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Resolution of Investment Disputes under the TTIP with Regard to the Principles of Independence, Impartiality, and Qualifications of the Court and its Judges

Abstract

The article provides for the judicial analysis of how a typical ISDS mechanism, as well as the ICS under the draft texts of TTIP, complies with all the provisions of the principles of independence, impartiality and qualification of the court and its judges, established under ALI/UNIDROIT Principles of Transnational Civil Procedure, which were adopted by the American Law Institute (ALI) in May 2004 and by the International Institute for the Unification of Private Law (UNIDROIT) in April 2004. These are the following provisions: judicial independence, impartiality of the court and its judges, reasonable tenure in office, transparency, substantial legal knowledge and experience.

Keywords

resolution of investment disputes, Investor-to-State Dispute Settlement, Investor Court System, TTIP

Introduction

Since July 2013[1] the European Union (hereinafter – the EU) has been negotiating a free trade and investment agreement with the United States – the

[1] *First Round of TTIP negotiations kicks off in Washington DC*, [online] http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151595.pdf [accessed: 13.07.2017].

Transatlantic Trade and Investment Partnership (hereinafter – the TTIP). One of the most controversial elements of the negotiations is the Investor-to-State Dispute Settlement (hereinafter – the ISDS). The issue of investment dispute resolution under the TTIP was opened for online public consultation carried out by the European Commission,[2] and faced strong criticism from different groups of society.[3] Afterwards, the European Commission proposed the Investor Court System (hereinafter – the ICS) in the TTIP.[4] The new draft was brought up for negotiations with the United States and made public on 12 November 2015.[5] As long as there is no final agreement, any of the options mentioned above might be reviewed. Thus, the article is aimed at the analysis of typical ISDS mechanisms with regards to the EU textual proposal of the investment resolution system in TTIP and studying its effects on investment activities.

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[2] *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, [online] http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 [accessed: 13.07.2017].

[3] As examples see the following articles: "200 environmental, consumer and labor groups have urged EU and US officials not to include an investor-state dispute settlement (ISDS) mechanism… ISDS forces governments to use taxpayer funds to compensate corporations for public health, environmental, labor and other public interest policies and government actions: ISDS has been used to attack clean energy, mining, land use, health, labor, and other public interest policies" – *Civil society groups say no to investor-state dispute settlement in EU-US trade deal' (December 2013)*, [online] http://corporateeurope.org/trade/ 2013/ 12/ civil-society-groups-say-no-investor-state-dispute-settlement-eu-us-trade-deal [accessed: 13.07.2017]; "Concern, however, remains about potential 'policy freeze': might governments think twice about introducing certain kinds of legislation if they fear potential challenges under ISDS?" – *The Transatlantic Trade and Investment Partnership and the NHS: Separating myth from fact' (November 2014)*, [online] http://www.nhsconfed.org/ ~/media/ Confederation/ Files/ public%20access/TTIP%20briefing%20-%20final%20pdf %20for%20website.pdf [accessed: 13.07.2017]; "Investors have used this system not only to sue for compensation for alleged expropriation of land and factories, but also over a huge range of government measures, including environmental and social regulations, which they say infringe on their rights" – *The obscure legal system that lets corporations sue countries' (June 2015)*, [online] http://www.theguardian.com/business/2015/ jun/ 10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid [accessed: 13.07.2017].

[4] *Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors*, [online] http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm [accessed: 13.07.2017].

[5] "This document is the European Union's proposal for Investment Protection and Resolution of Investment Disputes. It was tabled for discussion with the United States and made public on 12 November 2015. The actual text in the final agreement will be a result of negotiations between the EU and US" – *European Union's proposal for Investment Protection and Resolution of Investment Disputes*, [online] http://trade.ec.europa.eu/ doclib/ docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

1. Investor-to-state dispute settlement – what is it?

ISDS is a mechanism included in international investment treaties that allows a foreign investor access to international tribunals, if the host state has breached the investment provisions of the treaty. Typically, investment agreements include guarantees of minimum standards of treatment, non-discrimination provisions, compensations for expropriation, and free transfer of capital.[6] The European Union's proposal for Investment Protection and Resolution of Investment Disputes (hereinafter – the Draft) establishes no expropriation without compensation, the possibility to transfer funds relating to an investment, a general guarantee of both fair and equitable treatment and physical security, a commitment that governments will respect their own written contractual obligations towards an investor, and a commitment to compensate for losses in certain circumstances linked to war or armed conflict.[7] Another guarantee against nationality-based discrimination is already included in the EU proposal to the United States on Trade in Services, Investment and E-Commerce.[8]

Investment disputes arise because of an actual or potential breach of the above-mentioned provisions and, by its nature, it is no more than a breach of contract dispute. That is why no court decision may influence any legislation adopted by parliament. Invalidating regulation adopted by parliament is exclusively a competence of supreme courts or constitutional courts.[9] The state cannot use the ISDS mechanism to lodge a claim against investors, because investors are not parties to investment agreements and, thus, can-

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[6] See the following examples: *CETA – Article X.9: Treatment of Investors and of Covered Investments, Article X.11: Article X.10: Compensation for Losses, Expropriation, Article X.12: Transfers*, [online] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [accessed: 13.07.2017]; *Germany-Poland BIT – Article 2, Article 4, Article 5*, [online] http://investmentpolicyhub.unctad.org/Download/TreatyFile/1393 [accessed: 13.07.2017]; *US Model BIT – Article 6: Expropriation and Compensation, Article 5: Minimum Standard of Treatment, 9 Article 7: Transfers*, [online] http://www.state.gov/documents/organization/188371.pdf [accessed: 13.07.2017]; *Ukraine-Germany BIT – Article 2, Article 4, Article 5*, [online] http://zakon3.rada.gov.ua/laws/show/276_415/print1448046711507083 [accessed: 13.07.2017].

[7] *European Union's proposal...*, op. cit.

[8] *European Commission – Fact Sheet. Reading Guide. Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (16 September 2015)*, [online] http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm [accessed: 13.07.2017].

[9] J. Risse, N. Gremminger, *The Truth About Investment Arbitration (not only) under TTIP – Four Case Studies*, "ASA Bulletin" 2015, Vol. 33, Issue 3, pp. 465–484.

not be liable for breaching provisions of the treaty. State may bring a claim against foreign investors in its own domestic court. An investment dispute is aimed at compensation arguably owed by the host state to the investor for breaching their contractual duties under the investment agreement.[10]

Today the ISDS mechanism is popular in the EU and among its member states as well as among non-European Union countries. The EU member states concluded almost half of the total number of bilateral investment agreements (hereinafter – BIT) that are currently in force worldwide (roughly to 1400 out of 3000). Almost all of them include the ISDS.[11] In 2014 the European Union signed the first two free trade agreements (hereinafter – FTA) that include the ISDS, with Canada and Singapore.[12] FTA would ultimately replace many of the BITs concluded by member states.[13] As for an example of non-European Union member states, apart from multilateral agreements, Ukraine is a party to 72 bilateral investment treaties for the reciprocal protection of the investments.[14]

ISDS may be governed under different rules and institutions such as the UNCITRAL Arbitration Rules or the rules of the International Centre for Settlement of Investment Disputes of the World Bank.

Under the Draft, a claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:

a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);
b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to (a) do not apply;
c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL);

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[10] Ibidem.

[11] *The European Commission concept paper 'Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court'*, [online] http://trade.ec.europa.eu/doclib/docs/2015/ may/ tradoc_153408.PDF [accessed: 13.07.2017].

[12] Ibidem.

[13] M. Cremona, *Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, "Common Market Law Review" 2015, Vol. 52, Issue 2, p. 356.

[14] *Arbitration in CIS Countries. Current Issues,* Antwerpen–Apeldoorn–Portland 2012, p. 62.

d) any other rules agreed by the disputing parties at the request of the claimant;[15]
e) the above-mentioned rules on dispute settlement shall apply subject to the rules set out in the TTIP.[16]

2. Investment court system – what is the difference?

Whereas ISDS represents the tribunal made up of three arbiters, one chosen by the claimant, one by the defender, and one chosen mutually,[17] ICS is a two-instance court system composed of a Tribunal of First Instance and an Appeal Tribunal.

The Tribunal of First Instance consists of fifteen judges jointly appointed by the EU and the United States. Five of the judges shall be nationals of a member state of the European Union, five shall be nationals of the United States, and five shall be nationals of the third countries.[18] The Tribunal hears cases in divisions consisting of three judges, of whom one shall be a national of a member state of the European Union, one a national of the United States, and one a national of the third countries. Divisions shall be chaired by judges who are nationals of the third countries.[19] The disputing parties may agree that their case is heard by a sole judge who is a national of the third countries.[20] This would make the access to the system easier for small companies.[21]

The Appeal Tribunal is composed of six members, of whom two shall be nationals of a member state of the European Union, two shall be nationals of the United States and two shall be nationals of the third countries.[22] The judges are to be jointly appointed by the EU and the United States.[23] The

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[15] Article 6 (2), Sub-Section 3, Section 3, Chapter II – *Investment of the Draft*, [online] http:// trade.ec.europa.eu/ doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

[16] Ibidem, Article 6 (3), Sub-Section 3, Section 3, Chapter II.

[17] U. Khan, R. Pallot, D. Taylor, P. Kanavos, *The Transatlantic Trade and Investment Partnership: international trade law, health systems and public health*, London 2015, p. 41.

[18] Article 9 (2), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[19] Ibidem, Article 9 (6), Sub-Section 4, Section 3, Chapter II.

[20] Ibidem, Article 9 (9), Sub-Section 4, Section 3, Chapter II.

[21] *The European Commission 'Factsheet on Investment protection in TTIP'*, [online] http:// trade.ec.europa.eu/ doclib/docs/2015/january/tradoc_153018.5%20Investment.pdf [accessed: 13.07.2017].

[22] Article 10 (2), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op cit.

[23] Ibidem, Article 10 (3), Sub-Section 4, Section 3, Chapter II.

Appeal Tribunal shall hear appeals in divisions consisting of three members, of whom one shall be a national of a member state of the European Union, one a national of the United States, and one a national of the third country who shall chair the division.[24]

Furthermore, the Draft establishes a mediation mechanism. The EU agreements are the first investment agreements ever to include a specific provision on voluntary mediation before the first formal steps of the dispute settlement.[25] The procedure is confidential. However, any disputing party may disclose to the public that mediation is taking place.[26] The EU and the United States shall jointly compile a list of six mediators.[27] Mediators are appointed by agreement of the disputing parties or by the President of the Tribunal under the parties' joint requests.[28] Mediation is not intended to serve as a basis for dispute settlement procedures, thus, a disputing party shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicative body take into consideration positions taken by a disputing party in the course of the mediation procedure; the fact that a disputing party has indicated its willingness to accept a solution to the measure subject to mediation; or advice given or proposals made by the mediator.[29]

3. Resolution of investment disputes under the TTIP with regard to the principles of independence, impartiality, and qualifications of the court and its judges

The opinions towards the due mechanism of investment dispute resolution are highly controversial. Although public attitudes might be influenced by different factors, international standards retain the objective criteria to analyze the phenomenon. International standards in civil justice are represented in ALI/UNIDROIT Principles of Transnational Civil Procedure (hereinafter – the Principles), which together with the accompanying commentary was adopted by the American Law Institute (ALI) in May 2004 and by

[24] Ibidem, Article 10 (8), Sub-Section 4, Section 3, Chapter II.

[25] *The European Commission Fact Sheet 'Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors' (12 November 2015)*, [online] http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm [accessed: 13.07.2017].

[26] Article 6 (3) – *Annex I of the Draft*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

[27] Article 3 (4), Sub-Section 2, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[28] Ibidem, Article 3 (5), Sub-Section 2, Section 3, Chapter II.

[29] Ibidem, Article 6 (3), Annex I to Chapter II.

the International Institute for the Unification of Private Law (UNIDROIT) in April 2004. The Principles identify the scopes of their advisory application, namely they are considered the standards for adjudication of, inter alia, transnational commercial disputes; these Principles are applicable to international arbitration, to the extent that they are compatible with arbitration proceedings, e.g. the Principles related to jurisdiction, publicity of proceedings, and appeal.[30] Independence, impartiality, and qualifications of the court and its judges (hereinafter – the Principle 1) is one of the core principles. The Principle 1 contains a number of provisions, each of which will be analyzed with regards to the typical ISDS and the EU proposals on the ICS.

3.1. The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence

ISDS cases represent highly sensitive political issues. That is why securing judicial independence is a question of utmost importance. The accompanying commentary on the Principles clarifies possible sources of influences on the court and its judges: external influences may emanate from members of the executive or legislative branches of power, prosecutors, or persons with economic interests, etc.; internal influence could emanate from other officials of the judicial system.[31]

The opponents of ISDS mechanism state that ISDS is not necessarily needed in the countries which have a legal system based on the rule of law. However, the EU Commission pointed to the fact that even countries with strong legal systems do not always guarantee adequate protection of foreign investors. E.g. investors may face restrictions of their rights to bring their cases to domestic courts.[32] Moreover, even in countries where the rule of law applies, foreign investors do not always benefit from the same protection as domestic investors.[33]

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[30] PE Comment to *ALI / UNIDROIT Principles of Transnational Civil Procedure*, [online] http:// www.unidroit.org/english/principles/civilprocedure/ ali-unidroitprinciples-e.pdf [accessed: 13.07.2017].

[31] Ibidem.

[32] *The European Commission memo 'EU-Canada agree deal to boost trade and investment' (26 September 2014)*, [online] http://europa.eu/rapid/press-release_MEMO-14-542_en.htm [accessed: 13.07.2017].

[33] R. Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, "Journal of World Trade" 2015, No. 49, Issue 2, p. 204.

Both the ICSID Convention and the UNCITRAL Arbitration Rules establish that the arbitrator shall be independent.[34] If three arbitrators are to be appointed, each party shall appoint one arbitrator.[35] Under the UNICITRAL Arbitration Rules, the two arbitrators thus appointed shall choose the third arbitrator.[36] Under the ICSID Convention, the third arbitrator shall be appointed by agreement of the parties or by the president of the Tribunal.[37]

The UNCITRAL Arbitration Rules include a model statement of independence, which clarifies what is beyond the scope of independency and impartiality. In particular there might be no past or present professional, business, and other relationships with the parties and any other relevant circumstances which may affect independency and impartiality.

The Bluebank v. Venezuela case is instructive. The respondent filed a proposal for disqualification of the arbitrator on the ground that the arbitrator worked in a law firm that represented other claimants in unrelated ICSID cases against Venezuela. The proposal was upheld.[38]

In the **Vivendi v. Argentina** case an arbitrator lacked knowledge about a potential conflict. As far as arbitrators are to investigate whether conflicts of interests exist, the arbitrator was not excused from disclosure procedures.[39]

Thus, the practice proves the effectiveness of independency provisions. However, the fact that the arbitrators are chosen by the parties might affect the decisions.

The Draft includes the Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators,[40] which establishes provisions on inde-

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[34] Articles 14 (1) of the *ICSID Convention* and Article 9 (1) of *the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013),* [online] https://www.uncitral.org/pdf/ english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf [accessed: 13.07.2017].

[35] Articles 37 (2) of the *ICSID Convention* and Article of the *UNCITRAL*..., op. cit.

[36] Ibidem.

[37] Article 37 (2b) of the *ICSID Convention*, op. cit.

[38] *Blue Bank International & Trust (Barbados) Ltd. v. the Bolivarian Republic of Venezuela case materials*, [online] http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf [accessed: 13.07.2017].

[39] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) case materials. Available*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/97/3 [accessed: 13.07.2017].

[40] See the following provisions of the Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators of the Draft: Article 1: "member" means a Judge of the Tribunal or a Member of the Appeal Tribunal established pursuant to Section X (Resolution of Investment Disputes and Investment Court System); Article 5: Independence and Impartiality of Members: 1. Members must be independent and impartial and avoid creat-

pendence and impartiality of the judges. Moreover, there are other provisions that ensure the independence of the judges. The judges of the Tribunal and the members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organization with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed experts or witnesses in any pending or new investment protection dispute under this or any other agreement or domestic law.[41] Unlike ISDS mechanism, the judges would be allocated randomly, so disputing parties would have no influence on the process.[42]

3.2. Judges should have reasonable tenure in office. Nonprofessional members of the court should be designated by a procedure assuring their independence from the parties, the dispute, and other persons interested in the resolution

According to the accompanying commentary, this Principle recognizes that typically judges serve for an extensive period of time, usually their entire careers. However, in some systems most judges assume the bench only after careers as lawyers and some judicial officials are designated for short periods. An objective of this Principle is to avoid the creation of ad hoc courts. The term "judge" includes any judicial or quasi-judicial official under the law of the forum.[43]

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ing an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism; 2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties; 3. Members may not use their position to advance any personal or private interests and shall avoid actions that may create the impression that they are in a position to be influenced by others; 4. Members may not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment; 5. Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.

[41] Article 11 (1), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[42] Ibidem, Article 9, Sub-Section 4, Section 3, Chapter II.

[43] P-1C Comment to *ALI / UNIDROIT Principles*..., op. cit.

The ICSID Convention provides that the arbitrators shall serve for renewable periods of six years.[44] The UNCITRAL Arbitration Rules do not contain provisions regulating judges' tenure in office.

Under the TTIP the judges and Appeal Tribunal Members are appointed for a six-year term, renewable once.[45]

3.3. THE COURT SHOULD BE IMPARTIAL. A JUDGE OR OTHER PERSON HAVING DECISIONAL AUTHORITY MUST NOT PARTICIPATE IF THERE IS REASONABLE GROUND TO DOUBT SUCH PERSON'S IMPARTIALITY. THERE SHOULD BE A FAIR AND EFFECTIVE PROCEDURE FOR ADDRESSING CONTENTIONS OF JUDICIAL BIAS

The accompanying commentary clarifies that independence can be considered a more objective characteristic and impartiality a more subjective one, but those attributes are closely connected.[46] There has been a debate on impartiality of investment treaty arbitration. Some argue that investment arbitration favors the position of foreign investors over respondent host states.[47] However, the history of investment arbitration in Ukraine[48] proves the opposite. Since Ukraine joined the ICSID Convention, there have been 14 claims against Ukraine. Five disputes were decided in favor of Ukraine (Global Trading Resource Corp. and Globex International, Inc. v. Ukraine,[49] GEA Group Aktiengesellschaft v. Ukraine,[50] Tokios Tokelės v. Ukra-

[44] Article 15 (1) of the *ICSID Convention*, op. cit.

[45] See: Article 9 (5), Article 10 (5), Sub-Section 4, Section 3, Chapter II – *Investment of the Draft*, op. cit.

[46] P-1A Comment to *ALI / UNIDROIT Principles*..., op. cit.

[47] The position is based on, inter alia, the following materials: G. van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, [online] http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=ohlj [accessed: 13.07.2017]; J. Paulsson, *Denial of Justice in International Law*, Cambridge 2005, p. 306; *S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations*, [online] http://www.socialistsanddemocrats.eu/ sites/ default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304_3.pdf [accessed: 13.07.2017].

[48] To compare the amount of cases lodged against the EU member states: Austria – 1, Belgium – 1, Bulgaria – 6, Croatia – 4, Cyprus – 2, Czech Republic – 2, Denmark – 0, Estonia – 4, Finland – 0, France – 1, Germany – 2, Greece – 2, Hungary – 12, Ireland – 0, Italy – 4, Latvia – 1, Lithuania – 1, Luxembourg – 0, Malta – 0, Netherlands – 0, Poland – 3, Portugal – 0, Romania – 12, Slovak Republic – 4, Slovenia – 3, Spain – 25, Sweden – 0, United Kingdom – 0. Cases details see at: [online] https://icsid.worldbank.org/ [accessed: 13.07.2017].

[49] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, [online] https:// icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/09/11 [accessed: 13.07.2017].

ine,[51] Generation Ukraine Inc. v. Ukraine,[52] Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine[53]), two cases were amicably settled (Western NIS Enterprise Fund v. Ukraine,[54] Joseph C. Lemire v. Ukraine[55]), three cases were settled in favor of investors (Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine,[56] Alpha Projekt holding GmbH v. Ukraine,[57] Joseph C. Lemire v. Ukraine[58]), three cases are still pending (Gilward Investments B.V. v. Ukraine,[59] Krederi Ltd. v. Ukraine,[60] City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine[61]), and the Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine case[62] was discontinued pursuant to ICSID Arbitration Rule 43(1).

The following paragraphs discuss some cases demonstrating the issue, namely, Tokios Tokelės v. Ukraine, Joseph C. Lemire v. Ukraine, Generation Ukraine Inc. v. Ukraine, Western NIS Enterprise Fund v. Ukraine.

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[50] *GEA Group Aktiengesellschaft v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/08/16 [accessed: 13.07.2017].

[51] *Tokios Tokelės v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/02/18 [accessed: 13.07.2017].

[52] *Generation Ukraine Inc. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/00/9 [accessed: 13.07.2017].

[53] *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx? Case No=ARB/08/11 [accessed: 13.07.2017].

[54] *Western NIS Enterprise Fund v. Ukraine*, [online] https://icsid.worldbank.org/ apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/04/2 [accessed: 13.07.2017].

[55] *Joseph C. Lemire v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB(AF)/98/1 [accessed: 13.07.2017].

[56] *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, [online] https:// icsid.worldbank.org/apps/ICSIDWEB/ cases/Pages/casedetail.aspx?CaseNo=ARB/08/8 [accessed: 13.07.2017].

[57] *Alpha Projektholding GmbH v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/16 [accessed: 13.07.2017].

[58] *Joseph C. Lemire v. Ukraine*, op. cit.

[59] *Gilward Investments B.V. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/15/33 [accessed: 13.07.2017].

[60] *Krederi Ltd. v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/17 [accessed: 13.07.2017].

[61] *City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine*, [online] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/9 [accessed: 13.07.2017].

[62] *Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine*, [online] https://icsid.worldbank.org/ apps/ICSIDWEB/cases/Pages/ casedetail.aspx?CaseNo=ARB/15/9 [accessed: 13.07.2017].

Tokios Tokelės v. Ukraine. Tokios Tokeles, a Lithuanian entity, founded Taki Spravy, a subsidiary established under the laws of Ukraine. Taki Spravy is in the business of advertising, publishing, printing, and related activities in Ukraine and outside its borders. The Claimant, Tokios Tokeles claimed that governmental authorities in Ukraine were engaged in the series of actions related to Taki Spravy that breach the obligations of the bilateral investment treaty between Ukraine and Lithuania (hereinafter – 'Ukraine-Lithuania BIT'). Ukraine challenged the jurisdiction of the Tribunal to hear claims brought by Tokios Tokeles.

As far as Tokios Tokeles had no substantial business activities in Lithuania, the nationals of Ukraine owned ninety-nine percent of the outstanding shares of Tokios Tokeles and comprised two-thirds of its management, and the capital for the investment had also originated in Ukraine. Ukraine argued that Tokios Tokeles was economic substance-wise a Ukrainian investor in Lithuania rather than a Lithuanian investor in Ukraine. The Tribunal ruled that under the Article 1(2)(b) of Ukraine-Lithuania BIT, an investor is any entity established in the territory of the Republic of Lithuania according to its laws and regulations. And it was found that Tokios Tokeles was established under the laws of Lithuania. The Ukraine-Lithuania BIT stipulates no other criteria of foreign investor. Thus, the Tribunal decided that the dispute is within the competence of the Tribunal.[63] Afterwards the Tribunal found no Ukraine-Lithuania BIT breach committed by the state. Thus, the dispute was settled in favor of Ukraine.[64]

Joseph C. Lemire v. Ukraine. Mr. Joseph Charles Lemire, the national of the United States of America, brought a claim against Ukraine, concerning the issuance and operation of radio broadcasting licenses in Ukraine. The parties reached an amicable resolution of the dispute according to which Ukraine agreed to use its best possible efforts to consider in a positive way Gala Radio's application for the radio frequencies licenses. Additionally, Ukraine took the obligations to offer three leasing properties for a beauty salon for the Claimant's consideration. In accordance with Article 50 of the Arbitration (Additional Facility) Rules, the Parties agreed to request the Tribunal to record the settlement in the form of an award of the Tribunal.[65]

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[63] *Tokios Tokelės v. Ukraine Case No.ARB/02/18 Decision on Jurisdiction*, [online] https:// icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220 [accessed: 13.07.2017].

[64] *Tokios Tokelės v. Ukraine Case No.ARB/02/18 AWARD*, [online] https://icsid.worldbank.org/ ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2232_En&caseId=C220 [accessed: 13.07.2017].

[65] *Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB(AF)/98/1) AWARD*, [online] https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC569_En&caseId=C165 [accessed: 13.07.2017].

