Part III
Developments in International Law

The Prisoners of Hope

Reflections on the Constitutional Aspects of Life Imprisonment

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Abstract

The term 'actual life imprisonment' (ALI) is contained in the second sentence of Article IV(2) of the Fundamental Law of Hungary. However, it would be in vain to look for the legal institution by this name in the Hungarian Criminal Code or any other Hungarian legislation, because the only reference we find there is that in certain cases of life imprisonment the possibility of parole is excluded. Besides the designation of this legal instrument, there are of course a number of questions concerning its application. The most important questions concern the relationship between the top norm of the Hungarian legal system, the Fundamental Law, and the de facto life sentence. These can be answered by the Hungarian Constitutional Court, who has already dealt with this subject and proceedings related to ALI are currently pending before it. However, it has not yet taken a position on the compatibility of this legal instrument with the Fundamental Law. In the framework of the present study, we attempt to take stock of the possible aspects of such a constitutionality assessment, reviewing the history of ALI, its regulation in Hungarian law, the main international legal requirements governing it and the case law of the Constitutional Court.

Keywords: actual life imprisonment, Hungary, ECtHR, right to hope, hope of release

1. Introduction

Although life imprisonment has been part of the Hungarian legal system for several decades, actual life imprisonment (ALI) was only introduced as

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a new concept in Hungarian law a few years ago. Since then, the ECtHR has detailed its objections to the new legal instrument in several judgments rendered against Hungary. In addition, the Hungarian Constitutional Court has also issued a number of decisions on the subject, however, it yet to take a position on the constitutionality of the ALI.

In the present study, following an overview of the regulation of ALI in Hungarian law, we present the requirements surrounding this institution stemming from the ECHR (Convention) as they follow from the relevant ECtHR practice. Analyzing the case law of the Constitutional Court, we also try to identify the most important constitutional law criteria that, in our view, govern the substantive analysis of ALI's conformity with the Fundamental Law.

2. History of the Development of Life Sentence in Hungarian Law

In medieval Hungary, deprivation of liberty for life did not appear as an independent punishment, but as a specific feature of certain forms of imprisonment. For example, in the case of galley slavery, the low chance of survival resulted in life imprisonment. Imprisonment for life as an independent punishment in Hungary appeared only in 1723 in the *Corpus Juris Hungarici*.[1]

Since life imprisonment was for a long time the second gravest sanction in the Hungarian legal system after the death penalty, its fate was influenced by the perception of the death penalty. In Hungary, the 1843 bill on the Criminal Code[2] was the first to propose the abolition of the death penalty, making imprisonment the generally applicable punishment.[3] Later, it was the first written Hungarian penal code, the Csemegi Code[4] which gave priority to imprisonment, by reducing the number of death sentences (and

1 Barna Mezey, 'A hosszú tartamú szabadság-büntetés a joghistóriában', *Börtönügyi Szemle,* Vol. 24, Issue 2, 2005, p. 3.

2 Despite the fact that it did not become a law, the 1843 Criminal Code proposal is of great importance for the development of Hungarian criminal law.

3 András Polgár, *Ad dies vitae. Az életfogytig tartó szabadságvesztés szabályozása, gyakorlata és végrehajtása, PhD thesis,* Pécs, 2017, p. 6.

4 Act V of 1878, the Hungarian Criminal Code on offences and misdemeanors. It was the first Hungarian-language criminal code containing comprehensive criminal law. The general part was in force until 1951 and the special part until 1962.

the number of offences punishable by death).[5] The Csemegi Code also regulated the form of imprisonment, which could last up to a lifetime.[6] The Code excluded parole in two cases: if the convict was a foreigner or was a repeat offender of certain offences.[7]

The need to re-regulate criminal law in Hungary arose following the two world wars and the communist takeover in Hungary. Thus, the Criminal Code of 1950 (1950 Penal Code)[8] was born, which transformed the general part of criminal law.[9] The 1950 Penal Code dedicated death penalty and imprisonment to be the main forms of punishment,[10] providing for imprisonment for life or for a fixed term.[11] In terms of substance, the Csemegi Code and the 1950 Penal Code rules[12] were very similar. The difference lay in the fact that the rules on parole were not contained in the 1950 Penal Code itself, but in its implementing Law-Decree No 39 of 1950.

The next Criminal Code, Act V of 1961[13] did not contain provisions for life imprisonment. Instead, it provided that imprisonment should be imposed for a fixed term.[14] This solution of the legislator is significant in two aspects.[15] *(i)* On one hand, It was not obvious to the legislator whether life imprisonment was necessary in addition to the death penalty. *(ii)* On the other hand, without life imprisonment, the scope between the death penalty and fixed-term imprisonment was too broad, reducing the courts' leeway in imposing a sentence. These dilemmas were resolved by the legislator a decade later by amending the provisions of Act V of 1961 by Law-Decree 28 of 1971, which reintroduced life imprisonment into the Hungarian legal system.[16]

5 According to Balla's assessment, the Csemegi Code "was essentially custodial in its system of sanctions." Lajos Balla, 'Az életfogytig tartó szabadságvesztés büntetéskiszabási gyakorlata', *Magyar Rendészet,* Vol. 14, Issue 4, 2014, p. 44.
6 Csemegi Code, Section 22. Imprisonment is either for life or for a fixed term.
7 Id. Section 49.
8 Act II of 1950 on the general part of the Criminal Code.
9 Kálmán Györgyi, *Az új Büntető Törvénykönyv kodifikációjának története,* at https://ujbtk.hu/dr-gyorgyi-kalman-az-uj-bunteto-torvenykonyv-kodifikaciojanak-tortenete/.
10 1950 Penal Code, Section 31.
11 Id. Section 32(1).
12 Balla 2014, p. 45.
13 Act V of 1961 on the Criminal Code of the Hungarian People's Republic.
14 Id. Section 37.
15 Balla 2014, p. 46.
16 Law-Decree 28 of 1971, Section 5: "Section 37 of the Criminal Code shall be replaced by the following provision: Imprisonment shall last for life or for a fixed term […]."

