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CONTENTS

European Integration Studies, Volume 12, Number 1 (2016) pp. 5–9.

THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS IN DIRECTIVE (EU) 2016/343

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On 9 March 2016, the European Parliament and the Council adopted Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.
The Directive is the fourth legislative measure that has been passed since the adoption of the Council's Roadmap on procedural rights for suspects and accused persons in 2009.

The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights

After the Translation and Interpretation Directive, the Right to Information Directive and the Access to a Lawyer Directive, this new Directive tries to enhance the right to a fair trial through the adoption of common minimum rules on certain points of the presumption of innocence and the right to be present at trial. This should result an increased trust between the Member States (MS) in the field of criminal justice and thereby it facilitate mutual recognition.

The first three measures on the basis of the Roadmap[1] were adopted within a rather short time frame: Directive 2010/64/EU on the right to interpretation and translation (measure A) was adopted on 20 October 2010; Directive 2012/13/EU on the right to information (measure B) was adopted on 22 May 2012; and Directive 2013/48/EU on the right of access to a lawyer (measure C1+D) was adopted on 22 October 2013.

The European Commission has been examining the presumption of innocence for a long time. A Green paper on the presumption of innocence[2] from 2006 already indicated that the

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[1] The Stockholm Programme – An open and secure Europe serving and protecting the citizens (17024/09 Brussels, 2 December 2009)
However, during the Swedish Presidency, a programme to strengthen procedural safeguards was resurrected and the Stockholm Programme introduced a Roadmap of Procedural Safeguards which provides a step-by-step programme:
Measure A: Translation and Interpretation,
Measure B: Information on Rights and Information about the Charges,
Measure C: Legal Advice and Legal Aid,
Measure D: Communication with Relatives, Employers and Consular Authorities,
Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable,
Measure F: A Green Paper on the Right to Review of the Grounds for Pre-Trial Detention.

[2] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings Brussels, 27. 11. 2013 COM (2013) 821 final 2013/0407 (COD).

Commission was willing to include the presumption of innocence in a legislative instrument, if there was a need to do so. Although the presumption of innocence was not one of the measures covered by the 2009 Roadmap.[3] Point 2 of this Roadmap made clear that proposals on other topics could be launched. Therefore in November 2013, the Commission presented a package of three further measures to complete the rollout of the Roadmap, as integrated in the Stockholm programme: a proposal for a Directive on provisional legal aid (measure C2-), a proposal for a Directive on procedural safeguards for children (measure E-), and a proposal for a Directive on the presumption of innocence (the "example" of the Stockholm programme). Article 6(3) of the Treaty on European Union ("TEU") provides that fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms ("the ECHR") and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.

1. Description of the Main Contents of the directive

The approach of the new Directive is rather broad as it addresses not only the presumption of innocence and the connected rights such as the right to remain silent, but it equally addresses the right to be present at one's trial. The new rules apply to all people suspected or accused in criminal proceedings.

Article 1: Subject

Article 1 confirms that the Directive is intended to lay down minimum rules on "certain aspects of the right to the presumption of innocence in criminal proceeding" and the right to be present at the trial in criminal proceedings. The Directive is not intended, therefore, to be an exhaustive study of the principle and the ECHR will still be the main guide to those aspects which are not included in the text.

Article 2: Scope

The Directive applies to suspects or accused persons in criminal proceedings from the very start of the criminal proceedings, even before the time when the suspects are made aware by the competent authorities of the fact that they are suspected or accused of having committed a criminal offence. It applies until the conclusion of such proceedings, until the final judgement is delivered. The right to be presumed innocent encompasses different needs and degrees of protection regarding natural persons and legal persons, as recognised in the case law of the Court of Justice on the right not to incriminate one-self. This Directive takes into account these differences and therefore only applies to natural persons.[4]

Article 3: Presumption of innocence

Article 3 basically repeats Article 6(2) ECHR and Article 48(1) of the EU-Charter: suspects and accused persons should be presumed innocent until proven guilty according to law.
Article 3 is a simple restatement of the principle. It sets out that "Member States shall ensure that suspects and accused persons are presumed innocent until proven guilty

[3] Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings, RESOLUTION OF THE COUNCIL, of 30 November 2009, (2009/C 295/01).

[4] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceeding Brussels, 27. 11. 2013 COM (2013) 821 final 2013/0407 (COD).

according to law". There is no attempt to articulate the nature of the provision further or set out the core aspects of the presumption for the purposes of the Directive.

Article 4: Public references to guilt

The ECtHR established as one of the basic aspects of the principle of presumption of innocence the fact that a court or public official may not publicly present the suspects or accused persons as if they were guilty of an offence if they have not been tried and convicted of it by a final judgment.[5] According to the case law of the ECtHR this principle should furthermore apply to all public authorities.[6]

Article 4(3) explained a general exception: the obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings, if this is strictly necessary for reasons relating to the criminal investigation. This could be the case, for example, when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence.[7]

Article 5: Presentation of suspects and accused persons

According this article, "Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint."

It means that the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so they are required to avoid giving the impression that those persons are guilty.

Article 6: Burden of proof

Article 6 deals with the burden of proof. It requires Member States to "ensure that the burden of proof in establishing the guilt of suspects and accused persons is on the prosecution". This is an important issue. The burden of proof refers to the fact that it is the prosecution who must prove the case against the accused. The initial draft of Article 6 initially contained an article permitting the burden of proof to be shifted to the defence. The European Parliament's Civil Liberties Committee successfully proposed an amendment deleting this provision on the shift of the burden of proof . This Article reflects the ECtHR principle[8] which is considered as a correct balance between the public interest (the needs of prosecution) and the right of the defence.

Article 7: Right to remain silent and right not to incriminate oneself

Article 7 provides that the suspect has the right to remain silent "in relation to the offence that they are suspected or accused of having committed". This should surely have been extended to the right to silence in relation to the commission of any offence. The right to remain silent and the right not to incriminate oneself are not specifically mentioned in the

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5 See *Minelli v. Switzerland*.

6 See *Allenet de Ribemont v. France*.

7 CRAS, Steven–ERBEZNIK, Anze: The Directive on the Presumption of Innocence and the Right to be Present at Trial. *Eucrim*, 2016/1, 29.

8 See, *inter alia*, ECtHR cases *Salabiaku v. France* (judgment of 7. 10. 1988, application 10519/83), *Barberà, Messegué and Jabardo v. Spain, Telfner v. Austria* (judgment of 20. 3. 2001, application 33501/96).

ECHR, but the ECtHR has derived these rights from the right to a fair procedure under Article 6 of ECHR.[9] The Commission defined the right to remain silent and the right not to incriminate oneself as absolute rights, which means that they can be exercised without any conditions or qualifications and that there are no negative consequences attached to the exercise of these rights.[10] Suspects or accused persons should be promptly informed of their right to remain silent according to Directive 2012/13/EU. Such information should also refer to the content of the right to remain silent and of the consequences of renouncing to it and of invoking it.[11] Article 7(3) notes that "the exercise of the right to remain silent and of the right not to incriminate oneself shall not be used against a suspect or accused person and shall not be considered as evidence that the person concerned has committed the offence which he or she is suspected or accused of having committed". This has to be welcomed and appears to go further than the ECtHR which has found that an accused's decision to remain silent throughout criminal proceedings may carry consequences, such as 'adverse inferences' being draw from the silence.

Artice 8 and 9: Relating to the right to be present at the trial and the right to a new trial

The provisions regarding trials in absentia, which the Commission had proposed in paragraphs 2 and 3 of Article 8, were more problematic. Here, the Commission had almost copy-pasted provisions from Framework Decision 2009/299/JHA on trials in absentia. The ECtHR has confirmed that this is implicit in the right to a fair trial by way of a public hearing (*Jacobsson v. Sweden*, No. 16970/90, 19. 2. 98) and that it is difficult to see how anyone can exercise their defence rights without being present at their own trial (*Colozza v. Italy*, No. 9024/80, 12. 2. 85).[12] The Directive has brought clarity on an important point. In fact, in the Framework Decision it was not clear whether in respect of suspects or accused persons whose location is unknown a trial in absentia could be held and whether the resulting decision, including a custodial sentence, could be enforced immediately, in particular if the person concerned has been apprehended. However important conditions have to be applied. Firstly, Member States may only use the possibility to hold a trial in absentia if they have undertaken "reasonable efforts" to locate the suspects or accused persons. Secondly, the Member States must inform those persons, in particular upon being apprehended, of the decision taken in absentia as well as of the possibility to challenge this decision and the right to a new trial or other legal remedy.[13] Article 9 establishes a remedy (established by the ECtHR) in cases where the right to be present at trial has not been observed. In this case it is an obligation to provide for a re-trial.[14]

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9 See, e.g., ECtHR Funke v. France, 25 February 1993 (Appl. No. 10828/84), para. 44.

10 CRAS, Steven–ERBEZNIK, Anze: The Directive on the Presumption of Innocence and the Right to be Present at Trial. *Eucrim*, 2016/1, 31.

11 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceeding Brussels, 27. 11. 2013 COM (2013) 821 final 2013/0407 (COD) 35. point.

12 SAYERS, Debbie: *The new Directive on the presumption of innocence: protecting the 'golden thread'*. http://eulawanalysis.blogspot.de/2015/11/the-new-directive-on-presumption-of.html

13 CRAS, Steven–ERBEZNIK, Anze: The Directive on the Presumption of Innocence and the Right to be Present at Trial. *Eucrim*, 2016/1, 33.

14 *Colozza v. Italy*.

Article 10: Remedies

The right to an effective remedy is set out in Article 13 ECHR and Article 47 EU-Charter. The primary requirement is that the remedy should be "effective in practice as well as in law".[15] The ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial in Article 6(2) ECHR would be to ensure that suspects or accused persons, as far as possible, are put in the position in which they would have been had their rights not been disregarded.[16]

[15] SAYERS, Debbie: *The new Directive on the presumption of innocence: protecting the 'golden thread'*. http://eulawanalysis.blogspot.de/2015/11/the-new-directive-on-presumption-of.html

[16] See *Teteriny v. Russia* (judgment of 30. 6. 2005, application 11931/03, paragraph 56), *Jeličić v. Bosnia and Herzegovina* (judgment of 31. 10. 2006, application 41183/02, paragraph 53), and *Mehmet and Suna Yiğit v. Turkey* (judgment of 17. 7. 2007, application 52658/99, paragraph 47), *Salduz v Turkey*, paragraph 72.

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LEGAL QUESTIONS ON THE APPEARANCE OF SELF-DRIVING CARS IN THE ROAD TRAFFIC WITH SPECIAL REGARD ON THE CIVIL LAW LIABILITY

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1. Introduction

More, than a century has been expired, since Bálint KOLOSVÁRY published his work[1] on the automobile law apropos of the adoption of the Austrian auto mobile act. In this work, he drew attention to the step-by-step transformation of the traditional, Roman law based liability approach. As a result of the technology's fascinatingly fast development, cars appeared in the roads and brought up such liability questions, which could not be duly answered by the contemporary Hungarian tort law.

During the 20th century, the use of motor vehicles became natural. Nowadays, the performance of the daily "logistic tasks" (e.g. shopping, traveling to the working place, bringing the children to nursery/school etc.) by car is a part of the people's everyday routine. The legal regulation of the liability for the damages caused by on the roads en masse appearing motor vehicles, functions well, regarding provisions in the Hungarian private law which are practically changeless since the depth of the 20th century.

The 21st century's leap technical development, the experiments with artificial intelligence (AI) and consequently the automating of motor vehicles has opened a new dimension of liability questions. It is difficult to answer, how those situations can be adjudicated, where the damage occurred is caused by such a – partially or fully automated – car, which was driven by a "robot pilot" in the presence of the (human) driver or possibly there is no human driver in the car at all (e.g. Google car).[2] The straight root cause of this study is the accident of the Tesla self-driving car (Tesla Model S) in May 2016, in which in the car the sitting and because of the operating of the "Autopilot" system even not driving person died. Although some accidents caused by self-driving cars have happened before, the above mentioned case was the first, which caused not only pecuniary damage, but personal injury, namely death.

Albeit we do not have to reckon with the multitudinous appearance of self-driving cars in the Hungarian roads yet, it is a reality that worldwide increases the number of those motor car-manufacture companies, which invest into the improvement of such vehicles.[3]

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[1] KOLOSVÁRY, Bálint: Automobiljog, különös tekintettel az új osztrák automobiltörvényre. *Erdélyi Múzeum,* Vol. 25, Issue 6 (1908), 368–377.

[2] It shall be noted, that as to the USA legislation, Google's self-driving car, presented in 2014, is classified as low-speed vehicle limited to twenty-five miles per hour. Moreover, these cars have no steering wheel and no pedals. See GLANCY, Dorothy J.: Autonomous and Automated and Connected Cars-Oh My! First Generation Autonomous Cars in the Legal Ecosystem. *Minnesota Journal of Law, Science & Technology,* Vol. 16, Issue 2 (2015), 619–691, 624.

[3] In Europe, BMW tests its "Traffic Jam Assist" system in the German A9 motorway between Munich and Berlin. Scania starts its prototypes in Spain and the Volvo's "Drive Me" system is tested in Sweden, in the neighbourhood of Gothenburg. In the USA Google, Intel, General Motors

Having regard this fact, the European legislator would face the future challenges and endeavor to create a coherent legal framework on self-driving cars at a supranational level.[4]

The appearance of *autonomous technology* in the usage of motor vehicles creates a new situation for the legislator. The appearance of self-driving cars in public road traffic brings up several questions. Thus, previously separate rules were applied not only for the attendance of motor vehicles in road traffic and for the driver and its behaviour, but for the vehicle and its technical status. (The driver's behaviour has great significance in the course of determining the liability.) Nevertheless, the automating of motor vehicles has an effect on the driver's liability too, since the more autonomous the car is, the lesser participates the (human) driver in the operating of the car. In the case of *fully autonomous car* the contribution or presence of the human driver is not necessary, therefore if damage occurs, the human driver's liability cannot be determined upon the provisions of the traditional tort law.

The ultimate aim of the study is to answer the questions arisen according to the self-driving cars and to offer possible solutions for the future legislation. One of the elemental prerequisites is the creating of appropriate definitions; the study's first part focuses on this with regard to the already existing rules of the USA's certain states. Thereafter we intend to introduce the existing (international and American) provisions on self-driving cars and the future (at this time only in draft existing) European legal tools. The study's third part walks around the problems arisen with regard to the damages caused by self-driving cars. In the course of this task, we review different national rules on strict liability for traffic accident under the rule of liability for highly dangerous activities and product liability. We also intend to examine the possibility and limitations of the application of both mentioned liability constructions and offer the setting up of compensation fund as an alternative or supplementary solution. Within the liability questions, we also pay attention to the liability insurance solutions.

2. Self-driving car – Definition attempts, model solutions

In due to the automating of motor vehicles several different terms appeared, which once can be handled as synonyms, but another time they overlap only in part each other. Generally speaking, *driverless car* or *self-driving car* means such a motor vehicle, which safe operation do not make necessary the presence of the human driver.[5] Elsewhere *autonomous intelligent cars (AIC)* nominates those motor vehicles, which are guided – partially or fully – by artificial intelligence (AI).[6]

The automating of motor vehicles and the way to be autonomous is a long development process, where the using of modern technologies like lane-keep-assistance, electronic blind spot assistance, traffic jam and queuing assistance, adaptive cruise control, emergency breaking and crash avoidance etc. mean the first step. With regard to the autonomy of the certain motor vehicle (i.e. the relation of the tasks to be done by the driver or the vehicle) we can differ levels. In this system, those motor vehicles are located on the first scale,

and Autoliv Inc. are interested in the testing of self-driving vehicles, while in the Far East, Nissan (in Japan), Hyundai, GM-Daewoo and Ssangyong (in South Korea) make inquiries after the future motor vehicle technologies.

4 See later the so-called GEAR 2030 Roadmap.

5 *The Pathway to Driverless Cars: detailed review of regulations for automated vehicle technologies.* Department for Transport, London, February 2015, 20.

6 DE BRUIN, Roeland: Autonomous Intelligent Cars on the European intersection of liability and privacy. *European Journal of Risk Regulation,* Vol. 7, Issue 3 (2015), 485–501, 489.

which stands only under human power, therefore the (human) driver is liable for all event, which occur in connection with the vehicle (e.g. damages). The *fully autonomous car* is the highest level of automation, where the motor vehicle participates without human assistance (and presence), independently and safely in the road traffic. As to the forecasts, these vehicles will appear on the roads and will be available for the public at earliest in the 2020s, 2030s. Nowadays, the testing of the prototypes of the so called *highly autonomous car*s goes on. The levels of the automation of motor vehicles are demonstrated by the following figures.

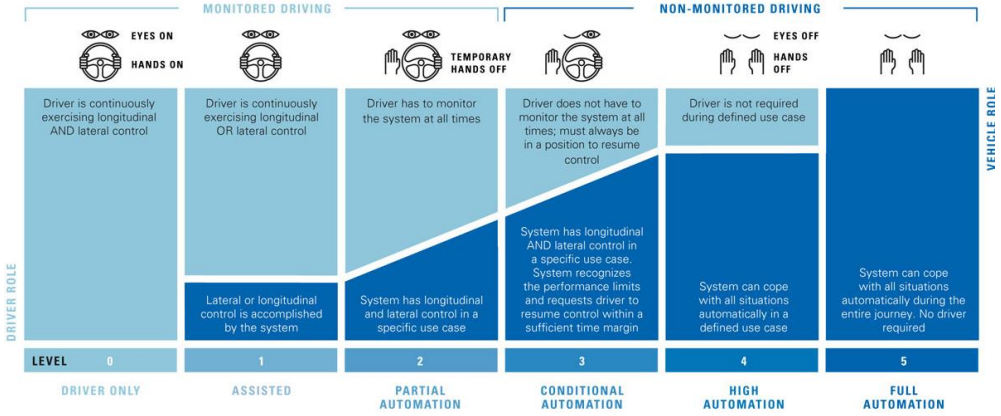

Figure 1. Levels of Automation[7]

In the course of defining self-driving cars, we can start from the legislative outcomes of certain states of the USA.[8] In the US terminology both *automated vehicle* and *autonomous vehicle* expressions are used, their content more or less overlap. As to the related act of *Nevada*[9] *autonomous vehicle* means a motor vehicle that uses artificial intelligence,[10] sensors (e.g. camera, radar, laser) and global positioning system coordinate to drive itself without the active intervention of a human operator. *Florida's* and *California's* act[11] states that *autonomous vehicle* is any vehicle equipped with autonomous technology.[12]

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7 http://safety.trw.com/autonomous-cars-must-progress-through-these-6-levels-of-automation/0104/ (Downloaded: 2. 11. 2016)

8 The legal acts of Nevada, Florida, Michigan and California mostly concentrates on the test phase (e.g. appearance of prototypes in road traffic), but some of them also determine the conditions of self-driving car's releasing for consumers.

9 *Assembly Bill*, No. 511 of 2011 (AB511).

10 As to the AB511 "artificial intelligence" means the use of computers and related equipment to enable a machine to duplicate or mimic the behaviour of human beings.

11 Florida HB 1207, *California Senate Bill*, No. 1298.

12 As to the Florida HB 1207, the term *autonomous technology* means technology installed on a motor vehicle that has the capability to drive the vehicle on which the technology is installed without the active control or monitoring by a human operator. The term excludes a motor vehicle enabled with active safety systems or driver assistance systems, including, without limitation, a system to provide electronic blind spot assistance, crash avoidance, emergency braking, parking assistance, adaptive cruise control, lane keep assistance, lane departure warning, or traffic jam and queuing assistant, unless any such system alone or in combination with other systems enables the vehicle on which the technology is installed to drive without the active control or monitoring by a

Contrary to the applied terminology of the above mentioned three states, the act of *Michigan*[13] contains the *automated motor vehicle* expression, which means a motor vehicle on which automated technology[14] has been installed, either by a manufacturer of automated technology or an upfitter that enables the motor vehicle to be operated without any control or monitoring by a human operator.

The divergence of the US terminology inspired the discussion paper,[15] which was prepared for the European Parliament (hereinafter EP). The paper differs between *automated vehicle* and *autonomous vehicle (AV).* The former means a motor vehicle (car, truck or bus) which has the technology available to assist the driver so that elements of the driving task can be transferred to a computer system. With regard to the built-in driver assistance system, we can speak about *partially automated*[16] and *highly automated* motor vehicles.

As to the above referred discussion paper *autonomous vehicle* is a fully automated vehicle equipped with the technologies capable of performing all driving functions without any human intervention. This time partially automated systems are used in water and air transport *(robot-pilot).* Nevertheless, there is a basic difference: in the case of water- and aircrafts, the applied system's task the keeping of the given direction or speed in a relative eventless environment. Contrarily to this, the AV's computer should continuously come to a decision instead of the driver, in a certain (to the operating necessary) measure mapped and equipped, i.e. typically urban environment. AVs shall also be differentiated from cars that are remotely controlled by external operator. In these latter cases the operational control by external managers simply moves the "driver" from inside the vehicle to a location outside the vehicle.[17] AVs does also not cover the so-called "platooning", i.e. "a coupling of several vehicles within minimal distance of each other, so that they automatically and simultaneously accelerate or brake".[18]

In the following part of the study we use the terminology, which appears in the European Union's preparing documents, since in the case of adopting any legal act on self-driving cars by the EU legislator, Hungary will have to implement them into its national law.

3. International agreements

The unification of road traffic rules has started relatively early, after the 2nd World War. Under the aegis of the *UNECE (United Nations Economic Commission for Europe)*, which has been created as a regional committee in 1947 within the frames of the UN, several agreements were born, which practically cover all dimensions of the road traffic, from the

human operator. The California SB 1298 contains a simpler definition: *autonomous technology* means technology that has the capability to drive a vehicle without the active physical control or monitoring by a human operator.

13 *Michigan Senate Bill*, No. 0169.

14 Per Michigan SB 0169 *automated technology* means technology installed on a motor vehicle that has the capability to assist, make decisions for, or replace an operator.

15 *Automated vehicles in the EU.* Briefing January 2016, European Parliament, 2. http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573902/EPRS_BRI(2016)573902_EN.pdf

16 The Super Cruise system of the General Motors and the Autopilot system of the Tesla mean a partially automated technology.

17 Remote control cars are often remembered as familiar childhood toys. In the real world, they often take the form of large-scale trucks, digging equipment, and unmanned ground vehicles (UGVs) used in military and mining operations. See GLANCY, 627.

18 *Automated vehicles in the EU.* Briefing January 2016, European Parliament, 2. http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573902/EPRS_BRI(2016)573902_EN.pdf

technical requirements on motor vehicles, through the traffic signs, until the requirements of getting a driving license.

The Article 8 of the *Convention on Road Traffic* done at Vienna, 8th November 1968 (hereinafter *Vienna Convention*)[19] stated that every moving vehicle (or combination of vehicles) shall have a driver. A further general condition is that every driver shall possess the necessary physical and mental ability and be in a fit physical and mental condition to drive. Vienna Convention also states that every driver of a power-driven vehicle shall possess the knowledge and skill necessary for driving the vehicle.

Because of the date and circumstances of the birth and thus the status of the science and technology, Vienna Convention could not calculate with the fact that after a few decades science passes through such development, which facilitates for the vehicles to circulate safely on the roads without any human contribution. With regard to the leaping technological development of the last few years and side by side the appearance of new tendencies in the motor car innovate, UNECE decided to prepare the modification of the Vienna Convention. As a result of this initiation, Vienna Convention was amended in March 2016. The modified text of the Article 8 makes possible the participation of driverless cars in public road traffic provided that the defined prerequisites are fulfilled.

The provisions and the above mentioned modification of the Vienna Convention have great significance not only on the legislation of the European Union, but also on the Member States', since most of these countries ratified it. However, there is a further question: how the international, European and national provisions relate to each other in the case of those states which did not ratify the Vienna Convention (e.g. Portugal, Spain)?[20] Another question is the cast of the United States, since it is not the party of the Vienna Convention, but ratified its "ancestor", the Convention on Road Traffic signed in Geneva on 19th September 1949 (hereinafter *Geneva Convention*).[21] It shall be also noted that Geneva Convention contains substantially softer minimum rules compared to the Vienna Convention.

4. Authorisation models

4.1. Provisions on self-driving cars in the USA

In the creating of the rules on driverless cars, the United States is on the top. However, this is not surprising, since the world's first driverless car (improved by the Google) appeared there. Though federal act on driverless cars does not exist, the elaboration of the related provisions are already in process both at state level and in the form of bilateral (inter-states) agreements.

Among the states of the USA, Nevada was the first in 2011, which adopted provisions on the driverless cars.[22] During the years 2012–2013 similar acts were born in Florida, California and Michigan and up to this day several other states decided to create the legal framework on driverless cars.

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[19] In Hungary, the Vienna Convention was promulgated by the Statutory Rule No. 3 of 1980.

[20] Though the United Kingdom did also not ratify the Vienna Convention, we did not mention it above, because with regard to the result of the Brexit, at time of adopting the future EU regulation on self-driving cars, the UK presumably will not be the member of the European Union.

[21] https://treaties.un.org/doc/Publication/UNTS/Volume%20125/v125.pdf (Downloaded: 4. 11. 2016)

[22] TERWILLEGER, John W.: Navigating the Road Ahead: Florida's Autonomous Vehicle Statute and its Effect on Liability. *The Florida Bar Journal,* Vol. 89 (2015), No. 7. http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/BFFA213CCE8AA5B085257E6C0047DB90 (Downloaded: 4. 11. 2016)

The structure of the presently existing (and operating) legal acts are similar: they define the autonomous vehicle and gives further notions (e.g. autonomous technology, operator, automated mode etc.), which support the interpretation of the former definition. Such regulations are strongly criticized by the literature, since they do not differ between motor vehicles with regard to the level of automation.[23] Prerequisites of the autonomous vehicle's participation in public road traffic are also determined. (In 2016, Florida amended its act and allowed the participation of autonomous cars in public road traffic. At the same time, it abolished the previously defined conditions on the testing of self-driving cars and on the driver's compulsory presence in the car.)

The adopted acts also contain provisions on driving licence: California requires the autonomous vehicle's driver to have a single, special type of driving licence, while Nevada prescribes the endorsement of the traditional driving license. In Florida any person with a valid driver's license is permitted to operate an autonomous vehicle in autonomous mode.[24] A further essential prescription is (e.g. in Nevada) that each vehicle is to be equipped with a black box-type data collector to store data from the autonomous system sensors, in order to retrieve information from at least 30 seconds before a collision.[25, 26] Moreover, such technology also shall be built into the autonomous vehicle, which safely alerts the operator to take control of the autonomous vehicle if a technology failure is detected.[27] The referred Nevada act contains some serious financial prescription: before a person or entity begins testing an autonomous vehicle on a highway within the state, the person or entity must submit to the Nevada Department of Motor Vehicles the proof of insurance or self-insurance in the amount of 5 million dollars or make a cash deposit or post and maintain a surety bond or other acceptable form of security in the same amount.[28] In the case of private use, the amount of the surety bond or deposit of cash is 500,000 dollars.[29] Thus, prototypes can put in operation upon only individual allowance in a certain geographical region; test vehicles have a distinctive temporary license plate.[30]

4.2. The angles of the European Union's legislation

From 2010, the European Commission (hereinafter Commission) has proclaimed several times that it would create such an intelligent traffic system within the European Union, which keeps step with the technological development, uses the newest innovations in motor

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[23] PEARL, Tracy Hresko: *Fast & Furious: The Misregulation of Driverless Cars*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2819473 (Downloaded: 3. 11. 2016)

[24] See PECK, Spencer–FATEHI, Leili–DOUMA, Frank–LARI, Adeel: The SDVs Are Coming! An Examination of Minnesota Laws in Preparation for Self-driving Vehicles. *Minnesota Journal of Law, Science & Technology*, Vol. 16, Issue 2 (2015), 843–878, 861.

[25] *Nevada Administrative Code (NAC).* Chapter 482A 2b. http://www.leg.state.nv.us/NAC/NAC-482A.html (Downloaded: 9. 11. 2016)

[26] The "black box" must be captured and stored in a read-only format by the mechanism so that the data is retained until extracted from the mechanism by an external device capable of downloading and storing the data. Such data must be preserved for 3 years after the date of the collision. The provisions of this paragraph do not authorize or require the modification of any other mechanism to record data that is installed on the autonomous vehicle in compliance with federal law. See *NAC*, 482A.110 2b.

[27] *NAC*, 482A.110 2d.

[28] *NAC*, 482A.110 4a. renewal, NRS 482A.060. http://www.leg.state.nv.us/NAC/NAC-482A.html (Downloaded: 9. 11. 2016)

[29] *NAC*, 482A.210 3b.

[30] *NAC*, 482A.140.

car industry and at the same time it complies to the different aims of the EU (e.g. sustainability).[31] Therefore, in October 2015, the Commission decided about the setting up of an advisory body[32] (hereinafter *GEAR 2030*), which consists of different experts. On the one hand, the members of the GEAR 2030 are state ministers, who are liable for the economy, industry and traffic. On the other hand, representatives of the industry, science, and civil sphere, e.g. consumer protective organisations (e.g. FIA[33], BEUC[34] etc.) and observers of other organisations (e.g. EIB[35], CoR[36]) also take place in it.

Discussion paper made by the GEAR 2030 for the Commission *(Roadmap on Highly Automated Vehicles)*[37] outlines the necessity of reviewing and amending the existing legal and political framework on highly automated vehicles. This demand is especially strong in the field of traffic rules, prerequisites of driving license, worthiness of roads and road signs, provisions on liability and insurance, cyber security and data protection. The main goal is the creation of such a legal framework, which is based on the international standards worked out by the UNECE and which aims fully harmonisation.

As it was mentioned before, most of the EU's Member States ratified the Vienna Convention. In accordance with this latter, every Member State has a national legislative act on the rules of road traffic.[38] Directive 2006/126/EC[39] contains minimum rules on the driving licenses; these provisions are supplemented by the national legislations. With regard to the appearance of the self-driving cars in public road traffic, Directive 2006/126/EC will need to be amended. However, the direction of the future amendment is uncertain yet. Thus, it is questionable, if the driving of such vehicles (provided that they require a special skill) can be bounded to the existing of a special driving allowance or traditional driving license on its own gives the possibility for driving an autonomous car. In the British press, such an opinion came to light, which stress that the autonomy of cars will make unnecessary the existence of driving license in the future. Since rules on driving license have already been adopted in some US states, European legislator presumably will proceed from these solutions in the course of working-up the future regulation. Nevertheless, the European legislator should have regard to the aims are to be reached with the introduction of self-driving cars in the public road traffic.

As it was referred in the GEAR 2030's discussion paper, according to the modification of Directive 2006/126/EC the amendment of the Directive 2003/59/EC on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods

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[31] See White Paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144 final, Brussels, 28. 3. 2011; CARS 2020: Action Plan for a competitive and sustainable automotive industry in Europe, COM (2012) 638 final, Brussels, 8. 11. 2012.

[32] High Level Group on the Competitiveness and Sustainable Growth of the Automotive Industry in the European Union (GEAR 2030).