Generation Ukraine Inc. v. Ukraine. The Claimant, a U.S. corporate vehicle owned outright by Eugene J. Laka, a U.S. national, sought damages for the spoliation of its alleged investment. It established a local investment vehicle and achieved approval of its specific project by the Kyiv City Administration. After that the local authorities were impeding and interfering with the implementation of that project for six years in a manner which, according to the Claimant opinion, was tantamount to expropriation and therefore proscribed under the Ukraine-U.S. Bilateral Investment Treaty. The Tribunal concluded that the failure of the Kyiv City State Administration to secure the Claimant's use of the adjoining property could not amount to an expropriation. The claim was dismissed.[66]

Western NIS Enterprise Fund v. Ukraine. The Claimant, Western NIS Enterprise Fund is the US regional private equity fund, which invests in small and medium-sized companies in Ukraine. The claimant lodged the claim against Ukraine because Ukrainian courts refused to enforce the American Arbitration Association commercial award in favor of the claimant. The claim fell within the scope of the United States-Ukraine Bilateral Investment Treaty (hereinafter – the US-Ukraine BIT). Under the Article VI (2) and (3) of the US-Ukraine BIT, the parties to the dispute shall initially seek a resolution through consultation and negotiation and than, if the dispute could not be settled amicably and if six months had elapsed from the date on which the dispute arose, the investor may submit the dispute to ICSID. The tribunal ruled that proper notice of the claim under the US-Ukraine BIT was not given, thus, the proceedings was suspended during six months. If a proper notice were not given within this period, the claim would have been dismissed.[67] Afterwards an amicable settlement was reached by the parties and proceeding was discontinued at their request.[68]

The cases mentioned above demonstrate how ISDS might be not a mere mechanism protecting investor's rights only, but rather a system securing the right balance. Moreover, the European Commission in its concept paper on investment in TTIP noticed that they have already accomplished some reforms of the traditional approach to investment protection and the associated ISDS system. As an example they mentioned CETA, a free trade agree-

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[66] *Generation Ukraine Inc. v. Ukraine (ICSID CASE No. ARB/00/9) AWARD*, [online] http:// www.italaw.com/sites/default/files/case-documents/ita0358.pdf [accessed: 13.07.2017].

[67] *Western NIS Enterprise Fund v. Ukraine (ICSID Case No. ARB/04/2) ORDER*, [online] https:// icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC649_En&caseId=C236 [accessed: 13.07.2017].

[68] *Western NIS Enterprise Fund v. Ukraine*, op. cit.

ment with Canada, setting out clearly defined procedures to follow to ensure full impartiality of arbitrators by requiring full disclosure of any situation which could give rise to real or perceived conflicts of interest. CETA provides concrete, clear procedure to determine whether a conflict could arise or has arisen. In case arbitrators are found not to comply with the code, they will be replaced.[69]

As for ICS, the EU proposed wording of investment chapter includes several provisions on impartiality. Article 3 (3) requires the impartiality of mediators. Both Article (2) and Article (5) command the impartiality of candidates and members of the Tribunal or the Appeal Tribunal. Article 3 (1) set forth the obligation for candidates to the Tribunal or the Appeal Tribunal to disclose any past and present interest, relationship, or matter that is likely to affect their independence or impartiality, or that might reasonably create an appearance of impropriety or bias in the proceeding. The candidates shall make all reasonable efforts to become aware of any such interests, relationships, or matters.[70]

3.4. NEITHER THE COURT NOR THE JUDGE SHOULD ACCEPT COMMUNICATIONS ABOUT THE CASE FROM A PARTY IN THE ABSENCE OF OTHER PARTIES, EXCEPT FOR COMMUNICATIONS CONCERNING PROCEEDINGS WITHOUT NOTICE AND FOR ROUTINE PROCEDURAL ADMINISTRATION. WHEN COMMUNICATION BETWEEN THE COURT AND A PARTY OCCURS IN THE ABSENCE OF ANOTHER PARTY, THAT PARTY SHOULD BE PROMPTLY ADVISED OF THE CONTENT OF THE COMMUNICATION

According to the accompanying commentary, proceedings without notice (ex parte proceedings) may be proper in certain cases, e.g. in initial application for a provisional remedy.[71]

The arbitration rules stipulate the relevant provisions. Under the UNCITRAL Arbitration rules in the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.[72] Under the ICSID Convention, if a party fails to appear or to pre-

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[69] *Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', published on the 5 May, 2015*, [online] http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [accessed: 13.07.2017].

[70] *The EU textual proposal of investment chapter*, [online] http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [accessed: 13.07.2017].

[71] P-1E Comment to *ALI / UNIDROIT Principles...*, op. cit.

[72] Article 28 (1) of the *UNCITRAL Arbitration Rules...*, op. cit.

sent their case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.[73] Moreover, Article 44 of the ICSID Convention provides that arbitrations will be conducted in accordance with the Arbitration Rules. Under the ICSID Arbitration Rules, as soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration, and of any communication received from either party in response thereto.[74]

In TTIP, however, the issue of transparency is regarded broader than in usual civil procedures. Given that investment cases under the TTIP is a matter of money of tax payers, the resolution of investment disputes are of public interest. The Draft incorporates the UNCITRAL rules on transparency, under which all documents will be made publicly available[75] and all hearings will be open to the public.[76]

3.5. The court should have substantial legal knowledge and experience

According to the accompanying commentary, judges for transnational litigation shall be familiar with the law. It does not require the judge to have special knowledge of commercial or financial law, but familiarity with such matters would be desirable.[77]

The ICSID Convention states that the competence in the field of law is of particular importance. Arbitrator shall be a person of high morale and recognized competence in the fields of law, commerce, industry, or finance.[78] The parties may challenge arbitrators on ground of a real or apparent lack of, inter alia, competence in the fields of law.[79] The UNCITRAL Arbitration Rules, however, do not provide provisions towards legal knowledge and experience of arbitrators.

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[73] Article 45 (2) of the *ICSID Convention*, op. cit.

[74] Rule 30 of the *ICSID Arbitration Rules*, [online] http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap04.htm [accessed: 13.07.2017].

[75] Article 2, Article 3 of the *UNCITRAL rules on transparency*, [online] http://www.uncitral.org/ pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [accessed: 13.07.2017].

[76] Ibidem, Article 6.

[77] P-1F Comment to *ALI / UNIDROIT Principles...*, op. cit.

[78] Article 14 (1) of the *ICSID Convention*, op. cit.

[79] Ibidem, Article 57.

TTIP establishes requirements for high qualification towards the judges. The judges shall have technical and legal qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body.[80] Under the Draft, the judges of the Tribunal of First Instance shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence; and the members of the Appeal Tribunal shall have the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognized competence. They shall have demonstrated expertise in public international law. In particular, it is desirable that they have expertise in international investment law, international trade law, and the resolution of disputes arising under international investment or international trade agreements.[81] The text also provides for giving the judges a monthly retainer fee in order to secure highly qualified individuals and ensure their availability at short notice.[82]

As for the mediators, TTIP provides for the mediators the same requirements as the ICSID Convention establishes for the arbitrators – mediator should be a person of high morale and recognized competence in the fields of law, commerce, industry, or finance.[83]

Conclusion

Notwithstanding strong public opposition, typical ISDS mechanism as well the ICS under the draft texts of TTIP complies with the principles of independence, impartiality and qualification of the court and its judges, established under UNIDROIT:

1. Under UNIDROIT, the court and the judges should have judicial independence. Both the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules establish that an arbitrator shall be independent. The cases prove the effectiveness of those provisions. The TTIP draft goes even further – the judges shall be allocated randomly so that disputing parties would have no influence on it.

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[80] See: *European Commission – Fact Sheet. Reading Guide...*, op. cit.

[81] Article 9 (4), Sub-Section 4, Article 10 (7), Sub-Section 4 – *Investment of the Draft*, op. cit.

[82] *European Commission – Fact Sheet. Reading Guide...*, op. cit.

[83] Article 3 (4), Sub-Section 2, Section 3, Chapter II – *Investment of the Draft*, op. cit.

2. UNIDROIT requires that judges should have reasonable tenure in office. According to the ICSID Convention the arbitrators shall serve for renewable periods of six years. Under the TTIP draft, the judges and Appeal Tribunal Members are appointed for a six-year term, renewable once.

3. UNDROIT provides the principle of impartiality of judges. There has been debate on impartiality of investment treaty arbitration on the ground of the argument that investment arbitration favors the position of foreign investors over respondent host states. However, the case analysis proves the opposite. Ukraine appears to be a leader among post-soviet countries in acting as a respondent in ICSID cases. Five of fourteen cases lodged against Ukraine were decided in favor of Ukraine. Two cases of fourteen were amicably settled. All the cases were controversial; however, all the decisions are unbiased.

4. UNIDROIT requires transparency in communication between the party and the judge, inter alia, the due notice of hearings. The UNCITRAL Arbitration as well as the ICSID Convention includes the relevant provisions. In the draft of the TTIP the issue of transparency is regarded even broader. The draft incorporates the UNCITRAL rules on transparency, under which all documents will be made publicly available and all hearings will be open to the public.

5. Under UNIDROIT judges for transnational litigation shall be familiar with the law. The ICSID Convention establishes higher standards – the arbitrators should have recognized competence in the fields of law, commerce, industry, or finance. Under the draft of the TTIP, the judges shall have technical and legal qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body.

Thus, both ISDS and ISC provide the right balance of maintaining public interest and securing the rights of investors.

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Untying Gordian Knot: Projects to Reform the UN Security Council

Abstract

The article focuses on the very topical, and hotly debated in the last three decades, issue of the United Nations Security Council reform. The author briefly describes the historical roots of the Security Council, its establishment in 1945 and the enlargement that took place in 1965. The second part of the paper outlines the systemic flaws of the current composition of the Council and presents the existing projects of its reform proposed by the UN bodies or groups of states. The final part provides the ranking of current members of, and aspiring candidates to, the Security Council. The author describes the methodology used for this ranking and its utility for better understanding of the complexity of the problem.

Keywords

United Nations, Security Council, veto right, state, permanent members

Introduction

The United Nations is a global international organization established in 1945 after the World War II. It replaced the largely ineffective League of Nations and has had similar goals – to maintain international peace and security, increase international cooperation, and, simply speaking, avoid the next global war. The UN's structure is to some extent based on that of the League of Nations. It has five principal organs, and the primary responsibility for the maintenance of international peace and security, according to art. 24 of the UN Charter,[1] is conferred on one of those organs – the UN Security Council.

[1] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

The UN Security Council has been created in a way that requires a consensus among its permanent members in order to effectively perform its duties. Such institutional arrangements may have been seen necessary in 1945 and may have helped to avoid a global military conflict between the permanent members during the Cold War era, in which the League of Nations had failed. On the other hand, it has become evident that the UN Security Council has fundamental flaws, and often cannot adequately react to modern conflicts and challenges, and cannot effectively maintain international peace and security.[2] Thus, the ideas to reform the UN Security Council have been actively discussed for years now.

1. Historical Overview

The ideas to establish a "world government" can be traced far back to the late 17th century. William Penn had proposed an idea of the world parliament, which would settle arising conflicts by a three-quarters vote and would have the authority to enforce peace by the use of force; Immanuel Kant had also argued in his "Perpetual Peace" for the establishment of the league of peace.[3]

During the Napoleonic wars, the four powers, Britain, Austria, Russia, and Prussia, came to an agreement to overthrow Napoleon and to remain in alliance for the following twenty years after Napoleon's defeat. This arrangement was signed as the Treaty of Chaumont in March 1814. In the next year, after Waterloo, another treaty was signed which confirmed and renewed previous arrangements. Article 6 of that treaty provided that the four powers "have agreed to renew their meeting at fixed periods for the purpose of consulting upon their common interests, and for the consideration of measures most salutary for the repose and prosperity of Nations and for the maintenance of the peace of Europe."[4] This article "formed the basis for the Concert of Europe and contained the germ of international government."[5] Between 1814 and 1914 there were numerous meetings in order to

[2] The most recent examples of the UN Security Council's inability to react to a threat and accept any decision are the civil war in Syria, war against ISIS and the Ukrainian-Russian conflict in Crimea and Eastern Ukraine.

[3] Ch. J. Tams, *League of Nations*, Max Planck Encyclopedia of Public International Law, [online] http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-978 019 9231690-e519 [accessed: 31.05.2017].

[4] R. Hiscocks, *The Security Council. A Study in Adolescence*, New York, 1973, p. 24.

[5] Ibidem.

resolve disputes peacefully, and maintain peace in Europe. At least 8 congresses (meetings of heads of governments or foreign ministers) and 18 conferences (meetings of ambassadors) took place during that period.[6]

The World War I and its horrible experiences became a decisive argument for the establishment of international organization and, thus, strengthening and enhancing the international cooperation. Several ideas had been developed in this regard, including the preparatory reports of British and French committees, chaired by Lord Phillimore and Leon Bourgeois respectively, the famous Fourteen Points of Woodrow Wilson, as well as the pamphlet *The League of Nations: A Practical Suggestion* by the South African General Jan Smuts.[7] The League of Nations was established by the Treaty of Versailles on 28 June 1919 and the Covenant of The League of Nations was signed on the same day.

The League of Nations comprised of three main organs: the Assembly, the Council, and the permanent Secretariat (art. 2 of the Covenant).[8] The Council of the League of Nations is the direct predecessor and prototype of the United Nations Security Council. It consisted, according to art. 4 of the Covenant, of Representatives of the Principal Allied and Associated Powers (permanent members – T. L.), together with Representatives of four other Members of the League (non-permanent members). The Covenant also provided a possibility to increase the number of permanent members of the Council ("with the approval of the majority of the Assembly, the Council may name additional Members of the League whose Representatives shall always be members of the Council" – art. 4 (2)), which is, in a way, a more progressive solution than that provided by the UN Charter. But on the other hand, the decision-making process required a unanimous agreement of the Council (and of the Assembly as well), except the matters of procedure (art. 5). Such an order made the decision-making process in the League of Nations extremely complicated and cumbersome; unfortunately, a similar, to some extent, design was established for the UN Security Council (so-called "veto right" by the permanent members), which is the reason of its inability to adopt many necessary decisions.

Despite its systemic problems and inability to prevent another great war, the achievements of the League of Nations should not be belittled. As Christian Tams puts it, "in the immediate aftermath of the Great War, the

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[6] Ibidem, pp. 25–26.

[7] Ch. J. Tams, op. cit.

[8] *Covenant of the League of Nations*, 28 June 1919, [online] http://www.refworld.org/docid/3dd8b9854.html [accessed: 31.05.2017].

League idea generated an unprecedented level of hope and faith in international progress. The League itself became the first international organization with general competence and, for at least 15 years, functioned as a permanent forum of international co-operation."[9] Francis Paul Walters also describes the founding of the League of Nations as "a forward leap of unprecedented extent and speed, accompanied by extraordinary changes in the conduct of international relations."[10]

The United Nations was established on 24 October 1945 after World War II and was largely designed upon the structure of the League of Nations. The General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat have been established as its principal organs (art. 7 of the UN Charter). The Security Council originally consisted of eleven members, five of them permanent (US, UK, France, the Republic of China, and the USSR) and six nonpermanent members elected by the General Assembly for a two-year term (art. 23).

In 1965 the UN Charter has been amended in response to the growing number of new states becoming the members of the UN. Article 23 was amended to enlarge the Security Council from 11 to 15 members (of which 5 are still permanent, and 10 are non-permanent), and article 27 was amended to increase the required number of votes from seven to nine (to reflect the enlarged number of the Security Council members).[11] Besides these, rather formal amendments, some structural changes have also appeared without the amendments of the Charter. In 1971, the People's Republic of China was recognized by the Resolution 2758[12] as the lawful member of the UN and assumed the permanent seat at the Security Council (the Taiwan-based Republic of China was expelled from the UN); and in 1991, the Russian Federation assumed the permanent seat in the Security Council after the dissolution of the Soviet Union.

Practically since the establishment of the UN, there have been many proposals to reform the organization, including the proposals and debates around

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[9] Ch. J. Tams, op. cit.

[10] F. P. Walters, *A History of the League of Nations*, London 1952, p. 1.

[11] Resolution 1991 (XVIII) *Question of Equitable Representation on the Security Council and the Economic and Social Council,* adopted by the UN General Assembly on 17 December 1963, [online] http://www.un.org/documents/ga/res/18/ares18.htm [accessed: 31.05.2017].

[12] Resolution 2758 (XXVI) *Restoration of the Lawful Rights of the People's Republic of China in the United Nations,* adopted by the UN General Assembly on 25 October 1971, [online] http://www.un.org/documents/ga/res/26/ares26.htm [accessed: 31.05.2017].

the Security Council reforms. Even inside the UN itself, some bodies have been established specifically for that purpose, such as the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (established in 1975), or the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council (established in 1993). There are also many projects and proposals designed by states or group of states, as well as non-governmental international organizations. The following part of the paper will explore these projects in more details.

2. Projects to Reform the UN Security Council

2.1. THE IDEA TO REFORM THE COUNCIL

The UN Security Council has been heavily criticized for its imperfect composition and lack of transparency of working methods and decision-making process. Due to the limits of this paper, the focus of the research will be put on the analysis of the composition of the Council and projects to reform it. The main arguments against the current composition are as follows:

- the Council is too limited, it consists of 15 members out of 193 member states (comparing to 15 members out of 117 member states in 1965 when the last and only enlargement of the Council has taken place);
- European countries are overrepresented having two permanent seats (the UK and France), two non-permanent seats for the Western European and Others Group, one non-permanent seat for the Eastern European states, comprising in total to 5 seats out of 15 (plus, the permanent seat of the Russian Federation may also be viewed as a European seat);
- Africa and Asia, in contrast, are underrepresented having only 3 seats (one of which is permanent) for Asian countries (while they represent more than a half of world's population) and 3 seats for African countries (representing 54 member states);
- the concept of permanent seats is criticized from two opposite points: on the one hand, it is criticized as a non-democratic and anachronistic principle, on the other hand, there is a number of states that aspire to receive the permanent seat in the Council and criticize it for inadequate representation of the modern geopolitical situation.[13]

[13] See more: P. Teixeira, *The Security Council at the Dawn of the Twenty-First Century. To What Extent Is It Willing and Able to Maintain International Peace and Security?*, Geneva 2003, pp. 11–12.

The ideas to reform the Security Council have been developed for a long time by the UN itself (including the UN University), numerous NGOs (the Center for UN Reform Education, the Global Centre for the Responsibility to Protect, the International Coalition for Responsibility to Protect, Global Policy Forum, Security Council Report, the United Nations Reform Study Group of the International Law Association etc.), and academics.[14] Since most of the projects and ideas developed before 2000[15] are either outdated or have not been discussed anymore, the article will analyze only the newest proposals from the twenty-first century and the last decade of the twentieth century.

2.2. INTENSIFYING THE REFORM DEVELOPMENT (1992–2003)

After the Cold War era, Germany and Japan started to increasingly push their candidacies as new permanent members of the UN Security Council; they were later joined by India and Brazil. These countries formed an informal group called G4 and they explained their aspirations by their growing role in international politics, by their territory and population, involvement in UN peacekeeping operations, and contributions to the UN budget. At the same time, their regional rivals (Italy, South Korea, Pakistan, Mexico, Argentina, and others) tried to block these aspirations and pushed the idea of increasing the number of non-permanent seats instead (these countries formed so-called "Coffee Club," later changed to "United for Consensus.")[16]

In 1992, Boutros Boutros-Ghali was elected a Secretary-General of the UN and shortly thereafter published *An Agenda for Peace* where he argued for restructuring the Security Council and reforming it.[17] As more and more countries raised this issue, the 1992 Security Council Summit included it on its agenda and, in 1993, the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council (hereinaf-

[14] See for instance: Y. Z. Blum, *Proposals for UN Security Council Reform*, "The American Journal of International Law" 2005, Vol. 99, pp. 632–649.

[15] See more on the projects developed from 1945 till 2000: D. Bourantonis, *The History and Politics of UN Security Council Reform*, Routledge 2005; E. C. Luck, *UN Security Council. Practice and Promise*, Routledge 2006; *Governing and Managing Change at the United Nations. Reform of the Security Council from 1945 to September 2013*, Vol. 1, New York 2013.

[16] Ibidem, pp. 2–3.

[17] Th. G. Weiss, *The Illusion of UN Security Council Reform*, "The Washington Quarterly" 2003, Vol. 26, No. 4, p. 150.

ter – the Working Group) was established by the General Assembly.[18] In the following years several proposals were developed, including the proposals to increase the number of permanent and non-permanent seats, as well as limit the veto right of permanent members.

Bardo Fassbender provides the statement of the Vice-Chairman of the Working Group in which he summarized the state of the debate as of September 1995:

> Discussions showed that there was an agreement in the Working Group on the need to strengthen the effectiveness of the Security Council by an increase in its membership in order to reflect more accurately the important international changes that have taken place, including the substantial increase in the membership of the United Nations, especially of developing countries. Discussions further showed that there was an agreement on the need to review the Council's composition, its working methods, and other matters related to its functioning.[19]

In 1997, the General Assembly President and, at the same time, the Working Group chairman, Ismael Razali, proposed an ambitious three-stage reform plan, which provided for the enlargement of the Security Council from 15 to 24 members, including the addition of five new permanent members. To counteract the Razali-proposal the Non-Aligned Movement and Italy successfully lobbied the adoption by the General Assembly of the resolution A/RES/53/30 on 23 November 1998. This resolution stipulated that any future resolutions on enlarging the Security Council would require a two-thirds majority vote. This requirement is applicable to even minor adjustments and has made decisions on Council enlargement extremely difficult ever since.[20]

2.3. LATEST PROPOSALS OF THE REFORM (SINCE 2003)

In 2003, the then Secretary-General Kofi Annan established the High Level Panel on Threats, Challenges and Change, which delivered a report *A More Secure World: Our Shared Responsibility*[21] in December 2004. In the report, the authors proposed two models of the Security Council reform.

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[18] UN Doc. A/Res/48/26, 3 December 1993.

[19] B. Fassbender, *Un Security Council Reform and the Right of Veto. A Constitutional Perspective*, Kluwer Law International 1998, p. 234.

[20] *Governing and Managing Change…*, op. cit., p. 5.

[21] *Report of the High Level Panel on Threats, Challenges and Change, A/59/565*, [online] https://www.globalpolicy.org/images/pdfs/1202report.pdf [accessed: 31.05.2017].

Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas as follows:[22]

Table 1: Model A of the Security Council reform

Regional area	Number of states	Permanent seats (continuing)	Proposed new permanent seats	Proposed two-year seats (non-renewable)	Total
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6
Europe	47	3	1	2	6
Americas	35	1	1	4	6
Total	191	5	6	13	24

Source: *Report of the High Level Panel on Threats*..., op. cit., p. 67.

Model B provides for no new permanent seats but creates a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas as follows:[23]

Table 2: Model B of the Security Council reform

Regional area	Number of states	Permanent seats (continuing)	Proposed four-year renewable seats	Proposed two-year seats (non-renewable)	Total
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6

[22] The data is valid as of 2 December 2004.
[23] The data is valid as of 2 December 2004.

Europe	47	3	2	1	6
Americas	35	1	2	3	6
Total	191	5	8	11	24

Source: *Report of the High Level Panel on Threats*..., op. cit., pp. 67–68.

Additionally, the authors proposed for the General Assembly

> to elect Security Council members by giving preference for permanent or longer-term seats to those States that are among the top three financial contributors in their relevant regional area to the regular budget, or the top three voluntary contributors from their regional area, or the top three troop contributors from their regional area to United Nations peacekeeping missions.[24]

In 2005, the African states formed an "**Ezulwini Consensus**" and called for two permanent seats. They argue that, even although the main focus of the Security Council activities is directed towards the African states, the continent has no permanent representative. The two permanent members should be chosen by the African Union member states themselves, and the main contenders for the positions are Egypt, South Africa, and Nigeria, with strong claims also from Ethiopia, Senegal, Algeria, and Tanzania.[25]

Another prominent proposal of the Security Council reform is the one delivered in 2015 by the Elders,[26] "A UN Fit for Purpose" which, among others, proposed a new category of members of the Security Council and called upon

> [...] the states which aspire to permanent membership accept instead, at least for the time being, election to a new category of membership, which would give them a much longer term than the two years served by the non-permanent members, and to which they could be immediately re-elected when that term expires. This would enable them to become de facto permanent members, but in a more democratic way, since it would depend on them continuing to enjoy the confidence of other member states.[27]

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[24] *Report of the High Level Panel...*, op. cit., pp. 68.

[25] *Governing and Managing Change...*, op. cit., p. 4.

[26] Informal and independent group of global leaders which was founded by Nelson Mandela and has included Kofi Annan, Jimmy Carter, Desmond Tutu, Fernando H. Cardoso and others.

[27] *A UN Fit for Purpose*, The Elders. Independent global leaders working together for peace and human rights, [online] http://theelders.org/un-fit-purpose [accessed: 31.05. 2017].

The biggest rivalry, concerning the Security Council reform, is currently present among the already mentioned groups of states that have interests in taking new seats in the enlarged Security Council. Those main groups are: the **Group of Four (G4)** – Japan, Germany, India and Brazil; **United for Consensus (UfC)** – Italy, Spain, South Korea, Canada, Mexico, Argentina, Turkey, Pakistan, Colombia, Costa Rica, Malta, and San Marino; the **Ezulwini Consensus** – representing the positions of the African Union. The plans of these groups may be described as follows:

Table 3: Plans of the Group of Four (G4), United for Consensus (UfC), and the Ezulwini Consensus

Plans	Description
G4	The G4 plans envisage a Council with a total membership of 25, including six new permanent members (Brazil, Japan, Germany, India and two African countries) and an additional three elected seats.
UfC	UfC called for a 25-member Council, which would be achieved by adding "no permanent members to the Council, but would rather create new permanent seats in each region, leaving it to the members of each regional group to decide which Member States should sit in those seats, and for how long".
Ezulwini Consensus	The Ezulwini Consensus proposes two permanent seats and two additional elected seats for Africa. Under the proposal, the permanent members would be granted "all the prerogatives and privileges of permanent membership including the right to veto".

