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CRITICAL JUNCTURES IN THE EVOLUTION OF BRITISH PARTY POLITICS

THE 1945 GENERAL ELECTION AND ITS IMPACT ON THE WESTMINSTER PARTY SYSTEM

MÁRTON KASZAP*

The Evolution of British Party Competition

The evolution of British party politics can be divided into separate time periods when one or another pattern of interaction became dominant. Usually, the literature offers explanation after the 2nd world war because the British party system became truly established in these years. Before the Second World War, there was either some democratic deficit due to the non-universal suffrage (before 1918) or to the ongoing economic and military crisis (1930 economic crisis and the Second World War.) Hence, there is a general consensus that 1945 was the first modern general election which can be compared to any succeeding ones.

In the literature of party competition classification, there are two important authors whom the author wants to rely on. Paul Webb, a political scientist, uses quantitative data to measure and identify different time periods in the history of UK party competition.[1] He uses indices like ENEP/ENPP, or electoral volatility. Vermont Bogdanor, on the other hand, a historian, prefers historical sources for his findings.[2] He uses legal acts, political speeches and historical statements. Although they approach the same question from different point of views, there is some overlap between their findings. Both of these two scholars agree that the 1945-70 time period was the 'golden era' of two-party politics. It was characterised by two-party competition, no relevant third parties, single governments and tight electoral results. Later, however, almost all of these criteria were questioned and a certain pluralisation started in British politics. The difference between them appears in the evaluation of the post-1974 period. Whereas Webb (2000) thinks that the post-1974 pluralisation process is still going on,

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[1] Webb, Paul: *The Modern British Party System*. SAGE Publications, 2000.

[2] Bogdanor, Vernon: The Constitution and the Party System in the Twentieth Century. *Parliamentary Affairs*, Vol. 57 (2004) No. 4, 717-733.

Bogdanor (2004) argues that the post-1974 ended in 1997 when a new era begun. He thinks that the constitutional changes and the devolution process launched by Tony Blair worth a completely new category. In this vein, Webb (2000) accepts the importance of the post-1997 devolution; nevertheless, he put it into a sub-category of the post-1974 period.

The most important conclusion of the two scholars is that; (a) the UK party competition has been going on an evolution since 1945, (b) this evolution means a pluralisation from two-party politics and (c) devolution enhances this process. In the followings, the present paper wants to understand 3 critically important general elections in the evolution of British party politics. The author starts with the 1945 general election and in another 2 papers, then continues with the 1974 and the 1997 general elections.

WEBB (2000: 4-15.)		BOGDANOR (2004: 724-733.)	
1945–1970	'The era of classic two-party competition.'	*1935–1970*	The 'heyday' of two-party competition
1974–today	The 'emergence of latent moderate pluralism.'	*1974–1992*	The ending of the two-party dominance
	–	*1997–today*	Constitutional reform and devolution.

Table 1 Comparing Webb's and Bogdanor's classification

Introduction to the 1945 General Election

The 1945 general election is generally considered as one of the most important landmark in modern British party competition. This was the first election when Labour gained absolute majority in the House of Commons and became the second party beside the Conservatives. The two-party rivalry has become a major characteristic of British politics since then. *Lijphart*[3] thought it so deterministic that he built up a theory about Westminster democracy which is eventually about the Conservative-Labour dichotomy. Due to the very important path-dependency that the 1945 general election generated, the overall outcomes of this crucial election can be felt even today.[4]

There are four reasons why the 1945 election should be treated as a critical juncture in the evolution of British party competition. Firstly, it was the first time in history when the Labour Party gained an absolute majority in the House of Commons (HoC). Previously, they had been able to win two general elections in 1924 and in 1929; however, these victories never lead to an absolute majority. So Labour previously was

[3] Lijphart, Arend: *Patterns of Democracy*. Yale University Press, 2012.
[4] Marsh, David – Johnston, Jim – Hay, Colin – Buller, Jim: *Postwar British Politics in Perspective*. Polity Press Cambridge, 1999.

always bound to minority or coalition governments. (HoC Briefing Paper 04951, 2015) Secondly, in 1945, Labour did not just get an absolute majority, but they did it in a *landslide* manner. They got 146 more seats than the second placed Conservatives and this gave them a comfortable governing majority. Such kind of victory often happened earlier in favour of the Conservatives, but never to any left-wing parties. Thirdly, the 1945 results introduced a completely new political rivalry in British politics: the *Conservative-Labour competition*. This dichotomy changed the whole traditional political scene. Before 1945, both Labour and the Liberals tried to become the second party behind the Conservatives which created either a three-party contest or most often a predominant party (the Conservatives) with two smaller ones (Labour and the Liberals).[5] Now, it became clear that only Labour could be the opposition party against the Conservatives. So the Liberals eventually disappeared from the political scene – at least for a while. Fourthly, the 1945 election was not only very different from any previous results, but it was the starting point of a *long-term trend*, too. In the first half of the 20th century, it could have been difficult to identify an established party system in Britain because the high electoral volatilities of general elections made a very fluctuating party system pattern. Therefore the mid-war years were more about irregular changes than about a regular and long-term trend. This fundamentally changed after 1945 because the Conservative-Labour dichotomy became a stable and inflexible characteristic of British politics. Moreover, electoral volatility almost disappeared between the years of 1945 and 1970. This two-party logic has become an integral part of British politics and political culture, too. The 1945 general election created such a remarkable point of reference than any other general elections later in the 20th century determined itself in comparison with 1945. The 1974 general elections might have questioned the validity of the 1945 general election patterns (and two-partyism) or the 1997 general election might have confirmed the 1945 general election with a similar outcome, however, the point of reference always remained the same. Therefore the 1945 general election is crucial to understand the whole British political landscape in the 2nd half of the 20th century.

Data

The 1945 general election was a landslide victory for Labour and a humiliating loss for the Conservatives.[6] Labour got 47.7% of the votes which translated into 61.4% of the parliamentary seats. At the same time, the Conservatives got 39.7% of the votes and

[5] See Skidelsky, Robert: *Politicians and the Slump: the Labour Government of 1929-1931*. London, Macmillan, 1967., Kinnear, Michael: *The Fall of Lloyd George: the Political Crisis of 1922*. Springer, 1973., Wrigley, Chris: *David Lloyd George and the British Labour Movement: Peace and War*. Harvester Press, 1976.

[6] All UK electoral data in this paper are from Commons Briefing Paper (2017) No. CBP-7529 *UK Election Statistics: 1918-2017* which has both .pdf and .xls versions. The author used the .xls version for his own calculations, while he calculated the later used indices (ENEP, ENPP, Pedersen index) from this dataset. All Figures and Tables in the text are also calculated from these data.

32.8% of the seats. The Liberals became the third party with 9% of the votes and jut 1.9% of the seats. If we compare this result with the previous 1935 general election, the difference is even more shocking. At that time, the Conservatives got 429 seats (69.76%), Labour had 154 seats (25.04%) and the Liberals got 21 seats (3.41%). In 1945, the Conservatives had 210 seats (32.81%), Labour did 393 (61.4%) and the Liberals did 12 (1.9%). So basically the Conservatives and the Liberals halved their parliamentary seat shares while Labour almost tripled it. Although the majority electoral system played a leverage role in Labour's landslide victory, nevertheless, the 1945 election result was the culmination of a long-term historic trend.

As one can see in Figure 1, the vote share for Labour had been kept rising since 1918. At the same time, the Liberals kept loosing votes. The Conservatives had changing patterns but they usually grew. However, Figure 2 shows how disproportionally these results translated into parliamentary seat shares. The FPTP electoral system usually favoured very much the Conservatives and disfavoured either Labour, the Liberals or both. For instance in 1931, Labour got under 10% seat share whereas their vote share was above 30%. In 1935, they made slightly better results but they were still minor parties to the Conservatives. With this previous record, the 1945 election showed a skyrocketing Labour performance both in votes and particularly in seats. The Conservatives nevertheless became a minor party beside Labour, although they enjoyed a predominant position before the war.

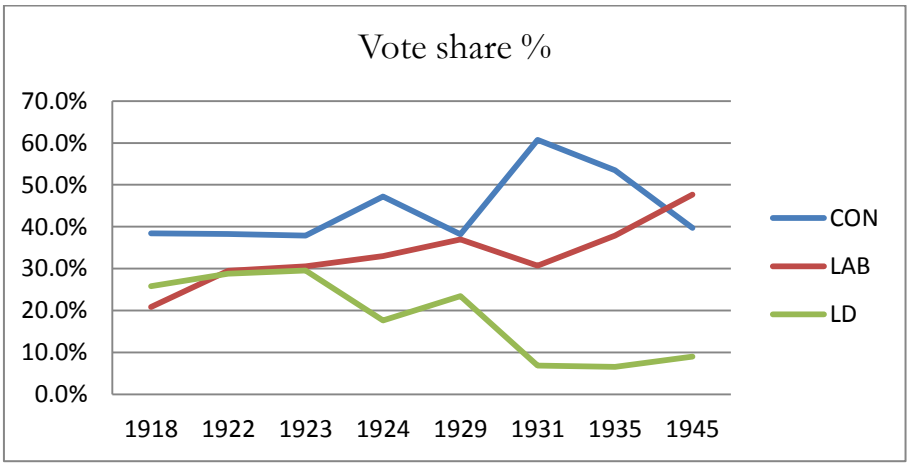

Figure 1 Vote share proportions in the party competition (1918-1945)

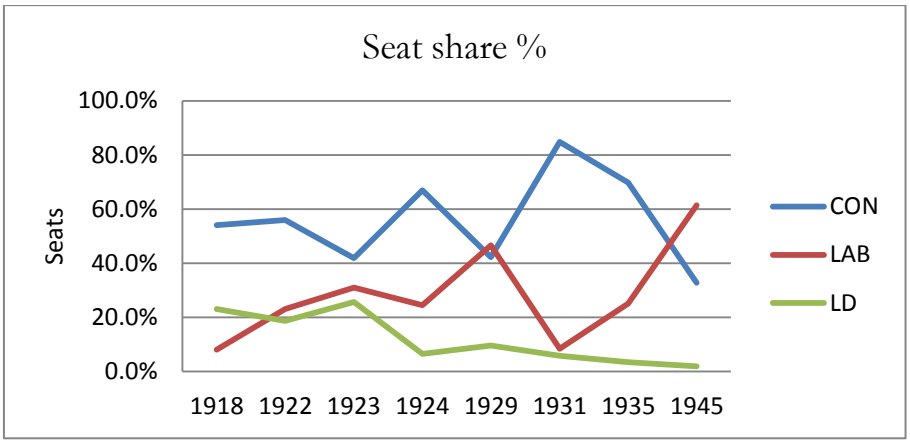

Figure 2 Seat share proportions in the party system (1918-1945)

This sudden change, however, froze after 1945. Instead of further electoral volatility, the two major parties conserved their dominance in British politics. So even though FPTP (first past the post) is usually considered as the source of two-party competition (*Duverger's law*)[7], in fact, the very same electoral system could result fundamentally different outcomes before 1945. Therefore, the author reckons instead that the two-party politics was sustained by social changes. This is particularly true if we compare the *effective number of electoral parties* (ENEP)[8] with the *effective number of parliamentary parties* (ENPP) before and after 1945.

	ENPP	ENEP	Diff
1918	2.68	3.57	25.08%
1922	2.49	3.16	21.12%
1923	2.95	3.08	4.12%
1924	1.95	2.75	29.32%
1929	2.46	2.96	16.78%
1931	1.37	2.14	35.95%
1935	1.82	2.30	21.21%
1945	2.06	2.53	18.92%
1950	2.08	2.45	15.10%
1951	2.05	2.13	3.69%

[7] Duverger's law says that countries using the first past the post electoral system will necessarily end up with a two –party system.

[8] ENEP and ENPP are party system fragmentation indices. They refer to how fragmentized a party system is. ENEP is calculated by using electoral vote shares whilst ENPP is done so by parliamentary seat shares. For instance, if ENEP =3.5, it means that there are three and a half equal sized parties in a given party system. If it is 2.0, we are talking about a two-party system. For more information please visit: *Prof. Michael Gallagher*'s website at Trinity College Dublin. Available at https://www.tcd.ie/Political_Science/ staff/michael/gallagher/ElSystems/Docts/effno.php. Downloaded: 2 November 2017.

1955	2.03	2.16	6.30%
1959	1.99	2.28	12.74%
1964	2.06	2.53	18.75%
1966	2.02	2.42	16.75%
1970	2.07	2.46	16.07%
1974	2.25	3.13	28.10%
1974	2.25	3.15	28.48%
1979	2.15	2.87	24.98%
1983	2.09	3.11	32.78%
1987	2.17	3.07	29.38%
1992	2.27	3.05	25.77%
1997	2.12	3.18	33.28%
2001	2.17	3.28	33.94%
2005	2.46	3.52	30.04%
2010	2.58	3.61	28.61%
2015	2.53	3.63	30.23%

Table 2 ENEP and ENPP values (1918-1945)

As it can be seen in Table 2, both ENPP and ENEP values were very unpredictable between 1918 and 1945. ENPP was sometimes over and sometimes under 2.00 which suggest that in the House of Commons there was either a two-and-a-half (sometimes three) party system or a predominant party system with one giant party (the Conservatives.) At the same time, the UK party competition (ENEP)[9] kept being above 2.00 which suggest a multi-party competition outside of Westminster. Therefore, the logical consequence is that the differences between ENPP and ENEP values were sometimes relatively high. (See third column in Table 2.) For example, in 1931, this difference reached 35.95% because ENEP was 2.14 and ENPP only 1.37. It can be interpreted that a predominant party system co-existed with two-(and-a-half) party competition. In other words, the House of Commons didn't represent well the ongoing party competition in the British society (as it was the case after 1974, too.) However, from 1945, ENEP started to decrease and ENPP began to stabilize around 2.00. This convergence resulted the decline of ENEP-ENPP difference, too. For instance, in 1951 and in 1955, ENPP was respectively 2.05 and 2.08 and ENEP was 2.13 and 2.16. The differences were just 3.69% and 6.30% during these two elections. This means that the post-1945 elections had a trend towards two-partyism both in the party system and in

[9] The author considers the UK *party system* as the party system inside Westminster and the House of Commons. However, when he talks about *party competition* it is a wider concept than Westminster politics and every contesting parties make part of it (not just those which manage to surpass the electoral threshold.) Therefore, the author thinks ENPP and ENEP can measure both these two concepts. ENPP is calculated from parliamentary seats (so it can measure the party system) and ENEP is calculated from electoral votes (so it can measure party competition.) Due to the high electoral threshold in the House of Commons, ENEP should be always higher than ENPP.

the party competition. Thus the post-1945 period was indeed the 'heyday' of two-party politics.

Causes

Labour's landslide victory in 1945 was caused by several factors. In the following, the present paper tries to collect them in a non-exclusive way.

- *Paul Adelman* quotes *Paul Addison*'s book 'The Road to 1945' which states that the year of 1940 had a particularly important role in Labour's success.[10] In 1940, there were two important events: the *Dunkirk crisis* which symbolised the complete failure of appeasement politics which was delivered by *Neville Chamberlain*'s Conservative government and it was also the first year when a *wartime economic plan* was accepted. Both these two events supported Labour's popularity.
- Paul Adelman adds that it was also very important to have a 'reconstruction plan' after the 2nd world war. In this vein, the Conservatives had very poor initiatives since they were more preoccupied with ongoing military acts. At the same time, Labour had already started to elaborate new reconstruction policies for the end of the war. This was supported by the Beverage Report in 1942 (although *William Beveridge* was personally a Liberal politician), the White Paper in 1944, the Employment Policy in 1944 and the Butler Education Act in 1944. At the same time, *Winston Churchill* was only concerned about international politics.
- During the 10 years of Coalition government (1935-45), Labour gained some reputation as a party in *governmental office*.[11] Previously, their lack of office record was a major handicap *vis-á-vis* the Conservatives. They were often considered as a sectional party which represented only a small proportion of the entire British nation. However, during the Coalition years, they showed how well they could perform in office (particularly in home affairs) and they acted as a responsible party.[12]
- *McCallum* and *Readman* add (1964: 267) that *Labour's monopoly on the left* was also a key factor in their 1945 electoral victory; there were no other significant party beside Labour.[13] Both the Liberals and other smaller parties (like the Communist Party or the Common Wealth) became extremely marginal at the end of the 2nd World War.
- Although Churchill was personally the most popular politician in Britain at the end of the 2nd world war, his party remained much behind his personal reputation. Harold Macmillan writes in his memories that *'it was not Churchill who lost the 1945*

[10] Adelman, Paul: *The British General Election, 1945*. Retrieved from http://www.historytoday.com/paul-adelman/british-general-election-1945. 2001.
[11] See Adelman: *op. cit.*
[12] Roberts, Martin: *Britain, 1846-1964: The Challenge of Change*. Oxford University Press, 2001.
[13] See McCallum, Ronald Buchanan – Readman, Alison: *The British General Election of 1945*. London : Frank Cass, 1964. p.267.

election; it was the ghost of Neville Chamberlain."[14] Churchill could not get rid of his party's previous negative record.

- McCallum and Readman (1964) also say that during the collation years, there was an *electoral truce* among the Conservatives, the Labour Party and the Liberals. In exchange for their loyalty in the coalition government, they promised not to nominate candidates against each other at constituency by-elections where an incumbent MP was re-running. This electoral truce was interpreted by the Conservatives as a *political truce* as well. It meant that in addition to the by-election deal, they also stopped party mobilisation. They only re-launched their party machine in Feb 1945 a couple of months before the 1945 general election. (The last general mobilisation had been in 1935, at the last general election!) At the same time, Labour didn't stop constituency life and party mobilisation. So during the 1945 election campaign Labour enjoyed a comparative advantage 'on the ground.'
- Expanding *secondary education* is considered another comparative advantage for Labour.[15] The new generation had a much vivid awareness of their rights and duties in the society. So they appreciated more detailed policy proposals in which Labour had a clear win. The *Let Us Face the Future* manifesto in 1945 promised social services, public ownership and equality for all. This was appreciated by the new and more educated generation.
- *Alun Wyburn-Powell* says that *Lloyd George*'s memory had also a negative effect on Churchill's personal reputation as a future peacetime prime minister.[16] Although both two politicians were war heroes in their times, Lloyd George became a weak and inadequate prime minister after the World War I. The negative experiences about his career also negatively affected Churchill's future chances.
- During the war, the military service mixed all social classes which facilitated the exchange of ideas and opinions. This crosscut of class cleavages lead to a high electoral volatility in 1945.
- The British people wanted to finally end the World War II. In this sense, the change in government would have meant a symbolical rupture with the past, too. Although Churchill was the most popular politician in the country, his name forged with belligerence and war. The vast majority of the electorate could only remember to the Conservatives as a party under which they experienced anxiety, austerity and humiliation.[17] The British electorate became a bit tired out after the 10 years of continuous Conservative rule. At the same time, Labour concentrated on post-war issues and the reconstruction plan. So there was a clear cut between Churchill's militaristic charisma on the one hand, and Labour's practical and detailed economic plans, on the other hand. In this context, Churchill represented the past and

[14] Ibid. 268.
[15] Ibid. 269.
[16] Wyburn-Powell, Alun: How Winston Churchill Lost the 1945 Election. Retrieved from http://theconversation.com/how-winston-churchill-lost-the-1945-election-36411. 2015.
[17] See McCollum-Readman: *op. cit.* 268.

Labour did the future.

- Labour intentionally appealed for a classless appeal. They were very inclusive and acted like a catch-all party. *Clement Attlee* said in the run-up to the 1945 election; *"fifty years ago the Labour party might with some justice have been called a class party, representing almost exclusively the wage earners." (...) "It is still based on organised Labour but has steadily become more and more inclusive.... the Labour Party is, in fact, the one Party which most nearly reflects in its representation and composition all the main streams which flow into the great river of our national life."*[18]
- Labour had successfully achieved party unity by *suppressing the popular front* (idealists, social revolutionaries, moralists inside the party). Instead the Labour leadership adopted a pragmatist and catch-all strategy which reached out for everyone. Attlee compared this process with the British characteristics of "*the triumph of reasonableness and practicality over doctrinaire impossibilism.*"[19]

In sum, the paper argues, the most important cause for Labour's victory laid in three things: i) the misery of the war which was mostly associated with the Conservatives, ii) the promise of a new world which Labour offered instead and iii) the bad shape of the Conservative Party organisation because Churchill cared much more about international politics than about domestic politics. Putting these three factors together lead to the 1945 Labour landslide. However, it is another question how they could keep their support in the following decades. Next, the paper will try to find out this question.

Aftermath

The 1945 election had two interwoven impacts for the following 30 years (or even more). First, it established an era of left wing politics in Britain where the two major parties revolved around the very same electoral policies: Keynesian economics and the need for welfare state. Since the two parties had a consensus over these policies, this time was characterised by a centripetal political competition where major parties offered very similar manifestos with only some slight differences.[20] Second, the 1945 election established the two-party competition by rising Labour to a dominant position on the left. As *Gary McCulloch* notes, Labour became "the only cock on the dunghill".[21] The Conservatives represented the middle class and the entrepreneurs while Labour represented the working class and the employees. These two phenomena (the post-war consensus and two-party competition) mutually reinforced each other.

[18] McCulloch, Gary: Labour, the Left, and the British General Election of 1945. *The Journal of British Studies*, Vol. 24 (1985), No. 4, 475.
[19] Ibid. 488.
[20] See Lowe, Rodney: The Second World War, Consensus, and the Foundation of the Welfare State. *Twentieth Century British History*, Vol. 1 (1990) No. 2, 152–182.
[21] See McCulloch: *op. cit.* 469.