The next reform was the adoption of Act IV of 1978 on the Criminal Code (the Hungarian Criminal Code between 1978 and 2012), which also distinguished between fixed-term and life imprisonment. The Explanatory Memorandum to the original text of the 1978 Criminal Code explained that

> "the humanism of the proposal is expressed in the fact that it does not exclude life imprisonment from the possibility of parole. The hope of this may encourage the prisoner to behave correctly when serving his sentence. However, it is consistent with the severity of the sentence that the convicted person must remain of good behavior for a long period."[17]

The Code therefore allowed for parole after a minimum of twenty years. Life imprisonment acquired a new status following the Constitutional Court's *Decision No. 23/1990. (X. 31.) AB* abolishing the death penalty. With the abolition of the penal provisions relating to the death penalty, life imprisonment became the gravest punishment in the Hungarian penal system.[18]

The regulation was substantially amended in 1993,[19] giving the criminal court the power to determine the earliest date of release on parole as part of the sentencing process. On the other hand, it excluded the possibility of parole if the person sentenced to life imprisonment was sentenced to life imprisonment again. Consequently, after the adoption of the 1993 amendment to the 1978 Criminal Code, the application of the so-called ALI became possible in Hungary.

In 1998, the Hungarian legislator once again amended the provisions on parole in the case of life imprisonment.[20] According to the new legislation, the court, after a complex analytical consideration of the factors relevant to the imposition of the sentence, could conclude that a person sentenced to life imprisonment should be excluded from the possibility of parole. In the event of such a decision by the court, there was no legal possibility for the prisoner to be released, with one exception: if the President of the Republic granted a pardon.

17 Explanatory Memorandum to Act IV of 1978 on the Criminal Code, Section 47.
18 Ágnes Czine,'Életfogytiglan, élethossziglan a büntetésvégrehajtási intézetben, avagy a 40 évig tartó remény, *Miskolci Jogi Szemle,* Vol. 14, Special Issue 2, 2019, p. 151.
19 Act XVII of 1993 amending criminal legislation, Section 6.
20 Act LXXXVII of 1998 amending criminal legislation, Section 5.

3. Current Legislation

Actual life imprisonment is not a separate penalty under the current Hungarian Criminal Code[21] (2012 Criminal Code) but the gravest form of life imprisonment, in which the prisoner is not eligible for parole. From the point of view of the constitutionality of this legal institution, it is decisive that the Fundamental Law, which entered into force on 1 January 2012, stipulates in Article IV(2) that 'actual life imprisonment' may be imposed only for the intentional commission of a violent crime. In Hungarian legislation the Fundamental Law is the only legal norm that refers to the legal institution of ALI by this name.

The 2012 Criminal Code retained the concept governing the rules on life imprisonment of the 1978 Criminal Code. Under Section 42 of the 2012 Criminal Code, the sentencing court shall, in the case of life imprisonment, determine the earliest date of parole or exclude the possibility of parole. Section 44(1) of the 2012 Criminal Code lists the 18 offences for which the court may exclude the possibility of parole. According to Section 44(2) the possibility of parole shall be excluded if the offender is a violent multiple recidivist or an offender who committed a crime under the Section 44(1) of the 2012 Criminal Code in a criminal organization.[22]

The legislator brought the provisions of the Criminal Code in line with the provisions of Act CCXL of 2013 on the Enforcement of Penalties, Measures, Certain Coercive Measures and the Detention for Misdemeanors (Criminal Law Enforcement Act). It did so by introducing[23] the mandatory pardon procedure for life sentenced prisoners excluded from the possibility of parole[24] among the provisions of the Criminal Law Enforcement Act According to the legislative explanatory memorandum, the amendment

> "ensures that the Hungarian legal system complies with the requirement of the ECtHR in its judgment of 20 May 2014 in the case of *Magyar v Hungary* that in the case of an ALI there should be a procedure for examining whether the reasons for the sentence in terms of criminal policy still exist, once a sufficient period of imprisonment has elapsed."[25]

21 Act C of 2012 on the Criminal Code, Sections 41–42.
22 A similar restriction was contained in the 1978 Criminal Code, Section 47 in connection with the release on parole of persons sentenced to fixed-term imprisonment.
23 Act LXXII of 2014 amending the Criminal Law Enforcement Act, Section 109.
24 Criminal Law Enforcement Act, Sections 46/A-46/H.
25 Explanation of Act LXXII of 2014, General Explanation.

Under the new rules[26] a prisoner sentenced to a life sentence and excluded from the possibility of parole is subject to an *ex officio* pardon procedure (mandatory pardon procedure). The penitentiary institution detaining the convicted person will notify the Minister responsible for justice in order to initiate the mandatory pardon procedure once the convicted person has served 40 years of the sentence. However, the prisoner must give consent to the procedure. In the absence of consent or refusal to give such consent, the mandatory pardon procedure may not be carried out. The Minister responsible for justice must act within 60 days of receiving notification from the prison. In doing so, he shall obtain the personal data and documents necessary for the decision to be taken and shall notify the President of the *Kúria*. The latter shall, without delay after the notification, take steps to appoint a five-member Board of Pardon and Paroles. This *ad hoc* Board, composed of judges in criminal cases, must examine within 90 days of receiving the documents whether there are grounds for a reasonable presumption that the purpose of the sentence can be achieved without further deprivation of liberty. The investigation procedure shall end with a reasoned opinion, which the Board of Pardon shall send to the Minister of Justice along with the file. Within 15 days of the submission of the documents, the latter will submit a recommendation to the President of the Republic. It may not depart from the opinion of the Board of Pardon. The decision on the pardon is then taken by the President of the Republic, acting in his discretion. In his decision, he is not bound by the recommendation of the Minister of Justice and is not obliged to give reasons for his legal position. If the convicted person has not been pardoned, the mandatory pardon procedure must be repeated after two years.

Summarizing the legal provisions in force, it can be concluded that in Hungary the ALI is still not a separate type of penalty, but the gravest form of imprisonment, in which the possibility of parole is excluded. Although Article IV(2) of the Fundamental Law refers to this form of imprisonment as actual life imprisonment, this designation is not mentioned in the 2012 Criminal Code or in any other legislation. However, due to legislative changes in the light of international requirements, deprivation of liberty in the case of ALI does not necessarily last until the death of the prisoner, since the mandatory pardon procedure may result in the release of a prisoner serving ALI.