Source: P. Nadin, *United Nations Security Council Reform*, Our World, United Nations University, [online] https://ourworld.unu.edu/en/united-nations-security-council-reform [accessed: 31.05.2017].

To further illustrate how complicated is the process of reforming the UN Security Council and how many opposite interests different states and groups of states have, it would be useful to describe other, not yet mentioned in the text, less active groups of states[28] that have proposed various projects of the Council reform:

[28] *Timeline UN Security Council Reform (1992–2015)*, provided by Lydia Swarf for the Center for UN Reform Education, [online] www.centerforunreform.org/sites/ default/ files/Timeline%20November%202015%20final.pdf [accessed: 31.05.2017].

1) **The African Group / C10**. Although the African Group represents a common position during the inter-governmental negotiations, it has serious internal divisions and competing candidacies. Despite the fact that they have formed the "Ezulwini Consensus" in 2005, South Africa and Nigeria tried to converge with the G4 group. In response to this, the Committee of 10 (C10) was established to act as a focal point on the Security Council reform and alliances with other regional groups. The C10 consists of Algeria, Congo Brazzaville/Republic of the Congo, Equatorial Guinea, Kenya, Libya, Namibia, Senegal, Sierra Leone, Uganda, and Zambia;

2) **ACT** (Accountability, Coherence, and Transparency) consists of 25 members including Austria, Chile, Costa Rica, Denmark, Estonia, Finland, Gabon, Ghana, Hungary, Ireland, Jordan, Liechtenstein, Luxembourg, Maldives, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Rwanda, Saudi Arabia, Slovenia, Sweden, Switzerland and Uruguay. They do not participate in inter-governmental negotiations as a group but instead had worked together to develop a Code of Conduct by which its endorsers pledge not to vote against credible resolutions of the Security Council aimed at preventing or ending genocide, war crimes, and crimes against humanity. By November, it had gained support from 106 countries, including France and the United Kingdom, but not the other three permanent members. Besides this group, Belize, the Netherlands, Spain, and Ukraine also participated in the development of the above-mentioned Code of Conduct;

3) **L69**. The group of about 40 developing countries: G4 members Brazil and India, 11 African countries, small island states, Caribbean Community States and several states from Latin America;

4) The **Arab group** advocates for its own permanent seat;

5) **Eastern European states** propose a second non-permanent seat for themselves;

6) Some states have proposed a joint permanent seat for the **European Union**, instead of two permanent seats of UK and France (a proposal rather not actual anymore, having in mind the recent *Brexit* developments);

7) **Small island developing states** are in favor of special cross-regional rotating non-permanent seat in exchange for their support of new permanent seats.

Such a variety of opposing interests illustrates the complexity of the Security Council reform. And it is only one aspect of the reform – enlargement of the Council. As Lydia Swarf puts it:

> A successful vote for new permanent members – with or without veto rights – may not be easy to bring about, however. There is a complex and large variety of options on the table. There are likely to be last-minute changes in national positions resulting from external pressure or new understandings. And most of all, there seems to be lack of genuine political will among the wider membership for a solution that will mostly benefit just a handful of countries whose relative power may change over time. Longer-term and renewable seats seems the most feasible and flexible option, but a vote for such a solution would likely fail too at this time. Neither a text without real negotiations or untimely votes will bring results. Only compromise can.[29]

3. Who Should Receive the Permanent Membership of the UN Security Council?

Given the political complexity of the issue, it may be useful to provide some quantitative data that may clarify the problem and provide some objective information on which countries should actually receive the permanent seat in the Security Council (or long-term renewable seat) in case of eventual enlargement. To answer this question, a few indicators will be taken into account: firstly, the population of a state, and its GDP; next, budget contributions to the UN and the number of peacekeepers from a given state; and, additionally, the nuclear arsenal of a state.

Statistics on the following countries will be analyzed: current permanent members of the Security Council (USA, UK, France, the Russian Federation, and the People's Republic of China) and countries that either aspire to receive the seat or are regional leaders (Germany, Italy, Japan, India, South Korea, Pakistan, Indonesia, Brazil, Argentina, Mexico, Canada, South Africa, Nigeria, Egypt, Turkey, and Saudi Arabia). The countries will be ranked by every indicator and will be awarded points depending on their place in the rank (1st place = 1 point, 2nd place = 2 points and so on). In the end, all the points from the ranks by different indicators will be summed up and the states with the least numbers of points will be those who most deserve a seat in the Security Council. Those countries that possess nuclear arsenal will be awarded 1 point irrespectively of the number of warheads, those that do not possess it – 2 points.

The methodology may be also used for a bigger number of states (including Canada, Spain, Australia, Iran, Ethiopia etc.), as well as with additional indicators (territory, defense budget, index of democracy and/or human rights protection etc.) but for the purpose of this research only the above-mentioned ones will be taken into account.

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[29] Ibidem.

The main goal of such quantitative approach is to provide the audience with some objective quantitative information on different states that are or aspire to become the members of the Security Council. As may be seen in the **Table 4** below, if the Security Council would have been established nowadays based on the objective criteria (in this case: population, GDP, and nuclear arsenal, as well as involvement in the UN activities, such as contributions to the UN budget and number of peacekeepers from each country) the permanent five members of it would be China, USA, India, Brazil, and Japan. The next five countries in the ranking are, respectively, Germany, France, UK, Indonesia, and Italy. The use of this methodology provides us with the clear understanding that the claim of **G4** countries (India, Brazil, Japan, and Germany) for the seat in the Security Council is the most reasonable and well-grounded. Among the African states, the highest position in the ranking belongs to Nigeria (13), which would make it the primary candidate for the "African" seat.

Unfortunately, the reform and alleged enlargement of the Security Council will, most likely, be based not upon the objective criteria but on political reasons and self-interests of states and groups of states.

Table 4: Ranking of the permanent members of and potential candidates to the UN Security Council

No.	State	Population[30] (millions)	GDP[31] (billions $)	Budget contribution to the UN[32] (%)	Number of peacekeepers[33]	Nuclear arsenal[34]	Points	Overall position
1.	USA	326,474 (3)	18,036 (1)	22 (1)	73 (18)	+ 1	24	2
2.	UK	65,511 (14)	2,861 (5)	4,463 (6)	528 (13)	+ 1	39	8-9
3.	France	64,938 (15)	2,418 (6)	4,859 (5)	846 (10)	+ 1	37	7

[30] Source of the information: *Countries in the world by population (2017)*, [online] http://www.worldometers.info/world-population/population-by-country/ [accessed: 31.05.2017].

[31] Source of the information (as of 2015): *The World Bank*, [online] http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=true [accessed: 31.05.2017].

[32] Source of the information (budget for 2017): *United Nations, Contributions to the UN budget*, [online] http://www.un.org/ga/search/view_doc.asp?symbol=ST/ADM/ SER.B/955 [accessed: 31.05.2017].

[33] Source of the information (as of April 2017): *United Nations, Numbers of peacekeepers by countries*, [online] http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml [accessed: 31.05.2017].

[34] Source of the information (as of 2017): *International Campaign to Abolish Nuclear Weapons*, [online] http://www.icanw.org/the-facts/nuclear-arsenals/ [accessed: 31.05.2017].

4.	Russia	143,375 (8)	1,365 (11)	3,088 (9)	95 (17)	+ 1	46	11
5.	China	1,388,232 (1)	11,064 (2)	7,921 (3)	2,509 (5)	+ 1	12	1
6.	Germany	80,636 (12)	3,363 (4)	6,389 (4)	728 (11)	+ 2	33	6
7.	Italy	59,797 (16)	1,821 (8)	3,748 (8)	1,272 (9)	+ 2	43	10
8.	Japan	126,045 (10)	4,383 (3)	9,68 (2)	123 (15)	+ 2	32	5
9.	India	1,342,512 (2)	2,088 (7)	0,737 (15)	7,648 (1)	+ 1	26	3
10.	S. Korea	50,704 (18)	1,377 (10)	2,039 (10)	625 (12)	+ 2	52	14
11.	Pakistan	196,744 (6)	271,049 (20)	0,093 (20)	7,111 (2)	+ 1	49	12
12.	Indonesia	263,510 (4)	861,933 (13)	0,504 (16)	2,722 (4)	+ 2	39	8-9
13.	Brazil	211,243 (5)	1,803 (9)	3,823 (7)	1,284 (8)	+ 2	31	4
14.	Argentina	44,272 (19)	584,711 (16)	0,892 (14)	464 (14)	+ 2	65	19
15.	Mexico	130,222 (9)	1,143 (12)	1,435 (11)	32 (19)	+ 2	53	15-16
16.	S. Africa	55,436 (17)	314, 571 (19)	0,364 (17)	1,395 (7)	+ 2	62	18
17.	Nigeria	191,835 (7)	486,792 (17)	0,209 (18)	1,686 (6)	+ 2	50	13
18.	Egypt	95,215 (11)	330,778 (18)	0,152 (19)	2,895 (3)	+ 2	53	15-16
19.	Turkey	80,417 (13)	717,879 (14)	1,018 (13)	117 (16)	+ 2	58	17
20.	Saudi Arabia	32,742 (20)	646,001 (15)	1,146 (12)	- (20)	+ 2	69	20

Sources: *Countries in the world by population*, [online] http://www.worldometers.info/world-population/population-by-country/; *World Bank*, [online] http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=true; *United Nations*, [online] http://www.un.org/ga/search/view_doc.asp?symbol=ST/ADM/SER.B/955; http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml; *International Campaign to Abolish Nuclear Weapon*s, [online] http://www.icanw.org/the-facts/nuclear-arsenals/.

Conclusion

There is a general understanding for the need to reform the UN Security Council which includes the improvement of the working methods and decision-making process, increasing transparency of the Council, restraining veto powers, and reconfiguration of the Council according to the current political configuration in the world. The reality has changed fundamentally since the World War II and the UN Security Council does not adequately

represent the world anymore. Most active in claiming their right to receive the seat in the Council are the so-called G4 countries: India, Brazil, Japan, and Germany. But their claim is strongly resisted by their regional competitors who formed the United for Consensus group (Italy, South Korea, Pakistan, Argentina, and others). There is also a group of African states who argue that their continent is the most underrepresented in the Council.

Besides the competition among the aspiring states, there is also discussion on the type of enlargement with two main approaches. The first approach proposes to increase the number of permanent seats in the Council (with or without the veto right), while, according to the other approach, the "quasi-permanent" long-term renewable seats should be added. The second approach becomes more and more popular since many states are reluctant to increase the number of permanent members of the Council. They claim that in a few decades some permanent members may lose some of their influence (as has happened with some current members of the Council, notably Russia, France, and, to some extent, UK) while the other states may arise as global or regional leaders (as has happened with G4 countries). Therefore, the establishment of "quasi-permanent" seats is more reasonable and more democratic.

Another major obstacle to the UN Security Council reform is the repugnance and unwillingness of the current permanent members to revoke or even restrain the veto right. The veto is usually used to protect the self-interests of states, although very often to the detriment of international peace and security or human rights. But since the veto right in the Security Council is a major advantage in international relations, it is highly doubtful it may be restrained in the near future.

Opposing interests of states and groups of states and unresolved issue with the veto right make the attempts to reform the UN Security Council a truly "Sisyphean work." The intensive work on this problem has started in the UN after the Cold War but there has not been a major progress since then. While many interested groups proposed numerous projects of reforms, there is not a single one that has gained the support of the majority of states. It is a "Gordian knot" the international community has so far not been able to either untie or cut.

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The Regulation of Counterfeiting Money in the German Criminal Code

Abstract

The crime of counterfeiting is probably as old as the use of money. The right to coinage and to issue money has always belonged to the privileges of the monarch and the state. Its risky nature lies in the fact that it affects the trust and confidence towards state-issued money. Franz von Liszt stated that counterfeiting is a mixed crime which breaches two legal objects: on one hand the individuals' interest of property, and on the other hand it attacks the security of cash-flow. The purpose of this paper is to compare the statutory provisions of the Hungarian and German Criminal Code, the legal practice, and criminal statistics of both countries. With the comparative law approach, we can learn from the German criminal legal system and give proposals for the Hungarian regulation and court practice. The first part of the study deals with a brief legal history of counterfeiting money. The second and main part of the study analyzes the in-force regulations of the German Criminal Code regarding counterfeiting money. The contribution has a comparative law approach. The third and last part of the study deals with the criminal statistics and the conclusions.

Keywords

counterfeiting money, Germany, Criminal Code

Introduction – Brief legal history of counterfeiting money

The crime of counterfeiting is probably as old as the use of money. The right to coinage and to issue money has always belonged to the privileges of the monarch and the state. Its risky nature lies in the fact that it affects the trust and confidence towards state-issued money. Karl Binding a German legal

scholar stated "that invention of money lead to the invention of counterfeiting."[1]

The Code of Hammurabi was one of the first written laws which punished counterfeiters. The specific sanction is not known, just the sacramental nature of it: "if he abolish the judgments which I have formulated, overrule my words, alter my statues, efface my name written thereon and write his own name… as for that man… whoever he may be, may the great god, the father of the gods… take from him the glory of his sovereignty, may he break his scepter, and curse his fate!"[2]

Among the ancient Greeks, Solon was the first who made a law against counterfeiters. The law passed in Athens in 594 B.C. contained capital punishment for counterfeiting money. With this law he intended to protect the Greek currency and make it more trustworthy than the Persian currency.[3] Not just in Athens, as according to a note from the 3rd century B.C., in the town of Dimi four counterfeiters were punished by death.[4]

In Rome Marius Graditianus was the first to punish counterfeiters in a written law. He established investigation offices which controlled the genuineness of the money.[5] Under the reign of Constantine the criminal act of counterfeiting was seen as treason and thus was punishable by death. The acquittal was only possible if the offender voluntarily withdrew from the crime.[6]

The concept that counterfeiting money is treason remained in the middle ages. Counterfeiting was punishable by cruel sanctions under the German customary and written law. A written collection of the German customary law, the *Sachsenspiegel*, which was written by Eike von Repgow in 1230, contained capital punishment.[7] The perpetrators of this crime were executed by burning at stake. If the offender counterfeited lesser amount of money, then there was an option for the court the punish him "only" by

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[1] K. Binding, *Lehrbuch Des Gemeinen Deutschen Strafrechts: Besonderer Teil*, Band 2, München–Leipzig 1904, p. 306.

[2] M. Kröner, *Der Schutz des Furo durch die Geldfälschungstatbestände unter der besonderen Berücksichtigung des Talbestandsmerkmals "Inverkehrbringen als echt" – mit Hinweisen zu den Geldfälschungstatbeständen in der Euro-Zone*, Marburg 2009, p. 29.

[3] Ibidem, p. 29.

[4] H. Voigtlaender, *Falschmünzer und Münzfälscher*, Münster 1976, p. 32.

[5] Th. Mommsen, *Römisches Strafrecht*, Leipzig 1899, p. 673.

[6] W. Rein, *Das Criminalrecht dér Römer von Romulus bis auf Justinianus*, Leipzig 1844, pp. 787–788.

[7] I. Kajtár, *Egyetemes állam- és jogtörténet*, Budapest–Pécs 2005, pp. 119–120.

cutting off his hands.[8] An example from the written law, the *Constitutio Criminalis Carolina*, which was written by Johan von Schwarzenberg in 1532, valued counterfeiting as treason. It had a differentiated regulation whit having three perpetration conducts.[9] Counterfeiting was only punishable by death in the most serious cases, otherwise it carried a pecuniary penalty.[10]

Comparing the German and Hungarian legal history we can establish that counterfeiting was also valued as treason. For example, the customary law collection of Hungary, the *Tripartitum*, which was written by István Werbőczy in 1514, prescribed that "who coins counterfeit money or uses counterfeit money in high numbers shall be responsible for treason."[11]

In the aspect of humane regulation regarding counterfeiting the *Allgemeines Landrecht* (ALR) from 1794 was progressive. The casuistic Prussian Code did not contain capital punishment for counterfeiters. In the most serious cases offenders got punished by lifelong imprisonment.

The Bayern Criminal Code, written by Anselm Feuerbach in 1813, had a very clear and precise terminology and at that time it was a role model for other German provinces. The Code has been written in the spirit of the enlightenment age. We can see from the title of the chapter – *Verbrechen wieder öffentliche Treue und Glaube* – that the legal object of counterfeiting money was primarily the public trust in the legal tender.[12] According to the Code, the most serious case was when somebody intentionally distributed counterfeit money. In this case the punishment was 8 to 12 years of imprisonment.[13]

The Prussian Criminal Code from 1851 regulated counterfeiting in a separate chapter titled coin felonies and coin misdemeanors. Even though the title only mentioned coins, it also punished the counterfeiting of banknotes with between 5–15 years of imprisonment. Furthermore the counterfeiting of foreign money was also punishable.[14] The imperial German Criminal Code from 1871 was mostly based on the above mentioned Prussian Crimi-

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[8] E. Balogh, *A pénzhamisítás bűncselekménye a XIX. század első felének néhány német kódexében és a korabeli magyar büntetőtörvény-könyv*, [in:] *Emlékkönyv Dr. Meznerics Iván egyetemi tanár születésének 80. évfordulójára. Szerk*, ed. K. Tóth, Szeged 1988, pp. 21–22.

[9] I. Kajtár, op. cit., p. 120.

[10] E. Balogh, op. cit., pp. 21–22.

[11] M. Tóth, *Gazdasági bűnözés és bűncselekmények*, Budapest 2000, p. 322.

[12] E. Balogh, op. cit., p. 22.

[13] Ibidem, p. 23.

[14] G. Beseler, *Kommentar über das Strafgesetzbuch für die Preußischen Staaten*, Leipzig 1851, pp. 282–289.

nal Code. This was first Criminal Code of the unified Germany and it came into effect in 1st of January of 1872. The legal scholars from the 19th century valued counterfeiting as a financial crime.[15] This Act regulated counterfeiting in the chapter titled crime against the state. Counterfeiting of foreign and national currencies were punishable. Securities were valued as the same as banknotes. The Code consisted of main and extension type of conducts:

1) Main type of conducts were:

- imitation of money with the purpose of distribution,
- the amendment of the money so that appears it has a higher value or money withdrawn money from the circulation has the appearance of money in circulation.

2) Extension type of conducts:

- distribution, procuring and import of counterfeit money,
- giving away of counterfeit money,
- coin debasement.

In the main cases the Code prescribed a minimum 2 years imprisonment.[16]

There were attempts to reform the German Criminal Code in the Weimar Republic, but in the and they failed. The national socialist Germany disregarded the principles of *nullum crimen sine lege* and *nullum poena sine lege* and the prohibition of analogy. The numbers of executed capital punishments have risen drastically. After the second world war a reform plan was developed for criminal law regulations, which were realized in the 70s. The statutory provisions of counterfeiting money were amended largely in 1975. The current in-force provisions preserve that state to a large extent, and 2003 was the last time when they were modified.[17]

1. The place of counterfeiting money in the current German Criminal Code

Counterfeiting money is regulated in Chapter 8 of the German Criminal Code titled *Counterfeiting of money and official stamps.* The regulation of the German Criminal Code was a possible role model for the Hungarian lawmakers

[15] G. Molnár, *Gazdasági bűncselekmények*, Budapest 2009, p. 449; M. Tóth, op. cit., p. 371; I. A. Wiener, *Gazdasági bűncselekmények*, Budapest 1986, p. 252.

[16] P. Angyal, *A magyar büntetőjog kézikönyve*, Budapest 1940, p. 17.

[17] M. Kröner, op. cit., pp. 50–53.

due to the fact that the new Hungarian Criminal Code has a very similar chapter, with almost exactly the same crimes. The in-force regulation reads as follows:

> Section 146
> Counterfeiting money
> (1) Whosoever
> 1. imitates money with the intent that it be brought into circulation as genuine or that such bringing into circulation be facilitated, or alters money with such intent, so that it appears to be of a higher value;
> 2. procures or offers for sale counterfeit money with such intent; or
> 3. brings counterfeit money which he counterfeited, altered or procured under the provisions of No. 1 or 2 above into circulation as genuine,
> shall be liable to imprisonment of not less than one year.
> (2) If the offender acts on a commercial basis or as a member of a gang whose purpose is the continued counterfeiting of money the penalty shall be imprisonment of not less than two years.
> (3) In less serious cases under subsection (1) above, the penalty shall be imprisonment from three months to five years, in less serious cases under subsection (2) above, imprisonment from one to ten years.
>
> Section 147
> Circulation of counterfeit money
> (1) Whosoever brings counterfeit money into circulation other than in cases under section 146 shall be liable to imprisonment not exceeding five years or a fine.
> (2) The attempt shall be punishable.

2. The legal object of the crime

The legal object of counterfeiting money is the security of cash-flow, the trust in money and the state monopoly of issuing money.[18] According to the prevailing concept of the German legal scholars, counterfeiting is a crime against assets.[19] Two observations should be made regarding this. On one hand we can see from the classification of the crime that counterfeiting breaches individual interest. On the other hand, the concept of the legal object shows us that counterfeiting also breaches the communal interest. Franz von Liszt – the father of the mediation school of criminal law – summarized this by stating the following*:* "counterfeiting is a mixed crime which

[18] Th. Fischer, *Strafgesetzbuch und Nebengesetze. Beckliche Kurzkommentare*, München 2013, p. 1059.

[19] R. Schmidt, K. Priebe, *Strafrecht besonderer teil. II. Straftaten gegen das Vermögen. 11. Auflage*, Hamburg–Berlin 2012, pp. 333–340.

breaches two legal objects on one hand the individuals interest of property and on the other hand it attacks the security of cash-flow."[20]

Hungarian prevailing concept[21] is a little different, because Hungarian legal scholars consider counterfeiting as an economic crime. In contrast of this concept András Kondorosi says – similarly as Franz von Liszt – that the criminal act of counterfeiting money firstly breaches the communal legal interest and secondly the individual legal interest.[22] However it is important to note that it is hard to distinguish the class of economic and financial crime and there is no significant difference between the two.[23]

Counterfeiting is a high risk crime to the society and to the economy, and thus the sanction is considerably high. In the basic case the sanction is between 1–15 years imprisonment. Due to the high risk of this crime there is an omission to report for who has credible information about the planning or the commission of the crime to the authorities otherwise the defaulter can be sanctioned by imprisonment.[24]

Many German authors highlight that counterfeiting is a special case of the crime of public document forgery.[25] This concept in the Hungarian legal literature can be found in the writings of László Fayer.

3. The perpetration object of the crime

The perpetration object of the crime is money. Money in a criminal legal sense consists of

- money in circulation (banknotes and coins)
- and securities: bearer and order bonds which are parts of an entire issue, if the payment of a specified sum of money is promised in the bonds;

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[20] P. Angyal, op. cit., p. 34.

[21] J. Gula, *A pénz- és bélyegforgalom biztonsága elleni bűncselekmények*, [in:] *Magyar Büntetőjog Különös rész*, ed. I. Görgényi, Budapest 2013, p. 582; K. Karsai, *A pénz- és bélyegforgalom biztonsága elleni bűncselekmények*, [in:] *Kommentár a Büntető Törvénykönyvhöz*, ed. K. Karsai, Budapest 2013, p. 821; B. Kereszty, *A gazdasági bűncselekmények (Btk. XVII. Fejezet)*, [in:] *A magyar büntetőjog különös része. Korona Kiadó*, ed. F. Nagy, Budapest 2005, p. 699; M. G. Molnár, *A pénz- és bélyegforgalom biztonsága elleni bűncselekmények*, [in:] *Büntetőjog II. Különös Rész. A 2012. évi C. törvény alapján*, ed. B. Busch, Budapest 2012, pp. 661–662; M. Tóth, op. cit., p. 371; *A büntető törvénykönyv magyarázata. 2. kötet*, eds. Z. Varga et al., Budapest 2009, p. 1295; I. A. Wiener, op. cit., p. 254.

[22] A. Kondorosi, *Gondolatok a pénzforgalom rendjét sértő bűncselekmények kapcsán*, „Jogelméleti szemle" 2012, No. 7, p. 77.

[23] See further in: L. Kőhalmi, *A gazdasági és szervezett bűnözés*, [in:] *Bevezetés a bűnügyi tudományokba. Bíbor Kiadó*, ed. V. E. Csemáné, Miskolc 2007, pp. 141–155.

[24] Strafgesetzbuch § 138.

[25] R. Schmidt, K. Priebe, op. cit., p. 333.

> shares of stock; share certificates issued by capital management companies; interest, dividend and renewal coupons of the types of securities indicated in Nos 1 to 3 above as well as certificates of delivery of such securities; traveler's cheques.[26]

The concept of money under the German criminal law practice is the following: certified money in a legal sense is a value carrier which was issued by the state or someone authorized by the state and which is in circulation for the public regardless of the general compulsory acceptance.[27] It is important to note here that foreign currencies and securities are also protected by the statutory provisions of counterfeiting money.[28] This rule complies with the Geneva Convention for the suppression of counterfeiting currency which was adopted in 1929 and Germany is part of it.

