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Előszó

A Miskolci Egyetem Deák Ferenc Állam- és Jogtudományi Doktori Iskolája gondozásában megjelenő Studia Iurisprudentiae Doctorandorum Miskolciensium 2024. évi második kötete a megjelenő dolgozatok száma szempontjából az ez évi első kötetet is felülmúlja. Huszonöt tanulmányban a jogtudomány rendkívül széles skáláján mozgó kutatások eredményéről adnak számot a doktoranduszok. A nemzetközi láthatóság szempontjából külön is kiemelendő, hogy a megjelenő dolgozatok több mint kétharmada angol nyelvű. Az, hogy külföldi doktoranduszok egyre nagyobb számban vesznek részt a hazai doktori iskolák képzésében, azzal az eredménnyel is jár, hogy a korábban a jogtudományi kutatásokban nem, vagy kisebb súllyal megjelenő országok jogszabályi rendelkezéseit, jogalkalmazói gyakorlatát is megismerhetjük.

A klasszikus büntetőjogi, jogtörténeti, munkajogi, nemzetközi jogi, polgári jogi kérdésekkel foglalkozó munkákon kívül több tanulmányt találunk a kínálatban, amely komplex, több jogterülethez köthető témát dolgoz fel.

Nehéz lenne akár csak röviden ismertetni a publikált írásokat egy előszó keretei között, így csak azt engedje meg a kedves olvasó, hogy – tágabb témakörök szerint csoportosítva – a dolgozatok tárgyára utaljak, bízva abban, hogy ez is elegendő a figyelem felkeltéséhez.

A büntetőjogi témájú írások közé tartozik *Sipos Alexandra* írása, aki Az új pszichoaktív szerek kábítószerpiacon történő tömeges megjelenésével kapcsolatos kérdéseket teszi vizsgálat tárgyává. *Alma Bela* tanulmánya bemutatja, milyen fontosabb változások következtek be a hatályos albán Btk. hatályba lépése óta eltelt közel három évtizedben. Amellett, hogy új bűncselekmények jelentek meg és a büntetések terén is szigorúbb büntetőpolitika érvényesül, a büntetés-végrehajtás során különösen érzékeny területként definiálható a fogvatartottak adatainak kezelése. *Rania Jallouli* a bűncselekmény körülményeinek a büntetés kiszabására gyakorolt hatását komplex módon vizsgálja a francia jogban, hangsúlyozva, hogy bár a bíró mérlegelési jogköre meglehetősen tág, döntését indokolni köteles. *Zahra Delshad* a jogi személyek büntetőjogi, különösen a kiberbűncselekményekkel kapcsolatos felelősségének iráni szabályozását vizsgálja.

Részben már a jogtörténeti témájú dolgozatokhoz sorolható *Kovács Bence Zsolt* tanulmánya, amely a középkor és a kora újkor jogalkalmazói gyakorlatának egy szokatlan megoldásáról, az állatok ellen folytatott büntetőeljárásokról szól, amelyek keretében állatokat állítottak bíróság elé és nem ritkán el is ítélték őket.

Bálint Anita az ókori Rómában folytatott gyógyító tevékenység egyes speciális területeit dolgozta fel a jogi szabályozás szemszögéből. *Rási Viktória Eszter* arra tesz kísérletet, hogy a kalózok jogi megítélésének változását az ókortól napjainkig felvázolja.

A civilisztikai tudományok körébe sorolható dolgozatok közül *Darnót Sára Edina* a jogcímhez kötöttség elvének érvényesülését vizsgálja. *Miroslav Chupáč* bemutatja, hogy a Cseh Köztársaságban milyen formai és tartalmi követelményeket támasztanak az ingatlan tulajdonjogának átruházásáról szóló szerződéssel kapcsolatban és felvázolja a tulajdonjog megszerzésével kapcsolatos eljárási szabályokat is. *Dzhusupov Akylbek* azt vizsgálja, hogy milyen szerepe lehet a Kirgiz Köztársaságnak a globális kereskedelemben, milyen lehetőségeket használhat ki a digitalizáció révén és mit tanulhat az uniós jogból. *Hanin Ghanem* tanulmányában a köz- és a magánszféra közötti partnerség fontosságát emeli ki a piacgazdaságra történő áttérés és az infrastrukturális projektek, valamint a közszolgáltatások megvalósítása terén. *Torjai Gergő Zoltán* elsősorban a béranyaság öröklési jogi és kötelmi jogi kérdéseit vizsgálja. Elemzése eredményeként arra a következtetésre jut, hogy a béranyaságot be kell tiltani vagy szigorúbban kell szabályozni. *Dajka Zsoltné* a munkavédelem újszerű problémáival foglalkozik és a kockázatértékelés jelentőségét hangsúlyozza.

A nemzetközi jogi, európai jogi tanulmányok körében *Douaa Zaidan* tanulmányában arra törekszik, hogy a kritikai elméletet alkalmazza az európai társadalom valóságára. *Kőrösy Péter Krisztián* a Bős-nagymarosi Vízlépcsőrendszer építésének történetét vázolja fel és a kialakult konfliktus jogi aspektusait mutatja be. *Leon Žganec-Brajša* a környezeti ártalmakkal kapcsolatban az Emberi Jogok Európai Bírósága által elbírált, Horvátországot érintő ügyek rövid elemzésére vállalkozott. *Marie Beyrich* a Német Szövetségi Alkotmánybíróság által elbírált két, kiemelt jelentőségű üggyel foglalkozik tanulmányában, de ezeken túlmutatva általánosságban is vizsgálja az uniós jog és a nemzeti jog viszonyát érintő alkotmánybírósági ítélkezési gyakorlatot. *Piero Orlandin* a nem megfelelő környezeti feltételek miatt kialakuló migráció sajátosságait mutatja be, felvázolva a probléma jövőbeli kezelésének lehetséges formáit is. *Sanar Shreef Ali* tanulmányában rámutat, hogy a technológia és az internet fejlődése új biztonsági kihívások megjelenéséhez vezetett, amelyekre az államoknak reagálnia kell. Ennek során nem mindig sikerült egyensúlyt teremteni, nemzetbiztonsági érdekből az adatvédelem sérülhet. A szerző a problémák megoldására is igyekszik javaslatot tenni.

Aktham Ra'ed Ahmad Alqattamin az államok szuverenitásával mint a nemzetközi kapcsolatok alapfogalmával, valamint a szuverenitás és az államok érdekei közötti kapcsolattal foglalkozik tanulmányában. *Jafaar Sakkour* Szíria adórendszerének vizsgálata során összehasonlítja Szíria pénzügyi helyzetét más jogrendszerekkel annak érdekében, hogy rávilágítson a közigazgatás decentralizációjának megvalósítása során jelentkező kihívásokra. *Révész Gábor* az ember szexuális fejlődés, különösen a serdülőkori változások sajátosságait mutatja be.

A kínálat bőséges, a Szerkesztők bíznak benne, hogy ebben a lapszámban is minden kedves olvasónk talál az érdeklődési körébe tartozó olvasnivalót.

Prof. Dr. Róth Erika
a Deák Ferenc Állam- és Jogtudományi Doktori Iskola vezetője

TARTALOMJEGYZÉK

AKTHAM RA'ED AHMAD ALQATTAMIN*

The Strong Pushes the Weak: Sovereignty Protection and States' Interests

Abstract: State sovereignty is a foundational concept in international relations, embodying the idea that a state possesses the supreme authority to govern itself without interference from external actors. This principle has been a cornerstone of the global order, shaping the dynamics of international politics and diplomacy. Concurrently, states' interests play a pivotal role in guiding their actions on the international stage. This paper delves into the intricate relationship between states' sovereignty and states' interests, examining how these concepts intersect and often clash in the complex arena of global affairs.
Keywords: Sovereignty, States' interests, International community, United Nations, International law.

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1. State Sovereignty

"Although some point out that he did not invent it, most consider Jean Bodin the 'father' of 'sovereignty' because he provided 'the first systematic discussion of the nature' of this extraordinarily powerful word. He has been referred to, very accurately, as a man who is 'often quoted, but rarely read'.[1]

Even though the idea of sovereignty was already present, the first emergence and clear definition of the concept of sovereignty was in Jean Bodin's "Six Livres De La Republique (Six Books of the Commonwealth)". Bodin defined sovereignty in his work as the absolute and perpetual power vested in a commonwealth. He also mentioned sovereignty as the distinguishing mark of a commonwealth, and that until then it was not properly defined[2] even though the idea of sovereignty was present and applied but unsystematically.

Sovereignty is a concept that asserts the autonomy and independence of states in their domestic and foreign affairs. It encompasses the authority to make and enforce laws, control territory, and engage in international relations.

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[1] BEAULAC, S.: The Social Power of Bodin's 'Sovereignty' and International Law. *Melbourne Journal of International Law*, 2003/4(3)

[2] BODIN, J.: *Six Books of the Commonwealth*. York University. 1576. (tr. & abr. M.J. Tooley 1955), 24-25.

The concept of sovereignty is also deeply rooted in the Westphalian Peace Treaties, comprising the Peace of Westphalia, signed in 1648, marked a pivotal moment in European history. These treaties brought an end to the devastating Thirty Years' War[3], a conflict that ravaged the continent and laid the groundwork for a new international order. The Peace of Westphalia is not merely a historical event but a cornerstone in the evolution of the modern state system and the principles of state sovereignty, as it included the notion that not only states are sovereign, but also equal in sovereignty[4].