Post-war consensus

The phenomenon of post-war consensus is usually, although not always, accepted in the academic literature. *Timothy Heppel* collects the arguments for and against the theory of a post-war consensus.[22] He says that the advocates for a post-war consensus agree that both Labour and the Conservatives respected each other's governmental records and they didn't try to reverse the other's achievements. Since the era was started in 1945 with Clement Attlee's Labour government, it had to be the Conservative Party which respected their left predecessor's achievements. Hence, a kind of left wing politics was carried out by both two parties after the 2nd World War. The policies which both two parties accepted were usually the followings according to Heppel;

- Full employment
- Public ownership
- Keynesian interventionist economic policy (demand stimulation)
- Corporative negotiations with trade unions
- National Healthcare System (NHS)
- Strongly support for North-Atlantic military alliance (NATO, nuclear weapon, British presence in West Germany)
- Withdrawal from the British Empire (India, Pakistan, Africa).[23]

Heppel also collects arguments against the post-war consensus. These are less numerous, nevertheless, he says;

- There were plenty of issues which divided the two sides (private education, crime and punishment and relations with the European Economic Community.)
- The whole categorisation and interpretation of the post-war era was elaborated after *Margaret Thatcher*'s neoconservative policies. Therefore, talking about a post-war consensus has been always somewhat *retrospective* which tried to understand historical events from the hindsight. Establishing the concept of a welfare consensus was often a neoliberal narrative which wanted to break with the past.[24]

Eventually, putting together the two opposing arguments, it is fair to say that a post-war consensus *did exist*. The best evidence for this argument is *nationalisation* which had been begun by the Labour governments and maintained by the Conservatives. The Conservatives didn't try to privatise these public companies for decades. Change only happened when Margaret Thatcher came into power in 1979. So there was certain consensus after the World War II that public ownership can be beneficial for the country and it wasn't reversed by the Conservatives for quite a long time. In addition, the policies of full employment and of concerted actions with trade unions were also

[22] Heppell, Timothy: *The Theory of Post-War Consensus*. Retrieved from http://www.britpolitics.co.uk/academic-articles-all/-theory-post-war-consensus-dr-timothy-heppell-leeds-university. 2015.
[23] Ibid.
[24] Ibid.

shared by both sides. Thus the author argues that a post war consensus existed at least in economic terms. This consensus could not have happened without the Labour victory in 1945 which set the whole political scene for such a path dependency. One major aftermath of the 1945 general election is therefore the birth of a post-war consensus.

Two-party competition

The second impact after 1945 was the institutionalisation of *two-party competition*. This idea is supported by two indices: the low electoral volatility and the low ENEP/ENPP differences. First, there is the *electoral volatility*[25] which was record low during this period. As Figure 3 demonstrates, the electoral volatility started with a record high level in 1945 (13.73%) which suddenly dropped to 3.73% for the next election and kept remaining under 8.00% until the Feb 1974 general election when it jumped up again to a record high level (14.43%.) It means that there was a one-off huge electoral realignment from 1935 to 1945 which manifested in a record high electoral volatility. However, the existing patterns of interaction which were established in 1945 remained for the next 7 general elections.

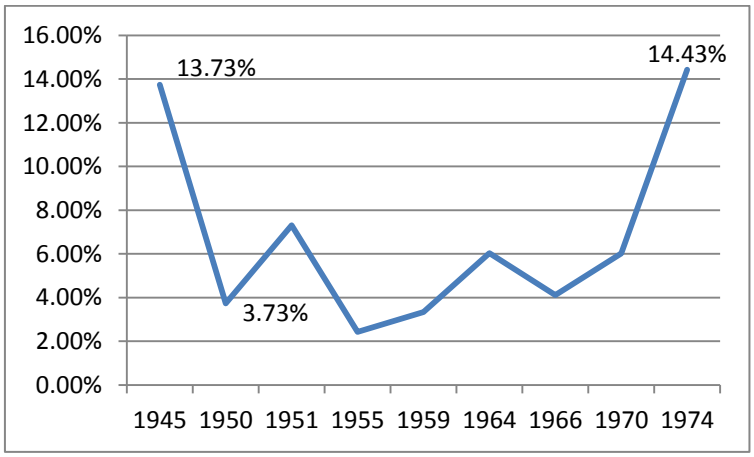

Figure 3 Electoral volatility (Pedersen Index) (1945 - Feb 1974)

Before 1945, there was a growing political demand for working-class representation; nevertheless, it didn't pair with a single political representation (a Labour party.) Instead, the working class was dispersed among three separate parties: Labour, the Liberals and the Conservatives.[26] So, before the 2nd world war, although the political demand was there for a working class representation, there wasn't a political supply for

[25] Electoral volatility is calculated by using the Pedersen Index. This formula measures the aggregate vote share differences of individual parties from one election to the next one divided by two.

[26] Cole, George Douglas Howard: Short History of the British Working Class Movement: 1900-1937. *Psychology Press*. 2001. Vol. 3.

it (a single party.) The record high electoral volatility hence meant that in 1945 these voters suddenly managed to find their party and changed loyalty in favour of the Labour. This loyalty for the Labour became so important that further volatility did not even happen in the following elections. So there was a one-off giant reorientation among the British electorate which focalized later. This brings further evidence for the fact that the labour class found their party in Labour in 1945. The low electoral volatility by contrast illustrates that class based politics started to dominate British politics.

Butler and Stokes give pivotal importance for the *parental political affiliation* in this process.[27] They argue that the children of working class families became Labour voters which favoured the Labour Party in the long term. I argue, there was not any general election between 1935 and 1945, so the manifestation of this additional support was shocking and fast in 1945. This is a bit similar to the 1918 universal suffrage when the Labour party advanced significantly. At that time, however, it was due to a constitutional change, whereas in 1945 it was rather due to social change. This long term historic trend is certainly one important element for the high electoral volatility in 1945.

The other element of this high electoral volatility was the relevant electoral switch from the Conservatives to Labour. As the author argued before Labour acted as a catch-all party in 1945. They successfully reached out to the whole society and to the non-working voters as well. In this sense, the record high volatility was caused by both class based politics (the inflow of working class votes) and issue politics (the inflow of non-working class people who favoured leftist campaign promises like free education or healthcare.) Later during the following elections, although much of the non-worker support flow back to the Conservatives, the working class support remained there. Therefore, the high electoral volatility in 1945 was not followed by other high electoral volatilities, and the stability of working class support balanced Labour's support. From 1950, a two-party/two-class competition was eventually institutionalised and only a small proportion of the electorate switched preferences (hence a record low electoral volatility).[28]

After 1974, however, there was an opposing trend going on which ended the two party competition. In February 1974, there was again a record high electoral volatility (14.43%) similarly to 1945. This time however, it was a major shock to two-partyism because much of the electorate stopped supporting its class based parties. Instead, third parties gained significant support. The author argues that in 1974, in opposition to 1945, there was a *political supply* for the classes (Labour for the working class and the Conservatives for the middle class), however, the *political demand* started to shrink. This

[27] See Butler, David – Stokes, Donald: The Rise of the Class Alignment. In: *Political Change in Britain*. Springer. 1971. 111-134.

[28] Goldthorpe, John – Lockwood, David: Affluence and the British class structure. *The Sociological Review*, Vol. 11 (1963) No. 2, 133-163.

generated a demand for third parties and a collapse of two-party competition. So only the period between 1945 and 1974 served in its pure form the two-party competition. Before 1945, there was a *demand* without a *supply* whereas after 1974, there was a *supply* with a less powerful *demand*. The balance between *supply* and *demand* was only secured during the 1945-74 period.

The second index which supports the idea of two-party competition is the difference between ENEP and ENPP. In fact, the British electorate should have been satisfied with the political representation (the supply side) because the differences between ENEP and ENPP remained relatively low. Before and after the 1945-74 period, there was a much larger difference between ENEP and ENPP. (See Figure 4.) This was moreover the only time in modern British history when the party system was congruent with the party competition. The balance between ENEP and ENPP suggests that the two-party competition enjoyed quite strong legitimacy in the society.

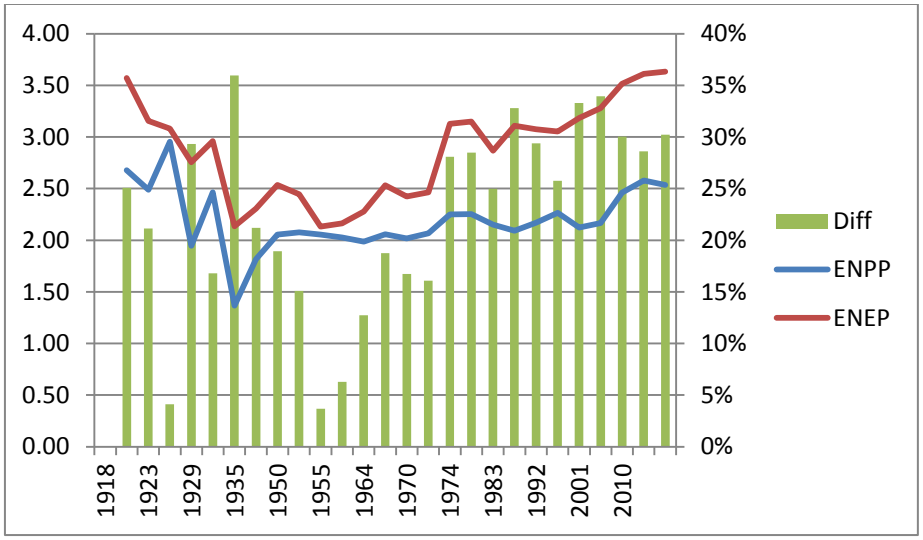

Figure 4 ENPP and ENEP difference (1918-2015)

To understand why the two-party competition enjoyed such a legitimacy during the 1945-74 period, the paper uses Paul Webb's explanation[29] who offers three factors: party identification, political socialization and majority electoral system. *Party identification* states that most people in the 1950s and 1960s felt aligned to a particular political party (be it the Conservatives or Labour.) The strength of this attachment was so important that it even overwrite individual voter preferences. To put it bluntly, voters thought what their parties wanted them to thought. The strong party identification was a major element of class politics. Second, as Webb continues, *political socialization* happened in families, neighbourhoods and workplaces. Due to the relatively limited social mobility, individuals stuck inside the same social group 'from the cradle to the grave.' Hence, it wasn't precisely

[29] Webb: *op. cit.* 44.

individuals who voted at general elections but instead families, friends, neighbours or workplaces. The individual preference which derived from personal experiences was only complementary but not primary. Third, as Webb argues, the political choices were refrained by the first-past-the-post *electoral system* because voters did not want to waste their votes for small parties. They only voted for the two major parties with a chance to win. This obviously imposed a high entry barrier for third parties. In sum, these three factors caused together the institutionalisation of two-party politics. The electoral competition during this time was very tight because always a couple of undecided (not aligned) voters switched preferences. Most of the electorate kept loyal to their parties and a marginal few voters decided the outcome.[30]

In sum, the 1945-74 period can be characterised as a post-war consensus and two-party competition. This centripetal competition was based on class cleavage where only a handful of people decided the outcome of a given general election. However, the period enjoyed high legitimacy because no third parties appeared, electoral volatility was low, turnout was high and the party system was congruent with the party competition. This idealistic picture stopped in 1974.

Comparing 1945 with 1997

The paper found great many similarities between the 1945 and the 1997 two Labour landslide victories. Although there are certainly plenty of differences, I find it more interesting to focus on the similarities. In both cases, the landslide victories came from the weakness of the Conservative Party, the dominance of Labour on the left, the party's internal unity and their very promising campaign manifesto. Each of these four factors was needed in both cases to win with a landslide. These factors cannot be separated from each other. Instead, there is a significant synergy and reinforcing effect among them. For instance, the Conservatives' weakness suggests incompetence which is further enhanced by Labour's promising competence (at least based on the campaign manifestos.) Internal unity always meant that the Labour leadership cut back the hard left wing and hence proposed a moderate party profile. This was both the case in 1945 and in 1997. This party unity facilitated both showing a competence to the electorate and dealing with other rival parties on the left. In 1945, the main rivals were the Liberals and in 1997 the Liberal Democrats. In both cases, party unity secured the dominance of Labour on the left. Finally, since the party manifestos were very promising, the electorate could feel both in 1945 and in 1997 that they can change politics. These four factors pulled into the same direction at these two general elections. In the following Table 3, the author compares the 1945 and 1997 in more details.

[30] Ibid.

	1945	1997
Landslide victory	47.7% votes and 61.4% seats for Labour	43.2% votes and 63.43% seats for Labour
Tiring out of the Conservatives	❖ Conservative predominance between 1918 and 1945. ❖ Austerity, anxiety and social challenges ❖ Conservative incompetence (Neville Chamberlain and the appeasement)	❖ 18 years of Conservatives governments ❖ Conflicting social transformation ('Thatcher's famous bag on the table') ❖ Conservative incompetence (Major's 1992 ERM crisis, the 'sleaze' inside the party, privatisation went too far (railways)
A very promising Labour appeal (issue politics)	Let Us Face the Future – 1945 manifesto ❖ Social services (NHS, education, in work benefit, full employment etc.)	New Life For Britain – 1997 manifesto ❖ Social-democratic program ❖ Devolution
Classless appeal	National party (good wartime record, patriotic behaviour during the war despite of their international agenda - pragmatism)	Neoconservative consensus (withdrawal of clause IV, supporting globalisation and the financial services)
Need for change	Ultimately getting rid of the war Very positive Labour post-war issues	Getting rid of the 'nasty party' Very positive Blair image
Internal party unity (Defeating the popular movement – moving to elitism)	The popular front (radicals, idealists, revolutionaries) were taken over by the Leadership (pragmatists.) "Transport House" over "Theoretical Tom and Defeatist Dick and Half-Hearted Harry."[31]	Abolishing block voting (trade union influence)
Left hegemony (Defeating other left parties)	The Liberals became 3rd party beside other smaller contestants (e.g. Common Wealth, Communist Party) who all were marginalised	Liberal Democrats lose ground, left nationalist parties (PC, SNP) were marginal

[31] Labour's victory in 1945 seemed to confirm the strength and wisdom of its attitudes and to discredit dissenters. *Dalton* wasted little time in pointing out the sagacity of the Labour leadership and deriding its critics: "may I be allowed for a moment to recall that in the years gone by there were faint hearts in the Labour Party- Theoretical Tom and Defeatist Dick and Half-Hearted Harry-who doubted whether we could ever win through as an independent Party, fighting alone.... But the wisdom of Transport House prevailed over all this." See McCulloch: *op. cit.* 487-488.

Table 3 Comparing the 1945 and 1997 general elections

The big difference however lays in a superficial similarity. Both the post-1945 and the post-1997 period had centripetal dynamics. After 1945, the Conservatives and Labour had a consensus over *welfare economics* whereas after 1997, these parties had a consensus over the *neoliberal economics*. However, although the 1945-74 centripetal competition was very legitimate and supported by the electorate, the 1997-2010 period was less legitimate and lead to an anti-establishment sentiment. The 1945-74 period was legitimate because the turnout at general elections was high (70-85%), and party system was congruent with party competition. (ENEP-ENPP difference was very low.) Nevertheless, between 1997-2010, the turnout was record low (around 60%) and party system was increasingly incongruent with party competition. Therefore, the centripetal competition was supported by the electorate after the World War II, however, it was not after 1997. It was instead rather superficial.

The two centripetal competitions are different not only for the legitimacy behind them but also for their *content*. The 1945-74 period was a *class based* centripetal competition between two mass parties with aligned voters. Nevertheless, after 1997, there was an *issue based* centripetal competition between two catch-all parties. In the first case, it was a competition about class interests, whereas in the second case, it was a competition about individual preferences. The two different centripetal competitions were also very different in campaign techniques (personalisation, political marketing and media). Whilst this was not crucial during the 1945 election, it might have been pivotal during the 1997 election.

Conclusion

The 1945 general election created the most important path dependency in modern British politics; the Conservative-Labour two-party competition. As we have seen, neither before 1945, nor later in the 20th century, two-partyism was as strong as in the 1950s and 1960s. We still often think that British politics has been always about the dichotomy of the Conservatives and Labour. However, it wasn't true. It was just true for a short period between 1945 and 1974. But the mere fact that we have a feeling that British politics was always about two-partyism supports the idea that 1945 created a lasting path dependency at least in minds.

The reason for this very strong path dependency originates from the *institutionalisation* of the post-war party competition. It was the time when party competition and party system perfectly overlapped each other. Therefore, the party system managed to conserve the patterns of the 1945 party competition. Later, however, when gradual change started to happen in the party competition, the fossilized party system resisted. Any change should have been interpreted as a response to this point of departure. The high congruence of the post-1945 period generated high legitimacy and high institutionalisation.

THE LEGAL STATUS OF PERSONNEL IN MULTINATIONAL PEACE OPERATIONS

With Special Regard to Sexual Exploitation and Abuse Committed During Peace Missions

András Hárs*

Over the last 60 years we have witnessed a massive expansion in the number, scope and mandate of peacekeeping missions worldwide. This also meant that the manpower required for such operations have also increased exponentially. With such a large personnel it is inevitable that the peacekeepers involved will commit criminal acts, some even as grievous as sexual abuse and exploitation (SEA). These cases may not be as isolated incidents as one thinks,[1] leading to scandals when leaked to the international media and forcing the UN to try to come up with solutions. However, part of what makes it difficult to tackle the issue is, *inter alia*, that the legal status of the different categories of personnel vary greatly. While members of military contingents are protected by the jurisdictional immunity of the troop-contributing country, others, such as UN staff, volunteers, military observers and police are governed by separate legal regimes, each supporting their own distinctive set of regulations. This article aims at uncovering the intricacies of the various legal solutions and attempts to synchronize them within the framework of international law.

The Issue of Responsibility and the Categories of Peacekeeping Personnel

It is the very basic principle of every legal system that the conduct of a wrongful act leads to the responsibility of the one who committed it. Responsibility in international law is constituted no differently according to the *International Law Commission's Responsibility of States for Internationally Wrongful Acts*.[2] To apply this principle in the context of peacekeeping operations the general perception would be the following: if a peacekeeper commits a criminal act then s/he should be held responsible. However, as peacekeeping operations are governed by international law, there are other factors to

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[1] The origins of sexual exploitation and abuse can be traced as far as the UN mission to the Congo in the 1960's, but has since proved to be an enduring stain on the blue helmet with scandals surfacing in Somalia and the Balkans in the 1990's, West Africa and Cambodia in 2000's as well as Haiti, DRC and CAR in recent times to cite the most infamous examples.

[2] UN Doc. A/RES/56/83 Art. 1.

consider, namely the responsibility of the international organization[3] and the state which sends its citizens to the mission – also called the troop-contributing country (TCC). The rationale why these other actors complicate matters is based on both legal grounds and on common sense.

The United Nations is the organization which calls for the mission in the first place. One of its main organs, the Security Council creates the mandate, which serves as a legal basis for the mission to operate upon, while also transferring its capacity to use force in an international environment. Furthermore the mission is created to further the goals of the organization[4] and it operates under the aegis of the UN.[5]

When it comes to the responsibility of the TCCs, it goes along the following line of logic: the peacekeeper as an individual is part of the military of the TCC, therefore considered to be under the supervision of the executive branch of power. The legal basis lies in the International Law Commission's Responsibility of States for Internationally Wrongful Acts. In its Article 4, paragraph 1, the Articles state the responsibility of the country regardless the character of its organ.[6] Of course, the question of attribution is not as simple and the jurisprudence of international law remains uncertain at best of which so-called attribution tests to follow.[7] According to the practice of various international tribunals, the responsibility of the state can be established if the state maintains some sort of control over the group of military personnel in question.[8]

The most logical solution would be to call the peacekeepers themselves to account. After all, they are the ones who commit the criminal acts. However before we accept this seemingly appealing reasoning, we have to answer the question of who are the peacekeepers? The general perception is that peacekeepers are a homogenous group of soldiers, the blue helmets, who maintain law and order, and oversee ceasefires during missions. In reality it is a diverse group of many different categories of personnel. We can distinguish at least 8 categories, which are the following: military, military observers, police, experts, employees of specialized agencies, UN Staff, volunteers and the members of private military and security companies. Due to the constraints of this article the author will only distinguish between military and non-military personnel as the two main legal regimes can be differentiated along those lines.

[3] In our case this will always be the United Nations.

[4] Charter of the United Nations. 1945. Art. 1. para. 1.

[5] The emblematic blue helmets serve also serve as a sign for the parties to the conflict, notifying them of the presence of international forces, who are and have to remain neutral to the conflict.

[6] UN Doc. A/RES/56/83. Art. 4. para 1.

[7] Boon, Kristen: Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines. *Melbourne Journal of International Law*, Vol. 15, No. 2, 2014, p. 7-8.

[8] Burke, Róisin Sarah: Sexual Exploitation and Abuse by UN Military Contingents – Moving Beyond the Current Status Quo and Responsibility Under International Law. Brill – Nijhoff, Leiden, 2014, p. 266.

The Process

Before the analysis of the process, it must be stated that the vast majority of the people involved in a peacekeeping mission are doing an outstanding job, facing constant danger and adversity while holding themselves to the highest behavioural standards of the organization (UN). There are those however, who do not abide by these standards and abuse their status as peacekeepers in order to commit criminal acts. This chapter aims to briefly discuss what happens in such a situation.

