Periodic Country Report: Hungary

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Introduction

Hungary is one of the countries with systemic problems, as is well documented by EU and extra-EU documents system of governance.[1] Hungary consistently appears across the different indices showing declining Rule of Law patterns. Varieties of Democracy (V-Dem) showed that Hungary was not a democracy any longer, instead it became an electoral autocracy.[2] Freedom House does not classify Hungary as a free country since 2019.[3] According to the Bertelsmann Stiftung's Transformation Index (BTI) Hungary was among the countries with the most significant drops in matters of the Rule of Law.[4] When looking over a five-year-period, the World Justice Project's Rule of Law Index showed that Hungary – together with Poland – declined the most in the EU/EFTA/North-America region.[5] Academic literature attaches various labels to Hungary, such as hybrid

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[1] L. Pech and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', (2017) 19 *Cambridge Yearbook of European Legal Studies*, 3-47, at 8. See also G. Halmai, 'Populism, authoritarianism and constitutionalism', (2019) 20 *German Law Journal* 3, 269-313; P. Bárd, B. Grabowska-Moroz, V. Z. Kazai, 'Rule of Law Backsliding in the European Union Lessons from the Past, Recommendations for the Future', (15 January 2021) *RECONNECT Blog.* Available at: https://reconnect-europe.eu/blog/rule-of-law-backsliding-in-the-european-union-lessons-from-the-past-recommendations-for-the-future/. In detail see P. Bárd, B. Grabowska-Moroz, J. Beqiraj, C. Closa, J. Grogan, G. Hernández, V. Z. Kazai, D. Kochenov, T. Tadeusz Koncewicz, M. Michalak, *The strategies and mechanisms used by national authorities to systematically undermine the Rule of Law and possible EU responses: RECONNECT Work Package 8 – Deliverable 2*, (RECONNECT, 2020). Available at https://reconnect-europe.eu/wp-content/uploads/2021/01/D8.2.pdf.

[2] https://www.v-dem.net/en/, https://www.v-dem.net/media/filer_public/c9/3f/c93f8e74-a3fd-4bac-adfd-ee2cfbc0a375/dr_2021.pdf

[3] https://freedomhouse.org/country/hungary; Zselyke Csáky, Nations in Transit 2020. Dropping the Democratic Façade. Availabe at: https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade.

[4] https://www.bti-project.org/en/home.html?&cb=00000

[5] https://worldjusticeproject.org/rule-of-law-index/global/2020

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regime,[6] constitutional populism,[7] abusive constitutionalism,[8] illiberal democracy[9] or democratic backsliding,[10] struggling to find the ideal description, showing the authoritarian nature of the regime.[11] This Country Report pays special attention to the effects deriving from the capturing of courts and a related phenomenon, systemic infringements of fundamental rights in the criminal justice sector. This Report will focus on the key legal and practical implications that such capturing has for the administration and delivery of criminal justice at the domestic level, and in a cross-border setting.

Even though every governmental step to jeopardize the rule of law and human rights have a veneer of legality, in the overall setting one can conclude that institutions and entities that were designed to check the government – the constitutional court, ordinary courts, media – are captured, and as a consequence they cannot fulfil their original functions. Modern authoritarian regimes[12] are however different from 20th century dictatorships.[13] Even though violence is rarely used, the Fundamental Law, ordinary laws, constitutional organs, state institutions do not serve as a constraint on arbitrary power, and thus the system cannot be labelled as democracies based on the rule of law anymore. Other elements of democracy are also under threat, media pluralism is seriously hampered,[14] furthermore shrinking the space of civil society and limitation of academic freedom are increasingly pressing problems.[15] All the steps to eliminate internal checks on the government are legal, but not in line with the rule of law. In other words, today's Hungary is in a rule by law era, since the governing supermajority uses abusive constitutionalism and legislation to consolidate its political power and to undermine democracy. Of course no state is immune to rule of law and fundamental rights problems, but Hungary introduced processes "through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant

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6 András Bozóki, Dániel Hegedűs, An externally constrained hybrid regime: Hungary in the European Union, Democratization, Volume 25, 2018 - Issue 7, 1173-1189.

7 Paul Blokker, Populism as a constitutional project, International Journal of Constitutional Law, Volume 17, Issue 2, 2019, 536–553.; Blokker, P., Bugaric, B., and Halmai, G. (2019). Introduction: Populist constitutionalism: Varieties, complexities, and contradictions. German Law Journal, 20(3), 291-295.

8 Rosalind Dixon and David Landau, Abusive Constitutional Borrowing, Legal globalization and the subversion, Oxford, 2021; David Landau, Abusive Constitutionalism, 47 UC Davis Law Review 189-60 (2013).

9 C. Gervasoni, 'A Rentier Theory of Subnational Regimes', World Politics, 62(2): 302–340 (2010).

10 W. Sadurski, Poland's Constitutional Breakdown, Oxford, 2019.

11 Martin Krygier (2016) The rule of law: pasts, presents, and two possible futures. Ann Rev Law Soc Sci, 12:199–229.

12 János Kornai: The System Paradigm Revisited. Clarification and Additions in the Light of Experiences in the Post-Socialist region, Revue D'études Comparatives Est-Ouest, 2017, Vol. 48, N 1-2, p 239-296.

13 "Sophisticated 21st century authoritarians, like their 20th century counterparts, are leaders who want to stay in power for the foreseeable future and who will do whatever it takes to realize that goal. But, having learned the lessons of earlier authoritarianisms, they now achieve their ambitions without brute force." K.L. Scheppele, 'Not Your Father's Authoritarianism: The Creation of the "Frankenstate", Newsletter of the European Politics and Society Section of the American Political Science Association, 2013, 5–9.

14 Gábor Polyák, 'Media in Hungary: Three pillars of an illiberal democracy,' in: Public Service Broadcasting and Media Systems in Troubled European Democracies. Springer, 2019, 279–303.Petra Bárd, Judit Bayer, A comparative analysis of media freedom and pluralism in the EU Member States, Brussels, European Parliament, 2016, https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU(2016)571376_EN.pdf.

15 It is sufficient here to mention the respective CJEU cases. Case C-78/18 Commission v Hungary (Transparency of associations), 18 June 2020, ECLI:EU:C:2020:476; Case C-66/18 Commission v Hungary (Higher Education), 6 October 2020, ECLI:EU:C:2020:792. For immediate analyses see Petra Bárd, Joelle Grogan, Laurent Pech, Defending the Open Society against its Enemies: The Court of Justice's ruling in C-78/18 Commission v Hungary (transparency of associations), VerfassungsBlog, 22 June 2020, https://verfassungsblog.de/defending-the-open-society-against-its-enemies/; Petra Bárd, A Strong Judgment in a Moot Case: Lex CEU before the CJEU, RECONNECT blog, 12 November 2020 https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/

party."[16] Unlike other types of infringements of a national constitution, or international documents, these systemic Rule of Law violations are deliberately designed to serve the exclusive interests of the ruling majority and enable and authorize arbitrary decisions.

A further and related concern is the rise of abusive case law.[17] Courts are among the first institutions captured by illiberal regimes.[18] They assist illiberal governments in invoking national sovereignty, constitutional identity, national security or simply offer them more time by refraining from adjudicating on politically sensitive cases in due time.[19]

A relevant issue for the present paper is the non-declaration of the Hungarian rules on life imprisonment without the possibility of parole unconstitutional,[20] albeit it had been clearly in violation of the ECHR and previous ECtHR case-law vis-à-vis other states. The Hungarian Constitutional Court (HCC) planned to declare the provision unconstitutional, but the President waited with the voting on the case until new judges joined the HCC and the majority for quashing the provision changed.[21] And in the meantime the ECtHR declared the Hungarian real life imprisonment regime in violation of the ECHR.[22] When the case was ultimately decided by the HCC,[23] post-Strasbourg, the majority of Hungarian constitutional judges took into account the fact that the legislative amended the respective law, and with due regard to the change in rules the HCC declared that "the circumstances giving rise to the complaint ceased to exist in the meanwhile" and it made use of its rights to exceptionally terminate the procedure, since the complaint "became substantially obsolete".[24] The HCC did not go into the merits albeit a legal analysis of the new regulation against the Strasbourg case law could have proven that the new rules are also contrary to the ECHR.[25] Since the HCC was not in the position to declare either the old or the new regulation unconstitutional, in a later case the new regulation has also been declared to be in violation of the ECHR again.[26] Even though the FD EAW allows in Article 5 for making surrender conditional on reviewing a life sentence on request or at the latest after 20 years, or for the application of

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16 Pech and Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", 19 CYELS (2017), 3-47, at 8.

