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CONTENT

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THEMATIC FOCUS:
Artificial Intelligence and Law

OPENING SPEECH TO THE WORKSHOP "AI AND LAW"

held at the Faculty of Law and Political Sciences of Pázmány Péter Catholic University as delivered by the Dean of this Faculty, László Komáromi,[*] Associate Professor, on 26 January 2024

Madam President, Professors, Ladies and Gentlemen,

Allow me to welcome all the participants of our workshop on "AI and Law" at the Faculty of Law and Political Sciences of Pázmány Péter Catholic University.

Since the launch of the ChatGPT, practically every single day breaks news about AI. The topic is extremely popular and attracts a lot of attention. Hosts of experts have been presenting prospects of the revolutionary potential AI can be useful in; fields ranging wide, from medicine to finance or the military, whereas other groups of scientists warn us of the potential dangers. It is but natural that each science have been taking efforts to reflect on the new AI technologies from an own perspective.

I have to admit that I am also fascinated by the capabilities of AI sometimes, mostly so when I encounter them in practice. In general, the range and scale of technological developments I have witnessed over the past decades have been breathtaking.

I have flashbacks to my childhood from time to time, when I used to encounter video telephony in science fiction movies only. Meanwhile it has become a natural part of my life. Or, I can remember the computer HAL, the one that talked intelligently to the astronauts and then tried to kill them in "2001: A Space Odyssey"[1]. Today I would confidently talk to the ChatGPT, and it has not tried to kill me yet. Nevertheless, there is definitely something adventurous about it.

For using AI in the legal profession, especially language models in the practice of law, I got my first serious impetus at our Faculty of Information Technology and Bionics. It happened at a workshop somewhat a year ago, and it came partly from

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[1] Directed by Stanley Kubrick, 1968.

colleagues presenting at this conference today. They outlined what AI applications based on language models are currently capable of, from text extraction over legal advice chatbots to contract drafting.

Before last Christmas, I consulted a friend of mine, a lawyer working for a large international law firm. He predicted a revolutionary change, saying that a significant proportion of lawyers' work would be taken over soon by AI applications, which would have a substantial impact on the market for law firms. The big ones will stay, the small ones will go bust, he says.

I have two general comments on the subject of this workshop. The first regards the extent and depths to which we can make timeless statements about the relationship between AI and law. What we conclude today will that be valid in six months or a year? How about five to ten years from now? Scientific research and reflection should not provide a snapshot of the real time situation; it is important to think about the issue viewing the widest possible horizon.

A story comes to mind, a hearsay; I wonder if it is true.

In 1989, an international conference of historians celebrated the 200th anniversary of the French Revolution. Chinese historians were invited to attend the conference, to which they politely replied that 200 years was not enough time for them to make sufficiently informed claims about the impact of the great French Revolution.

We will certainly not wait 200 years before making meaningful claims about the relationship between AI and law. Today, in an age of leaps and bounds, perhaps we should be humble enough to admit our limitations. However, we cannot give up the ambition to think far ahead as possible.

My second observation connects here and concerns the place and role of man in the rapid development we experience. On the one hand, we are tempted to make our work easier by the features offered by the AI applications. Who would refuse timesaving in reading and learning the details of a new piece of proliferating European or national legislation if the AI could extract the gist, even highlight what is new or answer the specific questions? Who would not opt to use the AI to compile legal documents they would otherwise spend hours on writing? Who would not wish a chatbot be able to answer the client's boring questions properly?

On the other hand, there is a danger that something will be lost; something essential, something deeply human, which has been part of our work and has served our personal development. Therefore, our discourse on the AI must be conducted about people as much as it is about AI.

Let me conclude by wishing you all a successful workshop. Looking forward to your valuable contributions, I am grateful to the organiser, Professor Harsági and to the National Media and Infocommunications Authority for supporting this workshop and research project.

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XI. 2024. • 7–15

DIGITAL TRANSFORMATION OF COURT PROCEEDINGS, ARTIFICIAL INTELLIGENCE AND THE PRINCIPLES OF CIVIL PROCEDURE*

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Abstract

The article analyses the relationship between artificial intelligence and the principles of civil procedure law. It pays attention to fields of tension, future challenges and how we should draw the limits of the introducing of AI in civil justice.

Keywords: AI, digital transformation, civil justice, civil procedure law, principles

Undoubtedly, the development of information technology has an impact on every aspect of civil proceedings,[1] the "new technologies have the capacity to change the core values of civil litigation by making litigation more efficient and effective, by making the civil justice system more accessible, and by changing the way we determine the facts and decide the case."[2] Nevertheless, at the beginning of our examinations, it is worth noting that the technology of our days, especially artificial intelligence (AI) could provide a wide range of devices, beyond actual need via electronic processing of judicial proceedings. This might lay foundations for handling effective and up-to-date litigious and non-litigious proceedings meanwhile safeguarding for the required guarantees.

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* This paper is an edited version of the author's presentation at the *„Artificial Intelligence and Law" workshop* held at Pázmány Péter Catholic University on January 26, 2024.

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1 Richard K. Sherwin – Neal Feigenson – Christina Spiesel: Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory and Teaching of Law. *Boston University Journal of Science and Technology Law,* (2006), 227.

2 Janet Walker – Garry D. Watson: New Technologies and the Civil Litigation Process. Common Law – General Report. In: Ada Pellegrini Grinover – Petrônio Calmon (ed.): *Direito Processual Comparado. [Comparative Civil Procedure Law].* Rio de Janeiro, Editora Forense, 2007. 122., 142.

Hence, the task experts of procedural law need to cope with is finding the scope of applicability IT may have instead of integrating without due criticism whatever technical possibilities into the proceedings. When establishing this scope, attention should be paid to numerous theoretical and practical aspects. One should find the "core" of the procedural rules serving the aim of proceedings; the basic values, the continuity of which must be ensured.

Thus, when analysing this problem, it is necessary to carry out a thorough review of the basic principles,[3] to be open to modern solutions, albeit applying criticism and searching for the equilibrium at the same time.

In consideration of the foregoing, it may not be exaggerated to claim that the development of IT constitutes one of the greatest challenges for procedural cultures deeply rooted in traditions.[4] Citing *Lord Woolf's* remark, several authors draw attention to the fact that IT does not only contribute to the improvement of the present-day system but may also serve as a catalyst for radical change.[5] This is even truer for artificial intelligence. Apart from the change in "technique" of the procedure, one must focus to change in basic questions. This process will not leave intact traditional procedural principles either, such as the principle of party control of the facts and means of proof, or the principles of orality, immediacy etc.

By the time of compiling national reports for the *Vienna World Conference of Procedural Law (1999)*, completely digitalized court proceedings were unimaginable. In the beginning, IT was mainly applied in the electronic administration of court affairs. Nowadays we can actually deal with the question of whether AI can be suitable for replacing humans in certain procedural tasks. Even if the automation of the entire procedure might not be necessary, the chances of AI as support have been definitely arising.

1. The principles of orality and immediacy and the principle of free evaluation of evidence

Orality plays an important role mainly at the trial, where it also ensures the implementation of the principle of immediacy. In the traditional model of litigation, public control is primarily guaranteed by the trial. The trial (oral proceeding) and the evidentiary proceeding have always been considered the central element, the core of civil litigation.[6] Consequently, they may also be regarded the "most sensitive" points

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3 Walker –Watson: op. cit. (footnote 2) 119.

4 Walker –Watson op. cit. 119., 122.

5 Lord Woolf: Access to Justice. Final Report. London, 1996.; Peter Gilles: Zur beginnenden Elektronifizierung von Zivilgerichtsverfahren und ihrer Verrechtlichung in der deutschen Zivilprozessordnung durch Sondernormen eines neuen „E−Prozeβrechts". In: Daisy Kiss – István Varga (ed.): *Magister artis boni et aequi. Studia in honorem Németh János.* Budapest, ELTE Eötvös Kiadó, 2003. 276.; cf. Richard L. Marcus: The Impact of Computers on the Legal Profession: Evolution or Revolution? *Northwestern University Law Review*, (2008), 1828−1829.

6 Heinrich Cf. Nagel: *Die Grundzüge des Beweisrechts im europäischen Zivilprozeß.* Nomos, Baden-Baden 1967. 20.; Dagmar Coester-Waltjen: *Internationales Beweisrecht.* Ebelsbach am Main, Verlag

of proceedings. Any effect on them may concern questions of basic principle directly or indirectly.

The question of orality and immediacy first arises when taking the evidence; while establishing the facts, a decisive role is played by personal conviction, directly and personally perceived impressions concerning people or objects, which serve as the guarantee for the legitimacy of the decision.

Nowadays professionals working in the field are to cope with the AI gaining ground and the resulting challenges. Hungarian courts have carried out numerous developments in recent years: introducing, e-files, client inspection and electronic payment systems, the distance hearing system (ViaVideo system) as well as the artificial intelligence-based speech recognition and transcription softwares[7]. Thus, technology has taken a leap from regulation. Not always can the gap arising be bridged over by judicial practice. The area in Hungary where this gap is smaller yet clearly perceivable is the emergence of new (electronic) means of proof and their integration into the civil action. Apart from the means of proof the fate of which has already been settled (for example, electronic documents), there are other means to which the legal system has not been able to react at a proper pace or in an appropriate manner. In this regard, it would be necessary to examine whether or not Acts on prodecure should elaborate new rules relating to recently emerging electronic means of proof. Since the internet has become the most relevant source of information for both the court and the parties, we should consider ways information found on the internet could be used during civil proceedings. Evidently, this question cannot be treated and answered uniformly due to the diversity of information available on the internet. However, it is a prompt to the world of AI; information accessible on the internet, exactly because of its quantity, sometimes requires us to apply a new approach and novel methods. This poses the question whether a new legal regulation or a substantial modification of the existing regulation will be necessary in case AI gains more ground in the examination of evidence. The fact that these rules may change the conduct of parties and other persons involved in the legal action is a circumstance to consider; parties may have to pay increased attention to the preservation of evidence.

This paper has a part aiming at reviewing judicial practice. It may provide assistance to reveal whether there is an increasing tendency to use new types as means of proof in civil proceedings. The following are to be solved consequently: the way these new means may become integrated into the demonstrative evidence system (if applicable). In addition, finding what may hinder the admissibility of such types of evidence; how their authenticity is to be determined by the court and proven by the parties; in what form these types of evidence are to be presented to the court by the parties, and how such evidence should be examined by the latter. Especially due to their fast-changing and changeable content, it may raise some difficulty for the court how to

Rolf Gremer, 1983. 1.; Walter H. Rechberger – Daphne-Ariane Simotta: *Grundriß des österreichischen Zivilprozeßrechts.* Wien, Manz'sche Verlags- und Universitätsbuchhandlung GmbH, 2000. 363.

[7] Martin Cp. Spitzer: Digitalisierung und Verfahrensmaximen. In: Christoph Althammer – Herbert Roth (ed.): *Prozessuales Denken und Künstliche Intelligenz.* Tübingen, Mohr, 2023. 38.

treat a printed version and how such information may be preserved and retrieved in an authentic format. The problem of authenticity and unadulterated solutions comes to the foreground due to a greater risk of manipulation compared with traditional means of proof. Moreover, judges have less experience in this field, so often the contribution of an IT expert may become necessary. All this is combined with the issue of unlawfully obtained evidence as reflected in the evolving practice of the new Hungarian Code of Civil Procedure. This could raise the question of reconsidering when judges themselves should be permitted to do research on the internet (ex officio), and whether they should be allowed to use the obtained information to establish the facts of the case and evaluate the evidence.

The issue of the *Internet of Things (IoT)* may require a new approach (and maybe even new regulation) due to its increasing spread. IoT enables us to connect devices on the internet and to save data to the local device as well as to transmit data between the connected devices and, possibly, to the cloud, too. So-called smart devices can include household gadgets, medical or office equipment, sensors and public utility meters, but one may also list here smart watches and, in a given case, also vehicles. At this point, the question of smart cities (e.g. with regard to parking cases) and smart homes and the main subject of my planned research become inseparable. As far as it may be predicted at present, in the near future, IoT could become relevant in the following fields apart from the above-mentioned: competition law, labour law, medical malpractice cases etc.

2. Impartiality and judicial independence is crucial

In the courts AI is rather expected to play a role in the preparation and support of decisions (e.g. Big Data analysis), or it may support the judge's work as an expert (e.g. in the field of handwriting analysis, facial recognition or the interpretation of radiograms). Moreover, automatic speech recognition systems enable real time recording of trials, which may improve courtroom culture and promote effectiveness. Introduction of the former has already started in Hungary. Algorithms analysing and evaluating jurisprudence exist already in foreign countries, which may be an important step towards predictability. The application of AI may also generate a significant change in cross-border disputes. Essentially, it could substantially reduce the extra costs stemming from the international character of the lawsuit (e.g. AI may be used in translation and interpreting, and video conferences can often replace travel). So-called self-enforcing contracts will pose a challenge to traditional forms of claim enforcement, while the use of blockchain technologies could possibly present another challenge with regard to registration procedures.

These possibilities provided by technology also imply legal and ethical problems, such as the responsibility of the creators of AI and the possibility for the court to hear AI (and in what capacity). It raises further questions whether the judge understands the operating mechanism of AI while possibly relying on it. It could be difficult to handle the fact that no human element is involved in the learning process of deep-learning algorithms. Possibilities for tracking this process and the relating system of liability have not been duly explored or thought over.

Opportunities offered by Legal Tech are presumed to bring about substantial changes in the work of law firms (mainly with the help of document analysis, document drafting and risk analysis). The question is how this process will influence competitiveness respective of smaller law firms. Due to quantitative factors, some differences may be expected in big and smaller countries using Legal Tech.

If we replaced the human factor with algorythms in any field of justice (decisions made by algorythms) in the future, this would evidently lead to a change in codification techniques. Legal regulations would have to appear in a form allowing them to be processed by a machine (algorythmic thinking).

According to Shetreet, using digitalization and AI in the work of courts should be done carefully in order to „avoid undue pressure on judicial independence and on the quality of the judicial process."[8] Also, Pérez Ragone and Vitorelli has a cautious approach. He draws attention to the fact that „if AI were to replace judge, the „robot Judge" should be able to take over all tasks (and value) of a human judge […]" who would „continually superwise the fairness of the trial as a whole." He thinks that it is „too difficult to weight for a machine in order to determine a correct and fair decision. The mixture of skills including logic, research, language, creative problem solving, social etc. is challenge for an AI system."[9]

AI can have a supportive function, assisting the judge to find a larger number of consistent, effective decisions.[10] It is worth contemplating the benefits for going further than this. A second question is whether a human supervising only a draft decision made by the AI can be justified. Alternatively, whether the first instance decision can be made by the AI meanwhile a human will work only at the second instance.

This topic would deserve a separate study by itself, hence the author plans to address it in a later work. The complex structure of litigious proceedings impedes, to some extent, the application of new information technologies even if for technical reasons only. If in specific proceedings automated processing is made possible, the "decision-making" programme must contain examinations equivalent to their counterparts in the traditional proceedings.[11]

3. "Access to justice" and equal opportunity during proceedings

Digital communication may be useful for the majority of the participants in civil litigation; on the other hand, it may have the effect of marginalizing those who lack

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8 Shimon Shetreet: Judicial Independence and Due Process of Law. In: Eduardo Oteiza – Giovanni Priori Posada (ed.): *Independencia judicial en el tercer Milenio. [Judicial Independence in the Third Millennium].* Lima, Palestra Editores, 2023. 84.

9 Álvaro Pérez Ragone – Edilson Vitorelli: Judicial independence, impartiality, and judicial decision-making. In: Eduardo Oteiza – Priori Posada, (ed.): *Independencia judicial en el tercer Milenio. [Judicial Independence in the Third Millennium].* Lima, Palestra Editores, 2023. 151.

10 Pérez-Ragone – Vitorelli op. cit. 152.

11 Uwe Salten – Karsten Gräve: *Gerichtliches Mahnverfahren und Zwangsvollstreckung.* 2. Aufl., Köln, Verlag Dr. Otto Schmidt, 2005. 34.

the required means or the skills to use these means.[12] With respect to ensuring access to justice and equal opportunities during electronic proceedings, it is crucial whether the party has the adequate means or internet access. Purchasing the infrastructure may cause problems mainly for smaller enterprises and private individuals.

IT also offers possibilities by which access to justice may definitely be improved and proceedings without a legal representative may become better available. Let us think of e.g. the introduction of electronic forms and their publication on the internet. Through these, a higher level of automatism may be achieved, especially if their actual online fill-in is alleviated by assisting programmes. Such solutions also render the court's work less complicated from several aspects, e.g. the later preparation of statistics; it may reduce the workload on courts in the long run. In addition, the assisting programme could reduce the number of errors made during the fill-in process, e.g. through the examination of jurisdiction and competence and the automated calculation of duties, costs and deadlines.[13]

AI also has the potential to help access to justice and make litigation preparation more efficient. As a matter of fact, however, this may appear dominantly in the work of larger law firms. The smaller ones will definitely be at a competitive disadvantage if they are not able to recognize the benefits provided by AI in time and integrate them into their work processes.

4. The requirement of effective proceedings

Rationalizing and accelerating potential resulting from the application of modern IT in court proceedings depends to some extent on the structure of the given proceeding. It offers larger space to proceedings with a simple structure and a routine course, a schematic and standardisable decision-making process. Not by chance, order for payment proceedings havebeen considered within this category in numerous countries. Automated processing is typically characterised by centralisation[14] as building the infrastructure requires lower financial resources. Moreover, the geographic location of the processing court is insignificant in automated proceedings as communication takes place through the internet anyway. For cost-efficiency, the whole proceeding must be fulfilled by a restricted number of specialized staff.

Nowadays several countries have been conducting experiments to work out how artificial intelligence could be used to serve the administration of justice. However, it is difficult to predict how AI will transform the justice system. We have more solid grounds when reviewing what AI is capable of (e.g. predictive encoding, predictive analytics, machine learning). The exploitation of these possibilities by larger law firms has considerably changed the work of lawyers already. How the work of lawyers will become restructured in the future may be of crucial importance. We may proceed from the fact that AI will not endanger the work of judges (as a whole) seriously for

[12] Cf.: Walker – Watson op. cit. 145.

[13] Bartosz Sujecki: *Mahnverfahren.* Heidelberg, C.F. Müller, 2007. 186–191.

[14] Salten – Gräve op. cit. 14–16.

a considerable time; it will rather be present having a supportive character. It will be worth finding an answer to the question as to what fields allow for a realistic prospect of effective cooperation between man and machine and, thus, what the future generation of lawyers should be prepared and trained for.

5. Publicity, inspection of documents, data protection

In the era of modern IT, electronic publicity has a meaning rather different from the first definition of the principle of publicity in the era of Napoleon. Because of its nature, using the internet may lead to wider publicity in any case; it may likewise ensure access to the data of the lawsuit and the litigation materials for a substantially wider group of people than publicity taken in its traditional sense would imply.

Court judgments anonymized by the aid of AI are now a reality, although sometimes there are problems with the use of such judgments. AI removes from the system data relevant from the factual background of a case, which would be important for lawyers who want to analyse the judgment later on.

Overextending the principle of publicity could cause crucial conflicts with other constitutional rights (e.g. data protection, protection of secrets, personal rights). Technology may also offer more possibilities than one should necessarily incorporate into the "texture" of the rules of civil procedure. It is not easy to strike the right balance in this field, though.

Theoretical and practical problems are generated by possible public access to files and that of data protection. Providing access to electronic court files may easily be implemented technically and it may have numerous practical advantages. Making the whole material of files accessible for anybody is obviously undesirable for data protection reasons. Electronic files may contain parts (such as judgments) of public relevance.

A primary issue could be the need for anonymizing, which may lead to the over-restriction of publicity in the majority of cases. Despite the main rule of public trials, in legal literature one may encounter positions objecting to the electronic publishing of trial records.[15]

However, finding a solution is a must to secure data protection and to prevent unauthorised access to electronic court files. When viewing and analysing documents, access should be recorded by the programme, and a solution must be found to preserve the intact and integral content of e-files.

6. Summary

The use of IT does not have the same impact on all principles; problems of conflict may arise more frequently with respect to certain principles and less frequently regarding others. In recent years, however, several possibilities have become available as a result

[15] Georg E. Kodek: Der Zivilprozeß und neue Formen der Informationstechnik. *Zeitschrift für Zivilprozeß,* 115, 4. (2002), 486.

of modern technology. Incorporating the appropriate legal guarantees, these may serve the better realization of some principles. As a result, it may lead us to partly reconstruct specific traditional principles. Problems present themselves more intensively concerning litigious proceedings and to a lesser frequency in de facto non-litigious or some type of non-litigious proceedings. However, both procedural law experts encouraging change and those holding more conservative views are likely to agree that the new IT may generate positive changes concerning both the procedural input and the output. The issue characterised by stronger differences in opinion is the trial itself, accompanied by questions of procedural law relating to it; the problem of virtualising a trial.

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ADAPTING TO CHANGE: AI'S POTENTIAL IMPACTS ON JOURNALISM

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Abstract

This article examines the transformative impact of the fourth industrial revolution on communication, particularly focusing on artificial intelligence (AI) in journalism. The proliferation of AI technologies has revolutionized how news is searched, produced, disseminated, and managed, enhancing communication flows and personalization. Despite historical resilience through various technological upheavals, local journalism faces unprecedented challenges due to the disruption of traditional business models by the internet, leading to significant declines in print circulation and advertising revenues. The advent of generative AI, exemplified by tools like ChatGPT, offers both opportunities and threats. While AI can automate routine tasks, enhance multimedia storytelling, and increase operational efficiency, it also raises ethical concerns, risks of misinformation, and potential job losses. The article emphasizes the need for responsible AI integration, continuous journalist training, and regulatory frameworks to ensure that AI sooner enhances than undermines journalistic integrity and democracy. Furthermore, the reliance on AI by media organizations could threaten financial stability and necessitate innovative business models and government regulations to ensure fair compensation and intellectual property protection. Despite these challenges, AI presents opportunities for innovation in journalism, emphasizing the importance of balancing technological advancement with ethical considerations.

Keywords: Generative AI, Journalism, Media, Misinformation, News

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1. Introduction

The field of media is undergoing relentless transformation. We are immersed in the fourth industrial revolution, significantly altering production systems and various societal aspects.[1] In this context, the introduction of artificial intelligence (AI) in the processes of searching, producing, disseminating, and managing communication messages has established a platform that will progressively drive the exponential multiplication of communication flows and personalization, accompanied by new ethical challenges.[2] Journalism industry has weathered numerous technological revolutions, from the movable-type printing press of the 15th century to the high-speed presses of the 19th century and the disruptive influences of radio and television. Despite these challenges, local news has historically thrived.[3] However, the advent of the internet dramatically altered the landscape of local journalism, challenging its traditional business model and threatening its very existence.

The World Wide Web enabled news organizations to reach global audiences and provided journalists with innovative tools to enhance their reporting. However, it also decimated the local news business model.[4] Free online news led to a drastic decline in print circulation and advertising revenues. Despite attempts to implement paywalls and digital advertising, these measures failed to fully offset the losses. Consequently, local news organizations became dependent on social media platforms for distribution and revenue, further undermining their financial stability. By the end of 2024, the Medill School of Journalism predicts the U.S. will have lost a third of its newspapers and nearly two-thirds of its newspaper journalists since 2005, creating vast news deserts and potentially undermining democracy by paving the way for misinformation and disinformation.[5] Amidst this backdrop, the emergence of generative artificial intelligence presents both opportunities and threats to local journalism. This technology, which can produce content based on user prompts, is hailed as the fastest-growing consumer software application in history.[6]

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6 Cindy Gordon: ChetGPT is the Fastest Growing App in the History of Web Applications. https://tinyurl.com/3wa4x5rp

2. Benefits

Generative AI, like ChatGPT, has incited considerable debate regarding its role in journalism. Experts argue that while these tools can assist in various aspects of news production, they are unlikely to fully replace journalists. Francesco Marconi categorizes AI innovation in journalism into three distinct waves: automation, augmentation, and generation. The first wave focused on automating data-driven news stories, such as financial reports and sports results, using natural language generation techniques. The second wave emphasized augmenting reporting through machine learning and natural language processing to analyze large datasets and uncover trends. The current wave, generative AI, uses large language models capable of producing narrative text at scale. This technology can generate longer articles or opinion pieces and even mimic the style of well-known writers or publications. However, despite the advancements, generative AI today is not original or analytic, as it relies on existing information without providing new insights.[7]

Innovative uses of generative AI are significantly transforming the media landscape, with numerous outlets leveraging its capabilities to enhance content creation, personalization, and efficiency. Generative AI can autonomously create content, which is particularly beneficial for news agencies that need to disseminate breaking news swiftly. This technology enables real-time generation of high-quality written content, images, and even videos, ensuring that audiences receive the latest updates almost instantaneously.[8] This creates an impression of intelligence, even though the technology is fundamentally a predictive tool trained on vast datasets. This reliance on existing content means that generative AI lacks originality and analytical depth, which are critical in producing high-quality journalism. Additionally, generative AI tools often make factual mistakes and struggle with precise calculations, making them unsuitable for breaking news reporting or detailed numerical data. These models frequently generate inaccurate and non-factual information, particularly regarding current events or real-time data, thus highlighting the need for human oversight in the journalistic process.[9]

The rapid development of AI technologies has significantly impacted the media industry. AI enables the automatic analysis of vast amounts of data, helping media organizations gain valuable insights, enhance content recommendations, and optimize marketing strategies. Machine learning algorithms improve content recommendation

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7 Marina Adami: Is ChatGPT a threat or an opportunity for journalism? Five AI experts weigh in. https://tinyurl.com/yjrcs4t2 (Accessed on: 05 September 2024)

8 Yusuf, et al.: Generative AI and the future of higher education: a threat to academic integrity or reformation? Evidence from multicultural perspectives. *International Journal of Educational Technology in Higher Education* 21, 1. (2024). https://doi.org/10.1186/s41239-024-00453-6

9 Maryam Ashoori – Justin D. Weisz: In AI We Trust? Factors That Influence Trustworthiness of AI-infused Decision-Making Processes. Computers and society. *Arxiv.* (2019). https://doi.org/10.48550/arXiv.1912.02675

accuracy, increasing user engagement and retention.[10] One significant trend is the automation of routine journalistic tasks. For example, the Associated Press has used AI to generate summaries of earnings reports, which has dramatically increased their output without sacrificing quality.[11] Similarly, BuzzFeed uses AI to enhance its quizzes and personalize content, providing users with a more tailored experience.[12] These applications illustrate how AI can help media companies to maintain a high level of productivity and personalization while reducing operational costs. Moreover, generative AI is revolutionizing multimedia storytelling by producing stunning visuals and audio content. This opens new avenues for creative expression and audience engagement. AI-generated art, animations, and music can add significant value to media productions, pushing the boundaries of traditional storytelling.[13] Generative AI holds several potential benefits for news outlets. It can enhance responsiveness, improve operational efficiency, and enable greater personalization of news content. By automating routine tasks, AI can free up journalists to focus on more complex and investigative reporting. Furthermore, AI can help news organizations to rethink their approaches to serving audiences and improve the targeting of advertisements, potentially increasing revenue.[14]

3. Risks

Despite the potential benefits, the integration of AI in journalism faces several challenges. While AI can enhance the capabilities of journalists by saving time and increasing efficiency, there is a perceived tension between the hopes of the industry and pitfalls regarding this technology.[15] Amongst others, the spread of AI technologies raises concerns about algorithmic bias, data privacy, and potential job losses in specific sectors.[16] The risk of unchecked algorithmic creation poses significant concerns, and the necessity for ethical guidelines is paramount. Charlie Beckett advises caution and

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[10] Rahima Aissani – Rania Abdallah – Sawsan Taha: Artificial Intelligence Tools in Media and Journalism: Roles and Concerns. In: *International Conference on Multimedia Computing, Networking and Applications (MCNA).* 2023. 19–26. https://doi.org/10.1109/MCNA59361.2023.10185738

[11] Peter N. Amponsah – Atianashie Miracle Atianashie: Navigating the New Frontier: A Comprehensive Review of AI in Journalism. *Advances in Journalism and Communication 12,* 1. (2024), 8. https://doi.org/10.4236/ajc.2024.121001

[12] Charlotte Tobitt: How Buzzfeed is using AI to boost engagement as social traffic wanes. https://tinyurl.com/anvxumcn (Accessed on: 05 September 2024)

[13] Rob Hackenburg – Helen Margetts: Managing the Risks of Generative AI. *Harvard Business Review* 101, 3. (2023), 28–35.

[14] Jordyn Habib: Leveraging AI to boost efficiency and innovation in the news. https://tinyurl.com/56b3nwyu (Accessed on: 05 September 2024)

[15] Rachel E. Moran – Sonia Jawaid Shaikh: Robots in the News and Newsrooms: Unpacking Meta-Journalistic Discourse on the Use of Artificial Intelligence in Journalism. *Digital Journalism* 10, 10. (2022), 1756–1774. https://doi.org/10.1080/21670811.2022.2085129

[16] Hourieh Khalajzadeh – Mohamed Abdelrazek – John Grundy – John Hosking – Qiang He: Survey and Analysis of Current End-User Data Analytics Tool Support. *IEEE Transactions on Big Data* 8, 1. (2022), 152–165. https://doi.org/10.1109/TBDATA.2019.2921774.

discourages journalists from using new tools without human supervision. He stresses that AI is not about total automation of content production but about augmentation to provide tools that enhance human capabilities. Understanding the tools and the associated risks is crucial to mitigating potential flaws and ensuring responsible use.[17]

AI's integration into journalism also poses significant risks to the financial models of media organizations. As seen with the advent of the internet, free access to news led to a steep decline in print circulation and advertising revenues. Similar risks are present with AI, particularly as search engines and other AI tools may provide information directly to users without directing traffic to news websites. This phenomenon could drastically reduce web traffic, further undermining the financial viability of news organizations.[18] In other words, AI could further disrupt the already ailing business models of local news outlets, exacerbate the loss of web traffic due to zero-click searches, and introduce errors into news stories, undermining credibility.[19] There is also the danger that AI could replace human journalists, leading to job losses and a decline in journalistic quality. Ethical concerns arise from the lack of clear guidelines for AI use, and smaller news outlets may lack the resources to effectively implement AI technologies. Additionally, AI's propensity for errors and its potential misuse could accelerate the spread of misinformation and disinformation. While there is considerable enthusiasm for AI's potential to transform and introduce efficiency into communicative processes, this technocentric vision of communication is fraught with risks and challenges, primarily due to a lack of transparency from socio-legal and scientific-computing perspectives.[20] These dimensions require close monitoring and analysis to understand and correct possible dysfunctions. The complexity of the ongoing changes in journalism stimulates renewed debates in communication and drives new transformations in the communication ecosystem, bringing opportunities and challenges as we enter the next technological revolution, where machines will drive machine learning, imitate human thoughts and behaviors, and perform new cognitive functions.[21]

The dominance of a few tech giants in the AI space also poses a threat to the independence and diversity of media. The control of these companies over AI technologies and their integration into media processes could lead to a homogenization of news and a concentration of power that undermines the plurality of voices essential for a healthy democracy. AI have become another way for powerful tech corporations

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17 Charlie Beckett: The JournalismAI Report. https://tinyurl.com/mrxjw79n (Accessed on: 05 September 2024)

18 L. Hazard-Owen: AI and the Future of Media Financial Models. *Media Finance Journal* 10, (2023), 58–72.

19 Nilay Patel: Google Zero is here – now what? https://tinyurl.com/5mu4aebu (Accessed on: 05 September 2024)

20 Stefan Larsson – Fredrik Heintz: Transparency in Artificial Intelligence. *Internet Policy Review* 9, 2. (2020). https://doi.org/10.14763/2020.2.1469

21 Syed Imran Ali – Araz Zirar – Nazrul Islam: Worker and Workplace Artificial Intelligence (AI) Coexistence: Emerging Themes and Research Agenda. *Technovation* 124, (2023), 102747. https://doi.org/10.1016/j.technovation.2023.102747

to extend and entrench their dominant market positions, and this could make it difficult, if not impossible, for sectors like journalism to remain independent and maintain a public interest orientation. The potential of the AI to disrupt journalism mirrors the impact of the internet, which decimated traditional revenue streams and made news organizations reliant on social media platforms they do not control. The dominance of tech giants in digital advertising, publishing, and search has already undermined the financial stability of journalism, and AI threatens to exacerbate these issues.[22] Large corporations are already utilizing machine learning for big data analysis and digital marketing, impacting all phases of the advertising process.[23] This technological shift has multiplied intermediaries and changed the media environment, necessitating innovative business models to ensure sustainability in a scenario where AI affects the processes, practices, and results of new companies.[24] Despite significant advancements, these models still have room for further enrichment and efficiency as integrated systems are explored for the new fourth industrial revolution landscape.[25]

The sustainability of journalism in the AI era will depend on the ability of the industry to adapt its business models and assert its pricing autonomy. News outlets must optimize revenue streams and develop sophisticated compensation frameworks for the use of their content in AI applications. They also need access to information about how their content is used in AI systems and foundational model weights. Government regulations will be crucial in enabling news organizations to negotiate fair deals and protect their intellectual property. Journalism is particularly valuable to generative AI search, providing real-time information, context, fact-checking, and human language. Local journalism, in particular, must be able to monetize its content to survive. Without access to high-quality, human-created content, the foundational models that fuel AI applications will degrade, potentially collapsing the entire system. Yet, AI's reliance on news content raises concerns about intellectual property rights and fair compensation. News media bargaining codes,[26] which are being adopted or considered in various jurisdictions, could require tech platforms to negotiate with news publishers and ensure fair compensation for the use of their content in AI systems.

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22 Mark Caro: AI is disrupting the local news industry. Will it unlock growth or be an existential threat? https://tinyurl.com/bdczrsx7 (Accessed on: 05 September 2024)

23 José Martínez – Juan-Miguel Aguado-Terrón – Paloma-del-Henar Sánchez-Cobarro: Smart Advertising: Innovación y Disrupción Tecnológica Asociadas a la IA en el Ecosistema Publicitario. *Revista Latina de Comunicación Social* 80, (2022), 69–90. https://doi.org/10.4185/10.4185/RLCS-2022-1693

24 Dominic Chalmers – Niall G. MacKenzie – Sara Carter: Artificial Intelligence and Entrepreneurship: Implications for Venture Creation in the Fourth Industrial Revolution. *Entrepreneurship Theory and Practice* 45, 5. (2021), 1028–1053. https://doi.org/10.1177/1042258720934581

25 Philip Ross – Kasia Maynard: Towards a 4th Industrial Revolution. *Intelligent Buildings International* 13, 3. (2021), 159–161. https://doi.org/10.1080/17508975.2021.1873625

26 Australian Competition and Consumer Commission: News Media Bargaining Code https://tinyurl.com/mry8xu53 (Accessed on: 05 September 2024)

4. The question of misinformation

Generative AI makes it easier to create misinformation, potentially increasing its supply. A study on AI-generated misinformation by Zhou[27] revealed significant differences between AI-generated and human-created misinformation. AI-generated misinformation (AI-misinfo) shows unique linguistic features compared to human-created misinformation (Human-misinfo). AI-misinfo tends to enhance details, add more emotions, express uncertainties, draw conclusions, and mimic personal tones, making it seem more credible and engaging. Linguistically, AI-misinfo is less analytical and authentic but more emotionally charged and self-centric than human-misinfo. AI-generated content uses fewer informal expressions and Internet slang, appearing more formal and polished. AI-misinfo also shows higher cognitive processing expressions, improving its articulation of insights and discrepancies, contributing to perceived credibility. It frequently enhances details by specifying the five Ws and one H (who, what, when, where, why, and how), includes vivid stories and diverse perspectives, and communicates uncertainties to increase transparency. AI-misinformation often draws conclusions and simulates personal tones, making the content relatable and engaging. So, AI-generated misinformation poses significant challenges for detection models due to its enhanced emotional appeal, formal tone, and credible presentation, highlighting the need for updated strategies and guidelines to effectively tackle it.[28]

However, other studies suggest that the consumption of misinformation is limited by demand, not supply. Increases in the supply of misinformation should only increase its diffusion if there is an unmet demand or a limited supply, neither of which is supported by evidence. Despite the quantity and accessibility of misinformation, the average internet user consumes very little of it, with consumption concentrated in a small portion of very active users who seek out misinformation due to traits like low trust in institutions or strong partisanship.[29] Conspiracy theories, for instance, are prevalent, but their popularity varies by country, influenced by factors such as corruption levels.[30] Some researchers say that generative AI could help to create more persuasive misinformation by making it look more reliable and professional. However, misinformation producers already have tools like Photoshop to enhance the credibility of their content, and they often choose accessibility or authenticity over reliability. Most people consume content from mainstream sources, so any increase in the quality of misleading content would

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27 Jichen Zhou – Yaxin Zhang – Qian Luo – Andrea G. Parker – Munmun De Choudhury: Synthetic Lies: Understanding AI-Generated Misinformation and Evaluating Algorithmic and Human Solutions. In: CHI '23: *Proceedings of the 2023 CHI Conference on Human Factors in Computing Systems.* 436. 2023. https://doi.org/10.1145/3544548.3581318

28 Ibid.

29 Serge Altay – Alberto Acerbi: People believe misinformation is a threat because they assume others are gullible. *New Media & Society*, https://doi.org/10.1177/14614448231153379; David A. Broniatowski et al.: Patterns of Misinformation Consumption Among Internet Users. *Cyberpsychology Journal* 27, (2023), 45–47.

30 Sinan Alper: Conspiracy Theories and Corruption: A Comparative Study. *Comparative Politics Review* 21, (2023) 56–67.

be largely invisible to the public.[31] Furthermore, generative AI could also improve the quality of reliable news sources, balancing any increase in the appeal of misinformation. The potential for generative AI to provide plausible deniability (the "liar's dividend"[32]) is not new, as technology for creating plausible fake content has been available for decades.[33] Generative AI might enable the creation of personalized misinformation tailored to users' beliefs and preferences. However, the technological infrastructures for micro-targeting users with content are not directly impacted by generative AI improvements. The cost of reaching people with misinformation remains a bottleneck, and evidence suggests that micro-targeting by political actors has limited persuasive effects.[34] Current generative AIs lack the capability to represent the full range of users' preferences and values, limiting their ability to create truly personalized content.[35] The persuasive effects of political advertising, including personalized content, are often limited and context-dependent.[36]

According to these studies, concerns about the impact of generative AI on misinformation are overblown and part of a broader history of moral panics surrounding new technologies.[37] These fears often assume that people are gullible and overlook the complex web of institutions that provide accurate information and maintain public trust in media.[38] While generative AI poses new challenges, the focus should be on strengthening institutions and trust in reliable news sources. Digital and media literacy education can help to mitigate issues arising from AI-generated misinformation. Regulatory efforts should be based on evidence, avoiding speculative warnings that might reduce trust in factually accurate news and overshadow other significant problems posed by generative AI, such as nonconsensual pornography and identity thefts.[39] While generative AI will undoubtedly influence the information landscape, its impact on misinformation is likely more limited than alarmist predictions suggest. Continued research and evidence-based discussions are crucial to navigate these changes effectively.[40]

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31 Andrew M. Guess et al.: Mainstream Media Consumption and Misinformation Exposure. *Public Opinion Quarterly* 85, (2021), 22–24.

32 John Christopher: Generative AI and the Liar's Dividend. *AI and Society Journal* 25, (2023), 95–107.

33 Ullrich K. H. Ecker et al.: Misleading Content and Plausible Deniability in the Age of AI. *Cognitive Science Journal* 46, (2022), 19–25.

34 Andreas Jungherr et al.: Micro-Targeting and the Limits of Political Persuasion. *Journal of Political Science* 40, (2020), 31–45.

35 Michael A. Kirk et al.: Generative AI and User Personalization: Current Limitations and Future Directions. *Journal of AI Research* 62, (2023), 214–228.

36 Rob Hackenburg – Helen Margetts: Political Advertising and AI: Limited Effects in the Digital Age. *Political Communication Review* 18, (2023), 63–70.

37 Amy Orben: Moral Panics and Technological Change. *Media Psychology Journal* 37, (2020), 99–108.

38 Benjamin Weikmann – Sophie Lecheler: Visual Misinformation and Public Perception. *Media Studies Review* 30, (2023), 102–115.