[33] Fédération Internationale de l'Automobile

[34] The European Consumer Organisation

[35] European Investment Bank

[36] Committee of the Regions

[37] https://circabc.europa.eu/sd/a/a68ddba0-996e-4795-b207-8da58b4ca83e/Discussion%20Paper%C2%A0-%20Roadmap%20on%20Highly%20Automated%20Vehicles%2008-01-2016.pdf (Downloaded: 3. 11. 2016)

[38] e.g. *Act*, No. 1 of 1988 on Road Traffic (Hungary).

[39] Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences. *OJ L*, 403, 30. 12. 2006. 18–60.

or passengers[40] will also be necessary for the future. A further – at present untimely – question can be, if the requirement of a special driving license for self-driving cars can have an effect on the purchasing of such cars, i.e. only those persons could buy self-driving cars, who have this special driving allowance. (This question will not answered in this study, since the answer depends on the future – and for the present not existing – European regulation.

5. Compensation for damages, liability questions

5.1. General issues

With regard to the present legislation of the European Union and as to the initiative[41] of the *Committee for Legal Affairs of the European Parliament* (hereinafter *JURI*), robots and – in wider sense – each instrument, which uses AI (included self-driving cars) cannot be held liable *per se* for acts or malpractices that cause damage to third persons.

For the time being, liability rules only cover those cases, when the robot's "act" or "omission" originates in human contribution (e.g. manufacturer, owner, keeper) and this person has should have foreseen and prevented the robot's harmful behaviour. The strict liability of the above-mentioned person can be stated, if the robot, who caused the damage, shall be deemed as "dangerous object" or it falls into the scope of the product liability regulation.

Related to the liability questions, the Regulation 864/2007/EC[42] (hereinafter *Rome II*) shall be noticed, since it determines, which law applicable to non-contractual obligations, e.g. liability in tort/delict. Liability rules closely connected to the national laws, therefore the applicable law to certain harmful act shall be ordered. As to the Rome II, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country *in which the damage occurs (lex loci damni)* irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[43]

As it can be seen, under the provisions of the Rome II, a certain state's national liability rules shall be applied for damages; this means an appropriate solution for these legal relations. Nevertheless, a demand has been arisen to unify or at least harmonise tort law of the Member States of the European Union. This work goes parallel with the harmonisation of the European contract law, but the realisation is different, since some scholars would integrate the European tort law into the future European Civil Code,[44] while others intend to work out separate legal rules on tort law.[45, 46]

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[40] Directive 2003/59/EC of the European Parliament and of the Council of 15 July 2003 on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers, amending Council Regulation (EEC) No 3820/85 and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC. *OJ L*, 226, 10. 9. 2003. 4–17.

[41] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-582.443+01+DOC+PDF+V0//EN (Downloaded: 4. 11. 2016)

[42] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). *OJ L*, 199, 31. 7. 2007. 40–49.

[43] Rome II, Art. 4, para (1).

[44] See VON BAR, Christian–CLIVE, Eric–SCHULTE-NÖLKE, Hans (eds.): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference.* European Law Publishers, Munich, 2009.

[45] See European Group on Tort Law (ed.): *Principles of European Tort Law. Text and Commentary*. Springer, Vienna–New York, 2005.

The adjudication of liability questions needs different examination dependent on the fact if the using of a self-driving car is in testing phase (as at present) or already in real consumer actuation. An undertaking pursuing tests upon allowance is liable for the damages, which occurred by test cars during the testing phase. Testing – as a highly dangerous activity – can only be pursued under the observing of strict prescriptions; compensation of damage occurred can be covered either by a special liability insurance or collateral (or other) security. Since the testing of self-driving cars requires for an appropriate qualitative road infrastructure (e.g. road surface, signs, tables etc.), the liability of the state or the authority charged with the roadway surveillance and maintenance (hereinafter roadway authority) can also come up as a subsidiary. Within this category, either the manufacturer or other persons have the right to claim for damages. Manufacturers can sue for the damage occurred in the test car. Persons injured in the accident caused by the test car can claim either for compensation or restitution against the roadway authority if infrastructural deficiencies led on the accident. Since self-driving vehicles usually do not appear in the trade at the time of testing, they cannot be deemed as a product, therefore product liability rules cannot, but rules on liability for highly hazardous activity can be applied. If such a self-driving car is involved in a road accident, which was sold for private use and was taken into road traffic, the following persons can be concerned accordingly the compensation of the damage occurred:

- the injured party, who can be either the driver or any other person, who traveled in the self-driving car;
- the driver or the keeper of the car;
- the manufacturer or importer of the car (or distributor in the case of final product);
- the undertaking, which manufactured the intelligent technology or equipment, which is to be installed into the car ("intermediate product developer");
- the operator of data base or network in the case of autonomous cars connected by wireless technology;
- any other person who involved in the accident's supervention;
- the insurers of the above mentioned persons.

Among the rules on compensation for damages and liability-settling rules, under which the compensated damage can shift off, hereinafter we concentrate only on the applicability of the provisions on liability for highly hazardous activity, product liability and other strict liability rules. Nevertheless, we should mention that as a result of the so-called *non-cumul rule* in the Hungarian civil law, the contractual relationship existing between the injured party (i.e. the buyer of the car) and the manufacturer (i.e. seller) will be a principal question, which brings up further questions on the application of the rules on lack of conformity and compensation for damages caused by the lack of conformity.

5.2. Operating a self-driving car as highly dangerous activity

As to the Article 6:535 of the *Hungarian Civil Code* (Act No. V of 2013, hereinafter *HCC*) a person who pursues an activity that is considered highly dangerous shall be liable for any damage caused thereby. The keeper (pursuer), i.e. the person on whose behalf the hazardous operation is carried out, shall be relieved from this strict liability if he proves that the damage occurred due to an unavoidable cause that falls beyond the realm of highly dangerous activities. In the light of the present judicial practice, we can state that the self-

[46] About the tendencies of harmonisation of European tort law see KOZIOL, Helmut: Harmonising Tort Law in the European Union: Advantages and Difficulties. *ELTE Law Journal Separatum*, 2013/1, 73–88.

driving car's operational abnormality, inner system error or programming deficiencies cannot be deemed as a cause that falls beyond the realm of highly dangerous activity. Moreover, in our opinion, in the case of vehicles communicating with wireless connection, defaults of networking or data transmission or the hacking of the system fulfil neither the above mentioned condition, nor the unavoidability. Thus, it can be stated that provisions on liability for highly hazardous activity having objective nature, shall be appropriately applied for damages occurred in correlation to the operation of self-driving cars. Nonetheless, detailed rules can cause difficulties in the interpretation.

Problems arise with regard to the notion of keeper. On the one hand, borders between the notions worked out by the judicial practice upon the old civil code and given by the rules on compulsory motor insurance[47] has been worn off. On the other hand, since the notion worked out by the judicial practice is broader than the notion used by the HCC (this latter takes focus only on the persons, on whose behalf the hazardous operation is carried out), it is to be feared that the previously used definition is going to narrow to the personal circle designed by the HCC.

Since we have already dealt with the notion of keeper, i.e. who is obliged for the compensation of a certain damage, here we only examine, if in the case of a future driverless taxi service[48] can such a person be liable for damages occurred in an accident caused by the vehicle, who seated in it, did not drive, but the car operated on his or her behalf.

It is also questionable – and it is not an unimportant aspect – if the operating of self-driving (autonomous) vehicles in the future (in 20–30 years) shall be deemed as highly hazardous activity, when decreasing statistical data of road accidents unanimously will prove that road accidents were mostly caused by human fault. Literature standing points count on networking data transmission faults or attacks against system or software[49] in the case of connected cars, i.e. such vehicles, which are in wireless connection with a central source. These actions can be serious contingency, therefore in the North-American states the keeping-up of Internet or other wireless connection is prohibited in the course of testing.[50]

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[47] As to the Article 3, point 35 of the Hungarian Motor Insurance Act (Act No. LXII of 2009 on the compulsory motor insurance) keeper (authorised person) is a person, who is registered in the document issued by the state of the motor vehicle's premise. In the lack of such person, owner shall be deemed as keeper.

[48] "Uber and Volvo announced plans to put driverless cars on the streets of Pittsburgh in September 2016, and Ford says it expects to introduce its first self-driving cars in 2020." See AHLEMANN, Dietmar–GERLING Walter: The autonomous frontier. In: *Connected car report 2016*. 49. http://www.strategyand.pwc.com/media/file/Connected-car-report-2016.pdf, 55. (Downloaded: 4. 11. 2016)

[49] "Original equipment manufacturers, suppliers, and technology companies are beginning to realize that the connected car could be a cyber security nightmare – unless the right steps are taken now. Determined hackers have already broken into some cars' systems, taking over vehicle functions, from navigation to safety features, and causing problems with the driver's ability to control the car. Future break-ins could even affect more than one car at a time, disrupting traffic flow or targeting an entire fleet of cars. Hackers could go after the increasing amounts of personal data flowing between the car and the cloud through car-based consumer apps and services." See MOHS, Joachim –SCHULTE, Manuel: Pitstop: Making the connected car cyber-safe. In: *Connected car report 2016*. 49. http://www.strategyand.pwc.com/media/file/Connected-car-report-2016.pdf (Downloaded: 4. 11. 2016)

[50] PECK–FATEHI–DOUMA–LARI, 843.

As to the report of the *German Federal Highway Research Institute*[51] *(BASt)* the liability of an AV's keeper can be stated under the rules on the liability for highly hazardous activity. However, the BASt also emphasized that the maintaining of the inverse burden of proof created by the related legal provisions[52] is problematic in all those cases, when the operation of the automated vehicle allows the driver not to take due attention to the driving. Although the German rules on road traffic do not prohibit driving without taking the wheel, in the case of traditional cars this act usually jeopardize the traffic safety, therefore it violates the traffic rules. However, it depends on the level of automation and the concrete circumstances of driving, if losing hold of an AV's wheel impacts the requirement of safe driving or not.[53]

Albeit German rules settle the risk from the operation of the highly hazardous activity to the keeper, the driver also can be liable under the general liability rules (Article 823 of BGB), i.e. driver is liable for damages caused by his or her negligent or voluntary act. Since highly or fully automated vehicles release their driver from the diligent behaviour, which should have been maintained by the driver within the control of the vehicle, in order to the acquittance, driver shall prove that at the time of the accident the vehicle was in automatic mode, instead of proving that his behaviour was diligent or he was not culpable.[54] As to the German rules both the keeper and driver have a duty to conclude a liability insurance contract provided that the insurer's accountability for damages caused by partially automated cars as special vehicle is not excluded or bounded to the payment of higher fee by the presently existing liability insurance contracts.

In the *Anglo-Saxon* legal systems, the basically culpability-based liability rules ("negligence liability") generally are not suitable to determine the driver's or owner's liability for damages originated from the self-driving cars' operation.[55] However, liability rules are not steady. In the majority of the states of the USA special acts settle the liability to the vehicle's owner, if the car is driven by any other person upon the driver's authorisation. The number of judicial decisions, which state that in the case, when a car becomes dangerous instrumentality because of its uncontrollable failure and therefore the owner's liability is strict, is vanishing.[56] Nevertheless, Louisiana's civil code not only knows the liability for damages caused by things, but separately regulates the liability for damages caused by default things. This latter solution can be applied to self-driving cars.[57]

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[51] Bundesanstalt für Straßenwesen, BASt

[52] Straßenverkehrsgesetz (StVG), Art. 18.

[53] See Legal consequences of an increase in vehicle automation. Consolidated final report of the project group (hereinafter *BASt Report*), 18–19. http://bast.opus.hbz-nrw.de/volltexte/2013/723/pdf/ Legal_consequences_of_an_increase_in_vehicle_ automation.pdf (Downloaded: 4. 11. 2016)

[54] *BASt Report*, 18–19.

[55] "Negligence liability generally requires proof that (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached this duty; (3) this breach was a necessary cause of the plaintiff's harm, in the sense that the plaintiffs harm would not have occurred had the defendant acted with reasonable care; (4) the breach of duty was a 'proximate' cause of the plaintiffs harm; and (5) the plaintiff suffered a legally cognizable injury as a result of the defendant's breach of its duty of care." See GLANCY, 658.

[56] DUFFY, Sophia H.–HOPKINS, Jamie Patrick: Sit, Stay, Drive: The Future of Autonomous Car Liability. *SMU Science & Technology Law Review*, Vol. 16, Issue 101 (2013), 453.

[57] We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications (Art. 2317. Acts of others and of

The creating of strict liability rules on the damages caused by self-driving cars is urged by several representatives of the North-American legal literature.[58] The standing point of the JURI is similar: such (strict) liability rules shall be work out for 'smart robots', under which only the existence of the causal link between the robot's harmful act and the damage suffered by the injured party should be proved. [59]

As a summing-up, we ascertain that there is a well-perceptible tendency in the liability regulation: the number of those countries, which intend to create such a rule, upon which the liability of the self-driving cars' owner or keeper can be based even the lack of culpability, is increasing. After comparing the different national rules on liability, the difference between the Hungarian model and the solution applied by other – mostly Western-European – countries is obvious. While the Hungarian legislation applies the strict liability construction for the compensation of damages caused by any kind of highly hazardous activity, in the legislation of the majority of the European countries there are special rules on highly hazardous activities.

It shall be noticed that the operation of driverless cars is a "touchstone" of the dogmatic base of the liability for highly dangerous activities. In our opinion, the keeper's strict liability extends not only for the causing of the highly dangerous situation (i.e. starting the driverless car), but for any circumstances, which could be avoidable under the highest diligence. In these cases we presume that the keeper would be capable of the proper intervention.

Contrary to this, those cars, which do not require human intervention and operate only in automatic mode (e.g. Google cars), are originally improved to transport any person, therefore these cars are not equipped with the fittings (e.g. accelerator), which are essential in the traditional driving. The exclusion of the possibility of human intervention a paradox situation draws up: a highly dangerous machine remain without real human control, therefore the liability of this person as the keeper cannot be determined upon the fact that he did not proceed with due diligence in the course of the highly dangerous activity. In contrast to this situation, if the liability for highly dangerous activities is considered as a clearly objective liability form, i.e. we set aside from the wrongful nature of the human act, we handle the keeper's compensation duty not as liability, but as risk management question. If a highly dangerous situation can be created legally and the maintenance of this risky situation without direct and permanent human control is also a legal concept, the keeper's liability for damages originated from this situation could reflect only one approach: burden of risk has to be taken by one, who creates this situation, or who benefits from it or on whose behalf the dangerous thing operates.[60]

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things in custody). The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the *doctrine of res ipsa loquitur* in an appropriate case (Art. 2317.1. Damage caused by ruin, vice, or defect in things). LA Civ. Code (2015).

58 DUFFY–HOPKINS, 459.

59 An obligatory insurance scheme, which could be based on the obligation of the producer to take out insurance for the autonomous robots it produces, should be established. The insurance system should be supplemented by a fund in order to ensure that damages can be compensated for in cases where no insurance cover exists. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-582.443+01+DOC+PDF+V0//EN (Downloaded: 4. 11. 2016)

60 The own interest attaches consequences of the burden of risk-taking to the owner.

As to the *French* law, damages caused by a certain thing should be compensated by the custodian.[61] Custody is a kind of authority, a power to use, manage and take control over the certain thing. It shall be noticed that liability is bound no to the things, but to their custody. A thing can stay under the custody of more persons. Determining the custodian's person is problematic in the case of driverless cars. Nevertheless, giving the answer is essential, since it will affect the vindication of compensation claims, which arise between the driver and the traveler of the car. We also should not forget that this liability is evoked by the – to another person escheating – damage caused by the thing's deficiency. Thus, behind the rules on the liability for things, there is causality between the thing's deficiency and the culpable act (negligence) of the custodian. If the occurrence caused by either an unmoved thing or such and unmoved or moving thing, which was not in physical contact with the aggrieved party, this latter person should prove that the thing was in an abnormal situation or its behaviour was irregular. Nonetheless, if the thing was moving and it had effect on the aggrieved party's injuries, this latter person should prove only the existence of the mentioned physical circumstances. Thus, in the case of driverless cars, the presumption of liability can be applied for the damages occurred during the operation of such cars.[62]

The above mentioned liability, i.e. the strict liability for damages caused by a defective thing, can be deemed as a type of the so-called vicarious liability (liability for another person or thing). Along with this perception, some scholar proposed to apply the liability rules on damages caused by animals for driverless cars and intelligent robots.[63]

In the course of the reviewing of the European tendencies, we noticed that the legal harmonisation of the European tort law is in process, but there are different versions on the realisation. In 2005, the *European Group on Tort Law* elaborated a collection of *Principles of European Tort Law* (hereinafter *PETL*). Article 5:101 of the PETL establishes *strict liability for abnormally dangerous activities*, but under point b) of the second sub-paragraph, this provision cannot be applicable, if the abnormally dangerous activity is the matter of common usage. Therefore, the usage of motor vehicles (as an example of common usage) falls out the scope of the referred article. Nevertheless, under the Article 5:102 of the PETL national laws can provide for further categories for strict liabilities for dangerous activities even if the activity is not abnormally dangerous. In our opinion, since autonomous cars are created for wide-spread use, it should be deemed in the future as common usage, i.e. AVs only in the testing phase can be qualified as abnormally dangerous things. In addition, these provisions of the PETL show us this strict liability for abnormally dangerous activities as a non-fault liability *per se*, where the driver's or user's conduct is irrelevant. This liability is not based on fault, so in order to carry on such activity the user/owner of AV does not need to show either active or passive behaviour.[64]

Among the provisions establishing accountability without intention or negligence, the *Draft of Common Frame of References* (hereinafter *DCFR*)[65] creates a strict liability for

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[61] *Code Civil*, Section 1384, aliena 1: On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.

[62] KOCH, Bernhard A.–KOZIOL, Helmut (eds.): *Unification of Tort Law: Strict Liability*. Kluwer Law International, 2002, 129.

[63] DUFFY–HOPKINS, 468.

[64] KOCH, Bernhard A.: *Strict Liability In: European Group on Tort Law, Principles of European Tort Law Text and Commentary*. Springer, Wien–New York, 2005, 105–110.

[65] Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)

damage caused by motor vehicles.[66] This regulation is justified by the huge amount of traffic accidents; nevertheless, DCFR does not contain detailed rules, but determines two basic elements: liability is strict and the keeper is the person who is held liable. Beyond that, the DCFR emphasises that the liability of the driver is unnecessary, because the strict liability of the keeper, the compulsory insurance system and the direct action for the injured person against the insurer company is sufficient for the defence of victims' interests.

Liability for damages arisen in connection with the operation of driverless cars brings also problems in those national laws, which know the types of strict liability. The elimination of these problems needs for the creation of single liability rules. However, in the course of creating this rule, legislator should take into account a basic consideration: would it be reasonable to settle the duty to compensate directly to the manufacturer or not?[67]

6. Product liability[68]

Compensation for damages caused by motor vehicles is also ensured in a proper way by the Directive 85/374/EEC (hereinafter Product Liability Directive),[69] which is supplemented by the national legislation.[70] Although the provisions contained in the Product Liability Directive will not at all or will only change slightly, some questions are to be answered have arisen. Since several persons are involved to the improvement of a self-driving car, it is problematic that each participant of this working process will be individually liable for the damage occurred or joint liability can be applied, where the measure of liability acts on the measure of the participants' contribution puts up in the developing phase. A further question is that whether a fault based liability approach can be applied at all in those cases,

Outline Edition: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, 3382. (10. 11. 2016)

66 VI–3:205: Accountability for damage caused by motor vehicles.

67 In October 2015, Volvo declared that it would pay for any injuries or property damage caused by its fully autonomous IntelliSafe Autopilot system, which is scheduled to debut in the company's cars by 2020. https://www.scientificamerican.com/article/who-s-responsible-when-a-self-driving-car-crashes/ (Downloaded: 4. 11. 2016)

68 In the study we review only the product liability models of the European Union and some stressful national legislation. We do not pay special attention on product liability rules existing in the USA, since the roots of the regulation method are different, these are far from the classical European (continental) approaches. From the relating US literature see: BOEGLIN, Jack: The Costs of Self-driving Cars: Reconciling Freedom and Privacy with Tort Liability in Autonomous Vehicle Regulation. *The Yale Journal of Law & Technology*, Vol. 17, Issue 171 (2015), 171–203; FUNKHOUSER, Kevin: Paving the Road Ahead: Autonomous Vehicles, Product Liability and the Need for a New Approach. *Utah Law Review*, Vol. 2013, No. 1, 437–462; GURNEY, Jeffrey K.: Sue My Car not Me: Product Liability and Accidents Involving Autonomous Vehicles. *Journal of Law, Technology & Policy*, Vol. 2013, Issue 2, 247–277; VILLASENOR, John: *Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation*. Center for Technology Innovation at Brookings, 2014; VLADECK, Dacid C.: Machnes Without Principals: Liability Rules and Artficial Intelligence. *Washington Law Review*, Vol. 89 (2014), 117–150; WITTENBERG, Steven: Automated Vehicles: Strict Products Liability, Negligence Liability and Proliferation. *Illinois Business Law Journal*, Vol. 20 (Fall 2015), 10–29.

69 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. *OJ L*, 210, 7. 8. 1985. 29–33.

70 Until the adoption of the new Hungarian Civil Code (Act No. V of 2013) provisions on product liability were regulated in a single act; presently Art. 6:550–6:559 of the Civil Code contains them.

when the damage occurred by an act or event which was determined by a software or algorithm. Can a person be liable for damages caused by self-driving car only upon the fact that he or she uses a vehicle equipped with autonomous system and it means risk on its own? Is it possible to take into account external factors (e.g. vis maior) in the course of determining the liability? Can the product liability be coupled with any other (possibly mandatory) insurance construction? As it can be seen, several questions arise according to the product liability on self-driving cars. Since here we only review the existing regulation, the answering of the mentioned questions takes place in the part of this study, which concentrates on liability questions.

In the past, decisions have already arisen in the judicial practice, in which the manufacturer's liability was determined because of the defective accessories of the cars. Along these decisions, damages "caused" by driverless cars can also be compensated with the application of product liability rules. However, further questions shall be examined in the followings.

Foremost it shall be stated that because of the maximum-harmonisation nature of the EU's (previously already referred) product liability directive, the injured party is not entitled to base his damage claim on any kind of strict liability (mostly on liability for highly dangerous activities) instead of product liability rules, even if the subjects of the underlain legal relationship (i.e. injured party and tortfeasor) are the same.

The Court of the European Union (hereinafter the Court) stated as principle in its practice that product liability provisions do not exclude to claim for compensation for damages upon other (delictual or contractual) liability. Moreover, in our opinion, Article 6:145 of the HCC, which excludes the parallel (delictual and contractual) compensation claims cannot be applied in the case of product liability, since these latter rules appear in the Hungarian civil law as a result of the European legal harmonisation.

As to the Article 6:550 of the HCC the manufacturer of the defective product is liable for damages caused by these products. Both the producer of a final or intermediate product or raw material shall be deemed as manufacturer. It means that the fault of an automatic technology, which has been built in the driverless car, or the failure of the software, sensor or communication equipment can cause the joint liability of the different units' manufacturers and the producer of the final product.

A product is defective or shall be considered defective if it fails to provide a level of safety generally expected, with special regard to the purpose of the product and the way in which it can be reasonably expected to be used, the information provided in connection with the product, the date of the sale of the product, and the current state of scientific and technological achievements.[71] However, determining the objective safety requirements, which shall be taken into account in the case of driverless cars, is problematic. In the case of less automated (partially autonomous) vehicles, safety systems have only indirect impact on the driving, while in the case of highly autonomous vehicles these factors have special significance.[72] Nevertheless, it should be noticed that a product cannot be released, until it endangers seeded interest, e.g. the potential violation of certain legal objects to be protected (e.g. life, of life, bodily integrity or health) has arisen.

The safe operation of the system essentially requires from the driver to know the capacity which can be reached by the certain system and know its borders; this ascertainment is especially right in the case of partially automated systems. Concrete

[71] *HCC*, Art. 6:552.
[72] *BASt Report*, 21.

information given by the manufacturer, users' manual-books and public statements on the whole equally have impact on the user's (consumer's) expectations.

The product's fault can be based not only on the non-safe configuration of the product, but the deficiencies of the requirements on the product's operation, if the damage has occurred because of the wrong usage (misuse). According to the previously referred report of the BASt, we can differentiate between two types of usage: in the first case the misuse is reasonably foreseeable, while in the second case the usage means an abuse of a product. However, the user's behaviour is formed not only by the above mentioned manual-books, but the usual usage of the similar products. Moreover, the existence of a not fully incidental, usual misuse is also recognised in the judicial practice. The instructions of the manufacturer should especially draw the driver's attention to these kinds of usages.[73]

In the case of highly automated systems, the request for urgent human intervention in case of emergency fronts the driver with serious challenge. With regard to this, in the future the managing of such situations without human intervention will be an essential requirement of these systems. Nevertheless, if a highly automated vehicle still causes damage, a presumption shall be applied, upon which it shall be considered as the damage caused by the product's fault. If the damage is a consequence of the act of the traffic's any other participant, the above mentioned presumption cannot be applied.

Determining the damage occurred in other thing by the product's fault could be particularly important, if a traditional motor car manufacturer company purchases the technological equipment to be built-in to the driverless cars and the software which are necessary to the operation of them from external suppliers. As to an opinion appeared in the Hungarian legal literature, damage which occurred in the car because of the fault of an intermediate (semi-finished) product, shall be deemed as a damage occurred in other thing, therefore – under the product liability rules – it shall be compensated.[74] In our opinion the referred rule principally aimed at the signing the limits between the compensation for damages under product liability and the compensation claims upon non-performance and other claims. According to this, we accept the solution, where compensation of the damage occurred in the driverless car (as damage occurred in other thing) can be claimed against the producer of the intermediate (semi-finished) product. Nevertheless, it also shall be taken into account that product liability rules exclude the reimbursement of damages other than occurred in things, i.e. damages arose in the injured party's property, profit lost and justified costs cannot be covered by compensation. Thus, the driverless car as defective product can cause – personal and material – damages not only for the operator, but other persons involved in the traffic. These latter persons also have the right under the product liability rules to claim the manufacture, but an action against the keeper of the "tortfeasor car" is more obvious. In this case, damages originated from the car's malpractice and escheats to another person shall be compensated by the keeper/driver under the strict liability rules. At the same time, these persons try to wheel further this duty to the manufacturer. If under the product liability rules the keeper or the car's owner have no right to shuffle off this compensation duty, an unfair situation comes into existence. However, it is questionable, if the existing loophole should be fill in by the creation of single liability provisions or the supplement or modification of product liability rules can serve as an appropriate solution.

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[73] *BASt Report,* 20–22.

[74] FUGLINSZKY, Ádám: *Kártérítési jog.* HVG-ORAC, Budapest, 2015, 641.

6.1. Liability insurance

Directive 2009/103/EC (hereinafter "Motor Insurance Directive"[75]) prescribes the compulsory insurance of motor vehicles. However, the more autonomous are the motor vehicles, the more difficult is the exact determination of those facts, which caused the accident. As to the referred initiative of the JURI, the creation of an insurance construction – similar to motor car insurance – can be the appropriate solution. Nevertheless, as long as the insurance in the case of traditional motor vehicles takes focus on the potential tortfeasor, i.e. insurance covers the human behaviours and injuries, in the case of vehicles using AI, the insurance duty burdens not the owner (or holder) of the vehicle, but the manufacturer. As a supplementary solution, the JURI initiates the setting up of "compensation fund" for all those cases, in which the existing insurance does not cover the damage caused by the self-driving car.

This latter solution, together with the – for expressly motor cars elaborated – notion of the keeper can be applied more pliantly in the case of damages caused by self-driving cars. It is also important that the majority of European legal systems have coupled their strict liability rules with the imposition of some compulsory insurance schemes as well as compensation funds.[76]

As it was mentioned before, (liability) insurance questions related to the driverless cars have big significance. We agree with Gerhard Wagner that "the liability of the policy-holder seems to be nothing more than an intermediate albeit necessary step, in order to trigger the obligation of the insurance company...".[77] In his – in the footnote referred – work Wagner distinguishes two basic approaches to the interplay between the two fields of law: the *deterrence model* and the *compensation model*.[78] As to the latter, the tort law and the insurance system altogether provide the victims of accidents an adequate compensation.

Under the deterrence model, which is the classical approach in the German-speaking countries of Europe, the tort system should be operated independently from the insurance aspect. Wagner mentioned that in some special areas, however, the insurance cover has an impact on the determination of liability such as the liability in equity, damages for pain and suffering or implied agreements to exclude or limit delictual liability.

The influence of the liability insurance upon the tort law can be perceived in the context of the so-called "constant dangerous activities" in which cases under the scope of highly dangerous activity are drawn much wider, when even a looser causality chain is sufficient to establish the liability. It means also that the operator can be exempted himself with more difficulty, the borders of realm of highly dangerous activity are wide. In this field the casual link between the dangerousness of the activity, its hazardous nature and the occurred damages is significant to examine. The legal practice has already shaped an axiom: "the scope of the dangerous activity should not be determined by the momentary situation, but by means of the whole course of the operation."[79] Applying this legal practice, in the case of emergency automatic stops of the AVs, the operator's liability does not end when he

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[75] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability. *OJ L*, 263, 7. 10. 2009. 11–31.

[76] KOZIOL, 82.

[77] WAGNER, Gerhard: Tort Law and Liability Insurance. *The Geneva Papers on Risk and Insurance*, Issue 31 (2006), 277–292, 281.

[78] WAGNER, 278.

[79] Decision of Curia of Hungary, No. BH 1977, 491.

falls unconscious or has lost the control over the AV. However, it is still questionable, whether an insurance company excludes the risk of AVs at all, or maximizes the amount of insurance benefit or what conditions would make them to take this risk.

From the beginning of the 1950s, several national legislations (e.g. in Scandinavian countries) have worded their intention to build up a non-fault compensatory system, which would mix the strict/non-fault liability with state-subsidised insurance scheme in favour of the defence of the victims. In our opinion such an insurance system can be a good model for indemnification of the damages caused by autonomous vehicle, taking into consideration that the insurance company's or the fund's duty of payment does not depend on the fault of keeper or operator's behaviour.

7. Closing remarks

In our study we reviewed shortly the most important questions on the self-driving cars. Albeit the working-up of the topic is not thorough, it can be seen that the demand for creating legal provisions on driverless cars has been clearly and squarely worded in all over the world, included Europe. However, up to present we learned that technology develops faster, than the law could react either by the modification of the existing legal rules or by the working out of new provisions.

The appearance of self-driving cars in European public road traffic brings up several important questions, since the relatively slight distances road traffic necessarily goes hand in hand with the crossing of state borders. This factor generates the need for making provisions on technical and legal questions of self-driving cars on supranational level instead of remaining the adoption of such rules in the national (or Member State) legislator's hand.

On May 19th 2010, the European Commission launched the Digital Agenda for Europe (hereinafter Agenda), a flagship initiative within Europe 2020, which assumes that digital technologies can help societies and policy makers to address several challenges. Highly automated cars are expected to increase traffic safety by reducing accidents due to human errors, such as the driver's distraction or reduced vigilance.