First of all when it seems feasible that a criminal act has occurred, the authorities – at first the UN – receive a form of complaint, called an allegation. An allegation can be considered a unique form of suspicion in written form, which serves as the basis of the inquiry. A major default of the allegation is that it only refers to an incident, therefore as far as official reports go, it can very well happen that an allegation means that several peacekeepers committed sexual exploitation and abuse against several victims.[9] The allegation is handled by the Conduct and Discipline Officer of the mission who reports the findings to the Office of Internal Oversight Services (OIOS). The OIOS, established in 1994, serves as the UN's internal audit organ, with a mandate to assist the Secretary General in matters regarding oversight, inspections and investigations as well as monitoring the efficiency of various programmes.[10]

What happens after the OIOS concludes the investigation depends on the type of personnel involved? For military personnel, all of the collected evidence as well as the materials of the process are handed over to the authorities of the TCC. From this point it is the discretional decision of the TCC to conclude its own investigation. As the justice system of most TCC's only accept the criminal process conducted by their own authorities, a large number of TCCs have proven to be reluctant in prosecuting their own citizens based on evidence collected by a foreign agency.[11] For civilian personnel an internal disciplinary process begins. The final sanction of the process could be the termination of employment. Unfortunately, the UN does not have the adequate means in either if these situations to effectively combat sexual exploitations and abuse. As in the first case concerning military personnel, the UN has no influence over the proceedings after handing over the evidence to the TCCs. When it comes to non-military personnel, there is a large disparity between termination of employment as an ultimate sanction and the type of criminal act committed.

[9] Notar, Susan A.: Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo, *Journal of Gender, Social Policy & the Law*, Vol. 14 (2006) No. 2, p. 417.

[10] UN Doc. A/RES/48/218B, 12 August 1994.

[11] Durch, William J., England, Madeline E.: *Ending Impunity: New Tools for Criminal Accountability in UN Peace Operations*. Stimson Issue Brief, 2009, p. 10-11.

A Regime of Immunities for Members of Military Contingents

It is clear that in the case of military personnel the UN has no rights or means to act, therefore we must inspect the possibilities of the TCCs in that regard. This segment aims at finding the sources of law which apply and the immunities which protect the personnel involved.

As the members of military contingents remain part of the armed forces of the TCC, it retains jurisdiction over them.[12] This also means that the criminal code of the state can be applied. As every criminal code prohibits sexual exploitation and abuse in some way, we can state that on the internal side, it is forbidden to commit the aforementioned criminal acts. From the side of international law, the Memorandum of Understanding (MoU) must be taken into consideration. The MoU serves as an agreement between the UN and the TCC defining the nature of the cooperation as well as providing some basic guarantees for the sending state regarding its peacekeepers, namely that it retains criminal jurisdiction over them and that neither the UN, nor the host country is entitled to press charges against the members of the TCC's military contingents.[13] After the scandals of 2002, when the employees of specialized agencies and aid-workers were found taking advantage of the population on a large scale,[14] then *Secretary General Kofi Annan* issued a bulletin calling for zero-tolerance of sexual exploitation and abuse in peacekeeping missions.[15] The bulletin, called '*Special measures for protection from sexual exploitation and abuse*' has since been part of the annex of the revised MoU and as such, takes on the form of a binding source of international law if the UN and the TCCs decide to follow the model agreement.[16] Apart from the bulletin, the 2007 Revised MoU also provides us with the definition of SEA. According to the Memorandum the following acts constitute sexual abuse: actual or threatened physical intrusion of sexual nature, whether by force or under unequal or coercive conditions. The definition of sexual exploitation can be any actual or attempted abuse of a position of vulnerability, differential power or trust for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.[17] These definitions are broad enough to fit in nearly all violations of sexual nature and to allow the punishable acts to be categorized to fit crimes in every state's criminal code. The Revised MoU also adds the publication '*We are United Nations Peacekeeping Personnel*' to the annexes.[18] The latter has served for some time as a

[12] Leck, Christopher: International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct. *Melbourne Journal of International Law*, Vol. 10 (2009) p. 349.
[13] UN Doc. A/45/594, Art. 47., para b.).
[14] UN Doc. A/RES/57/306.
[15] UN Doc. ST/SGB/2013/13 Section 3.2.
[16] Burke: *ibid.* 47-48.
[17] UN Doc. A/61/19 Art. 4, Annex F.
[18] UN Doc. A/61/19 Art. 5, Annex H.

pamphlet aiding the training of peacekeeping personnel, ensuring that those involved in peacekeeping abide by the highest ethical standards, fitting their status as peacekeepers.[19] However it has not been binding on the parties before its inclusion in the 2007 Revised MoU.

Evidently, there are multiple sources of law (both national and international) which forbid SEA. Therefore the question arises: why isn't there an easy way to call the perpetrators into account? The answer lies in the multi-faceted system of international law and the underlying political interests. The TCC's, in exchange for the personnel they provide to a peacekeeping operation always ensure that their own criminal jurisdiction applies and that neither the UN, nor the host country has the right to initiate a legal process against its citizens. This leads to a system of immunities, which is supposed to ensure that peacekeepers can comply with the mission's mandate without fear of harassment from the local authorities. The downside is that in case of an allegation against a peacekeeper, the TCC is very reluctant to accept the findings of a UN organ, as the organ can operate differently from the local authorities (police and/or prosecutor).[20] This perception of the states is not entirely erroneous, as the OIOS, formed originally as an accounting body, functions in a vastly different manner than any police or prosecutor. Another factor which makes it harder to tackle the issue, is that the UN cannot force a state to commence a criminal proceeding. Whether or not to initiate such a process remains the discretional decision of the state. Furthermore the UN cannot resort to the method of publicly announcing which countries are not cooperating in cases of SEA, as it could lead to alienating the support of the states in question. There is no clear and simple answer to this dilemma, but one can only make proposals, which would facilitate finding the best solutions. In order to do so we must first analyse the regime of immunities, and the factors which hinder the application of the norms on responsibility.

Two key documents serve as the source of international protection when it comes to members of military contingents committing criminal acts. The first one is the already mentioned Memorandum of Understanding. It not only serves as the source of definitions and prohibition of SEA, but as the very document ensuring the immunity from the proceedings of both the UN and the host state.[21] To quote the Model MoU:

'Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations

[19] http://www.un.org/en/peacekeeping/documents/un_in.pdf (downloaded: 05 January 2016).

[20] Miller, Anthony J.: Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations. *Cornell International Law Journal*, Vol. 39 (2006) p. 87.

[21] Clark, Roger S.: Peacekeeping Forces, Jurisdiction and Immunity: A Tribute to George Barton, Victoria University Wellington Law Review Vol. 77 (2012) 96-98.

peacekeeping mission]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes and offences.'[22]

This is further reinforced by the Status of Forces Agreements (SoFA), which can be considered agreements between the UN and the host state, defining the rights and obligations of peacekeeping personnel in the country. The SoFA mostly serves as a catalogue of immunities, shielding peacekeepers from local proceedings.[23]

'Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host country/territory].'[24]

As both the host state and the UN provides guarantees that members of military contingents would not be charged with criminal offences, it would appear as the TCC can obtain all available guarantees in order to ensure its jurisdiction over its citizen. The opportunities of the UN are very limited. All the Organization can do is to proclaim the person in question *persona non grata* and repatriate him/her. Repatriation serves as a way to ensure that the person would not commit additional criminal offenses during the mission. From the moment of repatriation it is entirely up to the TCC to initiate the criminal proceedings.[25] It has been a recurring problem that nothing prohibits the once repatriated personnel to join other UN missions and commit violations there, as the UN has no database of alleged perpetrators.

According to the official statistics of the UN, there has been a constant and promising increase in the number of responses the organization receives from TCCs regarding the criminal proceedings initiated by the state.[26] On the one hand, shortly after the UN began monitoring the situation in 2008, the situation was catastrophic. Only in 8% of the cases did the UN get a response of what happened to the alleged perpetrator. Even in that 8% it is not guaranteed that the case reached the phase of the sentence or whether there has been proper and proportionate punishment for the perpetrator. On the other hand, we can witness a dramatic increase in the number of responses from the TCCs. By 2015, 78% of the TCCs have responded to the UN, when inquired about the follow-up of the allegations. We can argue that anything less than 100% is not satisfactory, but the gradual progress is undeniable, and it speaks well of the effort by the organization.

[22] UN Doc. A/61/19 quinquiens Art. 7. para 1.
[23] Sari, Aurel: *The Status of Armed Forces in Public International Law: Jurisdiction and Immunity*, (21 January 2015) p. 44. (http://ssrn.com/abstract=2555278, downloaded: 10 January 2016).
[24] UN Doc. A/45/594 Art. 47. para. b.).
[25] Ferstman, Carla: *Criminalizing Sexual Exploitation and Abuse by Peacekeepers*. United States Institute for Peace Special Issue 335. 2013. p. 4.
[26] See Annex I: Statistics - UN follow-up with member states (Sexual Exploitation and Abuse).

The Applicable Law and Immunities Concerning Non-military Personnel

Whereas the scope of possibilities for military personnel is greatly limited, in case of non-military, the UN has more effective methods (if applied correctly and consistently). The United Nations Staff Regulation and Rules serves as a collection of organizational and operational provisions, which although not criminal in nature, explicitly prohibit sexual exploitation and abuse by UN Staff.27 'Staff' in this respect means the following categories: UN Staff, employees of specialized agencies, volunteers and experts. It is unclear as well as debated whether military observers, police and members of private military and security companies fall under the category of staff. The Staff Regulation and Rules also states that UN staff does not fall under the jurisdiction of the host state, as a regime of immunities apply.28 The type of immunity is defined in Article 105 of the UN Charter29 as well as in the 1946 Convention on the Privileges and Immunities of the United Nations.30 The protection can be considered similar to diplomatic immunity, as it protects UN staff form all criminal proceedings, those accused with criminal offences cannot be taken into custody, or seized, etc. However the immunity does not apply when the staff member in question fails to observe the laws or police regulations of the state or in case of non-performance of private obligations.31 In practice, the staff member will always argue that in the specific case the immunity applies. Whether or not the existence of the immunity can be verified, can only be decided by the Secretary General who can waive the immunity if he concludes that one of the abovementioned criteria has been met. This would mean that criminal procedure can commence against the alleged perpetrator in the host country. The main problem is that this process takes very long (often 6 months), during which the alleged perpetrator may disappear, or be reassigned to a new mission, leaving no means for the host country to initiate proceedings.

Additional Challenges

In the previous sections some of the most basic challenges have been covered. However, there are those, which are not obvious at first sight, but seriously hinder our understanding as well as the solution of the issue.

First of these problems is the categorization of the personnel involved in a UN peacekeeping mission. When we try to assess the problem at large we have to rely on the statistics provided by the UN. However, it is unclear at best which type of personnel are involved in the statistics. The Unit responsible for publishing the

[27] UN Doc. ST/SGB/2014/1 Rule 1.2 section e.).
[28] UN Doc. ST/SGB/2014/1 Art. 1. Reg. 1.1 section f.).
[29] Charter of the United Nations, 1945, Art. 105.
[30] Convention on the Privileges and Immunities of the United Nations, 1946, Art. 18. para. a.).
[31] UN Doc. ST/SGB/2014/1 Art. 1. Reg. 1.1 section f.).

statistics, the Conduct and Disciple Unit lists military, police, civilian and other as categories,[32] the Secretary General lists military and non-military,[33] while various NGOs differentiate otherwise.[34] It also remains unclear to which category military observers fall in, and we have no reliable data about criminal acts carries out by members of private military and security companies or employees of specialized agencies.[35] The reason why categorization is so problematic, is because if there are types of personnel omitted from the reports, it also means that we have no information about the amount of allegations committed by them. It can be stated that employees of specialized agencies, and of private military and security companies never make it to the reports.[36]

Secondly, the term allegation lacks transparency. As mentioned above, it is quite possible for an allegation to include several injured parties and a dozen perpetrators, given the nature of these crimes, but there are no statistics of how many people are involved in a given allegation.[37] It would serve as a great step for the UN to publish these data in a separate, distinguishable format, so that we could see the number of perpetrators *per annum*.

Another major factor which hinders our clairvoyance is the underreporting of SEA. Crimes of sexual nature are among the most underreported crimes everywhere on the planet and this is especially true in a peacekeeping environment. The fact that there is often no or only weakened central authority to report to or to investigate is only worsened by the seeming impunity of the perpetrators. Taking into consideration the difference in power – as the peacekeepers are considered the ones with authority, weapons, food and money - the widespread illiteracy, the vast distances a victim has to take in an often difficult geographical environment only contribute to the desperate situation of the victims. A further problem is that the victim has no idea about the identity of the perpetrator(s), knowing only a surname and perhaps the perpetrator's country of origin. Also, as peacekeepers are exempt from the jurisdiction of the host country, the victims have to file a complaint at the Conduct and Discipline Unit, which lies at the same camp/establishment as the perpetrator. Returning to the place, where the person fell victim to the SEA only serves as a deterrent for the victims not to press charges.[38]

[32] https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitation andAbuse/AllegationsforAllCategoriesofPersonnelPerYearSexualExploitationandAbuse.aspx (downloaded: 05 January 2016).

[33] UN Doc. A/69/779 Chapter 3, Art. 19.

[34] http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/sexual-exploitation-and-abuse (downloaded: 05 January 2016).

[35] See *ibid.*

[36] See Annex II. Sexual Exploitation and Abuse Allegations by Category of Personnel.

[37] http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/sexual-exploitation-and-abuse (downloaded: 05 January 2016).

[38] Csáky, Corinna: No One to Turn To – The Under-reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers. Save the Children Fund, 2008, p. 12-14.

Last but not least, as it was briefly mentioned above, the UN cannot single out a specific country, which fails to respond to allegations regarding its personnel. By doing so, the Organization (namely the UN) risks losing the manpower and the support of the state, which if it happens in case of the main contributors of peacekeeping personnel, can seriously undermine the potential of the UN to establish peacekeeping missions.

Conclusion

This article aimed at highlighting the diverse world of UN peacekeeping personnel, their legal obligations regarding SEA, as well the regime of immunities which protects them. In conclusion it can be argued that both military and non-military contingents have a well-established protection regime. The former is protected by the MoU and the SoFA, granting exclusive jurisdiction to the TCC, while the latter is governed by UN Staff Rules and Regulations, as well as the UN Charter and the 1946 Convention on the Privileges and Immunities of the UN. While both seem like a closed circuit, through a consistent application of its criminal jurisdiction and constant and open communication with the Organization, the TCCs can help remedy the issue. A quick and decisive usage of the waiver can serve as a short-term cure for non-military personnel committing SEA, but it requires the active participation of the Secretary General.

The challenges faced by peacekeeping are numerous and may seem daunting, but there are multiple steps which need to be taken. First of all the reporting and investigating mechanisms need to be strengthened, as this can be the root of solving the problem. Without accurate data, we cannot be certain of the scale of the problem, let alone be able to comprehend it. The OIOS either needs to be reformed to cope with its functions or the competence of investigation in criminal matters delegated to a separate organ. Furthermore it may be feasible to attain considerable improvement without a new international treaty, which could prove to be hard to realize, through the consistent application of existing norms. As it can be seen through the statistics of the UN, if there is a political will from the Organization and the TCCs it is possible improve the situation in a rapid manner.

Last but not least there have been events of great magnitude lately in the international community concerning SEA in peacekeeping operations. The heinous crimes committed in the Central African Republic in 2013-2014 incited the civil sphere to action.[39] The campaign, launched in May 2015 and dubbed Code Blue has been instrumental in ushering the issue into spotlight.[40] As a result, *Secretary General Ban Ki-*

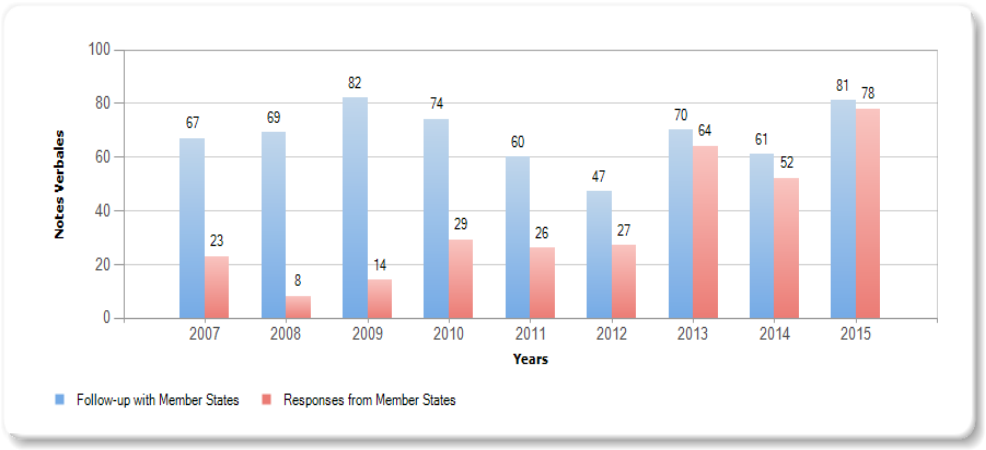
[39] http://www.aljazeera.com/news/2016/01/struck-sex-abuse-allegations-car-160106042447336.html (downloaded: 05 January 2016).

[40] http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/video (downloaded: 05 January 2016).

moon set up an independent investigation panel in June 2015, led by former Canadian Supreme Court Justice *Marie Deschamps*, which has concluded its report on 17 December 2015. The Deschamps Report is the first of its kind to state the responsibility of a head of mission, while also listing measures to avoid further violations.[41] There has been considerable interest from the side of politicians as well, as during the September 2015 Peacekeeping Summit, US President *Barack Obama* named eliminating SEA in peacekeeping missions a top priority, which may signal a shift in the interest of the international community, which is an absolute necessity to implement any possible solutions into practice.[42]

Whether the recent events signal the first breakthroughs in the matter or remain ripples in the pond of UN peacekeeping, remains to be seen.

ANNEX I
STATISTICS – UN FOLLOW-UP WITH MEMBER STATES
(SEXUAL EXPLOITATION AND ABUSE)



Source:
https://cdu.unlb.org/Statistics/UNFollowupwithMemberStatesSexualExploitationandAbuse.aspx (downloaded: 05 January 2016)

[41] http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf (downloaded: 05 January 2016).

[42] https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-un-peacekeeping-summit (downloaded: 05 January 2016).

ANNEX II
SEXUAL EXPLOITATION AND ABUSE ALLEGATIONS BY CATEGORY OF PERSONNEL

	Military	Non-Military*	UN Agency Staff	Total
Personnel deployed in UN peacekeeping operations	87,538	31,253	No total #s of staff provided	Total cannot be calculated
'Allegations' by category**	24	27	28	79
Percentage of all 'allegations' of sexual exploitation and abuse by category of peacekeeping personnel	31%	34%	35%	100%

Sources: UN DPKO, Peacekeeping Fact Sheets / Conduct and Discipline Unit, Department of Field Support. Statistics

Source: http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/sexual-exploitation-and-abuse (downloaded: 10 January 2016)

THE THEORETICAL AND PRACTICAL QUESTIONS OF THE CRIME OF SEXUAL EXPLOITATION IN THE HUNGARIAN CRIMINAL LAW

ALEXANDRA NAGY*

Introduction

Violent sexual offences always were and will be in the criminal law in consideration of the fact that these are very serious types of crimes. However, the rules of criminal law depend on the international and EU requirements and the current merits of the society, so they change constantly both in their content and in the language of the regulation.[1] The Hungarian Criminal Code which was in force until 30th June 2013 regulated two offenses among violent sexual crimes namely the rape (Section 197) and the sexual assault (Section 198). On the one hand the Act C of 2012 (hereinafter: the new Criminal Code), in order to adapt to the international requirements, overruns the dogmatic system[2] of Act IV of 1978 (hereinafter: the old Criminal Code), and in the frame of the crime of sexual exploitation (Section 196) protects specially the sexual liberty. On the other hand the earlier practical problems, which arised from the separated regulation of rape and sexual assault were eliminated by the legislator in such a way that the new Criminal Code regulates the aforementioned offences in the same statutory definition, called sexual violence (Section 197).

This study brings into focus the theoretical analysis, principally the problem of the ways of perpetration, and the practical application of the crime of sexual exploitation which is a *novum* compared to the former regulation. The author investigates the possible problems namely the interpretation, enforcement and constitutional law problems of the sexual exploitation.

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[1] Gál, István László: A szexuális bűncselekmények az új magyar büntetőjogban [The Sexual Offences in the New Hungarian Criminal Law]. 115-127. In: Elek, Balázs – Háger, Tamás – Tóth, Andrea Noémi (eds.)*: Igazság, ideál és valóság. Tanulmányok Kardos Sándor 65. születésnapja tiszteletére [Justice, Ideal and Reality. Studies in Honour of Sándor Kardos's 65th Birthday]*. Debrecen, 2014. p.115.

[2] Franczia, Barbara: A nemi önrendelkezési jog és a szexuális kényszerítés – Elemzés és javaslat *de lege ferenda* [The Right of Sexual Self-determination and the Sexual Exploitation – Analysis and Proposal *de lege ferenda*]. 165-174. *Jog, Állam, Politika,* Vol 6. (2014) No. 1, p. 165.