39 Marten Hameleers: AI and Public Trust in Media: Regulatory Perspectives. *Media Policy Journal* 32, (2023), 57–65.

40 Felix M. Simon – Sacha Altay – Hugo Mercier: Misinformation reloaded? Fears about the impact of generative AI on misinformation are overblown https://tinyurl.com/25npw5ya (Accessed on: 05 September 2024)

5. Is there any hope?

Despite the challenges, there is hope. Major journalism organizations have begun striking licensing agreements with AI companies for access to their content, providing a potential model for fair compensation. However, smaller and niche news outlets must also be included in these negotiations to ensure a diverse and robust journalism ecosystem. The industry must unite to demand frameworks that benefit journalism in the public interest, not just corporate profits. While some experts and professionals believe AI will play an important role in journalism, others fear it may negatively impact the journalistic labor market, displacing many journalists.[41] The potential of the AI to transform journalism will only translate into tangible results if it develops news pieces that are accurate, accessible, diverse, relevant, and timely, contributing to higher quality in message development.[42] The need for journalists to be trained in AI tools and the ethical debates surrounding their use are of particular concern.[43] Continuous updating of training programs and incorporation into journalism degrees are essential, alongside rigorous monitoring of AI processes in journalism.[44]

High-tech journalism demands competencies from professionals at the intersection of technology and journalistic content creation, giving rise to renewed professional profiles and new terms like "Exo journalism".[45] Technology is a key element in media strategy and development, but the ethical and ontological limits of automated journalism require attention. Good regulation is necessary to ensure AI contributes to good journalism and democracy, avoiding the disappearance of authorship and ensuring transparency.[46] The emergence of synthetic media, which relies entirely on AI, underscores the rapid development of this technology.[47] The main challenge for journalism is understanding existing tools, their risks, and the ethical dilemmas they pose. AI must be seen as a new aid, with ethical considerations grounded in core journalistic values such as truth, justice, freedom, and responsibility. Journalists must

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41 Beatriz Gutiérrez-Caneda – Jorge Vázquez-Herrero – Xosé López-García: AI application in journalism: ChatGPT and the uses and risks of an emergent technology. *Profesional de la Información* 32, 5. (2023), https://doi.org/10.3145/epi.2023.sep.14

42 Bibo Lin – Seth C. Lewis: The one thing journalistic AI just might do for democracy. *Digital Journalism* 10, 10. (2022), 1627–1649. https://doi.org/10.1080/21670811.2022.2084131

43 Amaya Noain-Sánchez: Ethics of AI in Journalism: Balancing Risks and Benefits. *Journal of Media Ethics* 37, (2022), 45–58. https://doi.org/10.15581/003.35.3.105-121

44 Vanessa Gonçalves – André Melo: The Role of AI in Modern Journalism: Opportunities and Ethical Challenges. *International Journal of Communication* 16, (2022), 2022–2038.

45 Santiago Tejedor – Pere Vila: Exo Journalism: Understanding the New Professional Profiles Emerging from AI Integration. *Media Studies Journal* 12, (2021), 89–104. http://dx.doi.org/10.3390/journalmedia2040048

46 Alžběta Krausová – Václav Moravec: Disappearing Authorship: Ethical Protection of AI-Generated News from the Perspective of Copyright and Other Laws, *JIPITEC* 13, 2. (2022), 143. https://www.jipitec.eu/jipitec/article/view/350/343

47 María José Ufarte-Ruiz – Francisco José Murcia-Verdú – Manuel Túñez-López: Use of artificial intelligence in synthetic media: first newsrooms without journalists. *El Profesional de la Informacion* 32, 2. (2023), http://dx.doi.org/10.3145/epi.2023.mar.03

monitor technology, requiring training and continuous education for both journalism students and professionals.[48]

Traditional forms of the press still enjoy a great deal of credibility and trust among their audiences. Consumers have developed a greater degree of skepticism and caution with regard to the sources of and the content of digital media as a direct result of the prevalence of false news, misinformation, and cyberattacks. On the other hand, traditional media have built a solid reputation among their audiences for consistently providing them with information that is both accurate and reliable, as well as entertaining content. Although some research suggests that citizens in the United States seem to have less and less trust in the national press,[49] in other countries around the world, trust in the press is still high.[50] The extensive process that print news, for instance, undergoes from on-ground reporting to rigorous editing and then to print, ensures a level of scrutiny hard to match. Journalists and news channels almost always ensure that all facts they are relaying are the truth and make sure to vet their sources. While it is true that digital media outlets also follow strict editorial processes, the sheer volume and speed at which digital content is produced can sometimes compromise thoroughness. Traditional press, with its slower, more deliberate pace, has the time and structure to ensure that the news being presented has been vetted from multiple angles.

This kind of journalism a name has been called slow journalism. It is an approach to news reporting that emphasizes depth, thoroughness, and long-term investigation over the immediacy and brevity that characterizes much of today's fast-paced media environment. Instead of focusing on breaking news and the 24-hour news cycle, slow journalism takes the time to dive deep into stories, often providing historical context, comprehensive analysis and nuanced perspectives. This method prioritizes quality over quantity and aims to give readers a more thoughtful and comprehensive understanding of the issues.[51]

While the digital age has transformed the way we consume news, it has not diminished the value of the traditional press.[52] Trustworthiness, depth, democratic function, and community focus of traditional media outlets make them relevant as well as essential in today's fast-paced world. Protecting traditional press is imperative not only for preserving history, but also for the very fabric of our democracy. Trust in the media, once eroded, is hard to rebuild; without this trust, informing citizenry, a necessity for

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48 Gloria Gómez-Diago: Perspectives to address artificial intelligence in journalism teaching. A review of research and teaching experiences. Revista Latina de Comunicación Social, 80. (2022), 29-46. http://dx.doi.org/10.4185/RLCS-2022-1542

49 David Bauder: Trust in media is so low that half of Americans now believe that news organizations deliberately mislead them. https://tinyurl.com/3kfcvka4 (Accessed on: 05 September 2024)

50 Amy Watson: Trustworthiness of news media worldwide 2023. https://tinyurl.com/4ktmatvk (Accessed on: 05 September 2024)

51 Edda Humprecht – Frank Esser: Diversity in Online News: On the importance of ownership types and media system types. *Journalism Studies* 19, (2017), 1825–1847. https://doi.org/10.1080/1461670X.2017.1308229

52 Reuters Institute (2023). Digital News Report 2023. https://tinyurl.com/47cecfpt (Accessed on: 05 September 2024)

a functioning democracy, is at risk. The role of the media as a watchdog, as a bearer of truths, and as a space for diverse voices cannot be overstated. By upholding and protecting the traditional press, we safeguard the integrity of our democratic society.

6. Conclusion

AI's potential to disrupt media is profound. The automation of routine tasks can increase efficiency, but it also threatens to undermine journalistic integrity and creativity. AI's role in media must be carefully regulated to ensure it enhances rather than detracts from the quality of journalism. This requires cooperative effort between policymakers, educators, and media professionals to develop frameworks that balance innovation with ethical considerations. AI should not be seen as a replacement of human work but as a tool that liberates journalists to focus on tasks that are more significant. Despite the automation of routine tasks such as sifting through extensive datasets and translating content, the human element remains indispensable in AI applications, particularly in journalism. AI is integrated into all aspects of news production, enhancing content personalization and recommendation. However, a basic literacy in AI technology is essential for all members of a news organization to understand and utilize its potential. AI is leveraged for data analysis, especially in identifying viral misinformation. It helps to save time and identify problems, but human intervention is crucial in debunking and verifying content. AI also promotes media literacy by labeling misleading content and providing correct information to the public. Utilizing AI for fact-checking presents challenges, including balancing resource limitations and addressing basic misinformation methods on social media platforms. Cooperation among media organizations and training journalists in digital tools for effective fact-checking are essential. [53]

AI's impact on journalism is not just a technological issue but a societal challenge. The rapid pace of AI development necessitates an urgent and comprehensive response from all stakeholders involved in the media ecosystem. Policymakers, media organizations, journalists, and educators must work together to ensure that AI is used ethically and responsibly in journalism. This includes developing clear guidelines and regulations, investing in training and education for journalists, and fostering an open dialogue about the ethical implications of AI in media. The ability of the industry to navigate this technological revolution will determine the future of local news and its vital role in society. By thoughtfully integrating AI and advocating for fair compensation and intellectual property rights, journalism can survive and thrive in the AI era, continuing to provide essential information and uphold democratic values. While AI presents significant opportunities for enhancing journalism, it also poses substantial threats that must be addressed. The future of journalism in the AI era will depend on our ability to navigate these challenges thoughtfully, ensuring that AI serves as a tool for improving the quality and accessibility of information rather than undermining the foundational

[53] The Use of Artificial Intelligence to Debunk Fake News https://tinyurl.com/23rfdzn2 (Accessed on: 05 September 2024)

principles of journalism. The stakes are high, and the decisions we make currently will shape the future of the media and democracy. By addressing the ethical, financial, and societal implications of AI in journalism, we can harness its potential for good while safeguarding the values and integrity of the media industry.

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ARTIFICIAL INTELLIGENCE AND THE MANAGEMENT OF STOCK CORPORATIONS – ORGANISATIONAL AND LIABILITY-RELATED ISSUES

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Abstract

Even if self-driving corporations are not yet on the horizon, some management tasks may be already performed by Artificial Intelligence (AI)[1]. This first raises the question to what extent and under which conditions the deployment of AI in the course of management of a corporation is already possible and can prove useful (I.). Secondly, the question arises whether and under which conditions the directors and the corporation can be held liable for the unlawful use of automated systems and any resulting damage (II.). The following article seeks to answer these questions mainly from the perspective of German and Swiss stock corporation law.

Keywords: Self-driving Corporations, Artificial Intelligence, AI, Management of Stock Corporations, Liability

Even if self-driving corporations are not yet on the horizon, some management tasks may be already performed by Artificial Intelligence (AI). This first raises the question to what extent and under which conditions the deployment of AI in the course of management of a corporation is already possible and can prove useful (I.). Secondly, the

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1 According to Art. 3 (1) Artificial Intelligence Act of the European Union (P9_TA[2024]0138) an "'AI system' means a machine-based system designed to operate with varying levels of autonomy, that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments".

question arises whether and under which conditions the directors and the corporation can be held liable for the unlawful use of automated systems and any resulting damage (II.). The following article seeks to answer these questions mainly from the perspective of German and Swiss stock corporation law.

1. Use of AI in the Management of Stock Corporations

1.1. Appointment of a Robot as Member of the Board of Directors

Already ten years ago, a Hong Kong-based venture capital firm announced in a publicity stunt that a robot named "Vital" had been appointed as a board member. Vital should protect the firm from investing in trendy, but overpriced inventions by identifying overhyped projects based on the level of public awareness a certain topic generates[2]. It is clear that a formal nomination of a robot is considered void not only in jurisdictions requiring natural personhood of board members[3], but also in jurisdictions that allow legal persons to sit on the board of directors[4]. This is because AI has neither direct personhood nor indirect personhood via the personhood of a self-driving company[5]. The concept of "e-personhood", which would be equal to human or juridical personhood, is not yet recognised by any jurisdiction[6]. It is therefore not surprising that "Vital" in fact only had the legal status of an "observer" on the board. A robot may support or consult board members, but it cannot directly take part in decisions of the board.

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2 Florian Möslein: Robots in the Boardroom: Artificial Intelligence and Corporate Law. In: Woodrow Barfield – Ugo Pagallo (ed.): *Research Handbook on the Law of Artificial Intelligence*. Cheltenham, Edward Elgar Publishing, 2018. 649–670.; Tieto (meanwhile Tietoevry) is also said to be the first Nordic company to appoint an AI by the name of Alicia T. to the leadership team of a new data-driven businesses unit (https://tinyurl.com/bd8h43re).

3 As it is the case, for example, in Hungary (§ 3:22 I Polgári Törvénykönyvről – Civil Code), Germany (§ 76 III AktG – Stock Corporation Act) and Switzerland (Art. 707 OR – Code of Obligations).

4 As it is the case, for example, in French law (Art. L.225-20 C. com. – Commercial Code) and English law (according to sect. 155 Companies Act 2006 a company must have at least one director who is a natural person).

5 See for corporations as legal containers for AI Shawn Bayern: The Implications of Modern Business Entity Law for the Regulation of Autonomous Systems. *Stanford Technology Law Review* 19, 1. (2015), 93–94.

6 See concerning the debate in German law Susanne Beck: Über Sinn und Unsinn von Statusfragen – zu Vor- und Nachteilen der Einführung einer elektronischen Person. In: Eric Hilgendorf – Jan-Philipp Günther (ed.): *Robotik und Gesetzgebung, Beiträge der Tagung vom 7.–9.5.2012 in Bielefeld*. Baden-Baden, Nomos, 2013. 239–262; Lawrence B. Solum: Legal Personhood for Artificial Intelligences. *North Carolina Law Review* 70, 5. (1992), 1231–1287.

1.2. Use of AI in Support of the Board of Directors

1.2.1. Organisational Framework

One can easily imagine that an artificially intelligent agent could deliver information, scenarios and advice to members of the board. The minutes of board meetings may also be kept by automated systems if – for example according to Swiss law[7] – the president finally signs them off in person. The board may not, however, delegate decision-making powers to AI because it has to ensure the overall management of the corporation in person. It can and must delegate some tasks of the day-to-day business but remains responsible for the overall management, i. e. the strategic orientation, the main features of the organisation and the monitoring[8]. These competences are non-transferable and inalienable. The directors are also the mediators between the stakeholders and the senior executives and it is difficult to imagine that they could be substituted by AI in this respect[9].

When considering the use of automated systems in performing supporting tasks, we should keep in mind the well-known strengths and shortcomings of AI at the current stage. It is clear that AI is superhuman when it comes to strength, endurance, efficiency and speed. It is also often mentioned that AI is free from conflicts of interest[10]. But that is not quite true when taking into account that AI is programmed in accordance with goals set by human clients and relies on relevant data from perhaps biased contexts[11]. On the other hand, the shortcomings of current AI are of particular importance in the field of corporate governance. First, AI is very much dependent on sufficient quantities of appropriate data. The comparatively high volumes of data pose a problem for small and medium-sized enterprises and will often demand the tapping of external data[12]. The reliance of AI on historical and identical data will reduce flexibility and innovation, which is particularly problematic in a dynamic entrepreneurial context

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7 Art. 713 III OR (Swiss Code of Obligations).

8 See, for example, Art. 716a OR (Swiss Code of Obligations) and § 76 I AktG (German Stock Corporation Act); see in Swiss law Lucas Forrer – Floris Zuur – Matthias Müller: Künstliche Intelligenz im Aktienrecht – Einsatz im Rahmen der Geschäftsführung und Verantwortlichkeit. In: Julia Meier – Nadine Zurkinden – Lukas Staffler (ed.): *Recht und Innovation – Innovation durch Recht, im Recht und als Herausforderung für das Recht.* Analysen und Perspektiven von Assistierenden des Rechtswissenschaftlichen Instituts der Universität Zürich (APARIUZ). Zürich/St. Gallen, Dike Verlag, 2020. 221./224; for German law Katja Langenbucher: Künstliche Intelligenz in der Leitungsentscheidung des Vorstands. *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 187, 6. (2023), 723., 725–727.

9 Luca Enriques – Dirk A. Zetzsche: Corporate Technologies and the Tech Nirvana Fallacy. *Hastings Law Journal* 72, 1. (2020), 22–23.

10 See, for example, Assaf Hamdani – Niron Hashai – Eugene Kandel – Yishay Yafeh: Technological Progress and the Future of the Corporation. *Journal of the British Academy 6, 1. (2018)*, 225., 229.

11 See especially for the use of AI when determining compensation Enriques – Zetzsche op. cit. 31–32.

12 John Armour – Horst Eidenmüller: Self-Driving Corporations?. *Harvard Business Law Review* 10, 1. (2019/2020), 87., 98–99.

due to changing market conditions and competition[13]. In addition, AI tends to struggle with infrequent, non-rule based and complex business judgements[14], overemphasises quantitative aspects in the decision-making process[15] and shows a lack of empathy when dealing, for example, with matters of human resources[16].

Given the organisational framework as well as the strengths and shortcomings of current AI, it seems clear that this technology can only serve as a management tool requiring enhancement by human managers in order to allow improvement of their own decision-making. There ensues a necessary interaction between human managers and machines. AI works as assisted AI in conjunction with managers in order to help them accomplish their tasks better, and as augmented AI it is designed to enable managers to do things they normally can't do[17].

With regard to the shortcomings, one can also ask whether the use of AI by a company must be disclosed. If the use of AI is associated with particular risks, such use should be mentioned and explained in the management report, which large enterprises have to draw up[18]. If this is not the case, there seems to be no special need for transparency according to general disclosure rules[19]. But the deployment of AI may also be mentioned in compliance reports and non-financial statements as a tool to detect and manage risks of unlawful behaviour[20].

1.2.2. Possible Applications of AI in Corporate Management

When it comes to possible applications of current AI in corporate management, financial planning and accounting first spring to mind[21]. Current AI is supposed to give sufficient results in this field dominated by quantitative parameters and demanding only a descriptive analysis (balance sheet, income statement, cash flow statement) or a predictive analysis (liquidity management). In view of its similar design, this should also be true for non-financial reporting regarding quantitative parameters, e.g. data on

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13 Enriques – Zetzsche op. cit. 26.

14 Armour – Eidenmüller op. cit. 97.

15 See for negative effects Michael Harris – Bill Tayler: Don't let metrics undermine your business – An obsession with the numbers can sink your strategy. *Harvard Business Review* 97, 5. (2019), 62–69.

16 Roland T. Rust – Ming-Hui Huang: *The Feeling Economy*. Basel, Palgrave Macmillan, 2021. 1. / 109–128: The human worker's competitive advantage over machines currently lies in empathy and therefore AI is assuming a larger share of thinking tasks, leaving human intelligence to focus more on feeling.

17 Armour – Eidenmüller op. cit. 96–97.

18 See, for example, Art. 19 Directive 2013/34/EU.

19 See, however, Akshaya Kamalnath – Umakanth Varottil: *A Disclosure-Based Approach to Regulating AI in Corporate Governance*. NUS (National University of Singapore) Law Working Paper No 2022/001. 2022.; for some pros and cons of code disclosure Enriques – Zetzsche op. cit. 49–50.

20 See, for example, Art. 19a I let. b Directive 2013/34/EU according to which "a description of the policies pursued by the undertaking in relation to those matters [i. e. non-financial information], including due diligence processes implemented" is part of the non-financial statement of large undertakings being public-interest entities.

21 See for real time accounting with the use of the blockchain-technology David Yermack: Corporate Governance and Blockchains. *Review of Finance* 21, 1. (2017), 24–25.

carbon emissions. Furthermore, the direct publication and analysis of quantitative data by AI does not pose any technical difficulties[22]. It is merely a matter of policy as to where the boundaries of the disclosure obligations are drawn and how precisely these obligations are defined in the law. It is difficult to imagine, for example, that AI would decide on ad hoc announcements given their undefined legal conditions[23].

Another favoured field of AI-application is monitoring as AI is capable of detecting unusual behaviours and developments by analysing large amounts of data, for example, in the area of personal trading by bank employees[24]. Proponents already describe the vision of a direct control of managers by interested shareholders or proxy advisors making the board superfluous[25]. This is, however, not merely a question of technical feasibility but also one of legal competences, efficiency and confidentiality. According to Swiss law, for example, the nomination and monitoring of executive officers and senior executives is a non-transferable and inalienable competence of the board[26]. In German law, it is up to the supervisory board to nominate and monitor the directors who are managing the stock corporation on their own responsibility[27]. All board members are subject to a duty of confidentiality, which forms part of their duty of loyalty[28].

When it comes to human resources management, the pre-selection of candidates from a large pool of applicants is a typical area of AI-application[29]. Conversely, the deployment of current AI in the recruitment of top level managers is difficult to imagine[30], though the use of AI in the design of compensation packages for managers

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22 Hamdani – Hashai – Kandel – Yafeh op. cit. 229–231.

23 According to Art. 53 of the SIX Swiss Exchange Listing Rules of 23 August 2023, for example, an issuer must inform the market of any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts the disclosure of which is capable of triggering a significant change in market prices. A price change is significant if it is considerably greater than the usual price fluctuations. The disclosure of the price-sensitive fact must also be capable of affecting the reasonable market participant in his investment decision. An ad hoc announcement is required as soon as the company becomes aware of the essential elements of the matter at hand.

24 See, for example, the AI-powered trade surveillance system Prometheus deployed by SIX Swiss Exchange Regulation in order to detect capital market abuses (https://tinyurl.com/4xt397k7); see in general Enriques – Zetzsche op. cit. 13–14.

25 Hamdani – Hashai – Kandel – Yafeh op. cit. 230.

26 Art. 716a I no. 4 and 5 OR (Swiss Code of Obligations).

27 §§ 76 I, 84, 111 AktG (German Stock Corporation Act).

28 See for Swiss law Christoph B. Bühler: *Art. 717 OR*. In: Lukas Handschin (ed.): *Die Aktiengesellschaft, Generalversammlung und Verwaltungsrat, Mängel in der Organisation (Art. 698–726 und 731b OR).* Zürcher Kommentar. Obligationenrecht. Zürich, Schulthess Verlag, 3rd ed., 2018. Art. 717 OR n. 165–169.; for German law Klaus J. Hopt – Markus Roth: § 93. In: Heribert Hirte – Peter O. Mülbert – Markus Roth (ed.): *Bd. IV/2 (§§ 92–94),* Aktiengesetz – Großkommentar. Berlin, De Gruyter, 5th ed., 2015. § 93 n. 279 ss.

29 Carmen Freyler: Robot-Recruiting, Künstliche Intelligenz und das Antidiskriminierungsrecht. *Neue Zeitschrift für Arbeitsrecht (NZA)* 36, 5. (2020), 284–285.

30 See, however, Isil Erel – Léa H. Stern – Chenhao Tan – Michael S. Weisbach: Selecting Directors Using Machine Learning. *The Review of Financial Studies* 34, 7. (2021), 3226–3264.

is possible[31] and quite often discussed. Proponents see AI as an opportunity to finally solve the seemingly eternal problem of fixing compensation of board members – a task, which shareholders often cannot effectively do and shouldn't be left to the conflicted board members themselves[32]. But as already mentioned, the conflict of interest remains. The managers will exert influence on the selection and programming of AI in a way that satisfies their own interests; furthermore, the AI application will rely on data distorted by similar conflicts of interest in comparable corporations[33].

As regards the core competence of the board of directors, i.e. the making of business judgements, the role of AI is limited to a supporting function. AI namely can assist with scenario planning, stress testing and processing of relevant data[34]. In the context of mergers and acquisitions, AI can help to process large amount of data to be analysed in due diligence procedures[35]. But the final decision will be and must be a human one[36].

1.2.3. Duty to Use or not to Use AI in Corporate Management

To answer the question of whether there is a legal duty to use or not to use AI in corporate management, one has to consider the three duties of the board members, i.e. the duty of care, the fiduciary duty and the duty of equal treatment of shareholders[37]. If, in the future, AI should form part of the state of the art of corporate management due to its ability to make reliable predictions by translating large sets of data into small, manageable portions, it must be deployed. Conversely, AI must not be used under any circumstances if it proves to be unreliable or unsuitable. Thus, the configuration of the AI system regarding, for example, the use of internal or external training data, the appropriateness of data and the alignment of the system with stakeholder interests as well as the testing and supervising of the automated systems themselves become important discretionary decisions of the board[38]. The board has to build up an appropriate expertise[39].

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31 Equilar for example recently introduced ERIC, an AI-powered proxy analysis tool for compensation and governance professionals, which transforms the navigation and extraction of insights from complex SEC filings and disclosure materials (https://tinyurl.com/bdcvdkwv).

32 See, for example, Hamdani – Hashai – Kandel – Yafeh op. cit. 229.; for empirical evidence on the shortcomings of different Say on Pay models see Fabrizio Ferri – Robert F. Göx: Executive Compensation, Corporate Governance, and Say on Pay. *Foundations and Trends in Accounting* 12, 1. (2018), 61–88.

33 See also Enriques – Zetzsche op. cit. 24–25., 31–32.

34 Möslein op. cit. 7.

35 Karl Michael Popp: *Automation of Mergers and Acquisitions – Due Diligence Tasks and Automation*. Digitalization M&A. Norderstedt, Books on Demand, 2021. 19 ss.

36 See above under I. 2. a).

37 See, for example, Art. 717 OR (Swiss Code of Obligations).

38 See for the growing need for a monitoring of AI and for data governance Armour – Eidenmüller op. cit. 90–91.

39 Forrer – Zuur – Müller op. cit. 224.

If AI turns out to be a remedy for conflicts of interest, it is to be used in compliance with the board's fiduciary duty. But the directors have to ensure impartiality with regard to programming and the data basis. Directors do not have any margin of discretion in this respect because the business judgement rule does not apply in case of a conflict of interest[40].

When it comes to ensuring equal treatment of shareholders, the use of AI may be necessary to identify equal treatment requirements and distinguishing features. But the decision, whether a distinguishing feature is of significant relevance or not, is a matter of discretion and requires a balancing process, and must therefore be left to the individual board members.

1.2.4. Attribution of Knowledge

A final organisational question concerns the attribution of AI knowledge to the corporation. The traditional approach, according to which only the knowledge of the current executive body members is attributed to the corporation[41], suggests that there is no such attribution since AI cannot become a formal board member. According to the more recent communication theory approach[42], however, attribution would take place if the AI application were programmed to communicate the relevant information to the information system and the person in charge of the relevant action of the corporation were obligated to retrieve such information from the system. If, for example, a corporation were to buy a stolen car whilst being represented by one of the directors in good faith, the corporation would not acquire ownership bona fide, if the artificially intelligent contract management system noticed during the document check that the seller was not the owner of the car. The management system would be programmed to communicate the information to the director, or the director would be obligated to retrieve such information from the system before concluding the sales contract. The corporation should not be allowed to benefit from the fact that the verification is carried out separately by an artificially intelligent agent.

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40 See for Swiss law Bühler op. cit. Art. 717 OR n. 67; for German law Regierungsbegründung zum Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), BT-Drucks. 15/5092, 11–12.

41 See for German law Reichsgericht (RG), Juristische Wochenschrift (JW) 1935, 2044; Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 41, 282, 287; BGHZ 109, 327, 331 s.; Eberhard Schilken: *Wissenszurechnung im Zivilrecht*. Schriften zum deutschen und europäischen Zivil-, Handels- und Prozessrecht. Bielefeld, Gieseking, 1983. 127 ss.; Reinhard Richardi: Die Wissensvertretung. *Archiv für die civilistische Praxis (AcP)* 169, 5 / 6. (1969), 385., 388; for Swiss law Entscheidungen des Bundesgerichts (BGE) 137 III 460; BGE 56 II 183, 188; BGE 101 Ib 422, 437; BGE 124 III 418, 420.

42 See for German law Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 132, 30, 35 ss.; Dieter Medicus: Probleme der Wissenszurechnung. *Karlsruher Forum (Sonderheft der Zeitschrift Versicherungsrecht)* 15, 4. (1994), 11 ss.; for Swiss law Bundesgericht (BGer) 4C.335/1999 E. 5; BGer 5C.104/2001 E. 4 c) bb); Han-Lin Chou: *Wissen und Vergessen bei juristischen Personen*. Basel, Helbing & Lichtenhahn, 2002. 157 ss.

2. Liability Issues

2.1. Liability of the Directors

Directors are liable at least to the stock corporation and, under certain circumstances, to shareholders and creditors when they breach their duties of care, loyalty or equal treatment by using and causing damage to the corporation or third parties[43]. Fault of the directors might be due to premature or unsuitable use of AI, its poor selection or installation, poor instruction or monitoring of AI or due to a delegation of non-transferable tasks to AI[44]. The liability might be based on general liability rules of contract, tort or corporate law[45] or – namely in the context of bankruptcy – might follow from special liability rules such as procrastination in bankruptcy[46], mismanagement[47], failure to keep proper accounts[48] or non-payment of social security contributions[49]. If, for example, a Swiss stock corporation neglects to pay private health insurance contributions[50] due to a failure of the new self-executing human resources management tool introduced by a resolution of the board, an employee, who suffers a loss because the insurance company does not reimburse treatment costs, may demand compensation from the responsible board members. He will have to prove damage, fault, causality

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43 See, for example, § 3:24 I Polgári Törvénykönyvről (Hungarian Civil Code), § 93 AktG (German Corporate Law Act) and Art. 754, 756, 757 OR (Swiss Code of Obligations).

44 See in detail Markus Becker – Philipp Pordzik: Digitalisierte Unternehmensführung. *Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW)* 6, 3. (2020), 334., 349–353; Forrer – Zuur – Müller op. cit. 222–223.

45 See, for example, Art. 97 I, 321e, 398 II (contractual liability), Art. 41 (tortious liability) and Art. 754 ss. (corporate liability) OR (Swiss Code of Obligations).

46 See, for example, § 15a I InsO (German Insolvency Act).

47 See, for example, Art. 165 I StGB (Swiss Criminal Code): "Any debtor who in a manner other than that in Article 164 through mismanagement, in particular through inadequate capital provision, excessive expenditure, hazardous speculation, the negligent granting or use of credit, the squandering of assets or gross negligence in the exercise of his profession or the management of his assets, causes or aggravates his excessive indebtedness, causes his insolvency or, in the knowledge that he is unable to pay, prejudices his financial situation, shall be liable, if bankruptcy proceedings are commenced against him or a certificate of unsatisfied claims is issued in his respect, to a custodial sentence not exceeding five years or to a monetary penalty".

48 See, for example, Art. 166 StGB (Swiss Criminal Code): "Any debtor who fails to comply with a statutory obligation to which he is subject to keep and preserve business accounts or draw up a balance sheet, with the result that his financial position is not or not fully ascertainable, shall be liable, if bankruptcy proceedings are commenced against him or a certificate of unsatisfied claims has been issued in his respect following a seizure of assets in accordance with Article 43 of the Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (DEBA), to a custodial sentence not exceeding three years or to a monetary penalty".

49 See, for example, Art. 52 AHVG (Swiss Act on Pension and Survivors' Insurance).

50 See for such a liability case in Swiss law Entscheidungen des Bundesgerichts (BGE) 141 III 112.

and the violation of a legal rule that serves to protect him as the injured party in a particular way[51].

When a possible breach of the duty of care and the liability of directors to the corporation is at stake, German and Swiss law apply the so-called business judgement rule, which was developed in US law[52]. According to § 93 I phr. 2 AktG (German Stock Corporation Act), there will be no violation of the duty of care, if at the time of taking an entrepreneurial decision, directors had good reason to assume that they were acting on the basis of adequate information for the benefit of the company. In any case, the decision to deploy and use a specific AI application must be considered a business judgement, i.e. a complex and multidimensional decision under uncertainty[53] principally comparable to the decision to acquire a company or not[54], to grant a loan to a company in crisis or not[55] or to conduct a trial or not[56]. In addition, the rule is only applicable to a breach of the duty of care and therefore not applicable where non-transferable tasks are delegated to AI or where there is a conflict of interest[57]. The business judgement rule is thus a privilege granted to the directors when it comes to their liability towards the corporation for breaches of the duty of care.

2.2. Liability of the Corporation

As one could see in section I., AI will gradually replace directors and employees as cause of corporate misconduct. Unless the law adapts by using classical or new imputation rules, corporations will become more and more immune to liability as they transfer tasks from directors and employees to AI[58]. As long as the legislators do not adopt new rules concerning the liability of the corporation for misconduct caused by AI, it will be up to the longstanding imputation rules and their interpretation to ensure

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51 Entscheidungen des Bundesgerichts (BGE) 141 III 112 considered Art. 159 Criminal Code as such a rule: "Any employer who breaches his obligation to make use of a deduction from an employee's salary for the payment of taxes, duties, insurance premiums or contributions or in any other way for the benefit of the employee and thus causes loss to the employee shall be liable to a custodial sentence not exceeding three years or to a monetary penalty".

52 See under Delaware General Corporation law Delaware Supreme Court opinions in Bodell v. General Gas Electric Corp., 15 Del. Ch. 119, 132 A.442; Zapata Corp. v. Maldonado, 430 A.2d 782 and Aronson v. Lewis, 473 A.2d 805 (Del. 1984); Stephen A. Radin: *The Business Judgment Rule – Fiduciary Duties of Corporate Directors.* Alphen aan den Rijn, Wolters Kluwer, 6th ed., 2009.

53 See in German law, for example, Holger Fleischer: Das Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts. *Neue Juristische Wochenschrift (NJW)* 57, 49. (2005), 3525., 3528., demanding an element of prognosis and risk.

54 In Swiss law Bundesgericht (BGer) 4A_306/2009 of 8 February 2010.

55 In Swiss law Bundesgericht (BGer) 4A_74/2012 of 18 June 2012.

56 In Swiss law Entscheidungen des Bundesgerichts (BGE) 139 III 24.

57 See for German law Regierungsbegründung zum Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), BT-Drucks. 15/5092, p. 11 s. and for Swiss law Bühler op. cit. Art. 717 OR n. 62–68.

58 Mihailis E. Diamantis: The Extended Corporate Mind*:* When Corporations Use AI to Break the Law. *North Carolina Law Review* 98, 4. (2020).

corporate accountability. In line with general principles of law and considering the various roles AI may play, one can distinguish five different ways of possible imputation to a corporation: AI may first be unlawfully deployed by directors. AI may furthermore act as a de facto or shadow director of the corporation, or serve as a dependant or independent agent of the corporation. The general liability for hazardous activities[59] or the liability for controlled movable things (responsabilité du gardien du fait de la chose)[60], which are not known to German or Swiss law, will not be considered here.

2.2.1. Liability for Human Directors

The corporation will be liable for damages caused by its human directors who, in the exercise of their competences, breach their duty of care, loyalty or equal treatment by using AI in a faulty manner[61]. This automatic imputation does not pose any particular problem in the field of AI because the corporation is, according to the theory of real existence of a corporation[62], directly responsible for any unlawful behaviour of its governing bodies amounting to a breach of contract or a tort in accordance with the mentioned rules. In addition, the corporation cannot invoke the privilege of the business judgement rule which is only granted to the directors when it comes to their liability towards the corporation for breaches of the duty of care. But the corporation cannot rely itself on this privilege in its relation to third parties. The rule is intended to protect directors in order to ensure that they do not shy away from risky decisions in the best interest of the corporation[63]. It is not meant to deprive injured third parties of their claims against the corporation based on general liability rules.

2.2.2. Liability for AI-Agents as De Facto or Shadow Directors

According to Swiss law, a corporation is also liable for the harmful behaviour of a de facto director[64]. De facto directors are natural or legal persons who effectively, repeatedly and decisively participate in the formation and expression of the will of the company by making decisions reserved for management bodies or by managing

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59 See §§ 6:535 ss. Polgári Törvénykönyvről (Hungarian Civil Code).

60 See Art. 1242 I C. civ. (French Civil Code) and Art. 2051 CC (Italian Civil Code).

61 See, for example, § 3:24 II Polgári Törvénykönyvről (Hungarian Civil Code), § 31 BGB (German Civil Code) and Art. 55 II ZGB (Swiss Civil Code); for the different forms of misconduct see under II.1.

62 In German law Otto von Gierke: *Die Genossenschaftstheorie und die Deutsche Rechtsprechung.* Berlin, Weidmannsche Buchhandlung, 1887. 5 ss. /174 ss.; Heinrich Dernburg: *Die allgemeinen Lehren des bürgerlichen Rechts des deutschen Reichs und Preussens*. Halle, Waisenhaus, 3rd ed., 1906. 179 ss. / 186–187 with fn. 6; in Swiss law Eugen Huber: *Erläuterungen zum Vorentwurf eines schweizerischen Zivilgesetzbuches, Bd. 1.* Bern, Büchler und Co., 2nd ed., 1914. 46–47; Entscheidungen des Bundesgerichts (BGE) 31 II 247.

63 See for the rationales behind the Business Judgement Rule Bernard S. Sharfman: The Importance of the Business Judgement Rule. *New York University Journal of Law and Business* 14, 1. (2017), 27–69.

64 Entscheidungen des Bundesgerichts (BGE) 87 II 184, 188; Bühler op. cit. Art. 722 OR n. 9.

the corporation without being effectively appointed to do so[65]. The requirements are met to the extent that AI does not have the status of a formal director. AI might also exert the necessary decisive and permanent influence on the will and behaviour of the corporation[66]. But the concept requires personhood, which is missing. Therefore, an analogy must be considered in the case of artificially intelligent de facto directors. Unlike an animal or a simple machine, an AI de facto director may come close to a human one in a way that the customary law concept of de facto directorship has not anticipated. The idea behind the imputation rule is that a company should not benefit from having the act performed by a de facto director instead of a duly appointed human director. The concept is intended to prevent abusive circumventions of legal rules and an analogy is a classical instrument to cope with such circumventions. The fact that an unlawfully acting de facto director is also personally responsible according to Art. 55 III ZGB (Swiss Civil Code) and other specific liability rules, and such liability requires personhood, should not be considered an argument against the analogy and the imputation of the AI's conduct to the corporation[67]. The competing personal responsibility of the de facto director should not be treated as a condition for the corporation's liability. The joint liability only serves to protect the injured person.

While in Swiss law, shadow directors are simply considered to be de facto directors for whom the corporation is responsible in the same way as for formal directors, English law, for instance, pays particular attention to this concept. According to Section 251 of the Companies Act 2006, a shadow director is a "person in accordance with whose directions or instructions the directors of the company are accustomed to act. A person is not to be regarded as a shadow director by reason only that the directors act (a) on advice given by that person in a professional capacity […]". If, for example, a stock corporation unlawfully neglects to pay health insurance contributions because the new AI legal assistant, following a wrong legal analysis, recommended that the board should refrain from making such payments, the liability of the corporation for its shadow director depends not only on the question of personhood and a possible analogy but also on the distinction between mere professional support or advice on the one side and permanent undue influence on decisions of the board on the other. In the example mentioned, the robo advice is close to a professional advice given by a lawyer and would therefore not be considered as provided in the capacity of a shadow director.

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65 See Entscheidungen des Bundesgerichts (BGE) 124 III 418, 420 s.; BGE 128 III 29, 30 s.; BGE 132 III 523, 528 s.; Michael Wyttenbach: *Formelle, materielle und faktische Organe – einheitlicher Organbegriff?*. Basel, Helbing Lichtenhahn Verlag, 2012. 239–240.; Alexander Vogel: *Die Haftung der Muttergesellschaft als materielles, faktisches oder kundgegebenes Organ der Tochtergesellschaft*. St. Galler Studien zum Privat-, Handels- und Wirtschaftsrecht. Bern, Haupt Verlag, 1997. 301.

66 Forrer – Zuur – Müller op. cit. 220. therefore consider a liability of a corporation for artificially intelligent de facto directors to be possible.

67 The Swiss Federal Tribunal, however, took a different view concerning the liability of a Market Maker who was said to have delegated services to an algorithm in violation of the prohibition of substitution. It rejected the liability of the Market Maker according to Art. 399 I OR (Swiss Code of Obligations) arguing, that the client should also have direct claims against the substitute according to Art. 399 III OR (Swiss Code of Obligations) and that these claims would require personhood of the substitute (Bundesgericht [BGer] 4A_305/2021 cons. 7.3.1).

2.2.3. Contractual Liability for AI-Agents

Jurisdictions widely recognise that a corporation is liable as debtor of an existing obligation for harmful acts of dependant or independent agents who are involved in the fulfilment of the obligation with the corporation's knowledge and will[68]. If, for instance, an airline uses a chatbot for customer contact, it will function as such an agent. If the chatbot informs the client that the airline will grant a discount on the condition that a receipt is submitted within 90 days, and the airline, referring to the contradicting information on the company website, then refuses to grant such discount retroactively, it might be responsible for the damage caused to the client by imputation of the misrepresentation by the chatbot[69].

But again, this classical imputation mechanism is not directly applicable due to AI's lack of personhood and its inability to act culpably[70]. One should, however, likewise consider an analogy when the AI is acting in an autonomous way comparable to a human being and not deployed as a mere tool[71]. The imputation according to § 6:148 Hungarian Civil Code or similar rules in other jurisdictions is based on the idea that a person who benefits from the use of an auxiliary should be liable for the associated damage, for which it would have been equally liable if it had acted on his own. The same applies to the case where a digital system is used instead of a human assistant or a legal person[72]. As with the deployment of an employee, the company is also in a position to manage the risks of an electronic division of labour. When arguing in favour of an analogy, the necessary degree of a human-like autonomy of artificially intelligent systems becomes the key question. In this respect, one can mainly differentiate between a human dominated "if-then-system" and an independently acting and self-learning system[73], or distinguish in a more sophisticated way between different degrees of autonomy ranging from a totally human dominated system via a pre-selecting or executing system to an independent system overriding the human being in the decision-making process[74]. The European Parliament defines a robot's autonomy "as the ability to take decisions and

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68 See, for example, § 6:148 Polgári Törvénykönyvről (Hungarian Civil Code), § 278 BGB (German Civil Code) and Art. 101 OR (Swiss Code of Obligations).

69 See Moffatt v. Air Canada, 2024 BCCRT 149.

70 Sascha Briner: Die Revolution des Brokergeschäfts und deren Folgen. *Haftung und Versicherung (HAVE)* 16, 4. (2017), 372., 380–381. and Forrer – Zuur – Müller op. cit. 220–221. therefore reject the applicability of Art. 101 OR (Swiss Code of Obligations).

71 See, for example, in favour of an analogy to Art. 101 OR (Swiss Code of Obligations) Christaphor Yacoubian: Digitale Systeme als «Erfüllungsgehilfen» – Relevanz der fehlenden Rechtsfähigkeit? Zugleich Anmerkungen zu BGer 4A_305/2021 vom 2. November 2021. *Aktuelle Juristische Praxis (AJP)* 33, 4. (2023), 412., 415–419.; Beatrice Borio: Haftungsrechtliche Herausforderungen bei autonomen Pflegerobotern. *Pflegerecht* (2021), 223., 225–226.; Freyler op. cit. 289., however, denies the possibility of a sufficient autonomy of AI which always relies on human programming and training.