Along the Commission's Agenda and our examinations, we can word the following requirements relating to the regulation of self-driving cars:

1. The future regulation shall determine all requirements, under which a certain automated vehicle can participate in the public road traffic. However, the future regulation should be fitted to the level of automation, i.e. it shall be taken into account, if a car is partially automated (and therefore has a driver or requires for human intervention in certain cases, e.g. in case of emergency) or the car reaches the level of highly or fully automation.
2. Some years before the European legislator decided the adopt standardised provisions on driving licences. In our opinion a similar step is necessary in the case of self-driving cars, where the test mode and the common usage should be differed. Moreover, the distinction mentioned in point 1) is also important, since it also shall be decided, if in the course of using a partially automated and highly autonomous vehicle – beyond the possession of a traditional driving license – extra-requirements should be prescribed for drivers and travellers in order to make the preventive intervention of these persons possible in case of emergency.
3. In our eye, accidents caused by self-driving cars and damages originated from these events shall also be regulated by legal act. Liability insurance is another essential

element of the future regulation. Nevertheless, since the legal approaches are different, certain aspects of the liability insurance should be modified.

4. In the case of a future harmonised regulation, national legislators should decide and agree on the applicable type of liability. Such a decision definitely requires for the simultaneous examination of provisions on liability for highly dangerous activities and rules on product liability. In our opinion the existing Hungarian rules on the liability for highly dangerous activities and the burden of proof based on the general exculpation model mean an appropriate solution.
5. According to the liability questions, European legislator should also decide, if it maintains the existing product liability provisions and applies them – of course in a proper way – for AVs or adopts supplementary rules. A further important question is, if the manufacturer can be obliged for compensating the consequential damages. Nevertheless, it is obvious that non-cumul rule cannot be applied in this field, contractual relation cannot exclude the manufacturer's liability.

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MATRIMONY AS A BASIC POINT FOR SUBSTAINING THE STATE BY THE DOCTRINE OF REASON

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1. Law of Reason School as a new version of Natural Law

From the end of the 18th century, the most sophisticated version of Natural Law considered as the Kant type of Doctrine of Reason (School of Reason) was increasingly getting accepted in Hungarian Legal Philosophical Thinking. The expansion of initially "hated" Kantian thoughts[1] started with a change of approach ongoing in Austria, when the Karl Anton Martini's concept favored in royal circles was officially replaced by views of Franz Zeiller and Franz Egger accepting Kantian doctrine at the University of Vienna.[2] This new critical theory of reason was firstly adopted within the Natural Law by Mihály Szibenliszt, so that he could give a way to such philosophers as inter alia Antal Virozsil, Imre Csatskó, István Bánó.[3]

At the end of the 19th century the theoretical summary of Law of Reason can be found in several works of Tivadar Pauler, who himself shared its principles but dealt with Law of Reason mainly in a historical way.[4] The same approach may also be recognized in views of Ferenc Deák and József Eötvös on State.[5] The Doctrine of Reason based on Kantian philosophy of law and relying on not infallible, but correctable pure reason tends to explore the rights and obligations of both the individual and its community. The former ones are deduced from the dignity of a person, the latter ones are defined within the framework of a society *(societas)* formed by persons *sui iuris* to achieve a common goal. The private-law institutions and relations based on Roman law, but reinterpreted by Natural Law provide a framework for the public-law relations, whose precise development was due to the appearance of the modern State's concept devised by Natural Law.[6]

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1 SZABADFALVI, József: *A magyar jogbölcseleti gondolkodás kezdetei, Werbőczy Istvántól Somló Bódogig* [The Beginnings of Hungarian Legal Philosophical Thinking, from István Werbőczy to Bódog Somló]. Gondolat Kiadó, Budapest, 2011, 33.

2 SZABÓ, Imre: *A burzsoá állam- és jogbölcselet Magyarországon* [The Bourgeois State and Legal Philosophy in Hungary]. Akadémia Kiadó, Budapest, 1980, 43.

3 PAULER, Tivadar: *Adalékok a hazai jogtudomány történetéhez* [Contributions to the History of Hungarian Jurisprudence]. Magyar Tudományos Akadémia, Budapest, 1878, 113.

4 SZABADFALVI, József: Pauler Tivadar, az észjogtudomány utolsó nagy alakja [Tivadar Pauler, The Last Great Figure of Law of Reason School]. *Zempléni Múzsa*. epa.oszk.hu/02900/02940/00054/pdf/EPA02940_zmimuzsa_2014_2_012-018.pdf (Downloaded: 05. 10. 2016)

5 PETRASOVSZKY, Anna: Eötvös József a Szibenliszt tanítvány [József Eötvös as a disciple of Szibenliszt]. In: VARGA Norbert (szerk.): *VI. Szegedi Jogtörténeti Napok: báró Eötvös József születésének 200 évfordulója alkalmából*. Szeged, 2014, 151.

6 POKOL, Béla: *Középkori és újkori jogtudomány*. *Az európai jogi gondolkodás fejlődése* [Medieval and Modern Jurisprudence, The Development of European Legal Thought]. Institutiones Juris Dialóg Campus Szakkönyvek. Dialóg Campus Kiadó, Budapest–Pécs, 2008, 139.

2. New interpretation of *societal domestic*

From the social theoretical point of view amongst the societies the society of man's house *(societal domestic),* in the proper sense the family *(familiar)* and the State *(civitas)* were highlighted by the Doctrine of Reason as an Academic Discipline of its time, like those emerged as a result of reasonableness given by nature, and they can be found in every human community as the universal formations.[7] Apart from the fact that the establishment of State was based on the individuals by Doctrine of Reason – on the contrary, formerly the role of heads of families was emphasized when contracting the State Treaty[8] – in respect of the State a meaningful importance was attributed to the family communities. The family was regarded as an essential point in the field of establishment and sustenance of the State. According to its general view, the Natural Law contains rules explorable by Pure Reason also regarding the terrain of family, which could be transposed into Positive Law created by the State. Its consequence is that the secular legislation regarding family and in particular the rules on marriage – owing to the universal characteristic feature of Natural Law – can be put on the basis of Natural Law. Besides it from the point of view of the State the legislation based on canonical or other religious beliefs could be no more but complementary.

The abstraction of Law of Reason is also predominated when interpreting the family as *society*, thus its establishment – as would normally be the case of all societies – was founded on individuals. The Kantian formal and material defining approach was applied by the conception of Law of Reason.[9] From a formal viewpoint relationship between spouses was basically understood by a family community *(societas coniugalis)*, from which later the relationship between parents and their children *(societas parentalis)* can be descended. In the material sense the unity of these persons is understood by the family community, to which the relation between masters and servants *(societas herilis)* do not belong according to a newer concept in particular in Mihály Szinbenliszt and István Bánó's interpretations. This last relationship was not considered to be a real *societas* by certain Natural Law Philosophers, since it lacked the common goal as one of the basic and coherent elements of *societas.*[10]

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[7] *Institutiones juris naturalis conscriptae per Michaelem Szibenliszt* [Institutes of Natural Law Summed up by Michael Szibenliszt]. Tomus II. Jus naturae sociale complectens. Eger, 1821, 15. §, 18. VIROZSIL, Antal: *Epitome juris naturae seu universae doctrinae juris philosophicae* [Epitome of Natural Law i. e. Universal Doctrine of Jurisprudence]. Pest, Typis Josephi Beimel, 1839. Pars I. Liber I, Sectio II, 74. §, 148. BÁNÓ, István: *Elementa Jurisprudentiae naturalis secundum vestigia celeberrimorum Franc. nob. de Zeiller, ac de Egger aliorumque de jurisprudentia meritissimorum virorum conscripta a Stephano Bano* [Elements of Natural Law Jurisprudence based on F. Zeiller and F. Egger… summed up by Stephanus Banó]. Claudiopoli Typis Lycei Regii, 1836, 213. §, 206.

[8] cf. MARTINI, Carl Anton: *Positiones de iure civitatis in usum auditorii Vindobonensis* [Propositions on State Law for use of University Lecture of Vienna]. Vindobonae, Typis Ioann. Thom. nobilis de Trattern, 1779, 2–5. and GIERKE, Otto Friderich: *Natural law and the theory of society 1500 to 1800.* University Press, Cambridge, England, 1950, 292.

[9] cf. Kant's distinction between formal and material principles in WOOD, Allen W.: *Kant's Ethical Thought. Modern European Philosophy.* Yale University, Cambridge University Press, 1999, 111.

[10] „[…] haec relatio societas sensu stricto dici nequit." SZIBENLISZT, 36. §, 42. BÁNÓ, 213. §, 206. According to Szibenliszt the relationship between masters and servants *(societas herilis)* cannot be considered to be a real society, because such relationship lacks a common goal. In his opinion such relationship is governed by a work agreement *(locatio conductio operarum),* and thereby the author excludes the issues of servitude and slavery from the realm of Natural Law. Szibenliszt's

3. Conjugal Partnership (societas coniugalis, matrimonium)

The Law of Reason approach views the community of spouses from the perspective of equality. This improved version of Natural Law does not already deals with matrimony in a context that would lead to the conclusion of assessing the institution of marriage exclusively on a theological basis. In both cases of societies referring to State and marriage it is emphasised that they are based on the treaty of equal persons possessing free will and choice.

From the doctrine of Natural Law, according to which the State is considered to be *maxima societas* – by the explanation of which the most underlined principle is that all societies established in State ought to be recognised by the State – results, that State claims the recognition of marriage without contesting certain rights of clergy.[11] The fact that the marriage is considered to be a shared life of a man and a woman is also deduced from the legal attribute of State, according to which it is regarded as *perennial* or *immortal* in the legal sense (the State is not terminated by extinction of each generation).[12] Therefore, the marital cohabitation can be defined as a contract *(pactum matrimoniale),* according to which two persons of different sexes declare their intention to undertake mutual rights and obligation for achieving a common and a durable goal.[13]

The further requirements deriving from the character of matrimony as *society* are the mutual consent *(verus consensus)* and that the fulfillment arising from rights and obligations shall tend to possible services *(possibilitas praestationis).*[14] Rights and obligations of spouses can be revealed from the purpose and function of marriage, however, taking the framework of a marital contract into consideration. Therefore the spouses are mutually entitled to freedom of action, according to which either party can do anything in accordance with achieving the purpose of marriage. Consequently, all the actions should be ignored, which are incompatible with the intended function of the wedding. As regards the enforcing rights mutual obligations arise between spouses, against which any marital partner act, then his or her action can be interpreted in a broader sense as a treachery or faithlessness *(perfidia),* ad absurdum as adultery *(adulterium).*[15]

There exist certain rights and obligations, even their violation listed by Natural Law Doctrine of Reason, as follows:

- right and obligation of cohabitation *(ius et officium conhabitandi),* the action against it is interpreted as desertion *(desertio)* and from which a legitimate demand arises to fulfil this obligation, that is to return
- right and obligation, under which we abandon ourselves to our spouse *(monogamia),* and violation of which manifests itself as polygamy *(polygamia)*
- right and obligation of faithfulness towards the spouse *(ius et officium ad fidem coniugalem),* that is the ignoration of any kinds of relationship with another

statements suggest that he considers subordination as a characteristic of Public Law and not a Privat Law, an in the realm of the latter equality of rights must prevail.

[11] SZIBENLISZT, 39. §, 46; VIROZSIL, 115. §, 257.

[12] SZIBENLISZT, 16. §, 18; VIROZSIL, 76. §, 149; BÁNÓ, 214. §, 207–209. Francisci Nobilis de Zeiller: *Jus naturae privatum* [Natural Private Law]. Editio Germanica tertia Latine reddita a Francisco Nobili de Egger, Viennae, apud Car, Ferdinandum Beck, MDCCCXIX, 189.

[13] ZEILLER–EGGER, 186; SZIBENLISZT, 20. §, 25; BÁNÓ, 217. §, 211; VIROZSIL, 78. §, 153.

[14] ZEILLER–EGGER, 186; SZIBENLISZT, 20. §, 25; BÁNÓ, 217. §, 211; VIROZSIL, 78. §, 153.

[15] SZIBENLISZT, 20. §, 25; BÁNÓ, 217. §. 211; VIROZSIL, 78. §, 153.

partner offending the existence of their marriage, whoes violation is in a strict sense regarded as adultery *(adulterium).*[16]

The institution of marriage is supposed to be a confidential, intimate relationship, under which by the unification of two natural persons the so-called "moral person" comes into existence. Therefore it refers to both partners, they act not on their own, but as an entity, and they may mutually exercise each other's competence.[17]

4. The Power of Making Decision in Matrimony

The following question emerges whether the marriage is based on equal or unequal society, as well as according to which who is entitled to directing the family? The answer to it, in the light of the facts discussed above, cannot, therefore be as if the marital agreement fails to include a rule about the direction of family, then as a general rule the direction is considered to be the most equitable if it aims at the purpose and function of the family into full account.[18]

Some Natural Law theorists state the view that such family direction proves to be the best for the purpose of the family, in which either party may exercise the right which can be fulfilled better than the other one. Consequently, as long as there is no reason to apply a different rule, either one or the other party is entitled to the decision-making power over family matters.[19] Regarding the forming of decision-making power the School of Reason in a general sense refers to characteristics of *societies*, when it is declared that any association in case of doubt is to be regarded as egalitarian. The family matters should be arranged on the model of an egalitarian society until the achievement of the family goal is threatened.[20] The husband, however, should not take the decision-making power against the wife' will,[21] but if the wife does not contradict the infringer, then the power as a result of her long-term tolerance which – in this case – shall be taken as an implicit acceptance, is legally considered to be conferred on him. However, the wife exercises the right of contradiction, then it might as well result in the termination of marriage, thus as the lack of mutual consent constitutes a reason for the termination of any society.[22]

5. Law of Reason Concept on the Terminating Marriage

In this context, the question of dissolution of marriage and divorce arises, in respect of which the Law of Reason recognizes the right to divorce in case of distress, despite the fact that it emphasizes the lifetime nature of marriage. In accordance with natural reason such a decision may be taken if sustaining the marital community of life would cause much more damage than its termination.[23] The Law of Reason provides the answer – avoiding the notion of "nullity" – enumerates the reasons grouped together, which lead to the dissolution of marriage in the most typical way. According to it, the mutual end of consent *(mutuus dissensus)* needed for sustaining

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[16] ZEILLER–EGGER, 161. §, 192–193; SZIBENLISZT, 24. §, 32; BÁNÓ, 217. §, 212–213; VIROZSIL, 78. §, 153–154.
[17] SZIBENLISZT, 21. §, 27.
[18] SZIBENLISZT, 23. §, 30; BÁNÓ, 219. §, 214.
[19] SZIBENLISZT, 23. §, 30; BÁNÓ, 219. §, 214–215.
[20] SZIBENLISZT, 23. §, 30; BÁNÓ, 219. §, 214–215; VIROZSIL, 76. §, 151.
[21] SZIBENLISZT, 30, footnote; BÁNÓ, 219. §, 215.
[22] ZEILLER–EGGER, footnote, 193.
[23] ZEILLER–EGGER, 162. §, 194; SZIBENLISZT, 24. §, 31–32.

the marital community of life may even lead to divorce,[24] provided the rights of third parties are not violated. Therefore, in the event of divorce, the efforts should be made to protect the rights of children as mush as possible. The consequence of agreement of both parties to get divorced results in fact, that no right or obligation derived from matrimony exists between parties any longer. The consensus on the dissolution of marriage, however, may not affect the children. Accordingly, certain natural law theorists in possession of a great deal of frequent experience claim if the compliance with obligation regarding children becomes impossible on account of divorce, the expulsion of wife should not be permitted.[25]

The other cause leading to divorce, the Law of Reason noted, the incurable impotence *(impotentia)* emerging prior to contracting marriage, which precludes the achieving the aim of marrige. Conversely, if it occurs after contracting marriage, it cannot cause the termination of marriage.[26]

The faithlessness *(perfidia)* also may result in the termination of marriage, which can be committed in several ways. The most obvious way proves to be the adultery or unfaithfulness towards the other spouse *(adulterium),* but the same problem emerges, if either party denies the marital obligation *(denegatio officii coniugalis)* manifested by the absolute and permanent refusal of the obligation *(ex absoluta aversatio promanente),* even with the mailicious evasion from it. Undoubtedly, the anti-life act *(insidiis vitae structis)* is considered to be the most serious case of marital infidelity.[27] The further version of infidelity is regarded as the sexual deviances, as follows: the onanism *(onania),* the pederasty *(paederastia)* and sodomy *(Sodomia).*[28] According to the explanation of Law of Reason the use of genital organs for their sake, besides the abuse of nature, is opposed to the right of the other spouse, therefore it proves to be a type of breaches of contract. Eventually, the termination of marriage is also caused by death, because the marital rights and obligations relate to personality, in every respect.[29]

6. Apprehension of engagement by the Law of Reason

The apprehension of engagement *(sponsalia)* preceding marriage also refers to the issue of mutual consent, which is regarded as the basis of wedding. According to this interpretation the engagement, taking the nature of marriage into account is considered to be an undesired practice by the Law of Reason.[30] As explained by the Law of Reason the legal criteria applied for contracts prevail concerning engagement, as well. In case, the parties get engaged the consequence results in the fact that both parties must give up any act leading to the termination of marriage or remending the fulfillment of it. This fact may, ultimately, restrict the free will which appears to be the most significant element of contracting a future marriage.[31]

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[24] ZEILLER–EGGER, 159. §, 191–192; SZIBENLISZT, 23. §, 30; BÁNÓ, 221. §, 218.

[25] SZIBENLISZT, 24. §, 32; BÁNÓ, 221. §, 218.

[26] SZIBENLISZT, 24. §, 32; BÁNÓ, 221. §, 218.

[27] ZEILLER–EGGER, 159. §, 191–192; SZIBENLISZT, 23. §, 30; BÁNÓ, 221. §, 218; VIROZSIL, 79. §, 154–155.

[28] „*Procul dubio etiam per Onaniam, Paederastiam, Sodomiam, ab uno conjuge commissam, matrimonium solvitur. Quia usu membrorum genitalium contra finem naturae est abusus, juri alterius conjugis contrarius, igitur violatio pacti conjugalis.*" SZIBENLISZT, 32, footnote; cf. BÁNÓ, 221. §, 218; ZEILLER–EGGER, 159. §, 191–192; VIROZSIL, 79. §, 154–155.

[29] „…cum conjugum jura sint personalissima" SZIBENLISZT, 24. §, 32; VIROZSIL, 79. §, 154–155.

[30] SZIBENLISZT, 32; ZEILLER–EGGER, 195; BÁNÓ, 222. §, 219.

[31] „sponsalia […] voluntatis libertatem, quae in matrimonio ineundo maximi momenti est, quoddammodo limitare videtur" SZIBENLISZT, 24. §, 32. and ZEILLER–EGGER, 195; BÁNÓ, 222. §, 219; VIROZSIL, 77. §, 153.

7. Conclusion

In the concept of Natural Law the legitimacy of matrimony interpreted as a civil-law contract by pure reason demands the recognition of the State. It is considered not to be an option possible for the future spouses by Doctrine of Law of Reason. From a legal aspect besides the consent between the parties, the institution of marriage is validated by the act recognized by the State. Overall, the marriage is not apprehended as a sanctity by the Law of Reason contrary to Canon Law, but as a contract recognized by the State, belonging typically to the State competence. This is also shown by the fact, that the Doctrine of the Law of Reason in the question relating to the termination of marriage focuses on its contractual nature, but not the dissolution based on fault, so the disintegration of consensus appears to be the crucial aspect of this issue.

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SOME REMARKS ON THE SCOTTISH INDEPENDENCE

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1. Introduction

Some authors[1] claim that we are witnessing the twilight of nation states, which are eroded by two major forces: *firstly* the ever growing number and power of supranational organizations and *secondly* the spread of minority-regionalism. The latter could easily render nation states fragmented and insignificant, that's why the author finds it important to examine this phenomenon through the scope of the Scottish and Catalonian aspirations for independence. Both groups are so called "captive nations" or "substate nations": they are culturally distinct groups living on their traditional territory, who think of themselves as distinct people or a distinct nation, and show a deep attachment to their cultural distinctiveness and to their homeland, which they have struggled to maintain despite being incorporated (often involuntarily) into a larger state.[2]

According to the widespread view, the ultimate aim of these substate nations can only be independence and nothing less. Every compromise or favour granted for them – including autonomy – is the first step to secession. Contrary to these opinions the author of the current article argues that the alteration of the borders does not always serve the best interest of the minorities;[3] as the 2014 referendum on the Scottish independence and the similar strives of Catalans prove it. The Scots voted against independence[4] and opponents of independence became the majority in Catalonia December 2014.[5] The referendum on the Scottish independence gained significant attention in the international community: while some feared of losing the great-power status of the UK or the very existence of GB, some – like the *Seklers* – waited for the possible *spill-over* effects.

Although, David Cameron said[6] that the issue of Scottish independence had been settled "for a generation", after Brexit-vote,[7] proponents of the Scottish independence claim that

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1 See: TRÓCSÁNYI, László: *Alkotmányos identitás és európai integráció*. Budapest, HVG-ORAC, 2014, 280.

2 KYMLICKA, Will: Beyond the Indigenous/Minority Dichotomy. In: ALLEN, Stephen–XANTHAKI, Alexandra (eds.): *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Oxford, Hart Publishing, 2011, 194–197.

3 Prior to the referendum on Scotland's independence the polling of the voters showed that 70% of them chose the further devolution of rights upon the Scottish Parliament over independence. – KING, Charles: The Scottish Play: Edinburgh's Quest for Independence and the Future of Separatism, 91. *Foreign Affairs*, Issue 5 (2012), 113–124.

4 BBC: Scotland Votes No. http://www.bbc.com/news/events/scotland-decides/results (24 October 2016)

5 JONES, Jessica: Most Catalans say no to independence: new poll. *The Local*, 19 December 2014. https://www.thelocal.es/20141219/most-catalans-say-no-to-independence-poll-spain-politics (24 October 2016)

6 OSBORN, Andrew–HOLTON, Kate: Cameron says Scottish independence issue settled 'for a generation'. *Reuters*, 19 September 2014. http://uk.reuters.com/article/uk-independence-scotland-cameron-idUKKBN0HE0IN20140919 (24 October 2016)

the issue ought to be put on the agenda again.[8] They argue that most voters, who voted against independence on the 2014 Scottish referendum, did so in order to retain the EU membership.[9] However, polling on the public opinion shows that despite the initial anger rising after the Brexit referendum, the majority of the Scots still want their country as the part of the UK.[10] As a result – before initiating a new referendum – the *Scot National Party* has to consider every possibility, since another "no" to Scottish independence, would – mean the end of the party and – render it impossible to put the independence on agenda again.

2. The creation of the UK and the emerging role of the Scottish Parliament

The UK was created in 1707, when England and Wales merged with Scotland according to the Treaty of Union; the original states lost their sovereignty, which was inherited by the newly formed entity. While Scottish nationalists like to refer to this event as an occupation, it was much like a cool calculation of business interests, however: the English crown offered to pay the debts of the Scottish nobles, in turn for political union. The latter ones accepted the offer and – after dissolving the Scottish Parliament – took their seats in the English Parliament.[11]

The Scottish Parliament was not summoned until 1999, when *Winifred Margaret Ewing* – the oldest Member of the Parliament – greeted her fellow MPs with the following words: "The Scots Parliament, last adjourned on 25th May, 1707, is hereby reconvened."[12] The legal basis of the adjournment was created by the *1998 Scotland Act*,[13] which instead of listing, what belongs to its jurisdiction, list the exceptions. Most importantly the Scottish Parliament is constitutionally subordinate to Westminster, the latter one however tried to avoid using its powers. In case of a possible debate between the two institutions, the *Supreme Court of the UK* has the jurisdiction to settle them.[14]

3. Self-determination, territorial integrity and succession in international treaties

Based on the current stand of the international law, the right to self-determination – at least which includes the right to secession – was only granted for the former colonies. In contrary, *Anikó Szalai* argues that the independence of *Kosovo* – inducing significant political tensions[15] and rising questions regarding the interpretation of international law[16] –

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7 The exit of Great-Britain from the EU.

8 Brexit: Nicola Sturgeon says second Scottish independence vote 'highly likely'. *BBC,* 24 June 2016. http://www.bbc.com/news/uk-scotland-scotland-politics-36621030 (24 October 2016)

9 HENNESSY, Peter John: A Political Perspective on the Scottish Independence Referendum. 3. *Cambridge Journal of International and Comparative Law*, Issue 1 (2014), 159–161.

10 KHOMAMI, Nadia: 'No real shift' towards Scottish independence since Brexit vote – poll. *The Guardian,* 30 July 2016. https://www.theguardian.com/politics/2016/jul/30/no-real-shift-towards-scottish-independence-since-brexit-vote-poll (24 October 2016)

11 EWING, Fergus–ERICKSON, Jennifer: The Case for Scottish Independence. 25. *Fletcher Forum of World Affairs,* Issue 2 (2001), 90.

12 EWING–ERICKSON: i. m. 91.

13 Scotland Act of 1998 (46).

14 HALLIDAY, Iain: The Road to Referendum on Scottish Independence: The Role of Law and Politics. 5. *Aberdeen Student Law Review*, 2014, 34– 35.

15 *The Economist,* A New Battlefield, 12 July 2007. http://www.economist.com/node/9481463 (24 October 2016); WILSON, Nigel: *Serbia and Albania Leaders Clash Over Kosovo Independence*. 10

suggest different outcomes.[17] Nevertheless, the writer of the current article reminds that the international community made it clear from the very beginning that Kosovo was an exceptional and one-off case:[18] atrocities committed against the Kosovars rendered the secession as the only possible alternative. According to the rules of international law, the integrity of the states is to prevail;[19] therefore the above mentioned captive nations – or any other minorities – do not have many possibilities to create their own nation state, unless the mother state approves.[20]

Despite Scotland remained part of the UK, it is worth devoting a few lines to the question of succession of states with special regard to the membership in international organisations, like the *Council of Europe* and the *European Union*. In accordance with the rules of international law,[21] there are two possible outcomes*: in the first case* one state is the "continuator" state and the other – the seceding – state is a new entity. While the continuing state retains its rights and obligations arising from international treaties, including its membership in international organizations, the seceding state does not inherit them. *In the second case*, two new successor states are created. Neither of them is a successor of the former entity and neither of them succeeds in international treaties. *James Crawford* and *Alan Boyle*, in their opinion – constituting the Annex of the report made for HM Government – argued that the secession of Scotland would realize the first possibility: while the UK would be the continuator state,[22] succeeding in the international treaties and retaining its membership in the international organisations;[23] the newly born Scotland should request its admittance to the said bodies.

Rules of international law did not prevent the proponents of Scottish independence – like *Nicola Sturgeon*, the prime minister of Scotland – to gain support with slightly unrealistic theories. According to the first theory, the break-up of the UK would result in the creation of two continuator states, both of them succeeding the rights and obligations of the former UK. The second theory suggests that the seccessing Scotland would be the

November 2014. http://www.ibtimes.co.uk/serbia-albania-leaders-clash-over-kosovo-independence-1474106 (24 October 2016)

16 *ICJ*, Advisory Opinion in accordance with international law of the unilateral declaration of independence in respect of Kosovo (22 July 2010).

17 SZALAI, Anikó: 5. *A kisebbségvédelem az ENSZ Közgyűlésében.* Dr. Szalai Anikó honlapja. https://drszalaianiko.hu/2014/04/25/a-kisebbsegvedelem-az-ensz-kozgyuleseben/ (24 October 2016)

18 COPPIETERS, Bruno: The Recognition of Kosovo Exceptional but not Unique. In: What is 'Just' Secession? (Is Kosovo Unique?) *European Security Forum Working Paper*, No. 28. (February 2008), 3–8. http://aei.pitt.edu/11495/1/1601.pdf (24 October 2016)

19 Timothy Walters argues that the sustainability and its contribution to the stability of the World is at least questionable. – WATERS, Timothy William: Taking the Measure of Nations: Testing the Global Norm of Territorial Integrity. 33. *Wisconsin International Law Journal*, Issue 3 (2015), 563–586.

20 PERRY, Frederick V.–REHMAN, Scheherazade: Secession, The Rule of Law and the European Union. 31. *Connecticut Journal of International Law*, Issue 1 (2015), 61–92.

21 1978 Vienna Convention on Succession of States in respect of Treaties (*United Nations*, Treaty Series, Vol. 1946, 3).

22 HM Government, Scotland analysis: Devolution and the implication of Scottish independence (2013), Annex A. CRAWFORD, James–BOYLE, Alan: *Opinion: Referendum on the Independence of Scotland – International Law Aspects*, §. 50–70.

23 The UK is part of approximately 14,000 bi- a multilateral international treaties. – AIKENS, R. J. P.: The Legal Consequences of Scottish Independence. 3. *Cambridge Journal of International and Comparative Law*, Issue 1 (2014), 166.

successor of the "pre 1707 Scotland".[24] The latter one is not a new theory, however: one only has to remember the words of Winifred Margaret Ewing in 1999, when she opened the session of the Scottish Parliament.

Among the memberships in international organisations the EU membership can be considered probably as the most important one: the possibility of losing it can retain minorities intending to secede.[25] While the Scottish Government often cited Article 34 and 35 of the 1978 Vienna Convention, arguing that Scotland could retain its membership even after the secession; Crawford and Boyle dismissed this argument: they believe that Article 4 of the said Convention is to prevail, which demands the basic document of the international organisations to decide the question.[26]

As for the EU, however, not only must legal rules[27] be considered, but also political realities: several EU member states have a minority group with significant number, demanding higher degree of autonomy, e.g. the Seklers in Romania. The Catalans of Spain – at least some part of them – claim even more: independence. In Italy and Belgium, too, the idea of secession emerges from time to time. These states, being afraid of encouraging their own minorities to secede and in order to protect their territorial integrity, denied any concessions to the Scots.[28] Fearing of the possible spill over effects – namely the strengthening of minority regionalism – the then president of the *European Council*, *Herman Van Rompuy* made it clear that: "The European Union has been established by the relevant treaties among the Member States. The treaties apply to the Member States. If a part of the territory of a Member State […] becomes a new independent state, the treaties will no longer apply to that territory. [The new entity will] become a third country with respect to the Union and […] may apply to become a member of the Union according to the known accession procedures. In any case, this would be subject to ratification by all Member States and the Applicant State."[29]

4. The attitude of the governments and the scope of electors

In the words of *Ved Nanda* international law provides little help for those who want to create an own national state.[30] In other words: if the mother state does not approve the secession, those intend to secede do not have many possibilities to do so. As a result the attitude of the mother state is of paramount importance, which is illustrated by the author through the example of the Scot and the Catalan example.

When the possibility of an accidental Scottish referendum first occurred, the English government made it clear that such a referendum is out of the Scottish Parliament's jurisdiction and will enforce its prerogatives in front of the Supreme Court.[31] Contrary to

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[24] AIKENS: i. m. 164–165.

[25] PERRY–REHMAN: i. m. 63.

