUSTAFA RESID PASHA travelled throughout much of Europe and learned a great deal about the West and its ideology.[47] MUSTAFA RESID PASHA is known as the author of the Edict of the Rose Chamber and the first fifteen years of the *Tanzimat* Era were dominated by him.[48]

MUSTAFA RESID PASHA started to read out the text immediately upon the arrival of ABDÜLMECID I, the youthful Sultan then only 16 years of age, as the enormous crowd listened breathlessly. Following the delivery, all the Ottoman statesmen joined the Sultan in taking an oath of allegiance to the *Gülhane* Decree by pressing their hands on the Holy Quran.[49]

"There were three radical remedies proposed by the *Hatt-ı Sharif* of *Gülhane*. The first of these was that it guaranteed the security of life, honour, and property 'for all people'. The last was the key phrase." The *Hatt-i Sharif* declared that all people, no matter their religion, language, or culture, should enjoy these fundamental freedoms. The most outstanding aspect of the Edict was that it was the promise of the Sultan to extend imperial concessions to all Ottoman subjects, regardless of their religion or sect. By this Edict all the Ottoman subjects were granted equal citizenship.[50] For the first time in Ottoman history the Sultan was confronting his people with a charter, promising and taking the responsibility for their welfare. If there is a lack of security for property, people remain indifferent to the state and his community; no one is interested in the prosperity of the country, absorbed as he is in his own troubles and worries. If, on the other hand, the individual feels completely secure in terms of his possessions, he will become preoccupied with his own affairs (which he will seek to expand) and his devotion to and love for state and community will steadily grow and undoubtedly spur him on into becoming a useful member of society. The Edict was not biased in favour of either Muslims or non-Muslims and all Ottoman subjects were given the status of *Osmanli*. Leaders of the non-Muslim communities lost their privileges and authority over their *millet* to the central government. It was even noted that the Greek Patriarch after observing MUSTAFA RESID PASHA rolling up the Edict upon the completion of his recital, and tuck it in his belt, remarked: "I hope it will never leave the case it is now tucked in."[51]

Another remarkable element of the Edict was a regular system of assessing taxes. That meant the abolition of *iltizam* system.[52] *Iltizam* was a system of tax collection, familiarly known as "tax-farming", whereby local officials or

[47] Abu-Manneh, Butrus op. cit. p. 173.
[48] Akgün, Seçil op. cit. p. 1.
[49] Ibid.
[50] Karpat, Kemal H. op. cit. p. 258.
[51] Akgün, Seçil op. cit. p. 13.
[52] Ibid. p. 12.

notables were given a contract to collect taxes as a commission. Whilst the state became increasingly unable to supervise or even occasionally check the conditions of tax collecting in the provinces, *iltizam* became a byword for extortion of cash and goods from craftsmen and peasants. Thus the tax farmers were able to collect higher taxes than in fact contracted for, and then to pocket the difference. The result was that the state was blamed by ordinary people in the provinces both for the extortionate tax rates, and for its failure to protect the producers within the Empire. A stable and reliable tax system would alleviate some of the financial uncertainties existing in the Empire at this time. This new tax system stated that every person should pay taxes and that these taxes would be assessed according to a person's wealth. A regular system of taxing would also decrease the likelihood of corruption.

The last policy prescribed by the document referred to the military. The Edict guaranteed a similarly stable system for the conscription of required troops and the duration of their service.[53] This document stated that all people should participate in the military, and each member of the military should serve between two and five years, as opposed to serving lifelong tenures with the military.

The edict was not an enforceable constitution. In the edict the Sultan had sufficed by calling the curse of God upon the violators.[54] It reflected only the aspects of the previous western revolutions. The outcome of these revolutions was the display of rationalist and secular mentality, expressed as the Declaration of Rights of Men and Citizens, against hierarchical society and the privileges of the aristocracy.[55] The *Hatt-ı Sharif* of *Gülhane* was a response to the administrative changes which had occurred among Western states during the post-Revolution (French) period and so it developed a reformative rather than a revolutionary character. The Muslims were unhappy to be regarded as equal with the infidels, while their counterparts were also disturbed that they would be losing some community privileges. Beyond any question, however, the *Gülhane* Edict ensured a framework for liberal development in the Ottoman Empire, and, moreover, the Edict opened the way to the emergence of a totally new administrative elite later known as the Young Ottomans. This group guided the Empire towards the first Ottoman Constitution through the following decades.[56]

[53] Ibid.
[54] Ibid.
[55] Ibid. p. 14.
[56] Ibid.

The Development of the European Union's policy on State Aid to Public Service Broadcasting – from early cases to formulated policy –

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ABSTRACT *This paper analyses and contextualizes Community policy on State Aid to public service broadcasting. The basis for Community action was laid as early as 1974 when the European Court of Justice declared broadcasting a service. The pressure on the Commission on how to handle financing issues of public service broadcasting intensified as private operators' complaints claiming infringements of the Treaty started to flow in. The Commission's passive attitude to the handling of these cases eventually brought actions to court and led to the declaration of the Commission's failure to fulfil its obligations arising from the Treaty. As policy was being formulated, a number of documents were published by the Commission, and an overview of these is provided. A discussion of the first Commission decisions in respect of State Aid cases will then follow, and those judgements which eventually pressured the Commission into formulating its policy documents on services of general economic interest and the Communication on the Application of State Aid Rules to Public Service Broadcasting are described. Details of these rules will then be elaborated before the paper discusses the Altmark judgement - one which undoubtedly had a strong impact on the examination process of the Commission in State Aid cases. Finally, before the concluding remarks, the first decision based on both the 2001 Broadcasting Communication and the Altmark judgement will be examimed.*

1. Introduction

The Public Service Broadcasting (PSB) sector was, in 2009, described by the European Commission as holding third place (immediately following Agriculture and Transport) in terms of receiving state aid. The annual figure from licence fees or direct government aid then amounted to more than €22 billion.[1] At the beginning, television broadcasting in Europe was provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry. In the 1970s, however, strong pressure was placed on Member States to open up

[1] IP/09/564

their broadcasting markets to commercial services as a result of economic and technological developments. Whilst opening the market to competition, Member States considered the added-value of public service broadcasting to the extent that it satisfied special cultural and social needs, and covered areas which private operators would possibly ignore.

Market opening increased competition, which in turn led to growing concerns about a 'level playing-field' for both state-funded and commercial operators. Soon, a huge number of complaints were brought to the Commission by private operators claiming infringements of Article 87 of the EC Treaty relating to the public funding schemes established in favour of public service broadcasters.[2]

This paper analyses and contextualizes Community policy on State Aid to Public Service Broadcasting. The basis for Community action was laid as early as 1974 when the European Court of Justice (ECJ) declared broadcasting to be a service in the so-called Sacchi case. This immediately triggered a thinking process on how to handle the financing issues of public service broadcasting. The pressure on the Commission intensified as private operators' complaints claiming infringement of the Treaty started to flow in, and the Commission's passive, hesitant attitude to the handling of these cases eventually brought actions to the Court and led to the declaration that the Commission had failed to fulfil its obligations arising from the Treaty. It was time for the Commission to take a more active role in formulating policy. During this process a number of documents were published by the Commission, and an overview of these will be outlined in Chapter 2. To show the development of the issue, the paper then discusses the early decisions of the ECJ in cases of state aid to public service broadcasters. Also included are those judgements of the Court which eventually pressured the Commission into formulating its policy documents on services of general economic interest[3] and the Communication from the Commission on the application of rules on state aid to PSB[4] in 2001 (further referred to as the 2001 Broadcasting Communication). Details of the rules

[2] http://europa.eu/legislation_summaries/audiovisual_and_media/l26099_en.htm [02.10.2011.]

[3] Communication from the Commission on Services of General Interest in Europe of 19.01.2001, OJ C 17, pp. 4-23. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC0119%2802%29:EN:NOT;
current legislation in force includes the Commission Decision of 28 November 2005 on the Application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, C (2005) 2673, OJ L 312, pp. 67-73. http://ec.europa.eu/competition/state_aid/legislation/sgei.html [02.10.2011.]

[4] OJ C 320, 15.11.2001, p. 5-11. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1115%2801%29:EN:NOT [02.10.2011.]

outlined in the 2001 Broadcasting Communication are elaborated in chapter 3. Following this, the paper moves on to an overview of the Altmark judgement. This is, perhaps, the most significant judgement, but it is undoubtedly one of serious impact on the examination process by the Commission in state aid cases. Finally, before the concluding remarks, the first case which followed both the 2001 Broadcasting Communication and the Altmark judgement will be examined. The process leading up to the revision of the Broadcasting Communication in 2009, as well as the rules of the revised Broadcasting Communication[5] would go beyond the limitations of this essay but will be published separately.

2. Steps towards formulating policy

This chapter focuses on the first decision of the Court to have serious consequences on the broadcasting sector: the Sacchi case. It then moves on to outline the policy context of the eighties and nineties with regard to public service broadcasting. It moves on still further to discuss the first Court judgements and decisions by the Commission which paved the way to the formulated policy issued as the Broadcasting Communication of 2001.

2.1 The Sacchi case[6]

In the Sacchi case a preliminary ruling was requested by the Tribunale di Biella, Italy. The national court in this case was concerned with penal proceedings against the operator of a private television-relay station for being in possession, in premises open to the public, of television sets used for the reception of transmissions by cable, without having paid the prescribed licence fee. In the procedure, the Italian and German governments suggested that, since television undertakings fulfil a task which concerned the public and was of a cultural and informative nature, they were not undertakings in the meaning of the provisions of the Treaty.

In answer to the questions referred to the Court, the rulings were as follows:

The transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services. However, trade in material, sound recordings, films, apparatus and

[5] Communication from the Commission on the application of state aid rules to public service broadcasting, OJ C 257, 27.10.2009, p. 1-14. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:257:0001:01:EN:HTML [02.10.2011.]

[6] C-155/73 Guiseppe Sacchi, Reference for a preliminary ruling: Tribunale civile e penale di Biella – Italy, Judgement of 30 April 1974**,** http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61973J0155 [02.10.2011.]

other products used for the diffusion of television signals is subject to the rules relating to the freedom of movement for goods.[7]

In its summary, the court stated that, if certain Member States treat undertakings entrusted with the operation of television as undertakings entrusted with the operation of services of general economic interest, then the prohibitions on discrimination apply in respect of their behaviour within the market. This applies particularly to their commercial activities, such as advertising, by reason of Article 90(2), as long as it is not shown that the said prohibitions are incompatible with the performance of their tasks.[8]

In other words, the relevance of the Sacchi judgment was that it defined the notion of services (the transmission of television signals) and of goods (the physical medium for the signals). Further, it stated that the chapter on the elimination of quantitative restrictions on the free movement of goods (currently Article 31) referred to commercial monopolies only, but not to service monopolies. Accordingly, Community law did not prevent the Italian monopoly on television advertising. However, the principle was tempered by an important condition, namely, that exclusive rights of this nature must not have a discriminatory influence either on trade between Member States, or on the rules on competition.[9]

This decision had the serious consequence of placing the broadcasting sector, as a service sector, subject to Common Market regulation. The dominant paradigm from that time on (to date) is to provide undistorted competition within the Common Market.