72 See concerning § 278 BGB (German Civil Code) Becker – Pordzik op. cit. 341.

73 See, for example, Susanne Beck: Der rechtliche Status autonomer Maschinen. *Aktuelle Juristische Praxis (AJP)* 26, 2. (2017), 183., 188.

74 See for a scheme with ten gradations of autonomy Sivio Hänsenberger: Die Haftung für Produkte mit lernfähigen Algorithmen. *Jusletter* 26 November 2018, n. 7.; Philipp Hacker: Verhaltens- und

implement them in the outside world, independently of external control or influence", while at the same time clarifying that "this autonomy is of a purely technological nature and its degree depends on how sophisticated a robot's interaction with its environment has been designed to be"[75].

If one denies imputation by way of analogy, one could also hold the company liable by arguing that in contract law, there is a fault presumption in case of misconduct of the debtor, which can only be overturned if the debtor proves that he has carefully selected, instructed and supervised the AI[76]. But this approach seems only appropriate for tool-like and not for human-like automated systems. This is because a contractual debtor is always responsible for culpably acting auxiliary human beings even if he can prove that he has carefully selected, instructed and supervised the auxiliary[77].

Another problem associated with this imputation rule concerns the standard of diligence. One may wonder if it should be based on human capabilities or on those of the AI. The answer should primarily depend on the agreement between the parties. In case of doubt, the creditor can expect the corporation as debtor to guarantee an average standard of corporate organisation characterized by the division of human labour[78]. This standard then also applies to the use of AI regardless of whether the digital systems have a humanoid appearance or demeanour. However, if the use of AI has been discussed by the parties and is an intended part of the fulfilment of the contract, the creditor may rely on special AI-abilities but, on the other hand, should not be allowed to refer to higher human standards[79]. One must determine whether the system used falls short of the technical quality standards applicable to systems of the type available at a given time. This should be considered equivalent to the requirement of culpable behaviour, which must be met in the case of a human assistant[80]. One should focus exclusively on the incorrect output of the automated system (e.g. a wrong answer

Wissenszurechnung beim Einsatz von Künstlicher Intelligenz. *Rechtswissenschaft (RW)* 9, 3. (2018), 243., 251. differentiates between week, medium and strong autonomy.

75 European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), document no. P8_TA(2017)0051, sect. "Liability", Z.AA.

76 This is why in Moffatt v. Air Canada, 2024 BCCRT 149 the tribunal held that "the applicable standard of care requires a company to take reasonable care to ensure their representations are accurate and not misleading", rejecting Air Canada's argument that the chatbot was a separate entity and without considering any imputation rule because the chatbot had been part of Air Canada's website; see also for German law Freyler op. cit. **289.**

77 Forrer – Zuur – Müller op. cit. 221–222., however, consider this limitation of liability to be appropriate.

78 See concerning § 278 BGB (German Civil Code) and a human debtor standard Becker – Pordzik op. cit. 341.; see in general concerning Art. 101 OR (Swiss Code of Obligations) Entscheidungen des Bundesgerichts (BGE) 130 III 591, 605 and Bundesgericht (BGer) 4A_58/2010 E. 3.2.

79 See for Art. 101 OR (Swiss Code of Obligations) Yacoubian op. cit. 419.; Becker – Pordzik op. cit. 341., however, favour a human standard of liability.

80 The majority of the authors, however, states that at least current AI is not able to act culpably because this presupposes a recognition of the behaviour's consequences and an acting in accordance with this knowledge; see Silvio Hänsenberger: *Die zivilrechtliche Haftung* für *autonome Drohnen unter Einbezug von Zulassungs- und Betriebsvorschriften.* St. Gallen, Carl Grossmann Verlag, 2018a. 153.

of a chatbot due to a false data basis or an error in programming) and not require an element of "fault" due to incorrect autonomous behaviour of the system. The distinction between incorrect programming and incorrect training of the AI on the one hand and the AI's own failure on the other[81] mainly plays a role with respect to the liability of the manufacturer, but not that of the user. When it comes to the liability of the user, the human trainer or the programmer cannot be considered to be auxiliaries of the debtor when they have trained or programmed the AI, as it is usually the case, before the contractual obligation was established by the user[82].

2.2.4. Tortious Liability for AI-Agents

According to a last classical rule, the tortious behaviour of dependant agents can be attributed to the corporation where the corporation, as their employer, fails to prove that it has taken all due care in selecting the agents, instructing and supervising them[83]. This last rule is not a real imputation rule. It is based on proper fault on the part of the representatives of the corporation and therefore no fault of the AI is required. If, for example, a corporation is running a taxi business with some taxis being driven by human beings and others by AI, this rule might come into play when one of the self-driving taxis causes an accident due to a lack of care in the selection, training or supervision of the automated system by the corporation's representatives. As in the before mentioned imputation rules, personhood and in this case particularly natural personhood of the agent is required. When considering an application of the rule by analogy to AI-agents[84], it is necessary to examine under which conditions an AI can be regarded as dependent[85]. A functional approach and a comparison with similar human activities and relationships appear appropriate. If, in the given example, the human taxi drivers are considered to be dependant, this should also apply to self-driving cars insofar as they function in the same way as their human counterparts when transporting clients in accordance with the instructions of the principal. Dependency cannot be dismissed simply because there is a certain degree of autonomy, e.g. with regard to driving and decision making, as this also applies to human drivers. This autonomy is precisely what is needed to justify the analogy. The dependency relationship exists with

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81 See, however, for this distinction Hänsenberger (2018a) op. cit. 150. and Freyler op. cit. **288.**

82 In this respect, the situation is the same as for manufacturers or sellers of tools, who are also not regarded as vicarious agents of a later established contractual obligation demanding the use of the tool; see, for example, in Swiss law Rolf H. Weber – Susan Emmenegger: *Allgemeine Bestimmungen, Die Folgen der Nichterfüllung (Art. 97–109 OR)*. Berner Kommentar. Schweizerisches Zivilgesetzbuch. Das Obligationenrecht. Bern, Stämpfli Verlag, 2nd ed., 2020. Art. 101 OR n. 50.

83 See, for example, § 6:540 I and § 6:542 I Polgári Törvénykönyvről (Hungarian Civil Code), § 831 BGB (German Civil Code) and Art. 55 I OR (Swiss Code of Obligations).

84 In favour of an application of § 831 BGB (German Civil Code) by analogy Becker – Pordzik op. cit. 341; against an application of Art. 55 I OR (Swiss Code of Obligations) because of the missing personhood and the legally uncertain handling of the autonomy criterion as a prerequisite for the analogy Hänsenberger (2018a) op. cit. 167.

85 Hacker op. cit. **265**–266.

respect to the corporation, which deploys the AI-system in the course of its activity and is in a position to define, influence, control and stop its use. It does not exist with regard to the person who programmed and trained it.

3. Conclusion

The management of corporations is not a preferred field of current AI applications. At present, AI may provide some support to business judgments, but it is still a long way from being able to autonomously manage companies. Self-driving companies are as yet technically and legally impossible. And this holds true even for more straightforward scenarios such as subsidiaries or special purpose vehicles. Identifying regularities or irregularities in historical data might be useful in some situations, but reliance on such data can prove to be problematic in social and dynamic contexts[86]. It is more useful in a planned economy and in large enterprises than in a market economy and in small and medium-sized enterprises.

As AI lacks legal personhood up to now, liability for AI systems can only attach to the producer and/or the user. If a corporation uses AI in the management of the corporation or in the course of its activities, the longstanding imputation rules which exist in Hungarian, German and Swiss law concerning the misconduct of directors, de facto or shadow directors and dependent or independent agents can only be applied by analogy when the AI system is acting with a certain degree of autonomy in a functional equivalence to humans and not as a simple tool. In some jurisdictions like Hungary, the general liability for hazardous activities may constitute another basis for liability[87]. This is also true concerning the liability for controlled movable things (responsabilité du gardien du fait de la chose) which is, for example, known in French or Italian law[88].

It is only in the future that AI may perform as good as or better than humans in every dimension of intelligence. Then, a robot board member and a completely self-driving company become conceivable and will challenge corporate law. Then, a general authorization of self-driving companies by the legislator will be necessary – with or without legal personhood. In accordance with the current system applicable to juridical persons, there should be at least some form of state control upon registration[89]. The AI system must be reliable and ensure compliance with all mandatory legal rules. In this context, the state might offer a legal operating system for AI applications that is based on and conforms with its corporate laws[90]. Since totally self-driving companies are able to manipulate the location, where the day-to-day management of the corporation takes place, one has also to reconsider the real seat theory in international corporate law. It must be replaced by a link to the main branch of the enterprise, the centre of

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86 Enriques – Zetzsche op. cit. 26.

87 See §§ 6:535 ss. Polgári Törvénykönyvről (Hungarian Civil Code).

88 See Art. 1242 I C. civ. (French Civil Code) and Art. 2051 CC (Italian Civil Code); proposing a comparable liability for robots under Swiss law Borio op. cit. 227–228.

89 See Beck (2017) op. cit. 190.

90 Armour – Eidenmüller op. cit. 114.

main interest or a virtual registered office with some safeguards[91]. In the future, AI may also become liable as such. One would then have to think about implementing or adapting the traditional creditor protection mechanisms such as capital requirement rules, a compulsory insurance or shareholder liability[92]. The privilege of the business judgement rule should then also apply to autonomous AI decision-making. The privilege of the rule is not specifically granted to natural persons but to business decisions under considerable uncertainty in general[93]. But all these issues should not be a problem for the near future.

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[93] See Sharfman op. cit. 43–50.

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POSSIBILITIES AND PRACTICAL EXPERIENCES OF USING ARTIFICIAL INTELLIGENCE IN TAXATION

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Abstract

The present paper aims at analysing whether or not AI/robots should be taxed to counter this backdrop. In the first part, the author summarizes selected targeted options that have been considered for taxing AI/robots. The author also analyses the various options from the perspective of relevant tax policy principles. In light of the assessment and discussion in the article, the author puts forward the idea of a sovereign measure, that is, an education tax. Moreover, given the fact that a sovereign measure may not be sufficient to tackle the issue at stake, the author discusses the possibility of implementing a global fiscal redistribution mechanism (multilateral solution) from developed (surrender jurisdictions) to developing countries (recipient jurisdictions). One such solution is to create a global education tax to foster education or awareness in developing or low-income countries. A much broader solution would be to introduce the so-called planetary tax, which would assist developing or low-income countries in dealing with a wide range of planetary issues.

Keywords: taxation, robot, artificial intelligence, administration, income tax

1. Introduction

Since time immemorial, the concept of individuals have equalled workforce. Individuals have many unique skills that machines are still unable to replicate, yet it cannot be denied that AI/robots are developed to play a role similar as possible to that of the human beings. Certain factors may encourage the use of AI/robots instead of humans; let us enumerate some:

(I) robots can increase productivity, mostly in repetitive tasks;

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(II) robots can mitigate mistakes. They can be more precise and consistent than humans regarding specific functions;
(III) working conditions for humans can be improved by avoiding workers performing arduous tasks (for example, heavy movements). This would then promote a safer work environment;
(IV) robots could also address worker-related shortages;
(V) labour and production costs can be reduced, and routine tasks can be eliminated through automation. Hence individuals can dedicate more time to non-routine tasks or leisure.

Common examples of the widespread use of AI and robots include the use of
(I) industrial robots in assembly lines and manufacturing in general;
(II) self-check-out machines at grocery stores;
(III) self-check-in machines at airports;
(IV) self-payment vending machines for personal goods consumption, such as cigarettes, beverages and snacks;
(V) self-order machines, such as those found at McDonald's;
(VI) self-driving cars;
(VII) drones used in photography or delivery services;
(VIII) voice-activated assistants.

AI/robots are becoming extremely popular for their performance, sometimes on a par with, or better than that of humans. Examples of service robots: IBM Watson for Oncology aids in supporting cancer treatment; (I) Da Vinci assists medical and surgery purposes; (II) Ross is specialized in legal research; (III) Milo provides education for autistic children; (IV) Shimon plays music; (V) Motoman can play as a chef and cook, and so on.

Based on the examples above, it is likely that AI/robots overtake human workforce in quite a number of areas, causing massive job losses thereby. This probability has an important impact on tax revenues for governments. As an illustration, countries could lose a significant portion of their revenue collected from taxing regular employment income. Likewise, AI/robots, unlike humans, do not buy cars, clothes, food, electronic devices, nor do they contract services. Consequently, production as well as consumption of goods and services may decline. Such a decline in consumption could affect VAT collection; it could lead to lower VAT collection. In other words, employing AI/robots could cause tax distribution effects beyond employment-related tax collections.

The present paper aims at analysing whether or not AI/robots should be taxed to counter this backdrop.

The structure of the article is as follows.

In the first part, the author summarizes selected targeted options that have been considered for taxing AI/robots. The author also analyses the various options from the perspective of relevant tax policy principles. In light of the assessment and discussion in the article, the author puts forward the idea of a sovereign measure, that is, an education tax. Moreover, given the fact that a sovereign measure may not be sufficient to tackle the issue at stake, the author discusses the possibility of implementing a global

fiscal redistribution mechanism (multilateral solution) from developed (surrender jurisdictions) to developing countries (recipient jurisdictions). One such solution is to create a global education tax to foster education or awareness in developing or low-income countries. A much broader solution would be to introduce the so-called planetary tax, which would assist developing or low-income countries in dealing with a wide range of planetary issues.

2. The place of AI in the tax system

In this section, the author examines the following questios:

- How can artificial intelligence be integrated into the current tax system, tax types and the practice of the tax authority?
- What effects (advantages, disadvantages) of artificial intelligence can be identified in terms of current tax types?
- How can either taxpayers or the tax authorities use artificial intelligence?

2.1. AI and the income taxes

A tax is imposed each year on all earned income of individuals or corporations, with some limited exceptions.

Income is defined as all income from whatever source derived. It includes income forms as listed here: compensation for services, gross income derived from a business, gains derived from property dealings, interest, rents, royalties, dividends, annuities, life insurance payouts, pensions, income from discharge of indebtedness, distributed partnership income, income in respect of a decedent, and income from an interest in an estate or trust. Traditionally, income is defined as ordinary (essentially, actively earned income), passive (income earned without active participation) or portfolio (income from investments, such as dividends, interest, or royalties). Income includes capital gain on the sale of a capital asset. A significant challenge will be how to define and classify AI income.

While all types of income[1] can have unique sourcing and characterization issues, intangible income, such as royalty streams, or the sale and exchange of assets that created such streams, can be harder to source and characterize and thus subject to a myriad of rules. It is necessary to determine the characterization of the income as ordinary or capital based in part upon whether the intangible asset was self-created. If so, it is usually taxed more like ordinary income; if not, it may be subject to the lower capital gains tax rate. Sourcing rules also become more complex when taxing intangibles. Digital assets can be harder to find and more easily shifted offshore, limiting the tax reach of any state.

[1] Zsolt Halász: *A jövedelem- és vagyoni típusú adók*. Budapest, Magyarország. Wolters Kluwer Hungary, 2022. 331.

Additionally, income abroad can be subject to lower tax rates under the global intangible low-taxed income or foreign derived intangible income provisions, depending upon the ultimate product, intangible or services sold.

2.2. AI in the service of the tax authority

In recent years, we have seen intensive digitalisation in tax reporting, especially in the area of VAT. Tax authorities are now obtaining huge amounts of structured data (such as uniform VAT control files, SAF-T or JPK in Poland). Moreover, the trend of the digital transformation of the tax administration is bound to continue, and soon tax authorities will be able to obtain real-time detailed data on every transaction carried out through the introduction of ongoing reporting systems based on structured electronic VAT invoices in individual countries. As a result, tax administration will have an ever-growing database of extremely high quality data, which, due to its structured nature, can be analysed relatively easily and efficiently. Such an environment provides an ideal basis for the application of AI solutions.

AI-based models have long been an extremely effective tool in the hands of the tax administration, which is able to monitor taxpayer activity on an ongoing basis or detect tax fraud and select taxpayers for tax audits by analysing the data it holds. An example of such a solution is the Polish STIR (Clearing House Information and Communication System) a tool used by tax authorities to counter VAT fraud. This system analyses bank operations carried out in real time and, in the event of identifying high-risk transactions, informs the tax authorities, who can block the bank account in question.

However, AI solutions are not only used to monitor taxpayers and their activities. AI can also assist tax authorities in their dealings with taxpayers, acting as a consultant to manage their affairs. Such a solution, in the form of a rather simple virtual assistant, is used in the UK by the tax administration there (HMRC). In other countries, solutions to support the tax administration in dealing with taxpayers take different forms, where, for example, Spain has introduced a chatbot to support taxpayers with their VAT returns.

However, a key issue that may pose some barriers to the development of AI on the part of the tax authorities, particularly in terms of possible dispute resolution or interpretation of tax law, are ethics and respect for general taxpayer rights. Such are the principle of resolving disputes in favour of taxpayers, or the principle of conducting proceedings in a way that inspires confidence in the tax authorities. Moreover, tax law in some countries is not very stable. Often, the interpretation of tax laws does not follow the rules of logic. Particularly complex cases, which need to be assessed based on experience, often contradictory case law and certain unmeasurable rules, may still require human involvement for some time to come.

2.3. Using AI to facilitate tax compliance

Tax authorities requiring increased transparency across jurisdictions characterize the current tax environment. Sharing information and applying determined approaches to tax management and collection process lacks consistency when across borders. This

expands compliance workload for businesses. Meanwhile they are exposed to increased tax risk and uncertainty about sustainability regarding current business models and group structures. To overcome these challenges, businesses centralize compliance by using technology to aggregate, validate and report for compliance purposes and data analytics on the information they have gathered to identify anomalies and to mitigate risk.

To manage this changing landscape, alongside the increased use of analytics, tax authorities and tax advisors start exploring the possibilities for deploying sophisticated data analytics and Artificial Intelligence (AI) to facilitate compliance and assist professionals and their clients with commonly encountered questions in tax. While data analytics has received a lot of attention, Artificial Intelligence in tax is relatively a new phenomenon.[2]

2.4. AI as a route to VAT settlement automation

AI solutions are still somewhat of a novelty for taxpayers, who are not yet using them as widely as tax administrations. The most obvious use of AI in tax calculation on the taxpayers' side is using it to automate certain repetitive tasks, or the preparation of VAT registers and the submission of tax returns. There are also tools on the market using AI models that can assist taxpayers in other areas affecting VAT settlements, in particular data analysis, verifying correctness and completeness of uniform VAT control files, contract analysis, VAT invoice settlement, payment verification and VAT tax risk assessment.

There is a vast number of commercial solutions using AI for VAT issues. At the same time, due to the dynamic development of this technology and the growing confidence in this still new solution, the role of artificial intelligence is bound to grow serving taxpayers in their VAT settlements.

2.5. Tax advice from AI

More and more people turn for advice to conversational language models such as ChatGPT, even in tax issues. These AI-based technologies can provide quick answers to basic questions by analysing huge databases in a fraction of a second.

However, while AI-based solutions can help answering simple questions, they are no substitute for a tax adviser. Tax law is complex, dynamically changing and requires a case-by-case approach. Language models do not have the ability to assess the reliability of the information provided by the user, which can lead to erroneous conclusions.

Tax advisors not only have the knowledge, but also the experience and ability to assess the nuances and specifics of a given situation. Therefore, while conversational language models can be an excellent support tool, final decisions and consultations on tax matters should be conducted with a trusted specialist in the field.

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[2] Zsolt Halász: Regulating the Unregulateable. *Hungarian Yearbook of International Law and European Law*, 1. (2022), 217–230. http://dx.doi.org/10.5553/HYIEL/266627012022010001013

2.6. New challenges for the tax system

The biggest AI-related challenge the tax system will face is the need to adapt to the new digital world, in which AI will replace the human factor in many areas. In order to remain effective in this new reality, the tax system will have to adapt to new and changing business models.

For example, financial services and medical services are exempt from VAT. Therefore, will services performed by AI in the field of finance (e.g. providing automated trading of financial instruments) or medicine (medical consultations performed by AI) also be able to benefit from the VAT exemption in the same way that the services of brokers and doctors currently benefit from it? Can AI affect designating the place of business, and therefore taxation, of a given taxpayer? Should AI be given tax subjectivity for VAT purposes? Since AI is intended to replace employees, should it not be subject to taxation as human labour is currently taxed? Proposals have emerged in the debate to tax AI, requiring that companies using AI solutions[3] should calculate the aggregate value of their services/goods created due to AI utilisation. Such added value could be taxed at an increased VAT rate. These and many other challenges will soon have to be faced by the world of taxation.

In this rapidly changing reality, attention must be paid to ethical and social implications brought about by the introduction of AI taxation, including potential impact on human employment. In a global context, differences in approaches to AI taxation between countries may even lead to 'tax havens' for technology companies. Solutions to the above issues might be worked out with the help of AI.

3. The introduction of a possible new type of tax for AI

The question raises what basic principles should be taken into account in general when introducing a tax.

3.1. Neutrality

It could be argued that the tax system should be neutral in the sense that it should not incentivize businesses to engage AI/robots as compared to humans. As robots can perform tasks similar to those carried out by humans, the tax costs to engage AI/robots should be as high as the tax costs to hire the human workforce.

Are AI/robots really comparable to human beings and workers? In our view, the answer to this basic question is as follows.

Compared to AI/robots, human beings have human features: free will, creativity, emotional experience, gut feelings, etc. These attributes are relevant even in performing routine jobs. In light of these attributes, it seems that AI/robots and humans are not comparable. Therefore, the neutrality argument that considers AI/robots on an equal

[3] Yan Qing: The concept establishment and system construction of "artificial intelligence + tax collection and management". *Contemporary Economic Management* 12, (2019), 77–83.

footing with humans is incorrect. Consequently, any proposals are indeed questionable that build hold AI/robots to be perfect or close substitutes for humans. Also, such proposals do not factor in the possibility that a substituted individual, unlike AI/robots, can find alternate employment. Moreover, if businesses are taxed higher when investing in AI/robots (e.g. if they are classified as capital assets and depreciation expenses are limited or restricted) as compared to other capital investments, then it is quite clear that the tax system gives preference to investments in the latter (e.g. capital expenses incurred for developing a new generic pharmaceutical product). There seems to be no justification for this.

On the other hand, it could be argued that the taxpayers (especially businesses) engaged in electronic commerce or businesses and industries in automation can have more important role in the economy. In other words, taxpayers (especially businesses) who create or who own or use AI/robots are impacted by such measures. Thus, such taxes (including automation taxes) could be considered non-neutral for businesses that create or use such technologies, as such businesses would need to comply with special rules.

3.2. Simplicity and certainty

Moving on to simplicity and certainty, taxing AI/robots as independent taxable subjects leads to several complications, and surely creates an uncertain tax environment.

The question arises as to how to define AI/robots.[4] Should the definition include a simple vending machine or an ATM, which has already been part of our daily lives for a considerable time, or a sophisticated self-driving car? How different is a self-driving car from an autopilot, used in airplanes for a very long time?

It must allow for a clear delimitation of the substantive or personal scope of the tax; at the same time, it must be future-proof and comprehensive enough to take into account the relevant technological progress. Even among roboticists, there is no consensus concerning this concept. A robot can be defined simply as "a machine controlled by a computer that is used to perform jobs automatically".

Although the European Union rejected a proposal to implement a robot tax, the European Parliament drafted recommendations related to Civil Law Rules on Robotics and approved the text on 16 February 2017. The Resolution does not define AI/robots. In the Annex, it provides common features, such as: (i) capacity to acquire autonomy through sensors and/or by exchanging data (inter-connectivity) and the analysis of those data; (ii) capacity to learn from experience and by interaction; (iii) form of robot's physical support; and (iv) capacity to adapt its behaviour and actions to the environment.

Thus, the following proposals would require a proper definition of the term AI/robots. Developing a definition for both non-tax law and tax law purposes could indeed be challenging.

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[4] Jia Kai – Jiang Yuhao: Three basic problems of artificial intelligence governance: technical logic, risk challenge and public policy choice. *China Administration* 10, (2017), 44–45.

3.3. Flexibility

At this stage, the tax loss issues triggered by AI/robots, seem a probable, yer not an actual concern. There is no need to introduce taxes on such innovations. As discussed above, most of the proposals will require defining AI/robots. A narrow definition could lead to the legislation inflexible for future developments. With a broad definition, it could be possible that a household vacuum cleaner could be classified as a robot. Some proposals on taxing AI/robots could lead to tax evasion due to non-compliance, possibly profit shifting. Some proposals apply to selected situations or to selected businesses only. In the near future, all individuals/all businesses could use AI/robots to a certain extent and benefit from them. Accordingly, designing AI/robot-related taxes only for selected situations would lead to the outcome that the system for taxation is neither, flexible nor dynamic.

3.4. The taxpayers – businesses (companies)

Every business (as a separate entity) will be subject to this tax considering that each business or company uses automation or artificial intelligence to some extent.

A revenue threshold will need to be developed for reasons of efficiency. This means that small enterprises would be out of the scope of the contribution. The fund contribution would be applied to entities/self-employed businesses that have annual turnover that exceeds, for instance, EUR 50 million. This threshold is a suggestion, and it should be adapted in accordance with the social and economic circumstances of each state.

The base of the contribution would be the total profit made (accounting profit or taxable profit, whichever is higher). That is becauseaccounting profit may differ from taxable profits in many jurisdictions. Moreover, tax incentives (e.g. input or output incentives) may reduce the taxable profit base of the business as opposed to accounting profits. The rate of the contribution could be based on a certain percentage of the accounting or taxable profits (e.g. 1% to 3%).

The information regarding taxable basis, tax rate and due amount can be integrated in a tax return already submitted by businesses or companies (such as a corporate tax return). By doing so, this would avoid more compliance complexities and costs. The payment could be done on an annual basis, according to the profit accrued during a tax year.

3.5. The taxpayers – individuals

Individuals will be the ones who benefit most from this fund. Nevertheless, it would not make sense to charge the contribution at stake from the ones who are unemployed and who are currently looking for relocation. Accordingly, workers that maintain their employment status during the Fourth Industrial Revolution, people who actually work, can also contribute to the fund to support education programmes based on the gross annual salary they earn.

From a social perception perspective, it would be worth mentioning that tax debates pertaining to individual taxation usually focus on the rich or the poor. In this context, the middle class is the most affected by tax progressivity around the world, founded on the premise that lower income people are mostly exempt, whilst higher income groups have more sources of income and often hire tax professionals to take advantage of loopholes, tax schemes and exemptions.

It would not be a good idea to increase the tax burden of the middle class. Thus, the author' suggestion would address high-income individuals. The definition of a high-income individual would also depend on each state according to the economic and social reality of each country.

Therefore, an individual revenue threshold would be state specific. A percentage of the income crossing the revenue threshold would be subject to the contribution. A certain percentage of the excess will be paid as an education tax (for example, 1% to 3%). When fixing percentages, policy officials should consider many factors, such as the population size, expenses, living costs, marital status, family members and so forth. To facilitate regular payment of this tax, the employer could withhold the levy and pay it to the authorities (for salaried individuals). Alternatively, the individual could pay it while filing their tax return.

4. Automation taxes

Another idea is the implementation of automation taxes. Such taxes are addressed to businesses/ companies which engage fewer and fewer employees. In other words, these taxes aim at reducing the laying off and/or replacement of employees by AI/robots. A few options to introduce such taxes is discussed hereafter.

One option for introducing such taxes is to charge employers (businesses) for unemployment insurance in proportion to their human employment rate. This means that the higher the rate of layoffs or replacements made, the more the employer would contribute to government revenue by paying more taxes. It would indeed work as a kind of compensation for layoffs. Therefore, businesses that decide to replace the workforce by using AI/robots would contribute more since the government would need more money to help those people who are out of the market, even temporarily. In this regard, an agency could be created to develop a system and control and collect all data concerning layoffs and replacement to inform tax authorities.[5]

Another option is the idea of a corporate self-employment tax that would increase the tax burden for companies that produce goods or provide services without using a human workforce.

This model could be compared to the self-employment tax for individuals enforced in some jurisdictions or situations where the owner of a small business is supposed to pay social security, similar to the social security that would be paid on their wages if they were employees. The main goal here is also increasing the collection to guarantee

[5] Chen Weiguang: Some Thoughts on the Problem of Artificial Intelligence Governance. *Academic Frontier* 20, (2017), 48–55.

support to those who are unemployed due to automation. For calculation purposes, a ratio of corporate profits could be used to gross employee compensation expense. In case this ratio surpasses a threshold fixed by the government, additional taxes could be applied on corporate profits.

These additional taxes would reflect the amount that the companies avoided paying because of implementing automation. Alternatively, instead of profit ratio, the sales ratio could also be contemplated for this purpose.

Lastly, an alternate proposal to curtail investment in technology is to extend tax benefits for companies that hire people. Those tax benefits could be granted by reducing or exempting from social contributions or contributions to Medicare systems levied on the payroll. Another tax benefit that could be given is the super-deduction of wages paid to humans. For tax purposes from the employer standpoint, these benefits would ensure that humans and machines are treated in the same manner, or at least in a very similar way. Machines do not receive wages subject to taxation, and several jurisdictions grant accelerated tax deductions for the implementation of technologies that are presumably supposed to increase productivity.

Another solution presented is the introduction of narrowly targeted taxes. In 2017, the Grand Council of the Canton of Geneva, Switzerland, proposed a tax on each automated cashier installed in the retail sector. This proposal was rejected.

In 2018, San Francisco County and City enacted AB1184 establishing a new tax on rides made by autonomous vehicles. According to the text, the tax will be levied "on each ride originating in the City and County of San Francisco provided by an autonomous vehicle, whether facilitated by a transportation network company or any other person, or by a participating driver in an amount not to exceed 3.25% of net rider fares, as defined, for a ride and 1.5% of net rider fares for a shared ride". Instead of imposing taxes on AI/robots in general, both models chose to levy taxes on a specific new service or type of automation. Such taxes intend to create a direct link between the tax imposed and remediation of job losses.

5. Education Taxes

At this stage, due to the different opinions on the impact of AI/robots on employment the author shares the view expressed by the United Kingdom and Switzerland, as well as some scholars, that taxes on AI/robots should not be introduced.

Only as time goes by will it be possible to tell how this Fourth Industrial Revolution will turn out; particularly, whether employment levels of human beings will reduce (temporarily or more permanently) or increase (temporarily or more permanently).

It is important to keep in mind that taxes are not an appropriate tool to reduce automation levels (and preserve existing jobs). To draw a parallel, it is the same way that taxing cigarettes does not prevent people from smoking. Levying tax is not always an effective measure to dissuade a given behaviour.

One of the most important policy objectives over the next few years is that policymakers make their best efforts to ensure that the Fourth Industrial Revolution benefits people as much as possible. On the one hand, their aim should be to accommodate and encourage

progress that promotes economic value; whereas they should aim at redistributing benefits and advantages to the ones negatively impacted.

Among other global challenges, one of the main challenges would have to find is a most appropriate balance designing taxes around AI/robots and the actual technological development and innovation; the former should not completely or considerably eliminate the latter. Technology is progressing exponentially and "what is yet to come" is unknown. It may well be possible that "high-tech" and "high employment" do not need to be exclusive – they can actually coexist.

The author holds that policymakers need to be "proactive" rather than being "reactive". Government will need to monitor the evolution of the impact of AI/robots on tax revenues. If reliable economic data starts pointing out that unemployment levels have been increasing due to automation (and not other events, for example, COVID-19), then governments should focus on reskilling workers by providing appropriate education instead of funding support schemes that entail handing out minimum wages. This is because "for every robot we put in the world, you have to have someone maintaining it or servicing it or taking care of it"[6]. One may raise the question "why not create a national skills centre, which would anticipate/shape the needs of the market in terms of skills and help with a programmed reorientation before obsolescence? Or introduce a 'skills insurance', which would help to finance career reorientation?"

By doing so, the chances of people being employed increases. Thus, by empowering individuals and putting them back on the job market, governments can expect taxes from such personnel (payroll taxes, income taxes or consumption taxes). As a start towards this end, policymakers could identify the existing "jobs" which could be automated, and reskill the people working in these jobs.

It is not the purpose of this contribution to discuss what "new" skills will look like; fact is, however, that sufficient information seems to be available in the public domain, especially, suggestions to enhance digital literacy or skills. As best practice let us mention École Polytechnique Fédérale de Lausanne (EPFL); it has created the EPFL Extension School to teach new digital skills to individuals without university qualifications.

6. Innovation perspective on introducing taxation for AI

It does not come as a surprise that several states have rejected the idea of a tax on AI/robots. The UK Parliament rejected the idea of imposing robot taxes "in his evidence to us, the Minister indicated that the Government too found the idea of a robot tax in current automation environment as 'perverse'. We need more robots and not fewer. A tax on them would further discourage take up. We do not believe that a tax on robots is in the interest of businesses or workers in the UK".[7]

A similar conclusion was reached in Switzerland. A statement from the Swiss Federal Council (English translation) declares "the report issued by the Federal Council on

6 Ibid.

7 Ibid.

11 January 2017 on the main framework conditions concerning the digital economy, which analyses the situation in the context of the Digital Switzerland Strategy, does not foresee any immediate need to fundamentally revise the social and fiscal systems in force. In addition, current knowledge does not allow us to anticipate a negative effect of the digitization of the economy on employment". In 2017, the European Union rejected the adoption of robot taxation.

Moreover, in light of the BEPS initiative, in particular BEPS Action 5, many governments have introduced input and output-related tax incentives (IP boxes) for promoting R&D. AI technology would typically fall under qualifying IP assets. Thus, imposing taxes on such assets would be contrary to the R&D policy of many states. Then they could be considered to hamper innovation. Comparing its own tax system with Japan's system for taxing AI/robots, the UK Parliament stated: "we recommend that the Government brings forward proposals in the next budget for a new tax incentive designed to encourage investment in new technology, such as automation and robotics".

With respect to encouraging investments, Italy's 2020 Budget (Law no. 160 of 27 December 2019) introduced a tax credit ranging from 6% to 40% equivalent to a cash grant enjoyed when investing in Industry 4.0 assets. Investments in machinery and other equipment controlled by computer systems and/or operated by smart sensors or drivers and drives linked to the computer system of an industry or factory are such eaxmples. Taxpayers can also offset such credit with some other tax debts/liabilities.

There are requirements to classify an asset as an "Industry 4.0" asset.[8] The pertinent Law entered into force on 1 January 2020 and replaces the previous provisions known as hyper or super-depreciation.[9]

Similarly, Poland has announced its intention to encourage investments in robots from 1 January 2021 onwards. The idea is to provide a tax relief that would allow both individuals and companies additionally to deduct 50% of costs relating to this type of investment, regardless of the size or the sector. This measure will also encompass costs regarding the lease of robots, the acquisition of software required to operate such robots and staff training.

One can also note that the proposals to provide AI/robots with separate tax personality or to install on them specific taxes leave us without justification for such innovations. Relying on such a logic we could call for a tax on all technology that lowers the need for the involvement of people. Would this also encompass taxing all technology based on e.g. the wheel or the leverage mechanism, as these have for millennia made human work superfluous. In other words, what is the fundamental difference between the wheel and a robot?

If AI/robots were to alter fundamentally our behaviour making the majority of the world's population docile due to lack of gainful employment, it would not suffice to amend our fiscal policies. The world would need to find firstly new social, secondly

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8 Min Xu – Jeanne M. David – Suk Hi Kim: The Fourth Industrial Revolution: Opportunities and Challenges. *International Journal of Financial Research* 9, 2. (2018).

9 Wu Handong: Institutional Arrangement and Legal Regulation in the Age of Artificial Intelligence. *Social Science Abstracts* 12, (2017), 76–78.

economic and thirdly fiscal paradigms. To illustrate the depth of such a change, the very concept of money and remuneration would need to be replaced; the majority of those in need of goods and services would have no means of offering anything tangible in exchange for them. Furthermore, in the absence of a market, our understanding of capital would need to change. Consequently, taxation itself may become obsolete as a concept.

On the other hand, if AI/robots are just another step in our development saga; tools that will help us surmount future obstacles such as climate change, aging of the population and the global demographic decline. Our attention should not be focused on trying to fiscally target novel material objects i.e. robots; we should attempt to understand social trends they might be connected to.

7. Conclusion

Based on the transformation taking place worldwide and the uncertainty regarding the future, the discussion tackling taxation of AI/robots will be standing for a while. It concerns dilemmas whether high rates of unemployment will be widespread due to replacement of human workforce by machines. Yet studies conducted by several respected institutions reach different conclusions.

The wide range of targeted proposals presented so far could be difficult to implement. Besides, most of them violate commonly accepted principles of tax policy, such as neutrality, simplicity/certainty, efficiency, effectiveness and fairness, as well as flexibility.

The author believes that taxing AI/robots would slow down innovation, which directly impacts the fields of science, health, economy, security, nutrition, the environment, leisure and so forth. Moreover, it would also deter people from enjoying innumerable benefits arising from AI/robots in all those fields. For such reasons, those new technologies should not be taxed.

Governments need to be proactive and not reactive. COVID-19 has taught this lesson to many "reactive" governments as the number of people affected by the virus was substantially high. If it ever happens that a trend of unemployment due to automation is witnessed in a state, the government will need to have a damage control plan in place so as to invest in people's education. This article discussed the possibility of implementing an earmarked education tax, in this regard on national level; a contribution that would be allocated to a special fund dedicated to finance and foster education programmes.

Individuals and businesses would pay such a contribution, as both of them would benefit from the fund, hence the programmes. The tax rate would be levied on companies accounting or taxable profits, whichever is higher. Individuals will be pay when their gross annual income exceeds a certain threshold. The thresholds will be established in accordance with the economic reality of each country or region. The contribution will be made on an annual basis, and related information and payments would be integrated with tax returns that are already submitted by the taxpayers, thus avoiding an increase in compliance obligations.

However, many countries would not be in position to implement or fully benefit from an education tax. A new global "social contract" argument should be built on the existing one to implement a global fiscal redistribution mechanism.

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LESS HUMAN BUT MORE EFFECTIVE?

IT and the organisation of working time[*]

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Abstract

The advent of information technology has also facilitated the organization of working time. As for now, various electronic monitoring tools and AI algorithms assist in tracking employee performance and planning schedules, making registration of working time easier and enhancing efficient planning. This paper explores the impact of the IT and the AI on working time, advocating for technology to support more human working time policies, for the benefit of both the employers and the employees. It examines EU and Hungarian legal provisions, emphasizing that the organization of working time should prioritise worker needs alongside economic considerations. The paper argues for the humanization of work, with digital tools offering potential to incorporate employee preferences into working time management, thus fostering mutually beneficial solutions.

Keywords: working time register, working time schedules, humanisation of working time, working time directive, algorithmic management

1. Introduction

Regulating the working time is one of the most complicated parts of labour law. Maximum level of daily and weekly working time and minimum rest periods, all possibly calculated as an average during a certain reference period, lead to a complex set of technical rules. Albeit these provisions are not without inner logic, practical

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implementation can be challenging, especially for small and medium-sized enterprises that often lack HR specialists.

Employers have been using information technology to facilitate the organisation of working time since the dawn of computer science. With the explosive development witnessed in the last decades, it results in huge competitive disadvantage if organisations do not introduce IT solutions also for managing the working time.

There are different technologies to collect the necessary data on the employees' temporal performance. Various electronic monitoring tools can be used to accurately track the presence of workers in the workplace (access control systems), their use of computers and the internet (capturing screenshots, logging keystrokes), or their movements in and out of the workplace (GPS technologies embedded in vehicles or in workers' personal smartphones), just to mention a few. These innovative solutions can make fulfilling the obligation to register working time much easier, but such rich data may also help to enhance the efficient planning of future schedules. Moreover, recent advancements in artificial intelligence research have resulted complex algorithms, which accomplish tasks and make decisions by mimicking human capacities to reason, learn, and recognize visual objects, text and speech. Algorithms transform input data into technological outputs, which can take the form of everything,[1] for example the entire organisation of working time.

The aim of this paper is to explore the possible effects of IT and artificial intelligence on working time, especially from the aspect how these technologies can lead to more human working time policies and not only to one-sided gains for the employers. First, the issue of registering working time will be analysed, demonstrating the importance of this seemingly technical obligation for both parties. Then the assessment turns to the more complex issue of working time planning. Both parts will cover the relevant provisions of EU and Hungarian law. The paper argues that there are guiding principles in written law already on both EU and national level, which require employers to organise working time around the worker and not prioritize economic considerations above all.

2. Registering working time

Registering working time seems a merely technical issue; however, it is an essential prerequisite for the practical implementation of working time provisions. A comprehensive, reliable, up to date and easily accessible record of the temporal dimension of the employee's performance is key evidence to check compliance with rules on working time and wages.[2] Besides, it is also useful if the employer needs to prove that late or absent employees breached their obligations.