[26] CRAWFORD–BOYLE: § 119–133.

[27] The procedure of admission to the EU is regulated by Article 49 of the Treaty on the Functioning of the European Union (*OJ C*, 326 [2012], 2012. 10. 26. 1).

[28] AIKENS: i. m. 168–169.

[29] Remarks by President of the European Council Herman van Rompuy, on Catalonia, 12 December 2013 (EUCO 267/13).

[30] PERRY–REHMAN: i. m. 89.

[31] Ministry on Scotland: Scotland's Constitutional Future (2012) Cm8203, 9–10. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/39248/Scotlands_Constitutional_Future.pdf (24 October 2016)

this the Scottish Parliament argued[32] that the referendum is conform with the Scotland Act, since it is not about independence, but the further devolution of rights to the Scottish Parliament, including the right to decide on the independence.[33] The *House of Lords Constitutional Committee* pointed out that the SNP's manifesto clearly indicated the real purpose of the referendum: the achieving of independence. As a result should the referendum be peremptory or not, it would clearly constitute an excess of jurisdiction.[34]

2012 brought radical changes in the attitude of the English government: the parties agreed that deciding the case before the courts would not serve the interest of neither party.[35] According to this, the Westminster changed the Scotland Act in order to allow the Scottish Parliament to legally declare the referendum. From this aspect the Scottish referendum is unique for being the first occasion, when a non-colonial minority group was allowed to decide on its own fate within democratic frameworks. *Benjamin Levites* identifies three main aspects, which underpin the democratic nature of the referendum, namely the (i) consent of the mother state, the (ii) the clear and polar question and last – but not least – (iii) the requirement of simple majority.[36]

It is worth mentioning for many reasons, in the current article, however, the author will only pick one of them. As *Tamás Ádány* pointed out at the public debate of the author's PhD dissertation, while in accordance with EU[37] and *British Common Wealth* law[38] not only Scottish citizens were entitled to vote: while those who had a permanent, registered residence in Scotland were eligible to vote, those Scottish nationals, living outside the country at the time of the referendum did not have the possibility to vote. Therefore Ádány argues that considering the above mentioned reasons calling the referendum Scotland referendum or referendum in Scotland, instead of Scottish referendum is much more appropriate from a terminological point of view.

As mentioned earlier the question of Scottish independence was decided by a simple majority, regarding this, the million dollar question was, who should constitute this majority? Should the all affected principle prevail or it is enough to ask only the citizens? Some authors argue that the wider the scope is, the more democratic the result is.[39] Although one could bring strong arguments in favour of the all affected principle, determining the scope of persons eligible to vote is a serious problem, which needs thorough deliberation, at the same time offers the possibility of interesting commentaries. *Ben Saunders* brings forth the theoretical example of a student, who – at the time of the

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[32] Scottish Parliament: Your Scotland, Your Referendum (2012). http://www.gov.scot/Publications/2012/01/1006/0 (24 October 2016)

[33] Neil MAcCormick argued in of its writing back in 2000 that the Scottish Parliament has an unlimited power to negotiate any issues with the Westminster, including the initiating of a non-decisive referendum. – MACCORMICK, Neil: Is There a Constitutional Path to Scottish Independence? 53. *Parliamentary Affairs*, 2000, 72.

[34] HALLIDAY: i. m. 39.

[35] Edinburgh Agreement, 15 October 2012.

[36] LEVITES, Benjamin: The Scottish Independence Referendum and the Principles of Democratic Secession, 41. *Brooklyn Journal of International Law*, 2015. Issue 1 (2015), 373–406.

[37] Treaty on European Union (*OJ C*, 326 [2012], 26. 10. 2012). 47–390, 20, 22. art.

[38] 1981. évi törvény a brit állampolgárságról, 37. §.

[39] Robert Gooding argues that the most expedient way is involving every affected to the deliberation process: e.g. if the British would like to build a plant station that pollutes the Scandinavian countries, they should ask the locals. – GOODIN, Robert E.: Enfranchising All Affected Interests, and its Alternatives. 35. *Philosophy & Public Affairs*, Issue 1 (2007), 40–68.

referendum – studies in Scotland and has a permanent residence in the country, thus eligible to vote. This student most probably will not be in the country at the time, when the consequences of the referendum take effect. As he writes: filtering out, those who are not eligible to vote, due to being unaffected, would place too much burden on the authorities, not to mention that determining the rules of excluding certain individuals would also generate lengthy and serious debates. Based on this – Saunders argues – the only possible solution is placing trust into those, who are not affected and hope that they will recognise their situation – namely that they are unaffected – and will abstain from voting.[40]

Contrary to Her Majesty's government, the Spanish one tried to prevent the 2014 *non-decisive* referendum with any available legal tools. On the said referendum – organised by volunteers –, where only half of the eligible voters – 2.25 million out of the 5.4 – exercised their right to vote, those, who attended, voted in favour of independence with an overwhelming majority.[41] The one month later polling tinges the picture, however: within the overall population the opponents of secession outnumbered the proponents.[42] The issue of independence was put on the agenda again at the 2015 municipality referendum: although the referendum officially did not concern the independence, it was won by a pro-secession party by absolute majority.[43] The newly elected municipality legislation – exercising its clear authorization by the voters – passed a resolution declaring their adherence for secession. The Spanish government affirmed that it will stick to its earlier official-position[44] to quest remedy before the constitutional court. On the motion of the government, the *Spanish Constitutional Court* declared the resolution unconstitutional and annulled it.[45]

Contrary to the Catalan example, in case of the decisive 2018 New-Caledonia referendum, the three terms, identified by Levites related to the Scotland referendum, are to prevail. At the present moment the French government shows a democratic attitude towards the possible secession of her oversea territory. *James Anaya*, the former *special rapporteur* on indigenous rights conducted examinations on the execution of the *Nouméa Accord*,[46] and concluded that the overall-situation is satisfying. It is worth mentioning, however that in the last two decades significant number of migrants – among the French citizens and citizens of the surrounding isles – settled in New-Caledonia, reducing the proportion of the indigenous kanak peoples within the society.[47] Having regard to the pro-union opinion of the new settlers, the attitude of the French government is not so surprising.

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[40] SAUNDERS, Ben: Not All Who Are Enfranchised Need Participate. *EUDO Working Paper*. https://goo.gl/eqS7CF (24 October 2014)

[41] LEVITES: i. m. 400.

[42] Meglepő eredményt hozott a katalán függetlenségi közvélemény-kutatás. *HVG.hu*, 19 December 2014. http://hvg.hu/vilag/20141219_Meglepo_eredmenyt_hozott_a_katalan_fugget (23 September 2016)

[43] Catalonia Votes, The 27S2015 Vote. http://www.cataloniavotes.eu/the-27s2015-vote/ (24 October 2016).

[44] Spanish PM dismisses Catalan secession proposals as act of provocation. *The Guardian*, 27 October 2015. https://goo.gl/CpQer1 (24 October 2016)

[45] LEVITES: i. m. 400.

[46] Nouméa Accord (Signed 5 May 1998). http://www.france.net.au/politics/pages/noumea.en.htm (24 October 2016)

[47] Based on 2013 data the Kanak people constitute the 40% of the population. – MIKKELSEN, Cécilie (ed.): *The Indigenous World*. IWGIA, 2013, 215.

5. The role of economic considerations in making the decision

Authors agree that economic considerations play role in the debates on secession, they disagree, however, on the importance of these considerations. *Jordi Muñoz – Raül Tormos* argue that, economists can only make certain estimations of the effects of an accidental secession. Contrary to them, politicians tend to over-simplify the overall-picture, in order to send simple and coherent[48] massages to the voters in order to underpin their opinion. As a result, voters lack the necessary information – both in terms of quantity and quality – to take a well-considered decision. Instead they will most likely rely on their own preconceptions and ideological point of view, including their national identity.[49]

Based on practical examples, the author of the current article argues differently: economic consideration played an important role both in the creation of the UK and both in the dismissal of Scottish independence. While, in the short-run the drop in oil prices would have rendered the finance of state-building – such as the introduction of a new national currency[50] – almost impossible, on the long-run the drain out of the oil-rigs would have caused financial problems.[51] Not everybody agrees, however: *Fergus Ewing* and *Jennifer Erickson* argue that Scotland would be better off with a small, but independent economy. They bring two arguments to prove their theory: *firstly*, they calculate that Scotland is a net contributor to the "Union Kitty" due to the oil incomes and *secondly* they argue that the Westminster often brought decisions which caused serious economic drawback for Scottish economy.[52]

Economic deliberations play an important role in the case of the Catalonian independence, too, they affect in an opposite direction, however: Catalonia is one of the richest regions of Spain, where withdrawing incomes by the central government in order to develop the poor regions indicated tension among the population. Furthermore, the connection between the current economic crisis and the increase in the number of proponents of the secession is rather convincing: before the crisis only 20% of the population supported the secession, by 2015 their proportion reached more than 40%.[53]

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[48] Regarding coherency the SNP found itself in a very difficult situation: it had to emphasize the ground-breaking effect of the referendum, alongside with assuring the potential 'yes voters' that the secession will not traumatize the country and her population. – KING, 117.

[49] MUÑOZ, Jordi–TORMOS, Raül: Economic expectations and support for secession in Catalonia: between causality and rationalization. 7. *European Political Science Review*, Issue 2 (2015), 317–322.

[50] BLACK, Andrew–JAMES, Aiden: Scottish independence: 'Yes' vote means leaving pound, says Osborne. *BBC*, 13 February 2014. http://www.bbc.com/news/uk-scotland-scotland-politics-26166794 (24 October 2016)

[51] WARNER, Jeremy: Low oil prices are burying all hope of future Scottish independence. *The Telegraph*, 14 November 2014. http://www.telegraph.co.uk/finance/comment/jeremy-warner/11231933/Low-oil-prices-are-burying-all-hope-of-future-Scottish-independence.html (24 October 2016)

[52] They cited the mad cow disease as an example: Scottish farmer never used those practices causing the disease as a result their cows did not get it. When some of the European countries offered the Scottish farmers an exemption from embargo on beef export, the Westminster refused the offer, pushing many Scottish farmers to bankruptcy. – EWING–ERICKSON: i. m. 93–95.

[53] GRAY, Eliza: What Catalonia's Vote for Independence Means for Europe? *Time*, 7 November 2015. http://time.com/4102619/what-catalonias-vote-for-independence-means-for-europe/ (24 October 2016)

6. Conclusions

The Scotland referendum verified Marc Weller's theory,[54] whereby providing autonomy for a certain minority in its internal affairs and letting them exercise these powers for a long time, will strengthen their commitment for the mother state. In other words they will most probably opt for maintaining the existing state-frameworks instead of secession. This way the "failure" of the Scottish independence – a bit ironically – can contribute to the success of other minorities struggle for autonomy. *Firstly*, the democratic attitude of Her Majesty's government can serve as an example to be followed by other government. S*econdly*, if the Scots – who already bear a wide-scope of autonomy – had voted in favour of secession, it would have strengthened the stereotype that autonomy is the first step to secession. Dismissing the offer to become independent, however the Scots belied these opinions and can contribute to the autonomy struggles of the Seklers and the *German minority* in *South-Tirol;*[55] presuming that these minorities succeed in persuading the majority of the population that their autonomy claims do not aim at any further secession. In the Carpathian Basin, which carries the heavy burden of the past,[56] the latter one – despite some positive developments[57] – rather seems to be a wishful thinking, however.

[54] WELLER, Marc: Settling Self-Determination Conflicts: Recent Developments. 20. *European Journal of International Law*, Issue 1 (2009), 162.

[55] KISPÁL, Richárd: *A skót függetlenségi népszavazás hatása az európai kisebbségekre.* Barankovics Alapítvány, 29 September 2014. https://goo.gl/dTAlqm (2016. szeptember 23)

[56] Based on a recent pooling, half of the Romanians have explicitly negative feelings against Hungarians. – *Politics.hu*, Published on 15 October 2013. http://www.politics.hu/20131015/poll-suggests-over-half-of-romanians-dislike-hungarians/ (24 October 2016); For further information see: SZALAYNÉ SÁNDOR, Erzsébet: A nyelvhasználat jogi szabályozhatósága. *Magyar Tudomány*, 2009/11, 1343–1351.

[57] A Romanian court recently decided that is not against the Romanian constitution to talk about autonomy. This decision is in accordance with the jurisprudence if the ECtHR, which pronounced the same in the *Turkish Socialist Party et al vs. Turkey* case. – MAKKAY, József: Döntött a román bíróság: nem szélsőséges az autonómia. *Erdélyi Napló*, 7 August 2015. http://erdelyinaplo.ro/aktualis/dontott-a-birosag-nem-szelsoseges-az-autonomia (24 October 2014); ECtHR, *Turkish Socialist Party et al v. Turkey*, 13 November 2003 (26482/95) § 43.

European Integration Studies, Volume 12, Number 1 (2016) pp. 43–53.

RIGHT TO COURT ACCESS

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Introduction

The personal right to lay down a case to court proceeding and making decision is guaranteed by the constitution and legal provisions and in addition to by the international documents. Right to fair and just trial is created by two guarantees of a general kind. The first one is the guarantee of the right to fair trial, the right to obtain a decision in a reasonable time, the right to public proceeding and the right to an efficient remedy. The second group of guarantees is composed of the right to be familiar with the accusation, assumption of innocence, the right to be defended, the right to evidence and the right to have an interpreter. "The content to the right to fair trial does not rest in circumstance that people must not be inhibited from the execution of their right or to be discriminated in its implementation. The content of this right is to provide a relevant action by courts and other bodies of the Slovak Republic. The right to fair and just trial does not comprise the right of lawsuit party to agree with the general court statement with the court proposals and evaluation of court evidences."[1]

In comparison with the majority of other human rights the domain of the right to fair trial is not the guarantee of the result in the sense of pursuing claims of a real substantive law right. It is not the right to victory in the court action but merely the guarantee of the quality proceedings in achieving a result. Another difference rests in the fact that the right to fair and just trial expresses the privilege given to everybody to submit a case to an impartial and independent body who, within the framework of just proceeding, publicly makes decisions and the state is just obliged to create an execution and protection of this right by means of the definite court system.[2]

I.

The European Convention on Human Rights and Fundamental Freedoms, (further on only the Convention) accepts the right of individuals to fair trial declared by the Article 6 paragraph 1 with the following statement "everybody has the right to just, public and in an appropriate time deliberation of his case provided by an independent and impartial court established by law which will decide on some bodies civil rights or pledges or any other *criminal offence of which a person is accused on. A verdict must be passed publicly, but* media and the general public might be excluded during the all proceeding or a part of it if it is needed from the point of view of the moral interest, the public order or national safety of the democratic society, or if it is required by the interest of the protection of juvenile or the protection of private life of lawsuit action parties, or if it is considered to make it necessary by court having in mind the special conditions when a public might worsen the interest of

[1] The Slovak Republic Constitution Court Ruling, file reference IV. CC 252/04.
[2] MOLEK, P.: *The right to fair and just trial*. Wolters Kluwer, Prague, 2012, 15.

justice." "For the first time regarding the civil cases the right to fair trial had been recognized in the case of Golder. The right is not of an absolute character and it depends on the contracting states how this right is amended by them, but under the condition that the fundamental nature of this right would not be endangered. States are given a definite space for their free consideration and margin of appreciation in amending this right. However, their delimitation is under the control of investigation by European Court of Human Rights."[3]

"According the Strasburg bodies the right to fair and just trial regarding the criminal offences and civil cases means that both lawsuit parties must have be given a chance to submit a case to an independent court under the conditions which do not principally create a privilege for one of the parties. The principle of the equality of arms must go through the entire fair and just trial which is closely interconnected with the principle of none-discrimination regulated by Article 14 of the Convention."[4]

"The right to fair and just trial stands for a component part characterizing one of the essential attributes of the right declared by Article 6 of the Convention. It does not require an extensive interpretation forcing the contracting parties to accept a new obligation. Article 6 paragraph 1 of the Convention guarantees to everybody the right to submit a case to court concerning the civil rights and obligations. Principle, which belongs to the universally declared fundamental legal principles, stands for an obligatory opportunity which must be given to lay down a civil sue to the court."[5]

The Convention provision in question guarantees the right to fair and just trial but on the other hand this notion is not specifically defined by the Convention. The literally explanation of this provision might be interpreted in such a way that a court should be an independent[6] and impartial subject established by law. More detailed specification of the court can be found in European Court of Human Rights judicature regarding the decision Sramek against Austria, It is declared that "on the grounds of legal norms and within the action administered by the prescribed manner, it is mainly the body whose function is to decide cases within its competences".[7] At the same time it is required to make its decisions bound and to make a court qualified to investigate the case and the legal merits of the case.

Besides that, the right to proceeding and decision in civil action belongs to other bodies if they are eligible fulfill the criteria stated above. "It is important at least for one interstate body and a proceeding, which is provided by it, to accomplish all demands concerning court and the action in court as it is stated by Article 6 paragraph 1 of the Convention. It is not sufficient if any other conditions have not been fulfilled as regards the proceeding course done by the various bodies, unless they have not contented the relevant required

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[3] VRŠANSKÝ, P.–PECNÍKOVÁ, M.–PETRÍK, M.: *Convention of the Protection of Human Rights and Fundamental Freedoms*. Association of Lawyers and Friends of Law, Bratislava, 2001, 36.

[4] ČAPEK, J.: *The European Court and the European Commission of Human Rights*. Linde Prague, a. s., Prague, 1997, 379.

[5] European Court of Human Rights decision on the case Golder against the United Kingdom, complain No. 4451/70.

[6] If a definite body can be considered independent regarding the decision, it is primarily needed to take into consideration modus of its creation and the mandate tenure of its members, further on the existence of the protection against the inner pressure and conditions if there is an image concerning its independence. European Convention of Human Rights verdict on the case Langborger in 1989.

[7] European Court of Human Rights decision on the case Sramek against Austria, complain No. 8790/79.

demands. According to the Convention by Article 6 paragraph 1, when a proceeding is provided publicly by an administrative body which cannot be considered to be a court, while on the other hand, if a court who has examined their decision has acted in chambers, the requirement of the public action is not fulfilled unless there are special exceptional conditions presuming the un-necessity of public proceeding. In this connection the fulfillment of the individual demands by various bodies must not be taken into account."[8] The Convention enables dealing and making decisions on the civil-law disputes and obligations by the court of arbitration who would guarantee all necessities which are required by the Convention.

The Article 6 paragraph 1 of the Convention enables the interstate legal orders implementation of some restrictions in relation to the right to fair trial only if they follow the legitimate goal and under the condition to keep a balance between the used means and having in view the legitimate aim. European Court of Human Rights admit that "the purpose of the legal amendment of different formal necessities and time-limits, which must be kept concerning any fulfillment as regards the court, is to make sure a proper execution of justice, and especially, to safeguard legal confidence constituting one of the most fundamental rudiments of the lawful state. From what was said it follows that on the one hand courts have a duty in procedural provisions executing to stop an enormous formalism which would be in contradiction with the just proceeding, and besides that to avoid an extreme discretion which in its final consequences might issue in decomposition of the proceeding requirements amended by law. If the definite provisions are applied which are stated by the interstate law and they are not respected by the lawsuit parties, then the parties might expect that they would be penalized by not accepting the given correcting legal remedy."[9]

In spite of the fact that Article 6 paragraph 1 guarantees to everybody the right to the fair trial together with the correct procedural guarantees in proceeding, it does not guarantee the right to free of charge court action. In contradiction to the Convention there is not such a legal amendment which states the court fee or any other fees for the court action deciding on civil rights or obligations.[10] At the same time European Convention on Human Rights and Fundamental Freedoms declare that "Taking into consideration justification of the needs of the just execution of justice, the Article 6 paragraph 1 does not exclude a likelihood to fix a fee limitation to the individual`s right of court access".[11] When deciding a complaint on the right to court action which had been abridged according to a complainant in connection with the obligation of fee charging, in that case European Convention on Human Rights and Fundamental Freedoms investigate the amount of the court fee and the phase of proceeding within which a fee duty had been imposed. In case of Schneider again France European Convention on Human Rights and Fundamental Freedoms did not consider "the violation of the right to court action if at first the complainant had been obliged to put down an advance payment of the amount of financial

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[8] ŠIMÍČEK, V.–LANGÁŠEK, T.–POSPÍŠIL, I. and co-authors: *The Bill of Fundamental Rights and Freedoms. Commentary*. Wolters Kluwer, Prague, a. s., 2012, 623.

[9] KMEC, J.–KOSAŘ, D.–KRATOCHVÍL, J.–BOBEK, M.: *The European Convention on Human Rights. Commentary*. C. H. Beck, Prague, 2012, 630.

[10] Finding of the Slovak Republic Constitution Court, file reference PL. CC 38/1999.

[11] European Court of Human Rights Rulings on the case Airey against Ireland dated on 9th October 1979 and on the case Brualla Gomez de la Torre against Spain dated on 19th December 1997.

fine for the less serious criminal offence against which she had wanted to protest".[12] In case of Urbanek against Austria the European Court of Human Rights declared "the risk is that the accuser will have to pay the proceeding charges whose amount will be finally higher than those ones approved by the court. In itself such a risk cannot discredit all system of the amount of court charges bound to the amount in controversy".[13] To complete this idea we can add that in this proceeding the complainant put down a proposal of his own model of payment obligations. According to this model the amount of court charge is bound to the amount of the piece of the share which would be probably obtainable by the complainant within the insolvent proceeding. European Convention on Human Rights and Fundamental Freedoms considers such model as an unrealizable one.

Other constraints may be caused by the length of time-limits which allows person to address a court. "Similarly, as in other places of the Convention, it is valid in this case as well. The interpretation of interstate law including proceeding norms adjusting the time-limits is first of all the privilege of domestic bodies, especially courts, European Convention on Human Rights and Fundamental Freedoms is not competent to substitute them unless the used interpretation of case in question is an irresponsible one."[14]

Among other constraints regarding the addressing a court the obligatory legal proxy, formal and content necessities connected with the submitting a case belong.

II.

By Article 36 the fifth Chapter of the Bill of Fundamental Rights and Freedoms (further on used only the "Bill") guarantees the right of an individual to fair and just trial including the proceeding guarantee of rights implementation at the independent and impartial court or at other eligible official bodies. By Article 36 paragraph 1 of the Bill, everybody can claim their right at the independent and impartial court as it is affirmed by the procedure and in certain cases at other eligible official bodies. "Objectively taking into consideration the interpretation of this right cannot cover all cases of the infringement of cogent provisions, in other words the breaking of the proceeding regulations stated by the proceeding legal provisions does not immediately mean the violation of the right to fair and just trial. In case of the subjective right to court and other legal protection, it is always needed to examine how the breaking of proceeding prescriptions might make a negative impact on a person prospect to claim the individual proceeding rights and the proceeding action which would otherwise might have much more positive influence on the decision of case in question. Whatever process is it, it does not exist just forming one`s own object, but otherwise, its aim is to achieve the origin, change or ending of the substantive rights and obligations of natural persons and legal entities. This reality must find its reflection on the level of fundamental rights and freedoms and in this case in the sphere of the delimitation of the range of right to fair and just trial. Only the infringement of objective proceeding rules would be a kind of the violation of the subjective right to fair and just court action which would in reality abridge an individual implementing some of the subjective proceeding right, e. g. incapability to provide a certain claimant`s procedural act and as a result of this

[12] European Court of Human Rights decision on the case Schneider against France, complain No. 37492/05.

[13] European Court of Human Rights decision on the case Urbanek against Austria, complain No. 35123/05.

[14] KMEC, J.–KOSAŘ, D.–KRATOCHVÍL, J.–BOBEK, M.: *The European Convention on Human Rights. Commentary*. C. H. Beck, Prague, 2012, 638.

he might be disadvantaged in comparison to the other lawsuit party or deprived of his substantial rights."[15]

The claimant of the right to address a court is an individual who claim the protection of his rights and without taking into consideration whether it is a natural person or a legal entity. Under the notion "affirmed approach" the additional conditions must be understood the fulfillment of which a claimant may ask regarding the court and any other kind of protection. From what it has been said the right to access a court is not an absolute one as it can be influenced by different conditions and constraints which are affirmed by law. Those are mainly such official bodies determined by case, local and purpose determinations which are affirmed by law. They are eligible to deal a case and to decide on the necessities of a proposal to start an action, the obligation of a legal proxy of the lawsuit party regarding some specific cases, stating time-limits to submit claim or to submit remedial tools and to state the obligation to accept financial charges etc. On the other hand, the mentioned obstacles, which might be legally stated, are not without a certain limitation, they are under the definite confines. The most common problem is to find out the most reliable balance between requirements concerning all system including the organization of jurisdiction, and on the other hand the right to court access.[16]

Guarantee of the proceeding rights of each individual could not exist without institutions providing protection of rights which were abridged or endangered. Therefore the affirmation of Article 36 of the Bill of Basic Rights and Freedoms rises from the premises that the structure of independent and impartial courts together with the structure of other bodies providing the protection of rights have been built up by the state. However, in the Bill the notion "court" is not precisely defined, but on the other hand a court is not necessary to be a body that is a part of the general court structure. In this way such subjects must fulfill the condition of independence and their members must be impartial and independent when arguing a case and decide on it. Besides that the length of their function must be stated as well as their nomination to the post and their respect to law when executing their making-decisions, but what is the most important thing, they must be established by law.

Regarding the most precise explanation of the notion "other body" is understood any public administration body which differs from a court and to whom the legislator gave powers to decide on rights and legitimate interests of individuals. On the practical level all public administration bodies are included here together with the public protector of rights and police corps bodies of a definite state.

Proposal content and formal necessities to start a proceeding which must be fulfilled are amended by the definite procedural prescriptions of state respecting the obligation not to become an obstacle for the access to court or it might be any other eligible body declared above.

The reason of the lawsuit party to have a proxy in certain actions as it is declared by law rests mainly in the fact to avoid the abundance of non-qualified and irrelevant proposals.

"Another example of the affirmed procedural action, which in itself conceals a potential likelihood of the court protection deprive, is the provision stating the financial obligation. The purpose of the financial obligation is the protection of the court structure to keep away

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[15] Court Ruling of the Czech Republic Constitution Court, file reference I. CC 148/02 dated on 27th August 2003.

[16] ŠIMÍČEK, V.–LANGÁŠEK, T.–POSPÍŠIL, I. and co-authors: *The Bill of Fundamental Rights and Freedoms. Commentary*. Wolters Kluwer, Prague, a. s., 2012, 729.

from being overburden. What`s more it is to make a guarantee that the right to court and any other protection would not be misused by claimants and thus avoiding their irresponsible and unsuccessful action to claim the right resulting to the useless overload of courts and the rise of the adverse claim proceeding costs."[17] In connection with its judicature activities, European Convention on Human Rights and Fundamental Freedoms takes into consideration the high of court fees as being an improper high fee for putting down a claim to start a court action, if it is an intolerable obstacle regarding the access to court.

III.

Aahur Agreement, which guarantees the right to court access is not very known document to general public. By Article 7 paragraph 5 of the Slovak Republic Constitution No. 460/1992 Coll., further on used only the "Constitution", it is an international agreement of human rights which had become valid on 5th March 2006 and was published in the Collection of Acts of the Slovak Republic under the number 43/2006. Since that time it has become an inseparable part of the interstate order.

Aahur Agreement gives a public[18] the right to information access concerning the environmental life, the right to participate in decision-making-processes on the subject of permission activities concerning environment and the right to attack the violation of law covering the environment at the independent official bodies, respectively at a court. "Having in mind the obstacles, which people meet regarding the protection of their personal rights with, the lawsuit parties of the Aahur Agreement, acknowledged a specific position of people associations or organizations, known as the ecological non-profit organizations whose aim is to protect environment. According to Aahur Agreement ecological non-governmental organizations must have a position which would enable them to participate efficiently in proceeding covering the permission which might considerably influence the environment, and in case of the law violation to claim it's upgrading at the independent body, respectively at a court."[19]

In relation to the right to access a court, the most important provisions of Aahur Agreement is considered to be the provision of Article 9 paragraph 3 enabling to members of the general public fulfilling certain conditions to contest any acts or proceedings of public power bodies and private people who are in contradiction with the interstate law in the area of environment. "According to the contemporary legal status of the Slovak Republic, the ecological non-governmental organizations fulfilling conditions affirmed by law have the right to be the lawsuit party who are connected with the permission of

[17] ŠIMÍČEK, V.–LANGÁŠEK, T.–POSPÍŠIL, I. and co-authors: 2012. *The Bill of Fundamental Rights and Freedoms. Commentary*. Wolters Kluwer, Prague, a. s., 2012, 731.

[18] Aahur Covenant anchors rights and participation regarding licensing procedure covering two forms of public who have at disposal different range of rights within the licensing procedure. While under the notion public the general public is meant consisting of natural persons, legal entities, their associations and organizations, by the concerned public is understood the public, which might be influenced by the decision–making process concerning environment or having an interest in this proceeding. Article 2 paragraph 5th of Aahur Covenant contents a legal fiction according to which the non-governmental organizations, which must have the guaranteed rights with reference to them, are always considered to be the concerned public.

[19] WIFLING, P.: Participation of non-governmental organizations in legal proceedings and their access to court by the Aarhur Covenant. *Justičná Revue*, Vol. 59, No. 10, 1250.

activities influencing the environment. As a result of the fact that they are the lawsuit parties of the administrative action, they have the right to claim upgrading of the unlawful decision, to place an accusation against such decision as it is affirmed by the Civil Court Order."[20]

IV.

By Article 46 paragraph 1 of the Constitution everybody can claim his right to be trialed by the independent and impartial court or by any other body of the Slovak Republic as it is declared by law and lawfully stated proceeding.[21] The precondition of the execution of this right rests predominantly in a lawful opportunity by means of the expression of one's will to claim the protection of the right at the independent and impartial court. Cited article together with the article 12 paragraph 1 of the Constitution "anchored the constitution law based on the autonomy of the will of the parties. The content component part of the autonomy of the will of parties, which is sometimes denoted as the right to self-determination, or self-disposition, together with the right of an individual means to claim the substantive and procedural rights at courts. However, this right includes in itself the legitimacy not to provide its execution, not to make use of it. This proceeding right of the lawsuit party can be considered to be one of the aspects of the constitution right to the autonomy of one's will".[22]

"By including the right to court or any other legal protection among the human rights protected by the Constitution, the Slovak Republic emphasizes the real legal protection not only of the human rights, but what's more, the protection of all rights issued from the legal order of the Slovak Republic. Without the real safeguard of the court or any other legal protection all the other rights would be merely guaranteed by the voluntarily respect what is not sufficiently fulfilled by whatever state it is. Therefore, the regime of the international agreements on human rights, especially articles 6 and 7 of the Covenant regarding the protection of human rights and fundamental freedoms together with the right to court protection have been transformed into the Constitution Law of the Slovak Republic by its 7th component part."[23]

Under the conditions of the Slovak Republic, the legal making is provided by means of general courts, the Constitution Court of the Slovak Republic and other bodies which fulfill the demands of independence, impartiality and the condition of their establishment by law. "Court protection is divided in order to be in accordance with the constitution division of

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[20] WIFLING, P.: Participation of non-governmental organizations in legal proceedings and their access to court by the Aarhur Covenant. *Justičná Revue*, Vol. 59, No. 10, 1250.