Old money and money withdrawn from the circulation are not considered as money under the German criminal law. So for example if someone creates a fake Roman Denarii and sells it as original he commits fraud and not counterfeiting money. There is an exception regarding money withdrawn from the circulation: if the state has obligation to exchange it to money in circulation (e. g. in the case of the Deutsche Mark) these are protected by the statutory provisions of counterfeiting.[29]

Before the Supreme Court of Germany there was a case called "Krugerrand decision" in 1983. In this case the Supreme Court had to decide if the offender committed counterfeiting money when he created fake Krugerrand coins. Krugerrand coins are investment gold coins issued by the state of South Africa. According to the South African Mint and Coinage Act (No 78 of 1964) Krugerrand coins were declared as unlimited legal tender. Under the German Criminal Code foreign currencies are protected by the statutory provisions of counterfeiting. The Supreme Court came to a decision that Krugerrands coins are not money in a criminal legal sense and it grounded its decision with the International Convention for the Suppression of Counterfeiting 04/20/1929. The court concluded that the German criminal law predetermines whether a value carrier fulfills the essential requirements for the concept of money and doesn't depend on the legal system of the

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[26] Strafgesetzbuch § 151.

[27] J. Wessels, M. Hettinger, *Strafrecht besonderer teil 1*, München–Landsberg–Frechen–Hamburg 2014, p. 281.

[28] Strafgesetzbuch § 152.

[29] L. I. Gál, *A pénz- és bélyegforgalom biztonsága elleni bűncselekmények*, [in:] *Új Btk. Kommentár, Különös Rész. 7. kötet. Nemzeti Közszolgálati és Tankkönyvkiadó*, ed. P. Polt, Budapest 2013, p. 197.

country.[30] In conclusion, according to the German criminal law practice the Krugerrand gold coin does not meet the requirement of money due to that it only carries its value through the gold fineness.[31]

According to the Hungarian legal scholars the object of perpetration is controversial. According to some views the object of perpetration is money, as well as securities and bank notes that are equivalent to money in the criminal law, and therefore considered as money.[32] Others pose that not all criminal conduct has an object of perpetration because in the case of imitation, the imitated money is not the object of perpetration but the product of it.[33] The Hungarian Criminal Code regulates the definition of counterfeiting money in the interpretation section of the statutory provisions (Section 389 (5)). According to the Hungarian Criminal Code (Act C of 2012) money in a criminal legal sense are the following:

1. Banknotes and coins, the circulation of which is legally authorized, or that will be authorized in the future on the basis of law, European Union legislation, or official notice published by an institution vested with the privilege of monetary emission, as well as banknotes and coins withdrawn from circulation, where the issuing national bank is required, or agreed, to redeem such withdrawn currency and exchange it to legal tender pursuant to the relevant national legislation or European Union legislation.
2. Printed securities issued as part of a series shall also be treated as banknotes, where the transfer of such securities is not restricted or precluded by law or by any endorsement made on the securities. The concept for securities otherwise found in the Civil Code.[34]
3. Any alteration of money that has been withdrawn from circulation to create an impression as if it was still in circulation.
4. The application or removal of a sign serving as an indication that the currency is valid only in a specific country, furthermore, the diminution of the precious metal content of the currency.
5. Foreign currencies and securities are granted protection identical with that of domestic ones.

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[30] Entscheidungen des Bundesgerichtshofes in Strafsachen, Band 32, Seite 198 [Decision of the Federal Court of Justice in criminal matter, Volume 32, p. 198].

[31] J. Wessels, M. Hettinger, op. cit., p. 281.

[32] G. Molnár, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények*, op. cit., p. 1456.

[33] L. I. Gál, op. cit., p. 197.

[34] J. Gula, op. cit., p. 583.

4. The perpetration conducts of the crime

The statutory provisions of counterfeiting money contains the following perpetration conducts:

- imitation of money (*nachmachen*),
- counterfeiting of money (*verfälschen*),
- procuring counterfeit money (*sichverschaffen*),
- offering for sale counterfeit money (*feilhalten*),
- and lastly bringing counterfeit money into circulation as genuine (*in Verkehr bringen*).

I will analyze the conducts one by one.

The essence of "imitation" is creating a new product (counterfeit money). Usually criminals use copying machines for this purpose. It is required for the imitated money to be deceptive for the unsuspicious and general circulation.[35]

It is irrelevant if the imitated money is created of original model or not. Under the German criminal practice creating for example a 25 euro banknote can be also punishable under the statutory provisions of counterfeiting money. The criminal practice applies this rule even to fantasy state money.

It is interesting here to compare the German criminal practice to the Hungarian. In Hungary there was a case where an offender bought three sheep with a 54 000 Forint denominated banknote. The imitated money had the exact same look as the 20 000 Forint denominated banknote only the denomination was altered. The Hungarian Court said that imitation can only be made on money in circulation. So the verdict stated that 54 000 Forint banknotes are not in circulation and thus the offender committed fraud and not counterfeiting money. This narrow interpretation of the statutory provisions of counterfeiting currency can be criticized due to the fact that in this case the criminal clear intention was to bring imitated money into circulation. The offender even succeeded with his act and eventually breached the security of cash flow. Also this case points out another problem with the regulation: it was clear that the court intention was to impose milder sanction and thus applied the statutory provisions of fraud. The lawmaker should give wider options regarding the sanctions of counterfeit-

[35] Bundesgerichtshof Neue Juristische Wochenschrift, Jahr 1995, Seite 1844 [New Legal Weekly Paper of the Federal Court of Justice, Year 1995, p. 1844].

ing (for example by creating more privileged cases) so the courts would be motivated to value the criminal conducts correctly.[36]

Another problematic area can be the quality of the imitated money. According to the German criminal practice, it is not required from the counterfeit money to have good quality but it is important that it can be mistaken for the legal tender.[37]

The second perpetration conduct is "counterfeiting" where the criminal altering the money so that it appears to have a higher value. It is important to note that only original money in circulation can be counterfeited.[38] It is irrelevant how it appears to have a higher value, so not just altering denomination but silvering or gilding can be a perpetration method for the offender.[39] In the Hungarian criminal code the only stipulation is made is alteration so an absurd case of altering money to have a lower value can be also punished.

The third perpetration conduct is "procuring." By procuring the counterfeit or counterfeited money, the offender has the power of disposal, he has the right to decide over the fate of it.[40] So if someone gets the counterfeit money as a depository, he will not commit the crime as perpetrator (the person who actually commits the crime) but maximum as accomplice (a person who knowingly and voluntarily helps another person to commit a crime).

"Offering for sale" is the fourth perpetration conduct. This is basically the attempt of bringing counterfeit money into circulation so the concluded offense sanction can be applied.[41]

The last but most dangerous criminal conduct is to bring counterfeit money into circulation as genuine. There are many ways possible for this: gifting, purchasing and so on. In one case the German criminal court stated that counterfeit money was brought into circulation when someone disposed of it in public so that everyone could easily access it.[42]

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[36] A. Kondorosi, op. cit., p. 78.

[37] R. Schmidt, K. Priebe, op. cit., p. 318.

[38] Ibidem.

[39] Bundesgerichtshof Zeitschrift für Wirtschafts- und Steuerstrafrecht, Jahr 2003, Seite 197 [Federal Court of Justice Journal's of Economic and Tax related Criminal Law, Year 2003, p. 197].

[40] Entscheidung des Rechtsgerichts in Strafsachen 59, 79, und 80 [Judgment of the Court of First Instance in Criminal matters number 59, 79, and 80].

[41] R. Schmidt, K. Priebe, op. cit., p. 320.

[42] Entscheidungen des Bundesgerichtshofes in Strafsachen, Band 35, Seite 21 [Decision of the Federal Court of Justice in criminal matter, Volume 35, p. 21].

The Hungarian Criminal Code has a similar regulation and it contains five perpetration behaviors:

- imitation,
- the counterfeit,
- the intentional acquisition,
- the export, import, or transport through the territory of the country,
- the distribution of false or falsified money.

These five are extended with the interpretation section: the application or removal of a sign serving as an indication that the currency is valid only in a specific country, and any alteration of currency that has been withdrawn from circulation to create an impression as if it was still in circulation shall be considered imitation of currency.[43]

5. Subjective side of the crime

The statutory provisions of counterfeiting money do not contain a special subject in the German Criminal Code so the perpetrator can be anybody. The crime can be committed only intentionally and in the first four perpetration conducts with the intention to bring counterfeit money into circulation as genuine. The last perpetration conduct can be committed with foreseeable intent (*dolus eventualis*) as well, but specific intent (*dolus directus*) is typical in the practice. If the perpetration conduct is procuring it is important that the offender must know about the origin of money at the moment when he procures it otherwise section 147 should be applicable.

In Hungary the regulation of the subjective side of counterfeiting money is almost the same. The perpetrator can be anybody. Counterfeiting currency can be committed only intentionally. The perpetration conduct of distribution of counterfeit or falsified currency can be committed with specific intent (if the perpetrator conceives a plan to achieve a certain result) and with foreseeable intent (if he acquiesces to the consequences of his conduct) as well. Imitation, counterfeiting, acquisition, and the transit type of conducts can be committed only with specific intent because the lawmaker prescribed in the statutory provision that the offender shall act with the purpose of distribution.[44]

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[43] K. Karsai, op. cit., p. 818.

[44] P. Polt, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények*, [in:] *Büntetőjog Különös rész II. Rejtjel kiadó*, eds. B. Blaskó, Z. Hautzinger, S. Madai, A. Pallagi, L. Schubauer, Budapest 2013, p. 278.

6. Aggravated and privileged cases

The regulation counterfeiting money consists of two aggravated cases:

- if the offender acts on a commercial basis,
- or as a member of a gang whose purpose is the continued counterfeiting of money.

In these two cases the punishment is higher due to the higher risk to the society. The minimum level of sanction is raised by one year: two years imprisonment.

The definitions of the aggravated cases cannot be found in the German Criminal Code but in the practice of the German courts. According to this someone commits the crime on commercial basis if his first or secondary source of income is from counterfeiting for a longer period of time.

The gang consist of at least 3 persons acting in unified will for a longer period of time to commit crimes in the future.[45]

The regulation of the privileged cases is very different from the Hungarian and therefore it is very interesting. There is a so called less serious cases section. In the less serious cases of the basic case the sanction shall be between 3 months to 5 years and paradoxically in the less serious case of the aggravated case shall be 1 to 10 years imprisonment. When can this section be applied? The category of a less serious case is not defined by the law so again we have to call the criminal court practice to enlighten us. According to this the courts should take into account every circumstance. For example

- on the objective side: did the offender commit a crime before this, is he a recidivist,
- on the subjective side: the personality of the offender, etc.

To show an example of a less serious case: a cashier accepts the counterfeit money in order to avoid conflict with the offender and after this he brings it into circulation as genuine.

There is an independent crime called circulation of counterfeit money which can be considered as the privileged case of counterfeiting money.[46] The German Criminal Code defines this crime in a negative way: "Whosoever brings counterfeit money into circulation other than in cases under sec-

[45] Entscheidungen des Bundesgerichtshofes in Strafsachen, Band 46, Seite 321 und 338 [Decision of the Federal Court of Justice in criminal matter, Volume 46, pp. 321 and 338].

[46] R. Schmidt, K. Priebe, op. cit., p. 320.

tion 146 shall be liable to imprisonment not exceeding five years or a fine." This crime can be established when someone procures the counterfeit money without the knowledge that it is counterfeit, but later he realizes it and thus brings it into circulation. The attempt of the privileged case is also punishable.

In the Hungarian Criminal Code there are two different aggravated cases:

- involves a particularly considerable or greater amount of money; or
- is committed in criminal association with accomplices.

According to the closing provisions of the Criminal Code particularly considerable amount of money is between 50 million plus one and 5 hundred million Forints so the aggravated case of counterfeiting currency can be committed above 50 million plus one Forints which is equivalent to about 161 235 Euros. Criminal association is formed when two or more persons are engaged in criminal activities in an organized fashion, or they conspire to do so and attempt to commit a criminal act at least once, without, however, creating a criminal organization. The state of affairs is stricter compared to the previous regulation (The Act IV of 1978). In the aggravated cases the punishment can be imprisonment for up to 15 years at maximum (previous Criminal Code had 10 years at maximum).[47]

The Hungarian Criminal Code has a privileged case too, which is similar to the German circulation of counterfeit money. But as opposed to the German solution the Hungarian Criminal Code enacts the issue and distribution of counterfeit money not as an independent statutory provision, but rather within the act of counterfeiting. The actual difference between the two acts is that in this case the perpetrator obtains the money legally and "bona fide," and realizes its wrong, disingenuous and sophisticated nature only after. Legality refers to the legal pretence of acquisition. Therefore, the acquisition is not legitimate if the person obtains the counterfeit money through a criminal act. The legal tradition measures this act as a privileged case with respect to the cause emerged from the expectations, that the international agreement has made feasible and to which it has given potential. For the security of the money flow (the circulation) the initiation of increased protection is reasonable. The distribution of forged or counterfeit money of substantial or greater amount cannot be measured as the lack of expectations, since the perpetrator is aware of the increased risk, therefore the new Criminal Code ensures the possibility for the mitigation of the

[47] Z. Nagy, D. Tóth, *Computer related economic crimes in Hungary*, "Journal of Eastern European Criminal Law" 2015, No. 2, pp. 167–168.

punishment only in specific cases, tied to a threshold limit (when the value of the money is trivial or even less substantial) and with an unlimited mitigation of the punishment.[48]

7. Stages of the crime

The preparation and the attempt of counterfeiting money is punishable. Preparatory act under the section of 149 consists of:

> Whosoever prepares to counterfeit money […] by producing, procuring for himself or another, offering for sale, storing or giving to another plates, frames, type, blocks, negatives, stencils, computer programs or similar equipment which by its nature is suitable for the commission of the offence; paper, which is identical or easy to confuse with the type of paper designated for the production of money […] and especially protected against imitation; or holograms or other elements affording protection against counterfeiting.[49]

The sanction for preparation of the crime is lower just as in the Hungarian Criminal Code due to not being as dangerous as the completed act. The offender in this cases shall be liable to imprisonment not exceeding five years or a fine if he prepared to counterfeit money.

The German Criminal Code gives the option to the offender to remain unpunishable if he withdraws from the preparatory acts.

> Whosoever voluntarily
> – gives up the commission of the offence prepared for and averts a danger caused by him that others continue to prepare the offence or commit it, or prevents the completion of the offence; and
> – destroys or renders unusable the means for counterfeiting, to the extent that they still exist and are useful for counterfeiting, or reports their existence to a public authority or surrenders them there,
> shall not be liable under subsection (1) above.[50]

The Hungarian regulation also gives the chance for the perpetrator to remain unpunished if he withdraws from the preparation of the crime. The main difference is that this rule is regulated in the General Part and not in the Special Part and it is applicable to all crimes.

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[48] Based on the justification of the Act C of 2012.
[49] Strafgesetzbuch § 149 (1).
[50] Ibidem, § 149 (2).

The attempt of a crime in the German Criminal Code is only punishable if the statutory provisions of the special crime expressively contains it. This is different in the Hungarian Criminal Code, because every single crime attempt is punishable as stated in the General Part of the Act.

Under the German Criminal Code attempt is defined as the following: "A person attempts to commit an offence if he takes steps which will immediately lead to the completion of the offence as envisaged by him."[51] The attempt of the crime has the same sanction as the completed offence but the judge has the option to punish the offender more leniently. This regulation method is very similar in the Hungary. The main rule is that the sentence is applicable to a completed criminal act, but the penalty may be reduced without limitation or dismissed altogether by the court if the attempt has been carried out on an unsuitable subject, with an unsuitable instrument or by way of unsuitable means. Furthermore, the Section 82 of the Hungarian Criminal Code states that in respect of attempt or aiding and abetting, if the sentence to be imposed remains excessive, a more lenient sentencing can be applied.

Both Codes give the option to the offender to withdraw his commission. The German regulation reads as follows:

> A person who of his own volition gives up the further execution of the offence or prevents its completion shall not be liable for the attempt. If the offence is not completed regardless of his actions, that person shall not be liable if he has made a voluntary and earnest effort to prevent the completion of the offence. If more than one person participate in the offence, the person who voluntarily prevents its completion shall not be liable for the attempt. His voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability, if the offence is not completed regardless of his actions or is committed independently of his earlier contribution to the offence.[52]

The Hungarian Criminal Code consists of two cases when the offender shall not be liable for an attempt:

- who voluntarily withdraws from the completion of the criminal act, or
- who attempts to prevent the crime of his own volition.

Even though it is important to note that if the attempt in itself constitutes another crime, the perpetrator shall be liable for prosecution for that crime.

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[51] Ibidem, § 22.

[52] Ibidem.

Summary and conclusions

To summarize, the Hungarian and German regulation regarding counterfeiting money is very similar. It is possible that the Hungarian lawmaker used the German Criminal Code as a role model when creating the relatively new Hungarian Criminal Code. The following table summarizes the similarities and differences between the two Code:

Table 1: The similarities and differences between the Hungarian and German regulation regarding counterfeiting money

	German regulation	**Hungarian regulation**
dogmatic place	counterfeiting is a crime against assets	counterfeiting is an economic crime
legal object of the crime	the security of cash-flow, the trust in money and the state monopoly of issuing money	same
perpetration objects	– money in circulation, – securities listed in the German Criminal Code. – Foreign currencies protected with the same criminal law measures – According to the court practice: – money withdrawn from the circulation: if the state has obligation to exchange it to money in circulation.	– banknotes and coins in circulation; – money withdrawn from the circulation where the issuing national bank is required, or agreed, to redeem such withdrawn currency and exchange it to legal tender pursuant to the relevant national legislation or European Union legislation; – printed securities issued as part of a series shall also be treated as banknotes, where the transfer of such securities is not restricted or precluded by law or by any endorsement made on the securities – Foreign currencies and securities are granted protection identical with that of domestic ones.
perpetration conducts	1. imitation of money 2. counterfeiting of money 3. procuring counterfeit money 4. offering for sale counterfeit money 5. bringing counterfeit money into circulation as genuine.	1. imitation of money in circulation 2. counterfeiting of money in circulation 3. acquisition of counterfeited money 4. the export, import, or transport through the territory of the country

		5. the distribution of false or falsified money This 5 is extended with the interpretation subsection – the application or removal of a sign serving as an indication that the currency is valid only in a specific country, and – any alteration of currency that has been withdrawn from circulation to create an impression as if it was still in circulation shall be considered imitation of currency
Subjective side of the crime	can be anybody. Can be committed only intentionally	same
Stages of the crime	The preparation and the attempt of counterfeiting money is also punishable	same
Is there an omission to report the planned counterfeiting to the authorities?	Yes, if someone has a credible information about the planning of the offense. at a time when the commission or result can still be averted, and fails to report it in time to the public authorities or the person threatened, shall be liable to imprisonment not exceeding five years or a fine.	No
aggravated cases	if the offender acts on a commercial basis or as a member of a gang.	if counterfeiting: – involves a particularly considerable or greater amount of money; or – is committed in criminal association with accomplices.
Privileged case	The so called less serious cases and the circulation of counterfeit money	The penalty of any person who distributes counterfeit or falsified currency of minor value or less, obtained as genuine, may be reduced without limitation.

Sanctions	– basic case 1–15 years imprisonment – aggravated case 2–15 years imprisonment – less serious case of the basic case 3 month to 5years – less serious case of the aggravated case 1–10 years imprisonment – circulation of counterfeit money imprisonment not exceeding 5 years or a fine – preparation: imprisonment not exceeding 5 years or a fine.	– basic case 2–8 years imprisonment – aggravated cases 5–15 years imprisonment – preparation: not exceeding 3years imprisonment.

Source: Act C of 2012 on the Hungarian Criminal Code §§ 389–390, and Strafgesetzbuch [German Criminal Code] §§ 146–149.

The following table shows the registered numbers of counterfeiting money and official stamps yearly in Germany. The German authorities counts these two crimes together but presumably counterfeiting money has a big percentage of these numbers.[53]

Table 2: The registered numbers of counterfeiting money and official stamps

Year	**2011**	**2012**	**2013**	**2014**	**2015**
Registered numbers of crime	7100	5476	5902	5338	4779

Source: Polizeiliche Kriminalstatistik (PKS) 2015, [online] https://www.bka.de/ DE/ AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2015/pks 2015_node.html;jsessionid=EFF6F5AD679ED9B2D4B7858F80544242.live0611 (accessed: 20.09. 2016).

We can draw the conclusion from the statistics that the registered numbers of counterfeiting are low. There are only around two to three thousand cases a year in Germany where the population is 80 million. Comparing the 10 million inhabitant Hungary has around 1000–2000 cases yearly.

[53] Bundesministerium des Innern, [online] https://www.bmi.bund.de/ SharedDocs/Downloads/DE/Broschueren/2016/pks2015.pdf?__blob=publicationFile [accessed: 20.09. 2016].

Even though the low number of counterfeiting cases there are many counterfeits withdrawn from the circulation.

Table 3: Numbers of counterfeit money withdrawn from the circulation

Banknote	**5 €**	**10 €**	**20 €**	**50 €**	**100 €**	**200 €**	**500 €**	**All together**
Number	991	1526	37916	46567	5608	2032	717	95357
Percentage	1%	2%	40%	49%	6%	2%	1%	100%

Source: *Deutlich mehr Falschgeld in Deutschland*, [online] https://www.bundesbank.de/Redaktion/DE/Pressemitteilungen/BBK/2016/2016_01_22_falschgeld.html [access: 20.09.2016].

All together almost one hundred thousand counterfeit euro banknotes were withdrawn from the circulation in Germany in 2015. The perpetrators counterfeited particularly the 50 and 20 euro banknotes (89%). The main reason for this that they do not want to get caught and these banknotes are not as often controlled as for example the 100 euro banknote.

The worth of the counterfeited banknotes withdrawn from the circulation were about 4.4 million euros.

Even though counterfeiting is not primarily a quantity but a quality problem of crime. The real threat of this crime is the damage it can cause to the economy. High numbers of fake money in the circulation can destabilize the economics relations, and the trust in a country's money.

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Third Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement

Abstract

This article deals with the problem of third party funding in international commercial and investment arbitration. It analyses the basic concept of third party funding, identifies the main areas of challenge as well as presents recent changes and innovations associated with this concept. The article concentrates on transparency and disclosure requirements, which is, according to us, the major issue that influences further development and use of funding arrangements. The conducted analysis and case study drive us to the conclusion that third party funding is "here to stay" in international arbitration and will progress to the benefit of the arbitral community, but upon a condition of regulated, imposed and observed principle of disclosure.

Keywords

Third Party Funding, TPF, international arbitration, investment arbitration, transparency, disclosure

Introduction

Third party funding (hereinafter: TPF) is not only one of the hot topics[1] of civil litigation and international arbitration but also one of the legal phenomena that is still much hidden under a veil of secrecy. Despite the long-lasting debate on the concept of TPF,[2] this concept is still hard to define due to a lack of legal regulation and existence of privacy-oriented international practice.

Since TPF is a result of development of international arbitration community, the relevant regulation (national arbitration laws and arbitration rules) has not yet caught up with it.[3] In fact, TPF rises a number of specific ethical and procedural issues both in international commercial and investment arbitration. These particular issues include *i.a.* the funders' relationship with parties and counsels in managing the dispute, attorney ethics (attorney-client privilege), allocations of costs and security for costs, transparency and disclosure of the funding arrangements, and finally arbitrators' conflicts of interest.[4]

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[1] M. Scherer, A. Goldsmith, *Third Party Funding of International Arbitration Proceedings – A View From Europe: Part 1 – Funders' Perspectives*, "International Business Law Journal" 2012, No 1, pp. 217–218, [online] https://ssrn.com/abstract=2348737 [accessed: 15.07.2017].

[2] Compare for example: M. Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, "University of Iowa Legal Studies Research Paper Number" 2011, 11–31, pp. 1268–1338; E. de Brabandere, J. Lepeltak, *Third Party Funding in International Investment Arbitration*, "Grotius Centre Working Paper" 2012, No. 1, pp. 1–19; J. Kalajdzic, P. Cashman, A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, "The American Journal Of Comparative Law" 2013, Vol. 61, pp. 93–148; W. Park, C. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, "The Pennsylvania State University The Dickinson School Of Law, Legal Studies Research Paper" 2014, No. 42, [online] http://ssrn.com/abstract=2507461 [accessed: 15.07.2017].

[3] As was shown in the Queen Mary University of London and White & Case 2015 International Arbitration Survey, *Improvements and Innovations in International Arbitration*, [online] http://www.arbitration.qmul.ac.uk/docs/164761.pdf, [accessed: 15.07.2017]. The Survey is analyzed below.