The Antecedents of the Constitution of Sexual Exploitation (Section 196)

According to the "old" Criminal Code (Criminal Code, Act 4 of 1978), the rape and sexual assault were punishable, when any person had forced another person to have sexual intercourse or sodomy by violence or imminent threat against life or bodily integrity. So the former practice qualified sexual act accomplished without the voluntary consent of the victim but without the effect of qualified duress as coercion, so we did not have a sexual crime which would have punished the so-called "non-consenting" sexual activities. The new Criminal Code brought significant changes because it punishes the sexual extortion as sexual exploitation more seriously than as a special case of coercion.

Although the crime of sexual exploitation is unprecedented in the Hungarian criminal law, it does not mean that the need for a special offense which would have penalized conducts punished now in the frame of sexual exploitation in the Criminal Code in force, had not appear in the earlier literature and among legislators. While preparing the "old" Criminal Code it occurred that the legislator would have had to create a new offense apart from the cases of sexual violence, highlighting it from the statutory definition of the crime of coercion, where the duress would not have achieved the rate required to rape or sexual assault. Those cases belong here, when the perpetrator enforces the sexual relationship by threatening for example with existential disadvantage or disadvantage related to family life.[3] The "old" Criminal Code, despite the plans, did not set out the sexual exploitation from the crime of coercion, but the new Criminal Code did it in order to suit for the international requirements.

According to the ministerial explanation of the new Criminal Code, the legislator shifted into the direction, which was required by the inland and foreign women right protecting organizations and the rulings of the Istanbul (CAHVIO) Convention[4] and Recommendation R (2002)5 of Committee of Ministers of the Council of Europe to member states on the protection of women against violence, when they enacted the crime of sexual exploitation; because the force of another person to perform or tolerate sexual activities incorporates all conducts when the passive subject does not give permission voluntarily and freely to the sexual activities, but under duress.[5] The cited international documents declare that parties shall take the necessary legislative or other measures to ensure all non-consensual sexual activities, if they are intentional conducts, are criminalised. They declare again, that consent must be given voluntarily as the result

[3] See Merényi, Kálmán: A nemi erkölcs elleni bűncselekmények pönalizálásának fejlődése a felszabadulástól a hatályos rendelkezésekig [The Progress of the Penalty of the Crimes against Sexual Morality from the Liberation to the Operative Provisions]. *Jogtudományi Közlöny,* Vol. 41 (1986) No. 1, 20-22.

[4] Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V. 2011

[5] The ministerial explanation of the Act C of 2012 to the Chapter 19th p. 483

of the person's free will assessed in the context of the surrounding circumstances.[6] According to the ministerial explanation of the Act C of 2012, the crime of sexual exploitation is suitable to found the criminal liability only on the lack of consent, corresponding with the international requirements.[7] Some authors do not agree with that argument. They reference to that the statutory definition of sexual exploitation does not make it clear, whether the legislator would like to punish the lack of consent, so there is a risk that a narrower interpretation will be dominant in the practice.[8] This is supported by the report of the CEDAW Commission, which gives expression to that "While noting the new provisions on rape in the Criminal Code, the Committee remains concerned about the use of violence, threats and coercion, which continue to be elements of the statutory definition of rape rather than the lack of voluntary consent by the victim."[9] Further on, by the practical cases and by the summary, the author will expose her own opinion as well.

Moreover, the reason of the creation of the new offense was to satisfy the regulations of the Directive 2011/93/EU and the Lanzarote Convention, which provided increased protection for children against sexual activities. The Directive 2011/93/EU (the date of implementation was December 18th 2013) Article 3 paragraph 5 and paragraph 6, furthermore the Lanzarote Convention (which was signed by Hungary on November 29th 2010) Article 18 point b) of paragraph 1 penalize sexual activities with a child, where:

- abuse is made of a recognised position of trust, authority or influence over the child;
- abuse is made of a particularly vulnerable situation of the child, in particular because of a mental or physical disability or a situation of dependence;
- coercion, force or threats are used.

[6] See in more detail: Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V.2011, Article 36 – Sexual violence, including rape. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e (Date of download: 20 February 2016) and Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence (Adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies) Criminal law 34., 35. https://wcd.coe.int/ViewDoc.jsp?id=280915 (Date of download: 20 February 2016).

[7] The ministerial explanation of the Act C of 2012 to the Chapter 19th p. 484.

[8] See for example: Gilányi, Eszter: A szexuális kényszerítés tényállása az Isztambuli Egyezmény rendelkezéseinek fényében [The Crime of Sexual Exploitation in the Light of the Rulings of Istanbul Convention]. *Miskolci Jogi Szemle,* Vol. 10. (2016) No. 2, p. 126.

[9] CEDAW/C/HUN/CO/7-8 United. Nations. Committee on the Elimination of Discrimination against Women. Concluding observations on the combined seventh and eighth periodic reports of Hungary, adopted by the Committee at its fifty-fourth session (11 February – 1 March 2013) Article 20. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/HUN/CO/7-8&Lang=En (Date of download: 28 January 2016).

- Coercing, forcing or threatening a child into sexual activities with a third party shall be punishable, as well. [10]

The Theoretical Analysis of the Crime of Sexual Exploitation

The legal object of sexual exploitation is the sexual liberty, the sexual self-determination.[11] It can be considered the injury of the sexual self-determination in essence, when somebody takes another people into sexual activities against the will of that person. Although the sexual self-determination, as a part of personality rights, is not featured in the catalogue of the fundamental rights, but it is an elemental part of another fundamental right: the dignity of the human being. The sexual liberty, what is synonymous definition for the sexual self-determination, has three substantial partial rights, which are a) *the freedom of the development of sexual identity*, b) *the practice of sexual activities which are suitable for the sexual identity*, and c) *the liberty of choosing the situational elements of the sexual activities*. The latter involves the liberty of choosing partner, and the liberty of deciding that where, when, how and what kind of sexual activities to have with the partner.[12] Injury of any component means the injury of the legal object.

The perpetrator's conduct is to force another person to perform or tolerate sexual activities, and the relationship of the two conducts is a purpose-instrument relationship. The instrument-conduct is the force (which means duress, coercion, concussion or compel)[13]. This is an activity, due to which the passive subject acts according to the will

[10] See The ministerial explanation of the Act C of 2012 to the Chapter 19th p. 484, Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA and Council of Europe Convention Protection of Children against Sexual Exploitation and Sexual Abuse, the so-called: Lanzarote Convention.
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0093-20111217&from=HU) and
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e1e1 (Date of download: 28 January 2016).

[11] Jacsó, Judit: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények [Chapter XIX. Crimes against Sexual Freedom and Sexual Morality]. 169-203. In: Horváth, Tibor – Lévay, Miklós (eds.): *Magyar Büntetőjog. Különös Rész [Hungarian Criminal Law. Special Part]*. Complex, Budapest, 2013. p. 170.

[12] Szomora, Zsolt: *A nemi bűncselekmények egyes dogmatikai alapkérdéseiről.* [On Some Dogmatic Questions of the Crimes against Sexual Morality]. Ph.D. Thesis, SZTE Faculty of Law and Political Sciences. 2008. p. 123.

[13] The official English translation of the new Hungarian Criminal Code uses the definition "force" both by the force, which means duress, coercion, concussion or compel and by the force too, which means rape, violence. I would like to ascertain, when henceforward the force appear as way of perpetration, it means rape, violence. When the definition "force" shall be construed as one element of the perpetrator's conduct, it means duress, coercion, concussion or compel.

of the perpetrator and not his/her own will.[14] The purpose-conduct is the sexual activity. If the use of force is not aimed at the sexual activities, the crime of sexual exploitation cannot be determined. [15]

The question of the ways of perpetration is really problematic, because both the sexual exploitation and the sexual violence, which is the more serious crime, punish the force to perform or tolerate sexual activities[16]; but while the legislator declares that sexual violence can only be perpetrated by force[17] or threat against the life or bodily integrity of the victim,[18] it remains silent about the ways of perpetration in the case of sexual exploitation. At least this is said by some views. The viewpoint of the specialized literature is divided on the issue of whether the statutory definition of sexual exploitation contains ways of perpetration or not, and if not, what is/are the implicit ways of perpetration of sexual exploitation. The author summarizes the essence of the

[14] Sinku Pál: A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények – Btk. XIX. Fejezet [Crimes against Sexual Freedom and Sexual Morality – Criminal Code. Chapter XIX.] 189-221. In: Busch, Béla (ed.): *Büntetőjog II. Különös rész [Hungarian Criminal Law. Special Part]*. HVG-ORAC Lap- és Könyvkiadó Kft, Budapest, 2013, p. 192.

[15] Court Decision 1997. 108.

[16] Criminal Code Paragraph 196 (1) and paragraph a) point 197 (1).

[17] The *force* can aim at a person or a thing. But in case of the violent sexual offences the force suits to the frame of sexual exploitation only when the perpetrator realizes force, which aims at a person. In connection with the concept of force we must make a distinction between the will-breaking force, vis absoluta and the will-bending force, vis compulsiva. The vis absoluta is the expression of physical force, which has directly influence on someone and breaks resistance. A typical example is a strike with fist. In case of vis compulsiva the force is not compelling, but for the violent sexual offences force bending the will, vis compulsive, is sufficient. For example a slap in the face. I would like to highlight, that the force and the violent conduct are not synonym category. The violent conduct which trend towards a person can materialize with the simple touch of the body of the injured, when this conduct is aggressive. See 34/2007 and 71/2008. Criminal College Decision.

[18] The definition of the *threat* is defined by the point 7 of the paragraph 1 of Article 459. According to that "threat shall mean - save as otherwise provided - a declaration of intention to cause considerable harm (this is the objective side) so as to make the person who is the target of the threat fearful by such a declaration" (this is the subjective side) In accordance with the juridical practice we must regard the declaration of intention of such conducts as considerable harm, which can be evaluated as crime. The declaration of intention of legal behaviour can be evaluated as considerable harm, when someone would like to use this to enforce miscarriage. A declaration of intention to cause considerable harm must be suitable to make the person who is the target of the threat fearful by such a declaration. We can this investigate this on the basis of the concrete circumstances and the knowledge of the person of injured. The fear is serious when the person who is the target of it thinks that the supervention of the considerable harm declared by the perpetrator is real and because it is unfavourable for him/her, he/she would like to avoid it. The objective and subjective criteria must be investigated as complex and interference with each other, so collectively. We speak about qualified threat, when the threat is committed against the life or bodily integrity of the victim and it is direct.

possible approach modes and then the author focuses on what, in her opinion, may be the criticism of these approach modes.

The possible approaches of the question of ways of perpetration:

Approach 'A'

"The force of another person to perform or tolerate sexual activities constitutes a crime, when the perpetrator commits this by the way of perpetration determined in the frame of the statutory definition of sexual exploitation, so by force or threat. The force can only bend the will of the subject (vis compulsiva)."[19]

The author thinks that the statutory definition does not contain explicit way of perpetration, because the text of the statute does not say *in concreto* that the crime can be committed by force or threat. It says only that any person who forces another person to perform or tolerate sexual activities is guilty of a felony. However, when we start up with the ministerial explanation, we can conclude that the general definition of sexual exploitation is the crime of duress (Section 195) and this contains ways of perpetration, which are not else then the force and the threat. When we approach from this direction, the force and the threat, as implicit ways of perpetration are possible. But in my view we must take account of that the statutory definition of sexual violence[20] evaluates ways of perpetration, and this includes the force.

When we start up from this, then we have the conclusion, that because the force is the way of perpetration of a more serious crime, of the sexual violence, when force happens the right qualification is sexual violence and not sexual exploitation in all cases. By the ascertainment of the sexual violence the force does not have to affect as *vis absoluta*. So in the viewpoint of the present study, if the perpetrator realizes compulsive force, the sexual violence is the right qualification and not the sexual exploitation.

Approach 'B'

The new Criminal Code does not evaluate ways of perpetration. However, when we start up from the statutory definition of the general crime of duress, then we can conclude that the sexual exploitation can be realized typically with force or threat, but we cannot exclude other ways of perpetration. In this viewpoint, the conduct of the perpetrator suits in the frame of sexual exploitation in all cases, when the perpetrator forces the injured to have sexual activities by such a way which do not realize sexual violence yet. Namely the sexual violence is the more serious crime, which expects the

[19] Sinku: *op. cit.* p. 193.

[20] Sexual Violence - Section 197 (1) Sexual violence is a felony punishable by imprisonment between two to eight years if committed: *a)* by force or threat against the life or bodily integrity of the victim; *b)* by exploiting a person who is incapable of self-defense or unable to express his will, for the purpose of sexual acts.

ascertainment of the sexual exploitation on the basis of the principles of specificity and consumption, if *quasi* technical cumulation occurs.
The crime can be perpetrated with the next typical ways of perpetration: (a) with threat, which is not direct; (b) with threat, which does not aim at the life or bodily integrity of the victim; (c) with force, which does not break the will, (not *vis absoluta*), but bends the will (vis compulsiva); (d) other modes, which are not qualified neither as force nor as threat." [21]

As opinion the author can confirm that what has been described: so the force is the way of perpetration of sexual violence. To support this, this paper refers to that the statutory definition of sexual violence came into being with the contraction of the crime of rape and sexual assault, and it requires henceforward the force or threat against the life or bodily integrity of the victim as ways of perpetration. By the rape and sexual assault, which is partial antecedents of the crime of sexual violence, the force had not got to effect to the passive subject as *vis absoluta*, the crime could materialize with compulsive force. [22] The author thinks that it is acceptable, that the crime can materialize other ways as well which are not qualified neither as force nor as threat, because when the perpetrator can materialize the crime only with "simple" threat, then the legislator presumably would have used the category of threat and not the force.

Approach 'C'

The statutory definition of sexual exploitation does not contain ways of perpetration, as against the duress, which is the general the statutory definition of sexual exploitation.

Therefore, the assignation is wrong, which says that the sexual exploitation can be perpetrated by force or threat, which are determined in the frame of the crime of sexual exploitation. When we set against the statutory definition of sexual exploitation and the sexual violence, we can establish *a contrario* the following conclusions: the way of perpetration of sexual exploitation is the "simple" threat, which cannot aim against the life or bodily integrity of the victim, or it can aim against the life or bodily integrity of the victim, but in that case it cannot be direct. But we cannot perpetrate the crime with force.

Considering that the threat is not a defined way of perpetration in the statutory definition, but only implicit, we might not use the legal definition of the threat by the sexual exploitation, particularly regarding to the comparatively restrictive components of the legal definition. Consequently, with regard to the sexual exploitation, the threat means a declaration of intention to cause harm so as to make the person who is the

[21] Gál: *op. cit.* 119-120. and Tóth, Mihály – Nagy, Zoltán: *Magyar Büntetőjog. Különös rész [Hungarian Criminal Law. Special Part.]* Osiris Kiadó, Budapest, 2014. p. 130-131. The chapter was written by Gál István László.

[22] Berkes, György – Julis, Mihály – Kiss, Zsigmond – Kónya, István – Rabóczki, Ede: *Magyar büntetőjog. Kommentár a gyakorlat számára [Hungarian Criminal Law. Commentary for the Practice].* HVG-ORAC, Budapest, 2002. 595.

target of the threat fear. Compared to the legal-definition of the threat, this approach mode broaden the scope of the conducts which can be evaluated in the frame of sexual exploitation, because by this definition we leave that the harm is considerable and the fear is serious. This wider interpretation of the threat harmonizes with the Council of Europe Convention on preventing and combating violence against women and domestic violence, so with the Istanbul Convention, which bases the criminal liability only on the miss of the consent."[23]

This approach meets the requirements which this paper has set out formerly, but the author thinks that it goes too far by the interpretation of the concept of threat since we can find the legal definition of threat in the Criminal Code. According to this, "threat shall mean - save as otherwise provided - a declaration of intention to cause considerable harm so as to make the person who is the target of the threat fearful by such a declaration." So, according to the definition, the threat has constitutive elements and this is that the harm is considerable and the threat is fearful. In my opinion, irrespectively of the fact that the threat is not a defined way of perpetration in the statutory definition of sexual exploitation, but it is an implicit way of perpetration, the legal definition of threat is applicable and the scope of the conducts, which we can evaluate in the statutory definition of the crime, cannot be extended with discretion.

Although this approach would like to adapt to the international requirements, the approach is not a most sufficient one, which wants to diverge from the legal definition of threat, because in accordance with the definition of Criminal Code the constitutive elements of the threat are the considerable harm and the fearful threat.

Approach 'D'

The definition of force with regard to the sexual exploitation incorporates all conducts under which the passive subject is disposed to have sexual activities without voluntarily consent. This may be will-bending force, namely *vis compulsiva* but cannot be will-breaking force, namely *vis absoluta*. This is also the case if the threat does not tend against the life or bodily integrity of the victim, but it foresees considerable harm, which affects other rights or interests, for example the loss of the workplace; or when the threat is not direct.

Compared to this in criminal law

- the crime of duress (Section 195) suppose the realization of force or threat, which does not tend against the life or bodily integrity of the victim, but it is direct, or threat, which tends against the life or bodily integrity of the victim, but it is not direct;

[23] Szomora, Zsolt: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények [Chapter XIX. Crimes against Sexual Freedom and Sexual Morality]. 403-431. In: Karsai Krisztina (ed.): *Kommentár a Büntető Törvénykönyvhöz [Commentary to the Criminal Code]* Complex Kiadó, Budapest, 2013. 40.

- the crime of sexual exploitation (Section 196) misses the force, but supposes the threat, which does not tend against the life or bodily integrity of the victim, but it is direct; respectively it tends against the life or bodily integrity of the victim, but it is not direct;
- the crime of sexual violence (Section 197) supposes the force or the threat, which tends against the life or bodily integrity of the victim, but it is direct. Respectively the crime can be established failing of this, when the passive subject did not attain the age of 12 years."[24]

In this approach, the author notifies the conflict, because the sexual exploitation can be realized with compulsive force, thus the author maintains that the force is the way of perpetration of the sexual violence and is not of the sexual exploitation.

Approach 'E'

„In the light of the delimitation from the crime of sexual violence, the way of perpetration of the sexual exploitation can be only the "simple" threat. Therefore, the assignation is wrong which says that ways of perpetration determined in the statute are the force and the threat. On the one hand the statutory definition does not contain explicit way of perpetration, and on the other hand the implicit way of perpetration of the sexual exploitation is the threat. By the use of force we must establish sexual violence."[25]

With this approach the paper can identify that has been revealed by the other approach modes as criticism. The author would like to supplement it only with that in my opinion, next to the threat, other way of perpetration is thinkable, seeing that the legislator uses the concept of force, which means more than the threat anyway.

Approach 'F'

The sexual exploitation means conceptually only psychic influence, which has the consequent that the passive subject acts differently from his/her true will by being a participant of the sexual activity. According to the representative of this approach, it is problematic too, whether we can regard the sexual exploitation as the special case of the duress at all. Namely when we start up with the concept of force defined in the Criminal Code, then the way of perpetration, also by the force of another person to perform or tolerate sexual activities, is the force or the threat, because the statutory

[24] Márki, Zoltán: A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények [Chapter XIX. Crimes against Sexual Freedom and Sexual Morality]. 679-712. Kónya, István (ed.): *Magyar Büntetőjog: Kommentár a gyakorlat számára [Hungarian Criminal Law. Commentary for the Practice]*. 679-713. Third Print. HVG-ORAC Lap- és Könyvkiadó Kft, 2013. p. 682-683.

[25] Szomora, Zsolt: Megjegyzések az új Büntető Törvénykönyv nemi bűncselekményekről szóló XIX. Fejezetéhez [Comments to the Chapter XIX about the Sexual Crimes of the New Criminal Code]. 649-657. *Magyar Jog*, Vol. 60 (2013) No. 11, 649-657.

definition of duress designates this ways of perpetration. The duress as way of perpetration, regulated in the Criminal Code under Section 196 suggests that the sexual exploitation can be realized with force or threat. But this is not correct, when we take into consideration the crime of sexual violence.[26]

This approach formulates it right, that the force cannot be the way of perpetration of the sexual exploitation, but the author thinks that the sexual exploitation, considering the conclusion, which we can *a contrario* deduct from the statutory definition of sexual violence, that when a more serious crime, in the case of question the criminal offense of sexual violence evaluates the force as way of perpetration, then if other statutory elements of sexual violence realizes too, that crime will be established, is evaluated as the special case of the duress, also in attention to the ministerial explanation of the new Criminal Code. With the creation of the crime of sexual exploitation the purpose of the legislator likely was to punish the cases of the so-called "sexual blackmail" (which were valued earlier in the frame of duress) as a more seriously qualified, independent crime in comparison with the statutory definition of duress.

To sum up the above-mentioned, the attitude of the paper is the next: reckon with that the crime of sexual violence, which has more serious judgment then the sexual exploitation, evaluates ways of perpetration, and these include the force, the right qualification is the sexual violence and not the sexual exploitation, when the perpetrator realizes force. However, the author thinks that the threat has a place among the ways of perpetration of the sexual exploitation, seeing that the sexual violence which is more seriously judged defines only the threat which tends against the life or bodily integrity of the victim, so the qualified threat as a way of perpetration. We must start up with the explanatory direction declared in the Criminal Code in relation to the definition of threat. This definition says: 'threat' shall mean - save as otherwise provided - a declaration of intention to cause considerable harm so as to make the person who is the target of the threat fearful by such a declaration. But, the sexual exploitation can be realized otherwise than threat too, because the approach adapts the best to the international requirements, which says, that the force by the statutory definition of sexual exploitation incorporates all conducts, under those the passive subject is disposed to have sexual activities without voluntarily consent.