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1 Annette BERNHARDT – Reem SULEIMAN – Lisa KRESGE: *Data and Algorithms at Work: The Case for Worker Technology Rights.* Center for Labor Research and Education, University of California, Berkeley, 2021. 4–6. https://laborcenter.berkeley.edu/data-and-algorithms-at-work/

2 Attila KUN: A munkaidő nyilvántartásának főbb szempontjai. [The main aspects of recording working time.] *Munkaügyi Szemle*, 10. (2005), 49–50.; Péter SIPKA – Márton Leó ZACCARIA: A tényleges napi

The recording of working time is, therefore, an important administrative obligation for the employer, which can be perfectly fulfilled by using digital solutions. This is nothing new; as such, IT solutions were available some twenty years ago. In order to measure the beginning and end of working time, i.e. to collect the data to be recorded, some kind of hardware is needed, which could be the workers' computer (or other personal device) or an identification terminal or panel. A software processes the collected data and produces the records; this can then form the basis for payroll.[3] In place of the old punch-card time clock, employees now log onto a computer or mobile device, swipe a radio frequency identification (RFID) badge, scan a fingerprint, or gaze into an iris recognition device.[4]

While digital tools can make it easier to keep accurate, up-to-date records of working time, they can also pose risks. For example, the credibility of the record can be jeopardised if the employer can modify the data recorded by the employee at any time, especially if the employee is not notified on such amendments. It is, therefore, inappropriate if the system allows for not only the correction of false data, but also its modification in general, without any reasoning. Any automatic mechanisms built into the system may also be a cause for concern. For example, the recording software may automatically deduct breaks from the hours worked, even if the employee was actually unable to take them; or, the system may apply rounding to the detriment of the employee.[5]

It is, therefore, important that the legislation sets out the basic requirements for the recording of working time, meanwhile allowing employers to use the most appropriate technical solution for that aim. Below we turn to such legal requirements as prescribed by EU and Hungarian law.

2.1. Working time recording in EU law

Interestingly, the working time directive[6] (hereinafter: WTD) does not explicitly oblige employers to record working time; however, the Court of Justice of the European Union (hereinafter: Court) derived it from the aim of the directive (protection of workers' health and safety) and the Member States' general obligation to take the "measures necessary" for the proper implementation of the directive.[7] As the Court pointed out in the CCOO case, in the absence of a working time register, it is not possible to determine objectively and reliably either the number of hours worked by the worker and when

munkaidő mérésére alkalmas nyilvántartási rendszer fenntartásának munkáltatói kötelezettsége. [The employer's obligation to maintain a record system for measuring actual daily working time.] *Munkajog*, 4. (2019), 42.

3 Kun op. cit. 52.

4 Elizabeth Tippett – Charlotte S. Alexandert – Zev J. Eigen: When Timekeeping Software Undermines Compliance. *Yale Journal of Law and Technology*, 1. (2017), 3.

5 Tippett – Alexandert – Eigen op. cit. 28–34., 30., 34., 37.

6 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

7 WTD Art. 1(1) and 3–9.

that work was done, or the number of hours worked beyond normal working hours, as overtime. Consequently, Member States must require employers to set up an objective, reliable and accessible system able to measure the duration of time worked each day by each worker.[8]

The Court acknowledged that in disputes concerning working time, a worker may rely on other sources of evidence. In order to provide indications of a breach of working time rights and thus bring about a reversal of the burden of proof, these sources can be witness statements, the production of emails or the consultation of mobile telephones or computers inter alia. However, unlike a system that measures time worked each day, such sources of evidence do not allow for the objective, reliable establishing of the number of hours the worker worked each day and each week. In particular, witness evidence in itself cannot be regarded as an effective source of evidence capable of guaranteeing actual compliance with the rights at issue since workers are liable to prove reluctant to give evidence against their employer. It is owing to a fear of measures possibly taken by the latter, which might affect the employment relationship to their detriment.[9]

Nevertheless, it is for the Member States to determine the specific arrangements for implementing such a system of registering working time, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size.[10] Thus, the relevant data might be kept on paper, in a computer-based system, or by use of electronic access cards, which shall ensure the effective implementation of the WTD.[11]

While the CCOO case made it clear that a reliable working time account is essential, it also added that its technical implementation could take various forms. The possible technical difficulties of registering working time can be easily overcome with digital devices.[12] In the era of complex algorithms operating many main functions of the employer (like selection of candidates, performance evaluation, monitoring etc.), it seems reasonable to expect that work time recording is not a challenge for software developers. Moreover, as the CJEU pointed out, recital 4 of WTD states that the effective protection of the safety and health of workers should not be subordinated to

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8 C-55/18. Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE [ECLI:EU:C:2019:402] 48., 60.

9 C-55/18. para. 53–55.

10 C-55/18. para. 63.

11 Vito S. Leccese: Monitoring working time and Working Time Directive 2003/88/EC: A purposive approach. *European Labour Law Journal*, 1. (2023), 24.

12 International Labour Organisation: *Ensuring decent working time for the future. General Survey concerning working-time instruments.* International Labour Office, Geneva, 2018. 298.; Elena Shevchenko – Angelika Efremova – Nataliya Oshovskaya – Aleksey Voloshin – Anna Finogentova: Improving Methods of Accounting for Working Time in the Context of Digitalization. *SHS Web of Conferences* 93, 03011, (2021), 3–4. https://doi.org/10.1051/shsconf/20219303011

purely economic considerations, consequently, the costs associated with working time registers are secondary issues here.[13]

Accurate accounting of working time should not be hampered even in flexible schedules where working time is more difficult to measure as it is not performed during an uninterrupted period and/or in a particular place. Considering the fast development of surveillance techniques in the word of work, one might be concerned not about the technical difficulties working time recording could mean to employers, but rather about the incredible amount of control over their workers that these techniques give them. Any device used to keep account of working time shall not gather more data than necessary and shall by no means monitor the employees' activities too closely or intrude into private life.[14] It is worth noting that in the Court's practice a record of working time is included within the concept of 'personal data'; one that indicates in relation to each worker the times when working hours begin and end, as well as the corresponding breaks and intervals.[15]

From a practical point of view, one of the most important issues raised by the CCOO case is whether the obligation to keep working time records has an impact on the rules of proof in working time disputes. For example, if an employee claims back pay for extraordinary working time, does the burden of proof shift to the employer who fails to keep adequate records of working time and, consequently, does the employer have to prove that the circumstances alleged by the employee do not exist? The answer to this question is in the negative. The WTD does not provide for rules of proof and remuneration for work since its legal basis is the protection of workers' health and safety at work.[16] In a legal procedure for back pay, it is for the Member State to determine the rules of proof, although it must surely be assessed to some extent against the employer if working time has not been properly recorded.[17] However, in occupational health and safety disputes, the subject matter is directly related to the WTD, so in such cases it does not seem excessive to expect the burden of proof to be reversed.[18]

It is worth noting that the European Parliament's proposed directive on the right to disconnect incorporates the merits of the CCOO decision. It calls Member States to ensure that employers set up an objective, reliable and accessible system enabling the

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13 C-55/18. para. 66–67.

14 Marta Glowacka: A little less autonomy? The future of working time flexibility and its limits. *European Labour Law Journal* 12, 2. (2021), 121. http://dx.doi.org/10.1177/2031952520922246; Tammy Katsabian: It's the End of Working Time as We Know It – New Challenges to the Concept of Working Time in the Digital Reality. *McGill Law Journal* 65, 3. (2020), 32.

15 C-342/12. Worten – Equipamentos para o Lar SA v Autoridade para as Condições de Trabalho (ACT) [ECLI:EU:C:2013:355].

16 Treaty establishing the European Community Art. 137(2).

17 Sipka – Zaccaria op. cit. 45.

18 Szilvia Halmos: Fordul-e a bizonyítási teher rendkívüli munkaidős perekben az EUB C-55/18. CCOO-döntését követően. [Is the burden of proof reversed in extraordinary working time cases following the CJEU's C-55/18 CCOO decision.] In: Ádám Auer et. al. (ed.): *Ünnepi tanulmányok Kiss György 70. születésnapjára*. [Studies for the 70th birthday of György Kiss.] Budapest, Wolters Kluwer, 2023. 206–210.

duration of time worked each day by each worker to be measured. This shall be done in accordance with workers' right to privacy and to the protection of their personal data. Workers shall have the possibility to request and obtain the record of their working times.[19] Interestingly, the proposed directive would apply to all workers who use digital tools for work purposes, thus its scope is broader than that of the WTD. Consequently, if adopted, the new directive would introduce the obligation to keep working time records for more workers.[20]

To sum up, the Court has established a clear obligation under EU law for all employers to keep records of employees' working time. However, each Member State is free to decide on the form of record-keeping, and the employer is free to choose the most appropriate solution within the framework of national law. Digital solutions can play an important role in fulfilling the obligation to record working time.

2.2. Working time registering under Hungarian law

Hungarian labour law explicitly prescribes the obligation to register working time from 1999.[21] The provision in force states that employers shall keep records of the duration of normal and extraordinary working hours, on-call time and paid annual leave. The records must also provide an up-to-date record of the start and end dates of the normal and extraordinary working hours and of the time spent on-call.[22] It follows from this relatively shortly worded rule that the recording of working time is the employer's obligation and must be kept up to date for each employee. This requires particular attention in the case of unequal working time schedules, where the amount of daily or weekly working time and/or the start and end of working time may change daily. In labour litigation, it is the employer who must prove the content of documents generated in the course of its business, including working time records.[23]

The form of the register may be decided by the employer. It can be kept on a paper-based document or in a chart posted on the wall of the workplace, or in any electronic form. The employer may also delegate this task to its employees; however, the employer is still liable for inadequate working time recording if the employee fails to comply with this obligation. Therefore, any form will do, provided that it contains the information required by law. The employer should choose the simplest solution which fits best both to the circumstances of its everyday operations and the legal requirements.

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19 European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), Art. 3(2).

20 LECCESE op. cit. 32.

21 For the history of the regulation, see: Attila MÁRIÁS: A munkaidő-nyilvántartás. [The working time record.] In: Lajos PÁL – Zoltán PETROVICS (ed.): *Visegrád 18.0. A XVIII. Magyar Munkajogi Konferencia szerkesztett előadásai*. [Visegrád 18.0. Edited papers of the XVIII Hungarian Labour Law Conference.] Budapest, Wolters Kluwer, 2021. 132–135.

22 Act I of 2012 on the Labour Code (hereinafter: Labour Code), Art. 134.

23 Act 130 of 2016 on civil litigation procedure Art. 522(1).

Court practice has developed a number of guidelines for the proper recording of working time.[24] Thus, the register must be such that a clear conclusion can be drawn as to whether the statutory requirements are complied with, and any changes in the working time schedule must be properly documented. Double record keeping is prohibited.[25] The requirement to keep up-to-date registers does not mean that each entry must be entered in the register immediately, but on the same day.[26] In the absence of a working time register, the employee might rely on any other evidence, for example witnesses, other documents, data from the electronic access system, or network login data. Based on reliable evidence, the court may establish the number of hours worked by estimation.[27] The Supreme Court (Kúria) also highlighted that the law does not explicitly provide for the obligation to keep records of working time at the place of work. However, the employer must record working time in an objective, reliable, up-to-date and verifiable manner, having regard to the regulatory purpose of this obligation.[28]

Thus, Hungarian labour law, just like EU law, only sets out some of the content and quality requirements of the working time record, but does not prescribe its form. Employers are free to use electronic solutions, which are widely used because of their practicality. It is clear from judicial practice that records kept in electronic form are also suitable for meeting the legal requirements.[29]

3. Working time planning

The planning of working time schedules is a much more complex task than keeping records of hours worked. First, ensuring compliance with the rather complex rules on working time is a challenge in itself. Second, while manoeuvring through the legal barriers, employers shall seek to find the most appropriate schedules for the operation of their business. For that aim, they must take into account a number of factors, many of which falls outside the employment field.

The most relevant data for working time planning are the following:

– Incoming orders: the primary consideration should be the expected demand for the employer's product or service in the period under consideration. Employers not only need to ensure they have the adequate workforce for peak periods, but

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24 For a comprehensive analysis, see Máriás op. cit. 138.

25 BH2013. 226.

26 BH2020. 52; EBH2016. M.13. Edina Tass: A munkaidő-nyilvántartási kötelezettség a bírói gyakorlatban. [The obligation to record working time in judicial practice.] In: Zoltán Bankó – Gyula Berke – Erika Tálné Molnár (ed.): *Quid juris? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára*. [Quid juris? Commemorative volume on the 20th anniversary of the National Association of Labour Judges.] Budapest, Kúria, PTE ÁJK, Munkaügyi Bírák Országos Egyesülete, 2018. 463–464.

27 Halmos op. cit. 207.

28 1/2022. Uniformity decision.

29 See for example the following decisions of the Supreme Court: EBH2016. M.13.; BH2020. 52.; BH2020. 311.

also should think about how to bridge downtimes when it is harder to assign relevant tasks to the workers.
- Machines' output: if the employer's activities are asset-intensive, the limited capacity of certain tools and equipment must be considered. To improve utilisation, it may be necessary to introduce additional shifts or longer and/or more working days.
- Raw materials: even with huge demands for the product (service) and a high-performance machinery, the raw materials needed for the activity might be scarce or available only during certain times of the year. In some sectors (e.g. food processing) the most important task of working time management is to ensure precisely that raw materials are processed quickly, upon arrival.
- Storage capacity: depending on the nature of the product, the employer's limited storage capacity or the high storage costs could have a serious impact on working time planning. In such cases, the storage possibilities determine the quantity of product that can be produced, which affects the required measure of working time.
- Transport capacity: like storage, the availability and cost of transport may affect the scheduling of working time.
- Available workforce: from the HR side, a key factor in planning working time is the number of employees that can be assigned to the task. In addition to the headcount of employees, the loss of staff due to planned and unforeseen absences should also be monitored. The additional costs of overtime pay shall also be calculated.

While the above list is not exhaustive, it well illustrates the complex nature of working time planning. An optimal working time schedule requires the combined consideration of many relevant factors, which is hardly conceivable without the help of a computer. In the era of algorithmic management there are many services available where this complex planning task is carried out automatically with the help of algorithms. The employer simply defines the relevant factors and uploads the data based on its previous operations, and the software uses this data to design the optimal schedules, which also respect the labour law provisions. Such IT tools can enable the employer to remove unproductive or inactive time from paid working hours and schedule working time solely to those periods when the workforce is needed.[30]

For example, in the United States many retailers have adopted scheduling optimisation systems. These systems draw on a variety of data to predict customer demand, make decisions about the most efficient workforce schedule, and generate schedules that can adjust in real time as new data becomes available. Some systems use computer vision and algorithms to monitor and measure in-store customer traffic and

[30] Agnieszka PIASNA: Algorithms of time: How algorithmic management changes the temporalities of work and prospects for working time reduction. *Cambridge Journal of Economics* 48, 1. (2023), 115. https://doi.org/10.1093/cje/bead017

worker activities. The system then estimates sales productivity scores for each worker, and creates schedules based on those scores.[31]

Nevertheless, the development of such IT-tools is rather complicated. If a poorly programmed management system is unable to handle some (otherwise legal) working time schedules or cannot amend the actual schedules quickly, then digitalisation becomes an obstacle to the optimal functioning of the employer.[32]

While digitalisation may make it possible for the employer to operate with the optimal working time schedules, it is questionable whether and how the interests of the employee would appear in this system. The algorithm could be able to design a schedule that perfectly fits the employer's interests, yet it may prove to be unacceptable for the employees. For example, according to the suggested schedule, in the hospitality sector, during the summer months, no employee can take any annual leave and as few weekly rest days are scheduled as possible; a retailer concentrates all possible overtime for the advent period; a logistics company schedules all deliveries for the night because shipping costs are higher during the day. These solutions may be legal. Still, beyond legal compliance, the schedule shall not ignore the needs of the human beings who will make the job done. If the workers' aspects are not considered, the scheduling software will dictate everything, from how much sleep the workers and their children can get to what groceries they will be able to buy in the relevant month.[33]

Employers shall not "over-optimize" their workforce management, which results in harsh scheduling practices.[34] Even if an employer is not specifically committed to providing decent working conditions, it should be aware that undesirable (or unrealistic) schedules could make the recruitment of the necessary personnel nearly impossible, or could lead to high fluctuation levels.

3.1. The labour law requirements to consider workers' preferences

There is a growing body of law in the EU to mitigate the possible harmful effects of automated decision-making; more specifically, the use of artificial intelligence.[35] Nonetheless, this paper concentrates only on the labour law provisions calling for the consideration of the human perspective in working time planning.

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[31] Bernhardt – Suleiman – Kresge op. cit. 9.

[32] Mátyás Zimmer: Az üzemi munkaidő-szervezés gyakorlati kérdései. [Practical issues in the organisation of working time in the workplace.] In: Lajos Pál – Zoltán Petrovics (ed.): *Visegrád 17.0 – A XVII. Magyar Munkajogi Konferencia szerkesztett előadásai*. [Visegrád 17.0. Edited papers of the XVII Hungarian Labour Law Conference.] Budapest, Wolters Kluwer, 2020. 236.

[33] Jodi Kantor: Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents with Hours of Chaos. *The New York Times*, August 13, 2014, https://tinyurl.com/2fys7kb7

[34] Carrie Gleason, Susan J. Lambert: *"Uncertainty by the Hour."* Open Society Foundations' Future of Work Project. Position Paper, 2014. 3., https://tinyurl.com/fndh9eht

[35] See Article 22 of the GDPR on automated individual decision-making, the proposal for the Artificial Intelligence Act (COM/2021/206 final) and the proposal on improving working conditions in platform work (COM/2021/762 final), especially Chapter III on Algorithmic management.

The principle that the worker is not only the subject of the employer's working time schedules, but his/her preferences shall be taken into account, appears also in the WTD. Under the enigmatic title "Pattern of work", it prescribes that Member States shall take the measures necessary to ensure that an employer who intends to organise work according to a certain pattern, takes account of the general principle of adapting work to the worker, with a view to alleviating monotonous work, and work at a predetermined work-rate, depending on the type of activity, and of safety and health requirements, especially as regards breaks during working time.[36]

The adapting work to the worker or the "humanisation of work" principle could be among the most important provisions of the WTD. It sets the priority of the human perspective over the economic considerations, regardless of the available technologies. Consequently, working time must be adopted to the worker's needs as a human being with dignity and autonomy, rather than insisting on the subjection of the worker's human needs to the employer's economic interests.[37] It is worth mentioning that the same provision was included also in the previous directive, coming into effect in 1996, even if during those years IT was incomparably less developed than today.[38] Nonetheless, during these almost four decades having this provision in force, it has never been interpreted by the CJEU yet. In the absence of case-law, it is not exactly clear what this requirement means for the application of the more concrete articles of the directive.[39]

The Hungarian Labour Code contains a similarly important principle, stating that the employer shall schedule working time considering the requirements of occupational health and safety and the nature of the work.[40] While the employer may decide on the employees' schedules unilaterally, it shall not only respect the explicit rules of the Labour Code, like on minimum rest periods or maximum level of daily and weekly working time, but also the more general principle of the protection of workers' health and safety. The significance of this is illustrated by the fact that some schedules may be mathematically correct and at the same time, lead to dangerous fatigue for the worker, thus it should be avoided. For example, the Hungarian legislation is very flexible in allowing for a "grouping" of weekly rest days, which can mean long weeks of continuous work with a "rest block" only at the end.[41] Such a schedule, numerically, may comply with the rules on weekly rest days, but it may undermine the overarching objective of the working time rules to protect workers' health and safety. Thus it is unlawful.

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36 WTD Article 13.

37 Alan BOGG: Article 31: Fair and Just Working Conditions. In: Steve J. PEERS – Tamara HERVEY – Jeff KENNER ~~and~~ – Angela WARD (ed.): *The EU Charter of Fundamental Rights: a commentary*. Oxford, Hart, 2014. 862.

38 See Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, Article 13.

39 Karl RIESENHUBER: *European Employment Law: A Systemic Exposition.* Intersentia, 2021. 544.

40 Labour Code Art. 97(1).

41 Labour Code Art. 105(3) and 106(3).

3.2. Technology in support of the human perspective

The most modern technological solutions can also play a pioneering role in ensuring that the preferences of employees are reflected in working time planning as much as possible. When designing working time schedules, employees' needs are not necessarily ignored simply because they are contrary to the economic interests of the employer. In many cases, the employer lacks the required tools, knowledge or human resources to identify workers' priorities, analyse employees' opinions and incorporate them into working time planning. Automation can also help employers and employees to give more emphasis on the human perspective in working time management.

A working time planning system using modern technologies, including artificial intelligence, can enhance the human aspect especially by the following:

- collecting workers' feedback. The system can automate the process of gathering and analysing immediate feedback from employees by regular online surveys or by AI-powered chatbots. AI could be useful to correlate feedback with workers' performance levels to understand the impact of scheduling on productivity and employee satisfaction.
- offering alternatives for the workers. The planning system can provide flexible scheduling options, propose alternative shifts or tasks that align better with workers' personal needs and preferences. An AI-managed working time tool can facilitate shift-swapping between employees by identifying suitable matches based on skills and availability. Note that EU law explicitly prescribes for parents the right to request flexible working arrangements for caring purposes. Employers shall consider and respond to such requests within a reasonable period of time, taking into account the needs of both the employer and the worker and include a reasoning in case of refusal.[42] Digitalised tools can facilitate the management of such requests.
- analysing workers' choices: the system can analyse the data on workers' scheduling choices and preferences to improve future planning. Algorithms can detect patterns in employee choices and identify trends and preferences over time. AI can also predict future preferences and availability.
- measuring efficiency: AI can monitor and measure the efficiency of working time schedules by tracking the most important indicators (as set by the employer, like the costs of one time unit, or the labour costs of one product), and can generate detailed reports to highlight areas for possible improvement.
- enhancing enforcement of working time rules: the application that generates the schedules must be designed to treat the legal provisions as an inescapable framework, and be able to interpret them correctly. This will ensure full compliance with the working time rules. For example, the practical implementation of the separation of working time and rest periods, or in a digital working environment: the right to disconnect, can be greatly enhanced

[42] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU Art. 9.

> if the time management system consistently respects mandatory rest periods, controls electronic communication outside working hours, records working time accurately and monitors employee satisfaction.[43]

Managing these tasks without the help of digital tools can be extremely resource intensive. Technology is not only able to optimise working time management according to the employer's interests; it can also be used to reflect the employees' priorities.

4. Summary

Tasks related to the recording and planning of working time are as old as the modern employment relationship. Therefore, employers have had to take these obligations into account way before IT tools were available to facilitate their fulfilment. However, employers have been able to rely on certain technical help to meet these obligations from the outset. For example, pre-printed timesheets or blocking clocks were the first milestones on the road that, by now has led to AI-driven solutions. In any case, the development is impressive, which not only makes employers' administrative tasks much easier, but leads to much more efficient decision-making and employer control by managing the huge amount of data on working time.

While the benefits of this technological development are clear on the employer's side, it is not self-evident that it would be in the interests of the employees. In my view, labour law regulation should seek to ensure that the results of this technological revolution are not unilateral benefits for employers, but mutually beneficial solutions. Data-driven technologies are, in the end, creatures of their creators and users. In the workplace, employers decide if, when, and how to use electronic monitoring; which performance metrics to use; which management decisions or functions to automate. Data driven technologies can be used also to help workers, make them safer, reduce monotony and improve their work lives.[44]

The study presented a few examples to prove that digitalisation is not necessarily an obstacle in front of the humanisation of working time; on the contrary, it could also be its facilitator. It is fairly beneficial that we are not acting in a legal vacuum in this respect. Since the mid-1990s, EU legislation has laid down the principle that the organisation of working time must take account of the worker him/herself. Although this general rule has not yet been interpreted by the Court, it is possible that it will be invoked in the near future, precisely in cases triggered by digitalisation. Moreover, the basic institutions of working time rules, like the strict divide between working time and rest periods, shall be complied with, irrespective of how digitalised the workplace is. The newly adopted EU measures on the use of AI and algorithmic management can help to avoid abusive practices. However, it is primarily up to employers and workers'

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[43] EUROFOUND: *Right to disconnect: Exploring company practices*. Publications Office of the European Union, Luxembourg, 2021. 45–46.

[44] BERNHARDT – SULEIMAN – KRESGE op. cit. 6., 15.

representatives to develop practical solutions that shape the future organisation of working time in a way that is beneficial to both sides.

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ARTICLES

US CONSTITUTION AND THE NOTION OF FAMILY

The risks of the Supreme Court's judicial activism through family and privacy cases

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Abstract

This paper examines the family and privacy jurisprudence exercised by the United States Supreme Court. These cases have provoked a substantial amount of attention from the public and politics in the history of the Court. Arguments for the decisions have been widely debated, criticized, and discussed. Arguably, some of these cases have even changed the role of the Court, the culture of the American nation, and the structure of the American society. The paper attempts to investigate these issues in detail and pose a federalist argument shedding light on the dangers of judicial activism regarding the institutions of a democratic state.

Keywords: US Supreme Court, constitutional interpretation, family, privacy

1. Introduction

The turmoil provoked by the question of abortion before the US Supreme Court seems to have been constant in the last 50 years. This paper attempts to research the underlying causes and effects of constitutional interpretation in cases of family and privacy by analyzing the argumentation of such issues and examining historical events, cultural context, and political situation surrounding them. The term family does not appear in the Constitution of the United States; however, several Supreme Court decisions have influenced, and defined fundamental family values. The dilemma is bewildering in the reasons and consequences of the influence constitutional tradition had on an area

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which is neither a federal matter, nor does it exist as textual element of the Constitution. Therefore, the research looks at the development of these rights and how these cases have affected the function of the Supreme Court. As we look through this development, it leads us to even more fundamental questions about the operation and the state of the democratic establishment of the US. The Court is faced with the difficulty of meeting the needs of a changing society and the boundaries of its judicial power. Inventing or discovering new rights through the interpretation of the Constitution has politicized Supreme Court nominations. The fear is that this erodes the democratic process: the majority of 9 unelected judges decide policy issues via a broad interpretation of the Constitution. This is criticized as judicial activism. The article will demonstrate some of the wrongs this method has led to.

This paper does not discuss how the US legislation or legal system should or should not regulate family and privacy. Nor is this research about what the correct governance of family law would be for American society. Instead, it concerns how the existing body of law can be read and interpreted without running the risk of misusing the democratic process, disrupting the system of checks and balances, or harming the principle of separation of powers; the foundations of the American governmental system. Family seems like a catchment of water for the debated substantive due process[1]– arguably the tool of judicial law finding most frequently employed. This article consists of an analytical discussion of cases and the historical context where family, marriage, kinship, birth, and privacy were at stake. It examines the historical emergence of the concept of privacy, family, and marriage in the argumentation of the Court up until the point where, for example, marriage becomes such a fundamental right that it is defined by the Supreme Court itself. The law of family necessarily composes value judgments reflecting views of the society. Yet judges cannot impose their own values through legal interpretation since they have to remain impartial. The research also considers a critical evaluation of interpretative history in different eras of the Court and the social, political, and legal interaction of its decisions. The broader purpose of this paper is to explore the history and impact of these Supreme Court verdicts and opinions, all related to the idea of the family in US law and politics. This enables us to examine how the influence of the Court has shaped American society and what the underlying values of the United States are.

Firstly, the paper determines basic notions of family, common law, and interpretative theories. These are essential then to, examine, secondly, constitutional tradition and the evolution of rights concerning the focus of the family. Thirdly, historical perspectives are considered and problems that arose in the application of these rights, which allows for the chronological structuring of the emerging constitutional family rights. Finally, this paper suggests that limiting the evolutive interpretation might heal the distorted democratic process and restore political issues to be resolved by democratically elected legislative branches of the government.

[1] Douglas NeJaime: The family's constitution. *Constitutional Commentary* 32, 2. (2017), 413.

2. Basic Notions

2.1. Family

For this paper, we must consider the notion of family as available for courts of law. An important principle of departure must be what the law can grasp from reality, the so-called legal facts.[2] What we mean by family depends very much on the context; it may denote something different in an anthropological, genetic, folkloric, historical, sociological, or psychological context. Even though these might interact with each other, they will never mean the same thing exactly. This is especially visible in recent years, with the notion of family becoming more and more fluid.[3]

Despite the fact that there is no legal definition for the concept of family, the law understands family depending on the subject at hand: narrowly in immigration law, but broadly for succession or rent-controlled tenancy. In the US legal system, family law belongs to state legislation; however, in recent decades, this has gradually altered. One reason lies in congressional legislation, a different one in constitutional interpretation.[4] But could and should constitutional interpretation determine the content of a notion that is under change? This is further complicated by the fact that the Constitution does not contain the word family, much less a definition for it. In addition, certain legal notions in the interpretation theory of constitutional law are fundamental to understanding how 'the family' as a notion has developed through jurisprudence. But what is the role of interpretation in the American legal system?

2.2. Structural background

Although the Bill of Rights and subsequent Amendments to the Constitution affect essential rights, they were articulated well before today's understanding of fundamental rights. Despite being the oldest constitution in force today, the US Constitution has its disadvantages, indisputably. There is no modern fundamental rights charter in the US legal system and amending the Constitution is very difficult, a huge majority and political consensus is needed.[5] This has become even more difficult with the increase

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[2] Legal facts may be classified in a number of ways; these include objective facts of nature such as time or weather conditions for example in case of an accident, state measures such as real estate registry, human circumstances that cannot in principle be influenced by the person like birth or death, age, sex or filiation, and human behavior or conduct for example contracting, breaching a contract etc. Some other instances, circumstances, behaviors and facts cannot be grasped by the law such as friendship or gratitude. Further classification: Arthur L. Corbin: Legal Analysis and Terminology. *The Yale Law Journal* 29, 2. (1919), 163–164. https://doi.org/10.2307/786105

[3] C. Quince Hopkins: The Supreme Court's family law doctrine revisited: insights from social science on family structures and kinship change in the United States. *Cornell Journal of Law and Public Policy* 13, 2. (2004), 435., 438. Even arguing that the Court should adopt a fluid concept of family see at 440.

[4] Brian Bix: *The Oxford Introductions to U.S. Law: Family Law*. OUP USA, 2013. 4.

[5] U.S. Const. art. V. Two third of Congress or two third of State legislatures may propose an amendment that has to be ratified by three fourth of States or call a National Convention within a timeframe given by Congress.

in the number of States and the population. Even more so, it was intended to be difficult originally, so that future generations could not easily modify the most fundamental operative legal text of the country, to preserve its stability.

In order to describe the way constitutional interpretation operates, a landmark of cultural heritage has to be discussed: the common law tradition and its challenges in an era of statutory law.

Common law developed traditionally through decisions of the courts in England when the emerging legislative power of the Parliament was far from being substantial. On the other hand, the monarchy did not operate on the principle of democracy. Therefore, judicial lawmaking was necessary for deciding disputes between the subjects of the king. In the classical common-law system, the judge finds the law through analogies with and distinctions from prior judicial interpretation. This is obviously required if there is no written law. However, whenever there is codified law, the judge's work is to interpret the text, and the two exercises are quite different. The United States of America embraced the governing principle of separation of powers when setting up the operating rules in the Constitution; according to its text, lawmaking lies with the Congress (US Constitution art. I. 1.) on the one hand. These are the enumerated powers of the Congress, the principle of Federalism (US Constitution art. I. 8.). These expressed powers belong to the Congress, which is authorized to enact all "necessary and proper" legislation for the completion of its prerogative expressed in the Constitution. On the other hand, all other areas of legislation are left for State legislation, and this is underlined in the Tenth Amendment. The judiciary has no such mandate (US Constitution art. III.).

Essentially, the US does not have a common-law legal system, but a mixed system, with an overwhelming percentage of codified law. Nonetheless, it seems that American lawyers are not trained in the skills to interpret written law; they are much more prepared for judicial finding of the law.[6] Madison, referencing Montesquieu, in The Federalist No. 47. warns against judicial lawmaking. If the power of judgment were combined with the legislative authority, it would put the life and freedom of the citizens at risk of being arbitrarily controlled since the judge would effectively become the legislator.[7] Hamilton argued that courts are granted "neither Force nor Will" by the Constitution.[8] Criminal law, tax law, environmental law, and administrative law are governed by written law, whereas private law is rather more influenced by common law. In particular, private law belongs to State legislation and jurisdiction for the exception of uniform laws if the State has accepted it (like the Uniform Marriage and Divorce Act 9A ULA). It seems just to say what late Justice Scalia did: "We live in an age of legislation and most

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6 Mary Ann Glendon: Comment. In: Amy Gutmann (ed.): *Matter of Interpretation*. Princeton, Princeton University Press, 2018. 96.

7 James Madison: The Federalist No. 47. at 326. In: Alexander Hamilton – James Madison – John Jay: *The Federalist*. Cambridge, Massachusetts, Belknap Press of Harvard University Press, 1961.

8 Alexander Hamilton: The Federalist No. 78. at 523. Hamilton – Madison – Jay op. cit.

new law is statutory law."[9] Therefore, it is worrying that American courts lack a clear, widely accepted, and consistently implemented framework for interpreting statutes.[10]

2.3. Methods of interpretation[11]

One obvious rule for statutory interpretation is grammatical interpretation, understanding what the text says as normally understood. Whenever the text is unambiguous, this should be easy and clear. Sometimes reading the particular article of a statute does not give a clear meaning. Therefore, logical interpretation is applied, which means that using the rules of formal logics gives a better understanding. Another frequently used tool is systematic interpretation where the context of the particular article, norm, is studied for correlation to other norms. Also, historical interpretation might be helpful whenever the clarity of the norm is not perfect. However, legal norms must be applied as they are applicable at the time of application and not as the legislator intended subjectively. Still, preparatory papers and proposals might shed light on certain ambiguity. Teleological interpretation requires identifying the aim of the norm, which involves valuation. Now all of these methods are fairly standard, although the proportions are disputed. A textualist approach starts with the text of the norm, but not in a literalist way; there is room for other tools of interpretation. After all, words are inherently constrained in their meaning, and the reading that exceeds this finite scope is recreating, not interpreting.[12] Obviously, there are legal gaps, and the text is not always clear-cut; legal interpretation, therefore, involves context but it is absolutely formalistic.[13] The problem, on the one hand, might be that the boundary between creating and interpreting is not always evident. On the other hand, the common-law heritage lawyers might not see that there is a difference when it comes to interpreting codified law whereas finding the law in precedent.

As far as the interpretation of the Constitution is concerned, there is a debate between originalism and dynamism[14]. The debate concerns the question of whether the text of the Constitution should be read narrowly or developed dynamically through the Court's rulings. Dynamism or evolutionism characterizes the concept of the so-called Living Constitution. This means that the Constitution is read flexibly in order to accommodate the needs of a changing society. Whereas, an originalist reading of the

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9 Antonin Scalia: Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws. In: Amy Gutmann (ed.): *Matter of Interpretation*. 47. Princeton, Princeton University Press, 2018. 13. https://doi.org/10.1515/9781400882953-004

10 Albert M. Sacks – Henry Melvin Hart: *The legal process: basic problems in the making and application of law*. Westbury, N.Y., Foundation Press, 1994. 1169.

11 For more detail on methods of interpretation see for example: Winfried Brugger: Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View. *The American Journal of Comparative Law* 42, 2. (1994), 395–421. https://doi.org/10.2307/840752

12 Scalia op. cit. 24.

13 Scalia op. cit. 25. and 37.

14 Scalia op. cit. 38. and William N. Eskridge – Philip P. Frickey: Statutory Interpretation as Practical Reasoning. *Stanford Law Review* 42, 2. (1990), 382. https://doi.org/10.2307/1228963

Constitution gives effect to the meaning of the original text employed to the current situation. The peril of a Living Constitution is that the judge creates the content of the Constitution as what it should say.[15] There is no legal certainty if the most fundamental operational document of the country changes. The promise of the Living Constitution is flexibility. Yet, once the Supreme Court grants or denies a right, there is no room for change. Whereas until policy issues are not dealt with in constitutional jurisprudence, there is room for democratic legislation.[16] On the other hand, an originalist reading requires judgment as to how to apply the original text to modern circumstances, and this might prove difficult and not completely clear-cut either.[17]

The Supreme Court also employs tests when different rights and interests clash. Most basic is the rational basis test evaluating the necessity and proportionality of a given legislation when limiting a constitutional right. Hierarchy has also been developed in constitutional theory; when depending on the class of right that is at hand, a stricter test is adopted: intermediate scrutiny and strict scrutiny.[18] Classification of rights to the different degrees of scrutiny is also developed by the Court itself.

3. Unenumerated rights

One of the most important tools of evolutionary interpretation has been the Due Process Clause. This was originally in the Bill of Rights' Fifth Amendment, and after the Civil War, the Fourteenth Amendment also included this provision. It aimed at ending discrimination based on birth, and equal protection of all citizens of the US. Notwithstanding, non-textual interpretation led to the "separate but equal"[19] doctrine and other discriminatory decisions, the very phenomenon it had been meant to cease.

With the Fourteenth Amendment, the Court has departed from textual interpretation further than with any other. Also, it may be observed that a shift in the role of the Supreme Court has brought about changes in the approach to private matters, such as the understanding of family.[20] Meanwhile, fundamental rights have been discussed worldwide, especially since the 20th century, in the US they were particularly brought

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15 For example: death penalty explicitly contemplated in the U.S. Const. amend. V: "No person shall be (...) deprived of life (...) without due process of law", that is a person may be deprived of life by the due process of law if this is the punishment that is imposed to a capital crime and if they were found guilty in a just judicial process. This is an option for the states, their legislation does not have to impose capital punishment, but if they do, it must be according to the fundamental rules laid out in the Constitution. Despite this, a number of Supreme Court justices have argued that death penalty is unconstitutional; for example: Brennen, J dissenting in Gregg v. Georgie, 428 U.S. 153, 227 (1976).

16 Scalia op. cit. 42.

17 Scalia op. cit. 45.

18 For more on this in the context of privacy see: Emma Freeman: Giving Casey its bite back: the role of rational basis review in undue burden analysis. *Harvard Civil Rights-Civil Liberties Law Review*, 1. (2013).

19 Plessy v. Ferguson, 163 U.S. 537 (1896).

20 This is an issue the Founding Fathers had never intended to be a federal matter.

to the fore by the interpretation of substantive due process after 1905. The due process was especially employed by the Warren Court in the Civil Rights era.

Nonetheless, another tendency is unfolding with dynamic interpretation. Even if the Civil Rights era was a champion of individual rights, with every newly found "right" that the Supreme Court grants or denies, there is no room for social change. Once the Supreme Court decides that there is a right to abortion, or that the fetus is a person,[21] therefore abortion is prohibited by the Constitution, there is no possibility to legislate otherwise despite the fact that abortion is not included in the Constitution. Should constitutional values change, then there is a process deliberately difficult for amending the Constitution. The pressing social change was important enough to amend the Constitution in 1920 in order to give women the right to vote in the Nineteenth Amendment. We cannot see such a process with newly found fundamental rights, possibly because of the high political costs, as we will later see, as it happened with the Equal Rights Amendment.

Firstly, when we look at why the Constitution says nothing about issues concerning family, we find that since the chief purpose of the Constitution was to establish a new country, it mainly deals with the basic structures of government. After all, as the goal was to create a state where people are free to pursue their happiness at their best abilities, individual rights soon emerged as listed in the Bill of Rights, that is, in the first ten amendments to the Constitution. Later, subsequent amendments were added to this enumeration. Nevertheless, the Court has gradually developed the concept of unenumerated rights in its reasoning. It seems unclear what grounds the Supreme Court Justices use for finding a right in the Constitution as implied by the spirit of the law. There are numerous "new" rights in the various argumentations, however the Court is not the legislator.

The roots seem to go back to Lochner.[22] This 1905 landmark case has created an era (post-lochner) where interpretation has changed significantly. The case tackled the issue of a state statute that limited the number of working hours for bakers in New York. As a policy issue, this was for the state to legislate. Yet the Court found that it was a violation of contractual freedom as guaranteed by the Constitution in the Due Process Clause of the Fourteenth Amendment. In principle, the Court declared that "the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation"[23], nevertheless they found the New York law inconsistent with the freedom guaranteed by the Fourteenth Amendment.

The Fourteenth Amendment's wording is "…nor shall any state deprive any person of life, liberty, or property, without due process of law…"[24]. In other words, any right

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[21] Even if some states want to legislate laws safeguarding embryos eg. Louisiana there is little room beacuse of Roe see further: Zoltán Navratyil: Az anyatesten kívüli embrió mint „jogi személy"?[Embryo outside the womb as „legal persons"?] In: Csehi Zoltán – Koltay András – Landi Balázs – Pogácsás Anett (ed.): *(L)Ex Cathedra et Praxis ünnepi kötet Lábady Tamás 70. születésnapja alkalmából*. Budapest, Pázmány Press, 2014. 409.