[21] By the Decision of the Slovak Republic Constitution Court, file reference I. CC 84/97, the source of law concerning the everybody's other legal protection is to enable them a real access to such official body who has a duty to act on case in such a way as not to violate the constitution principles as it is amended by the second chapter in the 7th section of the Slovak republic Constitution. The content of the fundamental right to other legal protection by any other body of the Slovak Republic might be claimed only within the range of laws which are applicable in relation to that provision as it is stated by Article 46 paragraph 1 and Article 51 of the Slovak republic Constitution. However it is not duty of that body to accept a petitioner's proposal to renew a proceeding.

[22] Decision of the Slovak Republic Constitution Court, file reference PL. CC 43/95 dated on 10th September 1996.

[23] CIBULKA, Ľ.–POSLUCH, M.: *The State Law of the Slovak Republic*. Heuréka, Šamorín, 2006, 545.

powers among general courts in cases of the protection of lawfulness, and the Constitution Court in cases of the constitutionality protection. In addition the right to court protection must be implemented within the system of court power to which a definite case belongs as regards the decision-making power. When implementing the right to court protection, it is not possible freely to choose the one from among the general courts, but also their case and local competences are stated by the procedural court law together with the right to legal proxy declared by Article 48 of the Slovak republic Constitution, not even the choice is probable among the constitution court and general courts. In case of dissatisfaction with the proceeding and decision made by the general courts, the correction can be claimed, even the abolishing of decision by means of the ordinary and sometimes by the extraordinary corrective devices within the close court structure. In this way the right to a great variety of court protection is saved which is provided by courts within the measures, ways and conditions affirmed by the executing regulations."[24]

However neither the Constitution guaranteed right to access a court is not an absolute one and it might be restricted or conditioned by the fulfilling stated conditions. As it is declared by Convention and the Bill even in this case the obstacles must not interfere the foundation of this right.

Concerning the relation between the right of the court access and obligation to pay court fees, the Supreme Court of the Slovak Republic expressed their statement that by the Article 6 paragraph 1 of the Convention the duty to guarantee the effective right to access to court does not only mean the absence of interference, however, it might require different forms of positive acts on the side of state. Besides that it does not represent nor specify the right of an individual to acquire free of charge legal help from the state in dispute, what's more from this provision cannot be derived the right to free of charge court action.[25] Regarding this problem-area the Constitution Court issued its statement that "In spite of the fact that the right to access to court is not an absolute one it must be effective and the courts are not allowed to restrict or lessen this right in a way which would violate its foundation. From the structural formulation and contextual graduation of the provision § 141 and paragraph 1 of the Civil Court Order it is clear the conditionality of its use but only under the casual condition resting in investigation of two fundamental presumptions which must be cumulatively fulfilled by the examination of the presumption of the exemption from court fees as it is declared by the § 138 of the Civil Court Order, and on the other hand by the examination of the high of the claimed entitlement in connection with the life minimum sum. Only under the grounds of the factual examination, not only by a formal one, of the declared presumptions on the side of the claimed lawsuit participant the conclusion can be made regarding the fulfillment of presumptions to order the obligation of that court action participant to give in earnest to cover costs, but anyway, the proportionality principle must be respected in order to make reasonable and minimal interferences into the property rights of the lawsuit party, only under these conditions the proposed future sum of the approved claim might be estimated covering the court action costs".[26]

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[24] Decision of the Slovak Republic Constitution Court, file reference II. CC 1/95 dated on 10th January 1995.

[25] The Slovak Republic Supreme Court Rulings, file reference 8Sžo/220/2008 dated on 11th December 2008.

[26] Finding of the Slovak Republic Constitution Court, file reference I. CC 112/2012 dated on 6th January 2012.

Act No. 71/1992 Coll. on court fees and the fee for the extract from criminal records presents an exhaustive list of court actions which are exempted from the payment of court fees in order not to render impossible the right to access to court of individual people by the payment obligations. Further on § 4 section 2 presents the list of people who are exempted from the payment obligation. At the same time Act No. 99/1963 Coll. as amended the civil court order enables to recognize an individual exemption from the court fees. In the sense of this provision the acting court may accept the total or at least a partial exemption from court fees, unless it is given by the lawsuit's conditions and if it is not motivated by the vexatious refusal to pay or an unsuccessful claim, or caused by the law encumbrance. "Under the notion conditions the law understands a material possession conditions of claimant, in case of natural person family, social and health conditions as well. All of them have their source in circumstances which are not only of temporary or short-term character. They create an assumption that the payer absolutely, or to some extent in case of the partial exemption claim of court fees, is not capable to fulfill a payment obligation or if it is not just to ask him to do it. Objective lack of the financial means, respectively any other property, should not cause incapacity to ask one`s right at court. According to the law theory a willful claim of the right is considered to be, for instance an assignation of one's right to other subject who might ask for the exemption of court fees based simply on the reason just to achieve the recognition of exemption while the claimant has not completed the required conditions. The evident irrelevance or infringement of the right must be fair only with the aim at the specific conditions of a case. The law theory considers it to be a kind of the lawsuit pre-judication as in the stage of making–decisions on the exemption of court fee, the court might declare that a complainant would be probably unsuccessful."[27]

If the court does not decide otherwise, the decision on the entitlement of exemption regards to entire proceeding, and in addition it has a retroactive force, while fees which have been paid before the pronouncement of this decision are not returned back.

Conclusion

The proper work provided by all public power bodies creates the real criteria of the lawful state quality. In this aspect courts play an important role being an important component part of the state-power-division. Their importance lays predominantly in the protection of rights and legally protected interests of natural persons and legal entities. In the presented article the author tries to point to the foundation of the right to court access and its significance from the point of view of the real execution of rights and legally protected interests. The right to court access safeguards the practical claim and protection of all rights and freedoms encored by the Slovak Republic Constitution and the European Convention on Human Rights and Fundamental Freedoms. The article analyses the individual component-parts of law which in their complex or separately create the foundation for the efficient and just implementation of law and thus creating a successful accesses to court. Besides that the author tried to emphasize the basic decisions made by the European Court of Human Rights and the Slovak Republic Constitution Court whose decisions should be obligatory for each judge when dealing and deciding on the protection of rights claiming by natural persons and legal entities. Finally the author comes to the conclusion that these minimal rules for safeguarding right to court access are anchored by the Legal Order of the Slovak Republic,

[27] HORVÁTH, E.: *Acceptance of the financial restriction of the right to access to courts.* http://www.najpravo.sk/rady-a-vzory/rady-pre-kazdeho/p/pripustnost-penazneho-obmedzenia-prava-na-pristup-jednotlivca-k-sudu.html

but at the same time it is needed independence and impartiality of judge when deciding on the disputable claims, otherwise the right to access to court remains for the claimant exclusively illusory one.

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[3] Finding of the Slovak Republic Constitution Court, file reference PL. CC 38/99 dated on 23rd June 1999.
[4] The Slovak Republic Constitution Court Ruling, file reference IV. CC 252/04 dated on 31st August 2004.
[5] The Slovak Republic Constitution Court Ruling, file reference 8 Sžo/220/2008 dated on 11th December 2008.
[6] Finding of the Slovak Republic Constitution Court, file reference I. CC. 112/2012 dated on 6th June 2012.

List of used Czech Republic Judicature
[1] Finding of the Czech Republic Constitution Court, file reference I. CC 148/02 dated on 27th August 2003.

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[1] European Court of Human Rights decision on the case Golder against the United Kingdom, complain No. 4451/70 dated on 21st February 1975.
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PUBLIC ADMINISTRATION, ETHICAL INTEGRATION AND GLOBALIZATION

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1. Introduction

Globalization is a phenomenon which dominates our contemporary world in all spheres of our life. It is mostly evident in the economic and technological interconnections, in the fields of trade, financial sectors and mobility of capital and labor producing thus fastening of our interdependence not only in the field of commerce but at the same time networking our culture, habits, minds and way of our everyday lives. As it is expressed by Kimberly Hutchings the word "global" is generally used "to signify something pertaining to the world as a whole. If something has global causes or global effects, then the suggestion is that either its causes or its effects are worldwide" (HUTCHINGS, 2010: 2). With its positive as well as negative impacts and effects it touches all world regions, and sometimes it is difficult to distinguish between the local, regional and global. Deep influences are evident on the European Union as a whole influencing its big countries as well as smaller ones. At present the most depressing consequences of worldwide financial crisis are bringing excessively difficult burden especially on smaller countries, such as Slovakia, and terribly ostentatious effort on public administration attempting to moderate the most extreme depression consequences on their citizens.

According to Hutchings living in a world in which all humanity shares a common situation the concept "global" indicates the following implications:

- a worldwide scale of commonality or sameness; commonality across people and peoples in which even the statement "we" signifies humanity as such; we participate in world markets, all of us are the subjects of international law, we all have some human rights etc.,
- a worldwide scale of interconnection and interdependence; thanks' to the easier communication, transport and media events in one part of the world have an immediate effect on other parts of the globe and a direct influence on people to an unprecedented scale.

In spite of the widening spread of globalization supported by the integration processes, enlargement, and concentration on the increase of the knowledge-based society underlined with the ideas of bringing up progress and improvements of citizens' lives, it is noticeable that all those proclamations are pretty far away from the common European citizens lacking legitimacy in their eyes together with the absence of a pan-European loyalty to those institutions. The vague conception and pronouncements of generally accepted ethical values, principles and norms are somewhere at the edge of all those processes. What is rather depressing in this situation is the existentially lost individual.

2. Public Administration and Integration Processes

Unification of globalized world and integration processes are with us, they are even accelerating, but at the same time they are successfully avoiding such intrinsic worth as common decency, honesty, integrity, openness, generosity, morality and the rest of all human ethical and moral qualities. So in spite of the speedy European integration, the integration in the ethical infrastructure is lacking behind, if not missing at all, being sometimes purposely, sometimes accidentally pushed to the margins of our attention. In some way it is more advantageous and profitable to close our eyes, being blind not seeing awful and appalling things around us and just let them unnoticed as they are. Generally speaking, at present it is still much more comfortable and easier to be unethical than ethical. We have only to agree with the words and opinion of Törbjörn Tännsjö that what we have left behind us when we look back at the 20th century are just unbelievable cruelty, terror, violence, devastating wars, holocaust, inhumanity and injustice. It is true that in Europe at the beginning of the 20th century most people accepted the authority of morality which had to be observed and obeyed as it is expressed by Immanuel Kant in his writings articulated in the following way: "the starry heavens above me and the moral law within me." (TÄNNSJÖ, 2008: 1) In spite of the generally respected morality, morals, ethical principles and moral law by the 20th century, let us say, by the decent and highly civilized public, it seems to be that all those values and virtues had been relevant only in theory and, as we all know, their practical application had been in fact far away from was theoretically and officially declared. At the start of the 20th century the Europeans had some ideas and believes in moral progress and to see human ferociousness, brutality and civilized barbarism in retreat, but at the end of century, as expressed by TÄNNSJÖ, SINGER, KREJČÍ[1] and many other authors and scholars, and also as we feel it ourselves, it is hard to be confident either about the validity of moral law or about any moral progress done, not only at that time but at this time as well.[2] Even today, when discussing global processes and the European integration, we must admit that there are still lacking certain general and integral global or at least European ethical standards, which would create a kind of broad-spectrum of some clearly defined values, principles and norms which might serve as a kind of guide for the appropriate and decent ethical behavior to be followed. As mentioned by Margozata Perzanowska and Marta Rekawek-Pachwicewicz, today it is the high time to call for more ethics in public life, using their words: "This is the time to build a different kind of European integration – ethical integration." (PERZANOWSKA–REKAVEK-PACHWICEWICZ, 2011: 217) Ethical integration is wanted if we wish to make interdependent and mutual relations among human beings more ethical and more human. This calls for the creation of globally accepted European human identity and human relations. It is here where ethical issues arise and a link between global, Europe and ethics is formed, "without morality, without universally binding ethical norms, indeed without ʻglobal standardsʼ, the nations are in danger of maneuvering themselves into a crisis which can ultimately lead to national collapse, e.g. to economic ruin, social disintegration and political catastrophe" (KÜNG in: HUTCHINGS, 2010: 11).

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[1] Oskar Krejčí, scholar and international relations specialist presenting his views on morals and international politics and international environment in his book *International Politics* published in Prague 2010.

[2] It is evident from many contributions issued in the recent publication with the title *Public Administration in Times of Crisis* published in 2011, and in publication *Europe of Values*, published in Bratislava in 2004.

As it is presented by Kimberly Hutchings ethics in its original meaning refers to codes of behavior or sets of values that state what is right or wrong to do in particular contexts and, accordingly to what was said, an ethical person denotes someone who aims to act following such codes of values. In a view of that, global ethics can be defined as "a field of theoretical enquiry that addresses ethical questions and problems arising out of the global interconnections and interdependence of the world's population" (HUTCHINGS, 2010: 9).

Of course, there are differences concerning the ethical values or what is good and right to do in our relations with others, not only among the individual European countries, but individuals as well, regarding their traditions, cultural and historical backgrounds, language differences, attitudes, standard of living and last but not least, their own individual perception of understanding moral and ethical values. So moral truth might be perceived to be relative, what from one culture or temporal perspective is right from another cultural or temporal perspective might be wrong. Anyway, there are some thinkers who try to find out a core of common beliefs, values and principles that operate across different conceptions and cultures in order to come to some reasonable starting point to arrive at global ethical standards that should govern human behavior, e.g. there are theoretical conceptions from theological point of view, such as Hans Küng's *Global Responsibility: In Search of a New World Ethic*, or secular ones based on a set of wide-ranging universal moral standards that might be commonly accepted across different cultures and the world.

3. Ethical Theories and Ethical Standards

Most conceptions on Global ethics find their inspiration and arguments developing the basic ideas of some traditional and most widely debated ethical theories. In all of them we can distill some important principles that can guide us in our ethical-decision-making. Let us mention at least some of the major ones which might provide the most practical assistance for creating theoretical as well as practical grounds for the European ethical integration in the area of public administration.

One of them is the theory of ***ethical relativism*** which considers that it is not possible to come to certain type of ethical values unification as each individual, culture or time is allowed to act in accordance with its own moral outlook. For the first time this conception had been proclaimed in Ancient Greece by Protagoras and his disciples known as sophists. According to their philosophical outlook, law is the creation of people, and therefore, it is always in accordance with the interest of legislator. Following this idea relativists come to the conclusion that law is nothing else than the enforcement of free will of those who are in power and who can do what they want to do. Even in the Ancient Greece their conception of ethical and moral relativism had been criticized and firmly refused by Socrates and Aristotle for sophists' conviction that truth is losing its objective foundation and for their commencement that when there is not an absolute truth, right and wrong are just vague and relative concepts.

Contrary to their theory is the conception of *virtue ethics*, developed during the period of antiquity, some 300 years before Christ. According to this theoretical conception, the most basic idea is not what we ought to do, but what kind of persons we ought to be. The virtue ethics approach focuses more on the integrity of the moral actor than on the moral act itself. For the first time the classification of virtues was done by Plato. However, his list of virtues is closely interconnected with characteristic traits of his ideal state representatives. Virtue ethics had been more precisely elaborated by his successor Aristotle in his work

Nicomachean Ethics.

Typical of virtue ethics is its interest in general traits of character in contradiction to the traits of personality. It is assumed that traits of character can be developed by means of training and education while traits of personality are closely tight to our biological nature. The prime moral virtues are: wisdom, justice, compassion, and respect for persons, courage, temperance, generosity, kindness, reliability and industry. If we develop these virtues, we are more likely to act rightly; a good character is a character that tends to lead to right actions. It is suggested that the most proper thing to do is instead of analyzing what makes right action right to focus our attention on those character features which ought to be fostered in ourselves and in our children through bringing up and education. Although virtue ethics as a philosophical tradition began with Aristotle, a number of contemporary ethicists have brought it back to the forefront of ethical thinking, especially the idea that ethical culture and behavior in public administration can be thought, e. g. Linda K. Treviño and Katherine A. Nelson.[3]

Virtue ethics may be particularly useful in determining the ethical qualities of an individual who works within a professional community that has well-developed norms and standards of conduct. But it is also inspiring for management administration posts within the public administration, of course, not excluding deontological and consequentialist approaches which are discussed below.

The action, its outcomes and consequences for individual human being are in the center of attention of the theoretical conception of *utilitarianism*. Utilitarianism is probably the best known *consequentialist ethics*.[4] According to the principle of utility, an ethical decision should maximize benefits to society and minimize harms, so a consequentialist thinks about ethical issues in terms of harms or benefits. On the other hand, virtue ethics would suggest thinking about ethical issues in terms of community standards.

In consequentialist ethics a sharp distinction is made between actions that are right and those which are wrong. If an action is not right, then it is wrong, and if an action is not wrong then it is right. The actions which we ought to do or the obligatory actions form a specific kind of sub-class actions that are right for us. So the utilitarian criterion for rightness of particular actions is stated by Tännsjö in the following way "…an action is right if and only if in the situation there was no alternative to it which would have resulted in a greater sum total of welfare in the world" (TÄNNSJÖ, 2008: 18). The idea that we ought always to act so as to maximize the sum total of welfare in the universe is hold by the utilitarian conception. According to classical utilitarianism we have to maximize happiness and well-being, utility means usefulness and convenience in order to bring pleasure. Our degree of pleasure is a quality of our total experience; the more our desires are satisfied, the better.

The utilitarian theory was for the first time presented by the English philosopher, lawyer and social reformer Jeremy Bentham.[5] He based his arguments on a view of human beings as naturally driven towards pleasure and happiness away from pain and unhappiness. And therefore, they have an interest in pursuing the former and avoiding the latter. On this basis

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[3] American scholars concerned mainly with managing business ethics.

[4] PETTIT, P.: *Consequentialism*, 1993; SHAW, W.: *The Consequentialist Perspective*, 2006.

[5] Bentham gathered around himself a group of followers, including the economist James Mill, his son philosopher John Stuart Mill. They were united by philosophical attitudes and social reformatory aspirations in the areas of law and justice, political institutions, education and women's liberation. Bentham was also the pioneer in defending the right of animals; "we have good reasons to treat them no worse than we treat our fellow humans" (TÄNNSJÖ, 2008: 17).

he built up an ethical theory that had one basic principle – the principle of utility. He makes a distinction between higher and lower qualities of well-being and according to his conception of utilitarianism we should try to maximize higher forms of well-being rather than lower ones following the idea that it is better to be dissatisfied Socrates than a satisfied fool.

Another essential aspect of Bentham's utilitarianism is the principle to act impartially meaning that in his decision-making the moral subject must respect the equality of other subjects' interests, even the interests of animals. So there could be no moral justification for putting one's own interests ahead of anyone else's.

The radical ethical conception is the idea that ends up with the formation that we must always act so as to maximize the sum total of our own welfare. This most extreme conclusion is known as *ethical egoism which is an extreme form of contractualism*. The egoist need not bother about the far reaching consequences of his/her actions; it is only the welfare of the agent that counts. You act wrongly whenever you do not maximize your own best interests, so any decision is right, so long as it satisfies the interests of the agent. Ethical egoism confers too much moral license to the agent, who is according to Thomas Hobbes in his fundamental nature egoistic and selfish, even if not, he lives in a constant fear of attack from others and desire for self-protection. When Hobbesian individuals are put in a state of nature, in which there is no external regulation of their deeds and actions, Hobbes argues that there will be a condition of "war of all against all"; "Bellum omnium contra omnes"; in this state of conditions there is no meaningful distinction between just and unjust, as Hobbes puts it, life in the state of nature is "solitary, poor, nasty, brutish and short". The only solution to normalize the given state of nature consisting of self-seeking individuals who live in a state of constant fear, danger and violence is the idea of agreement, he terms it "covenant" that has become known as the idea of "a social contract", where the individuals will give up their natural rights to the newly created overarching power – the state rule[6] which would guaranty order, justice and security. According to Hobbes, people must be forced to some extent by the state to cooperate; the state must supervise their actions and if they fail to respect the rules of law, threaten them by all sorts of punishment. Hobbes ethical contractualism is closely combined with politics. It is based on the social contract between people and the sovereign state power. Nowadays there are several different applications of contractualism.

On the other hand *deontological ethics or principle-based theory*[7] is founded on respecting duties, prohibitions which are bound to the agent irrespective of the consequences which might follow them. The best known representative of deontological ethics is the German philosopher Immanuel Kant. According to deontological ethics, some types of actions are prohibited and some are obligatory to do irrespective of their consequences. He declares that there is one general idea and that is the supreme and absolute duty, he calls it "categorical imperative", which has to be followed, using Kant words: "to act only in accordance with that maxim through which you can at the same time will that it become a universal law." (TÄNNSJÖ, 2008: 58) So a maxim is simply the rule we follow in any deliberately intentional act.

By Kant's critical philosophy human capabilities are limited and conditioned by human inclination to natural passions and needs similar to Hobbesian view of human nature. But according to Kant at the same time human beings are endowed by pure "practical reason"

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6 Hobbes ideas regarding state power are expressed in his work *Leviathan*.

7 The roots of the word *deontology* comes from the Greek language, words *deon* meaning *duty* and *logos* meaning *science*.

which offers us possibilities of transcending and take priority over our passions and natural partiality, "…human perfection lies not only in the cultivation of one's understanding but also in that of one's will, moral turn of mind, in order that the demands of duty in general be satisfied. First, it is one's duty to raise himself out of the cruelty of his nature, out of his animality more and more to humanity…" (KANT, 1983: 44–45). Only a rational human being has the power to act according to his conception of laws, it is the capacity of being able to detect and act on what is required by the moral law, so acting morally is ultimately equivalent to acting rationally. Moral principles are universally prescriptive and acting morally does not mean to act according to those moral principles but unpromisingly acting because of those moral principles. As it is mentioned by Hutchings the criterion of universality is central in Kant's apprehension of human beings as non-angelic who act morally only respecting and acting according to the universal categorical imperative. The moral law stands for all rational human beings, human or non-human as well. "The difference between humans and angels is not to do with different moral standards, but with human imperfection that means that we experience moral rules as a constraint on our non-rational drives and desires." (HUTCHINGS, 2010: 42)

Kant's philosophical theory is quite often comprehended as contradictory to Bentham's utilitarian ethics, when in Bentham's theory dominates importance of utility as an outcome, Kant considers the importance of moral principles regardless of their consequences in particular contexts. Where Bentham accepts some toleration of swapping some rights in pursuit of the maximization of utility, Kant persists on the obligation to respect every individual as an end in him or herself.

However, all of the presented ethical theoretical approaches have some limitations; no one in itself provides a perfect guidance in every situation, each of them finds its own areas of application which are more practical and useful to be applied following the dictum of the specific case and situation. In spite of many differences among the various theoretical conceptions all of them are interconnected by generally accepted universal human values, principles and norms which are more or less respected and observed by everybody and everywhere. As it is emphasized and put into our attention by Jan Vajda,[8] this common foundation which ought to be followed as the leading principle for the code of behavior of all human beings in all spheres of our life should be *the basic principle of humanism, the principle of justice and fairness, and the principle of honesty and meticulousness* which cover in themselves a deep awe and respect not only to all human beings, peoples, nations, one's own homeland, love and respect to freedom and qualities of other individuals, but at the same time they articulate responsibility and a deep respect and esteem towards all alive creatures, natural world and the entire environment around us. In its essence the principle of humanism is many-dimensional highlighting qualities of human being, which ought to be placed at the top of the value pyramid, expressed by Kant's words: "Act so as to treat humanity in oneself and others only as an end in itself, and never merely as a means; …the freedom of the agent…can be consistent with the freedom of every other person according to a universal law…" (KANT, 1983: XIX, 39), or by the well-known classical Biblical ruling "to regard a neighbor's interests as we do our own".

As it has been already mentioned before, it is without any doubt that global changes have an evidence of their progression and thus shaping the world around us, especially, by exercising deep impacts on the state governments and public administrations, and in this

[8] Ján Vajda, a Slovak scholar and ethicist is the author of his famous *Introduction to Ethics* published in 2004 in Slovakia.

way directly influencing citizens as they are the citizens who are most closely interconnected with them. Decisions taken by public servants and dignitaries affect considerably the fulfillment of individual and collective needs. The time of economic transformation in Central and Eastern Europe was a period which left enough room for unethical deeds and actions in the area of public administration. Carrying out public services leads to many situations that put the individual against difficult choices, either to gain personal advantages, which are a big temptation, or to be honest and serving their society following the public interest. Furthermore, even when people know the right thing to do, they often find it difficult to do because of the environmental pressures; it might be the pressure from society, group, organization or institution.

Another thing is that even when they are aware that they are facing some ethical dilemma, cognitive limitations and biases often limit their ability to make the best moral judgment. We have to be frank and we have to admit that there are such situations when it is hard to take the proper stance and to decide. Therefore, a certain kind of standardized European system of socio-ethical norms and guidance in decision-making processes is necessary. The European proper standard system of values, principles and norms seems to be very urgent mainly in the public administration which plays the most decisive role in future of the European integration processes since there are the quality and effectiveness of ethical values and norms which are creating conditions for the decent and human social order in all aspects of life. To acquire ethical standards and values means setting up some definite determinants this might lead and regulate individual relations among people. Social trust and ethical standards produce the most fundamental elements of the needful European social capital.

At present it is generally accepted that there is a crises of values and authorities affecting nearly every sector of public life, that's why there is a pressing need to seek new ways of motivation in carrying out our professional duties. In this connection a certain kind of revival of ethics initiatives have increased and have their continuation since 1970s, especially in the USA and some Western countries. At present some initiatives have been slowly finding their place in Eastern European countries as well. There is no doubt that at present the quality and effectiveness of public affairs management comes to the fore and it is extensively debated and evaluated by scholars as well as by practitioners.

The right to good administration which is guaranteed by *the Charter of Fundamental Rights of the European Union* in paragraph 41 refers to the right to good administration. It says: "Every person has the right to have his/her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union." Besides that, the right to participate actively in public matters governance is guaranteed by the majority of the European countries constitutions, e.g. the right of the Slovak citizens to take part in public matters is stated in Article 30 of the Slovak Constitution. The comprehensive analyses of the Article is presented in monograph *Proceeding on Legal Regulations Control before the Constitution Courts of the Slovak Republic and the Czech Republic* by Julia ONDROVÁ. Further on, she accentuates in her article *Constitution Relevant Conflict Interpreted by the Constitution and/or by Constitution Law* to respect rights and duties by all administrative bodies as it is stated by the Constitution and law (ONDROVÁ, 2013: 138). Besides the legally stated rights to good administration, the direct participation of all subjects by means of direct democracy plays one of the most decisive roles. The difference between the legally stated norms in comparison to moral and ethical norms consists in reality that they are stated by the norm – creating authority and consequently they comprise in themselves a kind of binding enforcement including sanctions and punishment. Anyway, between morals

and law there are dual interrelated complementary relations who in many aspects complement and adjust each other (GEFFERT, 2010: 210). Besides that, public administrators should have strong obligations to self, democracy, general welfare, and humanity and at the same time they should have strong obligation to Constitution, laws, organization-bureaucratic norms, and professionalism. This is the appropriate balance that should always be observed in terms of ethical administration.

Finally, concerning good administration it would be convenient to mention one of the recent ethical theories of the Slovak scholar Vasil Gluchman which might create a serious theoretical ground for the practical application in the area of public administration. It combines in itself universal validity of moral and ethical values and principles, but not excluding a certain kind of *moderate situation relativism* which is applicable mainly in decision-making processes. Moderate situation relativism put a special importance on taking into consideration the significance of the particular and specific contexts which might decisively influence our taking decisions. His theory is called *ethics of social consequences*; the core of his theoretical thinking is his theoretical conception of the crucial social consequences on individual human beings and their social and natural environment caused by the moral subjects' decisions. Furthermore, he stresses the importance of the traits of moral subject character, such as his views, attitudes which play a decisive role in moral subject's decision-making processes directly influencing his actions and deeds which might have had an unprecedented impact on conditions of people's life and the locality where they live. In the ethics of social consequences the priority is given to action consequences, motives and intentions are the subject of investigation, especially, in connection with the negative social consequences. The positive moral social consequences to which the action of the moral subject should be aimed at constitute the highest principle of the ethics of social consequences. Positive social consequences create good resulted from right and just decision-making which is in accord with the principle of humanity and human dignity. To reach goodness is not achievable without justice. Goodness is in compliance with the highest moral principle which is aimed at the fulfillment of human being happiness guaranteeing for people peace, social security, providing them with feelings of satisfaction and safety.

So at the beginning of the 21st century *the ethical theory of positive consequences* might be the answer in which way to drive the European ethical integration in order to foster the creation of such conditions which would assure fulfillment of decent economic, social, cultural, spiritual, family and professional aspirations for as many people as it is possible to achieve. The basic Moral Code of the European Public Administration regarding their decisions is to eliminate to minimum negative consequences and to promote positive ones to maximum.

4. Ethical Decision-Making Processes in Public Administration

Having in mind the importance and impacts on the general public of taking decisions in public administration, it is necessary to follow the main idea of public administration, and that is to serve citizens and to pursue general welfare of a community in order to fulfill one of the most important factors in public administrative processes to respect and defend public interests which must be guaranteed by means of these processes. Another factor important in taking decisions is necessity to avoid irrationality of spontaneous-immediate-deciding, which might be determined and influenced by one's personal character traits, tensed situation, operating working voltage or by a specific social background of a definite organization, as it is emphasized by many authors and ethicists, it is necessary to take

decisions which are based on the rational thinking and reasoning. The theory of taking eight linear steps elaborated by Linda Treviño and Katherine A. Nelson regarding taking decisions in the area of business might be applicable to public administration as well.

The first step is defined as "Gathering the Facts", it concerns with gathering necessary data and facts required for the objective, proper and impartial decision in order to solve the problem in question. Sometimes it is not so easy to find out all needful information and facts, but in spite of limitations of this first step, we have to try to bring together all facts which are available.

"Define the Ethical Issues" is the second step in order. The aim of this second step is to avoid quick decisions and solutions of problem-areas without taking into consideration all ethical and moral aspects. To solve occurred dilemma of our deciding, the deontological, or the principle-based theory or other theories discussed above might help us. While virtue ethics would suggest thinking about the ethical issues in terms of community standards, a consequentialist approach would think about ethical problems in terms of harms or benefits. The dilemma might be helped to be solved when we present the problem to our colleagues who might help us to see the matter-in-question from a different angle.

The third step covers the art of empathy known as "Identification of the Affected Parties". It means to try to see the problem from the point of view of the citizen who comes with his/her complains problems and objections. This is especially important in the case of public administration since one of their main goals is actually the need to deal with issues important for citizens and communities in the best possible way. Empathy or *role taking method* as it is called by Lawrence Kohlberg finds its practical relevance in decision-taking processes in various organizations and institutions including public administration as well. This theoretical and practical approach is based on moral reasoning to see the situation through others' eyes in order to take into consideration all affected parties and to comprehend the particular situation from different perspectives. In this theory the Golden Moral Rules incorporated "treat others as you would like others to treat you, or try to put yourself in their shoes" (TREVIÑO, 2010: 96–97).