As it marks out from the referred approaches, it is not obvious, that "since when", and "till when" the practitioner qualifies the given action as sexual exploitation and what is the line, when we already speak about sexual exploitation, and till when we can speak about sexual exploitation, and what is the line, when sexual violence already happens. And this raises the constitutional and practical problems of the not correct law-determination and of the overlap of the perpetrator's conducts. [27] To highlight the

[26] Franczia: *op. cit.* 169.
[27] Franczia, op. cit., p. 171.

constitutional law problems of the regulation (going to come to the practical problems by the explanation of the practical cases) first it is worth referring to that the principle of legal certainty, which is connected closely with the concept of the rule of law, requires that the complex legal system, the part-territories of the legal system, and all statutes of the law must be clear, unequivocal, calculable regarding to the effect and foreseeable for the recipients of the statutes. In the criminal law calculability and foreseeability requires both the sturdiness of the disposition describing the criminally prohibited conduct, and the clear declaration of the will of the legislator regarding the perpetrator's conduct. [28] The Constitutional Court dealt with the question of the legal certainty in many decisions, among others in the Constitutional Court Decision 37/2002. (IX. 4.), wherein it declares, that (...) „The recipients of the Criminal Code are usually everybody. But the recipients must know what the message of the legislator is, no matter what it is." (…) And in the Constitutional Court Decision 11/1992. (III. 5.) the judicial body takes sides as follows: "The legal certainty requires such clear and unequivocal formulation of rules, that everybody, who are touched, can be aware of her/his legal-situation, can regulate to it her/his verdicts and conducts, and can reckon with the legal-consequences." Evidently all these do not realize by the crime of sexual exploitation.

The new statutory definition is an intangible delict,[29] namely the exertion of perpetrator's conduct realizes for itself the crime, so the occurrence of any result is unnecessary. But in the literature we can meet with contrary viewpoint too, that says, the sexual exploitation is materialistic delict, and the result is the performance or toleration of sexual activities, which is contrary with the will of the passive subject.[30] The paper presents that that approach is more relevant, which assess the sexual exploitation as intangible delict, in regard to itself the crime does not evaluates result.

The subject as offender of the crime can be anybody, same-sex or opposite-sex person as the injured. The passive subject can also be anybody, independently of sex, physical condition and state of development, morality. The crime can be perpetuable only deliberately, namely regarding the orientation of the force, only with direct intention (*dolus directus*).

The qualified cases: by the creation of the crime of sexual exploitation the legislator took into consideration that international documents regard typically the age of 18 years as the upper bound of the childhood. That is why the statutory definition provides increased criminal defense to these persons, thereby that it threatens the perpetrator with more serious penalties, when the crime is committed against a person under the

[28] See Pócza, Róbert: Az erőszakos közösülés tényállása az „alkotmányos büntetőjog" tükrében [The Statutory Definition of Rape in the Mirror of the "Constitutional Criminal Law"]. *Magyar jog*, Vol. 52 (2005) No. 1, p. 16-17., and Constitutional Court Decision 37/2002. (IX. 4.) and Constitutional Court Decision 11/1992. (III. 5.)

[29] Gál: *op. cit.* 120., Jacsó: *op. cit.* 172.

[30] Sinku: *op. cit.* 193.

age of eighteen years. The passive subject of this qualified case can be the person ages between fourteenth-eighteen years. The intent of the perpetrator must comprehend the age of the passive subject. It is an even more seriously qualified case, if sexual exploitation is committed against a person under the age of fourteen years. It is also a qualified case, if the sexual exploitation is committed by a family member or against a person who is in the care, custody or supervision of the perpetrator, or receives medical treatment from him/her, or if abuse is made of a recognized position of trust, authority or influence over the victim.

The sexual exploitation is a special crime compared to duress regulated in the Section 195. The specialty comes about that the intent of the crime of duress is the sexual activity in the statutory definition of sexual exploitation. The cumulation of the sexual exploitation and the sexual violent is only quasi cumulation. We can distance the sexual exploitation from the sexual violence on the ground of way of perpetration; if it realizes force or threat against life or bodily integrity of the victim, we must to state sexual violence. The sexual exploitation can stand in real cumulation with battery (Section 164). The sexual exploitation assimilates the violation of personal freedom, which attends with the sexual exploitation. But when the violation of personal freedom separates from it in space and time, the cumulation of the two crimes is not *quasi*, but real.[31] In this case the violation of personal freedom is not qualified as committed by malice aforethought or malicious motive at the same time, in regard to the principle of *ne bis in idem*.[32]

The base case of sexual exploitation, which is sanctioned in Article (1) 196 is punishable only with the private motion of the injured. The legal policy cause of this direction is the protection of the injured.[33] But it should be highlighted that when an *ex officio* prosecuted crime is committed too in close substantive and temporal correlation with the base case, than the base case is punishable in default of private motion too. [34]

[31] Court Decision 2001. 448., Court Decision 2001.2., Court Decision 1991. 91.

[32] Court Decision 1991. 97.

[33] Constitutional Court Decision 37/2002. (IX.4) Justification III. 2.2. paragraph 2: "Requiring a private complaint for the punishment of forceful sexual acts serves the purpose of protecting the victim's privacy. It is within the scope of competence of the legislature to decide if it gives priority to punishing unconditionally those who commit sexual crimes over sparing victims the trauma of a trial. It is up to the legislature to select the criminal offences where substantive criminal law provides for exemptions from the criminal law principle of legality, and it has to specify the cases, among sexual crimes, where such exemptions apply - with consideration to sparing the victim - if it deems such exemptions justified. Therefore, the legislature is to decide on the basis of the mutually relative importance of public interest (the State's obligation to prosecute crime) and private interest (sparing the victim and respecting the victim's private sphere). It may decide that in specific cases of certain criminal offences, private interest shall prevail over public interest, i.e. punishment shall be conditional upon private complaint, or it may decide that the principle of legality in the classical sense shall have primacy."

[34] Court Decision 1998. 214.

The Practical Application of the Crime

Regarding to the novelty of the statutory definition, this crime has rather small practical use. But the author has found three practical cases.

According to the facts of the *first case*, the accused committed the sexual exploitation against his daughter. As stated in the accusation the man caressed, fingered his daughter, who loaded the age of fourteen years, and he had sexual intercourse with her several times. The injured told, that she was indicative for the accused more times, that "leave me alone!", but she did not defend in any way or forms against the action of her father. It happened only, that she tried to push the man away, but she could not. At another times she said nothing to her father, and she did nothing, because she dare not. The injured had told in her narration that her relationship with her father was not uncloudy, but she was not afraid of him, rather she was scared from the shame that what will be, if other people find out what happened to her.

As it is clear from the practical case, the defendant performed sexual activities with her daughter several times. The defendant did not use neither force, neither will-breaking (*vis absoluta*) nor will-bending (*vis compulsive*), nor threat tending against the life or integrity of the victim (qualified threat) was not occurred, but the sexual activities were against the will of the injured, because she asked her father to stop it and she wanted to push the man from herself, so the passive subject did not give the permission voluntarily and freely to the sexual activities. On the strength of the statutory definition the right qualification is the sexual exploitation.

In *another case* the Public Prosecutor's Office accused the defendant for the crime of sexual exploitation against a person under the age of eighteen years who, according to relevant historical facts, slept in the bed being naked next to the injured in the bedroom of the X. number's house, the defendant wreathed his right hand round the girl and pressed her down, while he was stroking her and pushing his sex organ to her bottom. The injured woked up her mother, sleeping in the same bed, who called the defendant to go back to the couch. The correct classification of the act is sexual exploitation, because according to the view of the Public Prosecutor's Office, the act of the defendant did not go to the frame of the crime of sexual violence, which can be committed with force or qualified threat. [35]

In the *third case* the Public Prosecutor's Office accused the defendant for the crime of sexual exploitation and other crimes, which were committed against a person who was in the care of the defendant and under the age of fourteen years. As per the relevant facts the defendant pushed his foster daughter off several times; he pulled off

[35] The author think it is an interesting question that how we can evaluate the act of the defendant that he pressed down the injured. In that case we cannot speak about force yet, but a sort of violent conduct was realized either way. And this raises the problem, "till when" we can speak about sexual exploitation and what is the demarcation, when the conduct of the defendant is appraisable as sexual violence, which has a more serious valuation.

her clothes and had sexual activities with her. The injured tried to push the defendant from herself, but the defendant spread the victim's legs. The defendant stopped the act, because the injured shouted and cried louder and louder. The Court qualified the action as sexual violence, differently from the qualification declared in the accusation, referring on the one hand to that the force: the push-off of the injured, the split of her legs etc., is not the way of perpetration of the sexual exploitation, but the sexual violence; and on the other hand to that the force does not have to be compelling to state sexual violence. Will-bending force (*vis complusiva*) is enough in cases of violent sexual offences affecting sexual freedom.

This case attests that the theoretical problem of the question of ways of perpetration, which the author suggested in the theoretical analysis of the statutory definition of sexual exploitation, is an existent practical problem, and it is not clear, that "till when" the practitioner can qualify the given action as sexual exploitation, and what is the line, when we have to analyze the criminal relevance of sexual violence.

Summary

The legislator, by constituting the statutory definition of sexual exploitation, complies with the requirements of international documents and women-protecting organizations, which found the responsibility on the missing of the consent. In case of appropriate legal practice, as it appears from the first case, the statutory definition is suitable to realize this. As reported in the cited case, the passive subject sometimes expressed orally, that she did not want to have sexual activities with the perpetrator, but in other times this verbally expressed "no" was missing, too. The action qualified as crime anyway, namely sexual exploitation, which shows that the statutory definition of sexual exploitation is capable to fulfill the requirements of international documents, which declares the respect of verbally expressed will of the injured in relation with sexual activities. This progress is definitely commendable.

But the author thinks that the „indeterminacy" of the regulation in force, as it marks out from the case, which has been reviewed in connection with sexual violent, can raise on the one hand dogmatic and on the other hand practical problems. So it is not fortunate, that the legislator did not define specifically the way of perpetration in the frame of the statutory definition of sexual exploitation or did not refer by any unequivocally mode to what is expected to realize the crime. In my opinion definitions incorporated to the Criminal Code or at least a decision ensuring uniformity that declares in concreto what to mean by force in the apropos of sexual exploitation would be a solution to the problem. It would ease the work of law enforcement bodies and ensure that with the same crime the same qualifications shall be born. So we can live down on the requirements of legal certainty too.

The following definition may be a solution, it is the de lege ferenda suggestion of the author: Criminal Code Paragraph 4 Section 196: „In the apropos of sexual

exploitation force is meant by threatening (Criminal Code Point 7. Paragraph 1 Section 459) and such a conduct - except for force (meaning rape and violence) - when the victim does not give his or her approval to the sexual act freely but under duress providing that sexual violence is not realised."

CONDITIONAL RELEASE AND REAL LIFE IMPRISONMENT

ANITA NAGY*

The European Court of Human Rights has condemned Hungary for its adoption of real life imprisonment (also known as whole life imprisonment),[1] and in response to this criticism, Hungary has made modifications to its presidential pardon system. Before considering the new provision in greater detail, it is helpful to take a more general look at the presidential pardon.

The problem of prison overcrowding is a prominent issue in the literature. An example of this problem is illustrated in Figure 1.

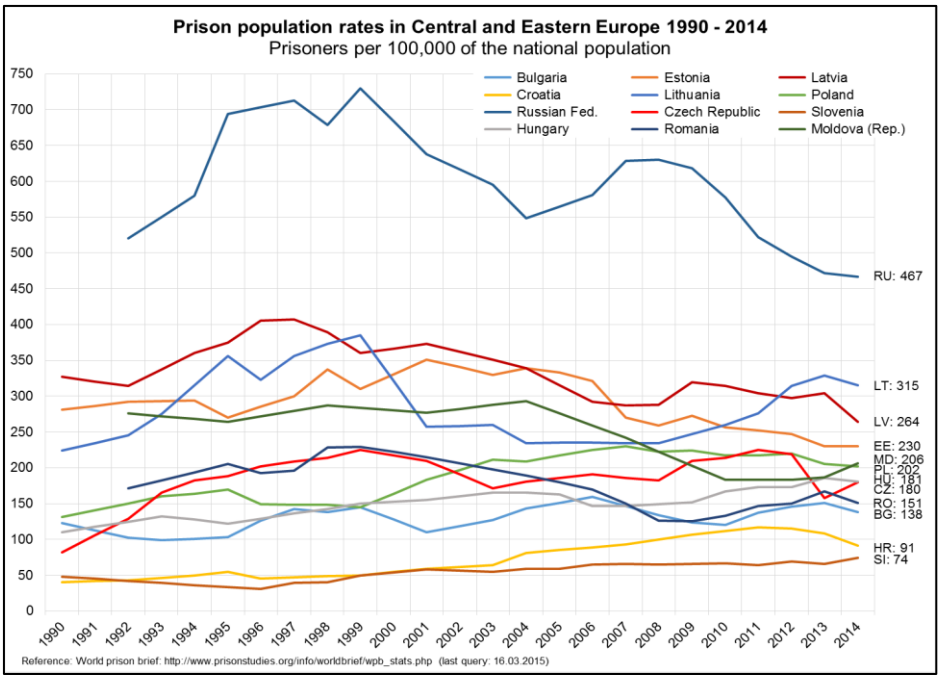

Figure 1. Comparison of prison population rates for Central and Eastern European nations, 1990-2014.

As is now well understood, a connection exists between prison overcrowding and the available methods of release from prison. In Hungary release from prison can occur in several ways:

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[1] Case of Magyar v. Hungary, 73593/10 – Judgement (Third Section) 20, May 2014.

- - completion of the term of imprisonment;
- - conditional release;
- - interruption of imprisonment (temporary);
- - presidential pardon and
- - reintegration custody (from 1 April 2015).

The presidential pardon is a discretionary power. There are two types of presidential pardon; a public pardon known as amnesty and an individual pardon (clemency). Each of these can further be divided into two categories, procedural and enforcement pardons.

The public pardon can be granted by the Parliament[2] and applies to a certain group of either the accused or the imprisoned. Further, an amnesty is usually connected with observing symbolic or political events, for instance, in order to commemorate the death of former prime minister and martyr *Imre Nagy*, a public pardon was granted to a number of prisoners in honour of his death. However, this article focuses on the system for individual presidential pardons in Hungary.

The Procedure for an Individual Presidential Pardon

According to article 9, paragraph (4), section (g) of the Fundamental Law of Hungary the President of the Republic has the right to grant individual pardons.[3] "The President of the Republic shall (g) exercise the right to grant individual pardon." The minister responsible for justice is responsible for the following: i) preparing the case, with the help of the Pardon Department, and ii) endorsing or countersigning the decision made by the President.

There are two ways to initiate the pardon procedure: it can be requested, or it can be initiated through official channels. In the case of a petition, the prisoner, the defence lawyer, the legal representative of a minor, or a relative of the accused or prisoner can apply for a pardon.[4] Under these circumstances the petition for a pardon must be submitted to the court of first instance.[5] Upon submission, the court gathers the necessary documents, for instance the opinion of the probation officer, family environment survey, police reports, and the opinion of the penitentiary institution. The court then sends the documents (the charge, the sentence, medical reports and a pardon form)[6] to the minister within thirty days.

[2] Péter Váczi*:* Kegyelem! A közkegyelem intézményéről és a semmisségi törvényekről. (Pardon! About the Amnesty and the Rules of Nullity). Tanulmányok a 70 éves Bihari Mihály tiszteletére. Szerk.: Szalay Gyula – Patyi András. Universitas-Győr Nonprofit Kft., Győr, 2013. 553.

[3] Case of Magyar v. Hungary, 73593/10 – Judgement (Third Section) 20, May 2014.

[4] *A*ct XIX of 1998, Section 597. (3) on the Hungarian Criminal Procedure Code.

[5] Act XIX of 1998, Section 597. (4) on the Hungarian Criminal Procedure Code.

[6] Degree of Ministry of Justice 11/2014. (XII. 13.) Section 123.

However, what happens when the minister does not support the application for a pardon? Where this is the case, the minister is required to send the documents to the President of the Republic, as well as the minister's negative opinion. If there are medical reasons, it is possible for the minister to postpone or interrupt the punishment.

What Does a Declaration of Pardon Entail?

In the case of imprisonment, the text reads, for example, "the remainder of the punishment is suspended for X years on probation." Further, the President's decision consists of a number of different features:

1. Above all, the president has discretionary power to decide.
2. The President of the Republic shall not discuss the reasons for granting or denying a pardon.
3. The opinion of the minister does not bind the president.
4. The decision becomes effective only with the endorsement of the minister.

Measures taking place after the endorsement.[7]

The court of first instance delivers the decision on the pardon to the prisoner. While there is no legal remedy against the decision, it is possible to submit a new request for pardon. According to the data issued by the Pardon Department for the period between January 1, 2002 and March 31, 2015, approximately 98% of the requests for pardon were refused.[8]

Year	*granting a pardon (+)*	*denying a pardon (-)*	*total*	*per cent (%)*
2002	24	1126	1150	2,09
2003	36	1187	1223	2,94
2004	41	1225	1266	3,24
2005	23	1316	1339	1,72
2006	23	1146	1169	1,97
2007	23	1355	1378	1,67
2008	27	772	799	3,38
2009	17	894	911	1,87
2010	5	866	871	0,57

[7] The document of presidential pardon: http://igazsagugyiinformaciok.kormany.hu/tajekoztato-az-altalanos-kegyelmi-eljarasrol.

[8] http://igazsagugyiinformaciok.kormany.hu/admin/download/9/48/21000/Kegyelmi%20%C3%BCgyek%20statisztika%2020020101-20150930.pdf (28 October 2015).

2011	16	935	951	1,68
2012	8	548	556	1,44
2013	12	976	988	1,21
2014	4	749	753	0,53
2015	8	171	179	4,47
Total	139	987	1126	1,97

Table 1. Pardon Department for the period between January 1, 2002 and March 31, 2015

Having laid out the procedural aspects of an individual presidential pardon, what follows from the results of an empirical study that was carried out with the permission of the Pardon Department of the Ministry of Justice.[9] Several dozen legal cases were analysed based on the following factors:

- the crime committed;
- the sentence;
- the reason for the request;
- the opinions from the relevant sources;
- whether the request was recommended for a presidential pardon.

The next table shows a sample case from the study[10] in Table 1.

Type of crime	Sentence	Reason for request	Attached opinions	Recommendation
Multiple cases of fraud	3 years 10 months imprisonment	Medical reason - paralysis due to a serious accident	Opinion of hospital: he saved the life of a person; Opinion of prison: good behaviour, frequently rewarded	Approval

Table 2. Factors examined in the study of presidential pardon petition.[11]

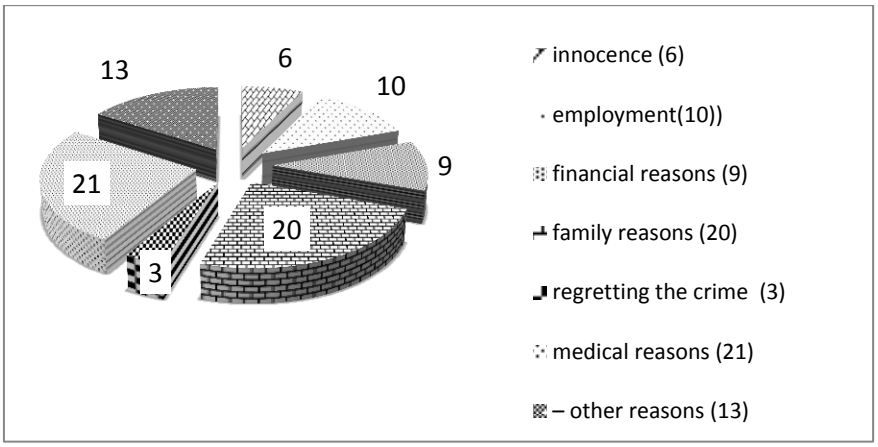
Figure 2 shows the distribution of the reasons for requesting pardon.[12] As we can see, the most frequent reasons given are medical reasons and family reasons.

[9] *Research number*: Igazságügyi Minisztérium Kegyelmi Főosztály (Ministry of Justice, Pardon Department) number: XX-KEGY/44/1/2015, 2015 January .

[10] *Research number*: Igazságügyi Minisztérium Kegyelmi Főosztály (Ministry of Justice, Pardon Department) number: XX-KEGY/44/1/2015, 2015 January .

[11] Made by the author herself, 12 June 2015. Miskolc, Conference in the honour of Prof. Dr. Tibor Horváth.

[12] Other reasons included, for instance, fear, good behaviour, and advanced age.



Real Life Imprisonment

Although most states that have abolished the death penalty have accepted life imprisonment as an appropriate alternative.

From March 1, 1999 the sentence of 'real life imprisonment'[13] came into force in Hungary.[14] According to paragraph 44 (1) of the Penal Code of Hungary, real life imprisonment is applicable to a list of certain types of cases. In eighteen cases the judge can use his/her judgement, including the following: genocide, crimes against humanity, apartheid, etc. In two cases, real life imprisonment is compulsory[15]: a) multiple recidivism with violence, or (b) those who committed the crimes from the list above in a criminal organization. In another case when a person sentenced to life imprisonment commits a further crime, they are sentenced to life imprisonment again. In this case the actual sentence must be real life imprisonment.[16]

In Hungary today there are two hundred and seventy-five people sentenced to life imprisonment, and of these only forty have been sentenced to real life imprisonment (not all of these are final decisions).[17]

[13] *Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole) recommends*: a "the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners." Life-sentence prisoner is one serving a sentence of life imprisonment.