Some of the main principles that were introduced by the Westphalian peace treaties can be listed as follows:

- State Sovereignty: One of the most significant contributions of the Westphalian Peace Treaties was the affirmation of the principle of state sovereignty. The treaties recognized the autonomy of individual states, allowing them to govern their internal affairs without interference from external powers. This notion of sovereignty became a fundamental aspect of the modern state system.
- Territorial Integrity: The treaties emphasized the inviolability of state borders, reinforcing the idea that changes in territory should only occur through mutual agreement rather than through conquest or external imposition. This principle aimed to reduce the frequency of wars driven by territorial ambitions.
- Religious Toleration: The Peace of Westphalia recognized the diversity of religious beliefs within the Holy Roman Empire, granting rulers the authority to determine the religion of their states (cuius regio, eius religio = whose territory, their religion)[5]. This principle contributed to developing religious tolerance and freedom of conscience, fostering coexistence among diverse religious communities.

While the principle of sovereignty has historically been cherished, the evolving nature of global challenges has led to debates about its relevance in a world increasingly interconnected through trade, technology, and communication. The increasing interconnectedness of the global economy has introduced a new dimension to the sovereignty discourse. While preserving their political autonomy, states find themselves entangled in economic interdependence. Trade agreements, multinational corporations, and financial institutions contribute to a complex web

[3] TISCHER, A..: *Peace of Westphalia (1648).* Oxford Bibliography, 2021.
[4] FERREIRA-SNYMAN, MP.: *The Evolution of State Sovereignty: A Historical Overview.* Fundamina, 2006, 9.
[5] FELLMETH, A. X. – HORWITZ, M.: *Guide to Latin in International Law.* Oxford University Press, 2009, 69.

of relationships that influence state behavior beyond traditional geopolitical considerations.[6]

The 21st century has witnessed a transformation in the nature of global challenges, challenging the traditional understanding of state sovereignty. Transnational issues, such as climate change, terrorism, and pandemics, have spurred the emergence of international institutions that necessitate cooperation and coordination among states. As a prime example, the United Nations embodies the delicate balance between upholding state sovereignty and addressing global concerns.[7]

2. Responsibility to Protect Doctrine (R2P)

The concept of state sovereignty encounters one of its most significant challenges in the debate over humanitarian intervention. The Responsibility to Protect (R2P) doctrine asserts that the international community is obligated to engage if needed to end the worst forms of violence and persecution being imposed on a population[8]. However, the application of R2P often raises questions about the violation of state sovereignty in the pursuit of protecting human rights.

One good example of when a group of people needed the interference of the international community to stop their tyrant from committing genocide against them is the Syrian Civil War (2011-present).

The origins of this war are intricate, involving a convergence of political, social, and economic factors. At its core, the conflict was sparked by widespread dissatisfaction with the authoritarian governance led by President Bashar al-Assad. The initial protests were part of the broader Arab Spring movement, a series of anti-government demonstrations that resonated across the Middle East and North Africa. Several key elements contributed to the Syrian conflict. Decades of authoritarian rule by the Assad family have bred resentment, restricted political freedoms, and meting out harsh repression of dissent. Economic challenges, marked by high unemployment and corruption, fueled public discontent.

The government's brutal response to peaceful protests demanding political reforms led to further escalation. Syria's diverse religious and ethnic landscape saw heightened sectarian tensions between the Sunni majority and the Alawite-dominated government. The involvement of regional and international powers introduced additional complexity, with various countries supporting different

[6] REDDY, C. S.: Globalization And The Sovereignty Of The Nation-State. *World Affairs: The Journal of International Issues*, 2012/16(4), 60–77.
[7] MAKINDA, S. M.: Sovereignty and International Security: Challenges for the United Nations. *Global Governance*, 1996/2(2), 149–168.
[8] United Nations – Office on Genocide Prevention and the Responsibility to Protect, 2023.

factions, prolonging the war. The conflict also triggered a massive refugee crisis, forcing millions of Syrians to flee their homes and resulting in a humanitarian disaster.

"As the Syria crisis enters its twelfth year, the humanitarian situation is more difficult than ever. An estimated 15.3 million people need humanitarian assistance and more than half of the population remains displaced from their homes - including 5.3 million refugees living in neighboring countries and more than 6.8 million internally displaced inside Syria. Women and children comprise more than two-thirds of those displaced. Over the years, Syrians have shown remarkable resilience, but as the war continues, hope is fading fast. Over 90 percent of Syrians live under the poverty line and it's estimated that 12 million people are food insecure and 2.5 million are severely food insecure as of Jan 2023."[9]

As much as the Syrian population needed international intervention to help the country be stable and put reasoning back on the table, it never happened. Bashar al-Assad is still at the head of the Syrian regime, walking as a free man after massacring his own population, which makes one wonder about the efficiency and the actuality of the application of the R2P doctrine in real life.

On another occasion, the NATO-led (North Atlantic Treaty Organization) military presence in Kosovo was considered a success as it retained peace and stability in the region and allowed the displaced population to go back to their homes.

The Kosovo Force (KFOR) has been militarily operating in Kosovo since 1999 to provide the people of Kosovo who were once victims of atrocities a chance for a better life and allow them to enjoy their very basic human rights. This presence as much as it provided stability and safety to the region, nevertheless, was accused of challenging the sovereignty of the country where they were operating in[10]. Such contradiction makes us wonder what is more important here, the concept of sovereignty and the realm of politics and international relations, or the safety and well-being of a population who wanted nothing but to live in peace.

The disparity in the responses of the international community on the two occasions mentioned should not solely be interpreted as abandonment of the Syrian population.

This discrepancy may arise from different reasons, we have limited access to the complete political and international context surrounding the issue to judge it fairly. The global community is influenced not only by national individuality and national interests but also by the established rules, norms, and laws of international relations. Diverse situations can prompt varied reactions.

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[9] The UN Refugee Agency. 2023. https://www.unrefugees.org/emergencies/syria/

[10] SCHAUB, G.: Kosovo and the Evolution of State Sovereignty. *Refuge: Canada's Journal on Refugees / Refuge: Revue Canadienne Sur Les Réfugiés*, 1999/18(3), 12–14.

3. States' Interests

States pursue a diverse array of interests driven by factors such as security, economic prosperity, and ideological considerations. Realism, a prominent theory in international relations, posits that states are primarily motivated by self-interest. This self-interest can manifest in various forms, from territorial integrity and national security to economic development and the promotion of political ideologies.

"Realism emphasizes the constraints on politics imposed by human nature and the absence of international government. Together, they make international relations largely a realm of power and interest."[11] These interests can be considered as drivers of actions, states usually prioritize their interests, often engaging in actions that assert and safeguard their objectives and interests. The pursuit of interests, however, can sometimes lead to clashes with the sovereignty of other states.

International law provides a framework for regulating the conduct of states and maintaining global order. The United Nations Charter, for example, prohibits the use of force against the territorial integrity or political independence of any state[12]. Any attack on another state's sovereignty without proper justification violates these legal norms, potentially leading to diplomatic and legal consequences.

The tension between a state's duty to protect its citizens and the respect for the sovereignty of other nations exemplifies the complexities inherent in the pursuit of security interests.

Attacking the sovereignty of another state has profound geopolitical ramifications. It can lead to regional instability, strained diplomatic relations, and, in extreme cases, armed conflicts. The international community often responds with sanctions or collective action to condemn such transgressions. Geopolitical consequences can reverberate globally, affecting alliances, trade relationships, and the overall balance of power.

One major concern or interest that might lead a nation to attack another state's sovereignty is national security considerations.

National security considerations often prompt states to take actions that may infringe upon the sovereignty of others. Examples include preemptive strikes, military interventions, and border disputes.

[11] DONNELLY, J.: *Realism and International Relations*. Cambridge University Press, 2000, 9.
[12] United Nations Charter, Chapter I. Article 2. 2023 (https://www.un.org/en/about-us/un-charter/chapter-1)

"National security is the ability of a country's government to protect its citizens, economy, and other institutions. Beyond the obvious protection against military attacks, national security in the 21st century includes several non-military missions."[13]

For instance, President Vladimir Putin has tried to justify his invasion of neighboring Ukraine in many ways, one of these ways was national security concerns as he tried to blame that war on NATO and its expansion. Many have considered this justification to be absurd as NATO never posed a threat[14].

Since the invasion, the Ukrainian population has witnessed a devastating toll, with as many as 10,000 lives lost due to Russia's full-scale invasion on February 24, 2022[15]. Those who survived the onslaught of the Russian war machine also faced a grim future. According to the UN refugee agency, 5.1 million Ukrainians are internally displaced, while 6.2 million sought refuge globally. Additionally, approximately 17.6 million Ukrainians are in dire need of humanitarian assistance[16]. The Ukrainian people find themselves as the primary victims in this tragic scenario, having not only lost their basic human rights but also their cherished sovereignty, which enabled them to shape the future of their nation according to their own aspirations. Unfortunately, Putin's interests have collided with Ukrainian sovereignty, compounding the challenges faced by the populace.

When a state expresses an interest that necessitates intervention in another state's sovereignty, the international community ought to oppose the actions of the state attempting to undermine the sovereignty of another, in contravention of international norms and regulations.

Although international law ensures the safeguarding of state sovereignty, the question arises as to whether this is reflective of the current reality. The following sections will explore this query, offering real-life examples to illustrate instances where international law is applied selectively, particularly favoring stronger states over others.