[22] Lochner v. New York, 198 U.S. 45 (1905)

[23] Lochner v. New York, 198 U.S. 68 (1905)

[24] U.S. Const. amend. XIV.

that can be understood as *life, liberty, or property* and if regulated in some way by the government, the Court can proclaim that right to be a fundamental one, therefore annul the government regulation. The problem with this approach is that all legislation concerns life, liberty and property at one point. If employed limitlessly, this theory leads to the Court becoming a super-legislator. But the Court cannot make a policy value judgment what is not involved in the Constitution. This flows from the principle of separation of powers. Justice Holmes argued in his dissent in Lochner that New York legislation was based on a paternalistic economic theory but the decision was written on a laissez-faire economic theory.[25]

> "If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. (…) But the Constitution is not intended to embody a particular economic theory (…) It is made for people of fundamentally differing views."[26]

Therefore, in his opinion, liberty as in the Fourteenth Amendment is distorted when it is used to prevent the legislation of the majority to prevail, except for the situation where it would "infringe fundamental principles as they have been understood by the traditions of our people and our law"[27]. Lochner has been discredited subsequently by West Coast Hotel[28], however the Fourteenth Amendment Due Process Clause has taken on a life of its own. This attitude of the Court has been characterized as judicial activism, unfounded invasion of the policy making area of the branches of government, legislature via a broad or dynamic interpretation of the Constitution.[29] This enabled the due process clause to guarantee certain substantive individual rights against the states.

This judicial activism was very much employed by the Warren Court in the Civil Rights era and this tendency has not stopped since. Some are founded upon the Due Process Clause of the Fourteenth Amendment, at other times on its Equal Protection Clause. Likewise, the Ninth Amendment gained an interpretation that opens the way for unenumerated rights: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".[30] People refers to democratic legislation governed by the will of people through representative democracy.

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25 Lochner 198 U.S. at 75-76 (Holmes, J., dissenting)

26 Lochner 198 U.S. at 75-76 (Holmes, J., dissenting)

27 Lochner 198 U.S. at 75-76 (Holmes, J., dissenting)

28 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

29 Cass R. Sunstein: Lochner's Legacy. *Columbia Law Review*, 5. (1987) 874.

30 U.S. Const. amend. IX.

The test for unenumerated rights in the Fourteenth Amendment for the Privileges and Immunities Clause had been established as in Corfield v. Coryell[31] as a right "which has, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign," that are "deeply rooted in American history and tradition".[32] For the Due Process Clause of the Fourteenth Amendment, as such a right, it "must be deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty".[33] No such history and tradition can be found about privacy as a right.[34]

4. Right to privacy

The laws invalidated based on the principle of privacy have exhibited a notable inclination to revolve around sexual matters, with significant cases relating to contraception, marriage, and abortion,[35] an area classically regulated by family law. However, the right to privacy has consistently lacked a clear conceptual framework.[36] The right to privacy has been found by the Supreme Court as one of the so-called unenumerated rights in the case of Griswold v. Connecticut[37] and later extended under Roe v. Wade. In Griswold, for example, not a single article or amendment was named, but these rights emerged from the whole of the Bill of Rights. This issue concerned Connecticut's ban on use and distribution of contraceptive tools. The Court struck down the state legislation on the basis that it intruded into marital life infringing a right of privacy that although not found explicitly in the Constitution, could be extracted from "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendment, creating "zones of privacy".[38] Nonetheless, the majority opinion carefully avoided reference to the Fourteenth Amendment and its Due Process lest it should bring an unpleasant recollection of the repudiated Lochner decision, and in fear that rooting privacy as a right in the substantive due process would give a sort of legislative force to the Court that could be used both by a conservative[39] as well as a liberal majority on the Court.

Since this case concerned the ban on contraceptives for spouses, to a certain extent, the Court dealt with the test established in Corfield v. Coryell, although not referencing it, proclaiming that the right of privacy in a marriage is deeply rooted in history, it

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31 Corfield v. Coryell, 6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. (1823)

32 Washington v. Glucksberg, 521 U.S. 702 (1997).

33 Washington v. Glucksberg, 521 U.S. 721 (1997) referencing Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) and Palko v. Connecticut, 302 U. S. 319 (1937).

34 Privacy and the right to private life has emerged in human rights theory in the 20th century and most influentially by the Universal Declaration of Human Rights article 12. adopted by the United Nations General Assembly on 10 December 1948.

35 Jed Rubenfeld: The Right of Privacy. *Harvard Law Review* 102, 4. (1989), 738. https://doi.org/10.2307/1341305

36 Rubenfeld op. cit. 739.

37 Griswold v. Connecticut, 381 U. S. 479 (1965).

38 Griswold v. Connecticut, 381 U. S. 484 (1965).

39 Peter H. Irons: *A people's history of the Supreme Court*. New York, Viking, 1999. 430.

actually precedes the Bill of Rights. Marriage might be deeply rooted in history very well, but contraception, especially as a right, is distinct from marriage as a right. Also, the State had trouble showing a compelling interest in the restriction; still the Court evaded using the rational basis test. Nevertheless, the Court, rather, created a new right from zones scattered across the Bill of Rights. Dissenting opinions in this decision claimed not that privacy was a faulty notion, but that any legislation invades a person's privacy. However, the Constitution only protects specific privacy rights, and contraception is not one of them.[40] Therefore, according to the dissenting Justices, it is not the role of the Constitution to strike down "silly laws"[41] when there is no explicit Constitutional provision as a basis for doing so.

The privacy doctrine was then extended to non-marital relationships in Eisenstadt v. Baird.[42] This involved a contraception ban by Massachusetts. The Court declared that the state legislation was unconstitutional because access to contraception must be the same for married and unmarried individuals according to the Fourteenth Amendment's Equal Protection Clause. This is surprising after Griswold for a number of reasons: different legal relationships are to be regulated differently, and the reason for granting the access for married couples to contraception in Griswold was exactly the special relationship that spouses have and the deep roots the marital relationship has in American history. In Eisenstadt this is overruled when the majority articulates that the constitutional protection has its root not in the marital relationship as such, but in the individual.[43] The Court famously stated, "if the right of privacy means anything, it is the right of the individual (…) whether to bear or beget a child"[44]. Formation of the argument this manner intrigues the question: does privacy mean anything under the Constitution? The Court does not answer, rather takes it for granted, that there is a right to privacy. The paper does not question the need for such a right, but the existence of it is doubtful with no explicit mention and the complicated argument that the so-called zones of privacy seem to be creating this right throughout the Constitution. The use of privacy and the reviving of substantive due process came about with the abortion cases that we shall discuss later in detail. The same line of expansion of the right of privacy came at a temporary halt in Bowers v. Hardwick[45] until it was overruled in Lawrence v. Texas[46]. Deeply personal choices, such as consenting adult's sexual practices were found to be under the protection of privacy from State intrusion, complemented with an equal protection argument.

40 Griswold v. Connecticut, 381 U. S. Justice Black dissenting 508 (1965).

41 Griswold v. Connecticut, 381 U. S. Justice Stewart dissenting 528 (1965).

42 Eisenstadt v. Baird, 405 U.S. 438 (1972).

43 Eisenstadt v. Baird, 405 U.S. 439 (1972).

44 Eisenstadt v. Baird, 405 U.S. 453 (1972).

45 Bowers v. Hardwick, 478. U.S. 186 (1986).

46 Lawrence v. Texas, 539 U.S. 558 (2003).

4.1. Marriage cases

The institution of marriage had a different career path in the Supreme Court. Marriage obviously predates the history and tradition of the Nation, common law, and law in general. In the 19th century, marriage was regarded as a common law right, which means that it was governed by custom and was subject to state legislation. The importance of marriage as a civil institution appeared in a number of cases.[47] Marriage was mentioned in the Pennoyer case as a matter over which the state has absolute jurisdiction as to decide how to contract a marriage and how to end it. In Reynolds v. US, the subject appeared more as a fundamental right issue. This regarded Mormons challenging anti-bigamy laws as a breach of their First Amendment right of religious liberty. Nonetheless, the Court upheld the plaintiff's conviction of bigamy claiming that the protection of religious freedom is not limitless and does not mean any action confirmed by religious views has to be allowed. Since marriage has a long tradition of monogamy in common law, the claim was rejected.

In the third case (*Maynard),* marriage appeared as a prerequisite for gaining land and the state interest behind the decision was that Oregon wanted to encourage families to settle down. Notwithstanding, after settling down and acquiring title to the land, the husband, divorced his wife from afar while she was still waiting for him in Ohio as he had promised to either return or send for her and his children. The question was whether such restriction is against the constitutional prohibition of impairment of contracts by state legislation. Despite all, it was found that marriage, an institution of society, is the most important relation in life that has both private and social importance. Therefore, it is regulated by the authority, the state, and this power extends to regulating divorce rules even in this manner.

4.2. Change in marriage cases

Be that as it may, already after the appearance of substantive due process,[48] in 1942, the Court struck down the Oklahoma law of sterilization of criminals because marriage and procreation are fundamental to the very existence and survival of the race.[49] Later, contraception bans were abolished on the grounds that they interfered with marital privacy.[50] Both cases concerned the state legislator's policy measures on procreation and privacy. This marked the beginning of an era of judicial activism unprecedented in the previous century; with this tool, the Court can always find a right that might be infringed or restricted by a state law, or federal law, and nullify it because it would violate the due process.

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47 Pennoyer v. Neff, 95 U.S. 714 (1878), Reynolds v. United States, 98 U.S. 145 (1878), Maynard v. Hill, 125 U.S. 190 (1888).

48 Lochner v. New York, 198 U.S. 45 (1905).

49 Skinner v. State of Oklahoma, exrel. Williamson, 316 U.S. 535 (1942).

50 Griswold v. Connecticut, 381 U.S. 479 (1965).

Consequently, the fundamental right of marriage was established over the next couple of verdicts. Mr. and Mrs. Loving were convicted for breaking the interracial marriage ban of Virginia, their residence when traveling to Washington DC. to get married in 1959. Anti-miscegenation laws dated back to colonial times prohibiting whites to marry their slaves "to keep the white race clean". After the Civil War, interracial marriage bans were imposed in some Southern states. The 1967 Loving v. Virginia[51] case was essentially a racial discrimination case, however its strong ties with marriage marked the constitutional status of marriage as well. The Lovings were not only discriminated against but they were denied a basic human good, the opportunity to marry each other because they belonged to different races. The decision nonetheless was not based on the right to privacy, but on the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Much like the Brown v. Board of Education[52] case was, because segregation had been unconstitutional since the passing of the Fourteenth Amendment in 1868 that originally targeted different treatment based on race.[53]

Marriage as a fundamental right was explicitly established in the case of Zablocki v. Redhail[54]. In this case, Redhail was a father but failed to pay child support and the State of Wisconsin took care of his child. Redhail had no wealth to ever pay the debt he owed to the state. The Wisconsin law protected the interest of the state to force parents to take care of their children. Therefore, when he wanted to get married to a woman, he was denied marriage license because of his unpaid child support. Although such a state interest might be justifiable, the means of achieving this goal was to deprive Redhail of the basic right to get married, which interfered with his liberty, and the legitimate aim might have been reached in a different manner. His fundamental liberty to marry was protected by the Due Process Clause of the Fourteenth Amendment, according to the Court.

Furthermore, this reasoning was confirmed in the case of Turner v. Safley[55]which dealt with Missouri state prison regulation that practically forbade inmates to get married for safety reasons. Here, while safety is a legitimate state interest, the almost complete ban on the exercise of the fundamental right of marriage is too burdensome and is not necessary to reach the goal. The Court also specified some purposes of marriage like expression of emotional support, public commitment, personal dedication, expression of faith, status, precondition for benefits etc. While these characteristics may be part of marriage, this does not provide a definition for it.

Most recently, the question of who may be parties to a marriage contract as to the gender of the spouses arose and made marriage the center of constitutional attention in

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51 Loving v. Virginia, 388 U.S. 1 (1967).

52 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

53 Therefore Plessy v. Ferguson, 163 U.S. 537 (1896) was wrongly decided from the beginning as discrimination on the bases of race was declared expressly unconstitutional in 1868 with the U.S. Const. amend. XIV.

54 Zablocki v. Redhail, 434 U.S. 374 (1978).

55 Turner v. Safley, 482 U.S. 78 (1987).

the United States. Originally, there was a precedent: it is not unconstitutional for a state to regulate marriage as a complementary relationship of man and woman,[56] when in 1972 two college students, both men, applied for a marriage license in Minnesota. The Minnesota Supreme Court declared that state law regulating marriage as heterosexual was constitutional, and the Supreme Court agreed. In the 1970's a huge wave of change in divorce law swept through the country starting from California. No-fault divorce soon became the norm and this has brought substantial change to marriage and family structure in the US society.[57]

In 1993 the Supreme Court of the state of Hawaii, in the case Baehr v. Lewin[58], decided that there is merit in the claim that only heterosexual marriage discriminates against same-sex couples. But, Hawaii reaffirmed traditional marriage in 1998 through legislation. Meanwhile Vermont[59] has decided that legal benefits of marriage should be granted for same-sex partnerships as well. In 2003 the Massachusetts Supreme Court downright decided that same-sex couples have the right to marriage.[60] On a federal level, in 1996 Congress passed a bill, DOMA in defense of the traditional view of marriage for federal purposes.[61] The Act specifically said that "the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife". In spite of the fact the President Obama explicitly made same-sex marriage issue a promise in the presidential campaign, neither was DOMA retrieved by Congress legislation, nor was same-sex legislation passed through Congress.

By 2013, the issue was raised at the federal level when the Supreme Court of the United States had to decide in the case of Windsor[62] whether it was unconstitutional to disregard a same-sex marriage acknowledged by New York state law. DOMA was struck down by the Court because it only acknowledged the marriage of a man and a woman for federal law. In Windsor, the Court decided that marriage in one State has to be acknowledged for Federal purposes; although it declared that this would not mean that same-sex marriage had to be recognized in all States.

However, in 2015 the same issue arose; since Minnesota by then defined marriage as genderless, this precedent did not hold any longer. The Supreme Court went even further in its ruling in Obergefell[63] by stating that not defining marriage as genderless is unconstitutional. By the time of the Obergefell decision, there were states where same-sex marriage was legal, and this particular problem arose from this fragmented state of the legal system. Marriages completely legal in one state would not be recognized

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56 Baker v. Nelson 409 U.S. 810 (1972).

57 James R. Jr. Stoner: Does the law and the constitution of the family have to change? In: Patrick N. Cain – David Ramsey (ed.): *American Constitutionalism, Marriage, and the Family: Obergefell V. Hodges and U.S. V. Windsor in Context* Lanham, Lexington Books, 2016. 208. https://doi.org/10.1080/10457097.2015.1111736

58 Baehr v. Lewin 852 P. 2d 44 (Haw. 1993).

59 Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

60 Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

61 DOMA Defense of Marriage Act, Pub. L. No. 104–199, §§ 2–3, 110 Stat. 2419, 2419 (1996).

62 United States v. Windsor, 570 U.S. 744 (2013)

63 Obergefell v. Hodges, 576 U.S. 644 (2015).

in another state. This ruling was based both on the Substantive Due Process and the Equal Protection Clause of the Fourteenth Amendment. This is a very odd rationale of ruling, and it is much debated, since no way could an Amendment in 1868 have meant to protect same-sex marriage. Furthermore, it is still debated today in public opinion and literature.[64]

The constitutional recognition of same-sex marriage has stopped the democratic process of individual States changing their laws in accordance with their citizens' views. Is self-government hurt by the change of law that the decision has brought about? This decision was again built on the unenumerated right in the Fourteenth Amendment. Without an explicit constitutional right, the decision failed to review whether same-sex marriage was rooted in the history or tradition of the United States, yet expanded the definition of marriage.

4.3. Abortion: the ignition point

On this path, not discussing the foundation for privacy anymore, leaving the Corfield v. Coryell test and other tests long behind, the Court has further expanded the meaning of privacy in Roe v. Wade by establishing that it implied the woman's right: whether to continue with her pregnancy or not.[65] Roe has caused an unprecedented turmoil and, arguably, changed the shape of the US legal system and politics. This landmark decision and its subsequent case law with Planned Parenthood v. Casey[66], had also remained controversial for almost 50 years, when in 2022 they were overturned.

Roe changed a situation where abortion was regulated by the States for 185 years in the United States. In its argumentation there was a lengthy report of the history of abortion going back to ancient times, disregarding the fact that there had never been a right to abortion in the history and tradition of the Federation, as it had been rather strictly regulated. Roe also offered the trimester scheme, elaborated by Justice Blackmun, as a guideline for States how to regulate abortion from then on, dividing pregnancy in three stages: in the first stage there would be no restriction for the women and her physician to carry out an abortion, in the second certain restrictions to safeguard women's health could be legislated, and in the final trimester, when the fetus would be viable, the State's compelling interest rose; therefore, abortion could be prohibited lest the woman would be in danger.

This part of the decision was strongly criticized as it resembled drafting legislation, thus outside the Court's scope.[67] The majority opinion rejected the State's argument holding that fetuses were persons under the Constitution. Roe termed the fetus as "potential life". This delimitates the State's compelling interest to protect life

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64 See more eg.: Ryan T. Anderson – Robert P. George – Sherif Girgis: *What is marriage?: man and woman: a defense*. New York, Encounter Books, 2012. 1st American edition.

65 Roe v. Wade, 410 U.S. 153 (1973).

66 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

67 John Hart Ely: The Wages of Crying Wolf: A Comment on Roe v. Wade. *Yale Law Journal* 82, 5. (1973), 926. https://doi.org/10.2307/795536

becoming valid once it is viable, outside the womb. Roe based its precedent on the unenumerated right of privacy, and cited a number of cases where zones of privacy could be discovered. Therefore, an analogy was employed so that privacy was found to be "broad enough to encompass"[68] the right to abortion. By doing so, under the Fourteenth Amendment, Roe essentially revived the substantive due process from 1937, once abandoned with West Coast Hotel from the Lochner era for resulting in freewheeling judicial policymaking. An interesting wrinkle to the story is that Norma McCorvey, the pregnant mother under the pseudonym Jane Roe, gave birth to her child, putting her up for adoption and later becoming a pro-life advocate.

Planned Parenthood promised to end the national controversy that Roe had caused and to settle definitively the abortion issue with its stare decisis;[69] "a standing of the decision", a strong precedent in the American legal system. It discarded the trimester plan and the privacy basis for abortion, but confirmed Roe's "central holding": the State cannot protect fetal life before viability. The basis for the right to abortion was formulated as deriving from the "freedom to make intimate and personal choices that are central to personal dignity and autonomy".[70] Instead of the trimester scheme, it introduced the limit on legislation: any restriction was unconstitutional that would put an "undue burden"[71] on the woman's right to access abortion. The issue of abortion was not settled; both the public remained widely divided on the question and the political debate remained intense. Abortion has continued to be a question raised at Supreme Court nominations.

What harm did Roe cause? What is the peril of judicial activism?

We have left considering the democratic process of amending the Constitution in 1920 when the Nineteenth Amendment guaranteed the right to vote for women. In 1923, a plan called the Equal Rights Amendment was introduced to Congress for further amending the Constitution regarding equality for women. In the late 1960s, the National Organization for Women and others lobbied for this constitutional amendment that would have declared gender discrimination unconstitutional. Finally, it was approved by the House of Representatives in 1971, the Senate in 1972, and it was open for ratification by the States. This process was largely interrupted by the abortion controversy, and the Equal Rights Amendment (ERA) fell short of adoption by only 3 States.[72]

Another long-term impact of these decisions was that abortion, a deeply value-based issue, became a factor in the appointment of Supreme Court Justices. Therefore, the Supreme Court became more politicized than ever before. It also distorted democracy despite almost all Western democracies had the choice to regulate abortion through their people's elected representatives.

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68 Roe v. Wade, 410 U.S. 153 (1973).

69 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 867 (1992).

70 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 851 (1992).

71 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 874 (1992).

72 Irons op. cit. 427.

Even if the majority wished to legislate abortion differently in a given State, there was no room for divergence. The issue has been resolved by Dobbs v. Jackson Women's Health Organization decision in 2022.[73] The Court had to decide whether Mississippi could constitutionally prohibit abortions after 15 weeks of pregnancy. This landmark decision overturned Roe and the stare decisis of Planned Parenthood, and gave the power to regulate abortion back to State legislations. This does not mean that there is no constitutional overview of these rules, but it might be done according to the rational basis test that all other health regulations have to endure. Dobbs lists five reasons for overturning these precedents: the nature of their error; the quality of their reasoning; the workability of the rules; the disruptive effect on other areas of law; and the absence of concrete reliance on case law.

First of all, the decision makes limitations with regard to other decisions from this area of privacy case law by saying abortion is "inherently different"[74] from other issues dealing with private choices, such as contraception, marriage, consensual sex, and children's education. These do not pertain to the crucial moral issue of ending the potential life of another human being, which is "a unique act".[75] The Court's error was to tackle an issue of basic moral and social significance that the Constitution allots to people. Roe claimed to be in accordance with the relative weight of the interests at stake, insights and instances from medical and legal history, the lenity of common law, and the pressing challenges of contemporary times.[76] Nevertheless, as we have seen, it disregarded both the history and tradition of common law as abortion had been a serious crime for centuries. The remaining two factors are aspects considered by the legislator. The reasoning gives no answer to the question why viability is the point when the State's interest is compelling enough. The basis for Roe's central rule is privacy; three probable sources are mentioned and it declares merely a "feeling" that the Fourteenth Amendment Due Process Clause contains such a right.[77] Furthermore, Planned Parenthood introduced the unworkable rule of undue burden.

5. Conclusions

As shown above, the notion of family has undergone major changes through the interpretation of the Court. This is directly caused by changes in the role and tools employed by the Court. However, there might be an indirect cause to these changes since society has changed over the last two hundred years, which is certainly true to some extent. More importantly, the values of society have changed, and public opinion has been shaped midst these value shifts.

We have seen that judicial activism could be used by both the right (for example Plessy or Lochner) and the left (for example Griswold or Roe) of the political spectrum,

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73 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

74 Roe v. Wade, 410 U.S. 159 (1973).

75 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 852 (1992).

76 Roe v. Wade, 410 U.S. 165 (1973).

77 Roe v. Wade, 410 U.S. 153 (1973).

which can have disruptive effects on the democratic process (eg.: ERA). The debate over abortion has structurally changed Supreme Court nominations especially, and widely politicized the Court itself. Whether this will change now that abortion regulation is given back to the States, is for us to see what the future will bring. If dynamism is followed as a principle, there is a risk of political decisions in the future.

Concerning the original question of this paper, we might wonder if the United States claims to have the oldest constitutional traditions in the world of modern democratic society, then why these changes have never taken place through the democratic process that the system set out. Ultimately, the law is what the competent body claims to be the law, may it be the executive, the legislative, or the judicial. Alternatively, is there a deeper source of law that has to be discovered? If so, what are the questions to pose for the next decades?

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THE IMPORTANCE OF THE PARTICIPATION OF THE MEDICAL EXPERT IN CRIMINAL PROCEEDINGS

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Abstract

The Criminal Procedure Act significantly changed the rules of expert evidence, so e.g. in order to prevent the prolongation of the procedures, it attempts to direct the process of appointing experts and evaluating expert opinions into a reasonable channel in order to make a considered and timely decision. The time that has passed since the entry into force of the law already allows us to examine the practice of law enforcement. I believe that the biggest change comes from the regulation of the private expert opinion, which allows the defendant and his defense to have equalrights in the criminal proceedings, which also follow from the principle of equality of arms. And all of this strengthens the fairness of the procedure in general, which can be a guarantee of the birth of judicial verdicts that are also close to the material truth.

Keywords: medical expert, evidence, criminal proceedings practice of law enforcement, principle of equality of arms

1. Introduction

One of the fundamental tasks of the criminal procedure is to establish the facts of the case and to clarify the facts and circumstances necessary for a well-founded prosecution. Evidence procedure plays an important role in this process, the purpose of which is to establish the truth through the assessment of the pieces of evidence. The assessment of the pieces of evidence is a less spectacular stage of the criminal case compared to the initiation of the procedure, the establishment of the identity of the perpetrator, the indictment, the judicial hearing or even the sentencing. However, there is no doubt that the assessment of the pieces of evidence is an important element

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of evidence. This is indicated, for example, by the fact that the Hungarian Criminal Procedure Act includes the principle of freedom of assessment among the general rules of evidence[1]. During the assessment, the legal practitioner must be convinced of the truth or falsity of the evidence used to establish the facts in criminal cases. This is a complex task, the resolution of which, in addition to the legal rules of evidence, also requires knowledge from other scientific fields.[2] Of these, the importance of expertise in forensics, psychology and, not the least, logic, or knowledge of certain physical, chemical, biological, and psychiatric issues that occur in criminal cases should be emphasized. Knowledge of the rules and recommendations relevant for assessment is required not just from the legal practitioner performing the evidence. This is also advantageous for lawyers who perform defense or representational duties.[3]
During the criminal proceedings, a lengthy and multifaceted process of discovery takes place. At the beginning of the procedure, more or less circumstances may indicate that a crime has been committed. Starting out from here, the amount of information, the available to the acting authorities increases, until, , all essential circumstances that can be discovered regarding the crime committed and the criminal liability of the perpetrator become known in the final stage of the criminal proceedings Therefore, the discovery process that takes place during the criminal proceedings goes from not knowing, through the more or less incomplete knowledge of the facts to the clarification of essential circumstances related to the crime.[4]

2. About Forensic Medicine Experts

Forensic expert activity may be performed by a natural person authorized to do so, or by a forensic expert institution established for this purpose. A forensic expert can be someone who has no criminal record, has a higher qualification in his field of expertise and at least five years of professional experience, is a member of the chamber of forensic experts relevant for his/her place of residence and is listed in the official register of experts maintained by the Ministry of Justice, that contains the name and field of expertise of the experts. The expert may only carry out expert activities in the field indicated as his field of expertise in the register. The 'backbone' of the domestic expert organization system is formed by the expert institutions and offices that the Minister of Justice or, in agreement with them, another minister or the head of an organization with national competence can establish. The majority of official assignments are carried out by the so-called permanent experts of these institutions.

Traditionally, there is an institutional 'predominance' in certain areas of expertise in domestic procedures, which is the result of a legislative decision. In fact, there are specialized issues defined by law where only institutions are authorized to act, given

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1 Act XC of 2017 on the Criminal Procedure – hereinafter referred to as: 'CPA' – § 167.

2 Géza Katona: *Valós vagy valótlan? Értékelés a büntetőperbeli bizonyításban* [Real or unreal? Evaluation in criminal procedural evidence]. Budapest, Közigazgatási és Jogi Könyvkiadó, 1990. 15.

3 Katona op. cit. 16.

4 Katona op. cit. 17.

that the material and personal conditions of the necessary special examinations are only guaranteed here. If a permanent or designated expert is not available in the given field, the authority employs a so-called casual expert, i.e. asks a natural person or institution to prepare the expert opinion who has or may have the appropriate expertise.[5]

The CPA takes into account the fact that there are forensic experts included in the register of forensic experts, as well as that there are state bodies, institutions, and organizations not included in the register that are entitled to perform expert activity by specific legislation.

3. Certain Innovations of the CPA in the Field of Expert Evidence

The CPA introduced several general innovations for experts. As an example, it can be mentioned that the regulation applied to certain institutions as special treatment can also be applied to the expert in the cases specified therein[6]. It also became clear that the expert participates in the criminal proceedings as another interested party in connection with the procedural act where he/she is involved (summons, notification, presence, presence at the place of the procedure, participation) or decision (fee, reimbursement of expenses), and his/her rights and obligations are established accordingly[7].

It is also worth highlighting that, unlike the solution of previous procedural laws, one of the general aspects of the regulation of expert evidence in the CPA is that it omits the so-called procedurally neutral provisions, that apply to all procedural laws and that can be found in the Act on Forensic Experts. For example, the contents of the assignment of the expert, the parts of the expert opinion, the obligation of the expert to report are not regulated by the CPA.

The CPA does not differ from the provisions of the previous procedural law with regard to the main rules for the exclusion of an expert, however, it makes a clarifying addition in Section 191 (1) point b) of the CPA when it comes to the process of a member of the investigating authority acting as an expert. In the absence of a stipulation to the contrary, the exclusion rules also apply to the expert commissioned to prepare the private expert opinion. It is essential that both the defendant or defense attorney who commissioned the preparation of the opinion, as well as the appointed expert must pay attention to this, because in the absence of this, the document cannot be regarded, not just as an expert opinion, but even as a documentary evidence or an observation.

Judicial practice requires serious reasons for the exclusion of experts. This comes from the strict liability system that guarantees the legal status of experts.[8]

However, according to judicial practice, it is a fundamental requirement for experts to act impartially and without bias when deciding questions that require special

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5 Miklós Angyal: *Igazságügyi orvostan a büntetőjogi gyakorlatban* [Forensic medicine in criminal practice]. Pécs, Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2001. 3.

6 § 96 of the CPA.

7 § 58 of the CPA.

8 Balázs Elek: A büntetőügyekben eljáró szakértők felelősségének rendszere [The system of responsibility of experts acting in criminal cases]. *Büntetőjogi Szemle* 11, 1. (2022), 49.

expertise during criminal proceedings. According to the court's decision, however, in the event that the expert's opinion served as the basis for the initiation of criminal proceedings, it does not in itself establish the bias of the experts, even if, based on it, the liquidator reported a crime in compliance with his legal obligation, that also served as the basis for the initiation of criminal proceedings. In the case, the liquidator reported a crime based on the expert opinion he obtained during his proceedings, after which the county prosecutor service filed charges for the crime of embezzlement and other crimes committed as a continuous criminal offence on a particularly considerable value. Pursuant to § 33 (4) of the Act XLIX of 1991 on bankruptcy and liquidation proceedings, the liquidator is obliged to notify the competent authority in writing of the crime he became aware of, and if the perpetrator is known, also specifying her/him. As a result, the liquidator fulfilled his/her obligation prescribed by law when reported the crime that was indicated based on the data that was acquired during the liquidation procedure bas Therefore, the impartiality of the experts cannot be called into question based on the mere fact that they prepared an expert opinion during the liquidation procedure, that later served as the basis for the indictment.[9] In view of all this, the court rejected the motion to disqualify the expert[10].

In the cited case, the fact that the decision was made in the second-instance illustrates that pursuant to the CPA, the constitutional right to appeal that is guaranteed in the Hungarian Fundamental Law is also provided against the decision on the exclusion of the expert. Of course, the exclusion rules also apply to party-appointed experts. Otherwise, if the opinion of a party-appointed expert is not recognized as an expert opinion in the procedure, there is neither a need nor a legal possibility to exclude the appointed expert from the proceedings.[11]

4. Party-appointed Experts

In my opinion, in the area of expert evidence, viewed separately from other rules, the biggest innovation of the CPA is the introduction of the party-appointed experts. In order to strengthen the right to defense and more effectively enforce the principle of equality of arms, the CPA enables the defendant and the defense attorney to obtain an opinion from an expert appointed by them, that is based on their assignment. The rules of the party-appointed (private) expert opinion are partially contained in the act on criminal procedure and partly in the act on judicial experts. The ministerial justification of the CPA also indicates that the basis of the regulation on party-appointed expert opinions was that the defense should be able to appoint an expert commissioned by itself against

9 CPA para. h) of § 103 (1).

10 Debrecen Regional Court of Appeals, Beüf.II.263/2018.

11 Marianna Csilla Idzigné Dr. Novák: *A szakértő státusváltozása a hazai büntetőeljárásban – különös tekintettel a kizárásra vonatkozó szabályokra* [The change of status of the expert in domestic criminal proceedings - with particular regard to the rules on exclusion]. PhD thesis, Győr, Széchenyi István Egyetem, 2018. 270. https://tinyurl.com/wfzh6yjz (4 April 2022).

the expert assigned by the prosecution, and that it should be possible to appoint an expert even if, despite the submission of a motion, an expert is not appointed at all.

The preparation of a party-appointed expert's opinion can essentially be commissioned if the court, the prosecution or the investigation authority reject the motion of the defendant and/or the defense to appoint an expert, and thus an expert opinion by an appointed expert has not yet been prepared, or if the prosecutor or the investigating authority did not appoint the expert indicated in the defendant's or the defense's motion. At the same time, if a motion by the defendant or the defence counsel is aimed at establishing or assessing a fact, that was already established or assessed by an expert in an opinion provided by an expert appointed by the prosecution or the investigating authority, then a party-appointed expert may be mandated to provide an opinion only if a motion filed by the defendant or the defence counsel to provide clarification or to supplement the expert opinion or to appoint a new expert was dismissed either before or after the indictment.

It should be emphasized that there are two further limitations to obtaining a party-appointed expert opinion: if the previous expert opinion was prepared either before or after the indictment by the expert named in the motion of the defendant or the defence counsel, then a party-appointed expert opinion cannot be commissioned. Furthermore, the defendant and the defense counsel can only commission one private expert opinion on the same specific issue

Violation of the relevant legal regulations means that the opinion of a party-appointed expert cannot be taken into account as evidence, but only as an observation.

In the legal literature, the opinion has emerged that for the evaluation of a party-appointed expert opinion, that is (later) qualified as an expert opinion, the provisions regarding the expert opinion by a tribunal/authority appointed expert should be applied with the exception, that since there is no legal relationship between the authorities acting in criminal proceedings and the party-appointed expert, and that the act establishes the procedural obligation of the expert for the authorities as provided in the official assignment itself, in accordance with this, the expert opinion of a party appointed expert can be supplemented or the expert can be heard in parallel based on the amendment of the mandate of the expert for this purpose. If an opinion by a party-appointed expert qualifies as an expert opinion and is submitted orally, or if a clarification is provided, the expert opinion is supplemented orally, or experts are heard paralelly on the basis of a mandate, the expert shall be obliged to also answer questions asked by the court, the prosecution service, or the investigating authority. The expert fee and costs of a party-appointed expert mandated to provide an opinion shall, of course, be advanced by the defendant or the defence counsel. If it qualifies as an expert opinion, in that case the authority concluding the procedure will decide on the bearing of the costs based on the provisions on criminal costs.[12] However, judicial practice shows that the decisive demarcation in such cases is what the assignment of a

[12] Erik Mezőlaki: A büntető eljárásjogról igazságügyi szakértőknek. In: Zsuzsa Szakály (ed.): *Igazságügyi szakértők első jogi képzése* [First legal training for forensic experts]. Budapest, Magyar Közlöny Lap- és Könyvkiadó Kft., 2021. 112.

party-appointed expert actually covers, so it can be supplemented by assignments for individual activities if necessary.

Analyzing the application of the rules on party appointed expert evidence, it can be established that a different approach to the rules of the previous procedural law is also needed in criminal proceedings. Examining the trial history of the criminal case published in the Cases of the Courts of Appeal [Ítélőtáblai Határozatok] it can be established that in the given case, during the investigation, the defense counsel of the accused formulated a detailed motion for evidence after the CPA already entered into force, in which he made a motion to supplement the completed forensic expert opinion, as well as to appoint a new forensic accountant.[13]

In this submission, he repeated his motion for evidence that he had already submitted previously, and to which neither the investigation authority nor the prosecution had responded until that time. The defense submitted a motion to supplement the expert opinion of the forensic expert based on Section 197 of the CPA, and to assign another expert based on Section 197 (2) of the CPA. A detailed reasoning was given regarding the concerns about and shortcomings of the expert opinion. However, the investigating authority informed the defense counsel in its transcript that it does not consider the evidentiary motion to supplement the forensic accountant expert's opinion or the assignment of a new forensic accounting expert to be justified, and the same is true the supplementation of the expert opinion. After the indictment, the county prosecutor service also forwarded to the court the expert's opinion attached by the defense and prepared after informing the investigation authority. In any case, it was not mentioned in this transcript, nor in the justification of subsequent prosecutorial appeals, that the assignment given by the defense attorney to prepare the expert opinion would not be in accordance with the procedural law. Neither did it arise at the time of sending these documents that the legally prepared private expert opinion could not be used as evidence in the proceedings for any reason. At the preparatory meeting held in the case, the prosecutor, taking into account the private expert's opinion prepared on the basis of the defendants' commission, requested to supplement the expert evidence, that is, the prosecution requested to send the newly acquired 'document' with their observations to the expert who acted as an expert in the investigation phase, on it, if necessary, to supplement the opinion.

The prosecutor service did not present any other motions for evidence at the preparatory meeting. After that, a parallel hearing of the expert that was assigned by the investigating authority by the request of the defense took place at the court. The chair of the judicial panel informed those who were present that the opinion of the party-appointed expert had been forwarded to the previously assigned expert, and accordingly, prior to the parallel hearing, the assigned expert was already able to state that he would like to amend his expert opinion based on another expert opinion sent to him with the motion of the prosecutor. In fact, the parallel hearing began with the expert appointed during the investigation amending his opinion, and then, as a result of the parallel hearing, he amended it on additional issues as well. The court of appeal

[13] Debrecen Regional Court of Appeal, Bf.II.286/2022/13.

found that the decision of the court of first instance regarding the qualification of the party-appointed expert's opinion as an expert opinion in the procedure was justified, and that the based on Chapter XXXI of the CPA, and the procedure of expert evidence was in accordance with the law. The assignment of a party-appointed expert opinion in the case was legal, so its use as evidence was also legal.

The argument of the prosecutor service, claiming that the experts who gave the opposite opinion and were legally involved in the proceedings, thus could not have been heard in parallel was wrong, given that the originally appointed expert did not provide information in advance about the concerns expressed in the party-appointed expert's opinion, neither was the opinion supplemented. Although this did not affect the legality of the assignment given to the private expert, it can be established that already prior to the parallel hearing of the experts, the originally assigned expert had modified and changed his previously submitted expert opinion, having entered the proceedings on the basis of a legal assignment based on a party-appointed expert's opinion. According to the panel of the court of appeals, the provision of the prosecution's appeal that such a procedure of experts giving private expert opinions could not have taken place cannot be accepted. According to the clear wording of the Chapter XXXI of the CPA, as well as the clear explanation of the ministerial justification of the Criminal Procedure Act, the procedural conditions for commissioning a private expert opinion were created precisely for the purpose of more consistently enforcing the division of functions and strengthening the equality of weapons. There is no doubt that in criminal proceedings, officially appointed experts have the priority for giving an opinion on a professional matter. The institution of a party-appointed expert is a supplementary guarantee associated with the right of defense and the equality of arms. That is why § 189 of the Act on Criminal Procedure created the system that in the motion to appoint another expert, the reason for the concern that arose in relation to the previous expert opinion must be indicated, if the motion is aimed at the expert's establishment or assessment of a fact that was already examined by a previous expert opinion in the criminal procedure. It was not argued by the prosecution either that this condition was met by the defense attorney before the party appointed expert was given the mandate. Chapter XXXI of the CPA., as well as its ministerial justification, leaves no doubt that an expert can be included in the procedure not only by official appointment, but also on the basis of a mandate, and, with minor differences, the same rules apply to the forensic expert involved as an expert in the procedure on the basis of an official assignment as to an expert that was appointed by party in the form of a mandate whose opinion later qualifies officially in the court. As a general rule, an expert may act on the basis of a on official assignment, however, in order to ensure the equality of arms, the law compensates for this limitation[14]. The preparation of a party-appointed expert's opinion may take place on the basis of the mandate of the defendant or the defense counsel, the additional rules of which are contained in the Law on Forensic Experts. The basis of the regulation of the party-appointed expert opinion is that, on the one hand, the defense should be able to produce the expert commissioned by itself against the expert assigned

[14] Legislative justification for CPA § 190.

by the prosecution, and on the other hand, it should be possible to commission the expert even if, despite his motion, no expert is appointed at all. Although the procedural law has been partially amended since its entry into force, an order for the preparation of a private expert opinion can be given based on precisely defined rules in the system established by the law. The motion of the defendant's counsel met the conditions set forth in Section 190 of the CPA.

The investigating authority remained silent on the motion for a longer period of time, and then rejected it. After this decision, a mandate was given to the party-appointed expert to prepare the opinion. So the assignment was not premature. Further legal limitations for obtaining a private expert's opinion could not be established either, because the previous expert's opinion was not prepared by the defendant or the expert named in the defense's motion, either before or after the indictment. At the same time, on the same professional issue, the defendant and the defense attorney can only commission a private expert opinion. The law wants to make it clear that the defendant and the defense attorney have the right to appoint a private expert, but they can only do so if the conditions specified in the law are met, and the defense attorney's appointment met these conditions. However, jurisprudence cannot create additional limitations. The expert can be included in the procedure not only by official assignment, but as an exception, also by a party's mandate to provide an expert opinion. In such a case, the same rules, with minor differences, apply to a party-appointed expert legally included in the procedure as to a person acting as an expert on the basis of official assignment. The parallel hearing of the expert was also not hindered by the lack of an official assignment of the expert giving the opinion, because Section 198 (2) of the CPA makes it clear that parallel hearings are possible based on the expert's mandate and not only on the basis of an official assignment. The expert participating in the parallel hearing did not raise any procedural objections that the power of the mandate received from the defense attorney would not extend the parallel hearing. For the preparation of the party appointed expert's opinion, the appointed expert and its procedure provisions of the chapter XXXI of the CPA are applicable, added, that the act itself refers to the differing regulations in each subchapters.[15] To sum up, the court of first instance obtained the relevant pieces of evidence necessary to establish the facts, it legally decided on the use of certain means of evidence, including the opinion of the party appointed expert, so there was no obstacle to uphold the first-instance judgment based on the facts established by the court of appeal in the second-instance proceedings[16].