17 R: Dixon, D. Landau, 'Abusive Judicial Review: Courts Against Democracy', (2019) 53 University of California Davis, 1313-1387

18 P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', (2019) 15 European Constitutional Law Review 1, 48-72

19 See for example the Hungarian Constitutional Court being silent on a submission regarding Lex CEU, a law singling out the Central European University and making its operation impossible on the territory of Hungary. After six months of silence, a reason to justify its lack of action was introduced. The HCC decided to stay the proceedings before it this time in the name of "European constitutional dialogue". This is just another inappropriate reason to postpone the proceedings as the legal bases for reviewing the Lex CEU are different with the HCC supposed to review the constitutionality of the Lex CEU on the basis of the Fundamental Law, whereas the CJEU will review whether the Lex CEU is compatible with EU law. HCC, "In the spirit of the European Constitutional Dialogue the Constitutional Court suspended its Procedures in the Cases related to the Act on National Higher Education and the "Act on NGOs"", 12 June 2018: https://hunconcourt.hu/kozlemeny/in-the-spirit-of-the-european-constitutional-dialogue-the-constitutional-court-suspended-its-procedures-in-the-cases-related-to-the-act-on-national-higher-education-and-the-act-on-ngos/

20 See Articles 40(1) and 47/A of Act IV of 1978 on the Criminal Code, Articles 41-44 of Act C of 2012 on the Criminal Code in force since 1 July 2013; furthermore Article IV of the Fundamental Law in force since 1 January 2012.

21 Hungarian Constitutional Court Resolution 3013/2015. (I. 27.). Viktor Z. Kazai, „ … hogy ne kelljen a múltat »végképp eltörölni«" -- Lévay Miklós leköszönt alkotmánybíróval Kazai Viktor Zoltán beszélget, Fundamentum, 59-71, 2016/1.

22 Magyar v. Hungary, Application no. 73593/10, 20 May 2014.

23 HCC Resolution 3013/2015. (I. 27.).

24 Act CLI of 2011 on the Constitutional Court, Article 59, Article 67 Section (2) Point e).

25 We have made such an analysis. See Petra Bárd, The Hungarian life imprisonment regime in front of apex courts I, 18 June 2015, https://jog.tk.hu/en/blog/2015/06/the-hungarian-life-imprisonment

26 Sándor Varga and Others v. Hungary, Applications nos. 39734/15, 35530/16 and 26804/18, 17 June 2021.

measures of clemency aiming at a non-execution of a custodial life sentence, the insecurity about the constitutionality of the life imprisonment regime certainly undermines mutual trust.

Another problem relevant for the present discussion is the overcrowding of prisons and in general inhuman prison conditions in Hungary. In an unprecedented pilot judgment *Varga and Others v. Hungary*[27] proceeding the ECtHR declared prison conditions in violation of Article 3 ECHR, which led the Higher Regional Court of Bremen asking the CJEU in the *Aranyosi* case how to go on with surrendering suspects and convicts to Hungary.[28] Hungary seemingly complied with the requirements, but in reality, it did not. Instead of rethinking its penal policy, which was expected by the ECtHR, the government continued to keep prisoners under horrible conditions, but it established a fast track compensation system outside the traditional judicial route to pre-empt further Strasbourg condemnations.[29] Once inmates were awarded compensations by the courts using this compensation scheme, the government labeled these judgments as a "prison business" of lawyers and their clients.[30] In clear violation of separation of powers, the government straightforwardly overwrote court decisions.[31] So not only did the government let prisoners down by keeping them under inhuman conditions, even after the Strasbourg judgment had been rendered, but it also adopted a law with the aim of overwriting judicial decisions and making sure that prisoners could not be awarded compensation, neither as a result of ECtHR judgments, nor due to national judgments. But pointing to this dubious compensation scheme the Hungarian government managed to convince the Strasbourg court about the correctness of the execution of *Varga and Others* in *Domján*, or that at least the compensation according to the new rules preempt a Strasbourg application[32] which again led the Luxembourg court in *ML* to conclude that the compensation scheme must be taken into account and in practice surrender requests can again be complied with.[33]

Let me mention one more issue with regard to judicial independence. Judges true to their vocation and taking their domestic and EU law obligations seriously are harassed. Judge Csaba Vasvári asked several questions in a case known as *IS*[34] in the forms of a preliminary reference. The questions covered among others the issue of judicial independence in Hungary.[35] The Prosecutor General exercised his right to initiate a review of the order for the preliminary reference in front of the Hungarian Supreme Court (in Hungarian: Kúria),[36] and the Kúria

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[27] Varga and Others v. Hungary, Applications nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015.

[28] Joined Cases C-404/15 and C-659/15 PPU Judgment of the Court (Grand Chamber), *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* Requests for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen (Germany), 5 April 2016, ECLI:EU:C:2016:198.

[29] Cs. Győry, 'Fighting Prison Overcrowding with Penal Populism – First Victim: the Rule of Law: New Hungarian Law "Suspends" the Execution of Final Court Rulings', (12 March 2020) *VerfBlog*. Available at: https://verfassungsblog.de/fighting-prison-overcrowding-with-penal-populism-first-victim-the-rule-of-law/.

[30] http://abouthungary.hu/prison-business/.

[31] News in Brief, 'Parliament suspends compensation payments to prisoners', (26 February 2020) *About Hungary.* Available at: http://abouthungary.hu/news-in-brief/parliament-suspends-compensation-payments-to-prisoners/.

[32] Domján v. Hungary, Application no. 5433/17, 14 November 2017.

[33] Case C-220/18 PPU Judgment of the Court (First Chamber), *ML,* Request for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen (Germany), 25 July 2018, ECLI:EU:C:2018:589.

[34] Case C-564/19, Judgment of the Court (Grand Chamber), *IS (Illégalité de l'ordonnance de renvoi),* 23 November 2021, ECLI:EU:C:2021:949. For an immediate analysis see Bárd, P., '*The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS', (26 November 2021) VerfBlog*, https://verfassungsblog.de/the-sanctity-of-preliminary-references/.

[35] For detailed analyses see D. G. Szabó, *'A Hungarian Judge Seeks Protection from the CJEU – Part I', (28 July 2019) VerfBlog,* https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/; V. Vadász, *A Hungarian Judge Seeks Protection from the CJEU – Part II, (7 August 2019) VerfBlog,* https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-ii/.

[36] Act XC of 2017, Articles 666-669.

held that the challenged decision was illegal, without attaching any further legal consequences to this finding.[37] The Kúria's decision straightforwardly restricted lower courts' right (and sometimes even obligation) to turn to the CJEU along Article 267 TFEU, since – so the judgment goes – the harmony between Hungarian and EU law must not be subject to preliminary references. And due to the hierarchy of courts, this decision is binding on every single ordinary judge in Hungary. When assessing judges, court presidents must check whether judges comply with such judicial precedent. The Acting President of the Budapest-Capital Regional Court, expressly because the reference for a preliminary ruling had been rendered illegal by the Kúria, initiated a disciplinary proceeding against the judge referring the case to the CJEU.[38] In the meantime, the disciplinary procedure was withdrawn with reference to the "interest of the judicial organization", or in other words, because of the international and domestic public outcry. But it is highly likely that a less high-profile case would not be withdrawn.[39] But disciplinary proceedings are not the only tools to silence judges and to prevent them from taking part in the European judicial dialogue. Gabriella Szabó was not confirmed as a judge after her probationary period as a junior judge,[40] only because she had sent a preliminary reference to the CJEU on certain Hungarian legal provisions restricting asylum.[41]

In sum, due to judicial capture, the legislative overwriting of court judgments, and the harassment of judges, courts cannot fulfill their traditional function of being the guardians of the rule of law and human rights including minority rights.

Member States, like Hungary with poor rule of law records, with a special regard to procedural guarantees, prison conditions and the health of the judiciary, opening the way for unconstrained powers by the executive, could obviously not join the EU, were they to apply today. But now that they joined the EU club, they cannot be made to leave, and thus endanger the European project from within.[42] Difficulties in the operation of mutual trust and mutual recognition based laws, such as the FD EAW are like canaries in the coalmine showing that rule of law decline in one Member State puts the European project, judicial cooperation between the Member States and specific laws in danger.

In the following, cases will be singled out, where respect for human rights by Hungary had been questioned by the executing judicial authorities, and which reached the Luxembourg, and sometimes also the Strasbourg courts. These mainly concern the respect for fundamental rights, albeit an LM-type[43] scenario with the executing court questioning judicial independence and thus the fair trials rights of suspects may also occur in the future in light of systemic attacks against the Hungarian judiciary. A case that did not reach the CJ, the *Tobin* case will also be discussed to show implementation problems in an entity such as the EU, where Member

[37] Act XC of 2017, Article 669(3).

[38] File number: 2019.II.IV.K.15/2.