4. Ceding Sovereignty to Be Involved

In an era marked by unprecedented interconnectedness and interdependence, the concept of state sovereignty finds itself under scrutiny as states grapple with the

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[13] LONGLEY, R.: *National Security Definition and Examples*. 2021, September 24 / Retrieved from https://www.thoughtco.com/national-security-definition-and-examples-5197450

[14] DICKINSON, P.: *Putin "knows very well" NATO poses no security threat to Russia*. Atlantic Council Ukraine Alert, 2023

[15] United Nations Ukraine. The United Nations Human Rights Monitoring Mission in Ukraine (HRMMU). (Nov. 21st, 2023). Civilian Deaths In Ukraine War Top 10,000, UN Says. Press release. (https://ukraine.un.org/en/253322-civilian-deaths-ukraine-war-top-10000-un-says#:~:text=At%20least%2010%2C000%20civilians%2C%20including,Ukraine%20(HRMMU)%20said%20today).

[16] The UN Refugee Agency.: Ukraine, 2023. https://www.unrefugees.org/emergencies/ukraine/

imperative to cede some of their autonomy to actively participate in the complex web of contemporary international relations and global affairs.

The advent of globalization has blurred traditional boundaries, making it increasingly challenging for states to insulate themselves from the impact of events beyond their borders. Economic interdependence and interconnectivity, in particular, compel states to participate in international trade, finance, and cooperative ventures. By engaging in global economic systems, states cede some control over their domestic economic policies, allowing the private sector and non-governmental investment powers to contribute to the overall economy of the state.

The modern global economy is characterized by unprecedented levels of interconnectedness, as countries across the world have become deeply intertwined through trade, finance, and technology. This economic interdependence has brought about numerous benefits, such as increased efficiency, access to diverse markets, and the sharing of technological advancements. However, it also poses significant challenges to the traditional understanding of the concept of sovereignty, the idea that a nation-state has supreme authority and control over its affairs. This interconnectedness often requires countries to navigate a delicate balance between pursuing their interests and recognizing the interdependence that binds them to the global community.

The challenges to sovereignty arise from the fact that economic decisions made by one nation can have far-reaching consequences beyond its borders. In some instances, economic conditions occurring in one nation can significantly impact the economy of another country and its capacity to recover or provide compensation to its investors who have also suffered consequences.

As an example, we can take the case of the Lehman Brothers crisis, which unfolded in 2008 and marked a pivotal moment in global financial history, sending shockwaves that reverberated across the world's economy. The bankruptcy of Lehman Brothers, one of the largest investment banks, triggered a cascading effect that led to a widespread financial meltdown. The crisis exposed the fragility of the global financial system, revealing intricate interconnections between financial institutions worldwide. The collapse of Lehman Brothers resulted in a severe credit crunch, freezing markets and causing a domino effect of failures in the banking sector. Governments intervened with massive bailouts to stabilize the financial system, but the crisis had already set off a deep recession. Unemployment soared, housing markets collapsed, and consumer confidence plummeted, leading to a protracted period of economic downturn around the globe. The crisis started to affect economies other than the U.S., countries such as Ireland, Greece, Spain...[17]

In the previous example, we can see how the interconnectedness of today's economic system, as effective and beneficial as it can be, also has weaknesses and

[17] BAKER LIBRARY: *Lehman Brothers 1850-2008. Global Impact of the Collapse.* Harvard Business School, 2022

gaps. Regardless, the crisis affected other countries' economies', in this case, Spain for example could not declare war on the U.S. as it damaged its economy, this level of agreed-upon diminishing in sovereignty allowed the first to benefit and compelled them to share the losses with the latter if any occur.

A question to be raised here is; how does the world control this interconnectivity and keep everyone in line?

The proliferation of international organizations and treaties has created a framework where states willingly cede certain aspects of their sovereignty in exchange for shared benefits and the resolution of common problems. Organizations such as the United Nations, the World Trade Organization, and regional bodies facilitate cooperation on issues ranging from peacekeeping to trade regulation. Membership in these organizations often involves adherence to common rules and norms, necessitating a degree of surrender of national autonomy.

International organizations typically do not require countries to cede their sovereignty entirely to be included, but they do necessitate a degree of cooperation and collaboration for membership and participation. Sovereignty refers to a state's autonomy in making decisions within its borders, and international organizations serve as forums for nations to address shared challenges, establish common standards, and foster collaboration. Countries voluntarily join these organizations, agreeing to abide by certain rules, norms, and obligations in exchange for the benefits of collective action. While member states retain control over their domestic affairs, they agree to coordinate on matters such as trade, security, and environmental issues. The extent to which countries relinquish sovereignty varies, as international organizations aim to strike a balance between preserving individual state autonomy and fostering collective efforts to address global challenges.

The idea is not to eliminate sovereignty but to find common ground for mutually beneficial cooperation.

The dynamics of joining the international community necessitate a nuanced approach to sovereignty, requiring nations to carefully navigate the delicate balance between preserving individual autonomy and participating in global affairs. The interconnected nature of the modern world, exemplified by the global economic system and shared challenges like climate change and security threats, underscores the imperative for states to cede certain aspects of their sovereignty in exchange for the benefits of collective action.

The Lehman Brothers crisis and other instances of global repercussions illustrate that economic decisions and crises in one country can have profound effects on others, reinforcing the interconnectedness of nations in today's complex geopolitical landscape.

The proliferation of international organizations and treaties has emerged as a structured response to these challenges, providing a framework for states to engage in cooperative efforts.

By voluntarily joining such entities, nations agree to adhere to common rules, norms, and obligations while retaining control over their domestic affairs. This cooperative model acknowledges the reality of shared global challenges and encourages states to contribute collectively to their resolution. The evolving nature of international relations underscores that, in the pursuit of shared benefits and problem-solving, a measured ceding of sovereignty becomes not just a pragmatic necessity but also a strategic imperative for nations seeking to thrive in an ever-interconnected world.

5. The Strong's Interests Come Before the Weak's Sovereignty

While state sovereignty and states' interests are often complementary, they can also come into conflict as mentioned before. The pursuit of national interests may require states to engage in actions that infringe upon the sovereignty of other states, leading to geopolitical tensions and conflicts.

One example is the tension between the right to self-determination and the responsibility to protect. The former emphasizes a state's right to govern itself without external interference, while the latter calls for international intervention to prevent or stop mass atrocities within a sovereign state. Striking a balance between these principles remains a persistent challenge for the international community.

In the annals of modern human history, superpowers have frequently disregarded the sovereignty of certain nations. What is even more concerning is their ability to legitimize such interventions by leveraging international law and its institutions, strategically upholding their reputation in the eyes of the global community and their own citizenry.

The idea of a strong state exerting its influence over weaker ones is not limited to any particular geographic area, but the Middle East provides a rich tapestry of examples, from the torn Iraq to the unstable Yemen, the region was and still is subject to Western interventions, especially from the U.S.A. Beyond the Middle East, In Eastern Europe, Ukraine's struggle to maintain its sovereignty in the face of the Russian invasion is also an example of how a stronger nation's interests come before a weaker nation's sovereignty. Following we will take a look at these cases and use them to understand how interests are more important than international law sometimes.

In the name of humanitarian intervention, the spread of democracy, and people's freedom, the United States of America single-handedly tore up the Middle East for example. When a legitimate reason was not found, it was made, and the spread of "democracy" started taking place, even though what the Middle East saw from this democracy was nothing but a destabilized region, mass murdering of civilians, and other atrocities.

Even though the Western colonization and mandate over the Middle East and the Arab world came to an end many decades ago, the way the Middle East is run tells us the opposite, the Western effect in the region did not cease to exist until this day. This might be noticed when seeing how the U.S. is still militarily operating from its bases in various Middle Eastern countries, it can be also noticed by observing the various policies of some Middle Eastern countries that are against the desire of their peoples, a good example on this is the normalization with the state of Israel.

The modern idea of a united Arab world can be traced back to the late 19th and early 20th century, however, it became more prominent after the fall of the Ottoman Empire in 1918-22. The term "Pan-Arabism" arose, and the chanting and working towards a united Arab world was taking place[18]. Some of the Arab leaders had a vision of a united Arab world that was not only united but also fully independent from any foreign interference in its affairs and sovereignty, leaders such as "Gamal Abdel Nasser, Saddam Hussain, and Moammar AL Qadhafi". These names caused many sleepless nights to the U.S. and other Western powers, manifesting their fears of the rise of a union that is capable of changing the balance of power and jeopardizing their interests in the region and out of it.

For instance, the U.S. and the U.K. felt a danger coming from Iraq back in the late 90s and early 2000s, this danger was the previous Iraqi President "Saddam Hussain" and his policies. This man was cheering for and working on unifying the Arab world, creating unity between the Arab countries. But the West saw that as a threat that needed to be dealt with, hence, overthrowing the Saddam Hussain regime.

In 2003, the U.S. led an invasion upon the Republic of Iraq. This invasion was clearly an attack on the Iraqi state sovereignty, but how did the U.S. get the green light and even the military support from some states such as Great Britain, Australia, and Poland?

"The enemies you confront will come to know your skill and bravery. The people you liberate will witness the honorable and decent spirit of the American military. In this conflict, America faces an enemy who has no regard for conventions of war or rules of morality.