[14] *Act IV* of 1978 Section 45. on the Hungarian Criminal Code, as in force since 1 March 1999, provided as follows: "(1) If a life sentence is imposed, the court shall define in the judgment the earliest date of the release on parole or it shall exclude eligibility for parole. (2) If eligibility for parole is not excluded, its date shall be defined at no earlier than 20 years. If the life sentence is imposed for an offence punishable without any limitation period, the above-mentioned date shall be defined at no earlier than 30 years." As in force at the material time and until 30 June 2013 when it was replaced by Act C of 2012 on the Criminal Code: "Imprisonment shall last for life or a definite time."

[15] *Act C* of 2012 on the Hungarian Criminal Code Section 44 (2).

[16] *Act C* of 2012 on the Hungarian Criminal Code Section 45 (7).

[17] http://www.jogiforum.hu/hirek/32833. (11 November 2014).

The European Court of Human Rights in the Case of Vinter and others v. The United Kingdom[18] emphasizes, that there are currently nine countries where life imprisonment does not exist: Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. The maximum term of imprisonment in these countries ranges from twenty-one years in Norway to forty-five years in Bosnia and Herzegovina. In Croatia, in a case of cumulative offences, a fifty-year sentence can be imposed.

In the majority of countries where a sentence of life imprisonment may be imposed, there exists a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period fixed by law. Such a mechanism, integrated within the law and practice on sentencing, is foreseen in the law of thirty-two countries: Albania (25 years), Armenia (20), Austria (15), Azerbaijan (25), Belgium (15 with an extension to 19 or 23 years for recidivists), Bulgaria (20), Cyprus (12), Czech Republic (20), Denmark (12), Estonia (30), Finland (12), France (normally 18 but 30 years for certain murders), Georgia (25), Germany (15), Greece (20), Hungary (20 unless the court orders otherwise), Ireland (an initial review by the Parole Board after 7 years except for certain types of murders), Italy (26), Latvia (25), Liechtenstein (15), Luxembourg (15), Moldova (30), Monaco (15), Poland (25), Romania (20), Russia (25), Slovakia (25), Slovenia (25), Sweden (10), Switzerland (15 years reducible to 10 years), the former Yugoslav Republic of Macedonia (15), and Turkey (24 years, 30 for aggravated life imprisonment and 36 for aggregate sentences of aggravated life imprisonment).

There are five countries in Europe which make no provision for parole for life prisoners: Iceland, Lithuania, Malta, the Netherlands and Ukraine. These countries do, however, allow life prisoners to apply for commutation of life sentences by means of ministerial, presidential or royal pardon. In Iceland, although it is still available as a sentence, life imprisonment has never been imposed.

In addition to England and Wales, there are six countries which have systems of parole but which nevertheless make special provision for certain offences or sentences in respect of which parole is not available. These countries are the following: Bulgaria, Hungary, France, Slovakia, Switzerland and Turkey.

Long-Term Imprisonment and Human Rights

There is a range of legal instruments by international organizations with provisions that either addresses the treatment and protection of person deprived of their liberty, or they are relevant for this group of the population because they have more general approach and regulate a variety of situations.[19] The prohibition of torture and inhuman

[18] Case of *Vinter and others v. The United Kingdom*, 66069/09, 130/10 and 3896/10 – Judgement (Third Section) 9 July 2013.

[19] Drenkhahn, Kirstin: International Rules concerning Long-term Prisoners, In: *Long-Term*

or degrading punishment or treatment is not only a prominent right in the Universal Declaration of Human Rights (UDHR),[20] the International Covenant on Civil and Political Rights (ICCPR)[21] but it is also part of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR)[22] as well as the purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[23] and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).[24]

In European Union the rules on long-term imprisonment are primarily concerned with the protection of human rights of prisoners and originates from the Council of Europe and its bodies and not from the European Union (EU). Even so, there have been significant developments with regard to human rights protection in the EU. In 2009, the Charter of Fundamental Rights[25] of the EU entered into force together with the Treaty of Lisbon, which means that there is now a legally binding set of human rights provisions for the EU by the EU (Art. 6(1) of the Treaty of the European Union).[26] However, the relevance of the Charter for prisoners` rights is still at best limited because although it addresses the EU institutions, bodies, offices and agencies and the member states, they are only bound by the Charter when they are implementing EU law (Art.51 (1). There was admittedly, an attempt to instigate the drafting of a European Charter of Prisoner`s Rights by the European Parliament in 2004 and resolution that called for strengthening prisoners. Thus, there is still no significant EU law on the treatment of prisoners.[27]

Then main actor in the promotion of human rights on the European level has been the Council of Europe, which consists of 47 member states including all EU member states. All Council of Europe member states have signed and ratified the ECHR. This Convention is the basic legal text of the Council of Europe as the protection of human rights is, in addition to the development of democracy in Europe, the main aim of this organisation. Not only does the ECHR grant all persons within the jurisdiction of the signatory states individual rights and freedoms, it also provides for an individual

Imprisonment Human Rights (eds: Drenkhahn, Kristin –Dudeck, Manuela – Dünkel, Frieder), Routledge, 2014. 31.

[20] UDHR, G.A.Res 217A (III), 10 December 1948.

[21] ICCPR, G.A. Res 2200A (XXI), 16 December 1966, entry into force 23 March 1976.

[22] ECHR, 4 November 1950, CETS 005, entry into force 3 September 1953.

[23] UNCAT, G.A. Res 39/46, 10 December 1984, entry into force 23 March 1987.

[24] ECPT, 26 November 1987, CETS 126, entry into force 1 February 1989.

[25] EU Charter of Fundamental Rights (2010/C 83/02) on 7 December 2000, updated version of 12 December 2007, entry into force 1 December 2009.

[26] Treaty of Lisbon (2007/C 306/01) of 13 December 2007, entry into force 1 December 2009.

[27] European Parliament Recommendation to the Council on the Rights of Prisoners in the European Union (2003/2188(INI), 9 March 2004, P5_TA(2004)0142, European Parliament Resolution on Detention Condition in the EU (2011/2897(RSP), 15 December 2011, P7_TA(2011)0585.

complaints procedure (Art. 34 of the ECHR) that may be instigated by any person, non-governmental organization or group of individuals who claim that their rights laid down in the ECHR have been breached by a state party. There are two additional mechanism for substantiating good as well as undesirable practices in prison and thus for setting standards: *recommendations to member states* and the work of the European Committee for the Prevention of Torture an Inhuman or Degrading Treatment or Punishments (hereinafter: CPT). The CPT was set up under Art.1 of the ECPT and started to work in late 1989 (CPT 1991:§7). The ECPT provides that the CPT as a mentoring body shall establish and regulate the CPT`s organisation, competence and work. The most important recommendation concerning the conditions of confinement for long-term prisoners are Rec(2006)2 in the European Prison Rules (EPR) and Rec (2003)23 on the management by prison administration of life sentence and other long-term prisoners (Recommendation on long-term prisoners). Among the wide range of recommendation concerning the deprivation of liberty, the recommendation Rec(82)17 concerning custody and treatment of dangerous prisoners Rec(82)16 on prison leave and Rec.(2003)22 on conditional release are the most relevant ones.

The CPT fulfils its preventive task through visits to all places within the jurisdiction of member states where persons are deprived of their liberty. It has unrestricted access to these places and may talk to inmates in private (Art.8 ECPT). After visit the CPT enters into dialogue with the state party about its findings and any consequences in the state. The Committee drafts a report of the delegation`s observations with recommendation to the state party. Although the European Court of Human Rights (ECtHR) and the CPT have different mission, the ECtHR uses the work of the CPT and has relied on visit reports in cases of alleged violation of Article 3 of the ECHR.

Whole Life Sentences and European Human Rights Jurisprudence

In the context the context of a life sentence, Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." It must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. However, the European Court of Human Rights would emphasize that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. It can clearly be stated that the comparative and international law materials before the ECtHR show clear support for the institution of a

dedicated mechanism guaranteeing a review *no later than twenty five years* after the imposition of a life sentence, with further periodic reviews thereafter.

It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.[28]

In Case of *Kafkaris v. Cyprus*[29]*,* the ECtHR held that there had been no violation of Article 3 of the Convention. Concerning the length of the detention, while the prospect of release for prisoners serving life sentences in Cyprus was limited, this did not mean that life sentences in Cyprus were irreducible with no possibility of release. On the contrary, such sentences were both *de jure* and *de facto* reducible. A number of prisoners serving mandatory life sentences had been released under the president's constitutional powers and life prisoners could benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment. Accordingly, although there were shortcomings in the procedure in place and reforms were under way, the applicant could not claim that he had been deprived of any prospect of release or that his continued detention – though long – constituted inhuman or degrading treatment.[30]

In Case of *Vinter and others v. The United Kingdom*[31] the Grand Chamber of the European Court of Human Rights ruled that all offenders sentenced to life imprisonment had a right to both a prospect of release and review of their sentence. Failure to provide for these twin rights meant that the applicants had been deprived of their right under Article 3 of the European Convention on Human Rights. The *Vinter and others judgement* stated "if a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable."

Two principle established in this judgement require changes in the enforcement of whole life orders that prevent some prisoners sentenced to life terms from being considered for release. (1) Implicit in the right to a prospect of release is a right to an opportunity to rehabilitate oneself; and (2) Implicit in the right to review of the continued enforcement of life sentence is a right to review that meets standards of due process.[32]

[28] Life imprisonment, in: *Factsheet ECtHR*, October 2015, 1.
[29] Case of *Kafkaris v. Cyprus,* 21906/04-Judgement (Third Section) 12 February 2008.
[30] Factsheet, ibid.
[31] Case of *Vinter and others v. The United Kingdom*, 66069/09, 130/10 and 3896/10 – Judgement (Third Section) 9 July 2013.
[32] Van Zyl Smit, Dirk – Weatherby, Pete – Creighton, Simon: Whole life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done? *Human Rights Law Review*, 2014, 59.

The impact of this case: it does not prohibit actual whole life imprisonment for adult offenders convicted for murder in light of Article 3 of the ECHR. Rather, it prohibits life imprisonment for adults only if there is no clarity under which conditions and when there is the possibility of reducibility of the sentence.

Since the Grand Chamber made this judgment, the issue of whole life orders returned to the Court of Appeal of England and Wales in the case of *McLoughlin*.[33] The Court found that the Secretary of State's discretion was limited to "exceptional grounds", which must be read in a way that is compatible with Article 3 of the ECHR. The Court was, therefore, of the opinion that English law did present the possibility of release even where a whole life order had been imposed and so did not violate the ECHR.

In 2015, the ECtHR in the Case of *Hutchinson v. UK* [34] confirmed that imposing whole life sentences on prisoners does not breach Article 3, where the national court in *McLoughlin* determined that the law in England and Wales is clear as to "possible exceptional release of whole-life prisoners" by the Secretary of State. Note, however, that life without parole still violates Article 3, and "whole life sentences" have to allow the possibility of release.

In Case of *Magyar v. Hungary*[35] the European Court of Human Rights held that the sanction of life imprisonment as regulated by the respondent state, which is *de jure* and *de facto* irreducible, amounts to a violation of the prohibition of degrading and inhuman punishment as prohibited by Article 3 of the ECHR. This is because it denies the convict any hope of being released in the future.

The judgment was challenged by the Hungarian government, but the request for referral to the Grand Chamber was rejected. The judgment became final in October 2014. The Court reinstated its previous case law and as a point of departure emphasized that the imposition of life sentences on adult offenders for especially serious crimes such as murder is not in itself prohibited by or incompatible with the ECHR (paragraph 47). The Court pointed out that there were two particular but related aspects to be analysed. First, the ECHR will check whether a life sentence was *de jure* and *de facto* reducible. If so, no issues under the Convention arise (paragraphs 48 and 49). Second, in determining whether a life sentence was reducible, the Court will ascertain whether a life prisoner had any prospect of release. Where national law affords the possibility of review of a life sentence, this will be sufficient to satisfy Article 3, irrespective of the form of the review.[36] Prisoners are entitled to know at the start of their sentence what

[33] *R v. McLoughlin, R v. Newell*: Court of Appeal, Criminal Division [2014] EWCA Crim 188, Criminal Justice Act 2003 (procedure for setting minimum terms of imprisonment in relation to mandatory life sentences).

[34] Case of *Hutchinson v. United Kingdom,* 57592/08 3 – Judgement (Third Section) February 2015.

[35] Case of *Magyar v. Hungary,* 73593/10 – Judgement (Third Section) 20, May 2014.

[36] Life sentence prisoners should not be deprived of the hope to be granted release. Firstly, no one can reasonably argue that all lifers will always remain dangerous to society. Secondly, the

they must do to be considered for release and under what conditions, including the earliest time of review (paragraph 53).

The government tried to argue that the possibility of presidential pardon made the execution of the sentence in practice reducible, but the ECHR did not accept this argument.[37] The Court also noted that the human rights violation was caused by a systemic problem, which may give rise to similar applications, and therefore suggested a legislative reform of the review system for whole life sentences. Hungary took two important steps in its response to the ECHR judgment: i) Hungary introduced a mandatory pardon procedure, where a convict has spent 40 years of his sentence, and ii) Hungary established a Committee in charge of Pardon decisions.

1. Convict has served 40 years of his/her sentence (and has declared that he/she wishes to request the compulsory pardon procedure)[38]
2. The minister must carry out the procedure within 60 days.
3. The minister informs the leader of the Curia, who appoints the five members of the Pardon Committee.[39]
4. The majority opinion must be made within 90 days[40] in an oral hearing (examining medical status, behaviour, risk ranking, etc.).
5. The opinion must be sent to the President within 15 days, and the President then decides whether to grant the pardon. The final step is the endorsement of the minister responsible for justice.
6. If a pardon is not granted at this time, the procedure must be repeated in two years.[41]

Regarding the declaration of the ECHR, the Hungarian Constitutional Court made a declaration on April 17, 2014 (No. III/00833/2014) and a Council of the Curia (Büntető Jogegységi Tanácsa) issued a declaration on July 1, 2015 (No. 3/2015. BJE). Regarding the compulsory presidential pardon procedure, these declarations stated that the Hungarian legal system now was in compliance with the requirements set forth by the European Court of Human Rights.

detention of persons who have no hope of release poses severe management problems in terms of creating incentives to co-operate and address disruptive behaviour, the delivery of personal development programmes, the organisation of sentence-plans and security. Countries whose legislation provides for real life sentences should therefore create possibilities for reviewing this sentence after a number of years and at regular intervals, to establish whether a life-sentence prisoner can serve the remainder of the sentence in the community and under what conditions and supervision measures. In: Explanatory Memorandum on Recommendation (2003)22 on conditional release (parole).

[37] The Government submitted that the applicant's life sentence was reducible both *de iure* and *de facto*; he had not been deprived of all hope of being released from prison one day. They argued that his sentence was therefore compatible with Article 3 of the Convention.

[38] Act CCXL of 2014 on the Hungarian Criminal Enforcement Code Section 46/B

[39] Ibid. Section 46/D

[40] Ibid. Section 46/F

[41] Ibid. Section 46/H

Conclusion

A new system for a compulsory presidential pardon procedure has been put into place to comply with the ECHR requirements. However, it can be argued that these measures are not sufficient to meet the requirements of the ECHR, because the requirement for the *endorsement of the minister* responsible for justice introduces a political element into the decision to grant a pardon. *Secondly*, neither the Minister of Justice nor the President of the Republic had to give sufficient reason for their decision about such requests. *Thirdly*, the ECtHR said that "the comparative and international law materials before the Court show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty five years after the imposition of a life sentence, with further periodic reviews thereafter." However, that means 40 years in Hungary now.

THE INFLUENCE OF THE CONCEPT OF HUMAN RIGHTS UPON THE POLICY OF DEATH PENALTY IN CHINA

HUANG GUI*

The issues of human rights and death penalty in China had always drawn the international human rights groups, critics' attentions. From the international level, "international protections of human rights have increased dramatically in the last century, due in part to the increased recognition that a number of nations share many fundamental legal values and expectations."[1] And due to the human rights movements and international efforts, many countries have already abolished death penalty *de facto* as well as *de jure*. According to the Amnesty International report, 'more than two-thirds of countries in the world have now abolished the death penalty in law or practice (as of December 31), 98 countries have already abolished death penalty for all crimes, and 58 countries are still the retentionist in terms of death penalty).[2]

For the Chinese own level, with the international trend, the Chinese government, combining the universal principles of human rights and the concrete realities of China, has made unremitting efforts to promote and safeguard human rights. The realization of human rights is the broadest sense has been a long-cherished ideal of mankind and also a long-pursued goal of the Chinese government and people.[3] For the past over three decades, China has participated in the international human rights system by signing and partly ratifying a range of human rights treaties or covenants. In 2004, the Constitution of the People's Republic of China (PRC) amended to include the guarantees for human rights, which is stipulated by the Article 33 (3), "the State respects and protects human rights."[4] Chinese government is argued by this amendment to be a progress for the democracy and protection of human rights in China, and it also marked that the human rights has become the constitutional rights,

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[1] Bassiouni, M. Cherif: Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions. *Duke Journal of Comparative & International Law*, Vol. 3 (1993), No. 2, p. 235.

[2] Amnesty International: Death Sentences and Executions 2014, April 1 2015, Index number: ACT 50/0001/2015, p.64.

[3] See Information Office of the State Council of PRC: 国家人权行动计划（2009-2010年）[National Human rights Action Plan of China (2009-2010)], http://www.humanrights.cn/html/2014/3_0605/26.html (8 November, 2015).]

[4] 中华人民共和国宪法 [The Constitution of PRC], Article 33.

and protecting human rights has already become one of great significant tasks of the Chinese government.

In terms of death penalty, Chinese legislators are also driven by the influence of human rights to reform execution system. "The criminal legislation regarding death penalty and its implementation is one of important marks that the level of human rights protected by a state."[5] Just as *Jeremy T. Monthy* pointed out, "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights."[6]

However, China is still a retentionist state in terms of death penalty, but it is developing domestic criminal law toward the international trend that "there can be little doubt that our world is inexorably moving towards being execution-free."[7] In this case, the death penalty policy plays a significant role in controlling the legislation and use of death penalty in practice, and it is greatly influenced by the human rights. In other words, the death policy can implement the human rights protection through controlling the legislation and the use of death penalty. Basic on this point, this paper would like to explore the death penalty policy under the influence of human rights in China since the human rights concepts were introduced into China in the 1980s.

The Development of Human Rights in China and its Requirements

The Brief Development of Human Rights in China

"Human rights as value are rooted in the historical development of human society, being theorized by both natural law doctrine and the doctrine of positivism"[8], but in China, "for several decades in the People's Republic of China's history, human rights were regarded as a concept of the West."[9] Under the influence of the Maoist and ideology, "it used to be an exclusion zone for the human rights in China. In a quite long time after the founding of China, it was not only for the concept of human rights cannot be found in the constitution law and other laws, but the issues of the human

[5] Zhao Bingzhi: 论中国刑事司法中的人权保障 [Human Rights Guarantee in Chinese Criminal Justice]. *Journal of Beijing Normal University (Social Sciences)*, Vol.195 (2006), No. 3, p.102.

[6] Monthy, Jeremy T.: Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC. *Texas International Law Journal*, Vol. 33 (1998), Issue 1, p.192.

[7] Bannister, Piers: The Death Penalty: UN Victory Puts Total Abolition within Our Grasp. *International Review of Law Computers & Technology*, Vol. 22 (2008), No.1-2, p.165.

[8] Pavel, Nicolae: Defining the Concept of Human Rights in the Light of Juridical Values Theory. *Contemporary Readings in Law and Social Justice*, Volume 4 (2012) p.508.

[9] Men, Jing: Between Human Rights and Sovereignty: An Examination of EU—China Political Relations. *European Law Journal*, Vol.17 (2011), No. 4, p. 542.

rights were also deemed as the exclusion zone in the research areas of the ideology and theories as well.[10]

The concepts of human rights was introduced into China and wildly discoursed by the Chinese scholars was in late of 1980s and 1990s, and after that, the provision of protecting human rights was included in the Constitution of PRC in 2004. Meanwhile, "China has actively participated in the international human rights regime"[11], and until the end of 2012, has already signed 26 international human rights treaties, including the three important closely related to criminal punishment in international treaties, namely, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: CTOCIDTP, signed on December 12, 1986 and ratified on October 4, 1988); the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR, signed in 1997 and ratified in 2003) and the International Covenant on Civil and Political Rights (hereinafter: ICCPR, signed in 1998)[12], in fact, "China is a party to most of the core international human rights treaties."[13]; and up to the end of 2012, China had drawn up a Constitution and many other laws, of which a total of 243 are currently in effect; in this way, the framework of human rights law under socialism with Chinese characteristics has been continuously enriched and perfected. [14] Meanwhile, 'human rights groups regularly issue scathing reports condemning China for widespread human rights violations'[15], which give international stress to China government and make it to shift outlook on human rights and improve the human rights situation. All these, on the one hand, require Chinese government to carry out corresponding international responsibility; on the other hand, the government gradually notices the importance and value of individual human rights.

In addition, the Communist Party of China's[16] annual political documents also emphasize on human rights protection. In the 16th National Congress of Communist

[10] See Tian Xingchun, **从**废除"**收容遣送**"**到**"**人**权入宪"[From the Abolitions of "Housing and Repatriation" to "Human Rights Written into the Constitution Law"], http://legal.people.com.cn/n/2012/0913/c42510-19001375-2.html, (8 November, 2015).