[39] Two further questions were added to the original preliminary reference in light of the Kúria's decision and the disciplinary proceeding. The AG Opinion was delivered on 15 April 2021.

[40] The Venice Commission criticized the practice of probationary periods back in 2012 when it reviewed the then recent law on the judiciary. See Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)001-e. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e But the Hungarian government never followed up the recommendations.

[41] Eszter Zalán, Hungarian judge claims she was pushed out for political reasons, 6 July 2021, https://euobserver.com/democracy/152349

[42] U. Belavusau, 'Case C-286/12 Commission v. Hungary', (2013) 50 *Common Market Law Review* 4, 1145-1160.

[43] Case C-216/18 PPU Judgment of the Court (Grand Chamber), *Minister for Justice and Equality v LM,* Requests for a preliminary ruling from the High Court (Ireland), 25 July 2018, ECLI:EU:C:2018:586.

States belong to different legal families. In addition, a highly political case, the *Hernádi* controversy and the related CJEU case *AY*[44] will also be discussed, where Hungarian courts as requested judicial authorities in a thinly veiled attempt to ensure impunity of a Hungarian citizen, expressed concerns of the principles *ne bis in idem* and fair trial rights in general.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

I.1. Hungarian authorities' competence and qualification to issue EAWs

Hungary transposed the EAW Framework Decision in 2003 (Act CXXX of 2003 on the Co-operation with the Member States of the European Union in Criminal Matters) and a new act came into force in 2012, replaced the earlier one (Act CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union).

In Hungary, the EAW is issued by a court. Before the indictment is filed, it is issued by the investigating magistrate, and if a custodial sentence needs to be executed, the judge responsible for penitentiary affairs issues the EAW. Public prosecutors are independent by the letter of the Fundamental law, and are to be considered as judicial authorities. Nevertheless they cannot issue EAWs on their own, but are entitled to submit motions to the Court to issue an EAW.[45]

The judge sends the EAW to the Minister of Justice (MoJ) and the International Law Enforcement Communication Centre (Nemzetközi Bűnügyi Együttműködési Központ - NEBEK). Upon receipt of the report on the arrest of the accused, the MoJ shall immediately send the EAW to the executing Member State.

Upon receipt of the report on the arrest of the accused, the court, the public prosecutor's office, the investigating authority before which the proceedings are pending, or the judge responsible for penitentiary affairs who issued the EAW shall immediately appoint a defense attorney, if the accused does not have a lawyer. At the same time it shall notify the MoJ. The MoJ shall inform the competent authority of the executing Member State about the identity and contact details of the defense attorney in order to inform the accused.

With special regard to EU standards on judicial independence, effective judicial protection, and fair trials rights, the Hungarian judicial authorities' competence and qualification to issue EAWs could be questioned, along the lines of the *LM*,[46] *L and P*,[47] or the *OG and PI*[48] judgments. However we are not aware of any cases where the alleged lack of the independence of the Hungarian judiciary justified the suspension of surrender.

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[44] Case C-268/17 Judgment of the Court (Fifth Chamber), *Proceedings relating to the issuing of a European Arrest Warrant against AY,* Request for a preliminary ruling from the Županijski Sud u Zagrebu (County Court, Zagreb, Croatia), 25 July 2018, ECLI:EU:C:2018:602.

[45] Council of the European Union, Impact of the CJEU Judgments of 27 May 2019 in Joined Cases OG (C-508/18) and PI (C-82/19 PPU) and Case PF (C-509/18) - Questionnaire by Eurojust and compilation of replies, 10016/19, JAI 652, COPEN 259, EUROJUST 120, EJN 58, Brussels, 11 June 2019, 21.

[46] Case C-216/18 PPU Judgment of the Court (Grand Chamber), *Minister for Justice and Equality v LM,* Requests for a preliminary ruling from the High Court (Ireland), 25 July 2018, ECLI:EU:C:2018:586.

[47] Joined Cases C-354/20 PPU and C-412/20 PPU Judgment of the Court (Grand Chamber), *L and P*, Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands), 17 December 2020, ECLI:EU:C:2020:1033.

[48] Joined Cases C-508/18 and C-82/19 PPU Judgment of the Court (Grand Chamber), *Minister for Justice and Equality v OG and PI,* Requests for a preliminary ruling from the Supreme Court and High Court (Ireland), 27 May 2019, ECLI:EU:C:2019:456.

I.2. Overcrowding of prisons and inhuman prison conditions in Hungary (the *Aranyosi* Case)

The Aranyosi case is one of the best-known cases in the EAW-related CJEU jurisprudence. Mr. Aranyosi is a Hungarian citizen. German authorities received two European Arrest Warrants for his prosecution of two offences of forced entry and theft.[49] The case was discussed jointly with that of Mr. Căldăraru, a convict, a Romanian citizen. The executing court worried that certain Hungarian and Romanian detention facilities fail to meet European minimum standards. These worries were underpinned in case of Hungary by a pilot judgment in *Varga and Others v. Hungary*, pointing to a systemic failure of the Hungarian prison system including overcrowding and other aspects of inhuman conditions.[50] Accordingly it asked whether compliance with the FD EAW was impermissible, where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned, or whether in such cases the executing Member State can or must make the decision on the permissibility of surrender conditional upon an assurance that detention conditions are compliant. It also asked whether the issuing judicial authority is entitled to give assurances that detention conditions are compliant.

The Court reiterated that both the principle of mutual trust between the Member States and the principle of mutual recognition are of fundamental importance for EU law: they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, with regard to the area of freedom, security and justice, that each state, save in exceptional circumstances, considers all the other Member States to be compliant with EU law and particularly with the fundamental rights recognized by EU law.[51] Normally, the executing judicial authority may only refuse to execute EAWs in the cases of mandatory or optional grounds for non-execution, exhaustively listed in Articles 3, 4 and 4a FD EAW. Moreover, the execution of the European Arrest Warrant may be made subject to one of the conditions spelled out in Article 5 FD EAW.[52] The Court furthermore acknowledged the need to address systemic violations of fundamental rights through the Article 7 TEU procedure,[53] but also pointed to 'exceptional circumstances' limiting mutual recognition and mutual trust as already mentioned in Opinion 2/13.[54]

Article 1(3) FD EAW states that the FD does not affect the obligation to respect fundamental rights and principles as laid down in the Charter.[55] The Court reminded that Article 51(1) of the Charter demands that Member States respect the Charter when implementing EU law, including Article 4 on the absolute prohibition of inhuman or degrading treatment or punishment.[56]

The Court then went on establishing its famous two-prong-test for checking the fundamental rights situation including the potential risks of human rights violations by the issuing Member State. As a first step, the executing judicial authority must assess whether there are deficiencies in general. When doing so it must consider objective, reliable, specific and properly updated information with respect to detention conditions in

[49] Judgment in *Aranyosi*, para. 29-31.

[50] Varga and Others v. Hungary, Applications nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015.

[51] Judgment in *Aranyosi*, paras. 46, 63; AG Opinion in *Aranyosi*, para. 78.

[52] *Id* at para. 80.

[53] *Id.* at para. 81.

[54] *Id*. at para. 82.

[55] *Id.* at para. 83.

[56] *Id.* at para. 84.

the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalized, which may affect certain groups of people, or which may affect certain places of detention.[57] Such pieces of information may be obtained from various sources, including judgments of international courts, judgments of national courts, documents issued by the Council of Europe or UN bodies.[58] Once a risk of fundamental rights violation is established, as a second step, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the person concerned by a European Arrest Warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions of his or her detention in the issuing Member State, to a real risk of inhuman or degrading treatment or punishment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.[59]

To that end, the executing judicial authority must request supplementary information to be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 FD EAW, must send that information within the time limit specified in the request.[60] The executing authority may further rely on any other information available.[61] [62]

Applying the two-prong-test, the risk of a human rights violation in general and in the specific case may be established. If it is, the execution of the warrant must be postponed, however, it cannot be entirely abandoned.[63] Eurojust should be informed of this decision. In addition, a Member State that has experienced repeated delays in getting its EAWs executed should inform the Council with a view to an evaluation of the implementation of the FD EAW at Member State level.[64] Neither the state nor the individual concerned may abuse the postponement of surrender. The executing judicial authority may decide to hold the person in custody, but only in so far as the detention is not excessive. It must also consider the presumption of innocence vis-à-vis persons requested for prosecution, and the principle of proportionality in respect of Charter rights.[65] Should the executing authority on the basis of the above decide to bring the detention to an end, it has to take measures to prevent absconding or jeopardizing surrender until a final decision on surrender is taken.[66] If the existence of a risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be

[57] *Id.* at para. 89. The judgment was praised for its individualistic approach, which can even be traced in the fact that it places a lesser emphasis on the first prong of the test, and stresses the potentiality of individual harm. D. Halberstam, *The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade, VerfBlog,* 9 June 2016, http://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/.