Saddam Hussein has placed Iraqi troops and equipment in civilian areas, attempting to use innocent men, women, and children as shields for his own military -- a final atrocity against his people.

I want Americans and all the world to know that coalition forces will make every effort to spare innocent civilians from harm. A campaign on the harsh terrain of a nation as large as California could be longer and more difficult than some predict. And helping Iraqis achieve a united, stable, and free country will require our sustained commitment.

[18] Britannica, The Editors of Encyclopedia. "Pan-Arabism". Encyclopedia Britannica, 25 Dec. 2023 / (https://www.britannica.com/topic/Pan-Arabism)

We come to Iraq with respect for its citizens, for their great civilization, and for the religious faiths they practice. We have no ambition in Iraq, except to remove a threat and restore control of that country to its own people.".[19]

"Our nation enters this conflict reluctantly -- yet, our purpose is sure. The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder. We will meet that threat now, with our Army, Air Force, Navy, Coast Guard, and Marines, so that we do not have to meet it later with armies of firefighters and police and doctors on the streets of our cities."[20]

Bush's administration used the alleged claims that President Saddam Hussain was in pursuit of Weapons of Mass Destruction (WMDs), that he used Iraqi civilians as human shields, and that Hussain was connected to the Al-Qaeda terrorist group which also has a back story linked with the U.S. that is filled with lies and alleged claims[21]. America's war on Iraq was meant as per President George W. Bush and The British Prime Minister at the time Mr. Tony Blair to prevent a "dictator" from acquiring WMDs that would be a direct threat to the U.S.A. and the "civilized" world, and to free the Iraqi people from their "tyrant", hence the name of the operation "Iraqi freedom" but did this war end up with a free Iraq?

On the contrary, the 9-year-long war led to nothing but the downfall of a stable Iraq and the hollowness of finding a new regime for the country. Iraq until today is in a constant state of political chaos and instability, sectarian strife, and roughly 320,000 killed Iraqi civilians, although, no actual numbers were published and some argue that the number of killed Iraqi civilians is significantly higher.

The irony of this is that when Saddam Hussain was going through the Iraq-Iran war (1980 – 1988), America took the side of Iraq and supported its war with Iran[22], but once that interest of the U.S.A. of weakening Iran was fulfilled, they pointed their support elsewhere and started pointing fingers towards Saddam Hussain to be a direct threat to the American national security, which shows how complex and misleading international relations can be, and this asserts the fact that states' interests often come before other weaker states' sovereignty.

Another example from the Middle East is when the U.S. decided to start a war on Afghanistan (2001), after the attack of the World Trade Centers (the two towers) in New York City on 9/11/2001, America decided to hunt down and eliminate the responsible party which was Al-Qaeda led at the time by Osama Bin Laden, who

[19] U.S. President George W. Bush.: Operation Iraqi Freedom. Oval Office of the White House, Washington DC, Mar. 19th, 2003

[20] U.S. President George W. Bush.: Operation Iraqi Freedom. Oval Office of the White House, Washington DC, Mar. 19th, 2003 (https://www.youtube.com/watch?v=EZ8iMwA11TQ&ab_channel=AmericanRhetoric.com).

[21] See the TV broadcast of General Wesley Clark, Democracy Now Studios / March 2nd, 2007 (https://archive.org/details/dn2007-0302_vid)

[22] SALE, R.: *Saddam Key in Early CIA Plot*. Global Policy Forum, 2003.

was once backed up by the American CIA and the Saudi Arabian dynasty at the time, to fight soviet troops in the Soviet-Afghani war back in 1979, but after the withdrawal of the Soviets, Bin Laden Sought leadership of his own creating Al-Qaeda which was deemed as a terrorist group by the international community later on.[23]

The American war on Afghanistan was meant again to eliminate a threat to its national security and once again to the "civilized" world. The American-Afghani war can be divided into 3 different phases or objectives as follows:

- The toppling of the Taliban radical Muslim group was the shortest as it took only 2 months.
- The defeat and erasing of the Taliban, 2002 – 2008, and Al-Qaeda until U.S. President Barak Obama declared the successful assassination of Osama Bin Laden in Pakistan in 2011 by the American Navy Seals force.
- The protection of the Afghani population from the Taliban and help Afghanistan build a new regime that will guarantee a better life for Afghanis (which never happened).

But what about the Afghani civilian and governmental losses during this war?

According to the Watson Institute of International & Public Affairs at Brown University, the results of this war were as follows[24]:

- The estimated losses within Afghani civilians are 70,000 people.
- An unstable Afghanistan. The CIA has armed and funded Afghani militia groups who have committed atrocities against civilians.
- And an Afghanistan filled with leftover minefields that are still killing civilians to this day.

After the 9/11 attack, the U.S. launched its rage upon the Middle East, treating millions of people as Osama Bin Ladens.

"*At least 940,000 people have died due to direct war violence, including armed forces on all sides of the conflict, contractors, civilians, journalists, and humanitarian workers…*"[25].

This shows us the interference of the United States of America and some other Western superpowers in many other states' sovereignty, in the name of defending their national security, maintaining world security, and freeing the people of those weaker states from their tyrant regimes. As for all these deaths and civilian losses, they were considered collateral damage which is a normal outcome of wars, wars

[23] PARENTI, C.: America's Jihad: A History of Origins. *Social Justice*, 2001 /28(3(85)), 31–38.
[24] Costs of War: Afghan civilians. Watson Institute for International and Public Affairs, Brown University, 2023.
[25] Cost of War: Watson Institute for International and Public Affairs, Brown University, 2023 / Summary of findings

that were built on lies and hidden interests and were unnecessary and unexplained but by the fact that the weak were being pushed by the strong to keep their interests safe.

Here in Eastern Europe, there is an example of a state sovereignty being under attack in Ukraine. Russia has been always a bad neighbor to Ukraine, recent events show the behavior of this bad neighbor such as the annexation of Crimea in Northern Ukraine in 2014 and the current full-scale invasion of Ukraine. Russia used the excuse of NATO spreading weapons along Ukrainian-Russian borders along with some other justifications that never reached the level of acceptance, then a Russian invasion of the Ukrainian lands took place, and many civilians were and are being killed and displaced, while the world is trying to show support and aid for the Ukrainian government and population, it is also trying to avoid igniting a new world war, many spoke about fears of a nuclear war as events started to escalate, but so far the war have been restricted to military operations on land and striking and shelling of Ukrainian cities.

A more recent action of attacking another state's sovereignty is what is happening now in the war between Israel and the Palestinian resistance in the Gaza Strip, Palestine. As an action to prevent aid and help reach the 2.2 million civilian population in Gaza who have been under siege for the last 16 years in the world's largest open-air prison[26], and under shelling and airstrikes for more than 90+ days now. Israel has bombed the only available crossing point between Gaza and Egypt (the Rafah crossing point).

The controlling sides of this crossing point are Egypt and Palestine, Israel attacked the Egyptian sovereignty (and the Palestinian sovereignty for about 75 years now) but Egypt's President Abdulfattah Al-Sissi did nothing in reaction to the event, on the contrary, against the willingness of the Egyptian people and many of its military and political leaders, the Egyptian regime seems to be avoiding any addressing or blaming to Israel, which can only tell that there is a sense of fear from the escalation of events and dragging the war to their lands.

These examples and many more can show us how stronger nations can prioritize their interests even if it means attacking other states and their sovereignty, committing atrocities against civilians, and leaving those countries in chaotic states that will prevent them from developing or even maintaining decent life circumstances for their citizenry or whoever survived of them.

[26] LINAH, M..: *Children make up nearly half of Gaza's population. Here's what it means for the war*. NPR Org, 2023. / (https://www.npr.org/2023/10/19/1206479861/israel-gaza-hamas-children-population-war-palestinians)

6. Conclusion

State sovereignty and states' interests are central components of the international system, influencing the behavior of states in their interactions with one another. While the principle of sovereignty remains crucial, the evolving nature of global challenges necessitates a nuanced approach that acknowledges the interconnectedness of nations. Striking a balance between preserving state sovereignty and addressing collective interests is a delicate task that requires diplomatic skill, cooperation, and a commitment to finding common ground in an ever-changing world.

The relinquishment of sovereignty is most evident in the realm of international law and institutions. Treaties and conventions, designed to address issues such as human rights, environmental protection, security, and economic activities, require signatory nations to adhere to shared standards and regulations. As countries commit to these agreements, they are, in essence, acknowledging the need for collective action to tackle global challenges that transcend borders. Moreover, participation in international organizations, from the United Nations to regional blocs, necessitates the acceptance of a framework that places certain constraints on unilateral decision-making. Countries willingly engage in this process with the understanding that the benefits of collaboration and shared responsibility outweigh the limitations on individual sovereignty.

Furthermore, economic interdependence plays a pivotal role in compelling nations to compromise on sovereignty. In an era of globalization, where trade and investment flow seamlessly across borders, countries recognize the importance of aligning their economic policies with international norms. Participating in global markets often requires adherence to standardized practices and regulations, which may influence domestic policy-making. While this may be viewed as a loss of sovereignty in certain aspects, nations understand that the economic benefits derived from international cooperation often outweigh the potential drawbacks.