The fourth step concentrates on "Identification Consequences" of our decision. This step is derived from the consequentialist approaches. The impacts on citizens and community have to be identified and in our decisions we have to try avoiding particularly negative ones, at least to minimize the negative ones. Here the application of the approaches of ethics of social consequences is relevant.

Step five gives attention to "Identification of Obligation" which are indispensably to be fulfilled, e. g. obligations towards community, the affected parties of our decisions and the people involved.

Step six points to "Consideration of Character and Integrity", meaning whether we will feel comfortable if our decisions are disclosed and made public. Public Administration decisions have to be transparent, open, fair, objective and unbiased. Linda Treviño and Katherine A. Nelson used the words of Thomas Jefferson to express the spirit and real meaning of this level of decision-taking: "Never suffer a thought to be harbored in your mind which you would not avow openly. When tempted to anything in secret, ask yourself if you would do it in public. If you would not, be sure it is wrong." (TREVIÑO–NELSON, 2010: 9)

Step seven emphasizes "Creativity in Thinking regarding Potential Actions". Before taking any decision it is good to think over all alternatives into consideration and to choose the best one. Being the representative of public administration we cannot allow to be forced to the corner by some interest groups, individuals, even bound by some measures which are

usually being applied in similar cases, it is always wiser to focus on finding out even if different but more proper equivalent.

The seven step concerns with not excluding ones "Intuition and Insight Perceptions" means to be sensitive to situations where something is not quite right. If facing ethical dilemma it is advisable to combine our inner intuition with rational thinking. Nevertheless, we have to say that the ethical decision in public administration is not always a linear process and the presented steps of decision-taking might be useful only as a kind of guide, inspiration or a helpful tool to make public administration decisions more accurate and righteous.

Finally we can conclude our short discourse in ethics using the words of Linda Treviño and Katherine Nelson that "ethics is not about connection we have to other being – we are all connected – rather, it is about the quality of that connection" (TREVIÑO–NELSON, 2010: 18).

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THE MIGRANT CRISIS EFFECTS ON THE RELATION BETWEEN TURKEY AND THE EU

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1. Introduction

As far as the relation between EU and Turkey is concerned, they have a long past. Turkey's desire to join the EU has stretch for more than 40 years as negotiations began and it still continues till this day. Turkey is a founding member of the United Nations (1945), a member of NATO (1952), the Council of Europe (1949), the OECD (1960) and the OSCE (1973) and was an associate member of the Western European Union (1992).

On the 31st July 1959, Turkey made its first application to join the newly-established organisation. The Ankara Agreement, signed on the 12th September 1963 started relation between Turkey and the EU. The aim of the Ankara Agreement, as stated in Article 2, was to promote the continuous and balanced strengthening of trade and economic relations between the parties. After the Customs Union's decision, Turkey-EU relation entered in a totally new dimension as it was one of the most important steps for Turkey's EU integration objective.

Unfortunately, the EU has highlighted many negative reasons objecting to the joining, such as human rights' problems, immigration problems and also the Kurdish problem in Turkey. Recently, on the 100th anniversary of the Armenian Genocide, the EU passed a non-binding agreement asking Turkey to recognize the Armenian Genocide. This was also followed by some EU Member States, like Germany and Austria, recognizing the genocide. This has not gone well with Turkey and the diplomatic ties have soured.

The dispute over human rights is not a new one. Turkey has been monitored under the lens due to its historical past and recent crackdown on opposition parties, press and the judicial system. The EU has locked the concerned chapters which form critical part of the 35 chapters, which a country must fulfill for the membership. Although there are issues in the process, we have to look at the bigger picture, the economic future for EU and Turkey and the other alternatives.

In March 2016, EU and Turkey reached a deal to solve the ongoing migrant crisis. Under this deal, the two nations would work together and any migrants arriving in Greece, who fail to apply for asylum or have their claim rejected would be sent back to Turkey. However, for each such Syrian returned, EU would accept a Syrian refugee from Turkey. The deal also came with promises for visa liberalization, financial aid to Turkey to improve care of the Syrian refugees to the tune of $3.3 billion and speeding up the Turkey's bid to join EU.[1]

The deal reduced the inflow at EU borders, however the sequence of events in the following months like the failed military coup in Turkey,[2] Turkey's crackdown over the journalists, soldiers or anyone possessing critical views towards the government or having

[1] Migrant crisis: EU-Turkey deal comes into effect. http://www.bbc.com/news/world-europe-35854413

[2] Turkey coup 2016 explained: What happened and what is a military coup? http://www.mirror.co.uk/news/world-news/what-happened-turkey-attempted-coup-8432395

any trace of association with Fethullah Gülen the US based cleric considered responsible by Turkish government for the failed coup,[3] have escalated the tensions between the two. Concerned, the EU has sought changes in anti-terror laws used by the Turkish government for crackdown and made the changes a pre-requisite for any visa liberalization for the Turkish citizens. However, the same law is considered as necessary by the Turkish government and any such criteria for visa liberalization by the EU is viewed as dishonoring the promises which in the eyes of Turkish officials is as good as bringing an end to the migrant deal itself.

In connection with the Anti-Terror Law in Turkey, the so called TMY, which the EU has asked Turkey to change according to the EU, this law interprets too widely the definiton of terror. It is not a new criteria of the EU. Turkey and the EU in 2013 made an agreement in connection to turkish anti-terror law. It is one of the criteria from the EU to give the visa liberation to Turkey. Turkey said that because of the current situation in Turkey, like the failed coup on the 15th of July, it is not the right time to change the laws, when the terror situation in Turkey is very high.[4] The EU was very concerned about the state of emergency in Turkey which was extended by President Erdogan for another 90 days.[5] As part of this paper, I would examine the migrant crisis and how it is impacting the relations between Turkey and EU.

2. Importance of the migrant agreement

Since January 2015, the EU has been struggling with mass influx of migrants coming from various war torn countries including Syria, Afghanistan, Iraq, Somalia and other countries. The extent of the crisis could only be understood by the fact that by March 2016, more than one million migrants had attempted to reach the EU from Turkey. A large number of these migrants have taken the dreadful journey over the Mediterranean Sea with more than 460 loss of life according to the datas of the International Organization for Migration.[6]

This irregular migration to Europe has been described as the biggest crisis the region has seen since 1945.[7] The inflow has been overwhelming and has divided the EU over the management with approach varying from identifying and accepting some of the asylums seekers and setting migrants' distribution quota by the EU for Member States[8] to some countries setting up border controls to some Eastern European countries like Hungary, protesting the quota and sealing their borders to restrict the inflow of migrants.[9]

However despite the measures in place the migrants continued to arrive at the EU borders with over 143,000 arriving in first three months of 2016 itself. In addition, with the increasing causalities of migrants attempting to cross sea to reach Greece or Italy, the human right activists, UN appealed for opening up the borders and requested for an empathetic approach.

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3 Turkey Targets Gulen Followers; Dismisses Military Personnel and Closes Media Outlets. http://thewire.in/54551/turkey-targets-gulen-followers-dismisses-military-personnel-and-closes-media-outlets/

4 Vize pazarlığında son durum. http://www.hurriyet.com.tr/vize-pazarliginda-son-durum-40228719

5 Avrupa'dan OHAL uyarısı: Normale dönün. http://www.hurriyet.com.tr/avrupadan-ohal-uyarisi-normale-donun-40242886

6 Migrant crisis: EU-Turkey deal comes into effect. http://www.bbc.com/news/world-europe-35854413

7 Migrant crisis explained in numbers. https://www.ft.com/content/7f7e0d28-5225-11e5-8642-453585f2cfcd

8 Relocation quotas. http://www.economist.com/blogs/graphicdetail/2015/09/europe-s-migrant-crisis

9 The Great Wall of Europe: Hungary splits continent in two with huge fence to stop migrants. http://www.express.co.uk/news/world/648269/Hungary-plan-fence-border-Romania-migrants-refugees-crisis-Viktor-Orban-Schengen

With pressures from all sides, the EU worked with Turkey to resolve the issue and in March 2016, migrant deal came into place.

The deal is of paramount importance for both the EU and Turkey. The deal mentions about returning any irregular migrant entering Greece from Turkey post 20th March. Though the asylum claim would be processed on an individual basis but this meant all migrants travelling by sea to be returned which till now have been huge in number. In addition, the deal had provision: the one for one exchange for migrants i.e. any Syrian migrant reaching Greece, who fails to apply for asylum or whose claim is rejected would be returned to Turkey. While in exchange, EU would accept a Syrian refugee from Turkey. However, important thing to note that even then the number is capped at 72,000[10] which is very low compared to the influx of millions of migrants, the EU has been dealing with. Additionally, the deal automatically discourages the illegal migrants from travelling to EU or risking their life over the sea in pursuit of asylum in EU.

On the other hand, the promises coming with this deal to Turkey are critical and fall in line with its long possessed ambitions. One of the important provisions of the deal is the visa liberalization i.e. Turkish nationals would get access to the Schengen passport free zone by June. The other important provision of the deal is the promise to speed up the Turkey's EU accession. As part of this, new chapters required for EU membership candidate are to be opened up. Both the provisions are what Turkey has sought for decades i.e. to work closely with EU and be part of EU, the membership which Turkey officially applied for in 2005.[11] In addition to the abovementioned provisions, the country would get aid to the tune of $3.3 billion from EU to help support the Syrian refugees on its soil.

3. Implementation of the deal and its impact on EU Turkey relations

Though the deal came into effect in March 2016, the implementation of the deal has run into various hiccups for either side which have varied from logistics to human rights concerns.

The first obstacle came from the logistics point of view. As part of the deal, migrants reaching Greece need to be held up, their requests processed and if their asylum claim is rejected, they need to be returned to Turkey. However, as soon as the deal was announced, Greece lacked the officials to process the asylum requests. Around 2300 exports including security, migration officials and the translators were required to handle the process. In addition, there was no process in connection with sending the rejected applicants back. The deal coming into effect also meant that huge number of migrants seeking asylum in Germany were now stuck in Greece. The deal along with measures against the people smugglers across the Turkish coast is considered to have stemmed the inflow of migrants to EU. The number of migrants reaching Greece on a given day dropped down to 50 in May 2016 compared to 6,800 a day in October the peak of migrant crisis. Though, the number of migrants reaching dropped but just 30% of the asylum claims were rejected which was unexpected because as per the deal all the migrants coming from Turkey were illegal and

[10] Migrant crisis: EU-Turkey deal comes into effect. http://www.bbc.com/news/world-europe-35854413

[11] Turkey's long road to EU membership just got longer. https://www.theguardian.com/world/2016/jul/20/turkeys-long-road-to-eu-membership-just-got-longer

needed to be returned to Turkey. With the process being slow, the asylum applicants continue to pile up and be held in the detention centers.[12]

In June 2016, Turkey had a failed military coup, where faction of Turkish armed forced used tanks and arms to bring down President Tayyip Erdogan. As part of the coup, nearly 265 people were killed including civilians, pro-government forces and the plotters.[13] Turkish government blamed Fethullah Gülen, US-based cleric for attempting to bring down the government. It also initiated a crackdown against anyone found having any trace of association with Gülen or possessing critical views against the government. As part of the crackdown, more than 131 media outlets were shut down,[14] more than 32,000 people were put behind bars, in addition to 100,000 plus individuals, who were dismissed from their jobs in security and civil services. Even the top military officials were not spared amounting to roughly 40% of all generals and admirals in Turkey's military.

The coup and crackdown however, strained the Turkey EU relations. Turkish government felt a delay in any support or response from the EU despite the huge number of deaths of civilians and pro-government forces. While European leaders raised concerns over the crackdown carried out in response to coup by the Turkish government. The EU sees this as increasing concentration of power in Erdoğan's hands and the EU members have become concerned about the rule of law in Turkey and have sought changes in anti-terrorism laws, which are deemed too broad and oppressive for European standards. In addition, the EU is concerned about the direction Turkey is taking under President Tayyip Erdoğan i.e. the target of shifting Turkey to an executive presidential system, role of Turkey in Syria, Iraq and Ankara's relations with Moscow.[15] The situation is so dire that Austrian government, Nicolas Sarkozy (French's presidency candidate) have stressed the need to end Turkey membership talks citing the country's attempt to flout EU policies.

Following the events described above, EU sees the changes in anti-terror laws as a prerequisite for allowing visa free access to the Turkish nationals. Additionally, the EU despite its promises to speed up the EU accession process for Turkey has been reluctant due to the human rights issues and out of opened chapters only one has been closed and the only new one chapter opened was on finance and budgetary affairs.[16] However, the progress is seen as very slow and recently Turkish EU Affairs Minister Omer Celik raised that these requirements of changes in anti-terror laws translate to EU not honoring its part of the deal and if by the end of year the visa related provisions of the deal were not implemented, Turkey would stop the readmission of migrants. Celik added that Turkey has done its part and the results can be seen already by looking at the number of illegal arrivals on the Greek islands which has dropped to 20–30 people a day way down from 7,000 in 2015. Çelik also raised that the only way to save the deal would be to engage in a dialogue.

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[12] Greece Struggles to Return Migrants Under EU-Turkey Deal. http://www.wsj.com/articles/greece-struggles-to-return-migrants-under-eu-turkey-deal-1463653671

[13] Prime Minister says 265 people killed in attempted military coup, including at least 100 ʻplotters'. http://www.independent.co.uk/news/world/europe/turkey-coup-dead-erdogan-military-chief-ankara-istanbul-death-toll-plotters-how-many-killed-wounded-a7140376.html

[14] Turkey dismisses military, shuts media outlets as crackdown deepens. http://www.reuters.com/article/us-turkey-security-journalists-idUSKCN1070NO

[15] Britain and Turkey talking about the future of the EU? http://www.hurriyetdailynews.com/britain-and-turkey-talking-about-the-future-of-the-eu.aspx

[16] EU opens new chapter in Turkey membership talks. http://www.middleeasteye.net/news/eu-opens-new-chapter-turkey-membership-talks-49617643

In such times of refugee crisis and their rehabilitation across EU countries, there is a growing sense of fear and xenophobia among the people. The situation in Turkey is not helpful. It was in fact the possibility of Turkey being given visa free travel to Schengen area and the inflow of migrants it might bring that dominated the Brexit debates and later Britons choosing to vote in favor of UK leaving EU.[17]

4. Turkish Constitution and the problams related to freedom of press

If we like to understand the difficulties between EU and Turkey, we need to look at the media/ press problems in Turkey right now, which is also a topic that makes EU worried. Understanding constitution is important, as in recent years, it has been misused by government to suppress freedom of expression in the name of protection of nation's sovereignty, unity, law and order or even national security. The Preamble of the constitution focuses on the sovereignty of the nation and its unity. The State attempts to achieve an everlasting existence with prosperity, spiritual and material well-being of the nation and be an honorable member of world nations and enjoy equal rights.[18] The Preamble gives utmost importance to the will of the nation. Though the sovereignty is unconditional and a core requirement of the nation. But anyone trying to preserve sovereignty shall not deviate from the liberal democracy which is provisioned in the constitution.

The constitution very clearly mentions that any activity which is against the Turkish national interests, its existence, unity, values shall not enjoy any protection. In addition, constitution is strict about preserving secular principles and mentions that politics should not be mixed with any religious feelings. Constitution grants each and every citizen rights to live an honorable life and improve his or her economic and spiritual well-being while following the rule of law and exercising various freedoms and rights granted to the citizen. All citizens share responsibility towards the nation and enjoy right to demand a peaceful life and live with mutual respect and understanding. Regarding the freedom of expression, the article 26 in constitution gives every individual the right to express and share his/her opinions through various communication mediums. Though these freedoms can be restricted if they endanger national security, law and order, nation's unity. Regulatory provisions do not form a part of these restrictions. In addition, for freedom of press and publications, the article 28 in constitution gives press all the freedom and mentions that the same shall not be censored. Limitations maybe imposed only based on conditions cited in article 26, 27. These include any news or articles which can compromise the national security and its boundaries, instigate riots or reveal state secrets. Distribution of media maybe limited or delayed if deemed necessary based on above conditions and requires orders from the judge. Though in case of ongoing criminal investigations, the periodical or non-periodical publications maybe seized. The article has provisions which allow temporarily suspension of periodicals in case of violations with respect to the content but if the violations persist over a period of time, the same shall be seized by decision of a judge. With regards to protection of printing facilities, article 30 in the constitution safeguards the printing house and its equipment against seizure or restriction from operation on the basis of having been used in a crime. In recent years, the freedom of press has deteriorated in Turkey. As part of this section, we look into the state of media and attempt to analyze the

[17] Britain's 'Brexit' Debate Inflamed by Worries That Turkey Will Join E.U. http://www.nytimes.com/2016/06/14/world/europe/britain-brexit-turkey-eu.html

[18] Constitution of the Republic of Turkey. http://global.tbmm.gov.tr/docs/constitution_en.pdf

reason behind this worsening of the state. In August 2015, following the breakdown of the Kurdish peace process, the media came under attack. One such instance was the three journalists of *Vice News*, who were taken into detention in response to their reports from South-East Turkey which is known for Kurdish presence. Months later in October 2015, as the run up to the elections, the government had carried out investigations to identify ties of the journalists and media houses with the US based Islamic cleric, Fetullah Gulen, who is accused by the government for attempting to destabilize the state. Based on the reports and various government suspicions, the media was severely attacked by the government. Turkish daily Hurriyet columnist, Ahmet Hakan, was physically attacked. While Media house, Koza-Ipek, was seized and based on the court orders it was to be placed under the management of the trustees. The situation was seen as crackdown on media. Following these events, editors from world leading media groups including *The New York Times*, *Agence France-Presse* and *Germany's ARD* among others collectively as part of World Association of Newspapers and News Publishers expressed concern over the worsening freedom of press in Turkey. They requested that the Turkish President, Recep Tayyip Erdogan, has to look into the situation and ensure freedom of speech for both citizens and the journalists and they be allowed to work without any obstacles.[19] In addition, European Commission raised concerns about the situation, that is crucial and it is in-fact critical for Turkish membership to the European Union. Turkey must ensure human rights including right to free speech. Human Rights Watch (HRW) group in its recent World report mentioned that after the November elections, President, Recep Tayyip Erdoğan, has indulged in policies which violate human rights, the rule of law and undermined democracy. Researcher at HRW raised concerns that Turkey is moving towards authoritarianism and is dismantling institutions which had the potential to keep a check on the leaders and their policies. A part of the process has been to defame the opposition. In last few months, there have been growing tensions between Russia and Turkey around Syrian war and accusations have been made that Turkey is providing arms to the Islamic State. Any effort by the journalists to uncover the truth has been seen as a violation and an action against the national state itself. Journalists Can Dündar and Erdem Gül were arrested in November for news report, which exposed truck laden with arms on their way to Syria.[20] The HRW report also highlighted that critical reporting be it by journalists through media houses or by ordinary citizens using social media has faced actions like defamation charges and convictions and even job loss. The legislation of the Internet bill, which allows government to block websites without any court order, is considered a big blow to the exchange of information. The government is widely criticized for blocking Twitter accounts and YouTube, the ban which lasted more than 2 years. In Dec 2015, European Court of Human Rights in its ruling mentioned that the ban on YouTube had violated freedom of expression and transmission of information.[21]

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[19] Editors from dozens of countries sound alarm on media freedom in Turkey. http://www.theglobeandmail.com/news/world/editors-from-dozens-of-countries-sound-alarm-on-media-freedom-in-turkey/article27046546/

[20] Rights violations, media crackdown deteriorating in Turkey. http://www.platform24.org/en/articles/343/rights-violations--media-crackdown-deteriorating-in-turkey

[21] Turkey YouTube ban violated freedom of expression: Europe court (Update). http://phys.org/news/2015-12-european-court-slams-turkey-youtube.html

5. Conclusion

The Syrian crisis is one of the main world problems nowadays, especially for Turkey because it will determine its economic position. Besides the human rights issues, there are many other significant problems in Turkey right now, which makes it even more difficult for the country to change its perception on the media. In such an atmosphere, as Turkeys image on the world stage deteriorates, Turkey would find it extremely difficult to mobilise its own public relation system in order to win hearts and minds.

The migrant deal which in recent times has escalated tensions between the two countries must be evaluated by the involved parties both the EU and Turkey separately and together. As Turkish EU Affairs Minister Omer Celik highlighted: the only way to save the deal would be to engage in dialogue. Some of the promises made like visa fee travel, speeding up the EU accession for Turkey do not seem reachable with current set of Turkish laws and human right violations. The two have to discuss, identify achievable targets and be willing participants to an eventual agreement.

The two nations have to work together and keep in mind the important relation they share with each other. For Turkey, EU is largest trading partner and with ongoing war in its neighbor's territory, it needs all the investment it can. While EU which has enjoyed the taste of migrant deal for months would not like to see any severing of ties with Turkey and the migrant issues any such event may unfold. Turkey and the EU must continue co-operation over security, migration, trade. The accession talks could lead to Cypriot reunification. EU Member States must regroup and review the promises as they may have to give in if Turkey keeps its end of the deal for visa liberalization.[22] Dialogue and co-operation is the only way ahead for both the nations.

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[5] *Migrant crisis explained in numbers.* https://www.ft.com/content/7f7e0d28-5225-11e5-8642-453585f2cfcd (Downloaded: 22. 10. 2016)

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[7] *The Great Wall of Europe: Hungary splits continent in two with huge fence to stop migrants.* http://www.express.co.uk/news/world/648269/Hungary-plan-fence-border-Romania-migrants-refugees-crisis-Viktor-Orban-Schengen (Downloaded: 22. 10. 2016)

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[15] *Avrupa'dan OHAL uyarısı: Normale dönün*. http://www.hurriyet.com.tr/avrupadan-ohal-uyarisi-normale-donun-40242886 (Download: 17. 10. 2016)
[16] *Vize pazarlığında son durum*. http://www.hurriyet.com.tr/vize-pazarliginda-son-durum-40228719 (Downloaded: 17. 03. 2016)
[17] *Constitution of the Republic of Turkey*. http://global.tbmm.gov.tr/docs/constitution_en.pdf (Downloaded: 22. 03. 2016)
[18] *Editors from dozens of countries sound alarm on media freedom in Turkey*. http://www.theglobeandmail.com/news/world/editors-from-dozens-of-countries-sound-alarm-on-media-freedom-in-turkey/article27046546/ (Downloaded: 22. 03. 2016)
[19] *Rights violations, media crackdown deteriorating in Turkey*. http://www.platform24.org/en/articles/343/rights-violations--media-crackdown-deteriorating-in-turkey (Downloaded: 22. 03. 2016)
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THE DEVELOPING EUROPEAN CRIMINAL POLICY*

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1. Introduction

One of the main principles of the functioning of the European Union is the *principle of conferral*, according to which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties. The Founding Treaties of the European Communities originally did not contain any express provision in connection with criminal law; therefore it was a common opinion for a long time that the European Communities did not have legal competence in criminal matters. However, it cannot be said that Community/EU law and national criminal law were entirely independent of each other. Due to several factors, criminal law is increasingly becoming the focus of European legislation and European legal instruments already exert influence on the existing national legal frameworks of substantive criminal law and criminal procedure law. With the reformed and renewed framework of the Treaty of Lisbon, this tendency will be even stronger in future.

Although it can be stated that national law is heavily influenced by EU law, the Union still failed to acknowledge criminal policy as an autonomous European policy. However, after the adoption of the Treaty of Lisbon, *European criminal policy* slowly began to develop.

In 2009, an expert group called *European Criminal Policy Initiative* published the *Manifesto on European Criminal Policy*[1] in which it tried to draw up a balanced and coherent concept of criminal policy.[2] The document listed the *fundamental principles of the European criminal law* (the requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt, the principle of legality, the principle of subsidiarity and the principle of coherence). These principles should be recognized as a basis for every single European legal instrument dealing with criminal law.

After the adoption of the Manifesto, the EU institutions also acknowledged the risk of the lack of a coherent European criminal policy and adopted several documents. In these – non-binding – communications and conclusions, the *European Commission*,[3] the *Council*[4]

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1 Manifesto on European Criminal Policy. *Zeitschrift für Internationale Strafrechtsdogmatik*, 12/2009, 707–716.

2 SATZGER, Helmut: Der Mangel an Europäischer Kriminalpolitik. Anlass für das Manifest der internationalen Wissenschaftlergruppe "European Criminal Policy Initiative". *Zeitschrift für Internationale Strafrechtsdogmatik*, 12/2009, 692–693.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law [COM (2011) 573 final, 20. 9. 2011].

and the *European Parliament*[5] also refer to the guiding principles of the European criminal law and intend to delineate guidelines for the future criminal legislation. These documents can be regarded as the first steps of a European criminal policy, which is indispensable for a coherent criminal legislation at the EU's level.

In this article, we intend to present some of the guiding principles of the nascent European criminal policy. Of course, each of these principles can be analysed from several points of views; therefore this paper will only focus on their relevant aspects relating to the European criminal law.

2. The requirement of a legitimate purpose, the ultima ratio principle and the subsidiarity principle

The first three general principles have very close relation to each other. Each of these principles intends to answer the question: when, under which conditions the EU is entitled to use criminal law measures, while the other principle we will mention below primary focus on the requirements of the content of the criminal measures.

The *requirement of a legitimate purpose* guarantees the *legitimacy of criminal law*.[6] According to the Manifesto, the EU legislator can only exercise its criminal competences in order to *protect fundamental interests*, if (1) these interests can be derived from the primary legislation of the EU; (2) the Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamentals Rights are not violated, and (3) the activities in question could cause significant damage to society or individuals.[7]

According to the *ultima ratio* principle, criminal law only can be used as a *last resort*.[8] That means European legislator may only demand an act to be criminalised if it is necessary to protect a fundamental interest, and if *all other measures have proved insufficient* to safeguard that interest.[9] It means criminal law should be reserved for the most serious invasion of interests since less serious misconducts are more appropriately dealt with by civil law or by administrative sanctions.[10]

Under the *principle of subsidiarity*, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[11] It means that EU legislator may take action only on the condition that the goal pursued (1) cannot be reached more effectively by measures taken at national level and (2) due to its nature or scope can be better achieved at European

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4 Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations [16542/2/09 REV 2, 27. 11. 2009].

5 European Parliament resolution of 22 May 2012 on an EU approach to criminal law [2010/2310(INI) – P7_TA (2012) 208, *OJ C*, E 264, 22. 05. 2012. 7–11].

6 KAIAFA-GBANDI, Maria: The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law. *European Criminal Law Review*, Vol. 1/1 (2011), 14.

7 Manifesto on European Criminal Policy, 707.

8 See further: LUKÁCSI Tamás: Az *ultima ratio* elve az Európai Unió jogában. *Állam- és Jogtudomány*, 2015/2, 20–46.

9 Manifesto on European Criminal Policy, 707.

10 HERLIN-KARNELL, Ester: Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause? *European Law Journal*, Vol. 15/3 (2009), 356.

11 Article 5(3) TEU.

level. According to the subsidiarity principle, EU can only fulfill the tasks that cannot be fulfilled effectively by actions on local, regional or national level. It has to be ensured that the decisions will be taken as closely to the citizens as possible.[12]

These principles require the EU legislator to *prove the necessity of the application of criminal measures* at EU law. Criminal law has to signify an *added value* compared to other less restrictive measures.[13]

These principles similarly appear in the documents of the EU institutions. According to the *European Commission*, a two steps approach has to be followed when taking the decision on criminal law measures: first the EU legislator have to decide whether to adopt criminal measures at all and second the legislator have to choose the kind of criminal law measures to adopt. When examining the necessity of the criminal measures the legislator needs to analyse whether measures other than criminal law measures, (e.g. sanction regimes of administrative or civil nature), could not sufficiently ensure the policy implementation and whether criminal law could address the problems more efficiently. This will require a thorough analysis in the Impact Assessments preceding any legislative proposal, including for instance and depending on the specificities of the policy area concerned, an assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground. To establish the necessity for minimum rules on criminal law, the EU institutions need to be able to rely on clear factual evidence about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardise the effective enforcement of an EU policy subject to harmonisation. That is why the EU needs to have at its disposal statistical data from the national authorities that allow it to assess the factual situation.[14]

Correspondingly to the Commission the *Council* also emphasises that criminal law provisions should be introduced when they are considered essential for the interests to be protected and, as a rule, be used only as a last resort. For the maximal compliance to the *ultima ratio* principle, the EU legislator has to examine (1) the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to investigate and prosecute the crime through reasonable efforts, as well as its seriousness and implications; (2) how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU; and (3) the possible impact on existing criminal provisions in EU legislation and on different legal systems within the EU.[15]

According to the *Parliament*, the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence. It have to be made clear that (1) the criminal provisions focus on conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals; (2) there are no other, less intrusive measures available for addressing such conduct; (3) the crime involved is of a particularly serious nature with a cross-border dimension or has a direct negative impact on the effective implementation of a Union policy in an area which has been subject to

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[12] ASP, Petter: *The Substantive Criminal Law Competence of the EU*. Jure Bokhandel, Stockholm, 2012, 184; VALKI, László: Az Európai Unióhoz csatlakozó államok szuverenitása. *Európai Tükör*, 1997/3, 90.

[13] See: HECKER, Bernd: *Europäisches Strafrecht*. Springer Verlag, Berlin–Heidelberg, 2012, 281; SIMON, Perrine: The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy. *New Journal of European Criminal Law*, Vol. 3/3–4 (2012), 252.

[14] Communication from the Commission, 7–8.

[15] Draft Council conclusions, 4–5.

harmonisation measures; (4) there is a need to combat the criminal offence concerned on a common basis, i.e. that there is added practical value in a common EU approach, taking into account, inter alia, how widespread and frequent the offence is in the Member States, and (5) in conformity with Article 49(3) of the EU Charter on Fundamental Rights, the severity of the proposed sanctions is not disproportionate to the criminal offence.[16]

3. The Principle of Guilt

The principle of guilt requires that the criminalisation of certain acts must be based on the *principle of individual guilt (the principle of nulla poena sine culpa)*. This requirement captures not only the fact that criminalisation should be used solely against conduct which is seriously prejudicial to society *(principle of ultima ratio)*; but that it should also be regarded as a guarantee that human dignity is respected by criminal law.[17] The principle of guilt also has close connection with the *presumption of innocence* enshrined in Article 6(2) of the European Convention on Human Rights[18] and in Article 48(1) of the Charter of Fundamental Rights of the European Union[19] as well.[20]

Until recently in the EU law, the principle of guilt was not an absolute guideline. For a long time, the *judicial practice of the European Court of Justice* does not exclude the possibility of the introduction *of strict criminal liability*.[21] Strict liability can be defined as a criminal liability which requires only the prohibited conduct, irrespectively of the *mens rea* of the perpetrator.[22]

However, the Charter of the Fundamental Rights of the EU, which with the Treaty of Lisbon obtained the same legal value as the Treaties, expressly refers to the principle of guilt. As a consequence, the *Manifesto* also states that the European legislator has to justify that the requirements in European legislation as to the sanctions permits the imposition of penalties which *correspond to the guilt of the individual*.[23] Furthermore, the *Council* also confirms that EU criminal legislation should only prescribe penalties for acts which have been committed *intentionally* or in exceptional cases with *serious negligent*. The criminalisation of an act that has been committed without intention or negligence, i.e., strict liability, should not be prescribed in EU criminal legislation.[24] Similar wording can be found in the resolution of the *Parliament* i.e. the European Union could prescribe penalties only for acts which have been committed *intentionally*, or in exceptional cases, for acts involving *serious negligence*.[25] Therefore, the recognition of the principle of guilt as a

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16 European Parliament resolution, point 3.