[58] *Id.* at para. 89.

[59] *Id*. at para. 92.

[60] *Id.* at paras. 95-98.

[61] *Id.* at para. 92.

[62] *Id.* at paras. 95-97.

[63] *Id.* at para. 98.

[64] *Id.* at para. 99.

[65] *Id.* at paras. 100-101.

[66] *Id.* at para. 102.

brought to an end.[67] If the real risk of a human rights violation can be discounted, the executing judicial authority must adopt a decision on executing the European Arrest Warrant.[68]

Previous interviewees I had conducted confirmed that the *Aranyosi* judgment and the substandard detention regime of Hungary did not have a significant effect on the execution of the EAW issued by Hungary.[69]

I.3. A dialogue between the ECtHR and the CJEU about prison conditions (the *ML* case)

In *ML* – similarly to *Aranyosi* – a German court had doubts as to whether the convict should be handed over to Hungary with still substandard prison conditions. The Higher Regional Court of Bremen asked the CJEU what information it needed to obtain about the conditions in which *ML* would be detained in Hungary.[70]

First, the court held that, when assessing the effects of potentially overcrowded and substandard prisons on the individual suspect, the executing judicial authorities are only required to assess the detention conditions in those prisons where the issuing authorities intend to detain the suspect. It means that the application of the second prong of the *Aranyosi* test will in practice not necessarily lead to effectively protecting detainees, who may be placed in decent prisons but may be transferred to other facilities over time.[71]

Second, the CJEU left open what pieces of evidence need to be used to prove the general problem heavy reliance on ECtHR judgments in *Aranyosi*. This uncertainty took its tolls in *ML*. The judgment in *Aranyosi* heavily relied on the ECtHR's judgment *Varga and Others v. Hungary*.[72] In this pilot judgment, the court held that prison conditions in Hungary violated Article 3 ECHR (Article 4 EU Charter corresponds to Article 3 ECHR). That said, after the judgment in *Aranyosi* was rendered, Hungary adopted a new law,[73] which provided for a combination of preventive and compensatory remedies, guaranteeing in principle genuine redress for ECHR violations originating from cramped prisons and other unsuitable detention conditions.[74] Therefore, the question in *ML* was whether surrender still had to be postponed in light of the new Hungarian law. In *Domján v. Hungary*,[75] the ECtHR ruled that the complaint filed by a Hungarian detainee on prison conditions – and all the others in his position –, was premature and therefore inadmissible. In particular, it stated that Mr. Domján should make use of the remedies introduced by the new domestic law before turning to the Strasbourg court. In contrast to the AG's Opinion,[76] the CJEU realized that procedures enabling authorities to grant redress for violations of fundamental rights cannot rule out the existence of a real risk of a violation and it is this latter aspect that the

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[67] *Id.* at para. 104.

[68] *Id.* at para. 103.

[69] Petra Bárd, Hungary, In: Sellier, Élodie; Weyembergh, Anne (eds.) Criminal Procedures and Cross-Border Cooperation in the EU Area of Criminal Justice: Together but apart? Bruxelles, Belgium: Éditions de l'Université de Bruxelles, Bruxelles, 2020, pp. 131-164, 146.

[70] Case C-220/18 PPU Judgment of the Court (First Chamber), *ML,* Request for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen (Germany), 25 July 2018, ECLI:EU:C:2018:589

[71] Cf. https://www.fairtrials.org/publication/beyond-surrender.

[72] *Varga and others, op. cit.*

[73] Act No. CX of 2016 amending Act No. CCXL of 2013 on the enforcement of punishments, measures, certain coercive measures and confinement for regulatory offences.

[74] For compensation procedures to remedy the harm resulting from fundamental rights violations during detention see Articles 70/A-B; for administrative measures taken due to the complaint on fundamental rights violations during detention; and transfer, see Article 75/A of the Act CCXL of 2013 on the execution of punishments, criminal measures, certain coercive measures and confinement for administrative offences.

[75] Domján v. Hungary, Application no. 5433/17, 14 November 2017.

[76] Opinion of Advocate General Campos Sánchez-Bordona of 4 July 2018, Case C-220/18 PPU *ML*, paras. 51-54.

executing authority needs to assess. Even though the *Domján* decision is no ultimate proof that detention conditions changed for the better in Hungary, the CJEU in *ML* also noted that the existence of the new proceedings of preventive and compensatory remedies may be taken into account when deciding on surrender.[77] Despite this refined reliance on ECtHR case law, the CJEU implies that "in the absence of minimum standards under EU law regarding detention conditions"[78] the ultimate bar for determining the potentiality of human rights violations remains to be decided by the Strasbourg court.

I.4. *In absentia* trials, meaning of fleeing justice, transposition of the FD EAW in disregard of differences between legal families, the question of procedural *res iudicata*, acquired rights (the *Tobin* case)

The difficulties resulting from *in absentia* trials were illustrated by the Tobin case, where the issue of the convict's surrender was on the table for more than a decade.

The Pest County Chief Prosecutor's Office brought charges against Mr. Tobin for recklessly causing a road traffic accident in April 2000, resulting in the death of two children. At the time of the offence, Mr. Tobin was resident and working in Hungary. At the beginning of the criminal process, he was required to surrender his passport, but it was subsequently returned to enable him to travel to Ireland for a family event. Pursuant to the Criminal Procedural Code (Act XIX of 1998) in force at the time, the court also ordered the defendant to deposit HUF 500,000 as a so-called insurance, which he did pay. In possession of his lawfully returned passport, Mr. Tobin travelled to Ireland with his family and, after the family event, he came back to Hungary on 9 October 2000. His defence attorney notified the court on the same day that the defendant was in Hungary again. Nevertheless, he was not required to submit his passport to the Hungarian authorities and no action was taken with respect to ensuring Mr. Tobin's presence during the procedure or providing his return in case of imprisonment. At the end of November 2000, Mr. Tobin's fixed term labour contract expired and he travelled back to Ireland with his family.

On 7 May 2002, Mr. Tobin was convicted, *in absentia*, by the Buda Surroundings District Court to three years of imprisonment for recklessly driving causing a road traffic accident resulting in death. Then, in the procedure of second instance, the Pest County Court approved the judgment with the condition that the convict could be released on probation after serving at least half of his punishment.[79] The convict did not, however, return to Hungary to serve his sentence.

Pursuant to the EAW FD, surrendering the defendant to the requesting country could be mandatory if the requesting court issued an arrest warrant in order to execute a sentence which is of at least four months prison term, and no refusal grounds as provided by the FD EAW are present. But on 12 January 2007, the High Court of Ireland refused the request for surrender[80] on the following grounds: According to Section 10 of the Irish

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[77] Case C-220/18 PPU Judgment of the Court (First Chamber), *ML,* Request for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen (Germany), 25 July 2018, para. 117.

[78] Id. at para. 90. Cf. W van Ballegooij, *Procedural Rights and Detention Conditions: Cost of Non-Europe Report*, PE 611.008, European Parliamentary Research Service, European Added Value Unit, (Brussels, 2017), https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf.

[79] As a general rule, a convict should have served at least two thirds of his sentence before being conditionally released but the court of second instance took the foreign nationality of the convict into account and the resulting disadvantages of not speaking the language, having less chance to keep family contact, etc.

[80] High Court, Minister for Justice Equality & Law Reform v Tobin, [2007] IEHC 15, 12 January 2007.

Act adopted in 2003 to implement the Framework Decision, as amended by Section 71 of the Criminal Justice (Terrorist Offences Act), the convict could be surrendered for the purposes of execution if he or she *fled* from the issuing State before he or she commenced serving the sentence or before he or she completed serving the punishment. In other countries, fleeing is not a requirement for surrender. The High Court found that, pursuant to the act implementing the Framework Decision, Mr. Tobin did not 'flee' Hungary as he had 'left' the country following the expiry of his fixed term labour contract and was in lawful possession of his passport. Therefore, the requirements for surrender were not met. The Minister for Justice, Equality and Law Reform submitted an appeal to the Supreme Court. The Supreme Court dismissed the appeal on 25 February 2008.[81]

Following the unsuccessful attempt to extradite Mr. Tobin, the Irish legislator tackled the discrepancies existing under national law: it amended the Irish criminal law with the introduction of the Criminal Justice (Miscellaneous Provisions) Act 28 of 2009. Section 6 of the 2009 Act repeals each and every obstacle to the surrender of Francis Ciarán Tobin or any other convict in a similar position. Pursuant to the amendment, which could be inspired by the troubled outcome of the Hungarian incident in the framework of which three arrest warrants were issued with different content,[82] the Irish legislative also deleted the requirement that arrest warrants need to be 'duly' formulated. The amendment also removed the conjunctive conditions according to which prior to the commencement or the completion of the punishment, the convict needs to have 'fled from the issuing State'.