2.2 The context of the 1980s and the 1990s

Following the Sacchi judgement, the eighties brought with them a more active approach from the part of the Commission in the field of broadcasting. For example, the Green Paper '*Television without Frontiers'*[10] (1984) was issued, and this was later followed by the Directive '*Television Without Frontiers' (TWF)*[11] (1989). This period also coincided with the changing

[7] Operative part of the judgement, point 1.
[8] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61973J0155 [02.10.2011.]
[9] http://www.cvce.eu/obj/judgment_of_the_court_of_justice_sacchi_case_155_73_30_april_1974-en-3d423d60-6cdc-4f74-8a1b-b2877ddbf618.html [02.10.2011.]
[10] Television Without Frontiers: Green Paper on the establishment of the Common Market for broadcasting, especially by satellite and cable, COM(84) 300, May 1984
[11] Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the

broadcasting landscape throughout Western Europe, as the emerging commercial channels ended the monopolies of public broadcasting.

The nineties saw even more movement in this respect, strongly questioning the existing systems of public service broadcasting. In 1994 for example, at the Uruguay Round the *General Agreement on Trade in Services* was negotiated (GATS). This was the first time that audiovisual services were negotiated in the context of multilateral trade rules. Although EC Member States, especially France, argued for introducing a cultural exception into the agreement, this was not accepted by the USA.[12]

The *Maastricht treaty* (1993) enacted two changes to Community competition rules, both related to State aid. The Commission's responsibility for enforcing competition rules remained, but the European Parliament was granted greater involvement in decision-making through the adoption of the co-decision procedure.[13] It also enacted a new title on culture (Article 151) into the EC Treaty and with it further broadened discretionary exception to Article 87(3) EC with a new subparagraph d) on cultural exception.

The WTO *Agreement on Subsidies and Countervailing Measures* (ASCM) entered into force in 1995. These established rules on what kind of potentially trade-distorting subsidies would be allowed and what remedies were available to countries that felt they had been adversely affected by another country's subsidies.[14]

There were a number of important policy documents published by the European Commission also in the mid-90s which brought together "competitiveness" with deepening globalisation of trade and investment and the liberalisation of regulation, telecommunication and information services. All were, basically, reflections of Al Gore's original proposal regarding the information super-highway, a metaphor successfully introduced and adopted world-wide after the 1992 American election.

In Europe, the first policy document published by the Commission was the Strategic White Paper entitled *Growth, Competitiveness and Employment* –

pursuit of television broadcasting activities (89/552/EEC), OJ L 298, 17.10.1989, pp. 23–30.

[12] Messerlin, Patrick A. – Siwek, Stephen E. – Cocq, Emmanuel: The Audiovisual Services Sector in the GATS Negotiations, In: Barfield, Claude, ed.: AEI Studies on Services Trade Negotiations, Washington D.C., 2004. http://www.aei.org/docLib/20040419_book760text.pdf [02.10.2011.] p. 5.

[13] Competition Policy in OECD countries, 1993-1994., OECD 1997. http://books.google.hu/books?id=CrRWMObi1UAC&pg=PA14&lpg=PA14&dq=%E2%80%A2%091994+Maastricht+treaty+includes+state+aid&source=bl&ots=U7DrpYnQUt&sig=oox7Cvx4GeCWBraG9PPgC31fyeE&hl=hu&ei=HVaETp-ENcK10QXWqujVDw&sa=X&oi=book_result&ct=result&resnum=6&ved=0CEwQ6AEwBQ#v=onepage&q&f=false [02.10.2011.] p.14

[14] http://www.globalsubsidies.org/en/resources/a-subsidy-primer/the-wto-agreement-subsidies-and-countervailing-measures-ascm [02.10.2011.]

Challenges for entering the 21st century,[15] referred to as the Delors report; closely followed by another report entitled *Europe and the Global Information Society: Recommendations to the European Council,*[16] quoted as the Bangemann Report.[17] The most obvious influence of this latter report was the insertion of the key-word "information society" into the European vocabulary.

In fact, the DG Information Society now holds the portfolio of information and technology markets and has been particularly successful in leading the liberalisation of the telecommunications market. From mid-1995 onwards this DG began to publish studies and policy papers on the convergence between telecommunications and the audiovisual sector.[18] The report perhaps raising most controversy, but certainly a strong political backlash from the European Parliament and national press, was published in 1996, entitled *Public Policy Issues Arising from Telecommunications and Audiovisual Convergence.*[19] In it public service enterprises were deemed monopolistic and unnecessary.[20] As a consequence, political movement intensified and manifested itself in the adoption of a *Resolution on the role of public service television in the multi-media society*[21] by the European Parliament, which was basically a call to the Commission to lay down guidelines for the promotion of public broadcasting establishments in order to have a positive public broadcasting policy. At the end of September of the same year, Ministers of Culture and Media in the EU met to discuss the future of public television services in Europe. They came to the conclusion that maintaining public television was favourable and made a

[15] White Paper, COM (93) 700, 5 December 1993

[16] Official Report, 26 May, 1994, http://www.epractice.eu/files/media/media_694.pdf [02.10.2011.]

[17] Servaes, Jan: The European Information society – a Reality Check, Intellect Books, Bristol, UK, 2003. http://www.google.com/books?hl=hu&lr=&id=mFOihbUL7UwC&oi=fnd&pg=PA33&dq=1995+European+Commission++convergence+initiative+Al+Gore+information+superhighway&ots=67vaXBdVs4&sig=BAtQkHYowm4yEwkTt66lw5Oob0Q#v=onepage&q&f=false [02.10.2011.] p.40

[18] Green paper on the convergence of the Telecommunications, Media and Information Technology sectors, and the Implications for regulation, COM (97) 623

[19] Summary Report of KPMG, 1 September, 1996; http://merlin.obs.coe.int/iris/1996/9/article4.en.html [02.10.2011.]

[20] Harcourt, Alison: The European Union and the Regulation of Media Markets, Manchester University Press, 2005. http://books.google.com/books?id=cxyQOhzJgQwC&dq=Public+Policy+Issues+Arising+from+Telecommunications+and+Audio+Visual+Convergence&hl=hu&source=gbs_navlinks_s [02.10.2011.] p. 77.

[21] Report on the role of public service television in a multi-media society. Draftswoman: Ms Carole Tongue, session documents, 11 July 1996, A4-0243/96.*;* Resolution on the role of public service television in the multi-media society. European Parliament, Minutes (Provisional Edition) of the sitting of 19 September 1996, 60-68. http://merlin.obs.coe.int/iris/1996/9/article16.en.html

commitment to guaranteeing adequate financial support for such services. The European Parliament reiterated its commitment to public service broadcasting and the maintenance of the dual media system in another of its Resolutions in 2010.[22] Furthermore, the Committee of Ministers of the Council of Europe also dealt with the issue of public services and adopted a *Recommendation on the Guarantee of the Independence of Public Service Broadcasting*[23] in 1996.

However, something which seemed to be of major political importance happened in 1997 when Member States unanimously supplemented the *Treaty of Amsterdam* with the *Protocol on the system of public broadcasting in the Member States*. The Protocol declared that "The system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism." The provisions of the Protocol, on the one hand, stated that the provisions of the EC Treaty "shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations to the fulfilment of the public service remit as conferred, defined and organised by each Member State." There follows the further proviso: "on the other hand, such funding does not affect trading conditions and competition in the Community to the extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account." This statement basically acknowledged the competence of the Commission to ensure the level playing field whilst leaving funding decisions to the competence of the Member States.

The other change which the Amsterdam Treaty enacted related to services of general economic interest. Article 7d stated that "Without prejudice to Articles 77, 90 and 92, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions." This article gained full importance through the Court interpretation given in the Altmark case discussed later in the essay.

[22] European Parliament resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI)) http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0438&language=EN

[23] Recommendation No. R (96) 10 of the Committee of Ministers of the Member States on the Guarantee of the Independence of Public Service Broadcasting

2.3 First Court decision and First Commission decisions

The first Court decision relating to state subsidies in the public service sector dates back to 1998. As a result of the hesitant attitude of the Commission, several complaints by private television companies[24] were filed at the Court of First Instance (CFI). The television companies asked for the declaration of the Commission's failure to fulfil its obligations under the EC Treaty by not making a decision on their complaints and by not initiating a supervision procedure on state aid. The Court delivered its first judgement in the Gestevision Telecino case.[25] It stated that, as the Commission had exclusive jurisdiction to assess the compatibility of state aid with the common market, it must conduct a diligent and impartial examination of a complaint alleging aid to be incompatible with the common market. Moreover, it must act in a reasonable period of time.[26] This was indeed a serious urge for the Commission to take action and develop a policy towards state aid cases of financing public broadcasting.

The first decision on a complaint concerning the financing of the Portuguese public service broadcaster RTP[27] was taken on 2 October 1996, followed by another two decisions in 1999 on the financing of new public channels in Germany (Kinderkanal/Phoenix)[28] and the United Kingdom (BBC 24-hour news).[29]

According to the press release on the RTP case, the Commission declared financing received by the Portuguese public television channel not to constitute state aid. The press release described financial "compensation" of certain activities, and in conclusion declared:

"State financing for these activities does not rank as state aid in so far as it does not represent an advantage free of charge since a quid pro quo (performance of the above non-competitive activities) is required."[30]

The approach to view payments from the state for delivering a service of general interest as compensation for delivering that service was short lived.

[24] SIC brought an action for failure to act before the CFI on 19 December 1995 (case T-231/95), TF1 on 2 February 1996 (case T-17/96), and Gestevision Telecinco on 17 June 1996 (case T-95/96)

[25] T-95/96, Gestevision Telecinco SA v. Commission, 15 September 1998. And yet another case T-17/96 Télévision Francaise 1 SA (TF1) v. Commission, 3 June 1999 C 265/6

[26] IRIS 1998-9:5/6

[27] This decision was never fully published, but the press release IP/96/882 is informative.

[28] NN 70/98 – Germany – Kinderkanal/Phoenix, all Commission decisions can be accessed at: http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf [02.10.2011.]

[29] NN 88/98 – United Kingdom – BBC 24 hours news channel

[30] IP/96/882

Apart from this case, only once had the Commission used the "quid pro quo" argumentation[31] and both cases were challenged in front of the Court.