5. Examinations Related to Medical Expert Activity in the Investigation

Even with the change in the procedural framework, the tasks related to forensic experts and their work do not change, only with the development of the science can the work method and protocol change, which inevitably affects the expert work based on it. In

[15] Section § 164, Section § 189, Section § 190 (1) (2) and (3), Section § 197 (2), Section § 198, §, Section § 520 (1), (2) and (3).

[16] Debreceni Regional Court of Appeals, Bf.II.286/2022/13.

such cases, the question naturally arises as to how much more disadvantaged the expert acting on the basis of a commission of a private mandate is in comparison to the expert appointed officially by the authorities.

Pursuant to the regulations of the CPA on expert examination, there had not been any significant changes introduced compared to the provisions of the previous procedural code. The detailed rules are not contained in the CPA, but in the Law on Forensic Experts and the individual sectoral legislation. However, the basis for preparing a private expert opinion is a generally speaking, a private legal relationship. This is why the CPA provides regulations for the party appointed expert's investigation and the priority of fulfilling the assignment[17].

6. Forensic Medical Examination of Physical Evidence

During the commission of the crime, various biological and non-biological physical pieces of evidence are created, which can be characteristic of the person of the perpetrator as well as the method of committing the crime. By objectively establishing the manner of the crime, forensic investigations provide data that is crucial evidence for the justice system.[18]

The court, the prosecution service, or the investigating authority may order and carry out an inspection if a person, object, or site needs to be inspected, or an object or location needs to be observed, to discover or establish a fact to be proven.[19]

Highlighting from the regulations on inspection, 'on-site inspection' is decisively needed when and if a fact significant from an investigative point of view can be proven by examining a specific location[20]. The observation and investigation of the scene of the crime provides most of the data regarding the commission of many crimes, especially those against life, bodily integrity, and health. Due to the nature of the crime, it comes to the attention of the authorities after it has been committed, so the investigation has to recall the act from the past. This activity is the on-site inspection, which is an investigative act bound by procedural formalities. The inspection committee of the investigating authority conducts the on-site inspection. The participation of a forensic medical expert is also required during the on-site inspection of crimes against life. The on-site inspection has a precisely defined sequence and rules. The professional investigation is absolutely important from the point of view of detecting the crime and establishing the identity of the perpetrator.[21]

From a medical expert's point of view, an inspection sometimes means nothing more than the examination of a living person or a dead body or various objects. When the medical expert examines, for example, the victim or the suspect in a case, in the legal

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17 Ministerial justification of Act XC of 2017 on criminal procedure.

18 László Buris – Éva Keller: Kriminalisztikai vizsgálatok. In: Péter Sótonyi (ed.): *Igazságügyi orvostan* [Forensic medicine]. Budapest, Semmelweis Kiadó, 2005. 337.

19 Article 207 of the Criminal Code.

20 See § 207 of the Criminal Code.

21 Buris – Keller op. cit. 337–338.

sense, an inspection is conducted. The same situation occurs for example in the case of an autopsy, when the subject of the inspection is the corpse, and the inspection is essentially the same act as the autopsy activity. The practicing physician - as a medical expert - must examine almost exclusively living persons, other examinations are usually the responsibility of professional experts. A medical examination of living persons is usually required for the purpose of medical examination of injuries, illnesses, and intoxication. Based on the inspection (examination), the expert has the opportunity to present his/her expert opinion.[22]

Occasionally, the police ask the expert for an opinion on the injury, state of health, and intoxication based on the investigative documents, such as obtained medical reports, X-rays, hospital final reports, and interrogation reports. The purpose of the inspection, the examination, the autopsy, the study of the documents, and the participation in the procedural act is that the expert can give a well-founded opinion on the given professional issue. The expert opinion is actually a summary of the professional conclusions drawn from the medical records, the discovered facts and the available data. It must answer the questions raised by the appointing authority, and in order to be complete, it is also necessary for the expert to point out circumstances and facts that are relevant to the case, but escaped the attention of the authority or that could not have been thought of due to the lack of appropriate expertise.[23]

An important condition for the effectiveness of examinations is that pieces of evidence and test materials are examined under appropriate conditions. Their effectiveness is not primarily decided in the laboratory, because the material sent for testing is analyzed there. According to Sótonyi, the basics for a successful examination are the following:

The professional search for pieces of evidence takes place within the framework of the on-site inspection. It is the primary task of the medical expert and criminal technician present at the scene is to search for all the signs and traces of crime, from which it is possible to infer the details of the course of the crime, the activities of the perpetrator on the scene, or the perpetrator himself.[24]

In case of crimes committed on a location, it is crucial to secure the scene professionally in order to preserve the pieces of evidence of the crime. If this is not done, there is a risk that external persons change, destroy the pieces of evidence created or left by the perpetrator at the scene, or create misleading traces that are not related to the commission of the crime.[25]

In connection with the professional packaging of pieces of evidence, it should be emphasized that the result of the forensic investigation to be carried out depends, among other things, on the condition in which the pieces of evidence are analyzed. The professional packaging of individual pieces of evidence and objects is a requirement

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22 Endre Barta – József Nagy: *Az igazságügyi orvosszakértőkről* [Forensic medical experts]. Budapest, Rendőrtiszti Főiskola, 2001. 21–22.

23 Barta – Nagy op. cit. 22.

24 Buris – Keller op. cit. 338.

25 Ibid. 338.

that must be guaranteed by the medical examiner, the crime technician, and the investigator working on the scene.[26]

The forensic medical laboratory tests are primarily authorized by the Hungarian Institute of Forensic Sciences of the National Police Headquarters, the National Institute of Forensic Toxicology under the organization of the Ministry of Justice and the Forensic Medicine Institutes of the universities, however, it may be necessary to use other specific institutions, such as in the case of examination of non-medically related evidences.[27]

The data required for the examination must be provided. The primary condition for a successful laboratory test is that there is adequate data available for the material sent for testing, as well as the questions to which the authority requests answers during the expert examination.[28]

One of the most important elements of physical evidence is the laboratory forensic examination, the result of which can be the following: establishing a fact, proof (positive or negative), identification, and exclusion.[29]

The examination of evidence by an expert is in itself an important element of criminal proceedings, and within that, the assessment of the pieces of evidence. An important principle of expert examination is the minimal use of original evidence, keeping track of changes, observing the rules of evidence, and not crossing the limits of one's own knowledge (not even on the part of the expert).

Upon completion of the expert examination, the expert will hand over both the pieces of evidence and the evidence extracted from them to the office appointed her/him.[30] In the absence of this, concerns may arise regarding the credibility of the expert opinion, which may ultimately lead to the failure of the entire evidence procedure.

7. Forensic Medical Expert Opinions in Court Practice

It is a general requirement for medical expert opinions that the expert opinion shall be justified, true, clear and objective. The opinion is justified if it is based on the facts described in the medical records and is based solely on the conclusions drawn from them. It is true, if its conclusions are professional and correspond to the current state of medicine. It is clear if it summarizes the professional findings concisely, to the point and in a comprehensible manner. It is objective, if it is free from bias and only contains objective professional statements.[31]

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[26] Ibid. 338.

[27] Ibid. 338.

[28] Ibid. 338.

[29] Ibid. 339.

[30] István Zsolt Máté: A bizonyítékok kezelése. Az igazságügyi informatikai szakértő a büntetőeljárásban. [Handling of evidence. The forensic IT expert in criminal proceedings]. *Magyar Rendészet* 14, 2. (2014), 36. https://folyoirat.ludovika.hu/index.php/magyrend/article/view/3981/3247 (Accessed on 4 April 2022).

[31] Barta – Nagy op. cit. 22.

A definite opinion can be given if there can be only a single reason for an established fact as a consequence with natural scientific certainty. It is characteristic of a probability opinion that such an opinion can be given in the majority of cases, since a fact can rarely be definitively traced back to a single reason. Something can be probable, very probable, probable to the point of certainty, or improbable. An inconclusive opinion can be made if the inadequacy or insufficiency of the test material does not allow a definite conclusion or probable conclusion to be drawn.

It is also worth pointing out that the nature of the expert's tasks can sometimes change due to changes in the legal environment. In an ongoing case due to the crime of drug-related crime, which was judged at second instance by the higher court, the panel pointed out that the first instance court legally concluded that the defendant was guilty, but the classification of the act did not comply with substantive law. The reason for this is that the court overlooked the § 2 of the Criminal Code (Act C of 2012). According to Section 2 (1) of the Criminal Code criminal offenses shall be adjudicated under the criminal law in effect at the time when they were committed. Paragraph (2), however, stipulates that if an act is no longer treated as a criminal offense, or if it draws a more lenient penalty under the new criminal law in effect at the time when it is adjudicated, this new law shall apply. In the judgment of the first-instance court, it was found that in the case of the drug ADB-FUBINACA, § 461 of the Criminal Code does not quantify the upper limit of the small quantity, its determination is the competence of the medical expert. Based on an expert opinion, the forensic doctor established that the amount of the active substance exceeded not only the lower limit of the substantial quantity, but also of the particularly substantial quantity (1400 mg). In contrast, pursuant to Section 341 (3) of the Act CXCVII of 2017 Section 461 paragraph (1) of the Criminal Code was supplemented with subparagraph (d) and (db) on January 1, 2018. According to this, in the case of ADB-FUBINACA, the upper limit of the small quantity is 0.05 grams. Thus, in the case of this drug, the calculation of the quantitative limits can no longer be considered with the involvement of a medical expert pursuant to § 461 (4) of the Criminal Code, the classification of the act shall be based on subparagraph § 461 (3) a) and b). Concludingly, the drug is of a particularly substantial quantity if it exceeds two hundred times the upper limit of the small amount defined for the given drug. Accordingly, in the case of the so-called ADB-FUBINACA, the lower limit of the particularly significant amount is 10 grams, which in the present case does not reach, neither in the case most favorable for the accused – 1900 mg – nor the maximum estimated amount of the active ingredient – 9400 mg. Based on the content of the active substance, the drug seized from the accused was a substantial quantity, as it exceeded twenty times the upper limit of the small amount.

Therefore, the crime charged against defendant was possession of a significant quantity of drugs as defined in Section § 178 (1) and classified according to § 178 (2) b) of the Criminal Code. Overall, it can be concluded that in the case of some drugs, that the calculation of the quantitative limits can no longer be assessed with the involvement of a medical expert, if the quantity limits stipulated in the effective Criminal Code for the pure active substance content given in the base form are more favorable to the perpetrator at the time of assessment. The change in the legal environment and the omission of an unnecessary medical expert's opinion could thus be the basis for

the application of the more favorable penal code at the time of assessment and the imposition of punishment in the given case.[32]

The expert opinion must reflect the objective truth and, according to its purpose, must be suitable for the acting authority to learn this truth.[33] Such a substantive interpretation of the conceptual system related to expert activity makes it obvious that the expert opinion can be considered a special kind of evidence that cannot be easily integrated into the dual (personal and material) system of the pieces of evidence. The expert opinion can be considered primarily, but not exclusively, of a personal nature, since it is created by a human subject just like the testimony of the witness and the defendant. At the same time, it differs from these, because the objective source of expert activity, the subject of the investigation, is made available to the expert by the acting authority. This also means that, on the one hand, it depends on the decision of the acting authority which object it sends for examination, and on the other hand, these can only be objects that meet the requirements of procedural law.[34]

Within the activity of the expert, the creation of the expert opinion as a means of evidence can be considered a central moment. The ultimate goal of the legal practitioner's assessment of expert evidence is to determine the probative value of the evidence presented in the expert opinion. The realization of this represents the final result of an evaluation process which, starting from the establishment of the expert's competence and the credibility of the means of evidence provided to the expert, continues through the consideration of the credibility of the expert opinion as evidence. From the point of view of criminal procedure law, a distinction can be made between the expert opinions of the primarily assigned expert, the experts assigned to repeat the investigation, and the expert who performed the review. According to the number of specialized areas included in the investigation, one can distinguish between homogeneous and combined (complex) expert opinions.[35]

8. Evaluation of the Forensic Expert Opinion

In order to prevent the procedures from being prolonged, the CPA strives to set reasonable limits on the evaluation of expert opinions by establishing a sequence for the evaluation of the expert opinion. The expert opinion cannot be accepted without concern, for example, if it does not contain the legally required content elements of the expert opinion, if it is not clear, if it contradicts itself or the data provided to the expert, or if there is serious doubt about its correctness[36]. In these cases, at the request of the court, the prosecutor service, or the investigation authority, the expert provides additional information or amend the expert opinion.

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32 Debrecen Regional Court of Appeals, Bf.II.471/2019.

33 Barta – Nagy op. cit. 22–23.

34 Katona op. cit. 302.

35 Katona op. cit. 316.

36 CPA § 197.

If the first correction was not successful, another expert can be appointed, however, in the motion for appointment and in the appointing decision, the concerns regarding the acceptability of the expert opinion must be indicated. The ministerial justification of the CPA also mentions that, as a third step, if the opinions of the experts differ from each other, the discrepancy can be clarified by hearing the experts in the presence of each other.[37]

In criminal proceedings, it may lead to an error in the establishment of facts if the court fails to clarify conflicting expert opinions through a personal hearing of the experts, or if the court does not resolve the contradictions between the opinion of the expert assigned by the court and in individual expert's opinions attached by the parties.

It sometimes happens that the judgment of the court is unfounded with regards to the mental state of the accused - that is, in terms of his judgment at the time of the commission of the offense and his state at the time of the judgment. In such cases, even if the authority obtains several expert opinions to assess the defendant's state of mind, it still happens that, based on the expert opinions and the amending opinions, the state the first-class defendant at the time of the commission of the offense or at the time of the assessment is still not clear. Related to this, it also happens that expert opinions have contradictory findings. Therefore, in such cases, by hearing the experts, it must be clarified whether the state of mind of the defendant at the time of the commission of the crime or afterwards affected his mental state. It is a procedural error if the court does not summon the forensic psychiatric experts who presented conflicting expert opinions regarding the defendant's ability to account for the hearing, but merely notifies them of the deadline for the hearing, and establishes the facts in this regard based on the evaluation of the testimonies read at the trial.

If, for example, the defendant's 'latent schizophrenia' existing at the time of the commission of the act did not affect his state of mind, i.e. did not preclude recognition of the danger of the act to society, the circumstance excluding criminality contained in the Criminal Code cannot be applied. If it could be determined that the defendant's state of mind at the time the act was judged did not yet exist at the time of the act, but this could already be established with complete certainty at the time the act was judged, the criminal proceedings should have been suspended until the defendant recovered.[38]

9. Final Thoughts

The CPA significantly changed the rules of expert evidence, so for example, in order to prevent the procedures from being prolonged, it strives to lead the process of appointing experts and evaluating expert opinions into a rational channel for a considered and timely decision. The time that has passed since the act entered into force already allows us to examine the legal practice. I believe that the biggest change comes from the regulations on the party-appointed expert opinions, which allows the defendant and

[37] Justification of Act XC of 2017 on criminal procedure.

[38] Lívia Hidvéginé dr. Adorján – Ágnes Sáriné dr. Simkó: *Igazságügyi szakértők az egészségügyben* [Forensic experts in healthcare]. Budapest, Medicina Könyvkiadó Zrt., 2017. 276–277.

his defense attorney to have similar rights in criminal proceedings, which also comes from the principle of equality of arms. And all of this strengthens the fairness of the procedure in general, which can be a guarantee for the birth of judicial verdicts that are close to the material truth.

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COMBATING PONZI SCHEMES: AN IN-DEPTH LOOK AT LAW ENFORCEMENT EFFECTIVENESS IN INDONESIAN CONTEXT

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Abstract

Ponzi schemes, infamous for their ability to exploit unsuspecting investors, continue to pose a significant challenge to financial authorities globally. Indonesia, with a burgeoning economy and a growing financial sector, is not immune to the threat of fraudulent activities. This study delves into the effectiveness of existing law enforcement measures in Indonesia to combat Ponzi schemes, shedding light on areas that need of needing improvement. The research employs a mixed-methods research design, the study combines quantitative and qualitative data to comprehensively examine the issue. The findings reveal that while Indonesia has specific legal provisions to prosecute Ponzi scheme operators based on the sectoral laws and regulations, law enforcement still faces challenges related to evidentiary factors, witness factors, legal instrument, and limited resources. The reluctance of victims to report these schemes hinder successful prosecution. Law enforcement agencies often prioritize other criminal offenses due to resource constraints. To address these challenges, the study emphasizes the need for enhanced collaboration among law enforcement agencies and banking institutions, and the allocation of resources for these cases should be reconsidered. These reforms are essential to improve the state of law enforcement and protect potential victims of Ponzi schemes in Indonesia.

Keywords: Effectiveness Assessment, Financial Crime, Indonesia, Law Enforcement, Ponzi Scheme.

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1. Introduction

The insidious nature of Ponzi schemes and their ability to exploit unsuspecting investors presents a formidable challenge to financial authorities worldwide. Indonesia, with its growing economy and expanding financial sector, is not exempt from the threat posed by these fraudulent activities. Data from the Central Statistics Agency (*Badan Pusat Statistik* or BPS) shows that Indonesia's economic growth in the second quarter of 2023 was recorded at 5.17% (yoy), an increase from growth in the previous quarter of 5.04% (yoy).[1] However, in recent years, there has been a growing concern regarding the prevalence of Ponzi schemes within the country, prompting the Indonesian government to implement regulatory measures aimed at detection and prevention. Coordinating Minister for Economic Affairs, Airlangga Hartarto, highlighted that there are still many cases in the financial services sector that need to be resolved so as not to harm the industry's reputation, such as in Ponzi scheme investments where it is stated that public complaints continue to increase reaching more than 130,000 complaints.[2]

Ponzi schemes, named after Charles Ponzi, the infamous scam artist of the early 20th century, continue to be a persistent menace to investors in Indonesia and across the globe. These schemes promise attractive, yet unsustainable, returns on investments, often leading individuals to part with their hard-earned savings.[3] Ponzi schemes, particularly in the context of Indonesia, have garnered considerable attention from scholars, resulting in numerous studies that shed light on various facets of this intricate issue. In 2022, Amanda et al conducted a study that offers an insightful perspective by focusing on the prevalence of money games within the Tiktok E-Cash application. Their research underscores the significance of harnessing existing legal provisions for law enforcement in combatting these unlawful activities.[4] Furthermore, the research conducted by Setiawan and Ardison in 2021 brings to the forefront the severity of large-scale investment scams, with a specific emphasis on Ponzi schemes, within Indonesia. Their comprehensive analysis of the problem provides valuable insights into the vulnerabilities of potential victims and the challenges faced by law enforcement and government agencies.[5] In addition, the research conducted by Ghazmi and Amedi, which focuses on VTube as a case study of illegal investment activities, introduces another intriguing dimension. Their proposal for the issuance of a legal decree by the

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1 Ying Xian Wong: Indonesia's Second-Quarter GDP Growth Beat Expectations. *The Wall Street Journal*. August 7, 2023. https://bit.ly/4dfArEM (Accessed on 18 February 2024).

2 Riantiza Meilanova Denis: Kasus Jiwasraya Hingga Skema Ponzi Jadi Sorotan Menko Airlangga. *Bisnis*. July 7, 2022. https://bit.ly/3yswJZe (Accessed on 18 February 2024).

3 Suwitho Suwitho – Ikhsan Budi Riharjo – Danang Ary Dewangga: The Nexus between Ponzi Scheme and Multi-Level Marketing Systems: Evidence in Indonesia. *Cogent Social Sciences* 9, 1. (2023), 1–17. https://doi.org/10.1080/23311886.2023.2178540

4 Shilvia Amanda – Sayid Mohammad Rifqi Noval – Elis Herlina: Law Enforcement Against The Practice of Money Games With Ponzi Scheme in Illegal Investments in The Tiktok E-Cash Application in Indonesia. *Res Nullius Law Journal* 4, 1. (2022), 57–76.

5 Peter Jeremiah Setiawan – Hansel Ardison: Criminal Victimization On Large-Scale Investment Scam In Indonesia. *Veritas et Justitia* 7, 1. (2021), 1–30.

OJK's Investment Task Force (SWI) instead of solely relying on press releases sparks a debate. The legal implications of such a decree and the potential challenges in its enforcement warrant further examination.[6] Lastly, the research by Hidajat and Phung delves into Ponzi schemes from the perspective of the perpetrators. It is fascinating to observe how Ponzi schemes have adapted to modern contexts, incorporating technology and disguises related to religion or belief in their investment schemes. [7]

While numerous studies have been conducted on the issue of Ponzi schemes in Indonesia, none have systematically assessed the effectiveness of current law enforcement measures and explored the factors influencing their efficacies. To address this research gap, this study aims to contribute by providing a thorough and comprehensive examination of the existing law enforcement mechanisms in Indonesia, as they pertain to combatting Ponzi schemes. By scrutinizing the regulatory landscape, the study aims to identify areas ~~of~~ requiring improvement, shedding light on the challenges in combating these fraudulent activities. Furthermore, the research begins with exploring the intricate nature of Ponzi schemes, emphasizing the importance of understanding their evolving tactics and the hurdles associated with their identification. By delving into the specific context of Indonesia, this study contributes to the discourse on Ponzi scheme, offering a nuanced understanding of the effectiveness of law enforcement measures in a rapidly developing economy. It serves as a reminder that, in the fight against Ponzi schemes, ongoing vigilance and adaptability are paramount to protect the financial interests of Indonesian investors and maintain trust in the nation's financial markets.

2. Unraveling the Intricacies of Ponzi schemes

The Ponzi scheme, named after Charles Ponzi, is a fraud investment scheme where the operator attracts new investors by guaranteeing attractive returns with minimal risk. The funds collected from new investors are then utilized to pay interest to those who invested earlier.[8] Ponzi schemes are a form of fraud that operates on a deceptive financial model. These schemes are illegal for several reasons, including their unethical nature, their potential to cause devastating financial harm to individuals, and the negative impact they can have on the broader financial market. Ponzi schemes are not yet explicitly regulated in Indonesian law, but business actors using Ponzi scheme systems can still be charged under Indonesian criminal law and under Law Number 7 of 2014 on Trade. These schemes prey on the trust and vulnerability of investors,

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6 Azeem Marhendra Amedi – Shabrina Fadiah Ghazmi: VTube Indonesia's Business Activities: How Can Ojk's Investment Task Force Take Action Against Illegal Investments. *The Lawpreneurship Journal* 1, 2. (2021), 139–157., https://doi.org/10.21632/tlj.1.2.139-157

7 Taofik Hidajat – Thanh-Binh Phung: Ponzi Scammer: Old Wine in New Bottles. *International Business and Accounting Research Journal* 7, 2. (2023), 184–93. http://dx.doi.org/10.35474/ibarj.v7i2.261

8 Anding Zhu – Peihua Fu – Qinghe Zhang – Zhenyue Chen: Ponzi Scheme Diffusion in Complex Networks. *Physica A: Statistical Mechanics and Its Applications* 479, (2017), 128–36. https://doi.org/10.1016/j.physa.2017.03.015

convincing them to hand over their hard-earned money under false pretenses.[9] This illegal behavior undermines the foundation of trust that the financial industry relies on, eroding confidence in legitimate investment opportunities. Furthermore, when these schemes inevitably collapse, they can lead to catastrophic financial consequences for countless victims.[10] Not only do individuals lose their savings, but the ripple effects of these scams can also destabilize the financial market, leading to a breakdown of investor trust and the potential for broader economic consequences. Therefore, Ponzi schemes are not only morally wrong but also pose significant threats to financial stability and must be vigorously combated and prosecuted.[11]

Ponzi schemes follow a predictable trajectory as they evolve through distinct phases, ultimately culminating in their catastrophic collapse. These phases are essential to understanding the inevitable pitfalls of these fraudulent investment schemes (Figure 1).

Figure 1. The phases of Ponzi scheme

The establishment phase marks the scheme's inception. During this early stage, the perpetrators create the framework of the Ponzi scheme and actively seek out their initial investors. To garner trust and credibility, these early participants are often offered disproportionately high returns on their investments. These initial successes are crucial to set the stage for the scheme's expansion. The Establishment Phase is characterized by an air of legitimacy, as these early investors typically receive their returns as promised, further enticing others to join. As the scheme transitions into the expansion phase, it starts to gain momentum. Here, word-of-mouth referrals and, at times, aggressive marketing strategies are employed to draw in a growing number of investors. The promise of high returns, coupled with the endorsements of earlier participants, can be enticing, leading to an influx of new capital into the scheme. The perceived success of these early participants fuels the growth, attracting even more individuals who believe they have stumbled upon a lucrative investment opportunity.[12]

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9 Massimo Bartoletti – Salvatore Carta – Tiziana Cimoli – Roberto Saia: Dissecting Ponzi Schemes on Ethereum: Identification, Analysis, and Impact. *Future Generation Computer Systems* 102, (2020), 259–277. https://doi.org/10.1016/j.future.2019.08.014

10 Irfan Ullah – Wiqar Ahmad – Arshad Ali –Shakir Ullah: Red Flags of the Modaraba Scam-a Ponzi Scheme in Pakistan: Using Victim Accounts for Better Prevention. *Crime Prevention and Community Safety* 23, 3. (2021), 278–301. https://doi.org/10.1057/s41300-021-00124-y

11 Taofik Hidajat – Ina Primiana – Sulaeman Rahman – Erie Febrian: Why Are People Trapped in Ponzi and Pyramid Schemes?. *Journal of Financial Crime* 28, 1. (2020), 187–203. https://doi.org/10.1108/JFC-05-2020-0093

12 Melissa S. Baucus – Cheryl R. Mitteness: Crowdfrauding: Avoiding Ponzi Entrepreneurs When Investing in New Ventures. *Business Horizons* 59, 1. (2016), 37–50.

However, the expansion phase does not last indefinitely. As the scheme matures, it approaches the Saturation Phase, which is marked by a slowdown in the recruitment of new investors. During this phase, the scheme struggles to fulfill its financial commitments to the existing participants, as the flow of new investments can no longer keep up with the payouts promised to earlier investors.[13] This results in growing financial strain and mounting pressure on the operators to keep the illusion of profitability intact. Finally, the collapse phase is an inevitable outcome of the Ponzi scheme's unsustainable model. In this stage, the scheme reaches its breaking point. The promised returns can no longer be maintained, leading to its ultimate collapse. This can transpire for several reasons, including the inability to attract new investors, regulatory intervention that exposes the scheme's fraudulent nature, or the perpetrators opting for a voluntary shutdown to evade detection.[14] Regardless of the cause, the end result is always the same: significant financial losses for those involved, and the unmasking of the fraudulent activities that sustained the scheme throughout its existence.

Ponzi schemes, the tricky money scheme created with bad intentions of divesting investors of their hard-earned capital, exhibit a carefully structured system, artfully tailored to instill unwavering faith among the public. This duplicitous design entices individuals to commit their financial resources to seemingly lucrative yet fictitious investment opportunities. It is only when the orchestrator of this financial deception, often a charismatic leader or mastermind, senses the accumulation of wealth to be sufficient, that they vanish into obscurity, absconding with the investments of their unsuspecting victims.[15]

The bait employed by organizations adopting the Ponzi scheme modus operandi includes alluring promises, such as extravagant Returns on Investment (ROI) augmented by enticing bonuses and guaranteed rates of return. These returns, while undeniably appealing to prospective investors, are invariably presented with an aura of realism, carefully calibrated to elicit trust and belief.[16]

Ponzi enterprises, by design, are sustained through the continuous recruitment of new members, ensuring the constant inflow of capital. These financial inflows are not channeled into any substantive business or legitimate investment, but rather serve as

https://doi.org/10.1016/j.bushor.2015.08.003

13 Peihua Fu – Anding Zhu – He Ni – Xin Zhao – Xiulin Li: Threshold Behaviors of Social Dynamics and Financial Outcomes of Ponzi Scheme Diffusion in Complex Networks. *Physica A: Statistical Mechanics and Its Applications* 490, (2018), 632–642. https://doi.org/10.1016/j.physa.2017.08.148

14 Darwin Cortés – Julieth Santamaría – Juan F Vargas: Economic Shocks and Crime: Evidence from the Crash of Ponzi Schemes. *Journal of Economic Behavior & Organization* 131, (2016), 263–75. https://doi.org/10.1016/j.jebo.2016.07.024

15 Mervyn K Lewis: New Dogs, Old Tricks. Why Do Ponzi Schemes Succeed?. *Accounting Forum* 36, 4. (2012), 294–309. https://doi.org/10.1016/j.accfor.2011.11.002

16 Marc Hofstetter – Daniel Mejía – José Nicolás Rosas – Miguel Urrutia: Ponzi Schemes and the Financial Sector: DMG and DRFE in Colombia. *Journal of Banking & Finance* 96, (2018), 18–33. https://doi.org/10.1016/j.jbankfin.2018.08.011

a reservoir for disbursements to prior members who have registered.[17] The system's vulnerability becomes manifest when the recruitment of new members falters, leading inexorably to its demise. Scholars often identify Ponzi schemes as a variant of pyramid schemes due to their inherent similarities, despite having distinct structures. In a Ponzi scheme, investors are enticed with promises of high returns, a model that, interestingly, exhibits pyramid-like characteristics as early investors are paid with funds from subsequent ones. This parallel is significant when considering the hierarchical recruitment model of traditional pyramid schemes, where participants earn money through the recruitment of others. Both schemes share common traits, such as being unsustainable and facing collapse without a continuous influx of participants.[18] Their deceptive nature, coupled with the absence of legitimate business activities justifying promised returns, renders both Ponzi and pyramid schemes illegal and subject to legal consequences for exploiting participants. The beneficiaries of this fraudulent stratagem are limited to early entrants, while subsequent investors, arriving late to the nefarious party, inevitably find themselves bearing the brunt of financial losses.[19]

A disconcerting statistic, as documented by the Financial Services Authority (OJK) Investment Alert Task Force (SWI), highlights the profound toll inflicted upon the public by fraudulent investments of this nature, spanning the period from 2011 to 2022. Cumulative losses, reaching approximately IDR 221 trillion, have been exacted upon countless individuals, numbering in the millions (Figure 2).[20]

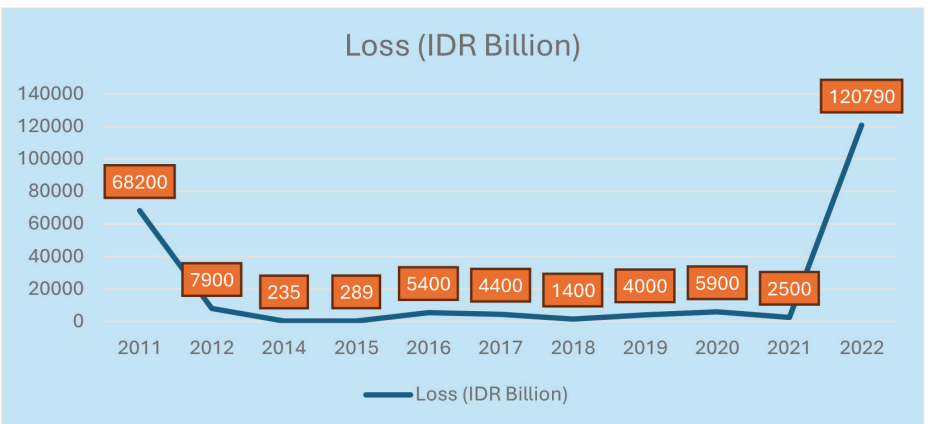

Figure 2. Cumulative financial damage resulting from illegal investments between 2011 and 2022.

[17] Rebecca Nash – Martin Bouchard – Aili Malm: Investing in People: The Role of Social Networks in the Diffusion of a Large-Scale Fraud. *Social Networks* 35, 4. (2013), 686–698.

[18] Pihu Feng – Xin Lu – Zaiwu Gong – Duoyong Sun: A Case Study of the Pyramid Scheme in China Based on Communication Network. *Physica A: Statistical Mechanics and Its Applications* 565, (2021), 125548. https://doi.org/10.1016/j.physa.2020.125548

[19] Smith Felicia: Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor. *University of Baltimore Law Review* 40, 2. (2010), 215–284.

[20] Kenzu Sanya: Public Losses Due to Illegal Investments Reach Rp117 Trillion: OJK. *Antaranews*, August 5, 2021, https://bit.ly/3Wvdk1H (Accessed on 18 February 2024).

Moreover, it is imperative to consider that the Ponzi scheme, in its characteristic operation, invariably engenders a substantial multitude of aggrieved participants. This phenomenon can be elucidated through a discerning exemplar, as graphically depicted in Figure 3. At the inception of this scheme, a solitary perpetrator initiates the process and subsequently lures and beguiles a cohort of six initial investors. In order for these six individuals to yield a return on their investments and recoup their capital, each of them is mandated to secure the participation of an additional sextet of investors. The ramifications of this cascading recruitment strategy reverberate through successive levels of the scheme.[21] At the third tier, an aggregate of 36 novices enrolls. These 36 individuals, in a hierarchical fashion, emulate the recruitment endeavors of their predecessors, thus perpetuating this chain. This sequence extends downward until the scheme reaches its nadir, denoted as level 14, where an astonishing figure of 13,060,694,016 participants emerges. This staggering numerical influx surpasses even the global human population, thereby underscoring the prodigious scale of the Ponzi scheme's expansion.

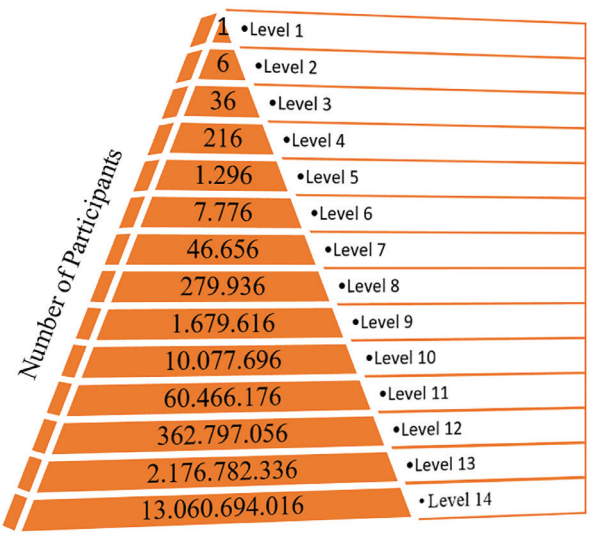

Figure 3. The illustration of exponential growth of a Ponzi scheme

Within enterprises that implement such stratagems, the ostensibly offered products merely serve as a veneer to conceal a nefarious underpinning. The revenue stream of these fraudulent schemes derives primarily from initiation fees assessed upon the recruitment of new participants.[22] The augmentation of this income is contingent upon

[21] David Domeij – Tore Ellingsen: Rational Bubbles and Public Debt Policy: A Quantitative Analysis. *Journal of Monetary Economics* 96, (2018), 109–123. https://doi.org/10.1016/j.jmoneco.2018.04.005

[22] Clinton Free – Pamela R. Murphy: The Ties That Bind: The Decision to Co-Offend in Fraud. *Contemporary Accounting Research* 32, 1. (2015), 18–54. https://doi.org/10.1111/1911-3846.12063

the expansion of the participant base, and this accrual is subsequently disbursed to the instigators and apex individuals within the scheme's hierarchical construct.[23] It is imperative to acknowledge that this design predominantly favors the early entrants, ensnaring them in the upper echelons of the pyramid.

A case in point is the scenario surrounding Wahyu Kenzo's trading robot, which amassed a membership base of 25,000 individuals while incurring losses amounting to IDR 9 trillion. Budi Hermanto, Chief of Police in Malang City, explained that the suspect initiated an investment venture involving trading robots in early 2020, amid the backdrop of the Covid-19 pandemic. Seizing upon the economic hardships afflicting the populace at that juncture, the suspect leveraged the circumstances to proffer collaborative opportunities under the guise of product distribution.[24] Notably, these products included Greenshake and Gluberry nutritional milk, bearing the imprimatur of PT Pansaky Berdikari Bersama (Pansaka), an enterprise overseen by the suspect. Intriguingly, as the narrative unfolded, the suspect veered toward soliciting members for joint efforts in product sales conjoined with a trading investment incentive mediated by the Autotrade Gold (ATG) application robot. The suspect dangled promises of biweekly investment returns, amounting to 2,000 US dollars or the equivalent of IDR 30 million. Members occasionally endeavored to amass investment capital from multiple recruits whom they enlisted into the ATG trading robot venture, thus engendering a network of entrants. However, Wahyu Kenzo failed to fulfill his promises, resulting in financial losses of IDR 9 trillion (equivalent to EUR 534 million) for 25.000 victims ensnared in his fraudulent scheme.[25]

Furthermore, it is worth emphasizing that a defining trait of these Ponzi or pyramid schemes is that the distribution of commissions or bonuses remains disassociated from product sales volume and hinges upon the establishment of a pyramid-shaped network with a prescribed quota of members.[26] The accentuation gravitates towards member recruitment rather than product transactions, thus insulating the income streams from fluctuations in product sales. Concomitantly, the membership registration fees assume a substantial pecuniary magnitude, serving the dual purpose of subsidizing commissions for the recruiting members and the beneficiaries occupying the apex of the pyramid hierarchy.

In the case of the Jombingo e-commerce platform, which left users grappling with financial losses tallying in the hundreds of millions of rupiah, the modus operandi starkly diverged from conventional e-commerce paradigms. While most e-commerce

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23 Stacie Bosley – Kim K. McKeage: Multilevel Marketing Diffusion and the Risk of Pyramid Scheme Activity: The Case of Fortune Hi-Tech Marketing in Montana. *Journal of Public Policy & Marketing* 34, 1. (2015), 84–102. https://doi.org/10.1509/jppm.13.086

24 Werdiono Defri: Robot Trading Fraud, Wahyu Kenzo CS, Accused in Layers. *Kompas*, September 6, 2023, https://bit.ly/46BOkus (Accessed on 18 February 2024).

25 Nugroho Johannes: Arrest of Indonesia's 'Crazy Rich Surabayan' Spotlights Risk of Robot-Trading Investment Scams. *South China Morning Post*, March 26, 2023, https://bit.ly/3yqUwbO (Accessed on 18 February 2024).

26 Mervyn K Lewis: *Understanding Ponzi Schemes: Can Better Financial Regulation Prevent Investors from Being Defrauded?*. Northampton, Edward Elgar Publishing, 2015. 1–5.

platforms afford users immediate purchasing capabilities, Jombingo mandated a prerequisite entailing the recruitment of new users prior to unlocking transactional privileges. The Jombingo victims had previously made a police report at the Resort and Crime Agency of the National Police Headquarters with Register Number LP/B/225/VIII/2023/SPKT/BARESKRIM POLRI. It elucidated that a victim's ordeal commenced with the receipt of an email originating from zhangdandan33@gmail.com, extending an offer to participate in an application known as Jombingo, ostensibly an e-commerce platform underpinned by a commission-based framework. The victim, unfamiliar with the email's sender but under the impression that it emanated from the application itself, proceeded to install the application as per the instructions.[27] Subsequently, the victim was instructed to deposit funds and enlist additional individuals to partake in the application's functionalities, involving the acquisition of offered goods. As a preliminary step, the victim was mandated to replenish a specified sum of money, which, driven by confidence in the offer, culminated in an outlay of 20 million Rupiah, remitted in installments. However, with the passage of time, the victim's capacity to withdraw the remaining balance from their account dissipated, culminating in financial detriment.[28] This limitation is orchestrated by the individuals operating the fraudulent system, who strategically manipulate and restrict the victim's access to their funds, exacerbating the adverse consequences of the fraudulent activity.

3. Legal Framework for Addressing Ponzi Scheme

Ponzi scheme draws the attention of Indonesian law primarily through the legal tenets stipulated in Article 372 in conjunction with Article 378 of the Criminal Code concerning embezzlement and fraud.[29] This scheme, characterized by its inherently deceptive nature, carries the potential for those convicted to face a maximum prison sentence of four years. Furthermore, the prevailing legal recourse for addressing Ponzi scheme perpetrators within the Indonesian legal framework necessitates their prosecution under sectoral laws and regulations. This approach is exemplified in cases such as that of PT Cakrabuana Sukses Indonesia, which engaged in the unauthorized solicitation of public funds.[30] In doing so, this company violated the provisions articulated in Article 59 of Law Number 21 of 2008, a statute that pertains to Sharia Banking.[31] Under the purview of Article 59, any entity involved in business activities

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[27] Wildan Noviansah: Rugikan Korban Hingga Puluhan Juta, Begini Modus Tipu-Tipu Jombingo. *DetikNews*, July 20, 2023, https://bit.ly/4fu9dM1 (Accessed on 17 February 2024).

[28] Catriana Elsa – Sukmana Yoga: Jombingo Diduga Terapkan Skema Ponzi Berkedok E-Commerce. *Kompas*, June 30, 2023, https://bit.ly/3YxQk4B (Accessed on 17 February 2024).