[11] Peerenboom, Randall: Assessing Human Rights in China: Why the Double Standard? *Cornell International Law Journal*, Vol. 38 (2005) p.78.

[12] See National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, A/HRC/WG.6/17/CHN/1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/159/47/PDF/G1315947.pdf?OpenElement (09 November, 2015).

[13] Sonya Sceats with Shaun Breslin: China and the International Human Rights System, Programme Report, Chatham House, https://www.chathamhouse.org/publications/papers/view/186781 (09 November, 2015).

[14] See National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, (09 November, 2015).

[15] See Peerenhoom: *op. cit.* 72.

[16] The Communist Party of China (CPC) is the founding and ruling political party of the People's Republic of China. Under the Constitution of China, the CPC is the governing party of China, although it coexists alongside eight other legal parties that comprise the United

Party of China (dated back to 2002), the former President of China, *Jiang Zemin* in his report stated 'human rights are respected and guaranteed' and he also stated that 'we should uphold and improve the system of people's congresses and ensure (…) their legislation and policy decisions better embody the people's will.'[17] In the 17th CPC's National Congress (in 2007), the former President of China, *Hu Jintao* also emphasized that 'we must respect and safeguard human rights, and ensure the equal right to participation and development for all members of society in accordance with the law.'[18] In the 18th CPC's National Congress (in 2012) *Hu Jintao* stated that, 'the rule of law should be fully implemented as a basic strategy, a law-based government should be basically in function, judicial credibility should be steadily enhanced, and human rights should be fully respected and protected.'[19] In 2013, the 4th Plenary Session of the 18th Central Committee of CPC launched its Decision on Some Major Issues Concerning Comprehensively Deepening the Reform, and it states that 'promoting rule of law' and emphasizes on that 'improving the judicial system to protect human rights'.[20] In 2014, the 4th Plenary Session of the 18th Central Committee of CPC passed Decision Concerning some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward, and it states again that, 'Strengthen the judicial protection of human rights; Strengthen the consciousness on respecting and protecting human rights in all of society, complete channels and methods to obtain relief for citizen's rights.'[21] All of these, to a great extent, show the shifting of the Chinese government's attitude toward human rights and judicial protecting all members' human rights is attached gradually importance to in the post Deng-era.

Front.

[17] Jiang, Zemin: 'Build a Well-off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics 2002, Section V, http://en.people.cn/features/16thpartyreport/16thpartyreport5.html (19 March, 2016.)

[18] Hu, Jintao, 'Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in all Respects, Scientific Outlook on Development, [website], 2007, p.12. http://news.xinhuanet.com/english/2007-10/24/content_6938749_11.htm, (19 March, 2016).

[19] Hu Jintao, 'Firmly March on the Path of Socialism with Chinese Characters and Strive to Complete the Building of A Moderately Prosperous Society in All Respects', 18th CPC National http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_4.htm, (19 March, 2016).

[20] Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform, http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm, (20 March, 2016).

[21] **中共中央关于全面推**进依法治国若干重大问题的决定[CPC's Central Committee Decision Concerning some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward], http://www.gov.cn/zhengce/2014-10/28/content_2771946.htm, (20 March, 2016).

The Requests of Human Rights for the Death Penalty

"The death penalty is a human rights issue may seem obvious."[22] In the human rights regime, the final goal of it is to eliminate the death penalty because it was considered as the ultimate cruel, inhuman, and degrading punishment. The application of death penalty does not only deprive the criminal's right to life, but also "impinge on the rights of the third parties, such as family members of persons sentenced to death."[23] The Article 6 of ICCPR states that the right to life, which cannot be arbitrarily deprived, is of a great import fundament right for every person, and if the right to life has to be deprived in accordant with the party's national laws, "sentence of death may be imposed only for the most serious crimes."[24] Thereby implying that, the death penalty can only be imposed on the criminals who have committed a type of the most serious crimes, which "should not go beyond intentional crimes with lethal or other extremely grave consequences"[25] pursuant to Economic and Social Council Resolution 1984/50. Article 1 (2) of Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of death penalty (1989) states that "each state party shall take all necessary measures to abolish the death penalty within its jurisdiction"[26] However, China, now is still one of the retentionist states and the number of crime punishable by death should be the largest in the world. So it should progressively restrict the number of use of death penalty.

The death penalty policy is a policy and guideline that concern to the death penalty legislation and its administration. In other words, the death penalty legislation and its execution have to conform to the death penalty policy. Therefore, the death policy plays an important role in controlling and limiting the use of death penalty *de facto* and *de jure*, as well.

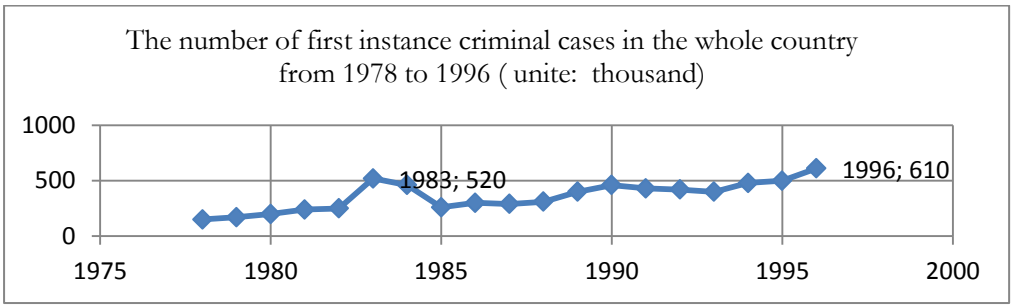
"There can be little doubt that our world is inexorably moving towards being execution-free"[27], in the case where the death penalty still plays a significant role in the criminal sanction system, China's death penalty policy should comply with this international trend and try to balance the relationship between punishing criminal and protecting human rights. In the context of controlling and limiting the use of death penalty, protecting human rights should be considered to be more important than punishing criminal.

[22] Shetty, Salil: The Value of International Standards in the Campaign for Abolition of the Death Penalty. *The Brown Journal of World Affairs*, Vol. XXI (2014), Issue 1, p.42.
[23] *Ibid.* 42.
[24] See Article 6 (2), ICCPR.
[25] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Economic and Social Council Resolution 1984/50, Article 1.
[26] See Article 1 (2), Second Optional Protocol to the International Covenant on Civil and Political Rights, Resolution 44/128, December 15, 1989.
[27] Bannister: *op. cit.* 165.

The Evolution of Death Penalty Policy Post-1979

In 1979, "China has its first Penal Code nearly 30 years after the founding of the country, which indicates the severe lag of legal system."[28] To a great extent, the 1979 Penal Code marked that the construction of rule of criminal law was entering a new phase of there are laws to abide by. In accordance with the Article 43 of 1979 Penal Code, the application condition of death penalty was that "the death penalty shall only be applied to criminals who have committed the most heinous crimes",[29] which was the basic standard of and the principle of application of death penalty. To a great extent, even though the concept of human rights in China was considered as the "exclusion zone" before 1979 Penal Code was adopted; death penalty legislation raised much more attention on protection human rights than afterwards. During that time, the death policy was that "death penalty has to be retained and be applied as little as possible and needs to prevent the execution from be done wrongly and unjustly."[30]

Shortly after the first Penal Code adopted in 1979, with implement of the reform and opening-up and economic development in China, the crime situation became very severe and public security situation faced serious challenges. From the below table, we can see the crime situation trend within the period from 1979 to 1997.



(This figure shows that the crime rate increased generally in curve style since 1978, even though it shows a decrease in a short time after the anti-crime campaign in 1983.)

For the deteriorating social environment, the Central Government of China had to apply such death penalty as the severe punishment to control over the increasing crime rate. At that time, 'the view of *Deng Xiaoping* on the death penalty could in principle represent the attitude of central government.'[31] In the regard of the social situation in

[28] Co-authored by Gao Mingxuan & Zhao Binzhi: **中国刑法立法之演**进 [The Evolution of Chinese Criminal Legislation]. *Law Press* (Beijing), 2007, p.78.

[29] Article 43, 1979 Penal Code.

[30] Chen, Xingliang: **死刑政策之法理解**读 [Death Penalty Policies: A Jurisprudential Perception]. *Journal of Renmin University of China*, 2013. No. 6, p.3.

[31] Zhang, Shouwen – Mi, Chuanyong, **中国死刑政策的**过去、现在及未来 [The Past, Now

1983, Deng Xiaoping said: 'the number of crimes, including serious ones, has increased substantially, and the people are very disturbed about it. Over the past few years, far from being checked, the tendency has grown. Why is that? Chiefly because we have hesitated to take prompt and stern actions to combat criminals and have given them very light sentences. (…). Serious offenders (...) should be severely punished according to law. A number of criminals should be executed according to law, and some others should be put behind bars for a long time (…). The only way to stop crime is to be tough about it. If we go easy, we'll lose the support of the people. This is what we mean by strengthening the people's democratic dictatorship."[32]

Based on Deng's abovementioned speech on 19 July 1983, CPC launched the Decision on Cracking severely down Crimes on August 25, 1983, which provided that 'cracking severely down crimes is a serious struggle of opposites as between us and the enemy in the political area.[33] Hence, the criminal was deemed as people's enemy.

As to death penalty, in 1986, Deng Xiaoping pointed out that the "death penalty cannot be abolished, and some criminals must be sentenced to death (…). Some of criminals must be executed, but of course we have to be very careful in such matters. Some of the perpetrators of serious economic or other crimes must be executed as required by law. As a matter of fact, execution is one of the indispensable means of education. [At this point Comrade Chen Yun remarked: executing some of them can help save many cadres. As the saying goes, execute one as a warning to a hundred."[34]

From Deng's speeches, it is obviously that Deng tended to emphasize on such death penalty as severe punishment to control crime, which differs totally from *Mao*'s attitudes toward death penalty. And the execution policy was correspondingly changed from restrictive in Maoist era to extensive application in Deng's era. For this change of death policy, one of Chinese scholars criticizes that 'the ruler expects to contain crimes and restore social order by death penalty, which has come to somewhat depend on death penalty during the process of social governments.'[35]

Chinese central government laid down the policy of "tough on crime" (*yan da*, 严打). And the death policy was changed to severe punishment. One important change was in the term of legislation. Since 1981, NPC Standing Committee had successively adopted 25 Special Criminal Laws until the present Criminal Law passed in 1997,[36] 18

and Future of Death Policy in China]. *The Law Review*, Vol. 2 (2006), p.40.

[32] Deng Xiaoping, The Selected Work of Deng Xiaoping, Vol.3, https://dengxiaopingworks.wordpress.com/2013/03/18/bourgeois-liberalization-means-taking-the-capitalist-road/ ,(20 March, 2016).

[33] CPC's Decision on Cracking Severely down Crimes, http://cpc.people.com.cn/GB/64162/64165/68640/68665/4739396.html, (20 March, 2016)

[34] Deng Xiaoping, the Selected Works of Deng Xiaoping.

[35] Chen: *op. cit.* p.4.

[36] These Special Criminal Laws include Decision on Severely Punishing Criminal Elements Seriously Endangering Public Security (September 2, 1983); Supplementary Provisions on

of which provided for the crime punishable by death. All of these Special Criminal Laws, to a great extent, brought great changes as below in term of the number of crimes punishable by death and its applicable conditions:

(1) *The number of crimes punishable by death was dramatically increased*. According to these Special Criminal Laws, 33 crimes in all can be punishable by death[37], and together with 1979 Criminal Law, the total number of crimes punishable by death is increased to around 80 before 1997 Criminal Law was passed with a staggering increment rate;

(2) *The death penalty was stipulated as an absolutely prescribed penalty by some Special Criminal Laws*. Such as the Article 2 of Decision on Strictly Prohibiting Prostitution and Whorehouse Visiting[38], the Article 1 of Decision on Punishing Criminal Elements Committing Abduction and Selling or Kidnapping of Women or Children[39], Decision on Punishing Criminal Elements Hijacking Aviation Vehicle.[40] The death penalty for these crimes was overwhelmingly prescribed;

(3) *other significant change was in the terms of judicial practice*. In temporal judicial practice, in order to crack severely down on such larceny as ordinary crimes, the relevant judicial authorities applied death penalty to these kinds of crimes through the way of making interpretation. For example, the death penalty cannot be applied for the larceny in accordance with 1979 Penal Code, but it can be, in the light of the Decision on Severely Punishing Criminals Who Seriously Undermine the Economy.[41]

However, the death policy was changed in 2006. The main reason behind this change is the provision of "state respect and protect human rights" was included by the Constitution of PRC in 2004, and in addition, the Chinese Government has already ratified the ICESCR in 2003, so the Chinese government has to carry out the relevant constitutional and international responsible of protecting human rights. On October 18, 2006, the Sixth Plenary Session of the Sixteenth Central Committee of the CPC decided that the China would implement the criminal policy of severity tempered with gentleness in the future.[42] Compare with the criminal policy of "cracking down on criminal activities which require the authorities to bring to justice as severely and fast as possible, the policy of severity tempered with gentleness requires the unification of

Cracking Down on the Crime of Smuggling (January 21, 1988); Supplementary Provisions on Cracking Down on the Crime of Corruption and Bribery (January 21,1988); Decision on Prohibiting Drugs (December 28, 1990), and so on.

[37] Gao, Mingxuan, 60years of Capital Punishment: the Evolution and Prospect of Capital Legislation of New China.

[38] NPC's Decision on Strictly Prohibiting Prostitution and Whorehouse Visiting, No. 51, 1991.

[39] NPC's Decision on Punishing Criminal Elements Committing Abduction and Selling or Kidnapping of Women or Children, No.52, 1991.

[40] NPC' Decision on Punishing Criminal Elements Hijacking Aviation Vehicles, No.67, 1992.

[41] NPC's Decision on Severely Punishing Criminals Who Seriously Undermine the Economy, March 8, 1982.

[42] News of the Communist Party of China: http://cpc.people.com.cn/GB/64093/64094/4932424.html, 2015. 1116.

leniency policy and severity policy. And this change also has an influence on the death policy, which is now changed from the "cracking down on criminal activities" to "retaining the death penalty but strictly controlling and applying the death penalty deliberately."[43] In accordance with this death policy, the judicial authorities have to restrict and control the application of death penalty.

The Present Death Policy and the Capital Punishment Reform

China has to restrict and limit the use of death penalty in the judicial practice in the light of the death penalty policy, i.e. "retaining the death penalty but strictly controlling and applying death penalty deliberately."[44] And some criminal scholars expressed this death policy as "adhere to rarely apply the death penalty and to prevent the execution wrongly"[45] and some other criminal scholars call it "rarely applying death penal and execute the death with caution."[46] In accordance with this death policy, it requires the judicial authorities to apply death penalty in two aspects, one is the judge or the court has to strictly comprehend the application conditions of death penalty provided by the Penal Code, and as far as possible to reduce the number of application of death, and make actually this punishment as a measure of last resort. Another aspect is in the terms of criminal procedure, which requires the judge and court to strictly comprehend and improve the evidence standards of death case in the light of Criminal Procedure Law, in order to sentence prudently the criminal to death. This is the present death policy of China.

Although the death penalty still plays an important role in the crime control and social governance, under the present death penalty policy, China has already amended criminal law towards limiting the execution. In 2007, a significant reform step of death penalty was firstly taken, namely, the power to review the death sentences was assumed by the Supreme People's Court of PRC from the local High Courts in every province and Military Courts on January 1st, 2007, so that the Supreme People's Court can uniformly exercise the power of reviewing and further improve the standards and conditions of evidences and procedure of sentencing death penalty. This is the first time for China to limit the use of death penalty in the judicial practice since the 1979 Criminal Law have been passed. On the one hand, this change could be due to the provision 'state respects and protect human rights' was contained into the Constitution; on the other hand, due to the criminal policy was changed in 2006 from 'cracking down on crime' to 'severity tempered with gentleness'.[47]

[43] http://www.law-lib.com/law/law_view.asp?id=310425, (11 November, 2015).
[44] Ibid.
[45] Chen: *op. cit.* 2.
[46] Zhao, Bingzhi: *Reform in Death Penalty System*. China Renmin University Press, 2014, 78.
[47] On October 18, 2006, the Sixth Plenary Session of the Sixteenth Central Committee of the CPC decided that the China would implement the criminal policy of severity tempered with

Another significant and substantial step was taken by the Eighth Amendment to Criminal Law of PRC (Hereinafter, the Eighth Amendment). In 2011, the Eighth Amendment had abolished death penalty for 13 economic and nonviolent crimes, reducing the number of crimes punishable by death from 68 to 55, and banned capital punishment for offenders over the age 75. Even though seven amendments were adopted before the Eighth Amendment, they do not involve any death penalty reform, in other words, the Eighth Amendment started a process in the course of gradually abolishing death penalty in China. Professor *Carolyn Hoyle* in UK pointed out that "important in themselves, these reforms are emblematic of China's emerging commitment to limit the scope and practice of capital punishment in stages, with, as it state to the UN Human Rights Council in 2007, the final aim of abolition."[48]

From above, we can see that in Jiang-era, China did not conduct any reform for death penalty and denied the criminal human rights, but in the Hu-era, China emphasized on putting people first as its core, and so the provision of 'state respect and protect human rights' was contained into the Constitution of China in 2006, and then the death penalty was started to be reformed by limiting the use of death penalty in judicial practice in 2007, and in 2011, by legislatively decreasing the number of crimes punishable by death. This is one of important pictures of shifting of CPC's outlook on human rights and reforming death penalty system. However, after the Eight Amendment, there were still 55 crimes punishable by death.

China comes into *Xi-era* since November, 2012, and China firstly launched its White Papers on Judicial Reform in China in this year. This White Paper explicitly states that 'China retains the death penalty, but strictly controls and prudently applies it.'[49] This is also the first time for China to state its opinion on death penalty with White Papers. In 2013, the 2013 Decision also states that 'we will gradually reduce the number of charges that could lead to the death penalty',[50] which is also the first time for China to state that abolishing gradually the death penalty by Party's report. However, in 2014, the 2014 Decision does not state about death penalty, but it states that 'promotes judicial reform', 'comprehensively constructing rule of law' and 'Strengthen the judicial protection of human rights'.[51] In the light of these Party's political documents and

gentleness in the future. See **中共中央关于构建社会主**义和谐社会若干重大问题的决定 [Decision of the CPC Central Committee on Certain Major Issues in the Building of a Harmonious Socialist Society], http://cpc.people.com.cn/GB/64093/64094/4932424.html, (21 March, 2016).

[48] The Death Penalty in China—the road to reform, https://www.law.ox.ac.uk/research-subject-groups/research-index/impact-index/death-penalty-china-road-reform, (21 March, 2016).

[49] The Information Office of the State Council of P.R.C, 'Judicial Reform in China, http://english.cpc.people.com.cn/206972/206981/8211483.html, (21 March, 2016).

[50] Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform.

[51] CPC's Central Committee Decision Concerning some Major Questions in Comprehensively

White Paper, China adopted the Ninth Amendment to Criminal Law of PRC (hereinafter: Ninth Amendment) on August 29th, 2015, which also abolished death penalty for 9 crimes and reformed the relevant death penalty system.

The Ninth Amendment pushed the death penalty reform further. All these reforms can be included as follow:

(1) *It has further reduced the amount of crimes punishable by death stipulated by specific provisions of Criminal Law*. It reduced the number of crimes punishable by death from the 55 to 46, namely, the death penalty for crimes of smuggling weapons, ammunition, crimes of smuggling nuclear materials, crimes of smuggling counterfeit currency, crimes of counterfeiting currency, crimes of raising funds by means of fraud, crimes of organizing for prostitution, crimes of forcing another person to engage in prostitution, crimes of obstructing a commander or a person on duty from performing his duty, crimes of fabricating rumors to mislead others during wartime. Thus, China has taken another solid step towards abolishing death penalty *de facto* and *de jure* by reducing the number of crimes punishable by death. However, in China, there are still 46 crimes punishable by death in the present Criminal Law, of which there are 24 crimes are in terms of nonviolence, occupying 52.2%, 22 violent crimes punishable by death, most of which are stipulated by Chapter II (10 Crimes of endangering public security) and Chapter IV (4 crimes of infringing upon citizens' right of the person) in The Specific Provisions of Criminal Law;

(2) It further improved the executive conditions of that the suspension of execution of death penalty is commuted to the immediate execution, which is of a great significant reformation for the China's present death penalty system. In accordance with the Article 2 of the Ninth Amendment, the term of previous Article 50(1) that "if it is verified that he has committed an intentional crime, the death penalty shall be executed upon verification and approval of the Supreme People's Court" is amended by the Ninth Amendment to "if he has committed an intentional crime, and of which circumstances are flagrant, the death penalty shall be executed upon verification and approval of the Supreme People's Court; if he has committed an intentional crime but the death penalty is not executed, the terms of suspension of execution of a death penalty shall be recounted again, and reported to the Supreme People's Court for the record"[52], so the system of death penalty with suspension of execution was reformed from two aspects, namely, firstly, "it raises further the thresholds of the suspension of execution of a death penalty commuted to immediate execution."[53], i.e. the previous terms of "it is verified" is amended to 'circumstances are flagrant'; secondly, it increases

Moving Governing the Country According to the Law Forward, 2014, http://www.gov.cn/zhengce/2014-10/28/content_2771946.htm,(21March, 2016)

[52] The Ninth Amendment to Penal Code of P.R.C, Article 2.