26 Criminal Law Enforcement Act, Section 46/A.

It is the mandatory pardon procedure that is at the center of the criticism by the ECtHR. Its two main objections can be summarized as follows: *(i)* on the one hand, the period of 40 years for the periodic review of the mandatory pardon procedure is too long compared to ECtHR requirements. *(ii)* On the other hand, the fully discretionary nature of the decision of the President of the Republic and the lack of justification of the decision mean that there is no guarantee of review.[27]

4. The Case Law of the ECtHR Regarding Life Imprisonment

The amendment of the relevant national provisions confirms that the development of Hungarian law concerning the legal institution of ALI has been directly influenced by the practice of, and requirements formulated by the ECtHR. In the following, we present the development of the ECtHR's practice and the system of requirements established. While several further international documents whose provisions are also applicable to Hungary and have an impact on the development of Hungarian legislation could also be mentioned in this regard, however, we refrain from a detailed description of these.[28]

The case law of the ECtHR on the imposition of life imprisonment has undergone significant changes over the past decade. In the following, we provide a chronological overview of the ECtHR's decisions regarding Hungary and other countries that have had an impact on the adjudication of cases and legislation in Hungary.

The ECtHR's initial jurisprudence pointed in the direction that life imprisonment is compatible with the requirements of the Convention. It also considered that a decision taken in a clemency procedure, rather than in a judicial procedure, whether judicial or non-judicial, was appropriate and admissible for the purpose of considering the possibility of release. In *Kafkaris versus Cyprus*,[29] the ECtHR confirmed its previous position that life imprisonment is not *per se* prohibited. However, it found that if the sentence is *de facto* and *de jure* 'irreducible', this violates Article 3 ECHR, *i.e.* the prohibition of torture and inhuman or degrading treatment or punishment. The main criterion for assessing whether the duration of

27 *See T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 6 March 2017, paras. 48–49.
28 *See* the details of international regulation in Czine 2019, pp. 147–151.
29 *Kafkaris v Cyprus,* No. 21906/04, 12 February 2008.

the sentence is reducible is whether the sentenced person has prospects of release. Where the State provides for a review of a life sentence, either by commutation or by remission of a certain part of the sentence or by conditional release, the regime complies with the requirements of Article 3 ECHR. In the present case, the ECtHR took into account the fact that in Cyprus, the release on parole of a person sentenced to life imprisonment could only be granted on the basis of a decision of the President of the Republic, approved by the Attorney General. The ECtHR considered that this was not a mere legal or theoretical possibility, since 9 people sentenced to life imprisonment were granted parole in 1993, 2 in 1997 and 2 in 2005, all on the basis of a decision taken by the President of the Republic. The ECtHR therefore considered that the applicant was not deprived of all possibilities of release and did not find a violation of the ECHR in the case.

In line with the above, in its judgment in *Iorgov (II) versus Bulgaria*[30] the ECtHR confirmed that where national law provides for the possibility of review for the purposes of commutation, remission, termination or parole of a life sentence, the decision, despite its non-judicial nature, is in accordance with Article 3 ECHR. It may be concluded from this that the Hungarian rules governing the mandatory pardon procedure also met the requirements developed by the ECtHR regarding life imprisonment.

The first Hungarian-related decision on this issue, in the case of *Törköly versus Hungary*[31] is noteworthy. Formally, it is 'only' an admissibility decision and not a judgment on the merits. More importantly, the ECtHR rejected the application in this particular case because the applicant was not deprived of the hope of release. Indeed, the Hungarian judgment provided for the possibility of parole – *i.e.* a review of the sentence – for the applicant after 40 years (at the age of 75). Since the possibility of the applicant's release was not excluded, the Hungarian criminal court did not impose an ALI, so that the ECtHR did not examine in detail the other features of the Hungarian legislation. The *Törköly* judgment may therefore give the impression that the ECtHR was satisfied with the 40-year review period provided for in the Hungarian legislation, which is longer than the European practice. However, the crucial point in this particular case was that the Hungarian court did not impose an ALI but 'only' a life sentence, which did not exclude the possibility of parole. Having established that the

30 *Iorgov (II) v Bulgaria*, No. 23295/02, 2 September 2010.
31 *Törköly v Hungary,* No. 4413/06, 5 April 2011.

convicted person was guaranteed the possibility of release, the ECtHR did not specifically assess when the review would take place.

The next important milestone in the assessment of life imprisonment in chronological order is the judgment rendered in *Vinter and others versus the United Kingdom*.[32] In this case, the ECtHR confirmed that a life sentence can be considered compatible with Article 3 ECHR if the law of the State Party provides for the possibility to initiate review by the sentenced person and, at the same time, regulates the mechanism for such a review. In the ECtHR's interpretation, detention is lawful if it is based on adequate penological grounds. Such grounds are punishment, deterrence, protection of society and rehabilitation of the offender. Several of these grounds may prevail at the same time when the sentence is handed down, but during the execution of the sentence, the validity of each ground changes over time, calling into question the legality of upholding the sentence. It is therefore necessary to periodically review these penological grounds during the implementation of a life sentence. If, after a certain period of time, the basis for the sentence no longer exists due to the successful rehabilitation of the sentenced person, the possibility of a reduction of the sentence should be provided for. The ECtHR has underlined that it is not competent to lay down rules on the review procedure. It is therefore left to the States Parties to decide whether to provide for judicial or administrative review. The ECtHR also refrained from setting a date for review. However, taking into account that, on the basis of a comparative analysis of the relevant international legal rules and the practice of States Parties, the time between the imposition of a sentence and the review of the conviction is generally 25 years, the ECtHR considers that a review should be carried out after 25 years for the first time and periodically thereafter.[33] The ECtHR has also pointed out that a person sentenced to life imprisonment has the right to

32 *Vinter and others v the United Kingdom*, (GC), Nos. 66069/09, 130/10, 3896/10, 9 July 2013.

33 The judgment found that 9 of the 47 Council of Europe Member States have no life imprisonment at all: Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. The maximum length of imprisonment in these countries ranges from 21 years (Norway) to 45 years (Bosnia and Herzegovina). In Croatia, a maximum of 50 years' imprisonment can be imposed for aggravated offences. Life imprisonment is part of the legislation in the 38 remaining Member States. In addition to the United Kingdom, the ECtHR has identified six Member States where a system of clemency exists but does not apply for certain serious crimes or sentences. One of these states is Hungary.

know, at the time of sentencing, what conditions they must meet in order to be released and when and how their sentence may be reviewed.