Apart from the treaties and the economic benefits, the good old human nature manifested in its greed for power has also made it harder for weaker nations to maintain full autonomy, stronger nations throughout history have tried to pursue their interests and benefits at any cost. The new world order and the spread of protection regulations outlined by international law and its institutions sound very humane and fair, but how come is it always the strong find a way to justify their unfit actions to gain their benefits? We can see what today's world looks like, an unstable Middle East, a diseased South Africa, a chaotic South America, and a fractured East Europe. These are all cases showing that international law and its institutions must alter their policies' application and treat the world as one unit and actually apply its verdicts and laws on an equal basis guaranteeing that the priority here is the world's well-being as a whole.

In conclusion, the complex interplay of states' interests often catalyzes challenging each other's sovereignty in the arena of international relations. The pursuit of national interests, whether they are economic, political, or strategic, can create tension and competition among nations, leading to challenges to the autonomy and authority of other states and possibly fracturing the international community and disturbing the world's peace. This dynamic reflects the inherent tension between the principles of sovereignty and the realities of a globalized world where states are interconnected and interdependent.

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ALMA BELA*

Sentencing policies in Albania and respect of personal data of convicted persons

Abstract: The current Criminal Code (material part) in Albania has been subject to continuous changes over the years, since its entry into force in 1995 until today, as a result of changes in economic, social, cultural and technological factors that affect the life of the citizens. Often the changes in the Criminal Code are related to the provision of new criminal offenses or the toughening of the punishment for existing criminal offenses. Such an influence on the criminal policy in general and the sentencing policy in particular, comes as a result of the fact that people may have committed one or several criminal offenses more than once. The Constitution specifically provides in Article 27, point 1 that: "No one can be deprived of their freedom, except in the cases and according to the procedures provided by law." This article is the basis of the entire procedure for the sentencing. And while the criminal offense author is awaiting the sentencing decision, it is the duty of the judge or panel of judges to base the decision they gave on behalf of the Republic, by arguing the reason for the sentencing measure, explaining which statistics, data, principles and other factors is referred to, etc. In Albania, there are data from the relevant institutions on the sentences decisions from the court and on the years of serving the sentence. After the verdict of guilty for the punishment of the author of the criminal offense, the issue arose as to how much legislation is applied in force for the storage, use and/or transfer of the data of imprisoned persons. During the last 20 years, the Albanian legislation and the by-laws issued in its implementation, are aligned with the *Acquis*, thus there is an improvement, the continuity of which should not be hindered. In this paper, referred to above, there will be an overview of the situation of the sentencing policies that have been applied, as well as how delicate is the issue of using the personal data of convicted persons and how they can be protected.
Key words: criminal law, data, data protection, law, sentencing policies.

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1. Introduction

Humanity in its times has faced the most diverse situations. In the beginning, there was a need to provide food, to create a safe and stable residence or shelter,

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then to continue with the creation of a family. Following these successive and necessary steps at the same time inevitably led to the need to have security for each of them. Protection from predators, thieves, barbarians, etc., triggered the response of the primary instinct for survival and then that of punishing the wrongdoer.

With the creation of the first polis, the birth of the first structures of civilization began, the result of which was the rhythm and the creation of some written and unwritten rules which were to be applied compulsorily by the people who were part of a certain society or social order. Thus, the need to establish a certain order naturally arose. As in any society, if someone commits an action that is contrary to the norms of that society or that harms the safety or life of another person, he/she will be followed by the undertaking of some measures that are mainly with the purpose of punishment by deprived of some fundamental rights or freedoms, such as: staying in a certain environment of serving the sentence, lack of movement to another environment/city or country, etc. In the beginning of humanity, the main goal was punishment. The principle related to the educational effect came much later, it can be emphasized in the last decades. From the Latin we remember the expression: "*per quod quis peccat per idem punitur et idem*"/ one who commits a sin is punished through it and in the same way. Regarding this, the philosopher of law, Immanuel Kant, in his book "Metaphysics of Morals", the section "Doctrine of Right", stated that: "The crimes mentioned[1] are called unnatural because they are perpetrated against humanity itself. To inflict whatever punishments one choses for these crimes would be literally contrary to the concept of punitive justice. For the only time a criminal cannot complain that a wrong is done to him is when he brings his evil deed back upon himself, and what is done to him in accordance with the criminal law is what he has perpetrated on others, if not in terms of its letter at least in terms of its spirit. So for the Kantians, criminal law has a retributive character, an idea that has its roots in antiquity, in the famous principle of talionis-lex talionis which means that: "in case you do harm, you will give, life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound." [2] The position of the Kantists proves their insistence on considering the individual as a rational being who freely chooses to respect or break the law[3].

1.1. The history of Albanian Criminal Law and the punishments that were given.

In the history of our country, starting from the first Illyrian states, there is information about the way they were organized in general, while there is no data

[1] KANT, I.: *The Metaphysics of Morals*, 2012, 169
[2] IKONOMI, L.: *Philosophy of Law*, Tiranë, 2006, 207.
[3] Ibid, 209.

regarding criminal law. The Croatian albanologist Milan Šufflay expressed his views on these issues, who in his book "Serbs and Albanians", Tirana, 1925, pg. 25, it was stated that "...Titus Livy gives some notices about the state organization of the Illyrians, but there is no information about criminal law in particular". Meanwhile, Prof. Dr. Ismet Elezi, in his book "Historical Development of Criminal Legislation in Albania", states that: "The process of birth and development of criminal law in the Illyrian states and then, was subject to the same laws of the development of other states in different places, without denying the local features defined in final analysis from the material conditions of people's lives, from the uneven economic-social development of this or that country. This is the reason why the criminal law in Illyrian states in content, from its character and tasks and goals, did not differ from the criminal law of slave-owners of other slave-owning states." [4] Meanwhile, with the Roman occupation, Roman criminal law continued to operate for as long as the Roman occupation lasted in Illyria.[5] Looking at the different texts related to the history of Albania in general, and to continue to those that are closely related to legal issues, we stop at the period where with the creation of the State of Arbër, the customary criminal law will be considered as the source principal of the law in these lands. For this we remember that cities such as Durrës, Shkodra, Ulqini, Drishti, Tivari, etc., had their own charters, based on which they were governed. In the Statutes of Shkodra, discovered by Prof. Lucia Nadin, in 1995, when she found their manuscript in the Library of the Correr Museum[6], the norms of criminal law were also mentioned. For medieval Europe, these satutes constituted a phenomenon. The acts that were punished and punished by the acts that were in force at different times were mainly those for acts of violence that were related to wounding or killing a person, those that conflicted with public order, etc. With the Ottoman occupation, in the Albanian years, in addition to Sharia, the government of that time also issued canons that mention the entry into force of the Penal Code in 1878, which also acted after the declaration of independence and the independent creation of Albania on November 28, 1912.

Based on the general panorama created so far, it can be seen that in most of the history of the Albanian state, it is occupied by customary law. It was precisely this right which, as a set of unwritten norms, passed down from generation to generation, has served as the best regulator of social relations. It is worth mentioning that the main sources of Albanian customary law were the Canon of Skënderbeu (or the Canon of Arbër), the Canon of Lekë Dukagjin, the Canon of Labëria and the Canon of Malësi. To this day, these are the main canons that had the greatest impact on the societies of that time. The norms with a criminal character were mainly those

[4] ELEZI, I.: *Historical development of criminal legislation in Albania*, 1997, 11.
[5] Ibid
[6] https://exlibris.al/lucia-nadin-shqiperia-ishte-toka-e-nje-kulture-per-tu-zbuluar/ (30/07/2023)

provided in the Lekë Dukagjini Canon (the Lekë Dukagjini Canon, a work by Shtejfën Gjecovi, republished in Shkodër in 1933.) In the Lekë Dukagjini Canon, some punishments were foreseen that were a response to the crimes or the acts that were carried out such as: blood feud, death sentence, burning of the house, fines, destruction of property or cutting of trees and leaving the land barren/uncultivated. Regarding the circumstances of the time in which the Canons were implemented, compared to those provided for by the Sharia or Byzantine law, such as beheading, eye gouging, etc., it is thought that this type of regulatory act of society was more moderate for the time and area in which it was applied. An innovation for the time was insulting, which was considered a serious crime since it affected dignity, "Honor cannot be bought with money", and therefore the maximum penalty was sentencing the offending person to be sentenced to death or to pay 1000 grosh and 10 ram (Seventeenth head). Due to the period under the Ottoman occupation, the geographical position and above all the tradition, the aforementioned canons operated until recently in Albania, even after the declaration of Albania's Independence on 28.11.1912.

Due to the geo-political position of Albania in 1912 and following, the Albanian state of that time did not have the possibility of a consolidation, compared to other countries in Europe, I mention here the Balkan Wars, the First World War, the London conference in 1913 where the great powers followed the path to the dismemberment of Albania or the War of 1920 against the Italian invaders, etc. Under these conditions, there could only be adoption of the Ottoman criminal law by the assembly of Vlora (I. Elezi, Historical development of criminal legislation in Albania). Until 1928, when the Criminal Code of the Albanian state came into force[7], several punitive laws were in effect, which were mostly limited to the "Punal Law for Political Offenses" (Law no. 1089, dated 27.04.1920), the law "On the Prohibition of carrying weapons and carrying weapons", the law "On murder among fugitives" (30.12.1923), etc. We note that most of the laws in force were harsh with such punishments due to social, economic and political conditions. Thus, the criminal policy of the time focused more on punishing the persons who committed these crimes that harmed the fragility of the newly created state.