In its ruling on the FFSA case,[32] one relating to a service of general economic interest, but not to public service broadcasting, the CFI stated: "In order to classify aid for the purpose of Article 87(1) of the Treaty, all that needs to be determined is *the effect of the aid on competition and not its purpose or its form*."[33] The purpose assigned to it cannot be sufficient to declare the prohibition of State aid laid down in Article 87 inapplicable, since the Court of Justice held that Article 87 "does not distinguish between the measures of State intervention... by reference to their causes or aims but defines them in relation to their effects and that consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article 87 "The same applies to aid granted to an undertaking entrusted with the management of services of general economic interest."[34]

The compensation for the Portuguese public television channel was challenged in the so called SIC case.[35] The CFI (again with judge Bo Vesterdorf as president of the Chamber) ruled that, "... the fact that a financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed *has no bearing on the classification of that measure* as aid..."[36]. In other words, by having been appointed a public service broadcaster, RTP had received an economic advantage, which it would not have obtained under normal market conditions. The scheme, therefore, constituted State aid. However, State aid might be compatible with the common market according to Article 86(2) – as has been stated before, in the FFSA case.

In its decisions on the Kinderkanal/Phoenix[37] and on the BBC 24 hour news[38] cases, the Commission followed the traditional State aid approach. Compensation for public service obligations was regarded as State aid, but it was considered to qualify for the derogation in Article 86(2) as a "service of general economic interest."

In brief, the conclusion may be drawn that, between the period February 1997 and November 2001, the Commission in its decisions (a total of 3 cases) followed the recent judgments of the CFI and the ECJ**,** holding that a measure

[31] Case NN 135/92 French postal services (FFSA)
[32] Case T-106/95, Judgement delivered on 27 February 1997. Case based on NN 135/92 French postal services (FFSA)
[33] Ibid. paragraph 139. I changed the original reference of ex Article 92 to the currently used numbering.
[34] Ibid.
[35] Case T-46/97, Judgement delivered on 10 May, 2000
[36] Case T-46/97 SIC v. Commission, paragraph 84.
[37] NN/70/1998 – Germany – Kinderkanal/Phoenix
[38] NN 88/98 United Kingdom – BBC 24 hours news channel, SG(99) D/ 10201 of 14.12.1999.

of public service funding involved State aid under Article 87(1), but might be justified under Article 86(2) EC. The Commission consequently considered that, in all other cases, there may be a presumption of aid that needs to be examined. This was the approach codified in the Communication on Services of general economic interest in Europe and the 2001 Broadcasting Communication.

2.4 The BBC Licence fee case[39]

A third type of approach to State aid cases which the Commission applied may be seen in the BBC licence fee case (often referred to as the "nine digital channel case"). In order to understand this, a look at the preliminary ruling of the Court of Justice in the so-called Ferring case[40] is necessary. The ruling dealt with the State aid character of a new tax introduced by French authorities on direct sales of medicines to pharmacies. The wholesalers were exempted from this type of new tax by the authorities reasoning that they were legally obliged to guarantee the availability of medicines by keeping them in stock. The Court stated: "...provided that the tax on sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 92 (currently Article 87) of the Treaty. Moreover, provided that there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purpose of Article 92(1) of the Treaty because the effect of the tax will be to put distributors and laboratories on an equal competitive footing."[41] In other words, an undertaking was not given undue advantage, neither was the legal ambit of Article 87(1) EC affected, if the advantages granted by the State did not exceed the costs resulting from the public service obligations.[42] In such a case, no justification or examination of State benefits under Article 86(2) EC would be necessary.[43]

The BBC started to run special purpose channels, two television channels for children and radio channels aimed at Asian audienceS and sports fans. In its decision on the licence fee case the Commission with reference to the Ferring case, noted that "... the aid qualification of funding for the compensation of public service obligations depends on the question whether or not the funding

[39] N 631/2001 – United Kingdom – BBC licence fee
[40] Case C 53/00 Ferring Preliminary ruling, Judgement of 22 November 2001
[41] Ibid. paragraph 27.
[42] Ibid. paragraph 29.
[43] Koenig, Christian – Haratsch, Andreas: The License-Fee-Base Financing of the Public Service Broadcasting in Germany after the Altmark Trans Judgement, European State Aid Law Quarterly, 4/2003, p. 569.

goes beyond the net extra costs of the public service obligation. In such a case no real advantage would be granted to the BBC compared to its competitors and therefore the measures would not qualify for State aid in the meaning of Article 87(1)."[44]

The principles and methods for assessing the proportionality of funding in the field of public broadcasting were laid down in the 2001 Broadcasting Communication (discussed in detail below).[45] The Commission decision interpreted these principles in its decision and, having first examined questions of definition and entrustment, in paragraphs 39-54 of the decision, it assessed the proportionality of financing in order to be able to conclude whether this went beyond the net costs of the public service obligation or not. Firstly, the separation of accounts and sufficient control mechanisms were identified. Secondly, the net benefits of the commercial exploitation of the public service activities were taken into account. The Commission found that the Fair Trading Commitment and the Commercial Policy Guidelines in principle safeguard that advantages derived from the public service mission are taken into account. Thirdly, side effects, such as undercutting competitors in the commercial market should be avoided by putting relevant mechanisms in place. In conclusion, the Commission stated that "the compensation for the digital channels does not seem to constitute a measure disproportionate to the net public service costs of the BBC, and therefore does not constitute a real advantage."[46] Consequently, the measure could not be considered to constitute state aid within the meaning of article 87(1) EC.[47] Some argue,[48] that the assessment method the Commission used in this case to judge compatibility of the funding under the EC-Treaty is the same as in case of the traditional approach that first declares funding to be state aid in the meaning of Article 87(1), and then assesses the applicability of a derogation under Article 86(2), although the legal qualification in the end is different.

3. The 2001 Broadcasting Communication

The paper set out to describe the broad political context and market conditions of the '80s and '90s, reviewed those Court decisions which gave substantial impetus for action and steadily manoeuvred the Commission into issuing a formal policy document and indicated the thinking the Commission went through in State aid cases by describing the decisions it had taken in the

[44] N 631/2001 – United Kingdom – BBC licence fee decision of the Commission C(2002)1886fin, 22.05.2002, paragraph 24.
[45] 2001 Broadcasting Communication, paragraph 29.
[46] N 631/2001 – United Kingdom – BBC licence fee decision, paragraph 54.
[47] Ibid. Decision, p. 11.
[48] Tigchelaar, Nynke: State Aid to Public Broadcasting – Revisited, European State Aid Law Quarterly 2/2003, p. 174-175.

different cases. This chapter will now give an overview of what the principles and methods were that found their way into the formulated policy document of the Commission.

The Commission first published its *Communication on Services of General Interest in Europe*, tn which there was a clear statement on the freedom of Member States to define "what they regard as services of general economic interest on the basis of the specific features of the activities. This definition can only be subject to control for manifest error."[49] The Communication in paragraph 26. referred to Court cases FFSA[50] and SIC[51] (described above) and, in accordance with jurisdiction, stated that compensation granted by the State to an undertaking for the performance of general interest duties constitutes State aid. In the Annex to the Communication there was a section on Radio and Television[52] where the following is noted: "It is for the Member States to decide whether they want to establish a system of public service broadcasting, to define its exact remit and to decide on the modalities of its financing... The choice of the financing scheme falls within the competence of the Member State, and there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenues) rather than a single funding scheme (solely public funds) as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest." These principles found their way into the 2001 Broadcasting Communication also.

The *Communication on the application of state aid rules to public service broadcasting* published November 2001 served to develop a coherent and transparent procedure for assessing state aid compatible with the common market, or distorting competition. It set out the applicability of Articles 87 and 86(2) of the EC Treaty. Firstly, the Communication addressed the question whether the financing of public service broadcasting should be qualified as State aid under Article 87(1) EC. Secondly, it developed the conditions for the applicability of the derogation under Article 86(2) EC for undertakings entrusted with the operation of services of general economic interest. Below is a brief analysis of the criteria which the Commission set out to scrutinise under Articles 87(1) and 86(2) EC.

3.1 Criteria analysed under Article 87(1) EC

Article 87(1) EC, or other Articles of the Treaty, do not give a definition for State aid. Instead, this Article describes the conditions under which State aid is

[49] Communication on Services of General Interest in Europe, paragraph 22.
[50] T-106/95
[51] T-46/97
[52] Communication on Services of General Interest in Europe, Annex I.: State of play for individual sectors, pp. 19-20.

incompatible with the common market. The Court itself refrained from a strict definition of the term, although it stated:

"A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges normally included in the budget of an undertaking and which, without, therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect."[53]

3.1.1 Distortion of competition and effect on trade between Member States

The criteria of distortion was interpreted broadly; where it altered, actually or potentially, the conditions of competition, or where it strengthened the position of an undertaking compared with other undertakings, trade must be regarded as affected.[54] The Communication identified several international markets where broadcasters compete;[55] e.g. the acquisition and sale of programme rights and advertising. It noted that the ownership structure of commercial broadcasters may also have a cross-border effect. Market definition had the purpose of identifying the effects of the aid under investigation and a possible distortion of competition.

3.1.2 Presence of state resources

According to the 2001 Broadcasting Communication, financial aid to public service broadcasters (state budget, levy on TV-set owners, capital injection, debt cancellation) were normally attributable to the public authorities and involved the transfer of state resources.[56]

In early 2000 a debate arose on whether licence fee revenues should be regarded as state aid. In her article TIGCHELAAR[57] summarized the arguments arising in the German literature for excluding licence fee revenues from state aid, mainly for the reason that there were no State resources involved in these

[53] Case 30/59, Steenkolenmijnen, Judgement of 23 February 1961, p.19.
[54] 2001 Broadcasting Communication, para 18.
[55] 2001 Broadcasting Communication, para 18.
[56] 2001 Broadcasting Communication, paragraph 17.
[57] Tigchelaar, Nynke op. cit.

cases, as the resources were directly transferred from private persons to the recipient. "These authors claim that the Preussen-Elektra ruling of the Court of Justice supports their view.[58] In Preussen-Elektra the Court of Justice gave a preliminary ruling on the question whether legislation of a Member State requiring private electricity supply undertakings to purchase electricity from renewable energy resources at minimum prices higher than its real economic value constituted state aid."[59] The Court noted that only aid granted directly or indirectly through State resources constituted aid within the meaning of the Treaty. The fact that the purchase obligation was imposed by statute and conferred an undeniable advantage on certain undertakings was not capable of conferring upon it the character of State aid within the meaning of the Treaty.