In summary, the judgment entails that a sentence of life imprisonment is compatible with Article 3 ECHR only if the possibility of review exists and the rules for such review are known at the time the sentence is imposed. With due consideration to these requirements, in its judgment *Murray versus the Netherlands*[34] the ECtHR pointed out that the possibility of an institutional review, introduced subsequently by legislative amendment, during the execution of an ALI, can avoid a conflict with Article 3 ECHR, even if the sentenced person has already served a longer period of his sentence.

At this point, it is worth briefly touching on the categories of 'hope of release' and 'right to hope' introduced by the ECtHR in *Vinter and others*. These terms are not mentioned in the ECHR, but the academic literature has used these categories when discussing ECtHR practice, since *Vinter and others* sets the criterion for the reviewability of life imprisonment.[35]

According to the Cambridge Dictionary,[36] hope is something good that we want to happen in the future. However, hope is not a legal concept, but a meta-juristic factor with several contexts that are difficult to approach in a precise way.

Irish judge Ann Power-Forde[37] has added a short but often quoted concurring opinion to the *Vinter and others* judgment, in which she refers to the right to hope. In her opinion, she recalls not only the right to human dignity, as examined by the German Federal Constitutional Court in the context of life imprisonment, but also the idea of atonement and reparation. The judge deduces the inhuman and degrading nature of life imprisonment from the denial of this possibility. However, not everyone agrees with the idea of the right to hope. For example, in a later dissenting opinion in *T.P. and A.T. versus Hungary*, the Lithuanian judge Egidijus Küris[38] contrasts the right to hope of convicted persons with the crushed hope of those in society who have suffered the effects of the crime.

34 *Murray v Netherlands,* No. 10511/10, 10 December 2013.
35 Sarah Trotter, 'Hope's Relations, A Theory of the 'Right to Hope' in the European Human Rights Law', *Human Rights Law Review*, Vol. 22, Issue 2, 2022, p. 3.
36 Cambridge Dictionary, at https://dictionary.cambridge.org/dictionary/english/hope.
37 *Vinter and others v the United Kingdom,* Nos. 66069/09, 130/10, 3896/10, 9 July 2013.
38 *T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 4 October 2016, Dissenting opinion, para. 22.

In Hungarian scholarly literature, too, opinions are divided on the right to hope. Such a category is not included in the Hungarian Fundamental Law (entered into force in 2012), nor did it appear in the previous Constitution. Such a fundamental right therefore does not exist in the Hungarian legal system.[39] According to some opinions, those who commit the most serious crimes give up their human dignity. As a consequence, they do not deserve to be punished by the court on the basis of the concept of human dignity and its guarantees under the rule of law.[40] According to another view, one of the most important tenets of constitutional criminal law, the basic pillar of sentencing, is the principle of proportionality. According to this principle, the court must impose a proportionate punishment, *i.e.* a punishment that is proportionate to the gravity of the offence committed. If the sentenced person is released from a life sentence, it follows that he has not served the proportionate sentence, *i.e.* he has not been punished in the manner prescribed by the sentence and in proportion to the offence committed. Thus, the sentence is not proportionate if it has not been carried out in its entirety.[41]

Almost a year after *Vinter and others*, the ECtHR in *László Magyar versus Hungary*[42] reiterated its earlier finding that the compatibility of life imprisonment with Article 3 ECHR can be evaluated based on whether there is possibility of release. In the present case, since the prisoner was excluded from the possibility of parole in the judgment, the ECtHR examined the legislation and practice of presidential pardon in the context of the possibility of review. In its judgment the ECtHR stated that it was not convinced that the applicant's sentence could actually be reduced because there was no practice of presidential pardon in Hungary in respect of the ALI. Furthermore, there was no legislation which clearly defined the requirements to be met and the conditions to be taken into account when considering a prisoner's application for pardon. Under the relevant Hungarian law, neither the Minister of Justice, nor the President of the Republic is obliged to give reasons for their decision, so the detainee may not be aware of what they must do to obtain clemency. Nor does the legislation guarantee that

39 Polgár 2017, p. 26.

40 Balázs Gellér, 'Az emberi élethez és méltósághoz való jog és az új Btk., különös tekintettel a büntetési rendszerre és a jogos védelemre' *in* Péter Hack (ed.), *Az új Büntető Törvénykönyv. Hagyomány és megújulás a büntetőjogban*, Bibó István College ELTE, Budapest, 2013, pp. 63–68.

41 Polgár 2017, p. 126.

42 *László Magyar v Hungary*, No. 73593/10, 13 October 2014.

the detainee's efforts to obtain their release will be taken into account by the decision-maker. The ECtHR therefore doubted whether the sentence imposed on the applicant was of a moderate duration within the meaning of Article 3 ECHR and found it to be in violation of the Convention. In view of the systemic problem identified in the specific case and the nature of the violation found, the ECtHR further considered that, in order to ensure the proper enforcement of the sentence, Hungary should reform, preferably by legislation, the system of review for *de facto* life imprisonment sentences.

In *Harakchiev and Tolumov versus Bulgaria*[43] the ECtHR followed its the findings in the Hungarian case. It pointed out that the absence of a procedure for the reduction of life imprisonment is in itself a sufficient basis for finding a violation of Article 3 ECHR. In such a case, it is not necessary to meet any further conditions, *e.g.* proof that the prisoner has served such a long period of their sentence that the continuation of detention can no longer be justified.

In *Bodein versus France,*[44] the ECtHR assessed a specific form of review, namely, the institution of judicial review in French law. The Court found that it allows for the possibility of release after 30 years from the beginning of the deprivation of liberty. This period was considered by the ECtHR to be acceptable in light of the discretion available to the States and no violation of Article 3 ECHR was established. In determining whether the French legislation was compatible with the Convention, the Court attached particular weight to the fact that this period included any form of deprivation of liberty, including pre-trial detention.