[4] Prof. W. Park, a member of the International Council for Commercial Arbitration and London's Queen Mary School of Law Task Force on "Third-Party Funding in International Arbitration", during the keynote of 14th Annual ITA-ASIL Conference on Third-Party funding, held in Washington, D.C. on 12 April 2017, identified four "musketeers" of TPF that should be addressed: (i) transparency; (ii) attorney-client privilege, (iii) costs; (iv) and finally "d'Artagnan" issue – the question of definitions – who or what exactly is a third party funder. As to the report from the Conference, see: J. E. Vernon, *Taming the*

Therefore, the main objective of this article is to review the up-to-date knowledge about this concept, particularly in light of recent innovations and changes introduced by the international arbitration community, as well as recent cases where the problem of TPF emerged and was decided. The article consists of three parts. Chapter I seeks to introduce a definition of TPF, examine the legal characteristics of this concept, and identify the pros and cons of its use in practice. Chapter II explains why TPF is important in international arbitration, what challenges it brings and which areas of concern can be identified. Chapter III focuses on the disclosure requirement. In particular, by an in-depth analysis of recent arbitration regulations and case law, it seeks to answer the questions as to what extent the disclosure is important from the perspective of TPF as well as how and why this principle should be implemented in order to strike the balance between the right to privacy and the right to public access in arbitration.

1. Concept of Third Party Funding

TPF originally emerged firstly in civil litigation where it was conceived as a method of financing litigation and hence as a tool to reduce or eliminate the risk associated with potentially unfavorable outcome of the litigation.[5] The TPF takes place when a third party, external to the parties and not involved in the legal relation between them, agrees to pay for the one party's (usually the claimant) legal fees, such as costs of lawyers, experts, outside counsels, any other costs that may be relevant or needed in the civil litigation in accordance with a stipulated agreement and stipulated budget, in exchange for an agreed return. The funder may additionally agree to pay the opposing party's costs if the funded party is so ordered and provide security for the opponent's costs.[6] One of the main characteristics is that the

"Mercantile Adventurers": Third Party Funding and Investment Arbitration – A Report from the 14th Annual ITA-ASIL Conference, Kluwer Arbitration Blog 21.04.2017, [online] http:// kluwerarbitrationblog.com/ 2017/ 04/ 21/ taming-the-mercantile-adventurers-third- party- funding-and- investment-arbitration- a-report-from-the-14th-annual-ita-asil-conference/ [accessed: 15.07.2017].

[5] M. de Morpurgo, *A Comparative Legal And Economic Approach To Third-Party Litigation Funding*, "Cardozo Journal Of International & Comparative Law" 2011, Vol. 19, p. 350.

[6] S. R. Garimella, *Third Party Funding in International Arbitration: Issued and Challenges in Asian Jurisdiction*, "AALCO Journal of International Law" 2014, Vol. 3, Issue 1, p. 48; V. Sahani, *Harmonizing Third-Party Litigation Funding Regulation*, "Cardozo Law Review" 2015, Vol. 36, pp. 860–861; eadem, *Reshaping Third-Party Funding*, "Tulane Law Review" 2017, Vol. 91, No. 3, pp. 415–421.

agreement between a funded party and the funder usually is to be kept in secret. As a result, the doctrinal and legal analysis is greatly reduced and a number of concerns, raised by both practitioners and academics, remain unsolved.

The problems with defining the concept of TPF are, according to W. Park and C. Rogers, that: "economic interests in a party or a dispute can come in many shapes and sizes. Arrangements may be structured as debt instruments, equity instruments, risk-avoidance instruments, or as full transfers of the underlying claims. Some agreements permit or require active participation of the third party funder in key strategic decisions in the case, while other agreements are limited to periodic updates."[7] According to these authors: "The terms 'third-party funder' and 'after-the-event-insurer' refer to any person or entity that is contributing funds or other material support to the prosecution or defense of the dispute and that is entitled to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration."[8]

Nevertheless, given the growing recognition of TPF worldwide, the first regulatory steps were already made. Under Art. 8.1., Section A, Chapter 8 (Investment) of CETA: "Third party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute."[9] Similarly Art. 1.2., Section 3, Chapter II Investment of TTIP, stipulates that: "Third Party funding' means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant."[10]

The proposed definitions suggest that the concept of TPF is broad and can embrace different relations between a party that has a legal claim and

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[7] W. Park, C. Rogers, op. cit., p. 4.

[8] Ibidem, p. 5.

[9] *The Comprehensive and Economic Trade Agreement (CETA), a free-trade agreement between Canada and the EU, revisited in 2016*, [online] http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ [accessed: 15.07.2017].

[10] Transatlantic Trade and Investment Partnership, currently negotiated trade and investment deal between the US and EU, the information about the process and content of the TTIP is available at: http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/ [accessed: 15.07.2017].

a funder that seeks opportunities to invest capital and earn. The main advantage of TPF is granting access to justice for those who could not, due to financial reasons, bear costs of expensive, often unpredictable and lengthy civil proceedings (or international or investment arbitration). In this situation, accepting external financial help may be the only option for the claimant to pursue meritorious claim. Whereas for a funder it is a way of gaining capital. What is more, TPF serves as a risk-management tool by sharing of risk associated with the civil litigation (arbitration) between a party and a funder. It allows for a better stand against unpredictable situations in the litigation. In addition, funders are interested in strong and grounded claims that offer high predictability of refund. They will conduct a due diligence and legal analysis to properly assess the risk of pursuing the case. This can assist the claimant to shape its strategy and prepare a well-grounded claim, which can even be decided on pre-judicial stage through settlement.[11]

On the other hand, TPF has also several disadvantages in particular: a successful claimant has to pay a significant proportion of his or her recoveries to the funder as a remuneration for funding the litigation (arbitration); claimant may to a certain extent lose autonomy in favour of the funding party (in particular when considering settlement) since it may reserve the right of approval of the settlement; claimant may bear substantial costs when packaging the case for presentation to a funder. These costs will be wasted if the application for funding is unsuccessful.[12]

Another unresolved issue relates to the allocation of costs of the litigation. Taking into account that the funder does not appear as a party in the litigation it is questionable if the costs that the opposing party (usually the respondent) bears can be demanded directly from the funder in the event of the adverse costs order.[13]

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[11] C. R. Flake, *In Domestic Arbitration: Champerty or Social Utility?*, "Dispute Resolution Journal" 2015, Vol. 2 (70), pp. 115–117.

[12] E. de Brabandere, J. Lepeltak, op. cit., pp. 8–9; C. R. Flake, op. cit., pp. 117–119.

[13] D. Galagan, P. Živković, *If They Finance Your Claim, Will They Pay Me If I Win: Implications Of Third Party Funding On Adverse Costs Awards In International Arbitration*, "European Scientific Journal" 2015, (Special Edition), [online] https://ssrn.com/abstract=2604048 [accessed: 15.07.2017]; S. Brekoulakis, *The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report*, Kluwer Arbitration Blog 18.02.2016, [online] http://kluwerarbitrationblog.com/ 2016/ 02/18/ the-impact-of-third-party-funding-on-allocation-for-costs-and-security-for-costs-applications-the-icca-queen-mary-task-force-report/ [accessed: 15.07.2017].

2. Importance of Third Party Funding in International Arbitration

TPF has been widely used in both international commercial and investment arbitration, however, due to confidentiality principle still in force in commercial arbitration and to some extent compromised in investment arbitration, this concept raises a number of concerns and challenges.[14] According to Queen Marry and White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, the respondents are generally of the opinion that it should be mandatory in international arbitration for claimants to disclose the fact of using TPF and the identity of the funder, but without revealing the content of the funding agreement.[15] In the Survey, the respondents were asked which aspect of the use of TPF should be subject to mandatory disclosure by the claimants. They showed widespread support for disclosure of the use of TPF (76%) and the identity of the funder (63%). The interviewees commented that the resulting transparency would help check for conflicts of interest and provide the tribunal with context as to the financial position of the parties. By contrast, 71% of the respondents felt that mandatory disclosure of the full terms of the funding arrangements was undesirable. Some interviewees, who took the minority view, asserted that the full terms should be disclosed in order to reveal the extent of the influence that the funders may have on the funded party. Others, who were opposed to the proposition, commented that such disclosure would be irrelevant to the effective management of the arbitral process.[16]

Taking into account the Survey results, to better address the identified and perceived concerns, International Council for Commercial Arbitration (ICCA) and Queen Marry University in London jointly created a Task Force on Third-Party Funding in International Arbitration in 2014. The Task Force is supposed to systematically study and make recommendations regarding the procedures, ethics, and related policy issues on TPF in international arbitration. The Task Force is comprised of representatives drawn from all rele-

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[14] Comapre J. von Goeler, *Show Me Your Case and I'll Show You the Money – How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings*, Kluwer Arbitration Blog 21.07.2016, [online] http://kluwerarbitrationblog.com/2016/ 07/21/show-case-ill-show-money-balance-conflicts-third-party-funding-aand-confidentiality-iin-arbitration-proceedings/ [accessed: 15.07.2017].

[15] *Queen Marry and White & Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, [online] http://www.arbitration.qmul.ac.uk/docs/164761.pdf, [accessed: 15.07.2017].

[16] Ibidem, pp. 46–48.

vant stakeholders, including arbitration practitioners, funders, government representatives and academics.[17]

The Task Force on Third-Party Funding prepared a working draft report presented, for discussion purposes, at the 14th Annual ITA-ASIL Conference on Third-Party funding, held in Washington, D.C. on 12 April 2017. In light of the Report, the following issues should be addressed:

1) transparency, without which the legitimacy of the arbitral process could be undermined;
2) privilege (while in the U.K. and the U.S. common interest privilege would likely cover a claimant and funder working together on a case, this may well not be the case in civil law jurisdictions);
3) costs (to what extent should the existence of TPF be taken into account in allocating costs in an increasingly "loser pays" legal environment? Should it be a factor when considering whether to grant an order on security for costs?) and
4) definitions (who or what exactly is a third party funder?)[18]

Both the Survey and the Task Force report underline the importance of regulating TPF for harmonized development of arbitration and integrity of the arbitration proceedings. In fact, some of the leading jurisdictions have already introduced relevant legislation. For example, as discussed in detail below, Hong Kong and Singapore have recently amended their legislation in order to create the legal framework for using TPF in arbitration and related proceedings.[19]

3. Disclosure of Third Party Funding in International Arbitration

The existence of TPF faces two major issues with respect to the disclosure. First of all, should the parties disclose the existence of TPF and/or identity

[17] The Task Force is co-chaired by ICCA Governing Board Member William Park and Catherine Rogers, the Professor of Regulation, Ethics and the Rule of Law at Queen Mary, and Professor of Law and International Affairs at Penn State Law, and Professor Stavros Brekoulakis, Professor of Commercial Law and International Arbitration at Queen Mary. Lise Boseman, Executive Director of ICCA, will serve ex officio, see: ICCA – International Council for Commercial Arbitration, [online] http://www.arbitration-icca.org/projects/Third_Party_Funding.html [accessed: 15.07.2017].

[18] J. E. Vernon, op. cit.

[19] In Singapore TPF is regulated by Civil Law (Third-Party Funding) Regulations 2017 (Regulation to Civil Law Act of 1999), that come into operation on 1 March 2017; whereas in Hong Kong the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 was introduced on 11 January 2017.

of a funder, and if so – when and on what basis? Secondly, should the parties disclose the terms and nature of a funding arrangement, and if so – when, on what basis, and under which terms? Currently, the parties are not obliged to reveal the involvement of a funder in a dispute. Therefore, the presence of the funder and the nature of its relationships with the attorneys and the parties in an international arbitration case is often unknown. Moreover, the funders generally require that their involvement is not revealed and use confidentiality agreements to prevent the disclosure.[20]

The reasons why the disclosure of TPF may be necessary include the arbitrators' impartiality requiremenent, the potential conflicts of interest, and the transparency, the latter especially in the investment treaty arbitration. Even if the funders are not the parties to an arbitral dispute, they still participate to certain extent in various stages of an arbitration. Thus, one of the potential sources of conflict is repetitious appointment in cases involving the same TPF, since generally the frequency of repeated appointments is seen as a concern for arbitrator's independence and impartiality.[21] Undisclosed ties may give rise to grounds for removal of the arbitrator or challenge to the arbitral award.[22] Early disclosure of the presence of TPF is therefore worthwhile as a means of eliminating the costly and adverse consequences.

The recently revised IBA Guidelines on Conflicts of Interest in International Arbitration (October 2014) addressed concerns regarding participa-

[20] M. Scherer, A. Goldsmith, op. cit., pp. 217–218. Discussing TPF disclosure obligations in the context of potential arbitrator impartiality issues, the funders baseline preference for non-disclosure of funding arrangements was coupled with a suspicion that disclosure could adversely influence an arbitral tribunal.

[21] E. de Brabandere, *'Mercantile Adventurers'? The Disclosure of Third-Party Funding in Investment Treaty Arbitration*, "Grotius Centre Working Paper" 2016, No. 059-IEL, "Leiden Law School Research Paper", p. 11, [online] https://ssrn.com/abstract=2846996 [accessed: 15.07.2017], where this phenomenon is addressed as a 'repeat arbitrators'. Author also identifies the 'issue conflicts' situation where an arbitrator may be tempted to decide an issue in a way that could benefit a position adopted by that same arbitrator acting as counsel in another investment dispute. See also: V. Sahani, *Harmonizing…*, op. cit., pp. 903–904.

[22] See: W. Park, C. Rogers, op. cit., p. 6, indicating the factors that contribute to the concerns about potential conflicts of interests, as the increase in the number of cases involving TPF, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, as well as close relations among elite law firms and leading arbitrators.

tion of the funder in arbitration.[23] General Standard 6(b) clarifies that if one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, the award to be rendered in the arbitration, may be considered to bear the identity of such party. Given the fact that the funder may have a direct economic interest in the award, as such it may be considered to be an equivalent of the party. Moreover, under General Standard 7(a) the parties are required to disclose, on their own initiative at the earliest opportunity, any relationship with the arbitrator. The duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party, has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.[24] The 2014 IBA Guidelines for Conflicts of Interest were the vital milestone towards transparency, as the first rules that directly address TPF. However, it is only soft law and, as the arbitral community is underlying – there has been no reported practice on their application to TPF so far.[25]

Some authors also state that the broad rule 6(2) of the ICSID Convention Arbitration Rules, requiring the arbitrator to declare past and present professional, business and other relationships (if any) with the parties and any other circumstance that might cause arbitrator's reliability for independent judgment to be questioned by a party, does provide for the disclosure of relationships with the funder. However, as in the case of IBA Guidelines, such an obligation naturally requires knowledge of the funding arrangement.[26]

Such an approach was followed by the arbitral institutions, again with the aim to pursue overarching strategy to enhance the transparency and

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[23] As to the outline of the key changes in the revised IBA Guidelines on Conflicts of Interest in International Arbitration see: K. Moyeed, C. Montgomery, N. Pal, *A Guide to the IBA's Revised Guidelines on Conflicts of Interest*, Kluwer Arbitration Blog 29.01.2015, [online] http://kluwerarbitrationblog.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/ [accessed: 15.07.2017].

[24] IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on Thursday 23 October 2014, Explanation to General Standard 6(b) and 7(a), pp. 14–15; [online] https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#collapseOne [accessed: 15.07.2017].

[25] See *i.a.* M. N. Iliescu, *A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact*, Kluwer Arbitration Blog 2.05.2016; [online] http://kluwerarbitrationblog.com/2016/05/02/a-trend-towards-mandatory-disclosure- of-third-party-funding-recent-developments-and-positive-impact/ [accessed: 15.07.2017].

[26] E. de Brabandere, op. cit., p. 13.

predictability of the arbitration process. In February 2016, the ICC adopted the Guidance Note for the disclosure of conflicts by arbitrators, as a part of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration. Under the general duty of all arbitrators to act at all times in an impartial and independent manner, arbitrators should in each case consider disclosing relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.[27] Although important, the approach adopted by ICC is imperfect. Not only does it not require mandatory disclosure of TPF, but most importantly it does not impose the disclosure obligation on the parties. When the party has not disclosed the existence of the funding agreement, the arbitrator will not be able to evaluate the potential relationship with the funder that might in turn endanger the integrity of the arbitral process.

In that context, a path taken by Singapore International Arbitration Centre (SIAC) in recently released Investment Arbitration Rules, offering a specialized set of procedures for the conduct of international investment arbitration,[28] is worth noting. Under Art. 24(l), the Tribunal shall have the power to order the disclosure of the existence of a party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability. The Rules give the tribunal far-reaching legitimacy to order disclosure, the scope of which is wide, covering not only the fact of TPF, but also the identity of the funder, as well as details as to the funding arrangements. The last information that might be demanded, regarding the TPF's exposure to costs, touches upon highly controversial is-

[27] Guidance Note for the disclosure of conflicts by arbitrators was adopted unanimously by the Bureau of the Court on 12.02.2016, incorporated into the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1.03.2017, p. 6, point 24; [online] https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/ [accessed: 15.07.2017]. As to the critical analysis of the ICC Guidance Note, see: A. Goldsmith, L. Melchionda, *The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction*, Kluwer Arbitration Blog 14.03.2016; [online] http://kluwerarbitrationblog.com/ 2016/03/14/the-iccs-guidance-note-on-disclosure-and-third-party-funding-a-step-in-the-right-direction/ [accessed: 17.07.2017].

[28] Investment Arbitration Rules of the Singapore International Arbitration Centre, 1st Edition, 1.01.2017. The Rules shall apply by agreement in disputes involving a State, State-controlled entity or intergovernmental organization, whether arising out of a contract, treaty, statute or other instrument.

sue, namely whether, and if so, to what extent, the funder may be liable for the successful adverse party's costs. It is postulated that since the funder exercises great control over the claimant's behavior in the arbitration proceedings, often directing the course of the proceedings, the adverse costs award should have an effect on the funder. However, currently there is no relevant court or arbitral practice to support this position.[29] This is due to the basic principle of arbitration proceedings – consent. Since arbitration cannot extend its effect to the third parties, an arbitral award only binds the parties to the arbitration proceedings. The impossibility of an arbitral tribunal to make an adverse costs award against the funder,[30] might eventuate the successful respondent not being able to recover the legal costs neither from the indigent claimant nor from the funder.[31]

Recognizing the need for more effective regulation of TPF in international commercial and investment arbitration, the issue of disclosure was also recently incorporated into free trade agreements. The CETA, revisited in 2016, cited above, includes a provision requiring the disputing party benefiting from TPF to disclose to the other disputing party and to the tribunal the name and address of the third party funder. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded after the submission of a claim, as soon as the agreement is concluded.[32] The same provision is included in the TTIP.[33]

Both in Hong Kong and Singapore, the national law prescribes disclosure requirements in relation to TPF. In Hong Kong the disclosure requires written notice by the funded party to the arbitral tribunal and other parties in

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[29] See: RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Assenting reasons of Gavan Griffith to decision on Saint Lucia's Request for Security for Costs, 13.08.2014, points 12–14, where the position of TPF in the arbitration proceedings that in fact only shares in the rewards of success, and risks no more than spent costs in the event of a failure, was compared to "a gambler's Nirvana: Heads I win, and Tails I do not lose." See also: E. de Brabandere, op. cit., p. 18.

[30] See: Art. 38(4) of ICC Rules of Arbitration (as of 1 March 2017), stating that the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. The same provision, allowing the tribunal to order the costs only against the parties to the proceedings, might be find also in i.a. Art. 42 of UNCITRAL Arbitration Rules, Rule 35 of the SIAC Arbitration Rules (as of 1 August 2016).

[31] Thorough analysis of the third party funder's liability for the adverse costs awards, see: P. Živković, D. Galagan, op. cit.

[32] CETA, Chapter 8 (Investment), Section A, Art. 8.26.

[33] TTIP, Chapter II (Investment), Section 3, Art. 8, the negotiations on the investment chapter were finalized in November 2015.

the arbitration of the fact the TPF agreement has been made, and the name of the funder, upon commencement of the arbitration, or if the agreement was entered after the commencement, within 15 days of the agreement.[34] Whereas in Singapore it is the legal practitioner, which conducts any dispute resolution proceedings before a court or tribunal, who must disclose to the court or tribunal, and to every other party to those proceedings the existence of any TPF contract related to the costs of those proceedings, and the identity and address of any funder involved in funding the costs. The disclosure must be made at the date of commencement of the dispute resolution proceedings where the funding contract is entered into before the date of commencement of those proceedings, or as soon as practicable after the funding contract is entered into where the contract is entered after the date of commencement of the dispute resolution proceedings.[35]

In line with those developments towards greater transparency and integrity of arbitral proceedings, the importance of disclosure of TPF was also underlined in recent investment arbitration cases. Starting point was the case Teinver S.A., et al v. Argentine Republic.[36] Referring to newspaper publications, in which it was reported that the alleged majority shareholder of some of the Claimants had transferred part of its ICSID claim to the U.S. investment fund in exchange for a contribution to pay the costs arising in the proceedings, the respondent requested that the ICSID Tribunal required the Claimants to provide all available information regarding the matter and the content of the agreement that was signed with said investment fund, and to also submit all related documentation. The Claimants, on the other hand, stressed that they had no obligation to disclose any agreements with the third parties regarding the funding of costs in this proceeding, and that

[34] However, in Hong Kong failure to disclose does not render the person liable to judicial or other proceedings, but may be taken into account by any court or tribunal if it is relevant. See also: G. Laughton, *Third Party Funding in International Commercial Arbitration Hong Kong and Singapore*, Lexlogy 27.03.2017, [online] http://www.lexology.com/library/detail.aspx?g=b87941df-279c-4731-982d-2133f814307a [accessed: 15.07.2017]; S. Jhangiani, R. Coldwell, *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?*, Kluwer Law Blog 30.11.2016, [online] http://kluwerarbitrationblog.com/ 2016/11/30/ third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/ [accessed: 15.07.2017].

[35] In Singapore, these additional requirements as to the form and time of the disclosure are provided in the Art. 49A of the Legal Profession (Professional Conduct) Rules 2015, as amended on 1 March 2017.

[36] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1.

Respondent failed to argue the necessity or relevance of its request.[37] The Tribunal had rejected Respondent's request at this early stage as it did not consider the currently available information on record as sufficient. However, the Tribunal added that it did not preclude reconsidering a similar request in the future once the main pleadings had been filed.[38] The modest reasoning provided by the Tribunal on that point did not involve the potential for conflicts of interest.

This approach has changed in the later case Guaracachi America, Inc. et al v. The Plurinational State of Bolivia.[39] The Respondent requested the production of funding agreement and further documentation in order to evaluate a security for costs request and to confirm that there were no conflicts of interest for the arbitration on account of the funder, whose identity remains unknown. The Claimants objected, arguing that Bolivia has not demonstrated what the conflict of interest would be.[40] The UNCITRAL Tribunal decided not to order the production of the agreement or any further documentation. The Tribunal shared the view that the Respondent has failed to specify what the conflict of interest created by the agreement would be. In any case, the applicable provisions governing conflicts of interest do not foresee the production of documents (as requested by the Respondent) by the parties, but rather disclosure by the arbitrators upon becoming aware of circumstances that could create a conflict of interest. However, since the identity of the funder has become known (due to the Respondent's request for security for costs), in order to remove any doubt, the members of the Tribunal declared that they have no relationship with the funder, and are not aware of any circumstance that could give rise to justifiable doubts as to their impartiality and independence on account of the financing of the Claimants' claims.[41] Although the request for the production of documents was dismissed, the Tribunal still gave careful consideration to the integrity of the arbitration proceedings.

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[37] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 24–25.

[38] Ibidem, para. 26.

[39] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011–2017 (international investment agreement case), [online] https://www.italaw.com/cases/518 [accessed: 15.07.2017].

[40] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011–2017, Procedural Order No. 13, 21 February 2013, para. 6–7.

[41] Ibidem, para. 8–9.

In the case Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, the ICSID Tribunal made a step forward.[42] The Respondent requested disclosure of the identity and nature of the involvement of third-party funder(s) for the Claimants in the arbitration proceedings, arguing that this was necessary to ensure there were no conflicts of interest, and that such a disclosure may be relevant to a potential security for costs application. The Tribunal ordered the Claimants to confirm whether their claims are being funded by a third-party funder, and, if so, to reveal to the Respondent and the Tribunal the name(s) and details of the third-party funder(s), as well as the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it(they) will share in any successes that the Claimants may achieve in this arbitration.[43] The Tribunal underlined that the disclosure of funder's identity will first and foremost ensure independence and impartiality of arbitrators. In that aspect, the Tribunal invoked its general power to preserve the integrity of the arbitral process and the good faith of the proceedings. While, when it comes to the full disclosure of the nature of the arrangements concluded with the funder, this was vital for the Tribunal to establish the grounds for an intended request for security for costs.[44]

Finally, in the case South American Silver Limited v. Bolivia,[45] the Respondent requested disclosure of the name of the funder on the basis that it was necessary to ensure the integrity of the arbitration and ensure the Tribunal's independence and impartiality. The Respondent also requested the terms of the funding agreement in order to determine whether the arbitration claims had been assigned, and whether the funder had committed to pay for an adverse costs order.[46] The UNCITRAL Tribunal ordered that there is a basis for ordering the disclosure of the name of the funder, but it did not find grounds to order the disclosure of the agreement entered into with the

[42] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6.

[43] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2015, para. 13.

[44] The case was commented on in E. de Brabandere, op. cit., pp. 13–14 and p. 20, where the Author states that this case is remarkable, since it preempts a future request for security for costs, and requests full disclosure of TPF in order to enable the Tribunal to properly address that future request.