The Commission, on the other hand, consequently argued that the "license fee system seemed to be more comparable with a system of parafiscal charges, where funds were created, financed through compulsory contributions imposed by State legislation and managed and appointed in accordance with that legislation. According to the Court of Justice, such systems must be regarded as State resources in the meaning of Article 87, even if they were administered by institutions distinct from the public authorities."[60] In the Preussen-Elektra case "Advocate General Jacobs observed that the common denominator of all relevant cases where the Court of Justice concluded on the concept of State resources was the State control over the resources in question."[61] In another case[62] the ECJ argued that the wording of Article 87(1) served to open the definition of aid not only to aid granted directly by the State, but also to that granted by public or private bodies designated or established by the State. Eventually, the Court interpretation of State aid "entails the transfer of State resources through a State measure or a measure taken by a body designated by the State, or frees the undertaking concerned from financial obligations vis-a-vis the State."[63]

3.1.3 Favouring of certain undertakings

The Commission's position on this issue evolved over the years and in line with relevant jurisprudence. As early as 1996, in the RTP compensation payment case,[64] the Commission argued that these payments did not constitute

[58] C-379/98, Judgement of 13 March 2001
[59] Tigchelaar, Nynke op. cit., p. 172.
[60] Ibid. p. 173.
[61] Ibid. p. 173.
[62] Joined cases C-72/91 and C-73/91 Sloman Neptun Schiffarts AG, Judgement of 17 March, 1993, paragraph 19.
[63] Castendyk, Oliver – Dommering, Egbert – Scheuer, Alexander: European Media Law, Kluwer Law International, the Netherlands, 2008., p. 218.
[64] NN 141/95 Financing of the public Portuguese television

State aid under Article 87(1) EC. However, the CFI[65] annulled this decision and confirmed the Commissions new approach taken in a later case, BBC 24-hour news;[66] namely that "any state measure capable of putting an undertaking in a more favourable position than its competitors and having an effect on trade between Member States has to be regarded as falling under the ban in Article 87(1) EC."[67] According to the 2001 Broadcasting Communication, any transfer of State resources to a certain undertaking has to be regarded as State aid.[68]

3.2 Criteria of compatibility of State financing under Article 86(2) EC

In its 2001 Broadcasting Communication the Commission clarified the criteria for applying a derogation under Article 86(2) EC. The Commission intended not to intervene as long as:

- the service in question is a service of general interest and clearly defined by the Member State (definition)
- the undertaking in question is explicitly entrusted by the Member State with the provision of that service (entrustment)
- the ban on State aid does not obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules does not affect the development of trade to an extent contrary to the interests of the Community (proportionality test).[69]

The test was therefore of a negative character: the Commission examined whether the measure adopted was not disproportionate.[70]

As far as the public service definition was concerned and in light of the Amsterdam Protocol on Broadcasting the Commission allowed for a wide public service definition. In two of its decisions,[71] however, the Commission gave some indication as to which activities could not fall within the public service remit; namely commercial exploitation of programmes and advertising activities should be regarded as non-public activities.

As for the second criterion, the Commission not only looked for formal entrustment in its examination, but for an appropriate authority or appointed body monitoring its application. In other words, the Commission only granted an exemption under 86(2) if there was a sufficient and reliable indication that the public service was actually supplied as mandated.[72]

[65] Case T-46/97 SIC v. Commission
[66] NN 88/98 – United Kingdom – BBC 24-hour news channel
[67] Ibid. paragraph 24.
[68] 2001 Broadcasting Communication, paragraph 19.
[69] Ibid. paragraph 29.
[70] Ibid. paragraph 47.
[71] Tigchelaar, Nynke op. cit., p. 177.
[72] 2001 Broadcasting Communication, paragraph 43.

In carrying out the proportionality test,[73] the Commission always adopted the presumption that State funding is normally necessary to carry out the public service task.[74] The Commission needed to assess that the aid did not exceed the net costs of the public service mission, that it did not have a negative effect on market prices (undercutting prices in non-public activities), and that development of trade within the Community was not affected to an extent contrary to its interest.

In the closing paragraphs the Commission acknowledged the fact that the analysis of the effects of State aid on competition and trade inevitably needed to be based on the specific characteristics of each situation. Assessment under Article 86(2) of compatibility of State aid to public service broadcasters could only be made on a case-by-case basis.[75]

4. The Altmark Trans Judgement[76]

While Article 87(1) EC was applicable to aid for undertakings entrusted with services of general economic interest, State subsidies could be justified by Article 86(2) EC. In other words, Article 86(2) EC was seen as an exception to Article 87(1) EC. However, the Ferring judgement detailed above seemed to override this argument inasmuch as in the circumstances of the case the tests of Articles 87(1) and 86(2) were identical. Consequently, there were two alternatives: either the value of the tax exemption equalled the incremental costs of complying with the public service obligation, in which case it did not confer any advantage on wholesalers and was not to be regarded as aid; alternatively, if the value of the tax exemption was higher than the costs of complying with the public service obligation then the tax exemption constituted state aid and could not be justified under Article 86(2).

Ferring was a case of a tax measure relating to state aid, but Altmark was an issue of finance provided through a public service concession contract. The Altmark Judgement expressly stated that a State measure was not subject to Article 87(1) EC if it had to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations.[77]

The importance of the Altmark ruling was seen in establishing four cumulative requirements which must be met to rule out the classification of State aid. These four requirements are:[78]

[73] Ibid, paragraphs 57-62.
[74] Ibid. paragraph 57.
[75] Ibid. paragraph 60.
[76] Case C-280/00 Altmark Trans GmbH Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, Judgement of 24 July 2003
[77] Ibid. paragraph 87.
[78] Ibid. paragraph 89-93, 95.

"First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.

Second, the parameters, on the basis of which compensation is calculated, must be established in advance in an objective and transparent manner, to avoid conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

Fourth, where the undertaking which is to discharge public service obligations in a specific case is not chosen pursuant to a public procurement procedure which would allow for the selection of a tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations."

Examining the Altmark criteria became one important element of the Commission decisions.

5. The first opportunity to apply the Altmark Judgement

In its decision of 1 October 2003 the Commission was granted the first opportunity to apply the conditions set out in the ECJ's Altmark judgement.

Once the Altmark conditions were not met, and it seemed that the fourth Altmark condition was not met in the case of the BBC Digital curriculum case,[79] the Commission proceeded to undertake an analysis of the facts under the auspices of Article 86(2) EC. The examination eventually led to declaring the proposed measures to be compatible with the common market.

Those schemes which satisfied all the four conditions of the Altmark judgement, in particular the fourth condition, namely the comparison with the cost structure of a well-run undertaking, did not constitute State aid within the meaning of Article 87(1) EC. They, indeed, need not be notified. However, those schemes which fail to satisfy all four criteria set out in the Altmark judgement may still be checked against the standards laid out in Article 86(2) EC. In other words, the Commission made it clear that, in its view, the; Altmark judgement had not changed the applicability of Article 86(2) EC. However, the criteria described in the Altmark judgement became an important asset in the hand of the Commission to evaluate those schemes which had not been notified

[79] N 37/2003 United Kingdom – Digital Curriculum

prior to being put into effect, but, in fact, turned out to be cases of State aid during investigations based on Article 88(1) EC.

In its assessment of the measures in the BBC Digital curriculum case,[80] the Commission first declared the activity an economic one. In order to ascertain whether the scheme constituted aid within the meaning of Article 87(1), the Commission assessed whether the scheme:

- was granted by the State
- provided an economic advantage
- was capable of distorting competition
- affected trade between Member States.

"The BBC would enjoy direct, unencumbered access to financing from the State and would benefit from a measure that is not available to other undertakings. It is important to consider whether such financing may be considered to be compensation for carrying out a public service and whether, in applying the criteria specified in the 'Altmark' judgement, the measure may escape classification as State aid under 87(1)."[81] "The Commission considers, on the basis of the information available, that the fourth condition does not seem to be met in the case of the Digital Curriculum. The service was not awarded as a result of an open public procurement. The BBC has arrived at the costs of its proposal using its own internal estimates."[82] "The Court has consistently held that Article 86 provides for derogation and must therefore be interpreted restrictively."[83] "...the BBC complies with the obligation of the Transparency Directive in keeping separate accounts for its commercial and public service activities."[84] "The non-public activities are performed by separate commercial subsidiaries of the BBC and the accounts of these subsidiaries are published in accordance with the UK Companies Acts."[85] "The Commission considers that the above mechanisms in principle safeguard that the advantages derived from the public service mission are taken into account properly when calculating the net public service costs."[86] "Therefore, the Commission concludes that the scheme meets all the conditions for the Article 86(2) derogation."[87]

This has not only been the first decision following the Altmark judgement, but also one of the Commission decisions dealing with the broader issue of funding public service moving to the Internet.[88] The question to be answered

[80] N 37/2003 United Kingdom – Digital Curriculum, section 3., paragraphs 19- 26.
[81] Ibid. paragraph 22.
[82] Ibid. paragraph 23.
[83] Ibid. paragraph 38.
[84] Ibid. paragraph 53.
[85] Ibid. paragraph 54.
[86] Ibid. paragraph 58.
[87] Ibid. paragraph 63.
[88] On the topic of public service broadcasting and the Internet see also Wiedemann, Verena: Public Service broadcasting, State Aid, and the Internet: Emerging EU Law. In:

was: does the fact that the service is offered by a public service broadcaster on the Internet make it commercial? In other words, how far does the public service remit stretch? In the BBC Digital Curriculum case the Commission stated that online educational services do not have a close connection to radio and television services of the BBC. This move should be considered to constitute a completely new service and was therefore a form of new State aid subject to notification. Some argue that this decision illustrated a narrow interpretation of broadcasters' public service mission, and with it the Commission broke away from its earlier broad definition of the public service remit.[89] On the other hand, the argument that the Commission inspected a new way of providing public services, but not the content itself, showed that online educational services were still considered to be within the public service remit. Therefore, the conclusion that the Commission broke away from the earlier broad definition of the public service remit could not be justified.[90] It is true, however, that technological development in the meantime, had fundamentally altered the broadcasting and audiovisual markets. The need for public service broadcasting to diversify publicly funded activities on new platforms was pressing and a good compromise needed to be sought in this respect.

6. Conclusion

The paper analysed and contextualised Community policy on state aid to public service broadcasting from the early beginning up to the adoption of the 2001 Broadcasting Communication of the Commission. It elaborated the Altmark judgement, as one having a strong effect on the argumentation demonstrated in the future decisions of the Commission, and consequently, on the whole of the Commission's examination process.[91] The 2001 Broadcasting Communication served as a good basis for the Commission to develop significant decision-making practice in the field. This process, leading to the

European State Aid Law Quarterly 2004/4., pp. 595-603. and Sumrada, Nana – Nohlen, Nicolas: Control of State Aid for Public Service Broadcasting: Analysis of the European Commission's Recent Policy. In: European State Aid Law Quarterly 2005/4., pp. 609-620.

[89] Wiedeman, Verena: Public Service Broadcasting, State Aid, and the Internet: Emerging EU Law, p. 597.

[90] Sumrada, Nana – Nohlen, Nicolas: Control of State Aid for Public Service Broadcasting, p. 615.