[53] Chen, Liping: **点**击中华人民共和国刑法修正案（九）草案的七大亮点[Clicking on the 7 Highlights of the Draft of Ninth Amendment to Penal Code of P.R.C.]. *Legal Daily News*, October 28, 2014. 3.

the probation period of suspension of execution, in other words, it looks like putting the criminal into a longer 'death row'[54] again.

Namely, the Ninth Amendment provides that if s/he has committed an intention crime during the probation period of suspension of execution and the circumstances are not fragrant, the death penalty shall not be executed, but terms of suspension of execution of a death penalty shall be recounted again.

Conclusion

Death penalty is one of great factors for considering human rights development. In accordance with international and Western human rights standards, China should have completely abolished death penalty like South Africa or some such Hungary, France, Germany as European states, but, in fact, unfortunately, it is still on the way. We believe that death penalty will be abolished entirely *de facto* and *de jure*, but we do not have the exact timetable. The Article 6 (1) of ICCPR provides that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

[54] Here, the death row is distinctly different from the "death row" in America where the criminal spend a long time to wait for execution; even some inmates have to spend several decades awaiting execution. But here, this death row is in the probation period, which is not less than two years. See Von Drehle, David: The Death of the Death Penalty: why the Era of Capital Punishment is Ending. *Time*, http://time.com/deathpenalty/, (21 March, 2016).

APPLICABILITY AND NEEDS FOR SHORT TERM INCARCERATION *(CUSTODIAL ARREST)*

ANDRÁS PAYRICH*

History

The so-called Csemegi Code (Csemegi Kódex), meaning Act V of 1878 set up a three-tier system for criminal activities based on their severity: felony, delict and delinquency. The Csemegi Code determinates the loss of freedom of punishment by five separate possibilities: in jail, state prison, prison, detention house or occlusion.[1]

The occlusion was the sanction of violent crimes. As for the delinquencies, they started to be regulated by Act XL of 1879 on special Penal Code (Kbtk.), the custodial arrest can be found in Article 15 of the Kbtk. among the punishments of delinquencies. Generally, the shortest time one could be incarcerated was as little as three hours. The maximum length depended on what level of legal regulation established the delinquency: two months, if by law; fifteen days if by ministerial decree; five days if by local governmental decree; three days if by a city regulation.

To replace part of the general part of the Csemegi Code, about the re-creation of the general part of the Penal Code - the Act II of 1950 (the so-called and hereinafter mentioned: Btá) remade the penalty system of Csemegi Code (appreciably simplifying) and instituted the uniform imprisonment. The Btá. regulated only one kind of imprisonment, namely the prison. It also so retained the occlusions for offence.[2]

There has been no research into custodial arrest, although it has come up as a possibility in OKRI (*National Institute of Criminology*). Right now, we can only use the relevant legal acts as foundation.

Rules in Force

Incarceration is found at Section 33. (1) point b) of the current Penal Code in effect described by Article 46. (1) and specified by the Section 111.

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[1] See Csordás Sándor – Csóti András – Garami Lajos – Müller Anikó: Szabadságvesztés végrehajtási fokozatok nélkül? (Gondolatok az új Btk. kodifikációjához) [Deprivation of Liberty without Degrees? Thoughts on the Codification of the New Criminal Code.] *Büntetőjogi Kodifikáció,* 2001, No. 2. (http://ujbtk.hu/buntetojogi-kodifikacio-2001-2/).

[2] See Csordás–Csóti–Garami–Müller: *op. cit.* 26.

Section 46.

> (1) The duration of custodial arrest shall be determined in days. The minimum and the maximum duration of custodial arrest shall be five days and ninety days, respectively.
>
> (2) Custodial arrest shall be carried out in a penal institution.

Section 111.

> The minimum duration of custodial arrest to be imposed upon a juvenile shall be three days, its maximum duration shall be thirty days.

Based on these, custodial arrest is a genre of punishment resulting in imprisonment. The Government of Hungary submitted the new Criminal Code (later known as Act C of 2012) as legislative proposal T/6958 to the National Assembly. The reasoning contains the following:

> "Custodial arrest is a punishment of imprisonment to be used in case of culprits sentencing whom to other types of punishment is deemed unreasonable due to their social, economic, family of age issues, or special prevention can be better served by this type of punishment. Custodial arrest may last from five days until ninety days. According to the Special Part, for criminal activities punishable by incarceration, custodial arrest can be set as sentence instead of imprisonment separately or in concert with other types of punishment. Should a criminal activity be punishable by custodial arrest, other types of punishment can be set instead of or beyond imprisonment."[3]

This reasoning is criticized by *Ferenc Nagy* when elaborating that based on financial situation, the more wealthy culprits can get away with a fine for something that will result in a custodial arrest for those less well-off.[4]

According to the current Criminal Code in effect, the following criminal offences can be punished by custodial arrest: i) Criminal offenses with Toxic Substances; ii) Invasion of Privacy; iii) Mail Fraud; iv) Criminal offenses with classified information; v) Misleading Authority; vi) Unlawful Refusal to Give Evidence; vii) Suppressing Exculpatory Evidence; viii) Escape from Custody; ix) Use of Symbols of Totalitarianism; x) Forgery of Administrative Documents; xi) Violation of Epidemic Control Regulations; xii) Counterfeiting of Cash-Substitute Payment Instruments; xiii) Breach of Discipline in the Line of Duty and xiv) Disobedience. Beyond these, custodial arrest may be set as sentence in case of commutation or unlimited mitigation.

[3] See Legislative proposal T/6958 on the Criminal Code http://www.parlament.hu/irom39/06958/06958.pdf (hereinafter: T/6958) 232-233.

[4] See Nagy, Ferenc: A szabadságelvonással járó szankciókról az új Btk.-ban [On Sanctions with Deprivation of Liberty]. *Börtönügyi Szemle,* 2014. 4., See in detail: http://bv.gov.hu/download/8/1a/01000/B%C3%B6rt%C3%B6n%C3%BCgyi%20Szemle%202014-4.pdf), 11.

The Act CCXL of 2013 (Bvtv.) about penalties, actions, some of coercion and misdemeanour detention implementation and Decree 16/2014. (XII. 19.) IM (Minister of Justice) about the detailed rules of imprisonment, detention, preliminary arrest and entering replaced with fines short-term prison execution – contain the following important rules relevant to the topic being discussed concerning custodial arrest:

- Custodial arrest shall take place in a penal institute appointed by law [Bvtv. Section 273 (2)],
- Implementing custodial arrest shall be performed under the governance of rules stipulated to minimum security prisons and the culprit sentenced to custodial arrest is entitled to the rights provided to imprisoned culprits [Bvtv. Section 273 (3)],
- Those sentenced to custodial arrest and those imprisoned for summary offenses can stay in the same quarters [Bvtv. Section 273 (4)],
- While performing custodial arrest, those under custodial arrest have to be separated from those imprisoned or under preliminary detention [Bvtv. Section 273 (5)],
- Those sentenced to custodial arrest shall the term of custodial arrest appointed by criminal proceedings authorities [Bvtv. Section 274 (3) a)],
- Those sentenced to custodial arrest shall keep the house order of the penal institution and perform according to the orders received [Bvtv. Section 274 (3) b)],
- Those sentenced to custodial arrest shall occasionally participate in cleaning and supply work of the penal institute without expecting remuneration [Bvtv. Section 274 (3) c)],
- Those sentenced to custodial arrest, if within school age, shall perform primary educational studies [Bvtv. Section 274 (3) f)],
- Those sentenced to custodial arrest may wear their own clothes [Bvtv. Section 275 (1) a)],
- Those sentenced to custodial arrest may keep correspondence with their relatives and the persons approved by the penal institute [Bvtv. Section 275 (1) b)],
- Those sentenced to custodial arrest may spend ten minutes using the phone, at least three times a week, while providing an opportunity of monitoring [Bvtv. Section 275 (1) c)],
- Those sentenced to custodial arrest may receive a visitor at least twice a month [Bvtv. Section 275 § (1) d)], lasting 90 minutes [16/2014. (XII. 19.) Decree of the Minister of Justice, Section 179 (3) a)],
- Those sentenced to custodial arrest may be away for 4 hours a week [Bvtv. Section 275 (1) e)],
- Those sentenced to custodial arrest may receive a parcel [Bvtv. Section 275 (1) g)],
- Those sentenced to custodial arrest may utilise the sport and public education opportunities arising in the penal institution [Bvtv. Section 275 (1) b)],
- Those sentenced to custodial arrest may stay in open air for at least an hour a day [Bvtv. Section 275 (1) i)],
- Those sentenced to custodial arrest may participate in employment and offsite work [Bvtv. Section 275 (7) a)],
- Those sentenced to custodial arrest may work together with those imprisoned [Bvtv. Section 275 (7) b)],
- During medical treatment, they don't have to be separated from the other prisoners [Bvtv. Section 99 (3) and Section 277. (2)],

- The occlusion or its remaining part cannot be executed, if following the judgment becomes final the convict after giving birth took care for the child in their own household for an year, or for at least one year child care fee or child care assistance benefits received, or five years or more time spent in pre-trial detention or imprisonment, or two years or more time spent in detention home (Bvtv. Section 278),
- During the implementation of detention the soldiers, in addition as described in the Section 273. Paragraph 5 the other convict and spending misdemeanour occlusion principal, and further the different stock group soldiers must be separated from each other [Bvtv. Section 279 (2)],
- Progressive regime rules[5] of confinement as defined in Section II. are not applicable on the convict. [16/2014. (XII. 19.) IM Decree Section 179. (1)].

The Ministerial Decree 55/2014. (XII. 5.) BM (Minister of Interior) contains the following about the premises on custodial arrest for Hungarian Citizens:

- In case of adults, custodial arrest should be performed in the competent penal institute stipulated in Appendix 4 [Section 10. (1)],
- In case of adults, if the custodial arrest cannot be performed in the competent penal institute due to lack of room, or after including preliminary detention and house arrest, there are more than fifteen days remaining from the custodial arrest, it can be performed in one of the penal institutes stipulated in section 5 of Appendix 5. [Section 10. (2)],
- In case of minors, custodial arrest should be performed in the competent penal institute stipulated in Section 3 of Appendix 5 [Section 11. (1)],
- In case of minors, if after including preliminary detention and house arrest, there are less than fifteen days remaining from the custodial arrest, it can be performed in one of the penal institutes competent according to the address of the minor and stipulated in Appendix 4 [Section 11 (2)],
- Custodial arrest of military personnel shall be performed in a separated section of the Juvenile Prison in Tököl [Section 12],
- The occlusion of non-Hungarian citizens and those who are not residing in Hungary should be carried out, the competent court imposes imprisonment seat of penal institution specified in the enclosure 4 level [Section 13 (1)]. This occlusion can be implemented in any of the Correctional Institute declared in the 5. point of enclosure 5 level. If after a preliminary detention and house arrest of imprisonment counting more than fifteen days left, or if the competent court imposing headquarters of imprisonment in the absence of capacity by the specified Correctional Institute in 4. Enclosure there is no possibility of detention for the implementation of imprisonment [Section 13. (2)].

The Appendix 4 to Decree 55/2014 (XII. 5.) BM (Minister of Interior Affairs) enumerates the penal institutions being appointed based on the address of the culprit sentenced to custodial arrest or incarceration for delinquency:

[5] The progressive regime rules are determined by 16/2014. (XII. 19.) IM Decree 33-36 §§.

Location	*Penal institute*
Budapest Capital and Pest County Komárom-Esztergom county	Central Transdanubia National Prison - Baracska (Men) Pálhalma National Prison (Women)
Baranya County	Baranya County Remand Prison
Bács-Kiskun County	Bács-Kiskun County Remand Prison
Békés	Békés County Remand Prison
Borsod-Abaúj-Zemplén County	Borsod-Abaúj-Zemplén County Remand Prison
Csongrád County	Szeged Strict and Medium Regime Prison
Fejér County	Central Transdanubia National Prison
Győr-Moson-Sopron County	Győr-Moson-Sopron County Remand Prison
Hajdú-Bihar County	Hajdú-Bihar County Remand Prison
Heves County	Heves County Remand Prison
Jász-Nagykun-Szolnok County	Jász-Nagykun-Szolnok County Remand Prison
Nógrád County	Balassagyarmat Strict and Medium Regime Prison
Somogy County	Somogy County Remand Prison
Szabolcs-Szatmár-Bereg County	Szabolcs-Szatmár-BeregCounty Remand Prison
Tolna County	Tolna County Remand Prison
Vas County	Szombathely National Prison
Veszprém County	Veszprém County Remand Prison
Zala County	Zala County Remand Prison

The Appendix 5 to Decree 55/2014 (XII. 5.) BM (Minister of Interior Affairs) enumerates penal institutions being appointed to juveniles sentenced to incarceration for delinquency, and penal institutions being appointed in cases to be stipulated in this decree.

Budapest and any county of the country	Juvenile Prison (Tököl) (juvenile men) Regional Juvenile Prison (Kecskemét) as a branch of Bács-Kiskun County Remand Prison (juvenile men and juvenile women) Pálhalma National Prison (juvenile women)
Budapest and any county of the country	Budapest Remand Prison (men and women) Állampuszta National Prison (men) Budapest Strict and Medium Regime Prison (men) Szeged Strict and Medium Regime Prison (men) Tiszalök National Prison (men) Pálhalma National Prison (women)

Assessment

Glancing at the implementation decrees on those sentenced to custodial address and the penal institutions detailed above, it is clearly visible that although those sentenced to

custodial address and those sentenced to imprisonment are not held in the same quarters, yet there is the possibility for them to meet during the day. Furthermore, if we take a look at the website of BVOP (Hungarian Prison Service) and access the website of Sopronkőhida Strict and Medium Regime Prison, we find that

> "Sopronkőhida Strict and Medium Regime Prison has a national scope. Its basic task is to perform tasks related to preliminary detention, maximum and medium regime incarceration of adult male culprits and custodial arrest as ordered by Sopron District Court. The Prison houses over 800 prisoners in different groups."[6]

Sopronkőhida does not appear in the relevant parts of the decree; furthermore, there is no minimum security prison there, something that is stipulated in Section 243 para. (3) as a starting point on a regulatory level by legislation.

In my opinion, those sentenced to custodial arrest are exposed to indeed negative "adverse effects" if meeting with prisoners, possibly spending maximum security time outside their quarters. Speaking to prisoners and prison guards reveals the fact that culprits often suffer physical, and, more often, psychical harm. Triggers thereof usually remain unknown. In such situations, the danger of those sentenced to custodial service being exposed to physical or psychical harm and atrocities due to not being completely separated from those sentenced to imprisonment is real. The danger is even more significant if a juvenile culprit has to spend custodial arrest in accordance with Section 11 (2) of Decree 55/2014 (XII.5.) BM (Minister of Interior) in a penal institution specified by Appendix 4.

There is hard to find the rationale behind military personnel being confined to the separated quarters of the Juvenile Prison (Tököl). Military personnel, with their special knowledge and training, even unwilling, may affect impressionable juveniles adversely. The mere fact of being incarcerated "gives" experiences to those being exposed to it by the legislator so that more and more emphasis is put on revenge instead of special prevention (or society's self-defence, something that is doubtful to take effect during such a short incarceration). One of the main reasons is that certain imprisonment harms take effect even on the short term. Human relationships are restrained, the prisoner, beyond every legal guarantee, becomes vulnerable to the guards, something that can result in a big psychological hurdle to take.

According to the then one-year statistics, until October 2014, only a total of 196 prisoners were under custodial arrest compared to 300-320 inmates incarcerated for delinquencies every year. It is notable, that the number of those sentenced to custodial arrest grew from 2013 up to sevenfold, meaning that the courthouse application of this form of punishment skyrocketed.[7] It represents the uncertainty of statistics that

[6] Ld.: http://bv.gov.hu/sopronkohida

[7] See Nagy, Ferenc: A szabadságelvonással járó szankciókról az új Btk.-ban. [On the New Sanctions of Deprivation of Liberty in the New Criminal Code]. *Börtönügyi Szemle*, 2014. 4.

according to the first Prison Affairs Review of year 2015[8], in the data of February 2015 altogether 632 prisoners spend their imprisonment.[9] The author agrees with the criticisms of Tóth concerning the custodial arrest:

- There are possible special preventive effects, the unwanted and dangerous consequences are more numerous and severe (personality distortion, stigmatisation, the danger of acquiring and accepting crime types during imprisonment);
- Custodial service is rendered to be short term imprisonment;
- Relating to short term incarceration, the Council of Europe has been rejecting it for the last 20 years due to its adverse effects;
- Incarceration should not be a valid sentence for either summary or criminal offenses against juveniles.[10]

The paper disagrees Ferenc Nagy's view that the criminal law means the possibility of a kind of humanization in the imprisonment's renaissance (and in the short duration of imprisonment renaissance), however, it is true that Nagy also urges empirical inquiries within this sphere.[11]

Custodial arrest could have been brought in by the legislator if they were willing to ignore the relevant decisions of the Council of Europe, by simply extending the lower threshold of incarceration, and stipulates in Criminal Proceedings as a general rule that for example Section 104 of Bvtv. stipulates commutation of implementation of proceedings and that these rules shall apply to incarcerations shorter than 3 months as well as the separations concerning these prisoners could have been regulated the same way.

If the legislator means the principles they wanted to establish related to custodial arrest, and willing to achieve special prevention goals via short term incarceration, then the prisoner must be protected from the negative experiences coming from those spending longer incarceration in the institution. However this protection could be quite expensive for the legislator. This could be done in institutions totally separated from other penal institutions, responsible only for custodial arrests. Even if these institutions

(http://bv.gov.hu/download/8/1a/01000/B%C3%B6rt%C3%B6n%C3%BCgyi%20Szemle%202014-4.pdf 13.).

[8] See Bogotyán, Róbert: A zsúfoltság csökkentésének útjai a börtönépítésen túl. [Possible Methods to Reduce Overcrowding – Beyond Building New Prisons]. *Börtönügyi Szemle*, 2015. 1. http://bv.gov.hu/download/b/3a/01000/B%C3%B6rt%C3%B6n%C3%BCgyi%20Szemle%202015%201. pdf.

[9] This data is very unlikely; it would be more believable if the source of the article would manage together the criminal and misdemeanour imprisonment.

[10] See Tóth, Mihály: Egy büntetőjogász gondolatai a „vox populi" oldalvizén [Thoughts of a Criminal Lawyer on the Issue of Vox Populi]. *Élet és Irodalom*, Vol. LVI (2012), No. 35, http://ujbtk.hu/dr-toth-mihaly-egy-buntetojogasz-gondolatai-a-vox-populi-oldalvizen/).

[11] See Nagy, Ferenc: A büntetőjogi szankciórendszer reformja. Büntetések és intézkedések az új Büntető Törvénykönyvben [Reform of the Sanction System in Criminal Law. Punishments in the New Criminal Code]. *Büntetőjogi Kodifikáció*, 2001. 2. (http://ujbtk.hu/buntetojogi-kodifikacio-2001-2/).

have to be opened for a wider audience due to prison usage issues, only prisoners spending time in a minimum security institution enjoying mitigated punishment could be placed here as they are especially motivated to keep their prestigious status, thus they are less dangerous towards those under custodial arrest. However, prison building is specially expensive and an abrupt change, and in the meantime, it would be an illusion to hope the establishment of special institutions for the punished chargers can solve these issues.

In Switzerland for short-term incarceration various facilities as professional critics have been introduced, such as the so-called "daily enforcement", "semi-captivity", a "semi-free implementation" and the "work of public interest".[12]

The above facilities are theoretical possibilities, about the actual implementation the cantons are up to decide. Most of the Swiss cantons from 26 to 20 were introduced in the daily execution regulated as such, they should be sentenced to imprisonment for at least a week to spend 24 or 48 hours. This facility can be used if the total of a maximum of two weeks imposed a custodial sentence. There are just a few cantons (e.g. St. Gallen), where the convicted person has to submit a daily implementation plan for themselves, which days and how many hours should they spend in prison.[13]

The convicted prisoner under the *semi-captivity* will be able to continue his mid-day of work or studies, but in his free time, rest periods must be spent as well. In order to *semi-free implementation* s/he spends rest and free time in prison and spends time working outside the framework of the employment practices. The convict can search a job for himself, and if s/he does not, s/he may be required to work in designated places.[14]

If we combine economy-wide approach into the "mix" of the development of the system of sanctions (of course not forgetting that it is true that the convicted can commit new crimes during the detention later only among the walls of the prison), it is worth to examining that implementation of the special and general preventive aims, and the mediation procedures of the applicability of cases could be extended.

The same is true for the reparation work. We should think about the probation system again expanding the scope of its personnel. Targeted impact studies should be selected on the rules of conduct system, which matching the personality of the accused and assist the court and the probation supervisor in that in the particular case.

[12] See Nagy, Ferenc: Életközelben: rövid tartamú szabadságvesztés Svájcban [Closeness to Life – Short Term Depriation of Liberty in Switzerland]. *Börtönügyi Szemle*, 1992. 4. (http://epa.oszk.hu/02700/02705/00012/pdf/EPA02705_bortonugyi_szemle_1992_4_84-89.pdf).

[13] See Nagy: Életközelben, 86-87.

[14] Ibid. 88-89.

Conclusion

The public work system could and should be reformed, which at the same time can be really useful to society (social integration can be achieved more successfully).

In the present form of the closure, the author considers it unnecessary as a penalty, which is expensive for society, expensive for the convict, its effectiveness (that is, the ability to access prevention targets) is highly questionable. The author thinks that it is also worth considering that along the same arguments for the misdemeanour law, other sanctions could be led out by the legislature, replacing such kind of offense imprisonment.