[45] South American Silver Limited v. Bolivia, UNCITRAL, PCA Case No. 2013-15; [online] https://www.italaw.com/cases/2121 [accessed: 15.07.2017].

[46] South American Silver Limited v. Bolivia, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, para. 69–70.

funder. The latter was rejected because exceptional circumstances required to order security for costs were not present. The Tribunal explained that the mere existence of the funder was not sufficient to order it. Therefore, it was not relevant to determine whether the funder would assume (or not) an eventual costs award in favor of Bolivia.[47]

To summarize, the recent case law suggests that investment arbitration tribunals started to underline the importance of disclosing the identity of the funder, emphasizing the transparency and integrity of the arbitration as well as independence of arbitrators. However, there seems to be a consensus in the arbitration community as to the lack of obligation to disclose the terms of the funding agreement, unless the specifics of the particular case provide for that, especially as to the requests for the security for costs. Generally, the details of the funding arrangements are irrelevant and unnecessary to establish possible conflicts of interest. It is also stressed that the funding arrangement is a private agreement, unrelated to the merits of the underlying dispute, hence its full disclosure should only be demanded in exceptional circumstances, as a last resort.[48]

Conclusions

TPF has steadily grown into the arbitration realm and definitely is here to stay. According to some anecdotal reports two-thirds of ICSID cases filed in 2013 implicated claimants which relayed on resources from a major funder on the market.[49] This shows the scale of the TPF phenomenon, that shall be adequately regulated and put into the legal frames in the interest of the arbitration practice, its users and arbitral institutions.

First and foremost, the existing regime of fragmentary regulation is inadequate to ensure the fundamental principle of integrity of the arbitration process and impartiality of the arbitrators. Conflicts of interest involving

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[47] Ibidem, para. 80–81, 84.

[48] V. Sahani, *Harmonizing...*, op. cit., p. 904. See also: A. Goldsmith, L. Melchionda, op. cit., where the Authors state that disclosing the identity of any funder associated with a claim does not mean requiring disclosure of the terms of funding, which should be considered only upon a demonstration that such additional information is necessary and relevant. Abstract invocations of transparency interests would not suffice. See also the judgment of the Tribunal in the case South American Silver Limited v. Bolivia (described above).

[49] Although no reliable statistics were gathered, the estimation was made by the Task Force on the basis of information provided by major funder, see: W. Park, A. Rogers, op. cit., p. 3.

funders could be prevented and resolved only by the adoption of both broad definition of TPF arrangements and disclosure requirement. The recent legislative steps taken by Hong Kong and Singapore are noteworthy, since they effectively complement the IBA Guidelines, some of the arbitration rules and international treaties that also recognized the importance of the obligation to disclose the use of funding agreements.[50] However, in order to secure a greater efficiency, the obligation should be imposed on the funders, the parties and/or the counsels, since its imposition only on the arbitrators might be hampered by the lack of knowledge of the third party funder's involvement. Finally, as to the scope of the disclosure, it is reasonable to argue that disclosing the full identity of a funder is sufficient to meet the objective of transparency and integrity of the arbitration proceedings.

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Hungary Is Campaigning: Main Issues of the New Electoral Campaign Legislation

Abstract

A number of recent amendments explain the actuality of the topic, since on 26th November 2012 the National Assembly adopted Act XXXVI of 2013 on Electoral Procedure (hereinafter: Electoral Procedure Act), which introduced radical changes in the electoral campaign legislation in Hungary. According to the Act, "campaign methods shall include all methods capable of influencing or used in an attempt to influence voters' choices."[1] The most used campaign methods are regulated with more details: posters, direct contact by the nominating organization or the candidate, political advertisements, election rallies. Thus this essay deals with the legal notion of electoral procedure, electoral campaign and the campaign finance.

Keywords

electoral campaign, electoral procedure, Hungary, media campaign, campaign finance

Hungary's moments are quite expensive,
but enchanting words and grandiloquent declamations are too cheap.

Count István Széchenyi

Introduction

A number of recent amendments explain the actuality of the topic, since on 26th November 2012 the National Assembly adopted Act XXXVI of 2013 on Electoral Procedure (hereinafter: Electoral Procedure Act), which introduced radical changes in the electoral campaign legislation.

[1] Section 140 of Act XXXVI of 2013 on Electoral Procedure.

The campaign – in its broadest sense – is the commencement of the electoral process that actually begins immediately after the former elections, as the loser nominating organizations are preparing for the next elections with their activities – even without direct references. The official campaign period lasts from the 50th day before the voting until the end of voting on the voting day,[2] so the period available to popularize party programmes has been shortened.

Sections 141–142 of the Act determines campaign activity:

> The following shall be campaign activities: the use of campaign resources in the campaign period, and any other activity in the campaign period aimed at influencing or attempting to influence voters' choices. The following shall not be considered election campaign: the activities of election bodies, and personal communication between citizens as private persons, regardless of its content and form.[3]

On one hand, "campaigning" is one of the means of persuasion at the disposal of the parties competing for political power in order to seek the voters' support to their programme or candidate. On the other hand, electoral campaign should inform the citizens appropriately and prepare them to express their opinion in public affairs and to make decisions in political disputes. Article 2 of the Fundamental Law declares that "members of the National Assembly shall be elected by universal and equal suffrage in a direct and secret ballot, in elections which guarantee the free expression of the will of the voters, in a manner laid down in a cardinal Act."[4] This is protected by the freedom of opinion, of information and of orientation. Nonetheless, public administration should observe the law for the sake of these freedoms.

In Hungary, as the political-economic-social framework returned to the rule of law after 1989, the legality of public administration became a constitutional requirement. It means legal control over administrative activities, i.e. that public administration observes the law and causes its observance by others. The legality of public administration includes the realization of other conditions too,[5] such as the legality of national and local elections, which requires the accomplishment of the basic principles of the electoral procedure, established by the Electoral Procedure Act as well.

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[2] Section 139 of Act XXXVI of 2013 on Electoral Procedure.

[3] Section 141–142 of Act XXXVI of 2013 on Electoral Procedure.

[4] Article 2 of the Fundamental Law.

[5] A. Rácz, *A közigazgatás törvényességének követelményei*, [in:] *Szamel Lajos Tudományos Emlékülés*, ed. F. Csefkó, Pécs 2000, p. 149.

During the electoral campaign some of the principles settled by the Act shall prevail more efficiently, e.g. the protection of the fairness of the election, equal opportunities for candidates and nominating organizations, and the exercise of rights in good faith and in accordance with their purpose. The last principle shall be given greater importance: although during campaign period candidates and nominating organizations have the right to express critiques in respect of each other's activity and programme (so-called 'negative campaigning'), this cannot lead to the infringement of the exercise of rights in good faith and in accordance with their purpose. Consequently, it is highly relevant to distinguish between a negative opinion, unable to violate individually the electoral legislation, and a statement, which, if false, can mislead the voters or, in more serious cases, might trigger criminal consequences.[6] The Electoral Procedure Act establishes the fundamental criteria which determine whether the campaign observes or not the principles of the exercise of rights in good faith and in accordance with their purpose and of the equal opportunities. It is worth mentioning too that the judgements dealing with negative campaigning have referred several times to the practice of the European Court of Human Rights, the Constitutional Court, and of the High Court of Justice.[7]

The new Electoral Procedure Act – in contrast to the former legislation – abolished the institution of the general campaign silence, introducing only a prohibition relative to specific places and to campaign methods on the day of voting.

Main Details of Electoral Campaign Legislation

In respect of the infringement of campaign silence, Section 41 of the former Electoral Procedure Act regulated campaign methods merely hinting at some of them. The act in force did not complete the list, yet it modified the scheme of the legislation in respect of the fact that campaign silence was abolished.

According to the Act, "campaign methods shall include all methods capable of influencing of used in an attempt to influence voters' choices."[8] The

[6] Sections 226–226/A–226/B of the Act C of 2012 on the Criminal Code and 36/1994 (VI. 24.) ABH Constitutional Court Decision.

[7] R. Sasvári, *Az új választási eljárási szabályozás gyakorlati tapasztalatai*, [online] http:// www.kozszov.org.hu/dokumentumok/UMK/UMK_2014_4/16_Sasvari_Robert.pdf [accessed: 23.07.2017].

[8] Section 140 of Act XXXVI of 2013 on Electoral Procedure.

most used campaign methods are regulated with more details: posters, direct contact by the nominating organization or the candidate, political advertisements, election rallies.

1. Campaign methods: Posters

Posters are the most well-known campaign methods, regarding which the Act fixes that for the purposes of the election campaign 'poster' shall mean election placards, legends, flyers, images and emblems regardless of size and the surface they are on.[9]

The National Election Commission (hereinafter: NEC) established that, according to Act CLXXXV of 2010 on Media Services and Mass Media, an election poster shall be considered a 'publication.'[10] thus it shall display the key editorial and publication data (imprint). The imprint shall display the publisher's name, registered office and the name of the person responsible for publishing.[11] Consequently – as highlighted by the NEC too – it shall be indicated on the election posters and an omission infringes the principle of the exercise of rights in good faith and in accordance with their purpose, as in this case the exercise of the right to having the poster edited compels the violation of the rules relative to the publication.[12]

According to the Electoral Procedure Act, in the campaign period nominating organizations and candidates may produce posters without expressed permission or registration. In the campaign period posters may be placed without any limitation. In respect of the court practice up until now, this provision of the Act is supposed to be one of the most polemic issues. The Act states that "posters may not be placed on the walls of buildings and fences without the consent of the owner, the tenant or, in the case of property owned by the state or the municipality, the consent of the entity that exercises trustee's rights."[13] Posters may be placed without the owner's consent

[9] Section 144 (1) of Act XXXVI of 2013 on Electoral Procedure.

[10] "Publication: […] any other printed material (address registers, name registers, publications containing graphics, drawings or photos, maps; flyers; printed postcards, greeting or similar cards; printed pictures, samples, photos; printed calendars; printed business advertisements, catalogues, brochures, poster ads and similar items; other textual publications)" – Section 203 of Act CLXXXV of 2010 on Media Services and Mass Media.

[11] Section 46 (9) of Act CLXXXV of 2010 on Media Services and Mass Media.

[12] 1112/2014 NEC Decision with regard to the complaint submitted by the individuals Z. M and A. B.

[13] Section 144 (4) of Act XXXVI of 2013 on Electoral Procedure.

– but observing the right to the defence of property – on objects not considered buildings or fences.

It is worth mentioning the Curia's rather controversial practice with regard to the placement of election posters on poles. On 5th March 2014 the Curia decided that, according to Section 12 (3b) of Act I of 1988 on Public Road Traffic (hereinafter: Road Traffic Act)[14] and to Section 3 (2) a) of Government Decree 224/2011. (X.21.) on the rules of placing billboards, advertising media and other carriers of advertisements along public roads,[15] their placement shall be prohibited.[16] In its decision the Curia upheld the NEC's 128/2014 second-instance resolution. In the Reasoning, the Curia stated that Section 1 of the Decree expressly names the election poster settled in Section 144 of the Electoral Procedure Act as a carrier of advertisement. Thus, it is rather evident that election posters fall under the prohibition fixed both by Section 12 of Road Traffic Act and by Section the present Government Decree.

On the other hand, in its decision passed on 17th March, The Curia establishes:

> According to the right interpretation of Section 144 of the Electoral Procedure Act, the placement of election posters shall be regulated exclusively by its own provisions. Election bodies may analyse the observance of these provisions, but they may not apply road traffic rules or decrees relative to the placement of billboards, for Section 144 of the Electoral Procedure Act composes a closed system. The above-mentioned Decree fixes precisely the set of advertisement carriers including election posters, though, its application is excluded by Section 144 (4)-(7) of the Electoral Procedure Act. Thus, this provision may not abrogate the general rule of placement without limits.[17]

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[14] "Billboards and any other advertising items may not be placed on poles of street lighting, electricity and telephone, regardless of the fact that the pole is erected on the part without road surface, pavement, footway or cycle path" – Section 12 (3b) of Act I of 1988 on Public Road Traffic.

[15] "For the purpose of this Decree, billboards, advertising media any other carriers of advertisement (hereinafter: carrier of advertisement): any sign or object which is considered economical advertisement according to Section 3 d) of Act XLVIII of 2008 on the conditions and restrictions of business advertising activity or the scope of which is to convince the by-passers on private roads not closed to the public about supporting or rejecting certain ideologies, principles, values and conceptions, including the election poster mentioned by Section 144 of Act XXXVI of 2013 on Electoral Procedure" – Section 3 (2) a) of Government Decree 224/2011 (X.21).

[16] Kvk. III. 37. 183/2014/10 Curia Decision.

[17] Kvk. II. 37. 307/2014/3. Curia Decision.

Consequently, in these cases the placement of posters on poles does not infringe the Electoral Procedure Act. However, in other cases, e.g. if the poster covers a road sign, further rules ought to be considered by the NEC.

Another exception stated by the Electoral Procedure Act: "On certain public buildings or on specific parts of public domain, the placement of posters and billboards may be prohibited by the municipality, in the Capital by the municipality of the Capital for reasons of protection of monuments and the environment."[18] *Exempli gratia*, it is prohibited to place election posters on any bridge on the Danube and in any subways.[19] Furthermore, "it is prohibited to place posters on or inside buildings that serve as premises for public or municipality authorities."[20] In this respect, the Metropolitan Court of Budapest upheld 16/2014 (IV.1.) NEC Resolution which declares that "healthcare providers shall not be considered state or local authority."[21]

For the sake of the procedural principles of the election, such as the protection of the fairness of the election and the exercise of rights in good faith and in accordance with their purpose, the posters shall be placed in such a fashion that they do not cover the posters of other candidates and nominating organizations, and that they may be removed without causing any damage. According to Decree 8. Kpk. 30. 158/2006/2 of the County Court of Hajdú-Bihar: "The condition of the poster formerly placed has no importance, the person who places shall not decide whether the fixed poster of other candidate is capable of drawing voters' attention. The person who covers the poster violates the law even if it has been already covered."[22]

The Electoral Procedure Act establishes that "posters shall be removed within 30 days after the day of the vote or the costs of the removal shall be borne by those who have placed them or those on behalf of whom they have been placed."[23] In this respect, the NEC launched a guideline in which it fixes that the election committee has no competence to adjudge a complaint submitted because the obligation of the removal of the poster within 30 days after the election has been violated. Furthermore, this body is not authorized to impose fines. Unlawful omission is an issue of public property,

[18] Section 144 (5) of Act XXXVI of 2013 on Electoral Procedure.

[19] Section 2 5)–6) of 4/2014 Decision of the General Assembly of Budapest on the prohibition of the placement of election posters on certain public buildings and specific parts of public zones.

[20] Section 144 (5) of Act XXXVI of 2013 on Electoral Procedure.

[21] 16/2014 (IV.1.) NEC Resolution.

[22] Decree 8. Kpk. 30. 158/2006/2 of the County Court of Hajdú-Bihar.

[23] Section 144 (7) of Act XXXVI of 2013 on Electoral Procedure.

regulated by Section 13 (1) 2) of Act CLXXXIX of 2011 on Local Governments in Hungary.[24]

2. Campaign methods: Election Rallies

According to Section 145 (1) of the Electoral Procedure Act, "election rallies may be held during the campaign period. Election rallies shall be public."[25]

Election rally – despite having all the essential features of an assembly – does not come within the scope of Act III of 1989 on the Right to Assembly, thus it can be held in campaign period without former registration.[26] In our opinion, though, it is convenient to make a registration to the police, so they can prepare for the protection of the event in case of emergency.

Article XVIII (1) of the Fundamental Law establishes that "everyone shall have the right to peaceful assembly."[27] In consonance with this constitutional requirement, election rallies shall be organized in peaceful manner, i.e. participants' conduct shall not be violent. They may join the rally but may not carry firearms, explosives, deadly weapons or any other items which can cause considerable harm. However, it would be highly agreeable to introduce a specific set of security rules, exclusively dealing with election rallies.

Comparing to the general rules of assembly, in case of an election rally the organizers' group is smaller, as election rallies established by the Electoral Procedure Act may only be organized by a candidate or nominating organization taking part in the election, or by the initiator of referendum or popular initiative. Consequently, all the unions of the organizers mentioned by the Electoral Procedure Act are considered election rallies, both in public and on private property. During the campaign period, the election rally can be distinguished from the assemblies falling under Act III of 1989 on the basis of its purpose: it aims to influence or to attempt to influence voters' choice.[28] It is worth questioning, though, whether the scope or the issue of the organization have any importance with regard to its classification as an election rally.[29]

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[24] NEC Guideline 13/2014 on the application of the rules with regard to the removal of election posters.

[25] Section 145 (1) of Act XXXVI of 2013 on Electoral Procedure.

[26] Section 3 a) of Act III of 1989.

[27] Article XVIII (1) of the Fundamental Law.

[28] *Választójogi kommentárok*, ed. A. Cserni, Budapest 2014, p. 271.

[29] B. Hajas, *A gyülekezési jog egyes aktuális elméleti és gyakorlati kérdései*, Pécs 2012, p. 144.

On the day of voting, posters may be placed with the limitations fixed by law, but election rallies may not be held. With regard to the spot of the rally, Section 145 (2) of the Electoral Procedure Act states that "for the purposes of the election campaign, state and municipality budgetary agencies shall make premises and other necessary equipment available to the candidates and the nominating organizations under equal conditions."[30] It is worth mentioning that these agencies are only bound towards the registered candidates and nominating organizations. This obligation ensures the realization of the principle of equal opportunities during the campaign period. "In buildings serving as premises for state or municipality authorities, it shall be prohibited to carry out campaign activities, hold rallies, except at settlements with less than five hundred inhabitants, provided that no other community building is available."[31] Election rallies may not be held e.g. in the marriage hall of the mayor's office[32] or in the Deputy Speaker's office in the Parliament.[33]

3. Campaign methods: Political Advertisements[34] – Media Campaign

Section 146 of the Electoral Procedure Act pronounces that

> […] political advertisement shall mean a political message in the media as defined in Section 203 (55) of Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter: Media Act) with the difference that party, political movement and government shall be interpreted as nominating organization and independent candidate. 'Political advertisement' shall mean any content published in the press or in the cinema in return for consideration, promoting or advocating support for a nominating organization or independent candidate, or promoting the name, objectives, activities, slogan or emblem of such entities.[35]

Political advertisements are applied as campaign methods within the framework of media campaign and they may be published exclusively after the registration of the candidate or the nominating organization. The substantial difference between the two campaign methods is that political ad-

[30] Section 145 (2) of Act XXXVI of 2013 on Electoral Procedure.

[31] Section 144 (5) of Act XXXVI of 2013 on Electoral Procedure.

[32] 2. Kvk. 20. 711/2006/2 of the County Court of Szabolcs-Szatmár-Bereg.

[33] 23/1998. (IV.6.) NEC Decision.

[34] In Hungarian 'politikai reklám' and 'politikai hirdetés' (the official English translation of the Electoral Procedure Act does not indicate this difference: [online] http://valasztas.hu/en/ovi/241/241_1_10.html [accessed: 23.07.2017]).

[35] Section 146 of Act XXXVI of 2013 on Electoral Procedure.

vertisement shall be published in the press or in the cinema only in return for consideration, while political commercial[36] shall be broadcast in the media service free of charge.

3.1. Broadcast of Political Advertisements

According to Article IX (3) of the Fundamental Law,

> In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.[37]

Political advertisements may be transmitted only on TV or on the radio.

Section 147 of Electoral Procedure Act contains the general rules with regard to the broadcast of political advertisement:

> **147. §** (1) In the campaign period, political advertisements shall be broadcast by the media provider with identical conditions – especially with regard to the number, appearing order, timeframe and time of broadcast of political advertisements – offered to nominating organisations that put forward candidates and the independent candidates. In case of joint candidates the nominating organisations are entitled jointly to order political advertisement.
>
> (2) No opinion, assessing explanation shall be attached to such political advertisements.
>
> (3) Media content providers shall not demand or accept consideration for broadcasting political advertisements.
>
> (4) Those who provide political advertisements to be broadcast in audio-visual media shall arrange for the advertisements to be subtitled or supplemented with sign language interpreting. (This ensures the unimpeded access to political campaign.)
>
> (4a) No political advertisement shall be published on ballot day.
>
> (5) In other regards, the rules of Media Act shall be applied to the broadcast of political advertisements.[38]

These rules shall be applied to those local and district media providers who are not obliged to announce the broadcast of political advertisement and – observing the law – are entitled to transmit political advertisement

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[36] Politikai reklám (hun).

[37] Article IX (3) of the Fundamental Law.

[38] Section 147 of Act XXXVI of 2013 on Electoral Procedure.

with no limitation with regard to duration or timeframe.[39] Equal conditions shall not be analysed among the singular media providers, but per media provider.

It is the patron who provides the production of the political advertisement: he is banned from influencing media providers and is exclusively responsible for its content. Launching the political advertisement, the media provider is obliged to name precisely its patron, for it is rather questionable whether the voter is capable of distinguishing the advertisements of candidates or nominating organizations.[40]

The specific rules on the linear media services of public media providers and the country-wide available linear media services of media providers not falling under the first category are included by Section 147/F of Act XXXVI on 2013 on Electoral Procedure.

> **147/A. §** (1) During the campaign period before the general election of members of the National Assembly, after the legally binding registration of national lists, public media providers shall broadcast in their linear media services political advertisements thereof in the order as determined by the National Election Commission according to (2).
>
> (2) During the campaign period before the general election of members of the National Assembly, the timeframe for broadcasting political advertisements shall be 470 minutes for nominating organizations putting forward party lists and 130 minutes for organizations putting forward national minority list. The time available to the nominating organizations shall be divided in equal proportions between party lists and national minority lists. Time available for nominating organizations shall be divided in equal proportions per public media service.
>
> (3) Political advertisement shall be published by the public media provider in the media service with the greatest yearly audience rate.
>
> (4) The media provider shall broadcast 3 times per day without interruption the political advertisements in the timeframes between 6–8, 12–14 and 18–20 o'clock. Political advertisement of nominating organizations putting forward party lists and organizations putting forward national minority list shall be broadcasted in a row. The broadcast order of the political advertisements shall be changed daily for the sake of equal opportunity.
>
> (5) The public media provider shall broadcast the political advertisement in the day and timeframe as requested by the nominating organization. The nominating organization may request the broadcasting of political advertisement in one timeframe – for a duration of maximally one minute – only once per day.
>
> (6) The media provider is only obliged to broadcast the political advertisement if the nominating organization hands over its political advertisement latest on the second day before the planned broadcast.

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[39] 2/2014 NEC Guideline on the broadcast of political advertisements.

[40] *Választójogi kommentárok*, op. cit., p. 273.

> **147/D. §** During the general elections of the national minority representatives on the day before ballot day public media providers shall broadcast the political advertisements of nominating organizations putting forward national list once, for a duration of 30 seconds per political advertisement. Provisions of section 147/A (3) and (6) shall be applied to the broadcasting.
>
> **147/E. §** The public media provider is not allowed to broadcast any further political advertisement than those according to 147/A–147/D.[41]

In this respect, Hungarian Television Non-Profit Private Limited Company, Hungarian Radio Non-Profit Plc. and Duna Television Non-Profit Plc., as public media providers, shall broadcast political advertisements within the time limitations settled by law, from the 50th day before the election until the day before the election.

> **147/F. §** (1) In the campaign period before the general election, media providers with country-wide available linear media services not falling under provisions of Section 147/A-147/E shall notify in a declaration the National Election Commission about their intention to broadcast political advertisements, also designating the used country-wide available linear media service/es/, latest by the 50th day before ballot day. Failing to comply this deadline shall result in not being allowed to broadcast political advertisements. The National Election Office shall publish on its official website the declarations of the concerned media providers, their name and the timeframe secured for the broadcast.[42]

Exempli gratia, it is worth mentioning 'TV2-case' with regard to political advertisements. On 9th March, TV2 broadcasted nine times the Government's advertisements, entitled 'Hungary is doing better,' with a duration of fifty seconds each. In the complaint submitted to the NEC, according to the complainants' view, the slogan and the audio visual effects of this social commercial are similar to the Government's political advertisements. The NEC stated that, according to Electoral Procedure Act, it may not be considered political advertisement, for it had evidently indicated the Government's authority, but an announcement in the public interest or a social commercial, fixed in the Media Act.[43]

Subsequently, complainants turned to the Curia pleading that it may classify the TV programme in question as political advertisement. The Curia amended the NEC's decision and established that transmissions shall be

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[41] Section 147/A-D of Act XXXVI of 2013 on Electoral Procedure.

[42] Section 147/E-F of Act XXXVI of 2013 on Electoral Procedure.