The next decision regarding Hungary was taken after the entry into force of the mandatory pardon procedure,[45] as detailed above. In the case of *T.P. and A.T.*[46] the ECtHR held that the 40-year period that a prisoner sentenced to life imprisonment must serve before they can hope for a first pardon is much longer than the maximum period recommended for review by national laws and international legal consensus. The cooling down period under the new Hungarian legislation therefore exceeds, according to the ECtHR, the limits of the discretion granted to the Member State. The ECtHR also referred to its earlier decision in *László Magyar*, stating that the

43 *Harakchiev and Tolumov v Bulgaria*, Nos. 15018/11, 61199/12, 8 October 2014
44 *Bodein v France*, No. 400410, 13 November 2014
45 On 1 January 2015.
46 *T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 4 October 2016.

presidential pardon does not ensure the *de facto* or *de jure* reducibility of the life sentence. Furthermore, the ECtHR expressed a number of concerns regarding the mandatory pardon procedure introduced by the amendment of the Criminal Law Enforcement Act. For example, it criticized the lack of discretional grounds and time limits for the President of the Republic's decision to grant release, and the fact that neither the President of the Republic, nor the Minister of Justice are required to give reasons for their decision. For the reasons set out above, the ECtHR was not satisfied that the applicants' sentence of life imprisonment could be reduced for the purposes of Article 3 of the Convention and therefore found a violation of the Convention.

Summarizing its practice, in *Hutchinson versus United Kingdom*[47] the ECtHR confirmed the criteria it considers when reviewing the compatibility of national rules life imprisonment with Article 3 ECHR. These are *(i)* the nature of the review (both judicial and administrative channels are acceptable); *(ii)* the scope of the review (legal basis for continuation or discontinuance); *(iii)* the conditions of the review (what behavior the prisoner must show in order to be released); *(iv)* the timeframe for the review (maximum 25 years from the date of the sentence).

In its decision in *Kruchió and Lehóczki versus Hungary,*[48] the ECtHR recalled the findings of the judgment rendered in *T.P. and A.T.*. Considering that *(i)* the mandatory pardon procedure in Hungary is only available after 40 years of imprisonment, and *(ii)* that the mandatory pardon procedure lacks adequate guarantees, it again found a violation of Article 3 ECHR.

It should be noted that the 40-year cooling down period is, according to the ECtHR, equally long whether it is about the ALI or 'simple' life imprisonment cases, where the possibility of parole is not excluded. This was confirmed by the ECtHR in *Bancsók and László Magyar versus Hungary (No 2).*[49] The earliest date of parole for the two applicants was set by the domestic court at 40 years. The fact that the applicants could not hope to be released from their sentences until they had served at least 40 years was sufficient for the ECtHR to find that their life sentences could not be regarded as reducible within the meaning of Article 3 ECHR.[50]

47 *Hutchinson v the United Kingdom,* (GC), No. 57592/08, 17 January 2017.
48 *Kruchió and Lehóczki v Hungary,* Nos. 43444/15 and 53441/15, 14 January 2020.
49 *Bancsók and László Magyar v Hungary,* Nos. 52374/15 and 53364/2015, 28 January 2022.
50 Id. para. 47.

In *Blonski and others* and *Horváth and others versus Hungary*[51] the ECtHR confirmed the position adopted in *Bodein* regarding the time period for reviewing release.[52] In *Blonski and others*, 7 applicants and in *Horváth and others*, 12 applicants were subject to parole, the earliest of which was between 30 and 40 years. According to the ECtHR, such long waiting periods constitute a violation of Article 3 ECHR.[53]

The lessons learned from the ECtHR practice in the cases presented can be summarized in the following principles. The ECtHR has taken note that the States Parties may impose life imprisonment for particularly serious crimes on adult offenders, and that the imposition of such a sentence is not in itself incompatible with the provisions of the ECHR. However, it is a condition that the sentence of life imprisonment may be reduced *de jure* and *de facto*. In order to assess this, the ECtHR must be satisfied that the sentenced person has a real chance of being released. The key issue in this context is the periodic review to be carried out after a maximum period of 25 years in line with ECtHR standards and with the application of the guarantees provided for in the legislation. Accordingly, where national law allows for a review of a life sentence with a view to its reduction, remission, termination or parole, it complies with the requirements of Article 3 ECHR (*de jure* requirement). However, the State Party must also provide at least one concrete case where the person sentenced to ALI has actually been released (*de facto* requirement). Nevertheless, the sentence is not irreducible merely because in a given case it lasts until the prisoner's death. A violation of Article 3 ECHR cannot therefore arise even where a prisoner sentenced to life imprisonment has the right under national law to be considered for release, but parole is refused on the well-founded and justified ground that they remain a danger to society.

The ECtHR therefore considers the application of the ALI to be in conformity with the ECHR if the above guarantees are regulated by law and applied. However, according to the decisions of the ECtHR, the amended Hungarian legislation, which entered into force on 1 January 2015, does not meet these requirements, despite the introduction of the mandatory

51 *Blonski and others v Hungary*, Nos. 12152/16 and 6 other applications, 23 October 2022; *Horváth and others v Hungary,* No. 12143 and 11 other applications, 2 March 2023.

52 Instead of the 30 years imposed in the *Bodein* case, the ECtHR takes 26 years into account in its reasoning. *See e.g.* the reasoning in *Bancsók and László Magyar v Hungary*, para. 45.

53 Id. para. 16.

pardon procedure. According to the ECtHR, the application of the ALI in individual cases therefore constitutes grounds for finding a violation of the ECHR.

It should be noted that in 2024 the Hungarian Parliament adopted the Thirteenth Amendment of the Fundamental Law of Hungary, according to which

> "A cardinal law shall specify the intentional offences committed against a child in respect of which the President of the Republic may not exercise his or her individual right of clemency under paragraph (3)(n)."[54]

At the very least, it is questionable to what extent this provision of the Fundamental Law is in line with the requirements arising from the ECtHR's practice. The amendment to the Fundamental Law is also likely to affect the practice of the Constitutional Court (to be discussed in the next Section).

5. Cases before the Constitutional Court of Hungary

The Hungarian regulation of life imprisonment raises serious questions not only in relation to the international requirements applicable to Hungary, but also in relation to the Fundamental Law, which is at the apex of the Hungarian legal hierarchy. This is well illustrated by the submissions to the Constitutional Court in the context of the ALI. Indeed, the Constitutional Court is competent to examine whether this legal instrument is in line with the requirements of the Fundamental Law. In the forthcoming section of the article, we attempt to show the constitutional contexts in which the Hungarian Constitutional Court's practice in relation to the ALI has developed and is still developing.

To date, there have been only two cases before the Constitutional Court where the constitutionality of the ALI was at the heart of the case. In neither case, however, did the Constitutional Court carry out a substantive constitutional review, therefore, these decisions provide little guidance for answering the questions raised. At the same time there are several other pending proceedings which provide an opportunity for the Constitutional Court to examine the compatibility of ALI with the Fundamental Law and to formulate a substantive position on the merits.