17 Manifesto on European Criminal Policy, 707.

18 Article 6(2) of the European Convention on Human Rights: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

19 Article 48(1) of the Charter of Fundamental Rights of the European Union: "Everyone who has been charged shall be presumed innocent until proved guilty according to law."

20 See further: SCHAUT, Andreas B.: *Europäische Strafrechtsprinzipien. Ein Beitrag zur systematischen Fortentwicklung übergreifender Grundlagen*. Nomos Verlagsgesellschaft, Baden-Baden, 2012, 220–231.

21 See for example: Case C-326/88 *Hansen* [1990] ECR I-02911; Case C-7/90 *Vandevenne and Others* [1991] ECR I-04371.

22 KLIP, André: *European Criminal Law. An Integrative Approach*. Intersentia Publishing, Cambridge–Antwerp–Portland, 2012, 203.

23 Manifesto on European Criminal Policy, 708.

24 Draft Council conclusions, 6.

25 European Parliament resolution, point 4.

principle of the European criminal policy could lead to the alteration of the judicial practice of the European Court of Justice.[26]

Beside the strict liability, other problematic question relating to the principle of guilt is the *question of the criminal responsibility of legal persons*. There are Member States who rejects the introduction of criminal responsibility of legal persons because it is inconsistent with the principle of guilt.[27] However, it can be stated that the EU norms clearly respect the national sovereignty of the Member States in this field, because they only oblige them to sanction the legal persons, but does not refer that the sanctions have to be criminal sanctions. Therefore it is up to the Member States whether they fulfill their obligation by means of criminal law or by other less restrictive measures. In connection with the liability of the legal persons, the *Manifesto* only states that rules concerning criminal liability of legal entities must thus be elaborated on the basis of criminal law provisions at the national level.[28]

4. The principle of legality

In order to respect the fundamental rule of law requirements, a criminal law system must adhere to the *principle of legality*.[29] The legality principle is an inherent element and a general principle of the EU law.[30] The principle is formulated in Article 7 of the European Convention on Human Rights[31] and in Article 49(1)–(2) of the Charter of the Fundamental Rights of the EU[32] as well. Furthermore, according to the judicial practice of the European Court of Justice, the principle of the legality of criminal offences and penalties is one of the general legal principles underlying the constitutional traditions common to the Member States.[33]

From the principle of legality four requirements and four prohibitions can be derived: (1) the requirement of the application of the criminal law which was in force at the moment of the perpetration and the non-retroactivity rule *(nullum crimen, nulla poena sine lege praevia)*; (2) the requirement of legal certainty and the prohibition of an uncertain criminal

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[26] KARSAI, Krisztina: *Alapelvi (r)evolúció az európai büntetőjogban*. Pólay Elemér Alapítvány, Szeged, 2015, 74.

[27] KAIAFA-GBANDI: Op. cit. 31.

[28] Manifesto on European Criminal Policy, 708, 711.

[29] Manifesto on European Criminal Policy, 708, 711.

[30] KLIP: Op. cit. 179.

[31] Article 7 of the European Convention on Human Rights: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[32] Article 49 of the Charter of the Fundamental Rights of the European Union: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations."

[33] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633, para 49.

law or sanction *(nullum crimen, nulla poena sine lege certa)*; (3) the requirement of a written criminal law and the prohibition of customary law and judicial law *(nullum crimen, nulla poena sine lege scripta)*; and the prohibition of the analogical application of criminal law *(nullum crimen, nulla poena sine lege stricta).*[34] From the point of view of the European criminal law, the *Manifesto* lists the following three sub-principles: the *lex certa requirement*, the *requirements of non-retroactivity* and the *principle of lex mitior* and the *nulla poena sine lege parlamentaria principle*.

4.1. The lex certa requirement

As it is reaffirmed by the European Court of Justice in multiple cases, the general principle of legal certainty requires that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are.[35] In connection with criminal law, the *lex certa* principle requires that an individual shall be able to predict actions that will make him criminally liable. This means that criminal law provisions must define offences in a *strict and unambiguous way*: (1) the objective and (2) the subjective prerequisites for criminal liability as well as (3) sanctions which could be imposed if an offence is committed have to be *foreseeable*.[36] Criminal law provisions may not be applied extensively to the detriment of the defendant.[37]

The *lex certa* requirement is also emphasised by the European Commission, the Council and the European Parliament. According to *Commission,* the principle of legal certainty requires that the conduct to be considered criminal must be defined clearly.[38] The *Council* states that the description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning[39] and the *Parliament* also determines that the description of the elements of a criminal offence must be worded precisely to the effect that an individual shall be able to predict actions that will make him/her criminally liable.[40]

However, in the European criminal legislation the observance of *lex certa* requirement could be problematic. According to the *Manifesto*, the smaller the margin of freedom at the level of implementation, the more important it is that the European legislative acts satisfy the *lex certa* requirement. If a certain European legal instrument seeks to fully harmonise the proscriptions in the Member States, it should satisfy the *lex certa* requirement in the same way as if it were a criminal law provision.[41] From the provisions of the Manifesto, it follows that it has to be distinguished whether a European criminal law norm was adopted in form of a regulation or a directive. In case of *regulations*, which are directly applicable in every Member States and seek to harmonize entirely the proscriptions of the Member

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[34] NAGY, Ferenc: A nullum crimen/nulla poena sine lege alapelvről. *Magyar Jog*, 1995/5, 257–258. See further: ASP: Op. cit. 168.

[35] See for example: C-209/96 *United Kingdom v Commission* [1998] ECR I-05655, para 35; Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita* [2003] ECR I-05121, para 89; Case C-255/02 *Halifax and Others* [2006] ECR I-01609, para 72; Case C-308/06 *Intertanko and Others* [2008] ECR I-04057, para 69; Case C-345/06 *Heinrich* [2009] ECR I-01659, para 44.

[36] Manifesto on European Criminal Policy, 708.

[37] Joined cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] I-06609, para 25.

[38] Communication from the Commission, 7.

[39] Draft Council conclusions, 5.

[40] European Parliament resolution, point 4.

[41] Manifesto on European Criminal Policy, 708.

States, the *lex certa* requirement naturally has to be satisfied.[42] However a *directive* has to be implemented into the national criminal law; therefore the perpetrator is not held liable based on the supranational norm, but on the domestic criminal norm implementing the provisions of the directive.[43] It is therefore highly questionable whether the directive has to fulfill the requirement of legal certainty. However, the answer to this question has to be 'yes'. The lack of clear delimitation of EU norms would pose a dilemma to national legislators: they either unilaterally adopt a precise definition and risk diverging from the actual objective of the EU and therefore being held responsible before the ECJ; or fail to give a clear description of the offence and thereby violating the *lex certa* requirement. Therefore it is evident that the *l*ex *certa* requirement is addressed to European legislator in case of a directive as well. Otherwise, it would be impossible for the national legislator to abide by its obligation to implement EU law without violated the *lex certa* requirement.[44]

4.2. The requirement of non-retroactivity

According to this sub-principle derived from the legality principle, punitive provisions must *not apply retroactively* to the detriment of the citizen involved. This principle, which also arises from the principle of foreseeability, implies that the European legislator cannot request that the Member States harmonise their criminal law by introducing criminal legislation to apply retroactively. There is only an exception permitted by this basic rule: when *retroactive criminal law benefits the offender*. Criminal law provisions which come into effect after the commission of the offence, but which are favourable to the offender (i.e. according to which the act is not punishable or carries a lighter penalty than before), can be applied as a basis for conviction without violating the requirement of non-retroactivity *(lex mitior principle)*.[45]

Both the *principle of non-retroactivity*[46] and the *principle of the retroactive application of the more lenient penalty*[47] forms part of the constitutional traditions common to the Member States, therefore they form the part of the general principles of law whose observance is ensured by the European Court of Justice.

4.3. The nulla poena sine lege parlamentaria requirement

Since criminal law is the most intrusive of the institutions of state control, in a democratic society it must be justified by reference to as direct participation as possible by the people in the legislative process.[48] European criminal law norms are required to have adequate *democratic legitimacy*.[49]

Before the entry into force of the Treaty of Lisbon, the lack of the democratic legitimacy of European criminal law was a huge problem. Firstly, the democratic,

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42 SCHAUT: Op. cit. 139.

43 See further ASP: Op. cit. 173.

44 KAIAFA-GBANDI: Op. cit. 27.

45 Manifesto on European Criminal Policy, 708.

46 See: Case 63/83 *Kirk* [1984] ECR 02689, para 22.

47 Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] I-03565, para 68. See further: HERLIN-KARNELL, Esther: *The Constitutional Dimension of European Criminal Law*. Hart Publishing, Oxford–Portland, 2012, 21–22; KLIP: Op. cit. 185–187.

48 Manifesto on European Criminal Policy, 708.

49 MUSIL, Andreas: Umfang und Grenzen europäischer Rechtssetzungsbefugnisse im Bereich des Strafrechts nach dem Vertrag von Amsterdam. *Neue Zeitschrift für Strafrecht*, 2/2000, 70; SCHAUT: Op. cit. 119.

parliamentary control was insufficient and ineffective. Neither the European Parliament nor the national parliaments could exert adequate competences in the legislative procedure. There was no co-decision with the European Parliament, which often could only take place after a compromise has been reached in the Council with considerable difficulties. Secondly, the judicial protection of citizens against the Union's action in the field of police and judicial co-operation in criminal matters was also unduly limited.[50]

The Treaty of Lisbon tried to satisfy the principle of democratic legitimacy with the reinforcement of the role of the European Parliament and the national parliaments. The Treaty introduced the ordinary legislative procedure in the areas of criminal law, which means legal acts can be adopted through co-decision between the European Parliament and the Council, by qualified majority voting, on the basis of proposals issued by the European Commission. The European Parliament therefore became co-legislator. The role of the national parliaments was also strengthened; they have to be informed from every legislative act as early and as thoroughly as possible. The Lisbon Treaty also enhanced the judicial control, the European Court of Justice obtained with some exceptions full jurisdiction over the former third pillar policies.[51]

Therefore it can be stated that the *EU's democratic deficit was reduced although not completely eliminated* by the Treaty of Lisbon.[52] According to the *Manifesto,* the democratic legitimacy of European criminal law could be further increased with the facilitation of a broader civil society participation in the legislative process.[53]

5. The principle of coherence

Because criminal law deeply intervenes in the private sphere of the citizens, it is of particular importance to ensure that every criminal law system has a *certain degree of inner coherence*. Such inherent coherence is a necessary condition if criminal law is to be able to reflect the values held to be important by society collectively and by individuals and their understanding of justice. Furthermore, inner coherence is necessary to ensure acceptance of criminal law.[54]

The principle of coherence has two dimensions: therefore we can speak about vertical and horizontal coherence. *Vertical coherence* refers to the relation between the EU and the Member States. In connection with this, it is an indispensable requirement for European criminal law to *respect the coherence of the national criminal law systems*. The Treaty on the European Union also declares that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental

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[50] LADENBURGER, Clemens: Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method. *European Constitutional Law Review*, Vol. 4/1 (2008), 24–25.

[51] See in details: FLETCHER, Maria: EU criminal justice: beyond Lisbon. In: ECKES, Christina–KONSTADINIDES, Theodore (eds.): *Crime within the Area of Freedom, Security and Justice*. Cambridge University Press, Cambridge, 2011, 18–25.

[52] KAIAFA-GBANDI, Maria: Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law. In: GALLI, Francesca–WEYEMBERGH, Anne (eds.): *Approximation of substantive criminal law in the EU. The way forward*. Editions de l'Université de Bruxelles, Bruxelles, 2013, 99.

[53] Manifesto on European Criminal Policy, 708.

[54] Manifesto on European Criminal Policy, 708. See further: MYLONOPOULOS, Christos: Strafrechtsdogmatik in Europa nach dem Vertrag von Lissabon – Zur materiellen Legitimation des Europäischen Strafrechts. *Zeitschrift für die gesamte Strafrechtswissenschaft*, 3/2011, 643.

structures, political and constitutional, inclusive of regional and local self-government.[55] In connection with criminal law, the Treaty on the Functioning of the European Union also emphasises that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.[56] The coherence of the national criminal law systems could be undermined especially in case of the *harmonization of the criminal sanctions*. Therefore, the *Manifesto* explicitly states that minimum-maximum penalties provided for in different EU instruments must not create a need for increasing the maximum penalties in a way which would conflict with the existing systems. However, several examples can be cited, when the minimum-maximum penalties prescribed by different EU directives could only be implemented contrary to the criminal law system of the Member State concerned.[57]

Beside the observance of vertical coherence, the European Union is also required to respect the principle of *horizontal coherence*. It means that during the adoption of criminal law measures the European legislator has to pay regard to the framework provided for in different EU instruments. Therefore the EU legislator should evaluate the consequences for the coherence parameters of the national criminal law systems, as well as for the European legal system and on this basis explicitly justify the conclusion that the legal instruments are satisfactory from this point of view. In connection with horizontal coherence, it is problematic that the EU criminal law norms are not so differentiated, which means that they prescribe the same penalty for conducts that are not equally detrimental to society (e.g. trafficking in human beings and counterfeiting of euro). Of course, the EU legislation usually prescribe minimum harmonization, therefore the Member States remain free to introduce penalties which are more severe than the minimum-maximum penalties in the EU directive. In this case, however, they are forced to at least partially raise the penalties, which interfere with the principle of vertical coherence again.[58]

6. Conclusion

The Manifesto on European Criminal Policy was an incredibly significant milestone in the history of European criminal law. It was the first attempt to establish a *coherent European criminal policy* by determining the *guiding principles of the European criminal law*. Of course, the aforementioned principles form the part of the common legal heritage of the Member States, they can be found in several international treaties (e.g. European Convention on Human Rights) and they are also parts of the basic legal principles of the EU law (they can be directly derived from the EU law). Therefore it can be argued that the enumeration of these principles once more was not so inventive. However, the real problem is that in practice the European legislator does not fully respect the listed principles.[59]

Therefore, the second part of Manifesto *examines the legislative practice of EU* and seeks to answer the question whether the adopted EU criminal law norms correspond to the aforementioned general principles. The Manifesto points out both *positive and negative examples* with which it aims to eliminate the weak points and negative tendencies. At the

[55] Article 4(2) TEU.
[56] Article 67(1) TFEU.
[57] Manifesto on European Criminal Policy, 708, 715.
[58] Manifesto on European Criminal Policy, 708, 712, 715.
[59] ASP, Petter: European Criminal Law – Challanges in the Future. In: BERGSTRÖM, Maria–CORNELL, Anna Jonsson (eds.): *European Police and Criminal Law Co-operation*. Hart Publishing, Oxford–Portland, 2014, 62.

end of the document the authors conclude that the analysed examples show some *alarming tendencies* which must be observed and not be ignored. Therefore criminal law must not be adopted without pursuing a legitimate purpose; the principle of *ultima ratio* must not be neglected; the Member States must not be obliged to pass imprecise national criminal laws; the legislation must not answer every social problem with passing increasingly repressive acts and consider this as a value in itself. If these entailed risks are not acknowledged in time, the authors fear to be confronted with criminal laws that contradict the fundamental principles.[60] Of course, this critique cannot be interpreted as a "euro-sceptical" point of view.[61] The authors of the Manifesto rather intend to emphasise the importance of a coherent, harmonious European criminal policy.

With the publication of the Manifesto, a process began at the EU's level. The institution of the European Union followed the example of the Manifesto and adopted documents in which they tried to determine the key features of the European criminal policy. Their content is very similar, each of these non-binding documents refers to the *fundamental principles of European criminal law* (the *ultima ratio* principle, the principle of subsidiarity, the principle of guilt, the principle of legality the principle of coherence etc.), and tries to draw up *guidelines for the European legislation when and how to adopt criminal law provisions*. However, the differences in the policy approaches of EU institutions towards substantive criminal law are also noteworthy. The European Commission attempted to demonstrate the added value of EU criminal law and focused primarily on the criminal competences of the EU enshrined in the Treaty of Lisbon, particularly in Article 83(2) TFEU. The Member States in the Council emphasised the conditions and limits of the exercise of EU criminal competences, therefore they rather aimed to pre-empt the supranationalisation brought forward by the Treaty of Lisbon. The European Parliament highlighted the need for EU criminal law to comply with fundamental rights.[62]

Despite these minor contradictions the aforementioned documents have outstanding importance. No criminal legislation can lack a coherent criminal policy. These documents can be regarded as the *first steps in the development of an autonomous European criminal policy*. If the European legislation complies with the principles laid down in these documents, we can hope that it could lead to a coherent criminal legislative practise in the European Union.

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[60] Manifesto on European Criminal Policy, 709–715.

[61] PRITTWITZ, Cornelius: Lissabon als Chance zur kriminalpolitischen Neubesinnung. Das Manifest zur Europäischen Kriminalpolitik. In: AMBOS, Kai (Hrsg.): *Europäisches Strafrecht post-Lissabon*. Universitätsverlag Göttingen, Göttingen, 2011, 32.

[62] MITSILEGAS, Valsamis: EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation. In: ARCARAZO, Diego Acosta–MURPHY, Cian C. (eds.): *EU Security and Justice Law. After Lisbon and Stockholm*. Hart Publishing, Oxford–Portland, 2014, 127.

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WRITTEN MORNING-GIFT, A SPECIAL LEGAL INSTRUMENT OF MARITAL LAW

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Morning-gift was a term defined in the framework of the legal instruments of marital law. As the instrument of morning-gift was a share in properties rightfully given to a lawfully married wife from the husband's wealth, the subjects of this instrument were mainly husbands and wives. Written, or contractual morning gift was a particular practice arising from practical reasons and then made part of legal practices by courts. When defining its term, we can accept the standpoint of Knorr, according to whom written morning gift was a contribution of assets promised to be given by one spouse or a third party to the other spouse according to a respective contract, as a consideration for proper marital conduct.[1] As early as in Planum Tabulare, it was stated that "the lawful morning-gift is superseded by written morning-gift, thus the widow cannot claim both, as the provided assets of a man supersedes the provisions of the law".[2] According to Szladits, the "…husband may undertake contractual obligations with respect to his wife; a written morning-gift annuls the lower-ranked lawful morning-gift".[3] However, in case the written morning-gift clause is void or ineffective due to any elements of the respective contract, the lawful morning-gift becomes effective again.[4] Consequently, these two kinds of morning-gifts only had the provision not to exist simultaneously, in parallel, therefore could not be effected at the same time.[5]

Lallossevits called the written morning-gift as contracted morning-gift,[6] and defined the its effectiveness to be valid as of the consummation of marriage.[7]

Based on this definition, this dual name can be acceptable. The two terms – written morning-gift, contractual morning-gift – were used by 19th century legislators and renowned practical legal professionals as synonyms, often using one for the other.

When investigating the circumstances of the establishment of contractual morning-gift, Schaurek admitted that the Tripartitum written by Werbőczy, there is no mentioning of written morning-gift, although it did exist in practice in the 16th century. Nevertheless, he pointed out that ʻdos sriptaʼ "it is the straight and logical enhancement, improvement of the lawful morning-gift, i.e. it is not contrary to but rather supplemental to the limitedness and deficiencies of the legal morning-gift…"[8]

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1 ALMÁSI, 1940, 285; KNORR, 1899, 129.
2 Planum Tabulare Dec. 9. ad acquis. mobil. Cited by STAUD, 1913, 66.
3 SZLADITS, 1933, 356; This standpoint was also accepted by Lallossevits. LALLOSSEVITS–LÁNYI, 1910, 96.
4 ALMÁSI, 1940, 285.
5 The Hungarian Royal Curia took a stand through its Resolution No. 5952/1894.
6 LALLOSSEVITS–LÁNYI, 1910, 96.
7 LALLOSSEVITS–LÁNYI, 1910, 97.
8 SCHAUREK, 1917, 169.

The subject of a written morning-gift could be any kind of property, i.e. money, movable or immovable assets.[9] However, Acsády, based on his research, firmly stated that it could only be settled from acquired assets.[10] However, nearly half a century later (according to court practices), it was stated to be settled primarily from acquired assets, and only if such assets were not sufficient, the respective family assets could be used for the settlement.[11]

Naturally, only lawful morning-gifts could serve the basis for stipulating exact values, as written morning-gifts were established between the parties in the form of a civil law contract, therefore the respective values could be determined freely, case by case.[12] Naturally, written morning-gifts seemed to be a sensible choice in case the value of the gift was higher than that of the lawful morning-gift.

Regarding written morning-gifts, as it was a contract governed by civil law, the contracting party was liable to pay, and the party to receive the payment was always the wife.[13]

In case an engaged couple concluded a contract between them on a written morning-gift, such gift could be claimed upon the conclusion of marriage of the contracting parties. Upon the death of either spouse, the written morning-gift could be claimed by the heirs of the deceased.

Another characteristic difference between the lawful and written morning-gifts was the fact that regarding written morning-gifts, based on the nature of such gifts, no social position was stipulated with respect to the contracting parties.

Generally, a written morning-gift could be claimed upon the termination of marriage. However, it was possible for the contracting parties that they would specify certain particular means of the termination of marriage as the grounds for applying the contents of a written morning-gift.[14]

For the protection of the wife, it was stated that a morning-gift could not be claimed, and the wife was only granted the right share of property to be paid upon the termination of marriage.[15] Furthermore, it was also true that from the moment of the conclusion of a marriage, the morning-gift became the property of the given wife, therefore she could make decisions on the gift even before the termination of marriage. A morning-gift was to be paid from the heritage of the given husband and the wife was granted a right of retention.[16]

The legal instruments of written morning-gift and gifts provided upon death had to be distinctly separated. The obligation of a written morning-gift was a type of contribution, but

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9 Curia 4547/1913; *Jogtud. Közlöny*, Vol. VIII, 168; LALLOSSEVTIS–LÁNYI, 1910, 97.

10 ACSÁDY, 1842, 82.

11 Lfi. 11944/1878.; "A woman marrying for the second time may claim her morning-gift due to be paid by the first husband …primarily from acquired assets. Inherited assets may only serve as a basis for the settlement of such claims, in case the claim of morning-gift could not be fully settled from acquired property." Lf. itsz. 7127/1879); Curia 10238/1881, Curia 304/1884; Curia 9307/1892.

12 LALLOSSEVITS–LÁNYI, 1910, 97; ALMÁSI, 1940, 285.

13 SCHAUREK, 1917, 179.

14 ALMÁSI, 1940, 285; Curia 4209/1929; Grill-féle új döntvénytár [Grill's New Collection of Decisions] edited by: NIZSLOVSZKY, Endre–ZEHERY, Lajos–PETROVAY, Zoltán–TÉRFY, Béla–BACSÓ, Ferenc–PUSZTAI, János (hereunder: *Grill Döntvénytár*), XXIII, 493; According to the decision made by the Curia, it can also be stipulated as a provision that written morning-gift is only payable in case no child was born from the marriage and the husband is deceased. Curia, 1195/1930., *Jogtud. Közlöny*, I. 190.

15 LALLOSSEVITS–LÁNYI, 1910, 96; SCHAUREK, 1917, 183.

16 LALLOSSEVITS–LÁNYI, 1910, 97.

it needs to be emphasized that it was a gift not given upon death.[17] However, on the other hand, regarding obligations on written morning-gifts, the Curia stated that it was "a gift to be given upon the occurrence of death…"[18]

Regarding written morning-gifts, the parties were entitled to stipulate restrictive conditions, but such conditions could not be contradictory of the purpose of asset contribution. The Curia judged a case as contrary to the purpose of this legal instrument, where the parties did not connect the contribution to the termination of marriage, and ordered it to be regarded as an "other contribution".[19] Practices also classified it as a contribution when "the husband gave assets to his wife. It did not classify as a morning-gift according to its definition, because according to it, the gift shall be given upon the death of the husband or perhaps the termination of marriage".[20]

Szladits emphasized that a morning-gift is not a gift, but, as a free gift, it cannot be taken from the heritages duly payable to descendant heirs ('legitimate portions').[21] "…it does not fall under the rules on wills and testimonies…"[22]

Legitimate portions could not even be violated by a contribution agreement concluded between living parties.[23] The practices of the Curia developed this rule to the point where not only any expressed contribution or gift, but also any free contribution of a testator violated the extent of a legitimate portion the value of which would have been subject to the given heritage should the testator had not given out such gifts or contributions. Also, other violating provisions were any deeds or defaults that included a waiver of any rights. For example, a foundation established by the testator for living people was considered as a free contribution; written morning-gifts were also considered under this definition.[24]

The written morning-gift, as a contribution-type legal instrument was similarly involved in falling under sums belonging to legitimate portions, just like any other gifts. Accordingly, it could not be deducted from the value of the property, because it could not be taken from the value of the legitimate portion a quasi-gift.[25] It had a priority position with respect to the inheritance charges of the husband's heritage, but its value could not be taken from the extent of the legitimate portion.[26]

On the other hand, lawful morning-gifts had to be considered among the charges, because they were not generated from the liability of the testator (the husband), but lawfully

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17 Curia 2655/1911; *Grill Döntvénytár*, VI, 67.

18 MÁRKUS, Dezső: *Felsőbíróságaink elvi határozatai* [Principal Decisions of Our Supreme Courts]. Bp., 1891, 755, 65. § (hereunder: MÁRKUS, 1891).

19 Curia 4209/1929; *Grill Döntvénytár*, XXIII, 493.

20 STAUD, 1913, 70.

21 SZLADITS, 1933, 356.

22 SZLADITS, 1933, 356.

23 "OBÉ" 4. §. In: SZLADITS, Károly (ed.): *Magyar magánjog*. Vol. VI, Law of Inheritance. SÁNDORFALVI PAP, István: *Törvényes öröklés* [Lawful Inheritance]. Bp., 1939, 412 (Hereunder: SÁNDORFALVI, 1939).

24 SÁNDORFALVI, 1939, 412; Curia 5377/1906, *Magyar magánjog mai érvényben: törv. rendeletek, szokásjog, joggyakorlat* [Hungarian Private Law Effective Today: Decrees, Customary Law, Legal Practices]. Part 4, Öröklési jog és örökösödési eljárás [Law and procedures of inheritance] Prepared and explained by Tihamér FABINYI. Bp., 1935, 477 (Hereunder: FABINYI, 1935); *Jogi Hírlap*, V, 140.

25 Curia 5377/1906; FABINYI, 1935, 477; SÁNDORFALVI, 1939, 441; STAUD, 1913, 70.

26 ALMÁSI, 1940, 284; Curia 3377/1906; *Jogtudományi Közlöny* által szerkesztett Magánjogi Döntvénytár [Collection of Private Law Decisions Collected by the Law Gazette], Vol. 1, 166 (Hereunder: *Jogtud. Közlöny*).

generated upon the conclusion of marriage, as a family law obligation. According to the standpoint of Sándorfalvi, the consequent act was that written morning-gifts had to be divided into two parts. The part equalling the sum of the given lawful morning-gift had to be considered among the liabilities and only the remaining sum was free from being considered among the liabilities.[27] Although his theory cannot be refuted, I could not find any relevant Curia decisions.

Regarding the formal structure of contractual morning-gifts, Szladits expressly pointed out that "…the provision of a written morning-gift is a marital law contract, sharing the formal requirements of such contracts".[28]

The validity of contracts on marital property required a formal certification issued by a notary public. Sections 22 and 23 of Act VII of 1886 provided a detailed list of cases, when legal acts concluded between spouses required formal documents of notarial acts.[29] In this list, the instrument of written morning-gift was not indicated 'expressis verbis', but in Section 22, it was stated in general that any contracts concluded between spouses required notarial deeds, and this also applied to written morning-gifts.[30]

In this study, I wished to point out that the legal instruments of civil law can demonstrate similarities or concordances in certain elements of theirs, but regarding the entirety of their contents cannot be supplemented from one another. This is particularly true regarding the contractual morning-gift, which had characteristics similar to giving gifts or contributions upon death, yet based in its individual legal instrument criteria, it could remain valid even in the 40's of the 20th century. In the explanation of the bill on civil law, it was specified that "the elimination of written morning-gift would cause a legal vacuum that could not be supplemented by either succession contracts or the provision of gifts. The aim of a morning-gift is to provide funds for a woman not only upon surviving the husband, but also upon the termination of marriage, and also to ensure that such gift is to be received

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[27] SÁNDORFALVI, 1939, 442.

[28] SZLADITS, 1933, 356.

[29] Act VII of 1886: Section 22. A notarial act is required for the validity of legal acts:
a) regarding contracts regulating the property relations between spouses, whether such contracts are concluded prior to or during the marriage;
b) contracts concluded between spouses or engaged couples in the subject of sale and purchase, exchange, annuity and lending, as well as renting and leasehold contracts, which are concluded for periods of more than three years, legal transactions in the subject of the acknowledgement of debts, assigns, and any other types of legal acts where one of the spouses or fiancé(e) transfers the property or leasehold rights of their immovable assets to the other spouse or fiancé(e);
c) regarding real properties in cases of giving contributions by the same parties, where this rule generally applies; regarding movable assets, it is effective if the given gift has not been handed over.
In case of the invalidity of legal acts between spouses or engaged couples, either party is obligated to return to the other party any items received upon the course of the invalid legal transaction, regarding which, however, private documents issued by spouses or engaged couple do not have a conclusive force against one another.
Section 23. For the validity of a legal transaction, a notarial deed is also required in case of the following:
a) general authorisations issued between spouses or engaged couples, and
b) special authorisations between spouses and engaged couples on undertaking promissory note liabilities, borrowing, the acknowledgment of debts, and the alienation or mortgaging of real properties, or the acquisition of real properties for consideration and the free waiver of any rights.

[30] This is also believed by Lallossevits. LALLOSSEVITS–LÁNYI, 1910, 97.

by the woman's heirs or successors in case the woman should die first. Due to the regulation of revocability, giving gifts significantly differs from the general term of morning-gift provisions. Accordingly, the legal content of sui generis applied in our country verifies the preservation of morning-gift, as an individual legal instrument.[31]

[31] Main proposal and the related evaluation material for preparing the further discussion of the bill for the Hungarian General Civil Code. The proposal was submitted by the directorate of the permanent committee established in the Ministry of Justice, Károly Grill, Imperial and royal bookshop, Budapest, 1904, 239.