The *Tobin* case therefore serves as an excellent example to demonstrate how the Member States were able to practice self-correction. The Irish implementation of the Framework Decision also emphasises the importance of comparative law. *Ex post facto* it has become clear that the legislator did not intend to bypass EU law, but the lawmaker simply proceeded in accordance with its own procedural legal system and in the course of implementation it merely considered the possibilities provided by common law. The *in absentia* hearing is unconceivable in common law systems, i.e. in legal systems where the emphasis is on the hearing and verbosity. Disregard for other legal systems' specificities resulted in wrong implementation – and this legislative mistake is the major reason why the Irish court could not and did not surrender Mr. Tobin.

In order to provide a full picture, it needs to be stated that the legislative change did not enable Mr. Tobin's surrender but will prevent other convicts from escaping justice in the future. After this legislative issue had been remedied, Hungary issued another arrest warrant in September 2009. Following several hearing postponements, Judge Peart, contemplating the Irish amendment in due course, approved the surrender request repeated in the new European Arrest Warrant on 11 February 2011.[83] On appeal however, on 19 July 2012, the Supreme Court of Ireland adopted its 3:2 judgment and reversed the judgment of first instance resulting in a decision refusing the surrender of Mr. Tobin to Hungary. Several legal issues were identified and discussed. Among these were the decisive questions as to whether the surrender procedure in the second round constituted an abuse of process under common law, whether it violated the separation of powers or whether it contravened Section 27 of the Interpretation Act 2005. All judges based their reasoning on different aspects of these issues and so there was no reasoning that was shared by the majority. But the majority of judges decided against surrender.[84]

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[81] Supreme Court of Ireland, Minister for Justice, Equality & Law Reform v Tobin, [2008] IESC 3., 3 July 2007. Fennelly J. provided his reasoning on 25 February 2008. Basically, the judgment did not contain new components in comparison with the judgement at first instance.

[82] See The High Court's decision in the first round of surrenders: Minister for Justice Equality & Law Reform v Tobin, [2007] IEHC 15, 12 January 2007.

[83] High Court, MJELR v Tobin, [2011] IEHC 72, 11 February 2011. (Peart J. does not number the paragraphs, thus I cannot provide more precise citations.)

[84] Supreme Court of Ireland, Minister for Justice Equality and Law Reform v Tobin, [2012] IESC 37, 19 June 2012.

Justice O'Donnell held that no procedural *res iudicata* exists in the case, but he found it important to clarify whether Mr. Tobin had the right to the finality of the first instance judgment, in particular considering the principle of fair procedure. The question for Justice O'Donnell was whether the *Oireachtas*, the Irish Parliament, overwrote the surrender judgment adopted at first instance. He came to the conclusion that the respective Irish law serves compliance purposes with the Framework Decision and did not aim at the alteration of the Tobin decision passed in 2007. Justice O'Donnell underlined repeatedly that his judgment does not have precedent-setting value: due to the special circumstances of the case it was so narrow that it would not be applicable to anyone else but Mr. Tobin. In each future case, surrender will take place in accordance with the amended act.

Concurring Justice Fennelly – together with Justice Hardiman – argued that the second round proceeding constituted abuse of process. According to Justice Fennelly, in the Tobin case it was a legislative mistake and its correction that triggered two surrender proceedings. Mr. Tobin won the case in the first round on the basis of a national law implementing the Framework Decision. It was never suggested that the law was erroneous. Therefore, once he had successfully relied on its provisions, Mr. Tobin had no reason to expect that the law would be changed. Therefore, in Justice Fennelly's view, the repeated proceedings amounted to an abuse of process.

Finally, the third concurring judge, Justice Hardiman, on the one hand, placed particular emphasis on the unblemished character of Mr. Tobin, portraying him as a law-abiding person and the victim of a crusade by the justice system. On the other hand, Justice Hardiman referenced differences between the Irish and the Hungarian legal systems and identified some 'mistakes' in the latter one, which should justify surrender. However, his opinion about another Member State's legal system should be regarded as irrelevant from the perspective of a surrender case – unless there is persuasive evidence to underpin systemic problems, which was not the case here. A national judge is not allowed to question mutual trust existing between Member States and there was no basis for essentially reopening and carrying out a further assessment on the substance of the criminal proceedings, as its competence should be strictly limited to the decision on surrender. The next argument is another piece of evidence proving that Justice Hardiman clearly did not believe in the principle of mutual recognition. He stated that, if he had not refused the surrender on other grounds, he would have assessed, in detail, the questions raised concerning the legal process in the issuing State, given that from his perspective, as someone who is not familiar with Hungarian law, mutual trust cannot exclude scrutiny of the Hungarian proceedings where a complaint is made by the individual concerned.

After a number of twists and turns, Mr. Tobin decided to serve his punishment. Since there were no means to enforce the prison sentence, he could design the choreography of events and insist on an Irish prison. After lengthy negotiations, he travelled to Hungary, spent five days in a Budapest prison in the course of January 2014, then requested his transfer to Ireland. The Hungarian and Irish justice ministers, in addition to the Irish supreme court, approved the request.[85] Thus, Mr. Tobin was transferred to Ireland on 17 January 2014 in order to serve the remaining part of his custodial sentence.[86]

[85] Az ír hatóságok engedélyezték, hogy Tobin a hazájában töltse le büntetését, 17 January 2014, https://nava.hu/id/1782448/#; Brigitta Lakatos, Papp Gergő: Végre börtönbe került az ír gázoló!, 14 January 2014, https://24.hu/szorakozas/2014/01/14/papp-gergo-vegre-bortonbe-kerult-az-ir-gazolo/

[86] Jövő szeptemberig börtönben marad az ír gázoló, 14 January 2014, https://2010-2014.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/videok/jovo-szeptemberig-bortonben-marad-az-ir-gazolo

Section II – The execution of EAWs: national judicial authorities as monitors of trust

II.1. The execution of the European arrest warrant in Hungary

The Budapest-Capital Regional Court (Fővárosi Törvényszék) is the designated executive judicial authority in Hungary. Hungary has also appointed a central body, which is the MoJ. In relation to EAWs the official correspondence is made via the MoJ, who shall receive delivery of the EAW, and immediately forward the request to the Budapest-Capital Regional Court. In case of refusal of the execution of the EAW by the Budapest-Capital Metropolitan Court, the MoJ informs the issuing judicial authority, giving reasons on the basis of the decision ordering such refusal.

The Budapest-Capital Regional Court has exclusive jurisdiction regarding EAW procedures. It acts as a single judge in surrender proceedings. If not excluded by Act CLXXX of 2012, an appeal against the decision can be admitted and judged by the Budapest Court of Appeal (Fővárosi Ítélőtábla). Appeals have no suspensory effect on the enforcement of the surrender decision. Consequently, decisions can be enforced, regardless of the filing of an appeal, it is not required to wait for the final court decision.

A person arrested on the territory of Hungary shall be brought before the Budapest-Capital Regional Court if a European (or an international) arrest warrant has been issued against him or her. Such custody may last for a maximum of 72 hours.

The Budapest-Capital Regional Court is obliged to hold a hearing on the execution of the EAW, where the presence of the prosecutor and the attorney representing the defendant is mandatory. If the accused does not speak the Hungarian language, the court will appoint an interpreter.

The Budapest-Capital Regional Court shall request additional information by means of the MoJ if it considers that the facts and information provided by the issuing judicial authority of another Member State are insufficient. The EAW and the supplementary information shall be received by the MoJ and sent to the Budapest-Capital Regional Court with immediate effect. The court will then hold a hearing.

If the person against whom the EAW has been issued, is applying for recognition as a refugee or asylum-seeker, the court shall immediately inform the local asylum authority that a procedure is pending against the accused person.

Whether it is a transfer or a refusal, the prosecutor, the accused and his or her defense attorney may immediately be entitled to announce an appeal against the decision made at the hearing, which will be adjudicated by the Budapest Court of Appeal. If the Budapest-Capital Regional Court refuses to execute the EAW, the MoJ shall inform the issuing judicial authority of the other Member State about the reason of the refusal on the basis of a court decision.

The transfer itself is made by the International Law Enforcement Communication Centre (Nemzetközi Bűnügyi Együttműködési Központ - NEBEK) with the assistance of the police, who will get in touch with the authorities of the issuing country. If the transfer is made to a neighboring country, it usually takes place at the affected border, and in other cases at the Liszt Ferenc International Airport.