54 Fundamental Law of Hungary, Article 9(8), entered into force on 1 July 2024.

5.1. Decisions of the Constitutional Court on the Constitutionality of the ALI

The earliest decision on ALI was taken in a procedure based on a judicial initiative. The Constitutional Court ruled in *Order No. 3013/2015. (I. 27.) AB* that the proceedings should be terminated because of the significant modification on the Criminal Law Enforcement Act. The petition was filed by a judge of the Szeged Court of Appeal,[55] seeking a decision that the provisions of the former law on ALI[56] were contrary to the ECHR. At the time of the initiation of the procedure, Hungarian law did not yet include the mandatory pardon procedure; this amendment was made after the submission of the judicial initiative. The essence of the motion was that the ALI cannot be reduced *de jure*, because the legal institution itself excludes the possibility of parole. The Constitutional Court noted that the Criminal Law Enforcement Act introduced a mandatory pardon procedure as a form of review effective from 1 January 2015. In light of this, the Constitutional Court considered that the petition had become obsolete and the Constitutional Court terminated its procedure without examining the merits.

The other related decision was taken in a procedure for the interpretation of the Fundamental Law,[57] which was initiated by the Commissioner for Fundamental Rights. *Order No. 3492/2023. (XII. 1.) AB* also failed to examination the merits, because the Constitutional Court dismissed the petition. The Commissioner raised a number of issues in his petition on the basis of which he considered it necessary to interpret a specific provision of the Fundamental Law in the context of life imprisonment.

Firstly, he asked whether it follows from the prohibition of torture, inhuman and degrading treatment or punishment in Article III(1) of the Fundamental Law that a person sentenced to life imprisonment must be given the possibility of release within a specified and foreseeable period. In its order, the Constitutional Court pointed out that, under the statutory provision governing its jurisdiction, it may only interpret a provision of the Fundamental Law in the context of a specific constitutional problem

55 Act CLI of 2011 on the Constitutional Court, Section 32.

56 The Constitutional Court examined the violation of international treaties by Act IV of 1978 on the Criminal Code, Section 47/A(1) and (3), and Act C of 2012 on the Criminal Code, Section 42(2) and Section 44(1).

57 Act CLI of 2011 on the Constitutional Court, Section 38.

if the interpretation can be directly deduced from the Fundamental Law. It also noted that the Criminal Law Enforcement Act contains provisions on the possibility of release within a specified foreseeable period of time for persons sentenced to life imprisonment. In other words, the Criminal Law Enforcement Act regulates precisely what the petitioner's question was aimed at. The Constitutional Court concluded that the legislation in force at the statutory level answered the Commissioner's question. Therefore, the question cannot be examined without consideration to the applicable law, solely by interpreting the Fundamental Law. Thus, the Constitutional Court saw no procedural possibility to examine the merits of the specific question submitted by the Commissioner.[58]

The petitioner also raised the question whether it follows from Article III(1) of the Fundamental Law that the latest date when the possibility of release is to be considered (general maximum) must be determined at legislative level. With this, the Commissioner was actually referring to a requirement that has also been expressed by the ECtHR: a statutory provision enshrining the date for mandatory review. In this context, the Constitutional Court held that, as regards the question regarding the level of regulation, no requirement can be derived from Article III(1) of the Fundamental Law *per se*. And the specific question cannot be answered by interpreting Article III(1) of the Fundamental Law. Therefore, there was no scope to examine the merits of this issue in the present proceedings.[59]

According to the Commissioner's third question, whether the possibility of release within a reasonable period of time must in theory be guaranteed to all persons sentenced to life imprisonment, it follows from Article B(1) and Article III(1) of the Fundamental Law that this possibility must be guaranteed regardless of the substance of the law applicable at the time of conviction.[60] In essence, the Constitutional Court again pointed out, that the answer is provided by the legislation in force at the statutory level. In a procedure of this nature – that is to say, a procedure for the interpretation of the Fundamental Law – the Constitutional Court could not give an answer for lack of competence.

The foregoing shows that the Constitutional Court has so far not taken a substantive position on the constitutional issues related to ALI. The compatibility of this legal instrument with the Fundamental Law therefore

58 Order No. 3492/2023. (XII. 1.) AB, Reasoning [19].
59 Id. Reasoning [20].
60 Id. Reasoning [22].

remains in question. However, as a hypothetical matter, it is worth taking into account the constitutional problems that could be the cornerstones of such constitutionality assessment by comparing the current regulation of ALI with certain provisions of the Fundamental Law.

5.2. To What Extent Might the Practice of the ECtHR be Relevant in the Proceedings before the Hungarian Constitutional Court?

In the context of possible future proceedings, the question may justifiably arise to what extent the decisions of the ECtHR on ALI are relevant in the development of the Hungarian Constitutional Court's jurisprudence.

The ECHR is binding because it is part of the Hungarian legal system.[61] The binding force of the text as a whole may be affected only by circumstances such as the reservation made to it or the failure to ratify the additional protocols. Hungary made a reservation to Article 6 ECHR (fair trial, access to court), which was withdrawn by the Hungarian Government in 2001. Certain protocols to the ECHR – such as Protocol No. 12 on the general prohibition of discrimination or Protocol No. 16 on advisory opinions – have not yet been ratified by Hungary, however, these are not relevant for the legal assessment of ALI.