[43] 745/2014 NEC Decision with regard to the complaint of private individuals.

categorized on the basis of their content rather than their patron. Popularizing the objective or the slogan of nominating organizations shall be considered political advertisement too. If the state supports one of nominating organizations in the mass media, it might lead to a violation of law.[44]

3.2. BROADCAST OF POLITICAL ADVERTISEMENTS

Section 148 of the Electoral Procedure Act settles the provisions of broadcasting political advertisements:

> (2) If a press product wishes to publish political advertisements, it shall send to the National Audit Office a price list for its advertisement services within five working days after the call for elections. The National Audit Office shall enter the price list into its records and publish it on its website. The press product shall publish the same price list on its own website.
>
> (3) Political advertisements shall only be published by press products which have had their price list registered with the National Audit Office. Political advertisements shall only be published in return for the consideration indicated in the registered price list.[45]

Consequently, not meeting the deadline for registration, the press may not publish political advertisements even if it intends to ensure the publishing free of charge.[46]

4. Campaign methods: Direct Political Campaigning

The Electoral Procedure Act fixes the rules of direct political campaigning: "**149. §** Election campaign materials may be delivered to voters by direct contact in accordance with the provisions of Section 89, with the restriction that the use of voters' personal data – such as mobile phone numbers, e-mail addresses – shall require expressed consent."[47]

Direct political campaigning means delivering election campaign materials to voters by direct contact.[48]

The name and address of voters in the polling district electoral register shall be supplied on request to the candidate by the election office with

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[44] Kvk. III. 37. 328/2014/6. Curia Decision.

[45] Section 148 of Act XXXVI of 2013 on Electoral Procedure.

[46] 2/2014 NEC Guideline on the broadcast of political advertisements.

[47] Section 149 of Act XXXVI of 2013 on Electoral Procedure.

[48] *Választási füzetek 193*, ed. I. Pálffy, p. 18, [online] http://www.valasztas.hu/hu/ovi/content/vf/vf_193.pdf [accessed: 14.09.2014].

a competence to register them. The above-mentioned data shall be supplied on request to nominating organizations by the National Election Office. The supply of data shall be conditional on the candidate providing proof of the payment of the amount of the monthly minimum wage (101 500 HUF). The supply of data shall be conditional on the nominating organization putting forward a list providing proof of the payment of the amount of the monthly minimum wage per candidate standing for election in the constituency covered by the list. The data supply fee shall be paid to the account of the National Election Office.[49]

Nevertheless, in order to protect the right to the protection of personal data declared by Article VI of the Fundamental Law,[50] voters are entitled to prohibit the supply of their data, which, otherwise, would be legal. The data shall be supplied by the election office within five days. Subsequently, candidates and nominating organizations shall plead electronically the registration of personal data with the scope of campaigning to the National Authority of Data Protection and Freedom of Information (hereinafter: the Authority), as – according to the Authority's announcement – political campaign activities do not fall under the exceptions settled by Section 65 (3) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.

If the data are supplied by the election office, the candidate becomes a 'data controller', i.e. is entitled to make and execute decisions concerning data processing or have it executed by a data processor (e.g. by a nominating organization). Evidently, as a data controller, the candidate is responsible for the damages caused by the data processor in both cases. The candidate shall enter into contract with the nominating organization as a data processor and inform the voters (data subjects) about the data processor.[51]

The supplied data shall be used only for direct political campaigning. Other use, copying and handing over to third parties shall be forbidden. Candidates and nominating organization putting forward a list shall destroy the supplied data not later than on the day of voting, and shall deliver a re-

[49] Sections 153–154 of Act XXXVI of 2013 on Electoral Procedure.

[50] Article VI (2) of the Fundamental Law: "Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest".

[51] *Announcement of the National Authority of Data Protection and Freedom of Information on the methods of the registration of the data supply used for political campaign*, [online] http://www.naih.hu/files/A-NAIH-koezlemenye-OKV-2014--3-.pdf [accessed: 13.09.2014].

cord of the destruction to the election office within three days.[52] In case of omission, the election office is authorized to impose fine.

If the nominating organization infringes the rules of data processing, the Authority is empowered to launch official investigation on the grounds of the infringement of voters' right to the protection of their personal data.[53] *Exempli gratia*, campaign activity based on public phone books is considered violation of law, for the voters' consent is necessary for the use of their phone or mobile phone number in direct political campaigning.

5. Campaign methods: Opinion Polls

The Electoral Procedure Act establishes that: "**150. §** On the day of voting, persons carrying out opinion poll surveys shall not enter the buildings where polling stations are located, and shall not in any way harass voters; they may only contact voters as they are exiting the polling station. The result of such opinion polls (exit polls) shall only be published after the end of voting as well."[54]

"While political campaign aims to influence voters' choice and conviction, publishing of the results of opinion polls does not have this direct objective"[55] – as the Constitutional Court settles in its Decision 6/2007 (II. 27.). However, even if opinion polls cannot be considered campaign methods per se, publishing these results may influence voters' choice.

In 8/2014 Guideline on the time of the end and closing of voting, the National Election Commission established that the results of exit polls shall be published after 19.00 CET, for this is the end of voting. Consequently, if at the end of voting (at 19.00) the local election commission does not close the voting because of the voters standing in queue, these voters might be informed about the result of exit polls, which might influence their choice.

Since persons carrying out opinion poll surveys shall not enter the buildings where polling stations are located, the Electoral Procedure Act corrects the former provisions by ensuring the possibility of opinion polls towards the voters exiting the building, rather than those leaving the polling station.

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[52] Section 155 of Act XXXVI of 2013 on Electoral Procedure.

[53] Section 52 (1) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.

[54] Section 150 of Act XXXVI of 2013 on Electoral Procedure.

[55] Decision 6/2007 (II.27.) of Constitutional Court.

6. Partial Campaign Silence

Campaign silence is the period during which exercising influence on voters' choice is banned. In our legislation since 2010, it has been limited to the day of voting, as the Electoral Procedure Act had abolished the institution of classic campaign silence. Campaign activity – in consonance with the former provisions – is limited only on the day of voting with regard to its area and to certain campaign methods.

In its Decision 39/2002 (IX.15.) the Constitutional Court highlighted that abolishing campaign silence is not unconstitutional, if the legislator ensures the peace of elections with other tools.

In a seven-point guideline with examples, the National Election Commission clarified Section 143 of the Electoral Procedure Act about territorial campaign silence: "No election campaign activities may be pursued in public areas within 150 meters of the designated building's entrance that is used to access the polling station."[56]

11/2014 NEC Guideline on the interpretation of the rules of relative territorial campaign silence fixes that the prohibition refers to active campaign activity (in this sense, posters legally placed in public areas need not to be removed) and that campaign activity shall not be pursued either inside the building used to access the polling station or in the polling station itself.

The Guideline declares that campaign ban within 150 meters generally refers to any electoral procedure. Furthermore, it settles that the public area of foreign country does not come within Hungary's jurisdiction, thus it is free from relative campaign silence. In other words, on the day of voting, in foreign representations, campaign activity pursued within 150 meters from the building's entrance used to access the polling station is not considered the infringement of the prohibition.

On the other hand, Section 143 of the Electoral Procedure Act is violated if on the day of voting a vehicle with the posters of any candidate or nominating organization is waiting within, or passes constantly or regularly through the area of 150 meters. Exceptions are means of transport with scheduled timetable. Thus, election posters need not to be removed from buses and trams, whereas the requirement of impartiality is violated if e.g. on the day of voting members of the election commission distribute candidates' emblems or wear the uniform of a nominating organization.

Law is infringed too if campaign activity is pursued out of 150 meters but it can be heard or seen within the area (e.g. if activists use microphones).

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[56] Section 143 of Act XXXVI of 2013 on Electoral Procedure.

The validation of the principles of universal suffrage and direct ballot explains the next provisions: "The voter is entitled to get help from another person to apply for a mobile ballot box or to get to the polling station."[57] In this respect, though, the Electoral Procedure Act introduces the following restriction: "No public announcements can be made about applying for mobile ballot boxes or transport to polling station, furthermore using buses for (organized) transport to polling stations is not allowed."[58]

As it was necessary to clarify whether this prohibition includes election bodies or not, 3/2014 NEC Guideline on the main questions of bus transfer on the day of voting established the interpretation of this provision. The Guideline declares that this ban includes election bodies, so election offices too, which shall pursue activities only determined by the Electoral Procedure Act or by other electoral provision. Section 75 of the Electoral Procedure Act itemizes the competence of election offices, in which publishing announcements on transport or bus transfer to the polling station are not included. Thus, they do not even have competence for such activities, which, furthermore, would be rather unlawful according to Section 143/A (2) of the Electoral Procedure Act.

7. Campaign Finance

The provisions of campaign finance are settled by Act LXXXVII of 2013 on the Transparency of Campaign Costs related to Election of the Members of the National Assembly, observing the principles of the electoral procedure, such as equal opportunities for candidates and nominating organizations, the exercise of rights in good faith and in accordance with their purpose, the protection of the fairness of the national election.

According to the Act, each representative candidate for a single mandate constituency (up to 1 million HUF), party setting up a party list and national minority self-governments setting up a national minority list, is entitled to support from the central budget. During the campaign period the latter two may only use the support to cover real costs related to campaign activities, whereas representative candidates may only use it to cover exclusively their material expenditures.

The support of parties setting up a party list shall be based on the product of the total number of mandates which can be acquired at the general elec-

[57] Section 143/A of Act XXXVI of 2013 on Electoral Procedure.
[58] Section 143/A (1)-(2) of Act XXXVI of 2013 on Electoral Procedure.

tion of the Members of the National Assembly multiplied by five million HUF (995 million HUF). The national minority self-governments shall be jointly entitled to support amounting to 30% of the support of parties setting up a party list (298, 5 million HUF).[59]

The support is placed at the candidate's disposal by the Hungarian State Treasury (hereinafter: the Treasury) after the registration, on Treasury account, with a Treasury card. The Treasury card may not be used to withdraw money, thus the candidate shall make payments from the account or by card. In case of representative candidates, the county office of the Treasury with competence in the single mandate constituency in question contributes to the provision of activities related to the support. Candidates nominated by a party are allowed to waive their right to the support for use by the party nominating them.

Candidates shall submit a financial statement to the Treasury within 15 days after the individual results of the general election. A candidate who fails to submit the statement within the deadline shall pay double the amount of their support. A candidate who submits the statement but it is not approved by the Treasury shall pay maximum double the amount of their support. If a candidate fails to obtain at least 2% of the valid votes cast in the single mandate constituency, they shall pay back the total amount of their support. On the other hand, the parties setting up a party list who do not enter the General Assembly do not have to pay back the amount of their support. In case of failure to meet payment obligation within the deadline, the Treasury shall propose the collection of the debt by the National Tax and Customs Administration of Hungary.[60]

Section 9 (1) of the Act establishes that "all candidates and nominating organizations shall publish in the Official Gazette of Hungary the amount, source, and use of state and other funds spent on election within 60 days after the election of the Members of the General Assembly". The use of state and other funds shall be audited by the State Audit Office of Hungary and the candidate or nominating organization who has exceeded the financial limit (5 million HUF per candidate)[61] shall pay back to the central budget double the amount by which they have exceeded the total maximum amount that may be spent on the election.

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[59] Sections 1 (1), 4 (1) and 5 (1) of Act LXXXVII of 2013 on the Transparency of Campaign Costs related to Election of the Members of the National Assembly.

[60] Section 8 of Act LXXXVII of 2013 on ibidem.

[61] Section 7 (1) of Act LXXXVII of 2013 on ibidem.

Conclusion

Analysing the new provisions of the election campaign, it is worth mentioning that the legislator has shifted into the background the television campaigns, which are considered more traditional and are getting gradually more insignificant in the Western democracies as well. On the other hand, the importance and the legal ground of direct campaign methods and others based on the personal influencing of voters' choice and on the communication via internet, have increased.[62]

According to a number of views, as commercial media cannot be obliged to broadcast advertisements, they do not allegedly put their programme time at the parties' disposal free of charge. Consequently, most voters cannot be informed via radio and television about the messages of nominating organizations, which violates the freedom of speech.[63]

The Act settles precise rules regarding official campaign period, although in real life it might be controversial to decide whether some activities are already considered or are not still considered campaign activities. *Exempli gratia*, when the posters of mayor candidates had been placed around the capital before the opening of official campaign on 23rd August, the National Election Office established that this may not be considered campaign activity, just mere advertisement to inform people. It indicates the ambivalence of the practice, though, that in another community the local election commission considered unlawful the distribution of posters with the mayor candidate before the official beginning of the campaign period.

Undoubtedly, one of the marginal issues of the new electoral provisions is campaign finance. In the constitutional democracy, electoral legislation shall ensure that political protagonists are authorized to exercise the public power by campaigning with funds which come from transparent resources and are used in a controllable way, and by winning at a competition which ensures equal opportunities for all participants. According to the survey of Transparency International, the new legislation does not promote transparency and affiliated civil organizations are still allowed to campaign without limits and by choosing methods arbitrarily. This, consequently, leads to

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[62] B. Orbán, *Nincs önmagában véve jó vagy rossz választási rendszer*, [online] http://arsboni.hu/orban-balazs-nincs-onmagaban-veve-jo-vagy-rossz-valasztasi-rendszer.html [accessed: 23.09.2014]

[63] *Érzékeny pontok – interview with Zoltán Pozsáry-Szentmiklósy Dr.*, [online] http://arsboni.hu/erzekeny-pontok-interju-pozsar-szentmiklosy-zoltannal.html [accessed: 22.09.2014].

uncontrollable expenses and unregulated campaign activities.[64] It is worth highlighting the (dramatically) sharp differences between the amount of support provided to independent candidates and those nominated by parties, which violates the requirement of equal opportunities to candidates and nominating organizations. It leads to further abuses too. Political advertisement tariffs of the written press shall be announced to the State Audit Office, whereas the amount spent on the much more expensive billboards remains hidden. In other words, the new financial provisions still give way to continued corrupt activities.

Finally, we approve of the opinion according to which the court practice regarding campaign prohibition within 150 meters will be one of the key legal questions on the day of voting – despite the NEC Guideline on relative territorial campaign prohibition.[65]

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[64] Transparency International Magyarország, [online] http://www.transparency.hu/uploads/docs/TI_valasztasi_torveny_hatteranyag_121219.pdf [access: 23.09.2014].

[65] B. Orbán, op. cit.

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The Historical Perspective of the Relations Between the Constitutional Court and the Supreme Court

Abstract

This article is about the problem of the jurisdictional dispute between the Constitutional Court and the Supreme Court. It shows the origin of the historical perspective of the dispute, analyzing the mutual relations between both judicial authorities since the moment when the Constitutional Court was created and its course after the Constitution of 1997 came into force. Possible solutions to the conflict between the two entities of highest judicial authority on a normative level were mentioned, in particular through an amendment to the Constitution.

Keywords

Constitutional Court, Supreme Court, interpretation rulings, Constitution

Introduction

The Constitutional Court (hereinafter: CC) and the Supreme Court (hereinafter: SC) are the two judicial authorities whose judicature is of particular importance for the application of law by courts and that is why the relations between those entities are so significant. The need to protect the citizens' trust in the rights has been repeatedly pointed out by the CC which indicated that "the whole social order, mutual coexistence of people, are unthinkable without taking into account the category of trust as a psychological and sociological element. It also relates to the field of law, if its rational nature is assumed. Confidence in law allows a citizen to plan and anticipate in the long term."[1] In its judicature the Supreme Court notes that the "uniformity

[1] The ruling of the Constitutional Courts of 2nd March, 1993, ref. no. (K. 9/92).

of judicial decisions undoubtedly exposes the legal certainty of law enforcement,"[2] because it should be remembered that the juridical aspects of the uniformity of court decisions are as important as the social ones, namely the uniformity of decisions in the public perception is an important value, because it is unthinkable for the citizens to accept that different decisions are passed on the basis of the same provisions of law.[3]

Looking at the mutual relations between the CC and the SC, one cannot miss the conflict between these judicial authorities which has existed since the beginning of the establishment of a separate body responsible for the constitutionality of the law. A prime example of mutual antagonisms is the Constitutional Court's judgment of 27 October 2010 in which it condemned the resolution of seven judges of the Supreme Court dated 20 December 2007, ref. no. (I KZP 37/07)[4] and the resolution of seven judges of the Supreme Court dated 17 December 2009 which was given the power of the legal principle of interpretation concerning the judgments of the Constitutional Court.[5] However, due to the time frame set by the Editorial Board the analysis regards the relations between the Constitutional Court and the Supreme Court before the Constitution of the Republic of Poland came into force.[6]

Looking at the relations between the CC and the Supreme Court, a question arises of the origin of the dispute, its course and the possibilities for further cooperation between the two judicial authorities. An answer should be also found to the question of whether it is a dispute about who should bear the palm or a fundamental dispute over the application of law.

Difficult beginnings of the coexistence of the Constitutional Court and the Supreme Court

When referring to history, it should be noted that the Supreme Court as a judicial authority which was set up on 18 July 1917 by the Provisional

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[2] Resolution of seven judges of the Supreme Court dated 5th May, 1992, ref. no. (Kw. Pr. 5/92).

[3] L. Leszczyński, *Jednolitość orzecznictwa jako wartość stosowania prawa* [w:] *Jednolitość orzecznictwa. Standard – instrumenty – praktyka. Materiały z konferencji naukowej Warszawa*, red. M. Grochowski, M. Raczkowski, S. Żółtek, Warszawa 2015, p. 13.

[4] Constitutional Court's judgment of 27 October 2010, ref. no. K 10/08.

[5] Resolution of seven judges of the Supreme Court dated 17 December, 2009, ref. no. III PZP 2/09.

[6] The Constitution of the Republic of Poland of 2nd April, 1997 (O.J.L. 1997 No. 78, item. 483).

Council of the State of the Kingdom of Poland, whereas the Constitutional Court was established by the Act of 26 March 1982 on Amending the Constitution of the Polish People's Republic[7] and in reality the CC actually operated since 1 January 1986. In the context of this subject, one should first outline the evolution of the political position of the Supreme Court over the decades. Moreover, what seems interesting is the Supreme Court's judges' opinion on the necessity to establish a new body which is the CC as well as the beginning of its functioning until the Constitution of the Republic of Poland came into force in 1997.

In the interwar period, in the absence of a body such as the CC, the Supreme Court found some unconstitutional acts which were refused binding force by the highest judicial authority and some unconstitutional acts which were considered to be still in force.[8] According to Art. 51, paragraph. 1 of the Constitution of the Polish People's Republic,[9] the Supreme Court was the main judicial authority and it supervised the activities of all other courts regarding judgments. On the other hand, under the Act on the Supreme Court of 1962,[10] this court is the supreme body in the system of the entire Polish judiciary system which governed the Social Insurance Court, and the Military Chamber of the Supreme Court took over the powers of the Supreme Military Court.[11] The Act on the Supreme Court adopted in 1984[12] stipulated that this authority is the supreme judicial body of the Polish People's Republic which supervises the activities of other courts regarding judgments. Even this short description clearly indicates the privileged position of the Supreme Court in the system of judicial power and it is no wonder that over the years the Supreme Court got used to the fact that *Roma locuta, causa finita.*

Under the ruling of March Constitution[13] and April Constitution[14] there was no authority responsible for the judicial supervision of the constitutionality of the law, whereas during the Polish People's Republic a negative

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[7] O.J.L. of 1982, no. 11, item 83.

[8] M. Zbrojewska, *Rola i stanowisko prawne Sądu Najwyższego w procesie karnym*, Warszawa 2013, pp. 15–16.

[9] The Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22nd July, 1952 (O.J.L. 1952, no. 33, item 232).

[10] The Act of 15th February, 1962 on the Supreme Court (O.J.L. 1962, no. 11 item 54).

[11] S. Włodyka, *Funkcje Sądu Najwyższego*, Kraków 1965, p. 25.

[12] The Act of 20th September, 1984 on the Supreme Court (O.J.L. 1984, no. 45, item 241).

[13] The Act of 17th March, 1921 – The Constitution of the Republic of Poland (O.J.L, 1921, no. 44, item 267).

[14] The constitutional law of 23rd April, 1935 (O.J.L. 1935, no. 30, item 227).

attitude to judicial supervision dominated due to the fact that the model of constitutional supervision assumed that the value of legal norms depended on its relation to the accepted norm of higher order. This solution led to eliminating unconstitutional legal acts from the legal system.[15] The demands for the establishment of a constitutional judiciary in the Polish legal system were brought up by the representatives of the doctrine already in the 1970s, however, it was not until the breakthrough of 1980 that it was possible for the proposals to establish a body empowered to control the constitutionality of the law to take real shape.[16]

By choosing a model of control of the constitutionality of the law in Poland, a system of control could be adopted from the English model, where the supervision is conducted by the common courts; in one variation of this model there is a separate SC control chamber of the constitutionality of the law. In the USA, within 8 years of the introduction of the Constitution,[17] the Supreme Court was granted the power to control the constitutionality of the federal Constitutions,[18] treaties and federal laws. The other model assumes an organizationally and functionally separate body whose main objective is to control the constitutionality of the law.[19]

The idea of establishing a separate body responsible for the control of the constitutionality of the law was firmly opposed by the First President of the Supreme Court – Włodzimierz Berutowicz. He used his influence in the Politburo of the Communist Party to entrust the Chamber of the Supreme Court with the control of the constitutionality of the law.[20] The skepticism about the need for the functioning of the CC as a separate body of the judiciary system was also expressed by the First President of the Supreme Court – Adam Strzembosz who argued primarily that some of the judges of the Constitutional Court[21] were appointed by the previous power.

Prof. Andrzej Zoll rightly notes that the formation of the CC was a failure of the concept according to which the Supreme Court's reputation was to be boosted by entrusting it with the tasks in the area of monitoring legisla-

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[15] S. M. Przyjemski, *Spory kompetencyjne między organami sprawującymi wymiar sprawiedliwości w Polsce*, Warszawa 2009, p. 44.

[16] L. Garlicki, *Prawo konstytucyjne – zarys wykładu*, Warszawa 2006, p. 361.

[17] R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego*, Warszawa 2010, p. 15.

[18] B. Banaszak, *Prawo konstytucyjne*, Warszawa 2008, p. 107.

[19] R. Hauser, J. Trzciński, op. cit., p. 16.

[20] A. Zoll, *Trybunał Konstytucyjny i Sąd Najwyższy*, [in:] *Trybunał Konstytucyjny – Księga XV-lecia*, red. F. Saddler, A. Jankiewicz, Warsaw 2001, p. 93.

[21] Idem, *Zollowie – opowieść rodzinna*, Kraków 2011, p. 400.

tion.[22] It seems that the system of omnipotence of the Supreme Court, which existed from the beginning of its creation in 1917 until the CC started to operate in the legal system, was supposed to be maintained.

At the moment of creation of the CC as an organ independent from the Supreme Court W. Berutowicz saw the need to develop the mutual relations between the two judicial authorities in such a way as to maintain the compliance with the Constitution and internal consistency of the entire legal system. As history would show, the development of mutual relations is a long-term process full of numerous disputes between the CC and the SC.[23]

The first fundamental dispute between the Constitutional Court and the Supreme Court occurred already in 1995 on the matter concerning the possibility of pursuing by the officers of uniformed services claims for payment of interest for delays in payment of salaries. In its resolution of 25 January 1995[24] the Constitutional Court, presiding in its full composition, ruled that the failure to pay salaries to the uniformed officer is a delay in the fulfillment of monetary performances, justifying, pursuant to Art. 481 § 1 of the Civil Code, the claim for interest before the common court. However, four months later the Supreme Court in the resolution adopted by seven judges[25] ruled that the court procedure to pursue the claim by the police officer before a common court together with interest is inadmissible. It should be noted that the right of the CC in the scope of the universally binding statutory interpretation encroaches on the Supreme Court competences since the competence of the CC corresponded to the institution of the Supreme Court explaining questionable legal provisions or those whose use caused discrepancies in court judicature, so the powers of the Constitutional Court and the Supreme Court crossed in this area, so did also the entities which may have initiated the proceedings before the Constitutional Court and the Supreme Court.[26]

As Professor Andrzej Stelmachowski rightly pointed out, the position taken by the Supreme Court in the resolution referred to above did not result from not knowing the CC's judgment but from the frontal polemic with it in terms of binding the Supreme Court and courts of general jurisdiction as interpreted by the Constitutional Court. On the basis of this dispute Pro-

[22] Idem, *Trybunał Konstytucyjny…*, op. cit., p. 93.

[23] W. Berutowicz, *Sąd Najwyższy w Polsce Ludowej*, „Nowe Prawo" 1985, nr 5, p. 21.

[24] The resolution of the Constitutional Court dated 25th January, 1995, ref. no. W 14/94.

[25] The resolution of the Supreme Court dated 26th May, 1995, ref. no. Act I PZP 13/95.