Another situation is presented to us with the entry into force of the Penal Code of 1928. The Albanian state already had the primary source of criminal law. The provision of "Conditional sentence" or "Suspension of sentence" were innovations for the time. And this was understood that the spirit of this law was mainly European, creating a break from the Ottoman legal system that still remained in our country. The influence of Italian and mainly French legislation was clearly understood if we bring to attention the "Bird Civil Code" which was a simile of the French one of the Napoleon Bonaparte period. In this Penal Code, the punishments

[7] Fletore Zyrtare nr.1, date 1 janar 1928

were grouped into the punishments assigned to the misdemeanors (which are: 1. Death; 2. Life imprisonment; 3. Heavy imprisonment; 4. Imprisonment; 5. Deportation; 6. Heavy fine and 7. Prohibition from public offices), as well as the punishments set for contraventions/misdemeanors (which are: light imprisonment, light fine and suspension of the exercise of a profession or a craft), article 11. One feature was the age for criminal responsibility, for which in this code it was foreseen that: "The criminal prosecution is not carried out against the one who, when he committed the crime, did not reach the age of 10 years.", article 54 of the Criminal Code of 1928. In the subsequent article (article 55), it was foreseen that: "He who, at the time he committed the criminal offense, was over 10 years old, but not 15 years old, and it is not proven that he had the mental power of appreciation/discernment) is not punished. Thus, we observe a punishment policy different from what we observed until now. And determining the age for criminal responsibility was an advance for the time, as the principle "*nullum crimen, nulla poena sine lege*" was sanctioned for the first time. Like any medal, this Criminal Code has its other side, for example, the provision made in its article 12 for the punishment of women who were pregnant, specifically "Pregnant women, who have been sentenced to death, hang - they are killed two weeks after giving birth to the child." As much as this code was a first proof of the creation of the penal corpus and the main source of criminal law, it (those who drafted and implemented it) inevitably protected the political and economic order of the time.

During the duration of the monarchy in Albania (1928-1939), in addition to the functioning of this penal code, special laws of the time also operated. These laws were mainly repressive and this was understood, for example: the law of February 7, 1925 "On the internment of dangerous propagandists", the law of December 23, 1925 "Punal law for political offenses", law no. 17, dated 07.01.1930 "On the disappearance of fugitives", the law dated August 29, 1930 "On the internment of children, the seizure of property and the burning of the houses of political fugitives." Regress was the law of April 14, 1937 "On the prohibition of publication, importation and keeping of forbidden books, which left room only for the commission which selected which books were necessary and which were not." [8] Consequently, during this period the laws adopted in the criminal field (including the Criminal Code itself) were a tool in the hands of the leaders of the time and were mainly used to protect their interests by suppressing any different or oppositional opinion.

In another phase of Albania's history, it is that of the occupation by Fascist Italy. The Penal Code of 1928 was still in force, but the General Viceroy of the Emperor in Albania, issued a decree where the death penalty was given to that person who "...attacks the life, integrity or personal freedom... of the Duce of fascism and against

[8] Fletore Zyrtare nr. 28/1937

the Viceroy General[9]. "During the fascist regime until the capitulation of fascist Italy, the Military Penal Code of Peace and the Military Penal Code of War came into force, the harsh punishments of which were an expression of the politics of the time.

In 1948, law no. 599, dated 13.05.1948 "On the general provisions of the Criminal Code", where a clear definition of punishment was given in its article 2: "The purpose of punishment is to eliminate any socially dangerous activity, to deter and stop the executor who to commit new criminal offences; to re-educate and improve the author; to exert a general educational influence on other members of society so that they do not commit criminal offenses". Regardless of the exact definition that was given to the purpose of the criminal legislation, when reading its specific articles, it is implied that the alienating character of this code was mainly in the implementation of its articles for the purpose of protecting the state. Another aspect to mention is the fact that this code accepted analogy. In this code, the punishments given were: death, deprivation of liberty with forced labor, deprivation of liberty, correctional labor, loss of citizenship, confiscation of property, loss of civil rights, loss of rank, separation of the exercise of a certain occupation, banishment, fines and reparations. Following the work done on the drafting of a legal corpus in criminal law, after the Second World War, we have the entry into force of a complete Criminal Code, such as the Criminal Code of 1952. The Soviet influence on this code was observed in the articles his, although in most of it originality was preserved, based on previous codes or laws in the criminal field. In contrast to the Criminal Code of 1948, in this Code, the sentence "Internment with or without correctional work" was prescribed, which clearly indicated the harsh criminal policies for persons who committed such criminal acts that influenced the awarding of this sentence.

The provision of sentencing methods was based on the previous code but also had room for improvement. With the increasing role of the governing party which was based on the ideology of the working class, the Penal Code of the Socialist People's Republic of Slovenia of 1977 was drawn up and approved. [10] Its politicization was seen in its first article, where, regarding the role of the penal code, it was specifically stated: "...powerful weapon of the dictatorship of the proletariat in the class war..." In subsequent articles, following from article 2[11] "Legislation criminal... is guided by the politics of the Party of Work of Albania and is based on the ideology of the working class, on Marxism-Leninism.", we look at the ideology of the Party-State. The provision of the life sentence in 33 articles, the removal of conditional release, were evidence of the backward step suffered by the Criminal

[9] Fletore Zyrtare nr. 14, datë 29.1.1940
[10] Gazeta Zyrtare nr. 3/1977.
[11] Ibid

Code compared to such legislation in other European countries. Some changes to this code that were made in 1988 with decree no. 7251, dated 15.09.1988, and why they were considered an advancement (I mention here article 22 where *"...the death penalty is not given against persons who at the time of the crime had not reached the age of 18, as well as against women*", also testified times, that practice showed differently than propaganda.

1.2 Albania after the 1990s and criminal policy related to punishment

After the change of government systems, passing from the totalitarian communist regime to the democratic system of government, the need to establish the first democratic institutions after 1990 automatically arose. Thus, with the changes made to the Criminal Code by law no. 7380, dated 08.05.1990, law no. 7553, dated 30.01.1992 and law no. 7669, dated 16.11.1993, are evidence of the first attempts of the need for change due to social, economic changes, etc. Creation of the rehabilitation institute (Article 42/a, Law No. 7380), the provision of the crime of kidnapping or human trafficking, violation of graves, theft or misuse of humanitarian aid, etc. (Law No. 7553), punishment for the criminal offense which provided for the incitement of hatred or strife between nationalities, races and religious beliefs (Article 56, Law No. 7669), where in the years of the dictatorship, Albania was the first country in the world that did not recognize religious beliefs, they aimed at the democratization of criminal justice for the period in question. But the reforms undertaken with these laws required further harmonization of practice to reach the unification of other legal acts in the criminal field, in a new criminal code. Due to the circumstances of the time, social, economic and political conditions, it was more than necessary that the legal framework as a whole, and that in the criminal field in particular, be drawn up in accordance with the legal acts of international organizations as well as international institutions such as the European Commission, European Council, European Union, etc. The ratification of many agreements or the implementation of international conventions required that in this legal framework, the main and basic principles related to human life and fundamental freedoms and rights should be foreseen. This code was drafted in implementation of international acts for the protection and freedom of human rights, such as: European Convention of Human Rights (ECHR), European Convention "For the Prevention of Torture and Inhuman or Degrading Treatment and Punishment", etc. Thus, the drafting of the Criminal Code of 1995 and its entry into force were the turning point in the history of our country. Its adoption was an event for the time when it entered into force, as in a way it was the face of political, social and economic changes. The prediction of the main principles that permeated this code, in its general part, tells us about the pursuit of a new criminal policy, different from what was followed until yesterday. The decriminalization of some of the previous criminal offenses such as deportation, the removal of the life sentence, as a prerequisite for signing the Geneva Convention, etc., testify to the new spirit that followed this law. The determination of the amount of punishment (minimum and maximum), in accordance with what existed at that time and what was foreseen for the following years, was influenced by foreign legislation, mainly Italian and French. Of course, the subsequent events of 1997, where the civil war took place in Albania as a result of the bankruptcy of the pyramid firms that were created and that led to the loss of the wealth of individuals who invested in fraud schemes, influenced the need that this code will have room for improvement. This domino effect also affected other laws of time.