[29] Pwee Leng – Handjaya A. Hugan: Bank Criminal Act: Case of Fraud Using Letter of Credit-Bank as a Victim. *Chinese Business Review* 17, 3. (2018), 105–154. https://doi.org/10.17265/1537-1506/2018.03.002

[30] Dian Rokhmawati – Desman Serius Nazara – Muhammad Irvan – Deddy Novie Citra Arta: The Role of Corporate Governance as a Moderating Variable in Relationship of Determinant Factors Stock Return. *JEMSI Jurnal Ekonomi, Manajemen, dan Akuntansi* 9, 1. (2023), 86–92.

[31] Law Number 21 of 2008 on the Sharia Banking Law, serves as the primary regulatory framework for overseeing Islamic financial activities in Indonesia. One of its key features is the incorporation of criminal

related to Sharia Banking, Sharia Business Units, or the solicitation of savings and investments in adherence to Sharia principles, without having obtained the requisite license from Bank Indonesia, is held accountable for their actions. Those found in breach of Article 59 face imprisonment for a period ranging from a minimum of five years to a maximum of fifteen years. Simultaneously, they are liable to financial penalties, the quantum of which may extend from a minimum of IDR 10 billion to a maximum of IDR 200 billion.

Likewise, PT Dream for Freedom, a company involved in investment activities, and UN Swissindo, an organization promoting financial solutions through innovative models, both breached the regulatory framework due to their activities diverging from the permissions granted to them. Their transgressions, particularly their unauthorized collection of funds from the public in the form of savings, are addressed by the provisions delineated in Article 46(1) of Law Number 10 of 1998, which amends Law Number 7 of 1992 governing Banking.[32] This legal statute explicitly stipulates that the act of accumulating funds from the public in the form of savings, without the requisite business license from Bank Indonesia, constitutes a criminal offense. Those found in breach of this provision are liable to stringent penalties. The prescribed consequences for such transgressions encompass the potential imposition of imprisonment, with a minimum duration of five years and a maximum of fifteen years. In tandem with the prison sentences, substantial financial penalties are also mandated. These financial penalties, ranging from a minimum of IDR 10 billion to a maximum of IDR 200 billion, serve as a deterrent against unlicensed financial operations and underscore the gravity of engaging in such activities without the necessary authorizations.[33]

Moreover, in cases where Ponzi schemes transpire devoid of the essential approvals from the Financial Services Authority (OJK), the Indonesian legal system offers a robust mechanism for addressing such transgressions. This mechanism is embodied in Article 103 of Law Number 8 of 1995, which regulates Capital Markets.[34] Under this

law rulings to ensure compliance. In the context of Article 59, the criminal provisions underscore the severity of engaging in business activities related to Sharia Banking without the necessary authorization from Bank Indonesia. The law aims to safeguard the integrity of Sharia Banking practices by imposing legal consequences on entities that operate outside the established regulatory framework.

32 The main features of Law Number 10 of 1998 include stringent regulations to ensure the stability and integrity of the banking sector. Specifically, Article 46(1) of Law Number 10 of 1998 empowers regulatory authorities to take action against unauthorized collection of funds from the public, such as the activities undertaken by the mentioned entities. The criminal rulings associated with this law serve as a deterrent against activities that could undermine the financial system and jeopardize the interests of the public. By imposing criminal liability, the law aims to maintain the trust and confidence of the public in the banking sector, discouraging any actions that may compromise the security of funds entrusted to financial institutions.

33 Otoritas Jasa Keuangan: Press Release: OJK And Investment Alert Task Force Uncover Two Illegal Investment Cases and a Loan Repayment Fraud. *OJK*. https://bit.ly/3SD5lOP (Accessed on 17 February 2024).

34 Sylvana Murni Deborah Hutabarat – Siti Nurul Intan Sari Dalimunthe – Wardani Rizkianti – Muthia Sakti: Supervision of Financial Planning Companies in Consumer Protection Efforts. *Borobudur Law Review* 5, 1. (2023), 43–54. https://doi.org/10.31603/burrev.7776

legal provision, any entity engaging in capital market activities without the requisite permission, official approval, or registration is subject to rigorous legal sanctions. These sanctions encompass the potential imposition of imprisonment for a maximum period of five years. Simultaneously, significant financial penalties come into play, with the potential to reach a maximum amount of IDR 5 billion.

Furthermore, the legal framework in Indonesia encompasses a comprehensive prohibition against pyramid schemes, elucidated within Article 9 of Law Number 7 of 2014 concerning Trade. This statutory provision explicitly delineates that distribution business actors (individual or business entity) are unequivocally forbidden from implementing pyramid scheme structures in the distribution of goods.[35] The accompanying explanation of Article 9 provides an insightful definition of pyramid schemes, characterizing them as business activities that do not derive their basis from the sale of tangible goods. Instead, these schemes exploit opportunities for financial gains or rewards, primarily arising from the participation fees levied upon subsequent entrants or individuals who join the scheme after the initial business partner. This definition underscores the deceptive and unsustainable nature of pyramid schemes, which prioritize recruitment over legitimate product sales. Moreover, the legal framework does not stop at mere prohibition. Article 105 of the same law prescribes punitive measures aimed at curbing the utilization of pyramid scheme mechanisms by distribution business actors. These penalties are significant, encompassing the potential imposition of imprisonment for a maximum duration of ten years, thereby emphasizing the gravity of perpetuating pyramid schemes. In addition to imprisonment, substantial financial penalties are in place, with the potential to reach a maximum of IDR 10 billion.

Furthermore, the stringent prohibition against pyramid schemes is also firmly embedded in the legal framework of Indonesia, as evidenced in Article 21, subsection k, of Minister of Trade Regulation Number 70 of 2019, which regulates the Direct Distribution of Goods. This legal provision leaves no room for ambiguity as it explicitly bars companies that hold trading business licenses from participating in activities structured around a pyramid scheme. The imposition of penalty as stipulated by Article 105 or Trade Law is based on the criteria specified by the Article 30 of Minister of Trade Regulation Number 70 of 2019. Article 30 goes a step further by providing explicit criteria for identifying a pyramid scheme. According to this article, a pyramid scheme is characterized by the accumulation of commissions, originating from membership recruitment fees and marketing programs. These commissions are generated in the absence of any genuine goods being sold by the company. This legal foundation serves as a robust mechanism to curtail the proliferation of pyramid schemes within the business sector.[36] By clearly prohibiting companies with trading business licenses from

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[35] Ridho Syahputra Manurung: Juridical Review on The Crime of Fraud in The Implementation of The Pyramid Scheme System of Business Actors. *Calitatea* 23, 188. (2022), 139–144. https://doi.org/10.47750/QAS/23.188.20

[36] Tri Hidayati – Masyithah Umar – Fathurrahman Azhari: Political Reorientation of Indonesian Sharia Economic Law: Legal Olitic of Trade Law on Sharia Multilevel Marketing. *Mazahib* 21, 2. (2022), 245–290. https://doi.org/10.21093/mj.v21i2.4971

engaging in such activities, it reinforces the importance of transparency and legality within the marketplace. Moreover, the detailed criteria set forth in Article 30 offer clear and objective benchmarks for identifying pyramid schemes, facilitating regulatory oversight and enforcement.

Furthermore, the legal framework in Indonesia provides for the prosecution of individuals engaged in fraudulent investment schemes, particularly those employing Ponzi schemes, under the ambit of Article 3 of Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering. Within the scope of this statute, the actions of these individuals, when analyzed in light of the statutory language, are characterized by the placement of investment funds obtained from victims. These funds are reasonably suspected to constitute the proceeds of fraudulent activities, with the subsequent intent to engage in money laundering. This multifaceted transgression carries the potential for significant legal repercussions. Specifically, those found guilty may face a prison sentence extending up to a maximum of twenty (20) years. In addition to imprisonment, the law also empowers the imposition of fines, with the quantum of such fines reaching up to IDR 10 billion. Given that the actions of perpetrators involved in Ponzi schemes align with the stipulations of Article 3, this legal recourse becomes a viable means of holding them accountable for their actions. It underscores the seriousness with which the Indonesian legal system views fraudulent investment activities and money laundering, and it serves as a powerful deterrent against individuals who seek to exploit financial systems for their illicit gains.[37]

Furthermore, in the context of combatting illicit investments such as Ponzi scheme and ensuring legal accountability, the legal framework concerning corporate wrongdoing also assumes significant importance. This framework is delineated under Article 46(2) of Law Number 10 of 1998 in conjunction with Law Number 7 of 1992, which regulates the banking sector, and is further specified under Article 59(2) of Law Number 21 of 2008, which governs Sharia Banking. Article 59(2) of Law Number 21 of 2008 serves as a crucial legal provision, particularly when the activities specified in paragraph (1) encompassing banking and financial operations are conducted by a legal entity. In such cases, the legal entity in question, often structured as a limited liability company, becomes the focus of prosecution. However, the legal entity is not treated as an abstract entity but is instead held accountable through the individuals who issued orders for the actions in question and those who assumed leadership roles in executing these actions. This legal framework thus directs attention to the functions and responsibilities of various corporate organs within the entity. As limited liability companies are widely utilized in the banking sector, the roles and obligations of these corporate entities' organs gain paramount significance. In cases involving corporate wrongdoing, the legal system in Indonesia emphasizes the principle of individual

[37] Achmad Sulchan – Ida Musofiana – Althof Rusydi: Implementation of Principles in Identifying Service Users Regarding the Prevention and Eradication of Money Laundering Offense. *International Journal of Law Reconstruction* 5, 1. (2021), 61. https://doi.org/10.26532/ijlr.v5i1.15492

accountability within the corporate framework.[38] This approach seeks to ensure that those who issue instructions and provide leadership in the commission of illicit actions bear legal consequences.

The legal framework surrounding corporate governance and accountability in Indonesia is well-defined, with specific roles and responsibilities attributed to various corporate organs. Law Number 40 of 2007 concerning Limited Liability Companies, in its Article 1, Section 2, provides a fundamental framework that outlines these corporate organs, specifically designating them as the General Meeting of Shareholders, the Board of Directors, and the Board of Commissioners. Each of these organs plays a distinct and crucial role in the corporate structure.[39]

Article 1, Section 4 of this law clarifies the role of the General Meeting of Shareholders (GMS) as an organ vested with authority that extends beyond that granted to the Board of Directors or the Board of Commissioners. This authority is exercised within the boundaries defined by the law and the company's articles of association. The GMS holds a pivotal position in corporate decision-making and governance, serving as a forum where shareholders can collectively make significant decisions regarding the company's operation and management.[40] Conversely, Article 1, Section 5 identifies the Board of Directors as the corporate organ vested with full authority and responsibility for the day-to-day management of the company. This includes safeguarding the company's interests in alignment with its objectives and representing the company both within and outside the legal realm. The actions and decisions of the Board of Directors are conducted in strict accordance with the provisions outlined in the company's articles of association.[41] The Board of Directors is, therefore, responsible for executing the company's strategy, managing its affairs, and ensuring its compliance with the law. The Board of Commissioners, as detailed in Article 1, Section 6, serves a distinct role. This organ is primarily responsible for exercising both general and specific oversight functions in accordance with the company's articles of association. Furthermore, the Board of Commissioners offers advisory support to the Board of Directors.[42] This advisory role is vital in ensuring that the company's operations align with ethical, legal, and corporate governance standards.

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38 Ilham Nurhidayat – Bevaola Kusumasari: Strengthening the Effectiveness of Whistleblowing System. *Journal of Financial Crime* 25, 1. (2018), 140–154. https://doi.org/10.1108/JFC-11-2016-0069

39 Patricia Rinwigati Waagstein: The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications. *Journal of Business Ethics* 98, 3. (2011), 455–66. https://doi.org/10.1007/s10551-010-0587-x

40 Ulya Yasmine Prisandani: Shareholder Activism in Indonesia: Revisiting Shareholder Rights Implementation and Future Challenges. *International Journal of Law and Management* 64, 2. (2022), 225–238. https://doi.org/10.1108/IJLMA-07-2021-0169

41 Joni Joni – Kamran Ahmed – Jane Hamilton: Politically Connected Boards, Family Business Groups and Firm Performance. *Journal of Accounting & Organizational Change* 16, 1. (2020), 93–121. https://doi.org/10.1108/JAOC-09-2019-0091

42 Dedy Eryanto – Iris van Eeden Jones – Karin Lasthuizen: The Troubling Impact of Political Interference in Indonesian Public Sector Institutions on Ethical Leadership Credibility. *International Journal of Public Leadership* 18, 4. (2022), 319–336. https://doi.org/10.1108/IJPL-10-2021-0056

The leadership role assumed by Directors within the organizational structure of limited liability companies is of paramount importance. Directors are central figures to whom all powers and instructions for conducting actions are directed.[43] Given their pivotal role in the decision-making process and management of the company, it is both appropriate and necessary to hold Directors of limited liability companies criminally liable for their involvement in or issuance of instructions to their subordinates to collect funds or investments, as is often the case in fraudulent investment schemes,[44] including Ponzi schemes.

The discussion of criminal liability within the context of fraudulent investments is articulated in the legal framework under Law Number 10 of 1998 in conjunction with Law Number 7 of 1992 concerning Banking. Article 48 of this legislation provides a comprehensive framework for addressing criminal liability in such cases, specifying the penalties that may be imposed, including imprisonment and fines. This legal provision emphasizes the need to hold individuals accountable for their involvement in fraudulent investment activities.[45] Furthermore, the legal framework extends its focus to encompass legal entities, such as limited liability companies, that become embroiled in fraudulent investment activities. As previously outlined, Article 142(1) of Law Number 40 of 2007 provides for the potential revocation of the legal entity status of such companies. This significant legal consequence underscores the gravity with which the Indonesian legal system views fraudulent investment activities and the determination to maintain the integrity of the corporate sector.

4. Assessing the Effectiveness of Legal Enforcement

The state of law enforcement vis-à-vis illegal investment in the Republic of Indonesia remains suboptimal, casting a shadow over the nation's regulatory apparatus. A comprehensive evaluation of the data spanning the last quadrennial period, commencing in the year 2017 and culminating at the denouement of May 2020, as disseminated by the Investment Alert Task Force (SWI), reveals a disconcerting statistic. Of the total of 986 illicit investment enterprises that were successfully dismantled during this time frame, a mere ten percent were efficaciously subjected to the rigors of justice.[46] This disconcerting figure underscores the formidable impediments faced in addressing the scourge of illegal investments within the nation.

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[43] Muhammad Zubair Abbasi: Legal Analysis of Agency Theory: An Inquiry into the Nature of Corporation. *International Journal of Law and Management* 51, 6. (2009), 401–420. https://doi.org/10.1108/17542430911005936

[44] Joshua Abor: Corporate Governance and Financing Decisions of Ghanaian Listed Firms. *Corporate Governance: The International Journal of Business in Society* 7, 1. (2007), 83–92. https://doi.org/10.1108/14720700710727131

[45] Ponadi Ponadi: Legal Liability for Banking Criminal Actions That Are Not Members of the Justice Board of Commissioners. *International Conference on Law, Economics, and Health*. Atlantis Press, April 19, 2023, 257–264. https://doi.org/10.2991/978-2-38476-024-4_28

[46] Tobing Tongam Lumban: Investasi Ilegal Dan Permasalahan Penegakan Hukum Oleh: Tongam Lumban Tobing. *Hukumonline*, July 9, 2020, https://bit.ly/4dsncQt (Accessed on 18 February 2024).

The multifaceted complexities inherent in the realm of illegal investment law enforcement are predominantly attributed to the guileful stratagems employed by the perpetrators. Illicit investment schemes often proffer beguiling returns, frequently surpassing prevailing market averages, thereby beguiling prospective investors. Furthermore, these nefarious entities resort to the dissemination of a semblance of risk-free prospects, which present their investments as tantalizing opportunities.[47] Oftentimes, these entities lack the requisite licensure to proffer such investment products, further exacerbating the confusion faced by potential investors. Even when such entities do possess legal status, they are frequently found to be operating outside the ambit of the lawful parameters delineated for their specific business activities.[48] This quagmire confounds potential investors and renders the demarcation between licit and illicit investments a daunting task.

A multitude of cases that have garnered public scrutiny, such as the Pandawa Group, PT Cakrabuana Sukses Indonesia, and Dream For Freedom, exemplify this pernicious modus operandi. These entities have all lured investors with promises of exorbitant returns, devoid of the requisite business permits.[49] The deleterious consequences of these endeavors have ensnared hundreds of thousands of victims within the labyrinthine web of illegal investments, resulting in financial losses that have ascended to the trillions of Indonesian rupiah. Although punitive measures have been meted out to the purveyors of these unlawful investment schemes, the disconcerting statistic, revealing a ten percent progression to legal recourse, poignantly underscores the intricate nature of this quagmire.

It is imperative to underscore that law enforcement endeavors play a pivotal and indispensable role in the broader mission to extirpate illegal investments. Law enforcement serves as the lynchpin for the realization of cardinal legal principles, such as equality, expediency, and legal certainty, as enunciated by the venerable jurist Gustav Radbruch.[50] In the context of illegal investment cases, notably those involving Ponzi schemes, a panoply of interrelated factors precipitates a profound influence on the efficacy of law enforcement efforts. Within this thematic milieu, three principal factors assume a central role in the appraisal of the efficaciousness of law enforcement undertakings, namely, evidentiary factors, witnesses' factors, and law enforcement agencies factors.

The evidentiary factor revolves around the curation and presentation of compelling evidence requisite for the prosecution of illegal investment perpetrators. The successful adjudication of these cases often hinges upon the degree to which irrefutable evidence can be marshaled, encompassing transactional records, contractual documentation,

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47 Benjamin Amoah: Mr Ponzi with Fraud Scheme Is Knocking: Investors Who May Open. *Global Business Review* 19, 5. (2018), 1115–1128. https://doi.org/10.1177/0972150918788625

48 Christiaan Ernst Heyman: A Red Flag Checklist for Cryptocurrency Ponzi Schemes. *Journal of Financial Crime* 31, 3. (2023), 711–747. https://doi.org/10.1108/JFC-05-2023-0118

49 Peter Jeremiah Setiawan – Hansel Ardison: Criminal Victimization on Large-Scale Investment Scam in Indonesia. *Veritas et Justitia* 7, 1. (2021), 1–30. https://doi.org/10.25123/vej.v7i1.3917

50 Gustav. Radbruch: Statutory Lawlessness and Supra-Statutory Law (1946). *Oxford Journal of Legal Studies* 26, 1. (2006), 1–11. https://doi.org/10.1093/ojls/gqi041

and communications that validate the perpetration of illicit practices. Moreover, the victim factor assumes a consequential role in the prosecution process, necessitating the provision of testimonies and the cooperation of aggrieved parties to elucidate the modus operandi employed in the illegal investment scheme. A heightened rate of reporting by victims augments the prospects for successful law enforcement interventions. The legal instrument factor encapsulates the regulatory and statutory framework that governs the sphere of illegal investments. Clarity and stringency in legal provisions, as well as the promulgation of rigorous regulatory frameworks, serve to facilitate law enforcement initiatives and provide a firm legal foundation for the prosecution of malefactors. Lastly, the law enforcement factor encompasses considerations of resource allocation, training, and the coordination of activities across disparate law enforcement agencies. The limitations of available resources, combined with competing priorities, invariably influence the allocation of attention to cases involving illegal investments. These factors, warranting meticulous analysis, will be expounded upon in the subsequent deliberations.

4.1. Evidentiary Factor

The pivotal role of evidentiary factors in the realm of law enforcement, particularly in the context of illegal investment cases, notably those involving Ponzi schemes, cannot be overstated. The efficacy of law enforcement hinges significantly upon the law enforcement agencies' capacity to amass compelling evidence that substantiates a legal case against the purveyors of illegal investment schemes. The arduousness of accumulating robust evidence often constitutes the foremost challenge confronted in the prosecution of illegal investment cases. Perpetrators frequently employ intricate and meticulous tactics to obfuscate their illicit activities.[51] Such tactics encompass the utilization of counterfeit contracts, meticulous electronic data management, and spurious documentation designed to confound investigators. Consequently, expertise in evidence gathering and analysis assumes paramount importance in the quest for substantial evidence. Lacking such cogent evidence, investigators encounter substantial difficulties in ascertaining the culpability of perpetrators and, as a result, may confront challenges in advancing investigations to subsequent stages or pursuing legal recourse.[52] In such circumstances, the role of investigators in procuring further evidence remains pivotal to ensure the success of law enforcement endeavors. Therefore, evidentiary factors stand as indispensable in ensuring that perpetrators of illegal investment activities are effectively subjected to the purview of extant legal provisions.

According to Law Number 8 of 1981 on Criminal Procedure, a suspect is defined as an individual who, based on preliminary evidence, can be reasonably suspected of

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[51] Gargi Sarkar – Sandeep K. Shukla: Behavioral Analysis of Cybercrime: Paving the Way for Effective Policing Strategies. *Journal of Economic Criminology* 2, (2023), 100034, https://doi.org/10.1016/j.jeconc.2023.100034

[52] Richard A. Posner: An Economic Approach to the Law of Evidence. *Stanford Law Review* 51, (1999), 1477.

having committed a criminal offense.[53] At this juncture, an individual is designated as a suspect based on initial information acquired through police investigations. However, in practice, amassing sufficiently robust evidence to prosecute an individual in a court of law often proves to be a formidable challenge. The protracted bureaucratic processes associated with evidence collection engender a sluggish and intricate landscape. In numerous cases, the police are compelled to navigate intricate procedures to secure written permissions or approvals from various stakeholders, including the Bank of Indonesia, to access requisite information. These hurdles can substantially delay investigations, affording perpetrators a window of opportunity to abscond or tamper with evidence. This dilemma is primarily attributable to banking regulations that impose stringent safeguards on customer data.[54] Within the context of illegal investment cases, these constraints pose a significant impediment to law enforcement agencies endeavoring to amass evidence in support of their legal cases.

The impediments posed by the challenges of accumulating preliminary evidence represent a formidable barrier to law enforcement efforts, particularly in the context of addressing illegal investment cases. An empirical case study conducted by Ismail et al concerning the handling of illegal investments such as Ponzi scheme within the jurisdiction of the Pohuwato District Police offers a tangible illustration of these challenges. In the interview, Brigadier Zukarnain Darise exemplifies the difficulties encountered by the police in collecting bank account data utilized by the purveyors of illegal investments. This process consumed a substantial duration, approximately six months, which constitutes a significant hindrance in the investigation of illegal investment cases, as it furnishes wrongdoers with ample time to erase their tracks or evade the law. This constraint is primarily engendered by banking regulations governing customer data disclosure. These regulations often impose stringent protections on customer information, and intricate legal processes must be adhered to in order to gain access to this data.[55] In the context of illegal investment cases, these constraints pose a serious challenge to law enforcement agencies striving to amass the evidence requisite for their legal cases. While the safeguarding of customer data is of paramount importance, it is equally crucial to strike a balance that enables effective law enforcement in combatting illegal practices that inflict harm upon numerous individuals.

Based on Article 1, paragraph (1) and (2) of Bank Indonesia Regulation Number 2/19/PBI/2000 concerning the Requirements and Procedures for Issuing Written Orders or Permissions to Disclose Bank Secrets, the police are exclusively authorized to request

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53 Suwarno Suwarno – Sri Endah Wahyuningsih: Urgency of Suspect Determining In the Investigation Process on Human Rights Perspective. *Law Development Journal* 2, 2. (2020), 241. https://doi.org/10.30659/ldj.2.2.241-248

54 Bruce Nikkel: Fintech Forensics: Criminal Investigation and Digital Evidence in Financial Technologies. *Forensic Science International: Digital Investigation* 33, (2020), 200908. https://doi.org/10.1016/j.fsidi.2020.200908

55 Ista Ismail – Fence M Wantu – Avelia Rahmah Y Mantali: Upaya Kepolisian Dalam Penanggulangan Kasus Investasi Bodong (Studi Kasus Wilayah Hukum Kepolisian Resor Pohuwato). *Journal of Comprehensive Science (JCS)* 2, 5. (2023), 1438–1446. https://doi.org/10.59188/jcs.v2i5.362

customer data pertaining to individuals who have become suspects or defendants. To obtain such data, investigators must secure written permission from the leadership of Bank Indonesia, subsequent to the formal designation of an individual as a suspect or defendant. This process must also commence with a written request from the Head of the Indonesian National Police.[56] While these provisions are underpinned by legitimate concerns for the protection of customer data, they, at times, hamper the investigative process. The constraints on police access to preliminary evidence in cases of illegal investment constitute a serious impediment to the curtailment of criminal activities. Hence, endeavors to reform the legal and banking systems warrant consideration to address this issue. Potential reforms may necessitate modifications in regulations that facilitate expeditious and efficient law enforcement efforts in the resolution of illegal investment cases, while concurrently upholding the legitimate privacy rights of uninvolved customers. Moreover, fostering enhanced collaboration among law enforcement agencies, the Bank of Indonesia, and banking institutions is imperative to ensure that requisite data can be accessed more efficiently, without compromising the privacy of customers not implicated in illicit activities.

4.2. Factor of Witnesses

The victim factor assumes a pivotal role in the domain of law enforcement concerning illegal investments, yet it frequently emerges as a primary obstacle in this process. Several reasons contribute to how law enforcement may be impeded by the reactions of victims, ultimately affording illegal investment operators continued operation without significant disruption. A major hindrance is the reluctance of victims to report instances of illegal investment to law enforcement authorities. Tongam Lumban Tobing, the Chairman of the Investment Alert Task Force *(Satgas Waspada Investasi)*, has acknowledged the prevalent phenomenon of victims of illegal investments refraining from reporting such cases. Various rationales underpin this reluctance, wherein victims often harbor uncertainty or hesitation as to whether the illicit actions they have experienced genuinely amount to criminal transgressions warranting official reporting. They may perceive these issues as civil disputes or contractual conflicts amenable to extrajudicial resolution. In certain cases, Tongam has also indicated that victims might feel embarrassed or consider the losses they have incurred as too inconsequential to merit formal reporting. Moreover, some victims of illegal investments maintain a lingering hope of eventually reaping returns on their investments, despite the evident signs of fraud. They may entertain the belief that their capital injections will yield profits in the future and thus refrain from reporting unlawful activities so as not to jeopardize these aspirations.[57]

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[56] Putri Anggia: The Influence of International Tax Policy on the Indonesian Tax Law. *Yuridika* 35, 2. (2019), 343. https://doi.org/10.20473/ydk.v35i2.16873

[57] Diah Setiawan Sakina Rakhma: Banyak Korban Investasi Ilegal Enggan Lapor, Mengapa?. *Kompas*, September 9, 2017, https://bit.ly/3YDK0si (Accessed on 18 February 2024).

The Ponzi scheme case of PT Kam and Kam via the MeMiles application in early January 2020 provides a tangible illustration of the challenges encountered in addressing illegal investments. The East Java Regional Police *(Polda Jawa Timur)* responded to this case by establishing complaint centers for victims both online and offline. Nevertheless, a significant disproportionality emerged between the number of victims involved and the number of complaints received. Only a small fraction of the 264,000 victims mustered the courage to report the case directly, amounting to a mere 28 individuals, while online reporting was similarly meager, comprising a modest 160 members.[58] The fear of being identified as complicit in this illegal scheme emerged as a primary factor elucidating the paucity of complaints. Victims may recognize their own roles as "agents" within this Ponzi scheme, entailing that they too derived benefits, such as cashbacks or merchandise, from participation in this fraudulent investment. This predicament triggers a moral quandary in which victims may experience feelings of shame or apprehension about disclosing their involvement in the illegal scheme.[59] Furthermore, the perceived threats emanating from the operators of illegal investments can exert influence over victims' decisions to report the cases. They may harbor concerns regarding potential reprisals by the perpetrators of illegal investments or may harbor doubts about the degree of protection they will receive post-reporting. The confluence of shame, doubt, and fear can attenuate victims' motivation to engage in law enforcement processes, even when they have suffered as victims within the ambit of illegal investment schemes.

The modus operandi of PT Kam and Kam illustrates a complex and alluring structure within illegal investment schemes. Two principal schemes employed within this practice entail "top-up balance" investment packages, ostensibly facilitating participation in an advertising business with the anticipation of monetary returns. Active members would purchase these packages and were incentivized to recruit additional participants. The introduction of allurements in the form of rewards such as mobile phones, motorcycles, automobiles, houses, and the like, promised members opportunities to attain these rewards through successful recruitment efforts. Furthermore, the second scheme proffered a 10 percent commission on the turnover generated by members recruited by active participants.[60] This offered financial incentives for members to persistently recruit new participants, thereby augmenting their earnings. The promises of profit and material incentives induce some members to hesitate in reporting these illicit practices due to feelings of entrapment within the scheme and apprehensions regarding potential legal sanctions. This case reflects how factors such as fear, promises of profit, and material incentives can impact the number of reported cases in Ponzi investment

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58 Karina Dina: Tega! Di Tengah Pandemi, Investasi Bodong Buat Masyarakat Rugi Rp 5,9 T. *Kompas*, April 14, 2021, https://bit.ly/3Ak9tNm (Accessed on 18 February 2024).

59 Deddy Sunanda – Topo Santoso – Eva Achjani Zulfa – Muhammad Yusuf: Concept of Benefit Owner's Responsibility in Crime in Indonesia: Charging Criminal Actors Behind Corporates. *International Journal of Engineering Business and Social Science* 1, 5. (2023), 363–371. https://doi.org/10.58451/ijebss.v1i05.62

60 Gunawan Candra: Misusing Marketing Management In Money Games. *Management Technology and Security International Journal* 2, 1. (2021), 56–69.

schemes. Victims frequently feel ensnared within the web of illegal investments, and the pressure exerted by illegal investment operators to continuously recruit new members fosters concerns about legal repercussions.

4.3. Factor of Legal Instrument

The legal framework, notably legislative regulations, plays a pivotal role in the enforcement of laws pertaining to illegal investments involving Ponzi schemes. Law enforcement agencies often encounter obstacles in delineating the applicable legal provisions for prosecuting perpetrators of illegal investments employing Ponzi schemes. This predicament is exacerbated by the inherent ambiguity or limitations within existing statutes, which do not always encompass the diverse array of evolving illicit schemes. The existing laws frequently neither explicitly govern illegal investment practices nor contain provisions adequate to address investments employing Ponzi schemes. Law enforcement resorts to general statutory provisions, such as Article 378[61] concerning fraud and Article 372[62] concerning embezzlement under the Indonesian Criminal Code *(Kitab Undang-Undang Hukum Pidana)*, to prosecute perpetrators of illegal investments. However, these provisions may not consistently align with the intricacies of violations occurring within the context of Ponzi investments, which are often marked by heightened complexity.

Bhima Yudhistira, an economist and the Executive Director of the Center of Economic and Law Studies (CELIOS), expounds upon the evolution of Ponzi schemes over time, wherein their modus operandi become increasingly diverse. These schemes may encompass investment propositions promising substantial and instantaneous returns, counterfeit employment offers, or other intricately structured schemes that elude the purview of existing legal regulations. Hence, the need for adaptability within the legal framework to contend with the continual mutations in illegal investment practices under Ponzi schemes becomes apparent.[63]

In line with Bhima Yudhistira's opinion, the author suggests that a specific regulation should be established to define and penalize criminal acts related to Ponzi or pyramid schemes. Although Articles 372 and 378 of the Criminal Code (KUHP) can be applied to Ponzi cases due to elements of fraud or embezzlement, it is necessary to emphasize the prohibition of pyramid scheme activities in Indonesia by creating a clause defining such schemes. This clause should also include severe sanctions or penalties for Ponzi

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61 Article 378 of the Indonesian Criminal Code (KUHP) regarding fraud states, "Anyone with the intention of benefiting themselves or others unlawfully, by using a false name or false authority, through deception, trickery, or a series of lies, induces another person to hand over any property to them, or to provide a loan or cancel a debt, is threatened with imprisonment for a maximum of four years for fraud."

62 Article 372 of KUHP regarding embezzlement states, "Anyone who intentionally and unlawfully possesses something that wholly or in part belongs to another, but is in their possession not as a result of a crime, is threatened with imprisonment for a maximum of four years or a fine of up to nine hundred Indonesian Rupiah."

63 Geordi Oswaldo Ignacio: Apa Itu Skema Ponzi Yang Dipakai Rihana-Rihani Hingga Rugikan Korban Rp 35 M?. *DetikFinance*, July 4, 2023, https://bit.ly/4duigdZ (Accessed on 18 February 2024).

scheme operators. This consideration arises because Articles 372 and 378 of the KUHP only prosecute embezzlement and fraud, carrying a maximum prison sentence of 4 years with minimal fines. However, looking at previous cases discussed, the losses caused by these schemes are significant, impacting hundreds to thousands of victims.

Imposing severe penalties on Ponzi scheme operators aims to create a deterrent effect on the perpetrators and prevent others from contemplating the same criminal activities. In the effort to enforce heavy penalties, the police sometimes employ layered charges against Ponzi operators. Apart from applying Articles 378 or 372 of the Criminal Code (KUHP), the police also use sectoral regulations corresponding to the type of business conducted by the Ponzi operator. If the Ponzi scheme involves financial or banking institutions, the police typically apply Article 46 of the Banking Law[64] or Article 59 of the Sharia Banking Law. [65] Furthermore, if the Ponzi operator is engaged in product distribution, the police may use Article 9 of the Trade Law.[66] Even if money laundering is suspected as a result of the criminal activity, the police will invoke anti-money laundering laws.

Although Ponzi scheme operators receive significant penalties through layered charges in their prosecution, the author believes that all these articles have limitations in defining the pyramid scheme itself. This creates difficulties for law enforcement in applying articles that accurately correspond to actions suspected to be Ponzi schemes. Conversely, if a specific article is created to regulate the definition of a pyramid scheme along with its corresponding penalties, law enforcement authorities will find it easier to prosecute Ponzi scheme operators because the legal basis is clearly defined. This is also crucial in the realm of the judiciary to ensure that judges do not have doubts about whether the act constitutes a criminal case or a civil case due to involving investment activities and contractual obligations. The existence of this specific regulation provides a very clear legal basis for prosecuting Ponzi operators as it explicitly constitutes a criminal offense regulated by the laws of Indonesia.

A salient exemplification of this complexity is the case of Indosurya Savings and Loans Cooperative, masterminded by Henry Surya, involving approximately 23,000 clients incurring total losses amounting to IDR 106 trillion. With the enticement of a 10% interest rate, they managed to accrue this staggering sum, rendering the Indosurya case the largest fraud case in the history of the Republic of Indonesia. Regrettably, in the

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64 Article 46 states, "Anyone who collects funds from the public in the form of deposits without a business permit from the leadership of Bank Indonesia, as referred to in Article 16, is threatened with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years, as well as a minimum fine of Rp10,000,000,000.00 (ten billion Indonesian Rupiah) and a maximum of Rp200,000,000,000.00 (two hundred billion Indonesian Rupiah)."

65 Article 59 states, "Anyone engaging in Sharia Banking, Sharia Financial Institutions, or fundraising activities in the form of Savings or Investments based on Sharia Principles without a business permit from Bank Indonesia, as referred to in Article 5 paragraph (1) and Article 22, shall be punished with a minimum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years, as well as a minimum fine of Rp10,000,000,000.00 (ten billion Indonesian Rupiah) and a maximum of Rp200,000,000,000.00 (two hundred billion Indonesian Rupiah)."

66 Article 9 states, "Business operators in distribution are prohibited from implementing a pyramid scheme system in distributing goods."

initial trial, the defendant Henry Surya was acquitted of charges relating to fraud and embezzlement of funds within the Indosurya Savings and Loan Cooperative (KSP).[67] Chief Judge Syafrudin Ainor at the West Jakarta District Court deemed Henry Surya's actions to constitute a civil matter rather than a criminal offense.[68] The judge believes that the legal relationship between the cooperative and its customers is a contractual relationship. In this case, the cooperative promises a significant margin of investment profit to its customers. However, until the agreed-upon time, the cooperative is unable to fulfill this promise. However, this decision subsequently elicited public outrage after Henry Surya was initially acquitted by the West Jakarta District Court, and later, in a cassation trial at the Supreme Court, the verdict was overturned, sentencing Henry Surya to 18 years in prison.[69]

Moreover, the inherent complexity is compounded by the disparate regulations dispersed across various statutes and differing legal provisions, thereby creating confusion regarding the appropriate regulations and their applicability in cases of illegal investments. This represents one of the principal challenges encountered by law enforcement when grappling with the ever-diversifying and intricate landscape of illegal investment practices. Regulations concerning investments are scattered across various statutes and laws, including the Trade Law, Banking Law, Capital Investment Law, Commodity Futures Trading Law, and Consumer Protection Law. This diversity can engender legal ambiguity and complexity, often perplexing the determination of suitable legal courses of action in cases of illegal investments. Budi Hariyanto, Director of the Special Economic Crime Division at the National Criminal Police Department *(Badan Resort dan Kriminal Kepolisian Negara Republik Indonesia)*, contends that many illegal investment cases, particularly those entailing Ponzi schemes, are frequently couched in the form of civil cases.[70] This signifies that these illicit practices are often perceived as civil matters, such as contractual violations or contractual disputes among the parties involved. In the context of criminal law, this may impede the pursuit of illegal activities with commensurate sanctions.

4.4. Factor of Law Enforcement Agencies

The law enforcement factor constitutes a crucial element in the endeavors to enforce the law concerning illegal investments such as Ponzi schemes. However, in many instances, several impediments stand as significant barriers to addressing this issue. According to Tongam Lumban Tobing, the Chairman of the Investment Alert Task Force (*Satgas Waspada Investasi* or SWI), one of the primary challenges encountered

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67 Eny Maryana: The Concept of Alternative Justice In The Form of Cumulative Criminal Sanctions For Corporate Crimes: Adopting The Concept of Justice of Thomas Aquinas. *International Journal of Social, Policy and Law* 4, 2. (2023), 10–19.

68 West Jakarta District Court Decision Number 779/Pid.B/2022/PN Jkt.Brt, 2023.

69 Supreme Court Decision Number 2113 K/Pid.Sus/2023, 2023.

70 Tri Nastiti Pamuji: Kepolisian Mengalami Banyak Kendala Berantas Investasi Ilegal. *Bisnis.Com*, September 20, 2017, https://bit.ly/46yWzqS (Accessed on 18 February 2024).

in this regard is that the handling of illegal investment cases often does not take precedence for law enforcement agencies. The prioritization of law enforcement efforts frequently gravitates towards common criminal offenses, such as theft, violence, or narcotics-related crimes, primarily due to the greater volume of cases and their broader societal implications.[71] This assertion finds reinforcement through data sourced from the National Crime Information Center (*Pusat Informasi Kriminal Nasional* or Pusiknas) of the Indonesian National Police (*Kepolisian Negara Republik Indonesia* or abbreviated as POLRI), wherein a total of 574,764 criminal cases were recorded throughout 2022-2023, with the majority of these cases being dominated by general criminal offenses (Figure 4).[72]

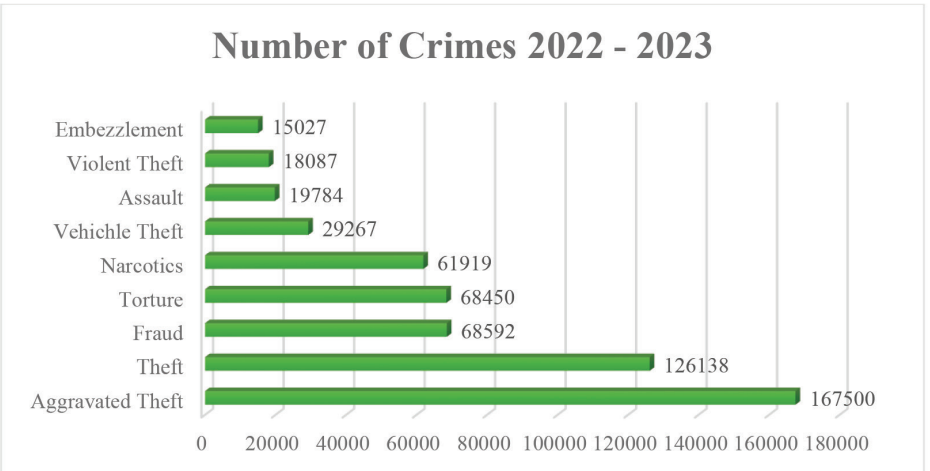

Figure 4. Overview of criminal cases in Indonesia (2022-2023)

Furthermore, this situation can be attributed to personnel limitations, compelling law enforcement agencies to make arduous decisions in selecting which cases to prioritize. The scarcity of human resources also impacts the ability of law enforcement agencies to respond swiftly and effectively to illegal investment cases. The current number of police personnel remains inadequate in comparison to the demand. The exodus of officers or their retirement significantly outpaces the recruitment of new personnel. This condition was elucidated by Hari Haryadi, the Head of Rank and Assignment Affairs (*Kabag Pangkat ASDM*) at the Indonesian National Police (POLRI). In his presentation, he conveyed that the POLRI boasts a force of 460,000 personnel, a number that merely satisfies 68 percent of the requisite figure. Conversely, the annual recruitment figures do not match the number of departures or retirements, with 11,000

[71] Samaniatun Mutiah – Rani Apriani: Penegakan Hukum Terhadap Investasi Ilegal. *Jurnal Justitia: Jurnal Ilmu Hukum Dan Humaniora* 9, 4. (2022), 1991–2001.