[91] A number of articles unfold the relevance of the Altmark judgement, for further reading see also Koenig, Christian – Haratsch, Andreas: The Licence-Fee-Based Financing of Public Service Broadcasting in Germany after the Altmark Trans Judgement. In: European State Aid Law Quarterly 2003/4., pp. 569-578.;
and Mortensen, Frands: Altmark, Article 86(2) and Public Service Broadcasting. In: European State Aid Law Quarterly 2008/2., pp. 239-249.

revision of the Broadcasting Communication in 2009, as well as details of the rules of the revised 2009 Broadcasting Communication exceeded the limitations of this essay and will be dealt with in a separate article.

The dominant paradigm for broadcasting services, as for all other service sectors, is to provide undistorted competition on the common market. The Commission, with the powers and obligations conferred upon it by the Treaty, acts to establish the precondition for economic success in the common market. Consequently, a way of dealing with state funding of the public service sector, more specifically with public service broadcasting, in order to ensure a level-playing field for both public service and private broadcasters, whilst at the same time taking note of, and acknowledging the added-value of public service broadcasting needed to be balanced. Member States demonstrated a degree of political protectionism as a response to the perceived negative impact of competition policy on public service broadcasting, especially with regard to questions of their competence. However, market pressure forced steps to be taken by the Community. At the beginning, the Commission tried different approaches to the issue of public service financing. The first, termed the "quid pro quo" approach, was short- lived and demonstrated only in one single case. The second, the "traditional approach" ,when financial compensation for public service obligations was first declared state aid and only then was derogation under Article 86(2) EC examined, appears to be the general line adopted. The third, applied in the BBC Licence fee case, applied when it appeared that the advantage did not exceed the costs resulting from the public service obligation and consequently, the measure did not constitute state aid. Apparently, all three approaches have certain features in common. There is a compensation element in all three, and, in fact, the key issue to be examined in all cases is the proportionality of the funding involved. The major difference lies in legal assessment: whilst, in fact, the first approach does not even require a statement of whether the measure does or does not constitute state aid as theoretically the proportionality of funding decides the quid pro quo, in the second case the starting point is the declaration of the measure as constituting state aid – and so only then is derogation examined. Finally, the third approach finds that the measure itself does not constitute state aid. In its decisions between 1997 and 2001 the Commission followed the lines appointed by the European Court of Justice**,** holding that a measure of public service funding involved State aid under Article 87(1) EC, but might be justified as a service of general economic interest under Article 86(2) EC. The principles and methods eventually codified in a formal policy document, the 2001 Broadcasting Communication, were, so to say, market- and juridically-tested before adoption. The Altmark ruling in 2003 was meant to further clarify the distinction between a measure constituting

or not constituting State aid.[92] It expressly stated that a State measure was not subject to Article 87(1) EC if it had to be regarded as compensation for services provided by the recipient undertakings in order to discharge public service obligations. Four cumulative requirements were established which, if met, rule out classification as State aid. The impact of the judgement is far reaching; the examination of the Altmark criteria became an important element of further Commission decisions.

No sooner had the 2001 Broadcasting Communication been adopted than the Commission was confronted with new challenges stemming from digitalisation. Convergence brought with it the need for public service broadcasters to expand their scope of activities into new media environments. Public funding schemes set to cope with this expansion soon came to the attention of the Commission which seemed supportive of a comprehensive understanding of public service broadcasting.[93] Nonetheless, the "structural conflict between the competition principles of the European Treaty and the status and practice of public service broadcasting is both inescapable and likely to become more salient."[94] The question to be answered is: How far does the public service remit stretch?[95] As competition is increasingly, dynamic interactions between the different actors (Member States, Commission, Court and private operators) are likely to multiply to test the limits of the rules established by the 2001 Broadcasting Communication.

[92] In fact, for a certain period of time this was not the case. For further reading see Mortensen, Frands: Altmark, Article 86(2) and Public Service Broadcasting. In: European State Aid Law Quarterly 2008/2., pp. 239-249.

[93] See chapter 5. and also Grespan, Davide: A Busy Year for State Aid Control in the Field of Public Service Broadcasting. In: European State Aid Law Quarterly 2010/1., pp. 88-90.

[94] Humphreys, Peter: The EU and the Future of Public Service Brroadcasting, In: Sarikakis, Katharine ed.: Media and Cultural Policy in the European Union, European Studies 24., Rodopi, Amsterdam – New York, 2007., p.109.

[95] See also Donders, Karen – Pauwels, Caroline: European State aid rules and the public service remit of public service broadcasting in the digital age: analysing a contentious part of European policy and integration. http://sections.ecrea.eu/Brussels07/papers/donders_p.pdf [17.10.2011.], pp. 1-34.

Obligatory or voluntary? – Participation in the UPR

SZAPPANYOS, MELINDA

ABSTRACT *The Universal Periodic Review mechanism is a new process for the control of the implementation of human rights obligations. To date almost every Member State of the United Nations has participated in this process as targeted by Resolution 60/251 of the General Assembly of the United Nations. Is it, however, possible that a State does not want to accept either the political consequences of its inadequate protection of human rights and does not participate in the process? Is it an obligation to participate in the new mechanism? Can an international obligation be established by the legal sources of public international law? Or is participation merely a recommendation without sanctions? This paper attempts to prove that participation in the Universal Periodic Review mechanism is an international obligation under customary law - or is, at least, an emerging rule of international customary law.*

1. Introduction

The Universal Periodic Review Mechanism (UPR), created by the Human Rights Council (HRC)[1] started its operation in 2008. From this point in time it has become a live topic among politicians, human rights activists and scholars also. Generally, they see the UPR as a great opportunity for the development of human rights law and the human rights situation on the ground, but they also recognise its weaknesses. According to the present Secretary General of the United Nations (UN), the UPR 'has great potential to promote and protect human rights in the darkest corners of the world'.[2] An NGO, UPR-INFO, states that the UPR is a 'major innovative development of the United Nations human rights system'.[3] We can find similar opinions in academic circles: 'Whilst it raises many questions, both substantive and procedural in nature, it is, nevertheless, at least potentially, a powerful tool to monitor and eventually

[1] Human Rights Council: Resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007

[2] Ki-moon, Ban, cited on the official site of the Universal Periodic Review http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx [26.02.2011.]

[3] UPR-Info, Analytical Assessment of the Universal Periodic Review 2008-2010 http://www.upr-info.org/IMG/pdf/UPR-Info_Analytical_assessment_of_the_UPR_2008-2010_05-10-2010.pdf [09.04.2011]

improve human rights protection.'[4] Enthusiasm is more or less general about the UPR and the innovations which it brings to the system of human right protection under the aegis of the United Nations, although a few criticisms have also been levelled.

The main innovations in this mechanism (according to the original concept) are: all of the Member States of the UN are monitored and the review is repeated every 4 years. Also the basis of the review is the widest possible, not restricted to international human rights treaties to which the States are Contracting Parties, but also including the Charter of the UN, the Universal Declaration of Human Rights and the voluntary pledges and commitments made by States.[5] Details of the mechanism are in the HRC resolution establishing the UPR and since the 10th session of the first cycle[6] has already ended, relatively firmly based practice is at our disposal. Despite the lack of any concrete sanctions in the case of non-participation,[7] to date participation in the UPR was complete; no Member State of the UN was omitted from the review.

The 1st cycle of the UPR is, therefore, almost complete and the HRC has tabled a review of its work on the agenda, including an assessment of the results of the UPR. The NGOs have also started to work adding the necessary information to this review to assist the HRC. As one example, UPR-INFO created a document, with Human Rights Watch (the biggest human rights NGO)[8] and other NGOs together elaborating an analysis[9] to help the HRC improve its work. In every proposal and analysis there is a main point concerning the consequences of UPR, the possible binding force of the recommendations and their implementation. The proposals aim to establish a follow-up procedure which monitors the implementation of the recommendations and commitments made by the State under review during the UPR. All of these suggestions aim to strengthen the UPR. Nowadays

[4] Bernaz, Nadia: Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism. In: Boyle, Kevin (ed.): New institutions for human rights protection. The collected courses of the Academy of European Law, Oxford University Press, Oxford, 2009 p. 92.
[5] HRC Res 5/1 op. cit. Annex I, Chapter A, article 1, paragraphs. (a)-(d)
[6] Human Rights Council, Calendar of reviews for 1st cycle http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf [09.04.2011]
[7] According to Point 38, annex, HRC Res 5/1, after 'exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism.'
[8] Human Rights Watch, Curing the Selectivity Syndrome, The 2011 Review of the Human Rights Council http://www.hrw.org/en/reports/2010/06/24/curing-selectivity-syndrome [09.04.2011]
[9] NGO Proposal on the Structure for the 2011 Review of the Human Rights Council's Work and Functioning, 6 May 2011 http://www2.ohchr.org/english/bodies/hrcouncil/docs/NGO_Proposal_Council_Review_Process_May_2010_final.pdf [09.04.2011]

participation in the UPR is almost 100% (as mentioned earlier), but what would happen if monitoring become stricter? Currently the UPR does not involve a real legal threat for States, but what if the implementation of recommendations and commitments were to be legally enforceable? It could significantly reduce the willingness of States to participate in such a mechanism - which is a key point in the success of the UPR.

According to UPR-INFO, 'the UPR is a mandatory process for every State to undertake'[10] – but is it? Can this statement be based on legal sources of public international law? This paper intends to prove that UPR-INFO is right in that participation in the UPR is an international obligation for States – which obligation is a rule of customary law.

2. The UPR and State Sovereignty

One of the greatest advantages of the UPR is that, theoretically, there is no avoiding it, in that, according to the original concept of the UPR, every Member State of the UN comes under review during its cycles. Currently this means that the human rights situation is monitored in every fully recognised state in the world, since such States are all members of this universal organisation. From the formulation of the documents concerning the UPR, Member States would appear to be obliged to participate in the UPR. For example whilst the function of the HRC to 'Promote human rights, education and learning as well as advisory services, technical assistance and capacity-building'[11] can be exercised 'with the consent of Member States concerned', undertaking the UPR does not depend on the consent of the States.[12]

This fact, that participation in the UPR is obligatory for every Member State of the UN and also the extended basis of the review[13] seems to be contrary to the traditional concept of State sovereignty.

Public international law has not elaborated one widely recognised definition for sovereignty, and for centuries experts in this disciple have analysed different aspects of this phenomenon and have laid emphasis on those which were important from the viewpoint of their actual research. We also find expressions of sovereignty in international treaties, and these also concentrate on those elements of the notion which suit their purposes.