II. 2. *Ne bis idem*, finality of the sentence, prosecutor terminating the case, the effect of investigations concerning unknown person (The *Hernádi/AY* case)

II.2.1Denying surrender in the first round with reference to *ne bis in idem*

Different understandings of the *ne bis in idem* principle hindered cross-border cooperation in the *AY* case. Hungarian citizen Zsolt Hernádi, an influential businessman, CEO of the company MOL, was accused in March 2014 by the Croatian prosecutor of bribery in connection with the privatisation of the Croatian oil refinery INA. According to the news sources, back in 2008 or 2009, Mr. Hernádi had paid the then Croatian Prime Minister Ivo Sanader €10 million before MOL acquired a 47.47% stake in INA.[87] In December 2019 a Zagreb county court as court of first instance indeed found Mr. Hernádi guilty, and in October 2021 the judgment was confirmed by the Croatian Supreme Court.[88] But early on, when details were still unclear, Mr. Sanader resigned on 1 July 2009 and left Croatia for Austria, from where he was extradited for the sake of crime prosecution.[89] By July 2011, Croatia decided to review the 2003 and the 2009 agreements signed between MOL and the government of Prime Minister Sanader. The *Sanader* case was initiated in June 2011 and Mr. Hernádi was named as a suspect for his involvement in the alleged bribery. Several requests were submitted by the Croatian prosecutor for legal aid, but the Hungarian prosecutor's office could not help with the request because providing such information was said to endanger Hungarian national interests.[90]

In July 2011 the Hungarian Prosecutor General initiated investigations since there were reasonable grounds to believe – in light of materials shared by the Croatian authorities – that corruption-related provisions of the Hungarian Criminal Code had been violated. The case was not conducted against Mr. Hernádi personally, but against an unknown person. In January 2012, the Hungarian prosecutors were no longer investigating the case as they had not found any pieces of evidence of a crime.

In November 2012, Mr. Sanader was sentenced to ten years for bribery in Croatia.

After its EU accession, in October 2013, Croatia issued both an international arrest warrant, but importantly for the present analysis, also a EAW for Mr. Hernádi. The latter was refused by the Hungarian court on the basis of the *ne bis in idem* principle – with reference to the fact that the prosecutor's office had previously started investigations, but later in January 2012 decided to bring them to a close.

The surrender case of Zsolt Hernádi requested by Croatia illustrates the consequences of different meanings attached to the phrase 'final sentence'.

According to Article 4(3) of the FD EAW, the executing judicial authority may refuse to execute the EAW "where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings". The majority of Member States transposing the Framework Decision on the EAW meant a decision of the prosecutor, which brings the procedure to an end without the possibility of

[87] See for example https://www.bloomberg.com/news/2011-07-05/hungary-opposes-changes-in-mol-ina-agreements-orban-says-2-.html.

[88] https://www.reuters.com/article/us-mol-croatia-court-idUSKBN1YY0J4 , https://bbj.hu/politics/foreign-affairs/world/croatias-highest-court-upholds-hernadi-conviction

[89] https://www.vecernji.hr/vijesti/sanader-uzeo-10-milijuna-eura-mita-i-dao-inu-madjarima-303028

[90] http://hungarianspectrum.org/2012/11/21/hungarys-oil-company-a-possible-bribery-charge-in-croatia/

having it reopened.[91] Hungary however does not follow this line of the majority. The Hungarian implementing legislation[92] states that surrender may be refused if the "Hungarian judicial authorities (courts, or prosecutors) or the investigation authorities rejected the denunciation filed or *terminated the investigation or the procedure*" (emphasis added). However, according to the Criminal Procedural Code then in force,[93] as a general rule termination does not incorporate finality since "termination of the investigation shall not prevent the subsequent resumption of the proceeding in the same case".[94] So the decision in the corruption case was not terminated finally, as required by Article 4(3) of the Framework Decision, but it was in line with the Hungarian implementing law.

II.2.2 The intervention of the substitute public prosecutor

A problem that had not been raised at the time, but was expected to be raised at some point was whether a case conducted against unknown persons will be deemed irrelevant in an actual suspect's surrender case. A former legal representative and shareholder of MOL decided to continue the case as a substitute private prosecutor. In his view, he suffered losses due to the fact that Mr. Hernádi refused to inform shareholders in due time about the alleged corruption case, which they first read about in the news. In May 2014, however, the court of first instance ruled that Mr. Hernádi could not be made liable for the fall in the value of MOL shares nor could the substitute private prosecutor prove that Mr. Hernádi had bribed Croatia's former Prime Minister.[95] It partially terminated the procedure and partially exonerated Mr. Hernádi. In December 2014, the court of second instance ruled that the substitute private prosecutor was not a 'victim' to the alleged crime and therefore the court did not go into the merits and decide on the issue of whether Mr. Hernádi was guilty or not. Ultimately therefore, there was no decision rendered with regard to Mr. Hernádi's guilt.[96]

II.2.3 Denying surrender in the second round and the CJEU discussing what *ne bis in idem* is not

After Mr. Hernádi's indictment in Croatia, in December 2015 a new EAW was issued, which was never executed by Hungary. The EAW was issued again in January 2017. The issuing authority emphasised the change in circumstances in the issuing State: whereas previous EAWs were issued before a criminal procedure was initiated against Mr. Hernádi, the 2015 and 2017 EAWs were issued after this procedural step.

Since Hungary remained silent even beyond the 60-day-deadline after the 2017 EAW was issued, the Croatian court approached the Croatian member of Eurojust. With his help, it was clarified that the Hungarian authorities did not consider themselves obliged to act on the EAW, claiming that a decision on surrender had already been taken during the pre-trial phase of the Croatian criminal proceedings.

This was the point when, in May 2017, the issuing court in Zagreb filed a preliminary reference to the CJEU asking whether Hungary and the other Member States refusing surrender of Mr. Hernádi violated EU law.

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[91] G Vermeulen, W De Bondt, Ch Ryckman (eds), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality* (Antwerpen, Apeldoorn, Portland, Maklu, 2012) 269.

[92] Act CLXXX of 2012, Article 5 g)

[93] Act XIX of 1998, Article 191(1)

[94] Cf. A similar provision in Article 400(1) of the Act XC of 2017 on the Criminal Procedural Code currently in force.

[95] Budapest-Capital Regional Court, 10.B.2044/2013/17, 26 May 2014.

[96] Budapest-Capital Regional Court as court of second instance, 3.Bf.275/2014/7., 3 December 2014.

On 25 July 2018, the CJEU handed down its judgment[97] in the *Hernádi* case, renamed as *AY*.[98] The CJEU answered the question as to whether the previous denial of surrender is relevant to the new EAW issued, in the negative. According to the CJEU, Article 1(2) FD EAW must be interpreted as requiring the court of the executing State to adopt a decision on any EAW, even when, in the executing State, a ruling has already been made on a previous EAW concerning the same person and the same acts and the second EAW has only been issued on account of the indictment, in the issuing Member State, of the person requested.

The court then examined four further questions of the referring court together, since all of them touched upon the issue as to whether Article 3(2) and Article 4(3) of the EAW FD must be interpreted as meaning that a decision of the public prosecutor terminating an investigation opened against an unknown person, during which the person subject to the EAW was interviewed as a witness and not as a suspect, may be relied on for the purpose of refusing to execute that EAW.

The court first examined the exact meaning of Article 3(2) of the EAW FD. In line with the principle of *ne bis in idem*, also enshrined in Article 50 of the Charter of Fundamental Rights of the EU, Article 3(2) incorporates a mandatory ground for refusing the EAW if the requested person has been 'finally judged' in an executing Member State. Even though the language of the EAW FD refers to 'judgment', the discussed provision is also applicable to decisions issued by other criminal justice authorities, not just courts. Such a judgment is considered to be 'final' if "further prosecution is definitively barred or when the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts".[99] This definition, according to the court, implies that criminal proceedings have been conducted previously and that they have been conducted against the person requested.[100] *Ne bis in idem* logically does not apply to persons interviewed as witnesses.[101] Since the Hungarian investigations concerned an unknown person, as opposed to AY as a suspect or accused, he was not 'finally judged' and the respective investigations could not serve as the basis for denying surrender within the meaning of Article 3(2).

The court then moved on to assess Article 4(3) EAW FD, a provision that lays down three optional grounds for refusing EAWs. The first such ground is if the executing authorities earlier decided to discontinue criminal proceedings. This ground for non-execution is irrelevant in light of the facts of the present case. The second ground for non-execution implies a situation where, in the executing Member State, judicial authorities have halted proceedings regarding the offence for which the EAW was issued. Here, the court noted that the first part of Article 4(3) only refers to the offence concerned by the EAW without referring to the requested person. However, an interpretation that provides a ground for non-execution where the proceedings have been halted, without taking into account the identity of the person against whom criminal proceedings are brought, would be too broad. The EAW is not only issued with regard to an offence, but also in respect to a specific person.[102]

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[97] Case C-268/17 Judgment of the Court (Fifth Chamber), *Proceedings relating to the issuing of a European Arrest Warrant against AY,* Request for a preliminary ruling from the Županijski Sud u Zagrebu (County Court, Zagreb, Croatia), 25 July 2018, ECLI:EU:C:2018:602.