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THE HUNGARIAN PENSION SYSTEM: THE PRESENT AND A POSSIBLE FUTURE

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I. A CONCEPT ON IMPROVING THE SOCIAL PENSION SYSTEM

1. Challenges of the current pension systems

Demographic changes

In recent decades some demographic processes, rather than have occured as popular wisdom would assume, instead have gained momentum, and they pose dangers to the future of the pension insurance systems. Decreasing birth rates have become a tendency in Europe from the last third of the last century: based on OECD's data, total fertility has continuously been on the decline since the 1970's in European countries. At the same time, life expectancy both at birth and at the age of 60 has increased, significantly changing the population pyramid: the proportion of older age groups has increased in comparison with younger ones.

In Hungary, this process was delayed slightly, due to social policies of the 1950's: In the first half of the fifties, and as these generations established families, in the seventies, birth rates have been extraordinarily high, but they, together with fertility rates, have been on the decline from the end of that decade. The birth figure of 1979 of 160 thousand dropped to 100 thousand by the mid-nineties, accompanied by a drop of the fertility rate from 2.0 to 1.3.

Chart 1. Fertility rate in Hungary, 1975–2015
(Source: Central Office for Statistics)

It is a wide-spread consensus in the literature on the relationship of fertility rates, birth figures and pension systems that a common social security system covering almost the entirety of the society results in a decreasing fertility rate.[1] Other opinions go further and claim that beyond the availability of social security systems, the developed nature of the financial system impacts fertility rates as well.[2]

Economic challenges

This study is concerned with two sides of economic challenges: globalization and state debt, or the effect on pension system thereof.

By globalization, we usually mean the internationalization of production and capital: as a consequence, states compete each other for investments leading to the decrease of labour costs and consequentially the decrease in contributions acting as income for the pension system. On the flip side, globalization enables labour mobility partly contributing to migrating workforce and partly the change in the structure of the labour market.

Pay as you go pension systems affect the state debt in two points: firstly, by the budget of the state pension funds, secondly, by the hidden (implicit) debt existing in the pension systems. The budget of the pension funds are planned on a yearly basis, meaning the income-expenditure balance needs to be established on a yearly basis. Should the balance fail to be struck and there is lack of income, the lack must be complemented from either the central budget or from other source which may explicitly increase state debt. On a longer term, if the contribution rate is below the rate necessary for the balance, meaning the pension system does not accumulate reserves, the inside, hidden (implicit) debt, i.e. the difference between the present value of the contribution and the pension promises in the future, increases.

At the end of the eighties, Hungary opened up towards the capitalistic world economy with the transition. This opening coupled with the accession to the EU has changed both the labour market and the economy enabling the free transfer of both capital and workforce. Migration of skilled workforce has become a phenomenon together with low added value production, at the same time, the hidden debt of the economic system surfaced. These and the expected slowdown of economic growth are going to challenge the Hungarian pension system economically.

Labour market trends

The classic employment structure has gone through a lot of changes in recent decades: the number of employees in the industrial sector has dropped, the number of people undertaking jobs in the service sector has increased. Additionally, the number of people working in part-time, self-employed or in some sort of small enterprise has increased.

In Hungary, the most impactful change on the pension system was the transition period. On the one hand, the labour market narrowed significantly, large numbers of people lost their jobs. On the other hand, a lot of people escaped unemployment by entering the pension system through some kind of early pension or disability pension. This way, the transition posed a dual threat to the pension system: a decreasing number of contributors and the increasing number of beneficiaries.

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[1] HOHM, Charles F.: Social security and fertility: An international perspective. *Demography,* 12 (1975), 629.

[2] CIGNO, A.: *Economics of the Family.* Clarendon Press, Oxford, 1991.

The employment ratio started to improve in the mid-nineties after the shock of the transition period and reached a peak in 2006: at that point, 58% of active residents were deemed to be in employment. Employment ratio starts to rise spectacularly again after 2010: By 2015 it reached almost 64%. However, this upward trend expresses the actual labour market relations only in part: the increase takes place partly because the Central Office for Statistics changed its methodologies, and partly because the extraordinary increase of number of people employed through the public works programme.

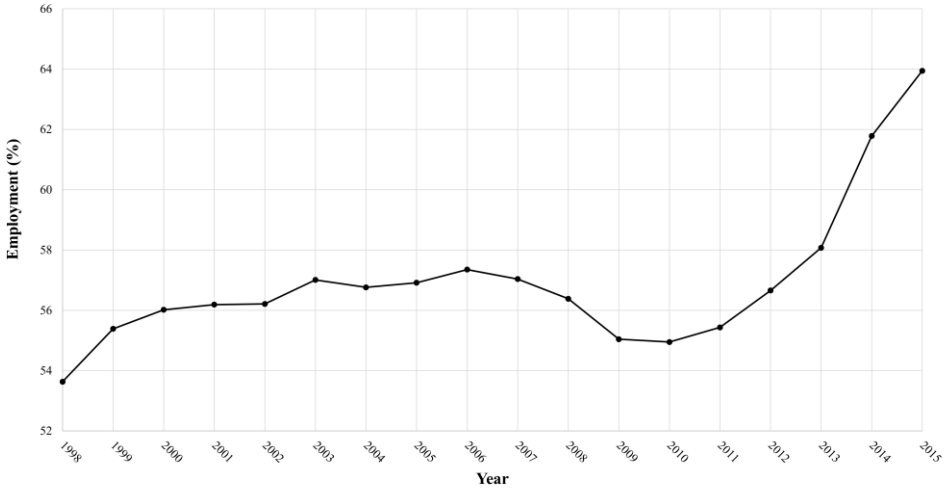

Chart 2. Employment ratio in Hungary, 1998–2015
(Source: Central Office for Statistics)

Today the biggest challenges are posed by minimal wage employment, long-term unemployment and contribution avoidance strategies; these are the sources of the largest gaps in the budget of the pension system. The minimal wage only results in a very low level of service gained even after a long period of service done. The contributions of those working in the black or the grey economy are missing from the current budget of the pension fund, but furthermore, there are fears that persons gaining income but avoiding paying contributions may be excluded from the beneficiaries if they fail to acquire the minimum service period necessary for the old-age pension.

Interestingly, no economic or legal literature is concerned with the presence and the situation of the Roma populace either from a demographic or a labour market standpoint when studying the sustainability of the Hungarian pension system. Yet, this is a minority of relatively high number, in a demographically more favourable position compared to the majority, most of whom are active in the informal economy.[3] The inactivity of active age Roma citizens impacts the present and future sustainability of all the social security systems including the pension system. The impact is negative, and amounts to 1–3% of the GDP.[4]

[3] KEMÉNY, I.: *Romák/cigányok és a láthatatlan gazdaság.* Osiris Kiadó–MTA Kisebbségkutató Műhely, Budapest, 2000.

[4] World Bank: *Economic costs of roma exclusion.* Europe and Central Asia Human Development Department, 2010.

Thus, integrating Roma in the society both socially and economically is of significant importance from the point of view of the sustainability of the pension system.

2. Possible directions for further development

Legislators in European countries need to perform reforms due to the problems caused by the ageing society and the decline of contribution-paying citizens. In the case of pay as you go pension systems, if the incomes decrease and the pension expense increases, state budget support becomes necessary in order to upkeep financial balance. The traditional toolset to establish this balance and decrease the need of state support (increase in contributions, cutback of benefits, raise of pension age) may prove to be insufficient in the future. The auxiliary pension systems' may count on a growing role in establishing old-age financial security, thus the sufficient regulation and the optimal connection thereof to the state pension systems is a focal issue in European countries. The European Commission's *Green Book* on the route to the adequate, sustainable and secure *European pension systems* (2010) and the *White Book* on the roadmap of adequate, secure and sustainable *European pensions* (2012) confirm the future emphasis of the significance of auxiliary pension systems in establishing old age security.[5]

The wanted features of pension systems

Inside social security, *pension insurance is insurance* in which the insurance risk is not reaching old age pension age limit as of itself but rather, the uncertainty of the length of the pension age. Reaching old age pension age limit is not risk but an event probably taking place – the real risk is long life, meaning the danger of the individual living longer than what they were able to prepare for with savings.

The main task of a state social security pension system is to establish old age financial security for those living from wages and salary permanently: this can be achieved *only by a pension system based on obligatory participation*. The ambition to extend participation to as wide a range of active age citizens as possible beyond those living off wages and salary, e.g. those living off capital incomes can be accepted.

In the pension systems it is reasonable *to separate the principle of insurance and the principle of solidarity*. The application of the principle of insurance appears primarily in the benefits calculated actuarially correctly, thus establishing a solid, transparent and predictable connection between contributions and benefits. The principle of solidarity appears not primarily in the regroupage of income but rather in uniform rules on calculating and paying contributions.

Financing a social security pension system – with consideration to the challenges in front of us in the coming decades, could be designed in a mixed system, as a symbiosis of a pay as you go system and an auxiliary one also accumulating capital. *Precise record keeping of contributions paid* is an expectation from both the state and the auxiliary system.[6]

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[5] For further details on auxilary pension systems, see: BARTA, J.: A foglalkoztatói kiegészítő nyugdíj. *Magyar Jog*, Vol. 60, No. 7 (2013), 426–427; BARTA, J.–PRUGBERGER, T.: *A foglalkoztatói kiegészítő nyugdíj megszervezésének és finanszírozásának útjai az Európai Gazdasági Térség államaiban és Magyarországon. Adózási pénzügytan és államháztartási gazdálkodás.* NKE Szolgáltató Kft., Budapest, 2015, 533–534.

[6] For further details on features of pension systems, see: VARGA, Z.: *A magyar nyugdíjrendszer pénzügyei*. PhD-dolgozat. Deák Ferenc Állam-és Jogtudományi Doktori Iskola, Miskolc, 2012, 135, 139–160.

The private-then-state model

The service structure of the private-then-state model significantly differs fom the state pension systems working today: in this model the individual does not get old age pension benefits from both the state and the auxiliary systems parallelly. Instead, the two parts of the pension are separated in time during the pension age. Living is covered by the benefit of the auxiliary system between a lower and a higher old age pension age limit,[7] and the individual gets the state system pension after reaching the higher age limit. I call the benefit provided by the auxiliary system annuity and the one provided by the state lifetime annuity.

Annuity in its essence is a bank benefit with a maximal duration of the start of payment and the higher age limit. As a main rule, individuals may request to establish their annuity after reaching the lower age limit, calculated from the recorded contributions paid[8] by the individual. The lower age limit would be flexible: the individual may request their annuity to be paid if it reaches a certain minimal level (minimum annuity). Starting the payment of annuity later then reaching the lower age limit results in a higher amount of benefit as the duration of payment is less. After reaching the higher age limit, the savings not paid out in annuity can be withdrawn in one lump sum or can be left for inheritance in case of early death.

The lifetime annuity is a benefit from the state system closely resembling today's state pension. In the structure of private-then-state model, lifetime annuity can be requested after reaching the higher age limit, when the individual has already received the savings accumulated in the auxiliary system.

In order to cover both the annuity and the lifetime annuity, the individual shall contribute a sum proportional to their income strictly and precisely recorded by both the state and the auxiliary system. The pension contributions are divided between the state and the auxiliary system, the state finances the lifetime annuities for the present year in a pay as you go system, the auxiliary system accumulates capital from the contributions paid and invests it with accordance to the rules of the model.

The investment policy of the capital accumulated in the auxiliary system is one of the main particularities of the private-then-state model: the capital may be invested mainly into humane instruments. Augusztinovics was the one who first claimed that pension savings should be invested in human resources, raising and educating the younger generations.[9] Berlinger argues convincingly in the same topic to connect the pension system to the student loan system, and the return of the student loans provided by pension savings.[10] The private-then-state model follows suit and invests the capital accumulated into the raising and education to the growing generations to pay contributions.

The relations of this model to present-day Hungarian pension system and EU trends

In the private-then-state model detailed above, the pension insurance is insurance, and it treats longer than expected life as a risk to be managed by the social security system instead of meeting a predetermined pension age. Those living off wages and salary are the insurees paying percentile contributions (insurance fees) from their income. The model is financed

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[7] The higher age limit is established to be around the statistical life expectancy date.

[8] Savings equal the contributions paid to the auxiliary system and its yield over the active period.

[9] AUGUSZTINOVICS, M.: Egy értelmes nyugdíjrendszer. *Közgazdasági Szemle*, Vol. 40, No. 5 (1993), 415–431.

[10] BERLINGER, E.: A nyugdíjrendszer és a diákhitelrendszer összekapcsolása. *Közgazdasági Szemle*, Vol. 52, No. 9 (2005), 631–647.

from multiple sources: the pension system provides pay-as-you-go (state) benefits to those surpassing the average life expectancy as well, but it operates a flexible and transparent (auxiliary) capital accumulating system based on state regulations and compulsory participation. This structure, rather than the parallel system of today provides sequential benefits from the auxiliary and the state systems.

In this private-then-state system the insurance principle is separated from the solidarity principle, thus establishing a close connection between contribution and benefit of the pension system, creates a system that is transparent and incentivises contributions. Paying Contributions (and earning the right to benefit) during the active years is assessed linearly and additively, meaning twice as much contribution results in twice as much benefit. Solidarity always means a kind of redistribution: in today's pension systems, redistribution takes place primarily from men towards women and from low-salary towards high-salary individuals. Instead, it is reasonable and justified if solidarity is expressed in uniform contribution rates and benefit calculation formulae for everybody, despite differences in income, demographic and other conditions.

In order to establish actuarily correct benefits, precise recording of paid contributions is important in both the state and the auxiliary system. In the Hungarian auxiliary pension systems it has been a legal requirement from the start and has been implemented. In the state system, individual accounts to keep precise records od contributions have been established in recent years,[11] but their sense is questionable: firstly, because only the pension payments submitted since 2013 are recorded (and only the individual pension contribution, one third of the total pension contribution, on the other hand, the benefit is not calculated based on the paid contribution but rather the gross income.[12]

Beyond unfavourable demographic and economic relations, labour market trends also have significant role with regards to financing pension systems from challenges of the current pension systems: masses are missing from the labour market in addition to the problem of an ageing society. This study mentions the Roma populace in this regard: involving them in the labour market would perceptibly improve the long-term financing situation of a pension systems. This is made possible by the private-then-state system's student loan feature, where the capital is provided for by the auxiliary pension system.

When introducing the compulsory private pension fund system, the legislation in Hungary was motivated by an intention to help the economy recover and decrease long-term expenses of the pension system, and when it was terminated in 2011,[13] the legislation was motivated by cutting back on state debt. The investment policy of the pension funds was quite limited: they could invest in treasury bonds and domestic securities primarily.[14] In the private-then-state model's auxiliary system, investing capital following Augusztinovics's (1993) gestation loan theory into human resources (mainly in education), a new structure of generation distribution occurs that can contribute to the economic and social integration of those living in deep poverty and Roma, something that entails economic growth, improvement of employment ratios, and is of key importance with regards to the sustainability of the pension system.

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[11] Section 96/A of Act LXXXI of 1997.

[12] Section 22 of Act LXXXI of 1997.

[13] The compulsory private pillar is not absolutely non-existent though, but the more than 3 million headcount dwindled down to a few tens of thousands.

[14] The investment policy of other existing voluntary pension saving schemes is more lax: the person making the savings can choose an investment portfolio based on their intention to bear risk.

The founding thought of the private-then-state system's financing structure meets the special policy intentions of both the Hungarian pension system and the Hungarian government's welfare intentions: they leave room for capital accumulating schemes. The institutional system of the private-then-state model, on the other hand, significantly deviates from that of the Hungarian pension system: the model inserts a compulsory capital accumulation pillar before, and not next to, the pay as you go state system – and the existing compulsory capital accumulation scheme in the Hungarian pension system was in fact terminated by the Hungarian government just a few years ago. The Hungarian pension system is not experiencing any urgency to reform now but subsidizing auxiliary schemes with tax reductions, the parent benefit's appearance in the legal system all show towards the eventual necessity of a comprehensive pension reform.

The latest EU pension policy trends show that the role of the auxiliary pension is not to complement the state pension to the income level of the active age anymore, instead, it is to provide an income level sufficient to cover the costs of living in old ages. This means that, apparently, not only will state pension be unable to retain an active age income, but it will not be able to protect the insurees from old age poverty either. The private-then-state model's concept suits this trend, as state benefits will be paid only to people surpassing the statistical average life expectancy, meaning the collateral contribution necessary can be significantly reduced compared to today's needs, and the contributions thus made available can be regrouped into the compulsory auxiliary system. With this step, the service level can be proportional to the active age income, and the model stays transparent, correct and incentivising contributions by not requiring surplus payments from the insurees compared to the current system.

II. THE CURRENT STATE OF THE ADDITIONAL PENSION PILLAR IN HUNGARY

1. The development of the additional pension pillar in Hungary

In Hungary, the first law introducing institutional voluntary retirement savings was *born in 1993*, allowing the foundation of *so-called voluntary mutual pension funds*. It was followed by *a mandatory private pension fund system based on the principle of full funding*,[15] which was dominating the additional pillar for more than a decade.

In the mid-1990s, the situation was ripe for the government in power at the time to set out to restructure the pension system. Due to the huge debt accumulated toward the World Bank, it had a substantial impact on the process of transformation by promoting and encouraging the reduction of pension-related expenses with the introduction of a more moderate version of the so-called Chilean model.

Hungary was the first among the Central Eastern European countries to introduce a mandatory pay-as-you-earn private pension system as an additional pillar, with the others following suit, except Slovenia and the Czech Republic. In 1997, the Hungarian Government adopted the three laws that implemented the transformation. As a result of the changes, the pension system became a three-pillar system, with the inclusion of a

[15] The essence of the pay-as-you-earn principle is that the monthly payments of private pension fund members are reserved and invested by the fund during the so-called accumulation or waiting period (its minimum duration is 15 years as determined by law), creating the financial basis for future pension services. Biometric, investment risks and the risk of untimely death or becoming disabled are all taken by pension fund members.

mandatory two-pillar pension system consisting of a pay-as-you-go state pension system and a pay-as-you-earn private pension system. The third pillar included several voluntary pension saving forms such as the voluntary mutual pension funds mentioned above and occupational pension scheme providers. As a result of the compulsory implementation of the Directive of the European Parliament and the Council of Europe *2003/41/EC*, *Act CXVII of 2007 on Occupational Retirement Provisions and the Institutions* was adopted in Hungary which has facilitated the foundation of occupational pension scheme providers since 2008.[16]

In September 1997, the first mandatory private pension funds appeared in Hungary. The private pension fund members *paid a membership fee mandatorily deducted by their employer from their taxable income* as the base of pension contribution as well as *a pension contribution to the Pension Insurance Fund*.

Members of the state pension fund system paid a pension contribution of 8% while private pension fund members paid only 2% to the central Pension Insurance Fund and another 6% as a membership fee so the greater part of their pension contributions was received by the private pension funds. As a consequence, the revenue of the state Pension Insurance Fund decreased in proportion to the number of entrants to the private pension funds. The lack of missing pension contributions due to membership fees was compensated from the revenues of the state budget. No one expected, however, that instead of the projected two hundred thousand people, more than three million would enter the private pension fund system, thus causing an enormous shortage in the Pension Insurance Fund, which constantly had to be compensated from the state budget.

In return for the payment of shared pension contributions, private pension fund members were entitled to receive only three-fourths of the entire social security pension and they would have received the remaining one-fourth, or even more in an ideal case, from the private pension funds. Therefore the members of the so-called mixed pension system would have received three-quarters of their pensions from the state and a quarter from the private pension funds.

After the accession and with the expiry of the given grace period, the European Union began to resent the serious budget deficit indirectly generated due to the introduction of the mandatory private pension fund system. As a consequence, in the summer of 2010, not only in Hungary but also all the other EU member states that had previously introduced an additional pay-as-you-earn pension system turned to the European Commission with the request of changing the rules of calculating state deficit and national debt. On the one hand, their goal was to achieve that the EU would not take the budget deficit generated by the introduction of the private pension fund system into consideration in the accounts, on the other hand, they also wanted to achieve that the mandatory membership fees paid to the private pension funds could be recorded as budget revenue. If the request had been accepted, the budget deficit in Hungary would have been only 2.4% on paper instead of the existing 3.8% which, in turn, would have met the required maximum of 3%.

Eventually, the EU rejected the request so the Hungarian government resolved the situation with administrative means, intervening in the private pension fund system by quick and successive law amendments. The greatest change was brought about by the law adopted on December 13th, 2010. The members of mandatory private pension funds had to

[16] Only one institution of the kind was established in Hungary in 2010. It was acquired by the Allianz Group in 2015, turning the name of the company into Allianz Foglalkoztatói Nyugdíjszolgáltató Zrt. It consisted of only 3 employers in 2014.

decide whether they wanted to remain in the private pension funds or return to the state pension system until January 31st, 2011. Those who did not return to the social security pension scheme, with effect from December 1st, 2011 onwards, could not gain any additional period of service in the social security pension system and lost their entitlement to receiving any state pensions. The accumulated capital on the individual accounts of those who decided to return to the state pension system was transferred to a fund specially created for this reason. They were allowed to make a decision on what to do with their return on investment above the inflation rate. According to the data released at the beginning of February 2011, 98% of private pension fund members decided to return to the state pension system.

The law was attacked by several people at the Constitutional Court, presumably it was also the reason why the Hungarian Parliament adopted another law in 2011, amending the previous one. *This law terminated the mandatory payment of membership fees* to private pension funds, the members were allowed to pay voluntarily a so-called contribution deducted from their taxed income, *the amount of which was not determined by the law any longer but by the private pension funds themselves. Thus the mandatory retirement provison schemes ceased to exist in Hungary*.

It was made possible for private pension fund members to return to the state pension system again, the membership of those who decided to return to it terminated on May 1st in 2012. The strict provision, according to which those who had previously chosen membership in any of the private pension funds lost their entitlement to receiving state pension in the future, was also repealed.

The termination of mandatory membership and the mandatory payment of membership fees to the private pension funds as well as providing the opportunity to return to the purely state pension system in two stages were not left without serious consequences: the number of private pension fund members was drastically reduced, forcing several private pension funds to close down.[17]

On a systemic approach, the Hungarian pension system has turned back to its former two-pillar structure again: the first pillar is a mandatory pay-as-you-go state pension system and the second pillar is a voluntary, additional one, including all institutional forms of pension savings such as pay-as-you-earn private pension funds, voluntary mutual pension funds, occupational pension schemes, the so-called. tax assisted pension savings account (NYESZ account) and life insurance policies designed for pension savings.

2. The characteristics of individual institutions

Voluntary mutual pension funds and private pension funds

Voluntary mutual pension funds and private pension funds operate on a pay-as-you-earn principle. Two periods are distinguishes in these systems: the *so-called the accumulation period* and the *so-called service or annuity period*.

During the accumulation period, savers collect the cover of their future pension, the minimum duration of accumulation is stipulated by the relevant laws (it is 10 years in the case of voluntary mutual pension funds and 10 years in the case of private pension funds). During this period, the members perform so-called payments to *their individual account*,

[17] The number of the members of the private pension funds exceeding 3 million decreased to 99.299 persons by the end of 2011 and dropped to 74,400 persons by the end of March, 2012. By 2014, only four pay-as-you-earn private pension funds were standing with approximately 61,000 members.

which amounts are invested in by the pension funds in accordance with their investment policy in the framework of a portfolio investment scheme chosen by the members and the yields achieved are credited to their account. After the expiration of the accumulation period and receiving the entitlement to state pension, members are also entitled to the additional pension service which is calculated based on the amounts accumulated in their individual accounts, mostly in the form of annuity. The pension or annuity is provided by the pension fund itself or it enters into a contract with an insurance company and purchases insurance annuity.

Savers pay their contribution deducted from their pre-tax income to both forms of institutions.

During the accumulation period, the amount accumulated in the individual account is in the ownership of the members but their freedom to act is restricted only to the designation of beneficiaries. In preparation for the possible event of their death during the accumulation period, *pension fund members are allowed to designate a beneficiary* with regard to their individual accounts for whom the amount accumulated in the individual account should be paid. If a beneficiary is already designated, the amount in the deceased pension fund member's account cannot be inherited, it is paid to the beneficiary as part of the service the pension fund provides. It depends on the choice of a fund member to designate a beneficiary who can be not only a heir but anyone else. More than one beneficiary can be designated up to different levels of entitlement, the designation of beneficiaries can be either withdrawn or changed.

During the service or annuity period, a beneficiary could not be designated to receive the amount not yet paid, which resulted in some criticism because the amount accumulated over the decades (up to tens of millions of Hungarian forints) remained at the private pension fund in the case of the untimely death of the member during the annuity period. In 2015 the laws on voluntary mutual pension funds and private pension funds were amended which facilitated the payment of the remaining amount on the service or annuity account to the designated beneficiary even in the case of a member's death during the annuity period. If the deceased pension fund member does not designate any beneficiaries, the rules of inheritance must be applied. The possibility of a beneficiary designation or heritability need to be provided even if it is not the pension fund that provides the annuity service but it "buys" that from a private insurance company, that is, it enters into a contract with a private insurance company for providing annuity service.

Voluntary mutual pension funds and private pension funds provide annuity services only for their members, their relatives or beneficiaries are not entitled to them. This possibility was earlier provided by the mandatory private pension funds. For relatives, the possibility of a beneficiary designation or heritability provide "care".

Occupational pension scheme providers

The unique feature of this form of saving for retirement is that it is focused on the employer's engagement and not that of the saver's. The employer makes a decision about the introduction of an occupational pension scheme, if there is no such scheme offered by the employer, the employees can only collectively put pressure on the employer. One can become a member if they have an employment contract with the founder of the scheme and their contract includes the employer's committment to paying contributions. The terms of pension services are determined by the employer within the framework of the related rules and regulations.

The occupational pension scheme basically operates according to two models:

- It can be financed *by the principle of pre-defined levels of retirement service (fully funded pension scheme)* where the financial and biometric risks are borne by the employer or
- it can be defined *by payment (partially funded pension scheme)* where the retirement service is not determined, it depends on the magnitude of the contributions and the yields of their investment. The employer is obliged to pay a certain amount of contributions, the risks of investment falls on the employee.

Employers in Hungary mostly prefer fully funded pension schemes, that is, retirement services determined by paid contributions.

Retirments service is provided by accumulation during *the waiting period* which is primarily paid by the employer in the form of regular payments and investments of pension contributions. The waiting period starts from the beginning of membership, although the employer determines its duration, it is maximized in 10 years by legal provisions. Pensions can be provided after the waiting period. The employee may decide to pay *supplements to the contribution* paid by the employer. The employer has the right to stipulate that the employee has to pay a supplement as well.

The amount credited to members' accounts[18] and its yields are the property of the member. In the case of both pension schemes – in order to bond employees – a period of conditional acquisition of rights can be determined which is the shortest period of time spent in employment, after which the employer gets the ownership of the employer contributions and the yields credited to their account. The period of conditional acquisition of rights can range from 0 to 3 years.

In the event of death, members may designate a beneficiary in a public document (death beneficiary). More beneficiaries can be designated, a member may also appoint a new beneficiary at any time. It is also possible to withdraw a beneficiary designation. If the member does not designate a beneficiary or the designation is repealed, the member's natural heir or heirs should be considered as beneficiary, in the share of their inheritance. The beneficiary becomes the exclusive owner of the account at the time of the member's death.

The pension scheme might contain a provision that in the event of a member's death no beneficiaries can be appointed. In this case the amount in the account is transferred to the member's occupational pension provider at the time of death of the member, and it is further transferred to member accounts of the pension scheme, calculated in proportion to the credit balances. If the employer payment of members' contributions is subjected to the payment of supplements by the employee, the pension scheme cannot contain any provision on the exclusion of beneficiary designation.

In the case of fully funded pension schemes, the law allows for designating a beneficiary for providing reversionary pension.

[18] Contributions paid by the employer. membership payments and investment yields are credited to a member account. After reaching retirement age, the pension service is calculated based on the amount held in the member account.

Pension savings accounts

Pension savings accounts (NYESZ account) can be opened by any individual who is not entitled to a pension yet and puts at least 5,000 forints in the account. The required period of savings qualifiying as a pension service is a minimum of three years but getting full tax benefit becomes possible only after 10 years of savings. There can be two types of pension savings accounts: money accounts or securities accounts. The account manager is not obliged to pay interest for the retirements savings placed in the money account because the goal is two invest the money primarily into securities. The discounts are therefore mainly related to the securities account when the saver invests the retirement savings in securities. The state supports the opening of NYESZ accounts in a way that an amount specified in the personal income tax (PIT) is returned to the NYESZ account of the individual in a form of benefit (savings support). The National Tax and Customs Administration (NTCA) transfers a maximum of 100,000 forints or 20% of the amount in the pension savings account after paying taxes in a given tax year.

An additional benefit is that the profits and yields (interest, capital gains etc.) of the transactions of investment assets in the securities account are exempt from taxation – except for stock dividends – and pension services paid from the account are also tax-free. Income tax is to be paid for the interest on financial assets held in the account. The amount of money paid by the saver is accumulated in the money account together with its potential interests and the part of income tax returned by the NTCA; in the securities account, however, the yields of investment assets and the part of income tax returned by the NTCA are collected. The account manager may charge a fee for managing the account and providing investment services.

Payment from a NYESZ account is considered *a tax-free pension service* if, in the case of the termination of the account, the account holder is entitled to receive pension, or, in exceptional cases, after 10 years following the opening of account, if the account holder is declared permanently disabled and becomes entitled to receive invalidity pension.

Payment from a NYESZ account is considered *a taxable pension service* if the account holder becomes entitled to receive pension, saves for at least three years but the termination of the account happens in no more than 10 years after opening the account. In this case, the account holder can keep the savings support but the overall yield achieved on the entire portfolio until the date of terminating the account – money and securities – qualifies as other income for which income tax and health contributions are to be paid.

In the case of payment not qualifying as a pension service, the payment support has to be paid back to the NTCA increased by 20% as a self-employed tax payer and income tax has also to be paid if any income is generated by the investment.

The assets held in the securities account – according to the rules of the inheritance of ordinary securities accounts – are a part of the inheritance. The inheritors can choose between the options of asking for selling the existing securities and receiving their yield or, if they have a securities account, of deferring the securities in the NYESZ account. The inheritors are exempt from taxation in terms of the yields or return in the NYESZ account regardless of the number of passed tax years and the entitlement to receive pension.

In respect of the amount held in the money account the situation is similar, the only difference is that a beneficiary can be designated in the event of death by applying the specific statutory rules to this type of payment account.

Conclusions

In Hungary, the types of voluntary pension savings have become more diverse recently, new institutions receiving state support have also appeared such as occupational pension schemes and pension savings accounts, furthermore insurance companies offer more and more of these types of products, the number of insurance contracts has been growing thanks to the tax subsidies provided by the state. The system of voluntary mutual pension funds works well but the prominent role of the pay-as-you-earn pension funds has been almost entirely ceased. The institutions of the current second pillar still ensure the opportunity to pay voluntary supplements to old-age pensions provided by the state as it is also preferred by the European Union but it does not seem to be enough in the long term. The majority of the Hungarian population does not take advantage of voluntary pension savings so new reform solutions are needed to be found.

NOTES FOR CONTRIBUTORS
to the European Integration studies

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The aim of the journal is to publish articles on the legal, economic, political and cultural sides of the European integration process.

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