[72] National Crime Information Center of the Indonesian National Police: Data Kejahatan. 2023, https://pusiknas.polri.go.id/data_kejahatan (Accessed on 18 February 2024).

personnel exiting the force each year, while recruitment numbers stand at 10,000. Consequently, even without any members retiring, it would take an estimated 30 years to reach the ideal personnel complement within the POLRI.[73]

Neta Pane, the former Chairman of the Presidium of the Indonesia Police Watch (IPW), as quoted in Parawangi's research, he assesses that the Indonesian National Police (POLRI) currently faces a shortage of personnel in the Sub-officer (*Perwira Menengah*) ranks. This shortage is evidenced by the delayed arrival of police at crime scenes when handling incidents. According to Pane, the POLRI 's concept of rapid response stipulates that police officers should arrive at the scene within 15 minutes of receiving a report from the public, a standard that is consistently unmet. It is worth noting that the POLRI still faces a deficit of 270,068 personnel, primarily in the Sub-officer (*Perwira Menengah*), Officer (*Pama*), and Non-commissioned Officer (*Bintara*) or Enlisted (*Tamtama*) ranks.[74]

Moreover, the handling of illegal investment cases can entail exceedingly high costs, particularly in instances where the cases are complex and necessitate in-depth investigations. Law enforcement agencies often have to allocate substantial resources for evidence gathering, coordination with financial institutions, and case processing through the legal system. This process can be time-consuming and costly, particularly if the suspects employ legal maneuvers to impede the judicial process. Consequently, it places a significant strain on budgets that should otherwise be allocated to other law enforcement activities. According to the Attorney General, Burhanuddin, as discussed in Ahmad and Warsono's research, that in numerous complex financial crime cases, such as corruption and investment fraud, the costs of law enforcement are perceived as disproportionate to the losses suffered by the victims. Especially when the losses are relatively small in comparison to the resources required to address the case, law enforcement agencies may incline towards other cases deemed more pressing or beneficial to the state.[75]

5. Conclusion

Indonesia has established a multifaceted legal framework to address fraudulent financial schemes, with a particular focus on Ponzi schemes. While there are specific legal provisions to prosecute those involved in Ponzi schemes, the regulatory landscape for such schemes remains underdeveloped, highlighting the need for comprehensive legislative instruments tailored to address the unique attributes of Ponzi schemes.

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[73] Setiawan Hilmi: Polri Kekurangan Personel, Rekrutmen Baru Tak Sebanding Dengan Yang Keluar. *Jawa Pos*, June 21, 2023, https://bit.ly/3LTXFUU (Accessed on 18 February 2024).

[74] Anwar Parawangi: A Model for Handling Act 'Begal'Violence at the Police of Makassar City. *The 1st International Conference on Research in Social Sciences and Humanities (ICoRSH 2020).* Atlantis Press, (2021), 957–960.

[75] Mashun Ahmad – Hardi Warsono: Revitalizing the Role of the Regional Government Internal Supervision Apparatus (APIP) to Realize Clean Governance in Indonesia. *Proceedings of the Proceedings of the 4th International Conference on Indonesian Social and Political Enquiries ICISPE 2019,* Semarang, 21–22 October 2019. https://doi.org/10.4108/eai.21-10-2019.2294403

And most importantly, the state of law enforcement concerning illegal investment in the Republic of Indonesia is facing significant challenges, resulting in suboptimal outcomes and casting a shadow over the nation's regulatory apparatus. The efficacy of law enforcement efforts is influenced by four principal factors: evidentiary factors, witness factors, legal instrument factors, and law enforcement agencies factors. Evidentiary factors play a crucial role, as the successful prosecution of illegal investment cases depends on the ability to gather compelling evidence. However, perpetrators often employ intricate tactics to obfuscate their activities, and the legal processes for accessing evidence can be cumbersome. Furthermore, the witness factor is significant, as many victims are reluctant to report illegal investment cases due to uncertainty, embarrassment, and hopes of recouping their losses. Victims may also fear retribution from the perpetrators or legal consequences for their own involvement in illegal schemes. In addition, the legal instrument factor highlights the inadequacy of existing legal frameworks to address the evolving landscape of illegal investment schemes, which often fall outside the scope of current laws. The lack of clarity and coordination across various statutes creates confusion regarding which regulations are applicable. At last, the law enforcement agencies factor reveals that illegal investment cases often do not take precedence due to limited resources, personnel shortages, and budget constraints. The prioritization of other criminal offenses further hinders the efforts to combat illegal investments effectively.

In light of these challenges, there is a pressing need for legal and regulatory reforms to facilitate efficient law enforcement efforts while upholding the privacy rights of uninvolved customers. Furthermore, enhancing collaboration among law enforcement agencies and banking institutions is crucial. Moreover, legal frameworks need to adapt to the ever-evolving landscape of illegal investments, and the allocation of resources to address these cases should be reconsidered. Addressing these issues is essential to improve the state of law enforcement and protect potential victims of Ponzi investments in Indonesia.

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COMPARING FORESEEABILITY IN CONTRACTUAL DAMAGES UNDER THE CISG, UNIDROIT PRINCIPLES AND PRINCIPLES OF EUROPEAN CONTRACT LAW

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Abstract

In contract law, when one party breaches its contractual obligations, the aggrieved party may claim to recover damages; however, they are not always entitled to the full amount of loss or damages caused. To limit damages in contract disputes, national legal systems and international instruments have introduced foreseeability into the contract language. The aim of this research is to investigate foreseeability as it has been applied under the Vienna Sales Convention (CISG), the UNIDROIT Principles (UPICC) and the Principles of European Contract Law (PECL). In the study, the principle of foreseeability is examined as regulated in these three instruments with a comparison of their similarities and differences. While textual differences between the instruments are minor, challenges remain in interpreting foreseeability rule including its ambiguity and uncertainty. Nonetheless, the broad and flexible approach of foreseeability continues to be effective in the global commercial context.

Keywords: foreseeability; contractual damages; United Nations Convention on Contracts for the International Sale of Goods; Principles of European Contract Law; UNIDROIT Principles of International Commercial Contracts.

1. Introduction

In contract law, incorporating foreseeability has become a popular method of limiting damage and has been entrenched in various national laws in numerous variations. The principle of foreseeability aims to limit the scope of damages that a breaching

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party is liable for; it ensures that the damages the breaching party pays are connected to and within the sphere of the contract. The effectiveness of foreseeability during its long history has driven its appearance in international trade relationships. At the international level, this principle can be found in the United Nations Convention on Contracts for the International Sale of Goods (CISG),[1] the UNIDROIT Principles of International Commercial Contracts (UPICC),[2] and the Principles of European Contract Law (PECL).[3] This study seeks to investigate how foreseeability was approached in the CISG, PECL and UPICC, performing a comparative analysis of the similarities and differences in their foreseeability rules.

2. Comparing the instruments

2.1. Foreseeability in general

Generally, foreseeability is used in the three instruments as a method of limiting damage awards. In the UPICC, it is addressed in Art. 7.4.4: '[t]he non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance'. The non-performing party (and its servants or agents) is not liable for harm that the party could not have reasonably foreseen, at the time of concluding the contract, as the consequences of non-performance in the ordinary course of events and the particular

[1] The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a multilateral treaty providing a uniform framework for international sales of goods between two parties whose places of business are in different countries. The Convention was prepared by the United Nations Commission on International Trade Law. It was adopted by a diplomatic conference in Vienna on April 11, 1980, and came into force on January 1, 1988. The CISG has been accepted and recognized worldwide, with 97 member states representing two thirds of world trade.

[2] The UNIDROIT Principles of International Commercial Contracts (UPICC) was written under the auspices of the International Institute for the Unification of Private Law's (UNIDROIT), and it comprises a set of general rules conceived for 'international commercial contracts.' It was first published in 1994 and was revised in 2004, 2010 and, most recently, in 2016. The main purpose of the UPICC is to 'provide a uniform framework for international commercial contracts, expressly refers to the need to promote uniformity in their application, i.e. to ensure that in practice they are to the greatest possible extent interpreted and applied in the same way in different countries'. The UPICC is considered the soft law of international commercial contracts, a guide for harmonizing international commercial contract law by interpreting and supplementing national law and international uniform law instruments.

[3] The Principles of European Contract Law (PECL) is a set of model rules drafted and promulgated by the Commission on European Contract Law. Part I of the PECL was published in 1995; part II has been available since 1999, and part III was completed in 2002. The Principles attempt to provide a set of neutral, basic rules for contract law in Europe, that include not only international commercial contracts, but also domestic and consumer contracts. They also aim to form a common core of European contract law toward the future unification of the laws. The PECL are inspired by the United Nations Convention on Contracts for the International Sale of Goods and is analogous to model laws in the United States. The PECL are very similar to the UPICC; the two pursue similar aims and were drafted in a similar style and structure. The PECL are also soft law and are not legally enforceable. However, they have gained a significant informal influence on law reform in a number of European countries.

contract circumstances. Because all harm suffered could be deemed unforeseeable, claims for damages could be limited or even denied altogether.[4]

According to Art. 9:503 of the PECL, '[t]he non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a like result of its non-performance, unless the non-performance was intentional or grossly negligent'. Under the PECL, the non-performing party is only liable for loss that at the time the contract concluded he actually foresaw or could reasonably have foreseen unless the non-performance was committed intentionally or was caused by gross negligence.

Article 74 CISG holds that:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Accordingly, the party in breach is only liable for losses they could foresee or ought to have foreseen at the time of the conclusion of the contract and is precluded from liability for any damage beyond the party's foreseeability. Art. 74 strongly affirms the idea that 'having regard to all circumstances of the given case, the party in breach is not liable for a loss he could not foresee'.[5]

2.2. Who must foresee the loss?

Who is required to foresee the harm or loss? Should it be contemplated by both parties? Both the UPICC and PECL stipulate that it is the non-performing party that is required to foresee the harm or loss. The Official Comments on UPICC Article 7.4.4 further clearly state that the non-performing party includes its servants or agents. Instead of differentiating types of breach as some legal systems do,[6] the two principles use the term 'non-performance' which includes every circumstance where a given party's failure to perform its contractual obligations. All possible damages caused by non-performance can be measured by foreseeability.

The CISG differs in requiring the party in breach to foresee the loss. The requirement to the non-performing party or party in breach to foresee of the three instruments is because only he has knowledge and could be aware of the facts and matters that will

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4 Ewan McKendrick: Damages. In: Stefan Vogenauer – Jan Kleinheisterkamp (ed.): *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. Oxford, University Press, 2015. 995.

5 Victor Knapp: Comments on Article 74. In C. Massimo BIANCA: *Bianca-Bonell Commentary on the International Sales Law*. Milan, Giuffrè, 1987. 538–548. Art 74, para 2.8.

6 See Ingeborg Schwenzer: Rechtsbehelfe und Rückabwicklungsmodelle im CISG, in den European und UNIDROIT Principles, im Gandolfi-Entwurf sowie im Schuldrechtsmoderniesierungsgesezt. In: Peter Schlechtriem (ed.): *Wandlungen des Schuldrechts*, 1. Aufl. Schriften der Ernst-von-Caemmerer-Gedächtnisstiftung 5. Baden-Baden, Nomos Verlagsgesellschaf, 2002. 49.

constitute a breach or non-performance.[7] This limited reference to the non-performing party or party in breach corresponds with the risk allocation rationale.[8] According to Murphey, affirming the party in breach under Article 74 surely does not envision delivering a windfall to the plaintiff, because the plaintiff recovers something not foreseen. Rather, this language reflects the view that the focus should be on the party who will have to answer for the amount of the loss.[9]

However, differences between the characteristics of the non-performing party/or party in breach and a 'reasonable person' could raise the question of who ought to have foreseen or could reasonably have foreseen the loss: a reasonable person in the same circumstances or the party in breach/non-performance. Even though there are slight differences in wordings, these instruments preclude the consideration of a reasonable person and indicate clearly that who 'ought to have foreseen' or 'could reasonably have foreseen' the loss is the party in breach/non-performing party itself.

2.3. Foreseeability of what?

Next, whereas both the CISG and PECL require foreseeability of loss, the UPICC refers to foreseeability of harm. Although there is only a slight difference in meaning, the use of 'harm' in the UPICC seems to expand the liability of the non-performing party.

2.4. The burden of proving foreseeability

The burden of proof of foreseeability of harm implied in the three instruments is on the aggrieved party. The injured party is required to provide that harm or loss that is certain or likely to result from such a breach must have been foreseeable.[10]

2.5. Test for foreseeability

All three instruments apply both subjective and objective tests to determine what is reasonably foreseeable. Under both the UPICC and PECL, the non-performing party is responsible not only for harm that it actually foresaw in a particular situation (subjective) but also for harm it 'could reasonably have foreseen' (objective). The word 'reasonably' used in this context does not imply a reasonable person in the philosophical consideration

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7 Chengwei Liu: Remedies for Non-Performance, Perspective from CISG, UNIDROIT Principles & PECL. Law School of Renmin University of China, 2003. https://tinyurl.com/4b3ucc5t (Accessed on 18 February 2024).

8 Djakhongir Saidov: *The Law of Damages in International Sales – The CISG and other International Instruments.* Oxford, Hart Publishing, 2nd ed., 2021. 114.

9 Arthur G. Murphey Jr.: Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley. *The George Washington Journal of International Law and Economics* 23, (1989–1990), 415.

10 Sieg Eiselen: Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 74 of the CISG. *Pace International Law Review* 14, (2002), 379.

discussed above; rather, it refers to reasonable foreseeability[11] and a 'higher probability than a mere possibility'.[12] It is important to evaluate a party's capacity to anticipate the harm and its consequences. The reasonableness element is added to the text to emphasise that only a party's subjective determination of foreseeability is not enough to award full compensation. Objective standards need to be applicable that account for market fluctuations or changes to the nature of the contract.

Although the CISG uses a slightly different expression, 'foresaw or ought to have foreseen', it contains the same subjective and objective standard: The breaching party is liable if there is evidence the party actually foresaw or was in a position to foresee the loss in circumstances. The objective test may be restricted by a reasonable distribution of risks in the contract. In cases when any reasonable person would have foreseen the loss and the breaching party actually did foresee the loss, the subjective foreseeability criterion is met.[13] There is no particular reason why the instruments express differently in this regard. This author considers that 'ought to have foreseen' is stricter than the UPICC's and PECL's 'could reasonably have foreseen' because it seems to impose a duty on the party to foresee harm or loss.

2.6. Time of Foreseeability

The time required to determine foreseeability in the three instruments is the time at the conclusion of the contract, similar to the Hadley rule or English law: the time parties made the contract.[14] The non-performing party or the party in breach is excluded from liability for harm or losses they objectively could not foresee at the moment the contract concluded even if they became aware of the harms while performing the contract.[15] Following this criterion requires establishing the precise time the contract concluded. Regarding that issue, the phrase 'at the time' in Art. 74 CISG as well as in the UPICC and PECL appears to be unambiguous and does not appear to need to be amended.[16] It is impossible to validate any legal consequences if harm or loss is foreseen after the contract comes into force[17] because the parties can only assume the risks and have the chance for self-protection (to consider price, insurance, liability and benefit, etc.,) at the time of the conclusion of the contract. At this stage, the parties have opportunity to consider any special circumstances outside the ordinary course of events that they ought to foresee when concluding the contract.

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11 Saidov op. cit. 116.

12 McKendrick op. cit. 996.

13 Liu op. cit. section 14.2.2.

14 See *Hadley v Baxendale* [1854] 9 Ex 341 para 354. Liu op. cit. section 14.2.3.

15 Knapp op. cit. para 2.13.

16 Guenter Heinz Treitel: Remedies for Breach of Contract: A Comparative Account. *Oxford University Press,* (1988), 160.

17 See Peter David Victor Marsh: Comparative Contract Law: England, France, Germany. *Gower Publishing*, (1994), 314.

The PECL sets the exception that in case of intentional or grossly negligent non-performance, the foreseeable reference point of time at the time of concluding the contract might not be applied. By expressing 'unless the non-performance was intentional or grossly negligent', it may infer that the time of foreseeability may be extended to a later time after the contract was made. This different expression of the PECL may come from its wider application to also national and consumer contract and therefore, it is reasonable to refer time of foreseeability to the point of time after the contract concluded.

Although the clause 'at the conclusion of the contract' is widely used and supported by the legal systems, international instruments and scholars, there are other views on the time to measure foreseeability. It is criticised that in practice foreseeability of consequences is not possible to affect the terms of the transaction because 'it is normally impracticable to fix a separate rate for every contract'.[18] Murphey comments that 'a sounder decision can be made nearer the time of performance or breach'.[19] Samek argues that the time of breach should be applied in case of wilful breach because such wilful action is undoubtedly less deserving of protection than accidental or negligent one.[20] Robin Cooke considers both at the date of contracting and immediately before the breach as the point of time to measure foreseeability of loss.[21] In *Chilean Sea Bass Inc. v. Kendell Seafood Imports, Inc.,* the seller ('CSB') and the buyer ('Kendell') concluded a contract in January 2020, when the COVID-19 pandemic started, for supplying more than 350 tons of Antarctic toothfish. Soon after, COVID-19 disrupted both domestic and international fishing markets, causing significant losses to both parties. CSB then claimed that Kendell violated the terms of the agreement and owed $2,549,749.70. Kendell contends that Pedro Grimaldi, an affiliate of CSB, legitimately altered the contract by lowering the price in order to mitigate the pandemic's impact on the market and preserve the commercial partnership. The US District Court notes that Kendell and CSB entered a valid modification in March 2020 to reduce the price by $6 per kilo and Kendell did not pay the amount owed under this modification, the Court finds Kendell breached its modified contract. Damages must be foreseeable based on what Kendell knew, or ought to have known, at the time of the modification. Id., art. 74. It was foreseeable, when Kendell agreed to a $6 per kilo modification, that failure to pay would result in substantial and calculable losses to CSB.[22]

The time of concluding contract is the appropriate time to evaluate foreseeability so that the parties have opportunity to protect themself. However, the author argues that

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[18] Patrick Selim Atiyah: The Rise and Fall of Freedom of Contract. *Clarendon Press*, (1979), 432–433; also A. L. Corbin: Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law. *West Publishing Co* 5, (2002), 64–65.

[19] Murphey op. cit. 415.

[20] Robert Samek: The Relevant Time of Foreseeability of Damages in Contract. *The Australian Law Journal* 38, (1964), 125.

[21] Robin Cooke: Remoteness of Damages and Judicial Discretion. *The Cambridge Law Journal* 37, 2. (1978). 288–300.

[22] Chilean Sea Bass Inc. v. Kendell Seafood Imports, Inc., C.A no. 21-cv-337-JJM-LDA (2024) https://tinyurl.com/59hn255k (22 June 2024)

there are circumstances of wilful or negligent breach where measuring foreseeability at a later date may be justifiable.

2.7. Causality requirement and probability of loss

A party cannot foresee any result without awareness of the possible consequences to others. Therefore, causality plays a role in foreseeability loss determinations: not every harm or loss that could be foreseen should necessarily be included in a damage award. Each of the three instruments under discussion here incorporates a causality requirement: 'as being likely to result from its non-performance' (UPICC), 'as a likely result of its non-performance' (PECL) and 'as a possible consequence of the breach of contract' (CISG).

The UPICC and PECL only allow the harm/or loss to be recoverable once it is foreseeable as '(being) likely to result' from non-performance. In contrast, the CISG stipulates that the foreseeable loss must be 'a possible consequence of the breach of contract'. Ziegel distinguishes 'likely to result' or 'a likely result' from 'a possible consequence' with this example: 'If one takes a well-shuffled pack of cards it is quite possible, though not likely, that the top card will prove to be the nine of diamonds even though the odds are 51 to 1 against' (1994).[23] CISG's 'a possible consequence' seems broader than the requirement of 'likely (to) result' set out in the UPICC and PECL,[24] but this wider implication is limited by the previous phrase of 'in the light of the facts and matters of which he then knew or ought to have known',[25] the ability to foresee only works if the party can be aware of the relevant facts and matters. It is noted that the UPICC and the PECL contain no similar phrase; they appear to set more restrictive standards for foreseeability than the CISG.

Stoll states that 'there is only a need for factual causation inquiry as the foreseeability rule is employed in the place of the legal causation requirement'.[26] This requirement creates the causal relationship between the breach and the loss that Liu points out 'strongly overlaps the foreseeability rule'. He further states that there exists an interconnection between foreseeability and causation that cannot easily be separated. However, some scholars criticise this understanding on the ground that it leaves no room for the two concepts to be considered mutually exclusive.[27] A foreseeability rule can work consistently and flexibly with a causality rule.

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[23] Jacob Ziegel: Parker School Text as quoted. In: Albert H. Kritzer: Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods. *Kluwer*, (1994), 587–588.

[24] Eiselen op. cit. 415

[25] Edward Allan Farnsworth: Damages and Specific Relief. *The American Journal of Comparative Law* 27, 2–3. (1979), 253. https://doi.org/10.2307/840031

[26] Hans Stoll: Comment Art 74. In: Peter Schlechtriem (ed.): *Commentary on the UN Convention on the International Sale of Goods (CISG)*. Oxford, Oxford University Press, 2nd ed., 1998.

[27] Liu op. cit. section 14.2.5.

2.8. What precisely needs to be foreseen?

The question of what precisely must be foreseen is not expressed clearly in the three instruments and therefore becomes a controversial topic in their formal comments. There are different interpretations of the international instruments regarding this issue without particular reason.[28] One of the Comments to the UPICC states that foreseeability pertains to the nature or type of harm rather than its extent unless the extent is significant enough to 'transform the harm into one of a different kind',[29] and the Comments to the PECL imply that both the type and the extent of the loss must be foreseen.[30] Commentators to the CISG interpret differently by arguing that what must be foreseen is not only the type and the extent of the loss but also the 'chain of events leading up to the loss'.[31] The type or nature of the loss is linked to a defining and integral feature of the notion of loss and it should be distinguished from the extent of the loss which relates to translating the limits of loss into money terms. Foreseeability to the extent of the loss is suggested by commentators in both PECL and CISG, whereas the Comments to the UPICC consider it is only possible if the extent is sufficient to alter the nature of harm. In *Zhejiang Xinlong Construction Co Ltd v Shaoxing Zhengxin Metal Trading Co Ltd*[32], the appellate court ruled that the failure to supply steel of the seller which resulted in the buyer's loss that ensued a 40% increase of the market price of steel, was foreseeable. Judge Yuan referred foreseeability to a universal consensus found in international treaties such as Article 7.4.4 of the UPICC and Article 74 of the CISG as the mirror because it is supported by Chinese law.[33] Notably, in dealing with the issue of whether the type or extent of a loss must be foreseen which was not solved by Chinese law, Judge Yuan considered only the type (not to extent) of a loss is subjected to the foreseeability test.[34] His view is similar to the approach advocated for Article 7.4.4 of the UPICC. In this case, the 40% rise of the market price was insufficient to

28 Saidov op. cit. 126.

29 Official Comment to Art 7.4.4 UNIDROIT Principles 2016, 276.

30 Illustration 1, Comment A on art 9:503 PECL. In: Ole Lando – Hugh Beale (ed.): *Principles of European Contract Law: Parts I and II prepared by the Commission on European Contract Law*. The Hague, Kluwer Law International, 2000.

31 Hans Stoll – Georg Gruber: Arts 74–77 CISG. In: Peter Schlechtriem – Ingeborg Schwenzer (ed.): *Commentary on the UN Convention on the International Sale of Goods*. Oxford, OUP, 2nd edn, 2005. 766.

32 [浙江信龙建设有限公司与绍兴正欣金属物贸有限公司产品购销合同纠纷上诉案], Shaoxing IPC, (2018) Zhe 06 Min Zhong No 1634, rev'g Shaoxing Yuecheng District People's Court, (2018) Zhe 0602 Min Chu No 565.

33 Yuan Xiaoliang: The People's Judicature, 35/2019, 83 at 85. Also, Chinese Contract Law art 113.; Chinese Civil Code art 584.; also, Guiding Opinions of the Supreme People's Court on Several Issues Concerning the Adjudication of Cases Involving Civil or Commercial Contract Disputes under the Current Situation [最高人民法院关于当前形势下审理民商事合同纠纷案件若干问题 的指导意见], Fa Fa [2009] 40 (issued and effective as of 7 July 2009) art 10.

34 Qiao Liu: The PICC in Chinese Courts. *Uniform Law Review* 27, 3. (2022), 472. https://doi.org/10.1093/ulr/unac027; City University of Hong Kong School of Law Legal Studies Research Paper No. 2022 (2) – 005, 24–25.

translate the harm into one of a different kind as described in the Comments to Article 7.4.4 of the UPICC. One case where foreseeability of the extent of the loss is implied. In this case, the Appellate Court refused the expert's calculations of the "foreseeable damage" should be 120% of the base market price as the correct determination of the foreseeable damage. Instead, the Court set the limit of foreseeable damage at 20% of the agreed price, based on the calculations presented by the expert. It is further explained by the Supreme Court that because the market price increased significantly beyond the reasonably acceptable limit of contractual risk after the contract was concluded, the seller was released from obligation for 80% of the harm claimed by the buyer.[35]

If only the type of loss is required to foresee, the parties may find it challenging to establish reasonable expectations about the potential financial liabilities in case of breaching contract. This brings uncertainty, especially in the international context, and therefore businessman tends to escape the international instruments and this may challenge the uniform application of the rules and rights around compensation to aggrieved parties.

2.9. Foreseeability in case the breach was deliberate or negligent

The question of whether a breach was deliberate or negligent also influences the determination of foreseeability. Some national legal systems award damages even for unforeseeable harm when the breach is caused by a party's intentional actions or gross negligence, but there is no such exception expressed in the UNIDROIT Principles and the CISG. Neither of the latter instrument awards full compensation for harm or loss, even it is impossible to foresee, in case of a deliberate breach. In contrast, the PECL addresses the issue of intentional or grossly negligent breach. The non-performing party is not exempted from liability for losses from intentional or grossly negligent non-performance if such losses were unforeseeable; instead, the PECL awards full compensation.[36] This distinguishes it from the other two instruments, which take fault as a basis.

3. Conclusion

Generally, foreseeability under the three regulatory frameworks requires the parties, at the time a contract concludes, to be able to anticipate and assess the potential risks and liabilities they could incur during the performance of the contract. Even though the three sets of rules seem very reminiscent of one other, the wording of foreseeability in the PECL is broader than in the other instruments. This is because of the wide application of PECL to the contract law which includes international commercial contracts, domestic as well as consumer contracts. A comparison of the texts of foreseeability rule under the three instruments reveals that the variations in wording among the three instruments are insignificant and do create not a huge practical impact.

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35 Case no. V CSK 254/14, available at https://cisg-online.org/search-for-cases?caseId=12977 (28 June 2024)

36 Liu op. cit. section 14.2.6.

The three international instruments have tried to standardise the rule, but confusion remains regarding interpreting the different foreseeability clauses. All the three instruments face the same issues: ambiguity surrounding the term and scope of foreseeability, and the burden of proof of foreseeability. There are also debates on the issue of fixing the time when harm or loss should be foreseen to the time of conclusion of the contract. The lack of clarity on what precisely must be foreseen as well as the differing interpretations by commentators to the three instruments will lead to inconsistent application of the instruments and create uncertainty about the injured party's right to be compensated and its amount. However, there is no need to follow a more specific but precise approach because a broad and flexible method remains balanced and effective for various circumstances, especially in the global commercial environment. The widespread application of the foreseeability rule by international instruments demonstrates its effectiveness in limiting damages in a modern and global context.

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CURRENT ISSUE

IUS QUIA IUSTUM: HELMUT PREE'S DOCTORAL LAUDATION

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When a volume is published in honor of an outstanding figure in a scientific field, the book's title should summarize the scientific orientation of the researcher. In 2015, the *Festschrift* was published on Helmuth Pree's sixty-fifth birthday. The title of the publication is *Ius quia iustum.* Helmuth Pree belongs to a generation of canon lawyers who had to confirm the legitimacy of canon law either in the eyes of secular law or in the eyes of the Church.

Helmuth Pree was born in 1950 in Reichenthal, Upper Austria. Although many biographies refer to him as an Austrian canon lawyer, it would be more accurate to say that he is a prominent twentieth-century figure in German-speaking canon law. Indeed, his work, as we shall see, extends beyond the field of German canon law. This is not only because, in addition to his many publications in German, he has also published in other languages but also because he taught and been an expert outside the German world. Most famously, in addition to his academic work, Pope Benedict XVI appointed Professor Pree as an advisor to the Pontifical Council for Legislative Texts on April 15, 2011. Professor Pree is also deeply involved in the Church outside the university. This is evident because he has been a member of Germany's Legal Commission of the Association of Dioceses since 1997. In 2004, Pree was appointed Vice President of the *Consociato Internationalis Studio Iuris Canonici Promovendo*, the five-decade-old worldwide association of scholars of canon lawyers based in Rome.

The aforementioned *Festschrift* lists Professor Pree's work in more than twenty pages. It includes monographs, co-authored works, articles, laudations, reviews, legal commentaries, handbooks, and significant lectures. Helmuth Pree's research focuses on the theological, legal-philosophical, and legal-theoretical questions, concepts,

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principles, and methodology of canon law. An important area of his work is the relationship between Church and State. Due to the importance of his research topics, numerous analytical and review works have been published on his monographs and books.

Professor Pree has had a significant influence on secular legal philosophers and writers. This is also because he has deliberately chosen areas of research that can be found in both secular and ecclesiastical law. Professor Pree first studied law at the Johannes Kepler University in Linz, then canon law at the Pontifical Lateran University in Rome, and Catholic theology at the Catholic Theological University of Linz. He habilitated in Linz with a thesis on canon law. In 1983, Pree was appointed full professor of law in Linz, and in 1988, he moved to the Department of Canon Law at the University of Passau. It is therefore understandable that Professor Pree was able to research canon law in a quality that requires not only theological but also legal knowledge.

This specific and complex vision is also evident in his writings, which focus on the internal law of the Catholic Church (to mention just a few examples, the territoriality and personal principle, the role of the laity, and the ecclesiastical offices). His writings are all worthy of analysis, but I will mention only those, by title on which I have based my presentation of Helmuth Pree's work.

Given the time frame, I would like to highlight three important areas of Professor Pree's research.

1) The first and perhaps best known to both secular and canon lawyers is Professor Pree's writings on legal theory.
2) His second utmost essential and widely known work focuses on the relationship between church and state. There are also many practical areas of this, such as property law or tax law, in which the Professor has published monographs. These works have had a significant influence not only on the German concept of the church-state, but after the fall of the Iron Curtain also countries on the Eastern European, which were looking for the right model for the relationship between Church and State.
3) Finally, it should be mentioned that Professor Pree was an eminent author of internal law of both the Latin and the Eastern Churches. Particularly noteworthy is the constitutional law of the Church, or the theology of canon law and general norms. It should be noted that Professor Pree has dealt with so many areas of internal ecclesiastical law that a detailed presentation of them is beyond the scope of this laudation.

Allow me to point out a few key aspects of Professor Pree's work

Professor Pree is well aware of the sacramental nature of canon law. This is evident in his analysis of certain questions of internal law (especially in his works on liturgical law, the ecclesiastical hierarchy, or the functions of certain offices such as the parish priest, parishes without pastors, or the various actors in ecclesiastical process law). It is remarkable how consciously he incorporates the concepts of the Second Vatican Council into his juridical works (one may think of the role of the laity, the ecclesiastical hierarchy, but also the law of property, the relationship between the internal and the external forum, etc.).

In the light of the texts and philosophy of the Second Vatican Council, Pree develops a classical but innovative aspect of canon law. His vision provides a good balance between the legal and theological realities of the Catholic Church. He emphasizes that it is a misinterpretation of the law and alien to Catholic legal thinking to focus only on the orders for the functioning of the Church. He also expressly rejects the idea that the new Code should be a mere rule of faith and morals rather than a legally binding code. The social dimension of the Church requires the legal character of the ecclesiastical documents, especially of the Code of Canon Law. Professor Pree's legal thinking is dominated by the classical Catholic hierarchy of law, as interpreted by St Thomas Aquinas and Francesco Suarez, in which divine and natural law play a prominent role. At the same time, the approach of Hans Kelsen is occasionally evoked, at least concerning the precise nature of the law, the task of the legislator, the regulative role of law, and its binding character. He points out that to ignore the legal nature of the Church is to completely misinterpret the conciliar texts. At a time when many prominent representatives of the Church were claiming that the law was contrary to the nature of the Church, Helmuth Pree consistently proved, based on both theology and canon law, that the law of the Church is not incompatible with the nature of the Catholic Church or with its pastoral mission. This is well explained in Professor Pree's summary, Profile and Challenges of Canon Law at the Beginning of the Third Millennium. *(Profil und Herausforderungen der Kanonistik am Beginn des dritten Jahrtausends)*

He was well acquainted with legal theorists who subordinated canon law to realizing pastoral goals and considered canon law to be of purely pragmatic importance. He was equally balanced in his attitude toward those who tended to overemphasize the theological aspects. It should be noted here that Professor Pree worked for many years (since 2004) at the Institute of Canon Law of the Ludwig Maximilian University in Munich. Nevertheless, his opinion on the nature of canon law is unique, and it is not just a reflection of the Munich School's understanding of law and theology or the nature of canon law. This is well illustrated by the fact that, while he writes with great respect for the founder of the Munich School, Klaus Mörsdorf, he also offers a solid critique of Mörsdorf's position. According to Pree, Mörsdorf gives too much attention to the theological aspect of canon law at the expense of its legal aspect. He points out that this overly sacramental approach to law leads to a lack of clarity in Mörsdorf's concept.

Professor Pree has also thoroughly analyzed the relationship between the Church and the State in depth. To mention only the most important.: Österreichisches *Staatskirchenrecht, Gibt es ein dogmatisches Prinzip des* österreichischen *Staatskirchenrechts? Kirche und Staat am Beginn des 3.Jahrtausends, Der Grundlagenvertrag zwischen dem Heiligen Stuhl und dem Staat Israel (1993) im Kontext der neueren Konkordate*. In these works (to mention only one or two: Reichnisse – ein sterbendes Rechtsinstitut?, Esercizio della potestà e diritti dei fedeli) Professor Pree had the opportunity to show how the law of the Catholic Church differs from and at thes sametime is identical to the law of the State.

In the German-speaking world, especially in contemporary Austria, the former Austro-Hungarian Monarchy, there were prominent figures of state theory. It is enough to think of Georg Jellinek and his son Walter Jellinek, Hans Kelsen, Max Weber, etc., whose categories are still the essential elements of the definition of the State.

Where the theories of the state are so well developed, it is obvious that the church can only position itself properly if it has a theoretical perspective. Although, in many cases, the relationship between church and state is practical, it can never be without a theoretical foundation. Helmuth Pree followed the Austrian school in this regard. Like Hans Klecatsky, Hans Weiler, Hugo Schwendeinwein, Inge Gampl he published a monograph on the relationship between church and state in 1984. Österreichisches Staatskirchenrecht, a work on the relationship between the Austrian state and the church. Austrian secular law has also accepted that a specific term (Staatskirchenrecht) is applied to the relationship between the state and the church - this is public ecclesiastical law. Pree is thus one of the few academics to deal with questions of canon law that explicitly presuppose legal knowledge of secular law and legal theory. He is known to us primarily for his publications in canon law, but he has also done a considerable amount of work in civil law. I would like to emphasize his work on Austrian public law, *Einführung in die Rechtswissenschaft II* Österreichisches *Verfassungs- und Verwaltungsrecht,* which is also a landmark work for canon law thinking, since one of the significant themes of the legal philosophy of the twentieth century is fundamental rights, public administration, and especially administrative justice. The Church owes the development of guarantee elements, especially administrative justice, to the modern state and administration, as is evident from Pree's work. The author has taken on the great challenge of presenting the material regulating the relationship between Church and State since it is fragmented, comes from different historical periods, and in many cases, there are terminological difficulties.

And allow me to give a Hungarian perspective here. Both Austria and Hungary are successors of the Austro-Hungarian Monarchy. However, due to historical features, the relationship between church and state has developed differently in the two countries. In the context of the Austrian state-church relationship, we can identify several historical institutions that have ceased to exist in Hungary and have thus fallen outside the interest of canon law. The work of Helmuth Pree is also interesting in this regard. Pree's work deals with some legal issues that are historical for us, but current in Austria.

Professor Pree raises not only the classic questions of Church-State relations. He raises new questions about of the rule of law and democracy in canon law*: Die Synoden im Recht der katholischen orientalischen Kirchen*. Issues of general interest to modern state legal systems and with implications for canon law, such as data protection, data reservation, and the right to report, are also mentioned. Pree also highlights the importance of making Church-State relations more transparent to citizens. This, he says, is essential to the mission of the Church. Professor Pree is one of the most influential canon lawyers who has worked on the temporal goods of the Church. He has written a monograph and numerous studies on ecclesiastical property law, which was treated with restraint after the Council. When analyzing the works of Helmuth Pree, canon lawyers often mention, as did Dietrich Pirson, that his works on the relationship between the Austrian State and the Church can be used in the context of the German Federal Republic since similar areas that Pree elaborated on are also relevant for Germany.

His work is also essential for Hungarian canon lawyers regarding the relationship between Church and State. This is true not only from a historical point of view but

also from the point of view of current law, since Hungary began to follow the German-Austrian cooperative model of cooperation between Church and State after the regime change. Pree's work can help us avoid many problems that the Austrian and German churches have failed to solve in this relationship.

The strength of Pree's state-church analysis is that it is not only a general work. It also deals with questions of the internal law of the Church, which it thematically integrates into the system of church-state relations. In this perspective, the clarity and sincerity with which Pree has addressed specific legal issues must be emphasized. In 1993, the work of Professor Pree's work on *Independenter a Civili Potestate* (c. 1254 § 1 CIC) *Zur Legitimität staatlich sanktionierter Kirchenfinanzierungsystem* (The legitimacy of state-sanctioned church financing systems) was published in which he illustrates clearly the problems in the field of ecclesiastical property law in Western societies. He describes processes such as the changing relationship between church and state and the steady shrinking of the Catholic Church, which have now reached the countries of Eastern Europe. Religion is increasingly marginalized and relegated to the private sphere. As far as this aspect of property law is concerned, the church's financial management system in many countries needs to be reorganized and reconsidered, Pree argued in 1993. Finding a more relevant observation of the Church in society is difficult. In this context, he points to the impact of the European Union on Church-state relations, especially on Church funding. In his view, a new form of church subsidy cannot be ruled out at this level. His works illustrate the relationship between secular and canonical expression and the underlying legal content. For example, the concepts of common law taxation and their impact on canon law. Nevertheless, Professor Pree rightly points out that the mission of the Church is threatened as much by an impoverished Church as by a clergy and Church living in great luxury and privilege.

In addition to his commitment to emphasizing the distinctive theological aspect of canon law, Professor Pree considered it essential that canon law should retain its legal character. He emphasized this in his essay in honor of Inge Gampl. Canon law, he argues, can only maintain its comparability with secular legal systems if it retains its legal integrity. Moreover, Pree naturally follows the theology of the Council, noting that neither the Code nor any other legislation can be expected to reproduce the Council's theological texts in their entirety. This would overburden the legal texts. In this comparison, Professor Pree makes the criterion of justice the basis for the comparability of legal systems. (As I mentioned earlier, it is no coincidence that the volume published in his honor has a subtitle that refers to justice). Justice must be present in all legal systems and is,, therefore,, the criterion of comparison. In this light, the author raises questions of legal theory such as legal certainty, effective protection of fundamental rights and, in particular, equality before the law. *(Zum Stellenwert und zum Verbindlichkeitsanspruch des Rechts in Staat und Kirche)*

In this constellation, Professor Pree points out that justice *(iustitia)* is the material standard of all positive law. Since justice is not specifically Christian but universal, Professor Pree says, it is a bridge between legal systems. He highlights the importance of the executability of canon law. The authority of the Church guarantees the enforceability of the law. This executability distinguishes between moral and legal rules in secular and canon law. At the center of Pree's legal thought, however, are not

legal structures and hierarchy but the Christian faithful. Nor can legality (positivity) and effectiveness (efficiency) be neglected in canon law. In this constellation, Professor Pree points out that iustitia, justice, is the material indicator of all beneficial laws.

The third and final element is Professor Pree's work on the internal law of the Church. His work touched on all the books of the Code, and even dealt with legal material outside the Codex. Thus, a summary can be made.

In all his works, there is a balance between law and morality, which is a characteristic of the Church's own internal law. While dealing with the positivist aspects of law, he affirms that the Church's concept of law cannot be derived from theology alone. The law's definition must first be clarified and then placed in the life of the Church.

Helmuth Pree spent sixty-six semesters as a full professor of canon law at three universities. He covered almost all areas of canon law. Helmut Pree's career as a canon lawyer unfolded when legal thinking was no longer focused on canon law but rather on the state and public law in particular. Helmut Pree's work has demonstrated that canon law is still worthy of study and relevant to the Church in modern society.

We thank him for his dedicated work in canon law and secular law.

We wish you God's blessing, strength, health, and many more years on the occasion of your honorary doctorate.