[10] UPR-Info, Analytical Assessment of the Universal Periodic Review 2008-2010 op. cit.
[11] Human Rights Council, GA Resolution, 60/251., Point 5 (a), 3 April 2006, A/RES/60/251
[12] Ibid. point 5 (e), 'Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by *each State* of its human rights obligations and commitments' (emphasis added)
[13] HRC Res 5/1 op. cit. Point 1., Annex, I. Universal Periodic Review, A. Basis of the review

For this paper, one aspect of sovereignty is especially important: according to the traditional principle of sovereignty, States are bound by those international obligations which were explicitly accepted by them. In the Lake Lanoux decision the Arbitral Tribunal declared, that 'an essential restriction on the sovereignty of a State […] could only be admitted if there were clear and convincing evidence.'[14] Regarding the legal sources of public international law[15] international obligations for States can be established by international conventions and by general rules of public international law, including customary law, general principles of public international law and jus cogens norms.[16] In the first case the consent to be bound by the treaty should be expressed explicitly by signature,[17] by exchange of instruments,[18] by 'ratification, acceptance, approval, or accession or by any other means if so agreed'.[19] On the other hand, in case of general rules of public international law it is more complicated. Customary law in general is obligatory for all States, but from its binding force there is an exception: the status of 'persistent objector' States.[20] The 'jus cogens' norm is a 'norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[21] From the definition it follows that jus cogens norms are obligatory for every State; there is no exception to this rule.[22] We know of no exception to the binding force of general principles of public international law, but what makes the determination of the obligations deriving from such norms difficult is that their content is obscure and uncertain.

[14] Arbitral Tribunal, Lake Lanoux Arbitration (France v. Spain), 16 November 1957, (1957) 12 R.I.A.A. 281; 24 I.L.R. 101, point 11.
[15] Using as a starting point the Statute of the International Court of Justice, article 38, what enumerates the sources to be applied in disputes before the Court.
[16] There exists also a wide academic dispute about the legal sources of public international law: whether customary law and jus cogens are separate sources of public international law, or if jus cogens can be considered as a special, 'stronger' type of customary law. In this paper we will use jus cogens as a separate category of legal sources of public international law, since there is a relevant difference between customary law and jus cogens from the viewpoint of their obligatory character. See more about the sources in Herczegh, Géza: General principles of Law and the International Legal Order. Akadémiai Kiadó, Budapest, 1969 pp. 57-68.
[17] Vienna Convention on the Law of Treaties, UNTS 1155, 1969, article 12
[18] Ibid. Article 13.
[19] Ibid. Article 11.
[20] See, as an example, International Court of Justice, Fisheries Case (Norway v. United Kingdom) 18 December 1951, I.C. J. Reports 1951 p. 116.
[21] Vienna Convention op. cit. article 53.
[22] Ibid. Article 64.

According to the traditional interpretation of state sovereignty, participation in the UPR is compulsory for states only if they have expressed in some form their acceptance of such an obligation. This acceptance in case of international treaties is always explicit, but in the case of general norms it can also be tacit or missing.[23] The harmony between State sovereignty and participation in the UPR is a crucial question, because if the obligatory participation cannot be based on public international law, it is not mandatory, but only strongly recommended for political reasons. In this case # participation is not enforceable at all; the lack of cooperation is not a breach of an international agreement etc. Henceforth we will examine whether the obligation to participate in the UPR can be justified under the norms of international law or not.[24]

3. International Conventions

In cases of human rights treaties, detecting those entities obligated by them is quite simple: they can obligate only those States which have expressed their consent to be bound by the treaty, and so are Contracting Parties to it.[25]

In human rights treaties there are two types of obligation for states: protecting the rights included in the document by different means and procedural obligations,[26] for example to submit reports concerning the fulfilment of the previous one. For example, in the International Covenant on Economic, Social and Cultural Rights (ICESCR), States have undertaken 'to take steps […] with a view to achieving progressively the full realisation of the rights recognised in the present Covenant',[27] and also 'to submit […] reports on the measures which they have adopted and the progress made in achieving the

[23] International Law Association, Committee on the Formation of Customary (General) International Law: Report of the London conference, 2000 http://www.ila-hq.org/en/committees/index.cfm/cid/30 [21.04.2011], point 18, commentary point (c)

[24] The recognition that some elements of the UPR can be contrary to the principles of sovereignty is not new, but the critics mostly concentrated on the basis of the review. This paper holds that the sovereignty problems relating to the review and also to the follow-up of the implementation of the final outcome of the UPR are derived from the same base: the lack of expression of the consent of States to be bound by treaties and the lack of explicit obligations in general rules of public international law. See also: Bernaz op. cit. pp. 78-85.

[25] See also Vienna Convention op. cit. article 26, about the principle of 'pacta sunt servanda', and articles 34-35 about treaties providing obligations for third States.

[26] In the present paper we use the expression 'procedural obligation' as a human rights obligation to participate in a mechanism which aims to monitor te fulfilment, implementation of other general or special obligations to protect or promote human rights.

[27] International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 4, Article 2 paragraph 1

observance of the rights recognised herein'.[28] 'The submission of state reports demonstrates recognition by states that the obligation to submit periodic reports is a compulsory obligation under the treaties.'[29]

From the standpoint of this paper, the latter, the procedural obligation, is important, since participation in the UPR is quite similar to the most common procedural obligation, the submission of reports. Naturally, during the UPR the submission of a national report is not the only obligation, but it does require active participation during the whole procedure. If we assemble all the documents relating to the mechanism we find resolutions of the General Assembly of the United Nations (GA) and the HRC, documents from NGOs, etc., but we find no international treaties. This means that states did not accept participation in the UPR expressly as an international obligation by expressing their consent to be bound by an international treaty. However, does it mean that no other treaty should be taken into consideration? We can find cases in international human rights law when no human rights instrument, but the founding treaty of an international organisation establishes general international obligations for the protection of human rights and also procedural obligations at the same time. The Charter (Bogota Charter) of the Organisation of American States (OAS) declares respect for human rights as a principle of the OAS[30] and it established the Inter-American Commission on Human Rights to 'promote the observance and protection of human rights and to serve as a consultative organ of the Organisation in these matters'.[31] 'It has two sets of functions: those accruing under the Convention in respect of contracting States and those pertaining to the entire membership of the OAS irrespective of ratification of the Convention. These latter functions are pre-existing functions of the Commission derived both from practice and from the OAS Charter itself.'[32] Therefore, 'all member states of the OAS may find themselves subjected to investigation and report by the Inter-American Commission on Human Rights'[33] without being a contracting party to special human rights instruments, for example the American Convention on Human Rights.[34]

[28] Ibid. Article 16 paragraph 1

[29] Gaer, D. Felice: A Voice not an Echo: Universal Periodic Review and the UN Treaty Body System. In: Human Rights Law Review, Vol. 7., Oxford University Press, 2007 p. 129.

[30] Charter of the Organisation of American States, Bogota, 30 April 1948, A-41, Article 3 point l.

[31] Ibid. Article 106.

[32] Smith, R. K. M.: Textbook on International Human Rights. Oxford University Press, 2003 p. 121.

[33] Ibid. p. 125., See also article 19 and 20 of the Statute of the Inter-American Commission on Human Rights, Approved by Resolution Nº 447 taken by the General Assembly of the OAS, La Paz, October 1979

[34] American Convention on Human Rights, San José, 22 November 1969, OAS Treaty Series No. 36.

The HRC was established by the GA as its subsidiary organ[35] and received its mandate to promote and protect human rights,[36] and so the HRC is functioning within the UN system. Based on the previous example, we should examine the founding treaty of the UN.[37] The Charter of the UN contains only a few provisions about human rights protection within the UN system.[38] Although the UN Charter establishes a general obligation for the protection of human rights, none of these provisions contain *expressis verbis* procedural obligation for the member states of the UN to let UN organs monitor the implementation of this general obligation. The obligation to participate in the UPR cannot be based on these provisions.

Provisions other than the ones dealing with human rights should be considered also. In Article 2 the Charter declares that 'All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter'.[39] 'At first glance, Art. 2(5) conveys the impression of a general obligation to give assistance to the Organisation.'[40] Such a general international obligation basically would also concern the protection of human rights through participation in different mechanisms, among them the UPR. However, according to the Commentary to the UN Charter, the scope of application of this provision is restricted: 'the second part of Art. 2(5) clarifies that it applies only to enforcement measures taken by the SC in the framework of Chapter VII.'[41] Consequently, even if special human rights obligations are created by the SC acting under Chapter VII of the Charter and Member States have the obligation to assist in their fulfilment, a general obligation to participate in control mechanisms such as the UPR cannot be legally based on this article.

To summarise, there is no international obligation based on international treaty or treaties for participation or active cooperation with the HRC in the UPR.

[35] Ibid. point 1.
[36] Ibid. point 2.
[37] Charter of the United Nations, 1945, San Francisco, 1 UNTS XVI
[38] Ibid. Preamble, 2nd phrase; article 1, paragraph 2; article 13 paragraph 1 point b); article 55, point c); article 62, paragraph 2; article 68 and article 76 point c).
[39] Ibid. article 2 paragraph 5.
[40] Simma , Bruno (ed.): The Charter of the United Nations, A Commentary. Second edition, Volume I., Oxford University Press, 2002 p. 137.
[41] Ibid.

4. General Rules of Public International Law

4.1 Customary international law

Norms are considered to be part of customary law, if they express the *opinio juris sive necessitatis* (opinio juris), so they are accepted as law by the majority of the international community (subjective element) and also State practice (objective or material element) follows them.[42] Though the rule of customary law necessarily contains both elements,[43] '[A] belief, on the part of the generality of States, that a practice satisfying the criteria [about the characteristics of State practice] set out in Part II corresponds to a legal obligation or a legal right (as the case may be) (opinio juris sive necessitatis) is sufficient to prove the existence of a rule of customary international law.[44] Therefore, any analysis which aims to detect whether an obligation to participate in the UPR exists in customary law must start with an examination of state practice and should then continue with an analysis of opinio juris.

4.1.1 State practice

Since, in the UPR, it is mainly the executive organs of State[45] which participate actively,[46] (physically, verbally)[47] in public[48] only the intensity of practice should be examined. According to the International Law Association (ILA) '*General customary international law is created by State practice which is uniform, extensive and representative in character.' and 'Although normally some time will elapse before there is sufficient practice to satisfy these criteria, no precise amount of time is required.'[49] State practice concerning participation in the UPR will therefore be examined, to determine whether or not it fulfils these criteria.

In October 2011 the 12th session of the 1st cycle of the UPR was held, and since the whole cycle ends in 2011 a precise calculation can be made concerning the Member States of the UN which have already participated in the procedure. To date, including the 12th session, every Member State has participated actively in the UPR. Even before the end of the 1st cycle it was

[42] Statute of the International Court of Justice op. cit. Article 38 paragraph 1 point b; International Law Association op. cit. point 10. and Part I. point 1.
[43] International Law Association op. cit. points 9-10.
[44] Ibid. Part III, point 16.
[45] Ibid. Part II, point B 9.
[46] Ibid. Part II, point A 6.
[47] Ibid. Part II, point A 4.
[48] Ibid. Part II, point A 5.
[49] Ibid. Part II, point C 12.

quite obvious that all States acknowledge the existence of the mechanism, since every State had made statements or drafted recommendations for States under review during the first cycle of the UPR. They had, therefore in some way already participated in the mechanism.