The ECtHR case law gives substance to the provisions of the Convention by interpreting its text authentically. Its means of interpretation are determined by the ECHR itself: the ECtHR may interpret a Convention provision in judgments, decisions, advisory opinions and decisions on enforcement.[62]

As to the legal effect of ECtHR decisions, a judgment is binding on the state that was a party to the proceedings.[63] It should be added that this obligation may be loosened by practical circumstances. *(i)* On the one hand, disputes of interpretation may arise in the course of implementation between the Member States' government representatives and the Council of Europe's Committee of Ministers responsible for monitoring the implementation of judgments. Such a dispute could for example concern whether a general measure in the form of legislation is required under the judgment or as to what specific measure constitutes a remedy. If there is a dispute

61 Promulgated by Act XXXI of 1993.
62 ECHR, Articles 46(3), 47(1), and Protocol No. 16.
63 Id. Article 46(1).

over the interpretation of the judgment on which these bodies cannot agree, the Committee of Ministers may refer the matter to the ECtHR itself for an interpretation of its own decision.[64] *(ii)* On the other hand, the ECtHR does not call into question that a Member State has a margin of appreciation regarding the implementation of a decision, typically when it concerns domestic remedies and the way in which the fundamental or human right in question is protected. The exact limits of this margin is a matter for further consideration. An extreme example is a domestic law in Russia, now a non-State Party, which empowered the Russian government to bring a case before the Federal Constitutional Court to declare that a judgment of the ECtHR is contrary to the Russian Constitution.[65]

The binding force of ECtHR decisions is the reason why the Hungarian Act on Criminal Procedure provides for the review of the related criminal case in Hungarian legislation.[66]

There is a strong divergence of academic opinion on the impact of ECtHR decisions on other States Parties beyond the specific case.[67] The ECtHR's intention, however, is clear regarding the interpretation and principles set out in its case law:

> "[the] Court's judgments are in fact intended not only to decide cases brought before it but more generally to clarify, defend and improve the rules established by the Convention, thereby helping to ensure that States comply with the obligations they have assumed as Contracting Parties."[68]

The practice of the Hungarian Constitutional Court demonstrates that it pays close attention to the interpretation of the ECtHR. In the reasoning of its decisions, it regularly refers to the case law on the relevant ECHR provision. It is important to note that the Constitutional Court referred to the Convention for the first time in its *Decision No. 23/1990. (X. 31.) AB* on the abolition of the death penalty, long before Hungary ratified the ECHR. This was a rather symbolic gesture at the time, but within a few years it became standard practice for the Constitutional Court to refer to ECtHR

64 Id. Article 46(3).
65 Péter Paczolay, 'Az Emberi Jogok Európai Bírósága, mint európai alkotmánybíróság', *Miskolci Jogi Szemle,* Vol. 15, Issue 1, 2020, p. 203.
66 Act XC of 2017 on Criminal Procedure, Section 649(4).
67 Péter Váczi, 'A nemzeti identitás és európai identitás csatája Magyarország Alkotmánybírósága és az Emberi Jogok Európai Bírósága között', *Jog-Állam-Politika,* Vol. 14, Special Issue 1, 2022, pp. 43 and 45.
68 *Ireland v United Kingdom*, No. 5310/71, 18 January 1978, para. 154.

case law in its decisions. Thus, over time, the Strasbourg principles became an integral part of constitutional arguments in Hungary.

A different question is the extent to which the case law of the ECtHR is taken as guidance by the Constitutional Court. In *Decision No. 18/2004. (V. 25.) AB* the response of the Constitutional Court to this question was still modest. In the context of freedom of expression, however, it acknowledged that the decisions of the ECtHR shape and bind Hungarian jurisprudence.[69] Later on, the Constitutional Court expressly ruled in favor of applying the case law of the ECtHR. In *Decision No. 61/2011. (VII. 13.) AB* the Constitutional Court not only referred to the ECtHR and the Convention, but also laid down an important constitutional principle that has been followed ever since. Accordingly,

> "[i]n the case of certain fundamental rights, the Constitution formulates the substantive content of the fundamental right in the same way as an international treaty (such as the ICCPR and the ECHR). In these cases, the level of protection of the fundamental right by the Constitutional Court can in no case be lower than the level of international protection (typically that developed by the Strasbourg Court of Human Rights). It follows from the principle of *pacta sunt servanda* [Article 7(1) of the Constitution, Article Q(2)–(3) of the Fundamental Law] that the Constitutional Court must therefore follow the Strasbourg case law and the level of protection of fundamental rights set out therein, even this would not necessarily follow from its own precedent decisions."[70]

This principle has been confirmed by several subsequent Constitutional Court decisions. For example, according to *Decision No. 36/2013. (V. 12.) AB,*

> "the Constitutional Court must refrain from interpreting a given statute (or statutory provision) in such a way that the inevitable consequence would be a breach of the international legal obligation undertaken and a series of condemnations of Hungary before the ECtHR."[71]

Finally, it should also be pointed out that the relevance of ECtHR case law depends on the type of Constitutional Court proceedings. Indeed, when the Constitutional Court is examining the conflict of law with an international

69 ABH 2204, 303, 306.
70 ABH 2011, 290, 321.
71 Decision No. 36/2013. (V. 12.) AB, Reasoning [28].

treaty such as the ECHR,[72] it necessarily takes into account the findings of the ECtHR more than in its other competences.

Of course, this does not mean that the ECtHR and the Hungarian Constitutional Court would judge a case in the same way. There are attempts in Hungarian scholarly literature to evaluate to what extent and in what ways the decisions of the ECtHR and the Constitutional Court show similarities or even differences based on the same or almost identical facts.[73] There may be a number of reasons for the difference of opinion between the two courts – from minor differences in the facts established, through the interpretation of the provisions serving as a basis for reference, to differences in the vision of the two courts, however, we shall not elaborate on these in the present paper. In summary, the Constitutional Court has referred to the case law of the ECtHR in a number of cases since 1990 and has used in its reasoning the legal principles and tests developed by the Strasbourg Court, which have thus become an integral part of the Hungarian Constitutional Court's practice.[74]

5.3. What Possible Violations of the Fundamental Law can the Constitutional Court Examine in the Context of de facto Life Imprisonment?

According to the information available on the website of the Constitutional Court,[75] at the time of finalizing the manuscript of this article, there was one relevant constitutional complaint pending. The case has been on the

72 Fundamental Law, Article 24(2)(f).

73 *See e.g.* Lénárd Sándor, 'Az Alkotmánybíróság és az Emberi Jogok Európai Bírósága előtt ugyanazon közhatalmi aktus ellen benyújtott panaszok miatt indult jogvédelmi ügyek összehasonlító értékelése, 1–2. rész', *Alkotmánybírósági Szemle*, 2020/1, pp. 31–36; and *Alkotmánybírósági Szemle,* 2020/2, pp. 30–37.