At the beginning of 2000, legal packages were drafted to amend the Criminal Code. So with the law no. 9086, dated 19.6.2003, we note that such a policy was followed for punishment measures by raising the minimum punishment for certain criminal offenses and increasing the years of punishment for some other crimes. The need to have a strong reaction to the phenomena that appeared from 1992 to 1999, influenced the changes in the Criminal Code to be related to the policy of toughening the punishments. The effect of the influence of various factors, as above, was the adoption of further draft laws which changed certain articles of the Criminal Code, of the general part or of its special part. Before continuing with the further study of punishment policies, to go further to the way in which the data of convicted persons are stored and processed, to create an overview of the situation so far, since the entry into force of the Code Penal until now, 24 laws have been approved which have changed most of it. What is of interest in this study is the fact that a special influence and role has been played by the Constitutional Court, which with its 9 decisions over the years (starting from 1997) has decided repealing some of the articles of this code. Specifically, the laws entered into force and the decisions of the Constitutional Court that have changed the Criminal Code are: laws no. 8175, dated 23.12.1996; no. 8204, dated 10.4.1997; no. 8279, dated 15.1.1998; no. 8733, dated 24.1.2001; no. 9017, dated 6.3.2003; no. 9030, dated 13.3.2003; no. 9086, dated 19.6.2003; no. 9188, dated 12.2.2004; no. 9275, dated 16.9.2004; no. 9686, dated 26.2.2007; no. 9859, dated 21.1.2008; no. 10 023, dated 27.11.2008; no. 23/2012, dated 1.3.2012; no. 144, dated 2.5.2013; no. 98, dated 31.7.2014; no. 176/2014, dated 18.12.2014; no. 135/2015, dated 5.12.2015; no. 82/2016, dated 25.7.2016; no. 36/2017, dated 30.3.2017; no. 89/2017, dated 22.5.2017; no. 44/2019, dated 18.7.2019, no. 35/2020, dated 16.4.2020, no. 146/2020, dated 17.12.2020; no. 43/2021, dated 23.3.2021; decisions of the Constitutional Court: no. 13, dated 29.5.1997; no. 46, dated 28.8.1997; no. 58, dated 5.12.1997; no. 65, dated 10.12.1999; no. 11, dated 2.4.2008; no. 19, dated 1.6.2011; no. 47, dated 26.7.2012; no. 9, dated 26.2.2016; no. 24, dated 4.5.2021). It is already known that crime generally affects the lives of the citizens of a country, changing or affecting the economic and social factors, to go directly to the quality of life. Over the years, the need arose for the study of criminality, data and statistics, in order to design strategies, measures or policies that should be undertaken, with the aim of combating it by minimizing or controlling the criminal behavior of persons (physical or legal) in a given society. From what we saw in the previous periods, specifically, the monist regime, we see that due to the severity of that regime, the lack of a free market, free movement, etc., (principles and policies that emerged after the 1990s where Albanian citizens got to know other European countries and beyond), criminality for that time had a low number. At the same time, we emphasize that the main criminal offenses were those related to agitation and propaganda, opinions contrary to what was broadcast by the "Block" leadership. With the "openness" to new experiences in foreign countries, together with the lifestyle innovations that European countries and beyond, were also "disappeared" or the desire to create wealth or gain rights to the detriment of the life, health or wealth of another person. Thus, starting from this, we have the appearance of some criminal offenses that did not exist until yesterday (before the 1990s), such as in the field of narcotics, human trafficking, taxes or crime in the economic field, prostitution, and even crimes in the cyber field.

With the entry into force of the Constitution of Albania (approved by law no. 8417, dated 21.10.1998), in Article II, "Freedoms and personal rights", in article 27, point 1, it is provided that: "No one can be deprived of their freedom, except in the cases and according to the procedures provided by law." This is the basis of the entire procedure for the sentencing of someone who has committed a crime. But if an individual commits a criminal offense, in the present action he can anticipate that the act he commits has some legal consequences (besides the personal interest that prompted him to commit the criminal offense). In general, the perpetrators of criminal offenses think that the measure of punishment, if they will be caught, will be as provided in the corresponding article of the Criminal Code. But what they do not know in detail (in general) is that in an interpretation of this law, by professionals in the field (lawyers, lawyers, prosecutors or judges), these provisions are subjected to a literal analysis. And this analysis includes from the moment of calculating the punishment, the duration, the alternative punishments, the selection criteria, until the study of the circumstances in which the criminal offense was committed or the suspicion of the element of its commission in cooperation. Regarding the policy for determining the criminal sentence in Albania, Professors I. Elezi, S. Kaçupi and M. Haxhia, in the book "Commentary of the Criminal Code of the Republic of Albania", (2009), state that: "The criminal conviction in the criminal law of the Republic of Albania, means a coercive measure, implemented by the state through the courts in accordance with the law against persons having committed a criminal offense" – Doctrine I. Elezi, S. Kaçupi, M, Haxhia.

2. Overview of the situation of the sentencing policies that have been applied in Albania

2.1 Sentencing policies in Albania

Based on the fundamental changes in the Albanian society, the Criminal Code was thought to be amended in its largest part with the Law 8175/1996. The intention to have a more radical system regarding punishments or criminal sanctions, were abolished by The Constitutional Court dismissed them with decision 13/1997 as they violated the principles of a regular legal process of protection and individualization of punishment. However, the tendency to toughen the punishments for the existing criminal offenses continued and this is evidenced by the further laws that were adopted, where we mention: 8279/1998; 8733/2001; 9086/2003; 9188/2004 and 9275/2004. These changes were dictated by the need to create a new rule, starting with the toughening of punishments, but that these laws did not conflict with the Constitution or other international acts, which our country ratified, such as the "European Convention" on the surveillance of convicted or paroled persons" ratified by law no. 8724 dated 26.12.2000, the Convention of the Council of Europe "On the transfer of convicted persons" ratified by law no. 8499, dated 10.6.1999, and many other conventions. Further changes in the Criminal Code followed from 2007. If we look in detail at these laws, in a simple study of them, we notice that the policy followed is that of toughening the punishment for the existing criminal offences. This is understood by referring to some cases, specifically the criminal offense "Carrying weapons" which was initially punishable by a fine or imprisonment of up to seven years and now for this criminal offense, if the weapon is held by an individual, without authorization or the corresponding permit, is punished from one year to five years, when this weapon is kept in public areas, the punishment will be from 7 to 15 years of imprisonment and if its possession was carried out in collaboration (that is, someone else is aware or accomplice) or the person is a recidivist, he will be sentenced from 15 to 20 years of imprisonment (Article 278/6 of the Criminal Code). These steps were followed by other criminal offenses (I remember here "Premeditated murder", "Concealment of income", "Production and possession of cold weapons without a permit", etc., etc.). This method followed for the execution of punishments is also seen by a simple comparison of the Criminal Codes of the countries of the Region or Europe. With the abolition of the death penalty (shooting, hanging, etc.), the maximum penalty for a person who commits criminal offenses, and among the most serious, is that of imprisonment (imprisonment, life imprisonment). With the democratization of the Criminal Code of 1995, we see that other punishment alternatives are presented, such as probation service, staying at home, parole, performance of work in the public interest or supervision. All these were and are in accordance with the acts in which Albania participated by ratifying them. The use of alternatives to prohibition has increased in 2019 compared to the previous reporting period. In 2019, there were 7,992 cases of non-custodial alternative sentences, compared to 6,171 cases in 2018 and 4,904 cases in 2017. The use of electronic monitoring has been suspended since 2017 due to an unresolved legal dispute. The new law "On probation service" has been drafted and is awaiting approval by the Assembly. The increase in the number of alternative sentences has also led to a reduction in prison overcrowding. In March 2020, about 600 detainees, 10% of the total prison population, were transferred for three months to their homes. The decision was adopted by the government as a measure to prevent the possible spread of COVID-19 in IEVP. [12]

2.2 Actual situation and specific laws

So, in order to make a more accurate and correct comparison with other countries, for the severity of punishments in our country, this can only be achieved by comparing the number of prisoners/incarceration rate, as the most accurate measuring unit. The statistical yearbooks of the Ministry of Justice are the main source of information related to the justice system. Referring to the statistical yearbook of the Ministry of Justice, for the year 2021, in support of the administered data, "...it is concluded that the trend of those convicted according to intensity is for the classes of crimes against the authority of the state and crimes against public order and security". For the year 2021, according to the articles of the Criminal Code, there are 12,603 convicts, of which 12,391 are adult convicts and 212 are juvenile convicts. According to the punishment measures for the year 2021, 1,247 or 10.1% were sentenced to a fine; 5,968 or 47.3% were sentenced to "Prison up to 2 years"; 972 people or 7.7% were sentenced to "2-5 years in prison"; for 44 people or 0.34%, the application of Article 39 was decided; 3,177 or 25.2% were sentenced with restriction of liberty; the application of Article 59/a was decided for 61 persons or for 0.48% of the total number of convicts; Article 63 was applied to 518 people or 4.11%; for 12 people or 0.09%, the courts have decided "the fulfillment of certain obligations"; for 22 people or 0.17% of convicts, forced treatment was imposed; 316 people or 4% were sentenced to "5-10 years in prison"; 78 people or 0.62% were sentenced to "10-25 years in prison"; 181 or 1.4% were sentenced to "Prison 25-35 years" and 0 people or 0% were sentenced to life imprisonment. □ The fashion for the measure of punishment for the year 2021 is the punishment of up to 2 years in prison with 5,968 punishments[13]. Meanwhile, the number for this year for the period from January to December is 4811 convicted persons.