As to uniformity, the ILA states that State practice should be internally and collectively uniform. The first means that the state has to behave in the same way on every occasion, so not only participating in the UPR only once, but several times even, if the status of the State is not the same. Participating actively in the mechanism cannot be fulfilled only by being under review, but also being a member of the troika. This means that most States took part in the UPR at least twice, once as a State under review and once or more frequently as a troika member. The collective uniformity means that 'different States must not have engaged in substantially different conduct'.[50] As mentioned before, the majority of UN members have already taken part in the UPR as a State under review or as a troika member in the way it was prescribed by the resolution of the HRC.[51] Consequently, it seems that the overall participation of States in the UPR fulfils the criteria of uniformity.

As to the criteria of extensive and representative practice, the ILA states that, even if State practice is to meet these criteria, this does not mean universality.[52] In simple terms, extensive and representative practice means that the majority of States follow the practice and this majority includes those 'States whose interests are especially affected'.[53] In the case of the UPR, this criterion can be considered fulfilled, since not only the majority of UN Member States follow the rule, but almost all of them, including the most significant members such as the permanent members of the Security Council, the members of the HRC etc.

Finally, in respect of the time factor, the ILA Report states that there is no precisely determinable time limit which is required, 'it is a question of accumulating a practice of sufficient density'.[54] There are norms of customary law which have emerged in a relatively short time - for example, sovereignty over air space.[55] One cycle of the UPR takes 4 years,[56] and the question is whether this is appropriate. Since, participation in the UPR fulfils other criteria of intensity a detailed analysis of the time factor is not necessary.

[50] International Law Association op. cit. Part II point C 13.
[51] HRC Res 5/1 op. cit.
[52] International Law Association op. cit. Part II point C 14 (i)
[53] International Court of Justice, North Sea Continental Shelf Cases, (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), 20 February 1969, I.C.J. Reports 1969, p. 3, point 74.
[54] International Law Association op. cit. Part II point C 12, Commentary, point (b)
[55] Ibid.
[56] The periodicity of the second and subsequent cycles will be 4.5 year. See HRC Resolution 16/21, Review of the Work and Functioning of the United Nations Human Rights Council, 12 April 2011., A/HRC/RES/16/21. Annex Point I B.3

To summarise, State practice concerning participation in the UPR mechanism seems to fulfil the criteria of *usus*. Basically, this means that the existence of the norm of customary law is proved merely on the base of State practice, and no further analysis is needed (strictly speaking) in connection with *opinio juris*. In our opinion, however, since the time element is quite weak in case of this norm, and also since this norm of customary law is possibly *in statu nascendi*, it is reasonable to examine also the subjective element as thoroughly as possible.

4.1.2 Attempt to avoid further analysis

Generally, proving the existence of *opinio juris* beyond any doubt is contrary to the *nemo ultra posse tenetur* maxim. However, in the case of the possible norm of customary law, obligatory participation in the UPR provides a sound and excellent starting point to avoid such an analysis: the HRC was established by a resolution of the GA and also the UPR as a new mechanism for the examination of human rights on the ground.[57] Basically, according to the UN Charter, the resolutions of the GA are not obligatory, but merely recommendatory,[58] and so it would seem fruitless to examine the above resolutions establishing the HRC, since they cannot contain obligations for Member States of the UN.

However, there is one further possibility open to us: the GA resolution on the establishment of the HRC was adopted by 170 votes,[59] and so there is a statement of the ILA which should be mentioned as well. 'Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption.'[60] Though the resolution was adopted 'almost unanimously',[61] in the opinion of the ILA it can not be considered as instant customary law, because it fails to fulfil another important criterion, because not all representative groups of States were present at the voting. In this case, according to the ILA, a general rule of customary law could not be created. If we accept the later position, it means that the GA resolution in question does not create a norm of customary

[57] HRC Res 5/1 op. cit.
[58] Charter of the United Nations, op. cit. Chapter IV.
[59] GA Official Records, 72nd plenary meeting, Wednesday, 15 March 2006, 11 a.m., New York, A/60/PV.72 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/272/60/PDF/N0627260.pdf?OpenElement [25.04.2011]
[60] International Law Association op. cit. Part IV Point A 32.
[61] General Assembly (GA) (2006) Official records A/60/PV.72. op. cit. The draft resolution adopted by 170 votes to 4, with 3 abstentions. The delegations of 2 States informed the Secretariat that they intended to vote in favour.

law instantly,[62] although we treat the GA resolution 60/251 at least as 'rebuttable evidence' of *opinio juris*.[63]

4.1.3 Opinio juris

According to the ILA, 'there is no reason why a General Assembly resolution should not provide the inspiration for the formation of a new customary law'[64] and 'Resolutions of the General Assembly can in appropriate cases themselves constitute part of the process of the formation of new rules of customary international law'.[65] In the case of the possible norm of obligatory participation in the UPR, the first option seems to be more relevant, and so other documents about the details of the process were adopted after this GA resolution.[6667] It should also be added that this is merely a possibility, and not necessarily the case. Proving the GA resolution establishes or indicates the customary law is extremely difficult, since not only the results of the voting should be taken into consideration, but also the precise language of the resolution and the circumstances of its adoption.[68]

Though the resolution did not create an instant rule of customary law, we can still consider this resolution as an evidence of a norm of customary law *in statu nascendi*. This view can also be supported by the fact that, even if the vote for the resolution was not unanimous, every State which voted against[69] or abstained from voting[70] or did not participate in the voting[71] has already participated in the UPR. Therefore the analysis of the resolution results in the same conclusion that State practice is clearly unanimous and the examination of *opinio juris* unavoidable, even if, by the nature of things, this analysis cannot be fully proved and complete. What should be taken into consideration in the first

[62] In our opinion the statement according to that 'in the event of a lack of unanimity, (i) a failure to include all representative groups of States will prevent the creation of a general rule of customary international law' is not always reasonable, but the proof of this position is the subject of another paper.
[63] International Law Association op. cit. Part IV point A 29
[64] Ibid. Point A 30, Commentary
[65] Ibid. Point A 31
[66] See the background documents at http://www.ohchr.org/EN/HRBodies/UPR/Pages/BackgroundDocuments.aspx [25.04.2011]
[67] General Assembly (GA) (2006) Official records A/60/PV.72. op. cit.
[68] International Law Association op. cit. Part IV point A 29, Commentary point (c)
[69] Israel, Marshall Islands, Palau, United States of America, See General Assembly (GA) (2006) Official records A/60/PV.72. op. cit.
[70] Ibid. Belarus, Islamic Republic of Iran, Bolivarian Republic of Venezuela
[71] Ibid. Liberia, Dominica, Dominican Republic, Côte d'Ivoire, Central African Republic, Equatorial Guinea, Seychelles, Eritrea, Chad, Cambodia, Kiribati, Democratic Peoples' Republic of Korea and Papua New Guinea

place is that, although the resolutions of the GA have a recommendatory character, they can create obligations as well in unique cases. For example, the creation of a new subsidiary organ of the GA in a resolution has an obligatory character. However, it does not mean that every provision of such a resolution is obligatory. The provision concerning the duties of the HRC including the undertaking of the UPR is obligatory for the HRC after its establishment, and it is also obligatory for the newly established organ to work out the details of the mechanism.[72] However, participation in the UPR is not obligatory for Member States of the UN *ipso facto* because of its included in a resolution of mainly obligatory character. However, it can still be obligatory as evidence of customary law. If we accept the opinion of the ILA, it possibly follows also from the formulation of the text. According to the ILA Report "normally the term 'should' is a sufficient indication that the rule in no more than recommendatory. Hence the choice of 'shall' is usually significant."[73] The GA resolution consistently uses the latter expression. We can find a further proof in the statement of TORO JIMÉNEZ, the representative of the delegation of the Bolivarian Republic of Venezuela. Mr. Jiménez before the voting on the draft resolution A/60/PV.72 drafted 'reservations' to subparagraphs (e) and (f) of paragraph 5. He stated that the delegation does not 'understand "reservation" as criticism', but it means 'that these paragraphs are not obligatory, they are not binding on the Bolivarian Republic of Venezuela. In other words, they have no political or legal effect…'[74] In our opinion the Bolivarian Republic of Venezuela wanted to adopt the 'persistent objector' position, since it realised the forming rule of customary law in respect of obligatory participation in the UPR.

To summarise, we are convinced that the obligation of States to participate in the UPR is an emerging rule of international customary law, since State practice in respect of participation is extended and representative and there are traces of evidence proving the existence of *opinio juris* although these are sporadic. In our opinion the proving of the existence of such a rule will be easier after the elapse of time, and probably after the 2nd cycle of the UPR.

4.2 Jus cogens

Since a quite remarkable number of scholars are convinced that jus cogens norms derive from rules of customary law[75] it is reasonable and necessary to

[72] HRC Res 5/1 op. cit. Point 5 (e)

[73] Institute of International Law, 61-1 Yearbook (1985), 177, cited by International Law Association op. cit. Part IV Point A 29, Commentary point (c).

[74] General Assembly (GA) (2006) Official records A/60/PV.72. op. cit. Statement of the representative of the Bolivarian Republic of Venezuela before the voting on draft resolution A/60/PV.72

[75] There is another relevant opinion according to what jus cogens norms on the filed of human rights derive from the general principles of public international law, and so their

examine whether the obligation for participation in the UPR as an *in statu nascendi* rule of customary law can be considered jus cogens norm.[76] To answer the question as to whether jus cogens norms include human rights obligations seems to be easy. They obviously do.[77] 'There is an almost intrinsic relationship between peremptory norms and human rights. Most of the case law in which the concept of jus cogens has been invoked is taken up with human rights,'[78] but the enumeration of these human rights norms with jus cogens character is much more difficult, since there are neither international treaties containing the exhaustive list of these norms nor there is a catalogue elaborated and widely accepted by scholars. The jus cogens character of the prohibition of torture, genocide and slavery, the right to life, basic norms of humanitarian law is not disputed,[79] but there are scholars who think that the list is much longer.[80]

Apart from those extreme opinions, according to which human rights as a whole belong to jus cogens,[81] no list contains the obligation for participate in mechanisms which aim to monitor the fulfilment of human rights obligations. An obligation for States to allow the international community, an international organisation or independent experts to monitor the implementation of their substantive human rights obligations cannot be justified by norms with a jus cogens character.