[26] B. Szmulik, *Pozycja ustrojowa Sądu Najwyższego w Rzeczypospolitej Polskiej*, Warszawa 2008, pp. 212–213.

fessor Stelmachowski submitted a *de lege ferenda* postulate for the CC to comply with the standards of the rule of law and hold that the rulings on the universally binding interpretation of the law are in force from the date of their publication in the Official Journal of Laws. According to Professor Stelmachowski, this solution will reduce tensions between the Constitutional Court and the Supreme Court because it would not lead to an undermining of the Supreme Court rulings already rendered.[27]

Another dispute of the Constitutional Court and the Supreme Court concerned the meaning of the term "the territory of the Polish State" in the so-called February Act.[28] In its resolution of 30 April 1996[29] the Constitutional Court ruled that Art. 8 paragraph 2a of the February Act refers to – taking into account the specified circumstances – "the Polish land" included in the territory of the Polish State on 1 January 1944, so also to that part of the territory of the Polish State which was located east of the so-called Curzon Line according to the borderline agreed in the Treaty of Riga of 18 March 1921. This position received a lot of academic criticism.[30] However, the Supreme Court ruled that the territory of the Polish State shall be construed as it is in its present borders. The then President of the CC, Professor Zoll tried to appease the conflict and suggested a meeting of the judges of the Constitutional Court with the judges of the Criminal Chamber of the Supreme Court, however, this meeting did not bring any results.[31]

There was also some misunderstanding around the competence of the President of the Constitutional Court to declare the loss of the binding power by the provision which the ruling of the Constitutional Court concerned in the absence of a reaction of the Sejm. It was indicated that the resolution of the CC did not fall within the limits of the interpretation of the Act which was an encroachment on the powers of the legislature.[32]

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[27] A. Stelmachowski, *Sąd Najwyższy kontra Trybunał Konstytucyjny*, „Przegląd Sądowy" 1996, nr 2, pp. 4, 9.

[28] The Act of 23rd February, 1991 on recognizing as null and void the judgments issued against persons persecuted for their activities on behalf of an independent Polish state (O.J.L. 1991, no. 34, item. 149).

[29] The resolution of the Constitutional Court dated 30th April, 1996, ref. no. W 18/95.

[30] See e.g. the critical voices: L. Paprzycki, *The Commentary to the resolution of the Constitutional Tribunal dated 30th April, 1996*, *W 18/95*, „Palestra" 1996, nr 9–10, p. 204; W. Czapliński, *Glosa do uchwały TK z dnia 30 kwietnia 1996 r., W 18/95*, „Państwo i Prawo" 1996, nr 11, pp. 103–106.

[31] A. Zoll, *Zollowie…*, op. cit., p. 401.

[32] Idem, *Trybunał Konstytucyjny…*, op. cit., p. 94.

It should be noted that previous attempts at cooperating between the CC and the SC failed because of the lack of good will. That was the case when Professor Zoll was the President of the CC and he suggested a meeting of the judges of the Constitutional Court with the judges of the Criminal Chamber of the Supreme Court to try to resolve the conflicts that occurred in their mutual relations. Unfortunately this meeting failed.[33]

Conclusion

When the Constitution of 1997 came into force the CC lost the right to make universally binding interpretations of the statutes and since then the rulings of the CC have been final and cannot be waived by the Sejm and so some normative causes of the conflicts between the CC and the SC went down in history. Then a question arises about the nature of the cooperation between the two judiciary entities in the present normative state. After more than two decades of mutual coexistence of the CC and the SC, have they developed a specific framework for cooperation and established a uniform judicature or there is still a dispute between the two entities which sometimes calms down only to explode in a moment with an even greater intensity?

The lasting dispute between the CC and the SC in the long perspective will damage the trust of the citizens in legal certainty and stability of law. It also gives rise to problems of judicature in the courts of lower instances and it lowers the reputation of the judicial system. Furthermore, the dispute is not about who should bear the palm – the Constitutional Court or the Supreme Court – but this is a dispute of fundamental importance for the functioning of a coherent legal system.

Will the vision of Wojciech Szpara come true? The lawyer wrote

> I can see it in my imagination – judges passing judgments in the first or second instance, sitting somewhere at night with rings under their eyes and wondering over another coffee which judicature they should rely on: that of the Supreme Court or the Constitutional Court. I can see myself too, strenuously elaborating a topic and drafting a legal opinion and I can see clients to whom I will not be able to explain why I am actually not able to clearly explain some legal issues. It is possible also that lawyers will have problems with the interpretation of conflicting rulings in cases in which the Supreme Court and the Constitutional Court get in each other's way![34]

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[33] Ibidem, p. 95.

[34] W. Szpara, *Sąd Najwyższy kontra Trybunał Konstytucyjny*, [online] http://adwokat-woj-szpara.firmy.net/aktualnosci.html?n=9P43[accesed: 15.06.2015].

De lege ferenda – we should return to the demand to settle in the Constitution the relations between the Constitutional Court and the Supreme Court, in particular the scope of exclusive cognition of the Constitutional Court to rule on the constitutionality of laws and also, and perhaps most importantly, binding of the Supreme Court by the findings included in the rulings of the Constitutional Court.[35] On the other hand, Jerzy Jaskiernia notes that the dispute between the Constitutional Court and the Supreme Court has the characteristic features of a conflict of competence which the Constitution does not account for, and that is why it should be amended or the relevant laws on the Constitutional Court and the Supreme Court should be amended.[36]

The words of Ronald Dwornik should also be remembered, as he said that "the courts are the capitals of the law, and the judges are its princes"[37] and if so, then *noblesse oblige*.

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[35] A. Korobowicz, *Sąd Najwyższy Rzeczypospolitej Polskiej: historia i współczesność: księga jubileuszowa 90-lecia Sądu Najwyższego 1917–2007*, Toruń 2007, p. 342.

[36] J. Jaskiernia, *Spór pomiędzy Trybunałem Konstytucyjnym a Sądem Najwyższym w kwestii znaczenia tzw. orzeczeń interpretacyjnych Trybunału Konstytucyjnego*, [in:] *Księga XXV-lecia Trybunały Konstytucyjnego. Ewolucja funkcji i zadań Trybunału Konstytucyjnego – założenia a ich praktyczna realizacja*, red. K. Budziło, Warszawa 2010, p. 256.

[37] R. Dworkin, *Law's Empire*, London 1986, p. 407.

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Social Network Analysis, Crime Prevention and Human Rights

Abstract

Use of Social Network Analysis (hereinafter as SNA) in crime prevention and law enforcement is widely discussed from either practical or theoretical point of view. Although its advantages are commonly acknowledged, incorporation of SNA into strategies of combating crime raises various controversies. The main aim of this paper is to present risks connected with application of SNA in practice, as a part of policing, from the point of view of the human rights system. The assumption is that all of legal responses to violence have to be in accordance with the human rights law requirements. As this subject matter is exceptionally complex, two main aspects of this issue have been chosen on the base of their significance – risk of infringement of the right to privacy and of politicization of the use of SNA, especially in the context of so-called "suspect communities." The possibility of indication of prompt solutions to presented matters has been discussed. As such, this paper is an introduction to presented subject area and provides a basis for further research.

Keywords

social network analysis, SNA, human rights, law enforcement, crime prevention, pre-crime

Introduction

In the most general form, the subject matter of Social Network Analysis (hereinafter as SNA) are social relations, visualized with the use of points (as the reflections of individuals or groups, dependent on a research purpose) and lines (as the symbol of various relations between particular points). The mathematical graph theory is used to present the network,

therefore SNA is more dimensional than pure link analysis. The concept that stands behind the SNA is that the mutual relations and connections between groups of individuals or collectives reflect the model of structures within that group, for example showing the hierarchy or the potential social role of the particular entity. However, even though the history of use of SNA as a research technique dates back to the early 1970s,[1] its usefulness as a tool of criminal prevention is still a subject of an ongoing and heated debate.

Arguments in favor of the use of SNA in prevention of crimes refer to its effectiveness due to the multitude of information that SNA may provide to the researcher, starting from such data as the hierarchy within the network, the impact of the network on an individual, and its role as a risk factor of the commission of crime. What is more, due to its universal character, SNA may be used in evidence-based policy making in reference to public policies of combating various kinds of crime, for example terrorism, gang violence, drug dealing and human trafficking. Last but not least, as research has shown, SNA may be used to predict the probability of the victimization regarding such types of crimes as gun violence.[2]

On the other hand, use of SNA in law enforcement rises various controversies. First of all, effective use of this research technique requires gathering of information that may be considered as sensitive and infringing the right to privacy. Another issue is connected with boundaries of exchange of information between various state agencies in order to improve the efficiency of analysis of particular network. What is noteworthy, improperly applied SNA can be used as a tool of political games, either intentionally or unconsciously.

Due to the rising popularity of SNA, recognition of rules of its proper application and rising the awareness of its potential risks are exceptionally important and should be widely discussed as a subject of scientific debate. Taking it into consideration, the main aim of this article is to present risks connected with the use of SNA as a tool of law enforcement and prevention of crimes from the point of view of the human rights system. Deliberations included in this paper are at an abstract level, without focusing on any particular example of a social network. The assumption is that legal responses to violence have to incorporate human rights law and its principles. Due to

[1] For the historical roots and the development of SNA read: J. Scott, *What is Social Network Analysis?*, London–New York 2010.

[2] A. Papachristos, Ch. Wildeman, E. Roberto, *Tragic, But Not Random: The Social Contagion of Nonfatal Gunshot Injuries*, "Social Science & Medicine" 2015, Vol. 125, pp. 139–150.

complexity of this problem, the scope of the paper is limited to issues that were selected on the basis of their importance and significance to proper presentation of subject matter and as such, it provides a basis for further research. All of those issues are, either directly or indirectly, connected with one particular question – about sources and boundaries of data collection for SNA purposes.

SNA and human rights

The use of SNA as a tool of crime prevention is discussed either in reference to criminological research or in the process of law enforcement. One of the requirements of lawful prevention of crimes is the incorporation of the human rights system into it. The importance of placing legal responses to violence within the framework of the human rights system requirements was stressed by the United Nations in various documents,[3] in reference to all types of crimes, including those that are the subject of interest of researches using SNA, such as terrorism or drug dealing.

When it comes to SNA, the risk of infringement of human rights of people placed within the social network is noticeable. This risk is complex and refers to various rights. One of them is the right to privacy, which will be discussed in details in the next part of this article.

a. The right to privacy. Usefulness of SNA as a tool of crime prevention

Among the most controversial issues connected with the use of SNA by law enforcement agencies one may find the problem of sensitivity of information gathered by researchers and/or law enforcement agencies especially important. Lines that connect nodes of graphs may refer to various relationships, such as co-offending, friendship, romance, exchange of information. What is more, gained information may be collected with the use of many different means, for example through collecting of private data from phone calls, police statistics, or surveillance of the online activity. Use of some of those means, such as the analysis of official police statistics, are less contro-

[3] For example: Article 11 of *United Nations Declaration on Crime and Public Security*, Resolution of General Assembly number A/51/610, [online] http://www.un.org/ documents/ga/res/51/ares51-60.htm [accessed: 01.03.2017] or in *The United Nations Global Counter-Terrorism Strategy Review*, Resolution of the General Assembly of UN number 70/9, [online] http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/291 [accessed: 1.04.2017].

versial than others. From the point of view of "innocent until proven guilty," use of information that was already acquired during investigations led by police forces and marked as criminal activity differs from wiretapping of private phone calls in search for a potential wrongdoing.

However, independently on the source of information, use of those techniques is unavoidably connected with the risk of infringement of the right to privacy. This right, as a part of the human rights system, is incorporated – *inter alia* – in Article 12 of the Universal Declaration of Human Rights,[4] according to which "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[5] The aforementioned example of wiretapping of private phone calls in search for signs of potential criminal activity is a severe interference with one's privacy at its core.

Eventual lawfulness of such interference depends on various factors, such as necessity of applied solutions and lack of arbitrariness. To elaborate on that, "the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant[6] and should be, in any event, reasonable in the circumstances."[7] By "reasonableness" one shall understand that "any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case."[8]

If so, to sum up at this point, lawful use of collection of data for SNA, for example in the form of wiretapping, in reference to the right to privacy should meet such requirements as: (1) necessity of use of this technique to achieve legitimate aim, (2) proportionality, (3) legal base of application of SNA. What is more, it should be the least invasive option from those available.[9]

Taking this list into consideration, it is crucial to discuss first and foremost the usefulness of SNA as a tool of achieving legitimate aims. In other words, in reference to the subject topic of this article, it has to be deter-

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[4] The Universal Declaration of Human Rights, [online] http://www.un.org/en/ universal-declaration-human-rights/index.html [accessed: 1.04.2017].

[5] Ibidem.

[6] International Covenant on Civil and Political Rights.

[7] Human Rights Committee, General Comment 16, 23 session, 1988, [online] http://hrlibrary.umn.edu/gencomm/hrcom16.htm [accessed: 1.04.2017].

[8] Communication Number 488/1992 of Human Rights Committee, Toonen v. Australia, [online] http://hrlibrary.umn.edu/undocs/html/vws488.htm [accessed: 1.04.2017].

[9] *The right to privacy in the digital age*, *Report of the Office of the United Nations High Commissioner for Human Rights*, 30th of June 2014, p. 8.

mined if the use of SNA may result in the reduction of crime rates as a tool of effective crime prevention.

On the base of preliminary research, it seems that the answer is positive. As various research has shown, analysis of social networks enables, among others, to evaluate the risk of gunshot victimization,[10] to discover the patterns of gang violence,[11] to predict leadership roles within criminal organizations,[12] to identify structures of criminal networks and their changes over time,[13] and to gain knowledge about the structure of drug trafficking groups.[14] However, the most significant advantage, connected with application of SNA, is that considering the multiplicity of information it may deliver to a researcher it is more effective as a tool of gaining scientific knowledge about crime patterns than other methods and techniques that are used in studies of crime.

The example of such techniques is link analysis. What primarily differentiates link analysis and SNA is the use of mathematical calculation that enables analysis of not only links between actors (nodes of the graph), without focusing on additional information, but also of mechanisms of creation of the network, its structure and changes over time. In the case of SNA observation and visualization of relations between nodes is rather a tool of further research than the goal *per se.*

When it comes to further points of the list, the requirements of proportionality and legal base of use of SNA, their fulfilment depends on circumstances of a particular case. To exemplify it, on the base of preliminary research it may be noticed that due to its features SNA is particularly useful as a tool of crime prevention and law enforcement in relation to organized crime. Taking it into consideration, use of SNA with the aim of preventing organized crime, such as terrorist nets, would be proportional and legitimated, if its application was adequate to severity of the crime itself and based on the legal rule.

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[10] A. Papachristos, Ch. Wildeman, E. Roberto, op. cit., pp. 139–150.

[11] A. Papachristos, D. Hureau, A. Braga, *The Corner and the Crew: The Influence of Geography and Social Networks on Gang Violence*, "American Sociological Review" 2013, Vol. 78, Issue 3, pp. 417–447.

[12] G. Berlusconi, *Social Network Analysis and Crime Prevention*, [in:] *Crime Prevention in the 21st Century. Insightful Approaches for Crime Prevention Initiatives*, eds. B. LeClerc, E. Savona, Cham 2017, pp. 129–141.

[13] Ibidem.

[14] F. Calderoni, *The Structure of Drug Trafficking Mafias: the 'Ndrangheta and Cocaine*, "Crime, Law and Social Change" 2012, Vol. 58, Issue 3, pp. 321–349.

Mentioned example refers to states' counter-terrorism strategies. Prevention of crimes falling into the category of "terrorism" differs from other types of crime. One of such differences is connected with widely approved allowance of use of pre-crime as a part of counter-terrorism strategy, which will be discussed later.

This allowance is caused by the particular severity of terrorist activity. In fact all of types of organized crime have features that justify state's extensive interest in their prevention, such as a multidimensional covertness or involvement of many individuals in the criminal activity. If so, use of more infringing methods and techniques, such as SNA, seems to be justified as proportional to severity of the crime and necessary to achieve legitimate purposes. However, in spite of those particularities of organized crime, as it was mentioned earlier, detailed evaluation of proportionality and legal base of use of SNA requires analysis of features of each of cases.

Last but not least, when it comes to the issue of invasiveness of SNA, interference into the sphere of privacy of those involved in a particular social network is the core of this technique. However, as it is applied mostly to those crimes that are based on covertness, hierarchy, social organization and fulfillment of particular roles by members of criminal groups, such interference is unavoidable to gain knowledge about the structure of the group, its size, or geographical range. Information about those features is crucial to ensure effective crime prevention. If so, if other requirements of avoidance of violation of the right to privacy are met, application of SNA should be allowed.

Significantly, to give another example, further potential problem concerning privacy and SNA is the issue of exchange of information between various public institutions and state officers, working within the field of law enforcement. Christopher Yang and Xuning Tang argue that such exchange of knowledge would make SNA more effective.[15] They assume that creating a complete social network analysis would require collecting all the information stored by the law enforcement and other agencies and institutions working in area of crime-prevention. Otherwise any SNA would be just partial.[16] The issue of such exchange raises various problems with finding a balance between violation of the right to privacy and the utility of shared in-

[15] Ch. Yang, X. Tang, *Information Integration for Terrorist or Criminal Social Networks*, [in:] *Security Informatics. Outlines the Foundations and Parameters of the Field of Intelligence and Security Informatics (ISIS)*, eds. C. Yang, M. Chau, J.-H. Wang, H. Chen, Springer 2010, pp. 41–57.

[16] Ibidem, p. 42.

formation. Since anonymized SNA is no longer fully functional, any anonymization of data affects its effectiveness as a tool of law enforcement. Detailed evaluation of Yang's and Tang's proposition of practical solution to this problem – sub-graph generalization approach – is out of the scope of this paper, but the important conclusion that comes from the analysis of their work is that in reference to law enforcement and activity of state officers, application of SNA is connected with the risk of infringement of the right to privacy at multidimensional level.

b. SNA and the risk of politicization

Another risk, connected with what was discussed before as an issue of variety of sources of data and the infringement of the right to privacy, is a potential creation of so-called "suspect communities" at the pre-crime level and its further consequences.

An idea of pre-crime as paradigm of crime prevention is not new, as it was known before the XXI century.[17] However, its rising popularity dates back to 9/11[18] and the rise of counter-terrorism strategies. Jude McCulloch and Sharon Pickering argue that from the point of view of criminology pre-crime is not a measure of crime prevention.[19] They assume that in general, in the criminological sense crime prevention is based on the non-punitive solutions that refer to, *inter alia*, reduction of opportunities of crime commission with reference to the broader social context. Taking it into consideration, McCulloch and Pickering highlight that "counter-terrorism pre-crime measures envisage specific serious harms and criminalize those whom it is believed will commit these imaginary future harms, while ignoring broader social and environmental factors."[20] To elaborate on that, pre-crime measures in their most controversial form are connected with the use of state force without factual commission of crime; sole suspicion is sufficient.

Even though such activity does not fit into criminological category of crime prevention, it has been used as a tool of law enforcement, especially in reference to counter-terrorism strategies. Mentioned authors argue that this is caused by the fact that proscribing an individual or an organization

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[17] For example: L. Zedner, *The Pursuit of Security*, [in:] *Crime, Risk and Insecurity: Law and Order in Everyday Life and Political Discourse*, eds. T. Hope, R. Sparks, New York 2000, pp. 200–214.

[18] J. McCulloch, S. Pickering, *Pre-crime and Counter-terrorism. Imagining Future Crime in the 'War on Terror'*, "The British Journal of Criminology" 2009, Issue 49, p. 629.

[19] Ibidem.

[20] Ibidem.

as "terrorist" is purely a political decision and does not require a confirmation of crime commission in the form of the court verdict.[21]

This issue is strictly connected with the topic of this article. The main assumption that underpins pre-crime in counter-terrorism strategies is that due to the fact that terrorists' aim is to create mass causalities, they should be stopped from acting prior to their criminal activity in order to reduce human cost.[22] From this point of view, SNA may be a useful tool of counter-terrorism, as its outcome is – for example – an understanding of structures of criminal organization and the role of the leaders, or raising the knowledge about the size of the group and its geographical range. In consequence, SNA enables disruption and other forms of action directed against a particular organization.

However, this is just one side of the coin. Due to the fact that labelling an organization as terrorist is rather a political than judicial decision, use of SNA in counter-terrorism is unavoidably connected with the risk of its politicization with all of its further consequences.[23]

To elaborate on that, the term "politicization" refers to various processes of making an issue political as a subject of interest of political agencies. In this context it is possible that through the lenses of counter-terrorism strategies SNA would be used against particular groups that had been considered as politically undesirable as the so-called "suspect communities." This raises the already mentioned question about the boundaries of data collection for SNA purposes.

According to the Universal Declaration of Human Rights, "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[24] What is more, when it comes to the example of counter-terrorism strategies, the UN highlights that "terrorism and violent extremism as and when conducive to terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group."[25] If so, creation of notion about existence of such phenomenon as "suspect community" and, as its further consequence, basing a selection of individuals or groups as a subject matter of SNA on particular ethnic or religious background would be a serious violation of the system of human rights.

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[21] Ibidem, p. 630.

[22] Ibidem, p. 632.

[23] This issue will be explained later with the example of Kurds in the United Kingdom.

[24] Article 2 of the Universal Declaration of Human Rights.

[25] The Resolution of the General Assembly of UN number 70/91, op. cit.

The presented issue is not only hypothetical. Vicki Sentas argues that due to listing of PKK[26] as a terrorist organization, Kurds and people of Kurdish origin are regarded as the "suspect community" by security policies.[27] Although her qualitative research is limited to the small sample and placed within particular geographical region, it presents various risks connected with criminalization on the base of ethnicity or nationality.

The example of Kurds has been chosen to present this issue, as it is particularly interesting from the point of view of this article. Labelling of Kurds' self-determination attempts as terrorist is widely discussed.[28] Due to the fact that PKK has been listed as terrorist organization in the United Kingdom, counter-terrorism strategies in reference to this entity require designation of boundaries between legal (not connected to PKK) and illegal (connected to PKK) activity. Sentas' research has shown that the authority to make a decision about "legality" or "illegality" of an act belonged to British policing organs. One of the conclusions of Sentas' research is that "interviewees believed that their 'legitimate' Kurdish rights were being criminalized simply because they supported the political goals of the PKK."[29] What is more, participants of the research considered that disruption strategies affected them due to their ethnicity, not terrorist activity, and were an effect of collective attribution of criminal tendencies to all of Kurds.

The presented example raises questions about the ontological core of counter-terrorism strategies, reflected in a shift to criminalization because of "being" instead of "doing." In reference to use of SNA in crime prevention and law enforcement, this risk is particularly significant. As it was mentioned, effective use of SNA requires data from various sources. SNA reflects multiple relations, not restricted solely to "pure" criminal activity. If so, the risk of application of this technique to social network because of its ethnicity or religion, instead of criminal activity, is particularly serious and may affect multiple members of vulnerable groups.

When it comes to solution to this problem, contrary to previously described issue, in this case I find it impossible to list in details prerequisites of avoidance of violation of human rights. Criminalization because of "being" instead of "doing" is a matter of application of particular public policies. If so, it is important to be aware of such risk, and its unlawfulness because of

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[26] Kurdistan Workers' Party.

[27] V. Sentas, *Policing the Diaspora: Kurdish Londoners, Mi5 and the Proscription of Terrorist Organizations in the United Kingdom*, "The British Journal of Criminology" 2016, Vol. 56, pp. 898–918.

[28] In relation to the United Kingdom see: ibidem, p. 903.

[29] Ibidem, p. 907.

infringement of human rights, at the level of policy shaping and in the process of its further implementation.

Summary

To sum up, use of SNA as a technique of crime prevention and law enforcement has its advantages and drawbacks. Main benefits from its use are connected with its universality and the multitude of information it may provide to researchers. Due to those features, SNA is particularly useful in reference to those types of crimes that are based on strict organization of human activity and indication of particular roles to be fulfilled by those who are involved in them. As such, social network analysis seem to be a crucial element of evidence-based policy making in reference to, as an example, terrorism, gang violence, drug dealing, or human trafficking.

On the other hand, application of SNA raises various controversial issues. The scope of this article was limited only to those aspects of disadvantages of SNA that were related to – either directly or indirectly – sources and boundaries of data collection for SNA purposes. As it was presented, use of SNA in reference to subject matter of this article is connected with the risk of infringement of various human rights. One of them is the right to privacy, which may be violated at multidimensional level. What is more, application of SNA may lead to (or be a tool of) stigmatization of particular groups, regarded as "suspect communities." Furthermore, it may be one of the effects of criminalization through "being" instead of "doing." Once again, such policing would be, without any exemptions, against the human rights system. As such, it highlights the necessity of avoidance of association of criminal activity with particular ethnicity, religion, or nationality.

If so, from the point of view of the human rights system, a legitimate application of SNA in reference to crime prevention and law enforcement is unavoidably connected with the necessity of fulfilment of various prerequisites. Some of them, as in the case of infringement of the right to privacy, are universal and possible to be listed. However, other requirements are related to particularities of the case itself. As such, at the abstract level it is only possible to indicate risks connected with them, instead of providing detailed lists of prompt solutions.

General conclusion that appears from presented deliberation is that effective crime prevention and law enforcement require use of various methods and techniques that derive from different fields of science. However, boundaries of application of such measures are provided by law, at either national or international level. One of such limitations is the human rights

system. As long as the use of particular method or technique fits into the requirements of the human rights and legal systems, and is useful to achieve the assumed legitimate purpose, its application should be allowable.

Last but not least, as it was mentioned, the main aim of this article was to present various risks and potential weak points connected with the use of SNA in crime prevention and law enforcement, related to particular aspects. However, I am fully aware that discussed issues are just a peak of an iceberg. What should be elaborated further are, for example, diverse aspects of making use of results of SNA during court trials, and other processes of judicial decision, detailed analysis of types of crimes that may be prevented with SNA, practical difficulties with application of this technique by the state organs. However, due to the complexity of these subject areas, they should be a matter of further research.

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