[98] The CJEU renamed the case as AY, but Mr. Hernádi can be identified unmistakably according to the description of the court: "a Hungarian national, the chairman of a Hungarian company, against whom criminal proceedings have been brought (…) is alleged to have agreed to pay a considerable amount of money to the holder of a high office in Croatia, in return for the conclusion of an agreement between the Hungarian company and the Croatian Government." See Opinion of Advocate General Szpunar, delivered on 16 May 2018, Case C-268/17, Ured za suzbijanje korupcije i organiziranog kriminaliteta v AY, para. 6.

[99] *Id.* at para. 42.

[100] *Id.* at para. 43.

[101] *Id.* at para. 44.

[102] *Id.* at paras. 53-54.

The EAW instrument was designed to combat crime; its very objectives would be undermined if the overly broad interpretation of the court resulted in suspected criminals going unpunished.[103] Since the Hungarian investigation was conducted against an unknown person, and not AY, the decision which terminated that investigation was not taken in respect of the requested person. Therefore, the second optional ground for refusal could not be invoked either. Finally, the third ground of optional non-execution concerns a case where a final judgment has been rendered upon the requested person, in the issuing State, which prevents further proceedings. The conditions of this third ground are not filled in the *AY* case.

The court consequently held that a decision of the prosecutor terminating the investigation, which was opened against an unknown person, during which the person subject to the EAW was interviewed as a witness only, and not as a suspect, cannot be relied on for the purpose of refusing to execute the EAW, neither according to Article 3(2) nor according to Article 4(3).

II.2.4 Denying surrender in the third round: fair trial rights allegedly in danger, and procedure initiated by the private prosecutor invoked again

On 23 August 2018, the Hungarian executing authority, the Budapest-Capital Regional Court, refused to surrender Mr. Hernádi again. The Hungarian public prosecutor alleged, on the one hand, that the procedure with regard to the crime in question is barred by the statute of limitation and, on the other, it held that the right to a fair trial of the suspect would be violated in case of surrender.

The Budapest-Capital Regional Court held that the statute of limitation had not yet expired since it was restarted when another EAW had been issued. However, the court agreed with the prosecutor in finding that the fair trial rights of the defendant would be jeopardised in Croatia, with regard to the decisions handed down in the same case at the Croatian constitutional court and at the United Nations Commission on International Trade Law (UNCITRAL).

Croatia initiated the UNCITRAL arbitration in January 2014, alleging the bribe between Dr. Sanader and Mr. Zsolt Hernádi. According to Croatia, the bribe was intended to ease the passage of amendments to the SHA that were detrimental to Croatia but beneficial to MOL. As none of this money was ever received into any account in the name of Dr. Sanader, Croatia had to rely on inferences and the testimony of a witness whose account was strongly denied by MOL and Dr. Sanader. On the ground of bribery, Croatia sought to set aside the amendments concluded with MOL as null and void. In addition, it relied on alleged breaches of Croatian corporate law as a ground to set aside the amendments.

The tribunal was to decide whether the bribe was offered and accepted as alleged, by applying Croatian law. If it found that the bribe took place, it was to decide whether the amendments should be set aside and, if so satisfied, assess Croatia's damages.

But finally, the tribunal dismissed both of Croatia's claims in relation to bribery and breach of domestic corporate law. The award ordered Croatia to bear the tribunal's and administrative fees, as well as most of MOL's legal and expert fees and other expenses.[104]

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[103] *Id.* at para. 57.

[104] PCA CASE No. 2014-15 in the Matter of an Arbitration under the UNCITRAL Arbitration Rules 1976 ("UNCITRAL RULES") and Shareholders Agreement Relating to INA-INDUSTRIJA NAFTE D.D Dated 17 July 2003 as amended on 30 January 2009 ("SHAREHOLDERS AGREEMENT" OR

Needless to say, the entity that has the burden of proving guilt is different in an arbitration case and in a criminal procedure, therefore the award issued in the former setting cannot influence the outcome of the latte process.

The Budapest-Capital Regional Court made a reference to the May 2014 decision, where a national court of first instance exonerated Mr. Hernádi. Interestingly, the Budapest-Capital Regional Court failed to note that the second instance court ruled, in October 2015, that the plaintiff, the substitute private prosecutor, could not be regarded as a 'victim' to the alleged bribery and therefore the court could not go into the merits and decide on the issue as to whether Mr. Hernádi was guilty or not. Albeit there was never a final judgment rendered on the guilt of Mr. Hernádi, the Budapest-Capital Regional Court nevertheless referenced it as one of the grounds for refusing surrender.[105]

The controversy over surrender is likely to continue in the future, with Mr. Hernádi as a requested convict. On 30 December 2019 Mr. Hernádi was sentenced *in absentia* for 2 years imprisonment by the Zagreb County Court.[106] On 25 October 2021, the Croatian Supreme Court upheld the sentence, the judgment is final and binding.[107]

"SHA") -between The Republic of Croatia (the "Claimant" or "Croatia" or "GOC") -and MOL Hungarian Oil and Gas Plc. (the "Respondent", "MOL", and together with the Claimant, the "Parties") Final Award. Registry Permanent Court of Arbitration 23 December 2016. Especially para. 333.

[105] The press release of the judgment is available on the court's website in Hungarian: Budapest-Capital Regional Court – The Budapest-Capital Regional Court refused the surrender of Zs.H. to the Croatian authorities, https://birosag.hu/aktualis-kozlemenyek/fovarosi-torvenyszek-fovarosi-torvenyszek-megtagadta-h-zs-atadasat-horvat, 24 August 2018.

[106] https://hungarytoday.hu/croatia-court-finds-mol-chief-hernadi-guilty-on-corruption-charges/

[107] https://hungarytoday.hu/hernadi-croatia-sentence-court-mol-leader/

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Hungary

The analysis of key jurisprudence related to Hungary cooperation in EAW surrender proceedings shows that, it is primarily the relationship between mutual recognition-based instruments and values that the EU and Member States are supposed to share which needs to be given more consideration.[108] The EU's legislative bodies have adopted a series of laws including the FD EAW in the criminal justice area on the basis of mutual trust without any leeway with solid legal basis to opt out if doubts arise concerning the issuing Member State's respect for values common to the EU and its Member States according to Article 2 TEU. However, it has emerged that mutual trust was premature and unjustified. As shown by the Article 7(1) and a set of infringement procedures with a rule of law or a human rights element – including ECtHR judgments and pilot judgments – Hungary violates the dictates and most basic tenets of the rule of law, engage in systemic human rights' violations and jeopardise judicial independence. Whereas the majority of cross-border cases do not involve such concerns, some do touch upon a fundamental tension between automatic mutual recognition and values that the Member States and the EU share. Those executing States that adhere to EU values find themselves between a rock and a hard place. They either follow mutual recognition-based laws and thereby become responsible for the proliferation of rule of law problems and human rights' abuses across the Union or they disrespect EU secondary laws.

For a long time, the CJEU insisted on a strict understanding of mutual recognition. In its Opinion 2/13[109] preventing the EU's accession to the European Convention on Human Rights under the terms agreed, the Court of Justice of the European Union emphasised the importance of the principle of mutual trust between Member States as the cornerstone of the Area of Freedom, Security and Justice. But, in *Aranyosi* and *Căldăraru*[110], the court departed from this strict interpretation. It established a two-prong test for checking the general fundamental rights' situation in a country and the potential risks of human rights' violations in the individual case. If the risk of a violation of human rights in general and in the specific case has been established, the execution of the warrant must be postponed.[111] The test was further developed in the case *LM*[112] with regard to the right to a fair trial, which incorporates the requirement of judicial independence. The judicial test developed in *Aranyosi* and *LM* could constitute a mandatory ground for refusal in mutual recognition-based instruments, beyond a proportionality test.

According to its Recital (10), the implementation of the FD EAW may only be suspended in the event that a Member State seriously and persistently breaches the principles set out in Article 2 TEU and is sanctioned by the Council pursuant to Article 7 TEU, with the consequences set out in that provision. The question may arise whether Article 7 procedures have to reach an end in order to generally suspend mutual trust. So far, the CJEU

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[108] P Bárd, Saving EU criminal justice. Proposal for an EU-wide supervision of the rule of law and fundamental rights, *CEPS Policy Brief* (2018) https://www.ceps.eu/ceps-publications/saving-eu-criminal-justice-proposal-eu-wide-supervision-rule-law-and-fundamental-rights/.