74 Péter Kovács, 'Az Emberi Jogok Európai Bírósága ítéletére való hivatkozás újabb formulái és technikái a magyar Alkotmánybíróság, valamint néhány más európai alkotmánybíróság mai gyakorlatában', *Alkotmánybírósági Szemle*, 2013/2, pp. 73–84; Marcel Szabó & Sándor Szemesi, 'A nemzetközi szerződésbe ütközés újabb vizsgálata az Alkotmánybíróság gyakorlatában: lehetőségek és korlátok', *Közjogi Szemle,* Vol. 16, Issue 2, 2023, pp. 1–8; Marcel Szabó, 'Az Alkotmánybíróság és az Emberi Jogok Európai Bíróságának gyakorlata' *in* Kinga Zakariás (ed.), *Az alkotmánybírósági törvény kommentárja,* Pázmány Press, Budapest, 2022, pp. 99–107.

75 Case fact sheet, at https://alkotmanybirosag.hu/ugyadatlap/?id=C5FB70C03EB40D1DC1258709005BE801.

docket of the Constitutional Court twice so far, most recently in June 2020. In light of this motion, it is possible to scope of the examination to be conducted by the Constitutional Court in relation to ALI. An interesting aspect of this particular case is that the ECtHR has already found a violation of Article 3 ECHR in the petitioner's case.[76] Subsequently, the petitioner initiated a review of the judgment finding him criminally liable and imposing the ALI according to the regulations of Hungarian Code of Criminal Procedure. The *Kúria*, however, rejected this application for review by an order and it did not change the ALI penalty imposed. The petitioner therefore argues in their constitutional complaint that their conviction violates their right to human dignity guaranteed by Article II of the Fundamental Law, the prohibition of torture, inhuman or degrading treatment or punishment under Article III(1), the right to a fair trial under Article XXVIII(1) and the right to a remedy under Article XXVIII(7). From among these alleged violations, the most significant element of the petition is arguably, in light of the case law of the ECtHR, the examination of the compatibility of ALI with Article III(1) of the Fundamental Law.

The practice of the Constitutional Court provides some guidance for the assessment. The Constitutional Court has explained in detail the constitutional substance of the provision stating the absolute prohibition of torture, inhuman or degrading treatment or punishment in its *Decision No. 32/2014. (XI. 3.) AB*. In this decision, the Constitutional Court pointed out that the prohibitions listed were previously regulated by the Constitution together with the right to human life and dignity in Article 54. Accordingly, the prohibition of torture, inhuman and degrading treatment or punishment was an autonomous and unrestricted part of the right to human life and dignity. Although the Fundamental Law regulates the right to life and human dignity (Article II) and the prohibition of torture, inhuman and degrading treatment or punishment (Article III) in separate articles, this way of drafting the norms only creates a formal distinction. Thus, in the interpretation of the Constitutional Court, the prohibitions in Article III(1) are also separate, specific forms of the prohibition of the violation of the right to life and human dignity. The decision notes that this approach is in line with the content of Article 3 ECHR, as elaborated by the ECtHR, according to which the violation of these prohibitions also constitutes a vio-

76 *T.P. and A.T. v Hungary*, Nos. 37871/14 and 73986/14, 4 October 2016.

lation of human dignity.[77] Accordingly, the Constitutional Court considered the practice of the ECtHR to be the guiding principle in defining certain conceptual elements contained in Article III(1) of the Fundamental Law.[78]

It is reasonable to conclude that the Constitutional Court would act along the lines of the principles laid down in *Decision No. 32/2014. (XI. 3.) AB* in the context of the ALI, supplementing it, if necessary, with further ECtHR jurisprudence. It is important to note, however, that in this decision the Constitutional Court examined partly the unconstitutionality of the challenged legislation and partly its conflict with an international treaty. The pending petition on ALI is different in that it only seeks the examination of the alleged infringement of the Fundamental Law. Thus, the substantive constitutionality examination in this case will presumably be limited to the compatibility of the legal instrument with the Fundamental Law.[79] The question will be to what extent the Hungarian Constitutional Court will give a different meaning and constitutional substance to the prohibition in Article III(1) of the Fundamental Law compared to the ECtHR interpretation of Article 3 ECHR.

The Hungarian Constitutional Court is bound by the petition submitted to it.[80] Therefore, in further Constitutional Court proceedings an examination in connection with Article IV(2) of the Fundamental Law may also arise. This provision of the Fundamental Law explicitly allows the imposition of an ALI in the case of a deliberate, violent crime. According to the explanatory memorandum attached to it, the provision does not exclude the possibility of deprivation of liberty for life, but it may only be imposed for committing a crime, it can only be based on the final judgment of a court, and with due regard to the criteria of necessity and proportionality. The question may arise what the constitutional substance of this provision of the Fundamental Law is and how it relates to Article III(1). A further question may be what requirements can be derived from Article IV(2) of the Fundamental Law with regard to the regulation of ALI, for example when it comes to the rules of the review mechanism regulated on the statutory level.

77 Decision No. 32/2014. (XI. 3.) AB, Reasoning [46].
78 Id. Reasoning [33]–[38].
79 However, the Constitutional Court can examine the conflict of laws with international treaties *ex officio*, *i.e.* of its own motion, in any procedure. *See* Act CLI of 2011 on the Constitutional Court, Section 32.
80 Act CLI of 2011 on the Constitutional Court, Section 52(2).

6. Conclusions

In Hungarian criminal law, ALI is not a new type of penalty – notwithstanding the fact that the Fundamental Law has created a separate concept for this institution – but a form of life imprisonment where eligibility for parole is excluded. The debate surrounding the legal institution of ALI is still ongoing both at the international and the national level.

The main actor defining the interpretation of the legal institution at the international level is the ECtHR. The shaping role of the ECtHR is reflected in the fact that the introduction of the mandatory pardon procedure in Hungarian law for the prisoners who are serving ALI was intended to meet the requirements set by the ECtHR. In this respect however, it is still a question if the hope of release is granted to all convicted person in Hungary.

The national constitutional discourse regarding ALI takes place before the Constitutional Court, as this forum has the competence to interpret the Fundamental Law authentically. The Constitutional Court has not yet ruled on the merits of the ALI. Thus, it is the future task of the Constitutional Court to develop a *modus vivendi* in its decisions, which is consistent with its practice under Article III, is in line with international standards, including those of Strasbourg, and which is still compatible with the provision of Article IV(2) of the Fundamental Law.

Given the international and national standards governing ALI, it is reasonable to expect that the debate on this legal institution will continue at both national and international level. The question remains how these discourses will affect the regulation and application of this legal instrument and whether these will result in the further development of ALI in Hungarian law.