Besides the formal approach, there are also some material arguments which deny the affiliation of the rule of obligatory participation in the UPR to jus cogens. First, jus cogens norms are mainly prohibitions, such as the prohibition of use of force or the prohibition of genocide, etc, but this argument alone is not

formulation is different from other fields of international law. Simma, B. – Alston, P.: The sources of human rights law: custom, jus cogens and general principles. In: Australian Yearbook of International Law, Vol. 12, 1988-1989. p. 107.

[76] In our opinion it is quite well grounded that the rule of obligatory participation in the UPR is an emerging rule of customary international law. Therefore the analysis of general principles of public international law in connection with the UPR as a whole and the participation in it is not strictly required.

[77] Bianchi, Andrea: Human Rights and the Magic of Jus Cogens. In: The European Journal of International Law Vol. 19 no. 3. pp. 491-493.

[78] Ibid. p. 491.

[79] Shaw, Malcolm N.: International Law. 6th edition, Cambridge University Press, 2008 p. 9.; See also Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [19.02.2011] Commentary to article 40 points (3)-(5)

[80] Whiteman, M. M.: Jus cogens in international law, with a projected list. In: Georgia Journal of International and Comparative Law, Vol. 7, Issue 2, 1977 pp. 625-626. Also the most generally referred national document, the Restatement of Foreign Relations Law of the United States gives a broader list in its § 702 (1987), cited by Parker, K. – Neylon, L. B.: Jus cogens: Compelling the Law of Human Rights. In: Hastings International and Comparative Law Review, Vol. 12. 1988-1989 p. 430.

[81] Parker – Neylon op. cit. p. 442.

enough to prove that the possible obligation in question does not have the jus cogens character, since there are other jus cogens norms which are exceptions. These include, for example, the right to self-determination and the right to life. On the other hand, the legal nature of the possible obligation to participate in the UPR is also different. Whilst jus cogens norms are basically *non facere* (not to be done), the participation in the UPR is a *facere* obligation (to be done).

None of the above arguments lone can prove the lack of jus cogens character, but, based on formal and material approach together, the main consequence is that the obligation to participate in the UPR is not a jus cogens norm.

5. Consequences

Based on the above evidence, our opinion is that the participation of Member States of the UN in the UPR is an obligation deriving from a rule of customary international law, or at least this rule is in the process of formation. In this chapter this papers attempts to analyse some aspects of the possible consequences of this statement, especially the 'persistent objector' status and the responsibility of States which break this rule of customary law.

5.1 Possible persistent objectors

'If, whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it.'[82] Even if the formulation of a rule of customary law cannot be prevented by the objection of some States, because the practice may still fulfil the criteria analysed before, these States can, under certain circumstances, prevent this rule from having binding force in respect of themselves. Two criteria: 'persistently' and 'whilst a practice is developing' should be examined carefully to be able to decide whether there are States among the Member States of the UN in this position in respect of the rule of obligatory participation in the UPR.[83] According to the ILA, the objection is persistent if it is repeated 'as often as circumstances require',[84] and it should be expressed 'when the customary rule is in the process of emerging'.[85] The first condition also expresses another implicit

[82] International Law Association op. cit. Part II point C 15. Although there are some concepts which aim the limitation of the persistent objector doctrine 'where the ripeness of a customary human rights law is at issue', until now the traditional concept is preserved. See Lau, Holning: Rethinking the Persistent Objector Doctrine in International Human Rights Law. In: Chinese Journal of International Law, Vol. 6., 2005-2006 pp. 506-507.

[83] 'Open' objection requires no further explanation than the ILA has already given.

[84] International Law Association op. cit. Commentary, point (d)

[85] Ibid. Commentary, point (b)

criterion: the objection should also be consistent.[86] An analysis of the fulfilment of these criteria should be carried out in respect of two different situations: if the rule of participation in the UPR is already an existing norm of customary law and if this rule is an emerging rule of customary law.

As to the first situation, if we consider this rule as an already existing, crystallized norm of customary law it means that there is no possibility for new States to claim 'persistent objector' status, since the rule's process of emerging has been completed. In this case the only question is whether or not there are already one or more 'persistent objector' States. The States which can be considered as 'persistent objectors' are those which have persistently rejected obligatory participation in the UPR before the rule crystallised. According to official records, the GA resolution establishing the HRC - and also the UPR - was adopted with 4 votes against and 3 abstentions. The delegations of 15 States did not participate in the vote, and of these 2 stated that they would have been voted in favour of the resolution. Applying the general 'persistent objector', rule it seems that those States can be considered as 'persistent objectors', who did not vote in favour of the draft resolution A/60/PV.72 and have not as yet participated in the UPR (continuous, restated on every possible occasion and consistent). Until the 12th session there was only one state which fell into both categories - the Bolivarian Republic of Venezuela. On the basis of its abstention during the voting on the draft resolution, and the fact that it has not yet participated in the UPR either as a State under review or as a member of the troika - and also its statement before the vote,[87] its 'persistent objector' status was well-justified. However, the final outcome of the UPR should also be examined, and from this it is clear that the Bolivarian Republic of Venezuela has not totally distanced itself from the mechanism. On the very first session of UPR this State made comments and drafted recommendations for the States under review, indirectly acknowledging the reason for the existence of the UPR. Also on 19 July, 2011 it submitted its national report to the HRC, and so its 'persistent objector' status cannot be justified, because its objection was not truly persistent even before the 12th session. Consequently, if participation in the UPR is an already existing, crystallized obligation for States under customary law it is obligatory for all Member States of the United Nations without exception.

As to the second situation, if we consider this rule as a norm of customary law in the process of emerging, then, in this case, according to the 'persistent objector' rule, there is still a possibility for States to establish the 'persistent

[86] For example, in the Fisheries case (United Kingdom v. Norway) the United Kingdom attempted to prevent the recognition of the persistent objector status of Norway stating that the 'the Norwegian Government had not consistently followed the principles of delimitation'. International Court of Justice, Fisheries case (United Kingdom v. Norway), Judgment of December 18th, I95I: I.C. J. Reports 1951, p 137.

[87] General Assembly (GA) (2006) Official records A/60/PV.72.

objector' position if their objection is persistent, and so the analysis will focus on the question of which States have still the possibility to gain this status. As mentioned earlier, in some way every Member State of the UN has acknowledged the UPR by voting or participation. This means that every State has excluded itself from the 'persistent objector' status at least for the moment. It is hard to predict when a rule of customary law is crystallized – when, that is, the process of emerging ends. Looking at the present situation, in theory, it would not be impossible that there will appear States in later cycles which would like to achieve 'persistent objector' status. However, validity would be extremely difficult to prove, since, to be able to accept that the practice was consistent, the earlier signals of recognition would mean that a long period of time would need to pass.

5.2 State Responsibility

According to the annex to the HRC resolution concerning the details of the UPR the HRC itself and the members of the international community will assist in the implementation of the outcome of the review and 'After exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism.'[88] It means that the HRC can start another process within its competence; for example, it can appoint a proxy or examine the problem during a complaint procedure if special conditions are fulfilled.[89] Therefore, if participation in the UPR is not an international obligation, it means that the responsibility of the State which does not cooperate with the HRC cannot be invoked.

Does the situation change in the case of the UPR if participation is a rule of customary law? Obviously, if it is an obligation under customary law when a State does not participate in the process, it is a breach of an international obligation.[90] If the other criterion is also fulfilled, the breach is attributable to

[88] HRC Res 5/1 op. cit. point 38

[89] The GA resolution, which established the HRC and its procedures was previously examined and, although the legal nature of the other competencies of the HRC is more difficult to examine, the basic conclusions are similar to those in respect of the UPR. The biggest difficulty is that the other competences of the HRC had precedents, since the GA resolution established a new organ, but used the Commission on Human Rights and its duties and procedures as a starting point. Therefore the customary law basis, for example, is more solid in case of the special procedures and the complaints procedure.

[90] 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.' Thus, according to the Draft articles on the Responsibility of States, the legal source from which the obligation derives is irrelevant. Draft articles on the Responsibility of States for Internationally Wrongful Acts op. cit. Article 12

the State and there is an internationally wrongful act.[91] Consequently the responsibility of the State which does not comply with this rule of customary law can be invoked.

Which State or States can invoke the responsibility? According to the draft articles on State responsibility, the injured State can invoke the responsibility 'if the obligation breached is due to: (a) that State individually'.[92] However, the Draft articles deal also with the 'injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not due to one State individually, but to a group of States or even the international community as a whole.'[93] This provision states that a State which belongs to this group and is specially affected can invoke the responsibility, or, if the breach of the obligation radically changes 'the position of all the other States to which the obligation is owed with respect to the further performance of the obligation',[94] any of these States can act.

If we consider obligatory participation in the UPR as a forming rule of customary law it is obvious that the international responsibility of the State which does not cooperate with the HRC cannot be invoked, since the latter behaviour is not a breach of an international obligation, because such an obligation does not exist. However, if we recognise participation in the UPR as a crystallized norm of customary law, the lack of cooperation, if attributable to a State, results in an internationally wrongful act. In this latter case which State or States can invoke the responsibility of such a State? Participation in the UPR is an obligation owed to the international community as a whole with respect to the principle of the universal promotion and protection of human rights and it also follows from the concept of the UPR.[95] In our opinion a breach of an obligation to participate in the UPR cannot fall under Article 43, Paragraph (b), point (ii), because it would not basically change the performance of the general obligation of the protection of human rights for the other States. Therefore the responsibility of a State which breaches the obligation can be invoked by a specially affected State.[96] Although there has been no such breach of the obligation to date, many possibilities are conceivable.[97]

Consequently, if the obligatory participation of States in the UPR is an obligation under customary international law, when a State does not participate

[91] Ibid. Article 2.
[92] Ibid. Article 42.
[93] Ibid. paragraph 11, Commentary to Article 42.
[94] Ibid. Article 42. paragraph b point ii
[95] HRC Res 5/1 op. cit. Preambulatory paragraph 12 paragraph 5 point (e)
[96] Draft articles on Responsibility of States for Internationally Wrongful Acts op. cit. article 42 paragraph (b) point (i)
[97] For example, if, in the practice of a State the discrimination against nationals of another State (mother State) in their enjoyment of human rights is obvious, the mother State can be considered as a specially affected State.

in the process it breaches an international obligation, and, if it is attributable to the state in question, its international responsibility can be invoked by States which are especially affected by the internationally wrongful act according to the general rules of State responsibility.

6. Conclusion

From the analysis, the consequence follows that, although the obligation to participate in the UPR mechanism depends on the willingness of States motivated by political risks, it can also be determined at least as an emerging rule of customary law - hence an obligation under public international law with legal consequences.

For now it is impossible to determine exactly if this rule is an emerging one or an already crystallized one. A breach of this possible obligation could induct progress in this analysis but would not be favourable to the idea and purpose of the UPR. The other possible factor which could change the consequences of this paper in the future is the passage of time and future cycles of the UPR.

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