[109] CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 192.

[110] CJEU, *Aranyosi, op. cit*.

[111] For a detailed assessment of the case, see W van Ballegooij, P Bárd, Mutual Recognition and Individual Rights: Did the Court get it Right? *New Journal of European Criminal Law* 7 (2016) 439-464.

[112] Judgment of the Court (Grand Chamber) of 25 July 2018, *Minister for Justice and Equality v LM*, Requests for a preliminary ruling from the High Court (Ireland), Case C-216/18 PPU, ECLI:EU:C:2018:586. For an assessment, see W van Ballegooij, P Bárd, Mutual Recognition and Individual Rights: Did the Court get it Right? *New Journal of European Criminal Law* 7 (2016) 439-464.

has answered in the affirmative.[113] The CJEU reserves the task of suspending mutual trust exclusively to the European Council[114] and only if the sanctioning prong of Article 7 TEU (current Article 7(2)-(3)) is invoked and the Council determines a breach of EU values.

But reaching the end of an Article 7(2)-(3) procedure is practically impossible. The Lisbon Treaty prescribes different voting majorities to the different prongs. Reaching consensus on even a risk of a serious breach is difficult as it requires a four-fifths majority in the Council. But the process under the second prong, i.e. Article 7(2), is even more unlikely to be carried out since the procedure can be vetoed by any Member State save for the one concerned. Therefore, the CJEU in effect precludes the possibility of having the EAW regime suspended *vis à vis* a State that violates Article 2 TEU values. In light of Hungary's worldwide identification as a 'competitive authoritarian' regime,[115] underpinned by various rule of law indices, a general suspension of mutual trust would be preferred *vis à vis* Hungary.

There is also a more technical problem of interpretation regarding Recital (10). The above understanding is based on a reading which disregards the historical evolution of Article 7 TEU. The reason Recital (10) is silent regarding current Article 7(1) TEU, the so-called 'preventive arm' of Article 7, is that it did not exist at the time when the FD EAW was drafted. Since this provision was added in the meantime, one could argue that the drafters of the FD EAW intended to refer to Article 7 as such and the preventive arm should also be read into Recital (10). Such an interpretation would be preferable in light of the inherent asymmetry between the individual and the State, especially in the area of criminal law.

At a more abstract level, it would have been preferable to follow a precautionary principle, and allow suspension of EU law instruments in case there are serious doubts as to the respect of Article 2 TEU values in the issuing Member State, since in criminal cooperation, including surrender procedures, fundamental rights are stake. But this is a lost case already, suspension of mutual trust in general is now connected to sanctions at the political level and is therefore rendered practically impossible.

The two-prong test developed by the CJEU has several weaknesses. First, it cannot tackle situations with systemic rule of law or fundamental rights problems in the issuing state. It places too high a burden on the individual to prove how they would personally be affected by the systemic problems. Instead, we suggested that surrender cases are frozen until the preliminary issue is clarified whether mutual trust is justified in light of the issuing Member State's rule of law and fundamental rights health status.[116] At the minimum, there should be a reversal of the burden of proof, obliging the state to show how the individual would not be affected by a systemic problem in relation to Article 2 TEU.

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[113] Judgment of the Court (Grand Chamber) of 25 July 2018, *Minister for Justice and Equality v LM*, Requests for a preliminary ruling from the High Court (Ireland), Case C 216/18 PPU, paragraph 7,70.

[114] Judgment of the Court (Grand Chamber) of 25 July 2018, *Minister for Justice and Equality v LM,* Requests for a preliminary ruling from the High Court (Ireland), Case C 216/18 PPU, paragraph 71,72.

[115] András Bozóki & Dániel Hegedűs (2018) An externally constrained hybrid regime: Hungary in the European Union, Democratization, 25:7, 1173-1189. Lest there be any doubt, the originators of the concept of competitive authoritarianism, Lucan Way of University of Toronto and Steven Levitsky of Harvard University, have stated that the Orbán regime fits in this category. Lucan Way, Steven Levitsky, (2019) 'How autocrats can rig the game and damage democracy', *Washington Post*, 4 January. https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/?utm_term=.32a0dd543512.

[116] S. Carrera and V. Mitsilegas, 'Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court's request for a preliminary ruling on the European Arrest Warrant', CEPS commentary, 11 April 2018. Available at: http://www.ceps.eu/publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary, Petra Bárd, Wouter van Ballegooij, Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM, New Journal of European Criminal Law, 2018, 9:3, 353–365, 362.

Second, the CJ's two-prong test is an *ex post* technique. It is responsive, i.e. designed to put a halt to the spread of rule of law and human rights violations when enforcing mutual recognition based EU law. But it is neither capable of preventing fundamental rights' abuses nor is it suited to fostering mutual trust. Against this background, EU-wide procedural guarantees play a crucial role. The list of issues to be harmonised could be extended as far as the Lisbon Treaty allows and preferably also minimum harmonisation of the rules on detention conditions should be agreed upon.[117]

Third, the EU could create "a legal landscape of earned, rather than perceived trust in Europe's area of criminal justice"[118] by way of establishing an all-encompassing monitoring mechanism for the rule of law, democracy and fundamental rights, including procedural rights and detention conditions, and with a special emphasis on judicial independence.

At present, there is no such systemic and all-encompassing monitoring of EU values in the criminal justice sector.[119] This is so despite the fact that Article 70 TFEU allows the adoption of measures for an objective and impartial evaluation of the implementation of Union policies in the Area of Freedom, Security and Justice in order to facilitate the full application of the principle of mutual recognition. On 25 October 2016, the European Parliament passed a Resolution inviting the Commission to initiate legislation on a comprehensive rule of law, democracy and fundamental rights' scoreboard (the DRF Resolution).[120] The last recommendation is to put the DRF Pact into practice. Should the DRF Pact be adopted, the EU may then be in a position to act without having to wait for rule of law backsliding or gross human rights' infringements to occur in order to determine – via its respective legal procedures – violations of EU values. Instead, it could warn the respective Member State in due time and request a return to these values. Also, if a Member State has already breached these values, the EU would not have to wait for external players, such as the UNHCR, the Council of Europe, including the ECtHR, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), to indicate generic problems (as happened in the abovementioned *Aranyosi* case), but could rely on its own scoreboard system. It could act promptly with regard to mutual trust by suspending the application of mutual recognition based EU laws (enhancing the effectiveness of the above recommendations on *ex post* instruments). Also, it could establish higher standards than those required by other external fora, such as the Council of Europe and the ECtHR.

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[117] Also addressed by the Stockholm Programme of 2009 and European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV(2014)0174, Point 17.

The question, however, emerges as to whether the EU has competences to adopt minimum standards on detention conditions. Article 82(2)(b) TFEU covering criminal proceedings could unquestionably be extended to pre-trail detention. But it is debated whether post-trial detention, i.e. detention as a form of sanction, is also covered in a lack of express provisions. One could argue that Article 82(1) TFEU emphasising judicial cooperation in mutual recognition could not be enforced without minimum standards in detention conditions as the *Aranyosi* case, *op cit.* proves. For a detailed discussion of the problem, see W van Ballegooij/European Parliamentary Research Service, European Added Value Unit, *Procedural Rights and Detention Conditions. Cost of Non-Europe Report*, *op. cit.*, 66-69.

[118] V Mitsilegas, The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice, 6 *New Journal of European Criminal Law* (2015), 460-485, 480. The President of the Court of Justice reiterated this stance in a scholarly article but also added "where EU legislation complies with the Charter, limitations on the principle of mutual trust must remain exceptional and should operate in such a way as to restore mutual trust, thus solidifying all at once the protection of fundamental rights and mutual trust as the cornerstone of the AFSJ". K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 *Common Market Law Review* 3, 805-840, 840.

[119] An ongoing project by Fair Trials entitled 'Beyond surrender' will provide insight into post-surrender treatment of people subject to indictment based on the European Arrest Warrant. Such a project may highlight deficiencies in the operation of the system, but cannot replace systemic scrutiny. https://ec.europa.eu/justice/grants1/files/2014_jcco_ag/summaries_of_selected_projects.pdf, 7.

[120] European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV(2016)0409.

For the time being, the Commission has followed up on this document in a rather hostile manner, which can be regarded as part of an inter-institutional dialogue on the matter. See Commission response to text adopted in plenary, SP(2017)16, 17 February 2017. For an assessment see P Bárd, S Carrera, 'The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts' (2017) 8 *CEPS Policy Insights* 1-11, https://www.ceps.eu/ceps-publications/commissions-decision-less-eu-safeguarding-rule-law-play-four-acts/.

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