[12] EC Report for Albania 2020, pg. 34.
[13] https://www.drejtesia.gov.al/wp-content/uploads/2022/06/REPUBLIKA-E-SHQIP%C3%8BRIS%C3%8B-Vjetari-Statistikor-2021-pdf.pdf

Gjendja dhe ndarja mesatare e të paraburgosurve (Mosha/Vepra që akuzohet) Viti 2021																				
IEVP	14 -16 vjec	16 - 18vjec	18 - 21 vjeç	21 - 25 vjeç	25 - 30 vjeç	30 - 40 vjeç	40 - 50 vjeç	50 - 60 vjeç	60 -70 vjeç	70 -80 vjeç	Mbi 80 vjeç	SHUMA	Vjedhje	Vrasje	Plagosje	Krim seksual	Droge	Organizata kriminale	Mashtrim	Shfrytëzim prostitucioni	Të Tjera
Jordan Misja	0	0	24	62	87	114	74	57	14	2	0	**434**	66	32	3	8	123	8	15	1	178
Ali Demi (Gra)	0	0	3	5	3	9	11	3	0	0	0	**34**	1	6	0	0	1	0	6	3	17
Mine Peza	0	0	9	15	18	55	21	25	6	0	0	**149**	14	23	4	3	40	13	12	0	40
Burrel	0	0	4	9	8	23	16	7	1	0	0	**68**	11	11	1	1	12	0	0	0	32
Fushë Krujë	0	0	24	29	54	48	19	11	2	2	0	**189**	16	15	5	6	102	0	5	2	38
Durrës	0	0	13	22	38	56	46	17	2	1	0	**195**	39	11	5	1	53	0	5	1	80
Korçë	0	0	40	49	44	58	30	18	4	0	0	**243**	27	10	6	1	63	0	3	1	132
Tropojë	0	0	0	4	0	2	4	0	0	0	0	**10**	1	3	2	0	2	0	1	0	1
Kukës	0	0	1	5	7	6	5	2	4	0	0	**30**	1	3	0	1	7	0	0	0	18
Lezhë	0	0	7	27	47	34	21	13	1	0	0	**150**	11	20	3	5	40	0	2	2	67
Peqin	0	0	3	10	22	37	23	13	5	0	0	**113**	23	11	3	5	32	0	5	0	34
Elbasan	0	0	5	19	28	48	32	24	4	0	0	**160**	19	15	4	3	68	1	2	0	48
Tepelenë	0	0	4	25	16	24	9	17	2	1	0	**98**	17	5	1	3	44	0	0	0	28
Vlorë	0	0	9	32	35	42	28	14	3	1	0	**164**	29	16	3	8	61	0	0	0	47
Berat	0	0	7	8	16	33	23	14	4	0	0	**105**	12	9	4	2	39	0	0	0	39
Kavajë	5	13	0	0	0	0	0	0	0	0	0	**18**	8	5	1	1	0	0	0	0	3
Sarandë	0	0	4	8	17	8	5	2	0	0	0	**44**	15	0	0	0	12	0	0	0	17
Fier	0	0	3	13	115	91	21	20	1	0	0	**264**	48	24	0	3	81	0	9	0	99
Shkodër	0	0	14	19	24	24	23	31	6	1	0	**142**	11	26	7	0	74	0	2	1	21
SHUMA	**5**	**13**	**174**	**361**	**579**	**712**	**411**	**288**	**59**	**8**	**0**	**2,610**	**369**	**245**	**52**	**51**	**854**	**22**	**67**	**11**	**939**

Pic. 1 Condition and average distribution of detainees (Age/Accused offense) Year 2021

Meanwhile, in the countries of the European Union, we have this data: One prisoner per 941 inhabitants in the EU in 2021. There is one prisoner per 941 inhabitants in the EU in 2021, or 106 prisoners per 100,000. The prisoner rate increased after the decline of the previous year that was probably due to COVID-19 measures. The 2021 rate is, at least, the lowest figure since the turn of the century just after the value of 2020. The highest prisoner rates per 100,000 in the EU in 2021 are in Hungary, Poland (191 both), and Slovakia (185). The lowest rates are in Finland (51), Slovenia (54) and in the Netherlands (65). In 14 out of 26 countries that provided data, the prisoner rate increased compared to 2020[14]. Frequent changes have been made to existing criminal offenses by increasing their minimum and maximum; Roughening the of existing criminal offenses. With the ratification of the Budapest Convention, new criminal offenses came up in light. Based on the administered data, which are presented as above, we understand that there is a harsh criminal policy for sanctions and punishment measures, compared to those ones in other EU countries. But how efficient are these decisions taken by our legislator, remains part of a wide discussion.

[14] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics#One_prisoner_per_941_inhabitants_in_the_EU_in_2021 (30/7/2023)

Filling institutions for the execution of criminal offenses (prisons) with convicted persons, for various offenses with a margin of punishment from minimum to maximum (life imprisonment), does not automatically mean a "victory" against crime. For this issue, we recall here the minority opinion of one of the members of the Supreme Court, who expressed himself differently from the majority regarding the unified decision, taken on 25.5.2015[15] where, among other things, he would emphasize: "*The reasoning given by the majority in the decision that prison overcrowding should be reduced according to the recommendation of the European Union does not hold, because the courts solve legal issues and not the policies that states make with convicts, which are in the exclusive competence of other state bodies. Overcrowding in prisons can be easily solved by the implementation of the amnesty institute, provided by Article 71 of the Criminal Code, or by the implementation of the amnesty institute, provided by Article 70 of the Criminal Code*".

From the above, it can be seen that this route is not as efficient as it was thought. In order to act in the prevention of the commission of criminal offenses, their reduction or minimization, consequently of the persons who are convicted and serve the sentence in prisons, the factors that lead the individual to the commission of those offenses must be specifically studied, which are mainly related to the factor economic. Lack of income to support living, lack of education, lack of work/employment, send individuals to undertake extreme acts. Of course, beyond this "panorama" there are other acts related to blood feuds, still found today in deep mountain areas, or criminal acts committed in anger, hot blood, such as murder due to jealousy, treason, etc. With the appearance of new phenomena in today's societies, there is a need to adapt or predict new criminal offenses. The main fight against crime is now taking place through information technology and computer networks. The fragility of the data of individuals, who are now *online* due to following their digitization path, leads to the risk that appears for their acquisition and use without right.

3. Rules for the treatment of convicted persons

The treatment given to convicted persons is based on the Constitution of the Republic of Albania and international legal instruments, which, as was said above, our country has made part of it. In every decision, be it for determining the punishment, for the way of serving the punishment, for the transportation of the convicted person, for the place where the criminal decision will be executed, all the circumstances provided by the international conventions will be taken into account, starting from the Convention European Commission of Human Rights. To create a more complete overview of what we have said so far, we mention here:

[15] UDHC No. 2, dated 25.5.2015, Decision no. 2/2015. Tirana: Official Journal no. 253/2015 Center of Official Publications, January 26, 2016. p. 17072; M. Bici.

- *1955 – The United Nations standard minimum rules for the treatment of prisoners.*
- *1985 – The UN Standard minimum rules for the administration of juvenile justice.*
- *1992 – Rec. (99) 16 CoE- European rules on community sanctions and measures.*
- *2003 – Rec (2003) 22 CoE- On conditional release.*
- *2006 – Council of Europe, Prisons Rules/ 2023 Guidance document of the European Prison Rules.*
- *1995- Albanian Penal Code*
- *1995 – Albanian Criminal Procedural Code*
- *1998- Constitution of the Republic of Albania*
- *European Convention on the Supervision of Sentenced or Paroled Persons*
- *Council of Europe Convention "On the Transfer of Sentenced Persons"*
- *Council of Europe Convention "On mutual legal assistance in the criminal field"*
- *Council of Europe Convention "On the International Validity of Criminal Trials"*
- *Council of Europe Convention "On the Transfer of Proceedings in Criminal Matters"*
- *Law no. 81, dated 25.6.2020 "On the rights and treatment of those sentenced to imprisonment and pre-trial detainees"*

These acts, followed by those issued in and for their implementation, constitute the foundation of the rules for the treatment of convicts. Despite the fact that convicts or persons in custody are kept in such institutions, the problem lies in the applicability of these laws and acts. During the years, in Albania, various monitoring are carried out by state institutions. Civil society organizations have played and continue to play an important role. Regarding the issue of the applicability of the legal acts in force, I will focus on some of the reports or recommendations of the aforementioned institutions. To begin with the observation of the detention situation, by the Organization for Security and Cooperation in Europe, the OSCE Presence in Albania. In its 2003 report [16], after monitoring the detention system in the cities of Albania, came to the conclusion that: "The detention situation in Albania continues to remain problematic. The physical conditions of detention rooms are deteriorating. Overcrowding also creates a major obstacle to providing minimal normal treatment to detainees. All these problems, together with the treatment of minors and women, seem to be simpler to solve if detention were under the Ministry of Justice, which would mean that decisions would have to be made in vertically, within the same ministry, and not horizontally, from the Ministry of Justice to the Ministry of Public Order and vice versa." From this report, it is seen that it is necessary to take measures immediately related to the conditions in which the persons are in the detention facilities. This report leaves no room for space to remember the conditions in which the convicted persons are serving their prison

[16] Observation of the state of the detention system, OSCE, 2003.

sentences. At the same time, it should be mentioned that due to the social and economic circumstances, Albania was being institutionally resurrected from its troubled past. A special role has been played by the Albanian Helsinki Committee, where in the reports over the years, in addition to the many suggestions given, it focuses on:

2009 report[17]

Accelerating the process of reconstruction and improving the conditions of escort and detention rooms of Vlora, Saranda, Burrel Police Stations as well as the detention rooms in the Fier District Police Directorate; KSHH recommends the immediate addition of female employees to the police station of Saranda.

2012 report[18]

Albanian Helsinki Committee considers keeping people in prison with the measure "Forced treatment" as a serious legal violation; ...overcrowding had increased, mainly in some of the detention sectors. Therefore, we suggest intensifying the efforts of the responsible state structures...; AHC suggests that the personnel of the institutions, where minors are kept, should be equipped with knowledge and practical skills in the use of U-Turn and Equip pedagogical methods, which have been introduced as a pilot practice in the Kavaja juvenile institution; HC suggests that any claim of physical or psychological violence by the staff, or even among the convicts themselves, should be examined immediately and very carefully by the relevant state authorities, with the aim of holding accountable anyone who perpetrates violence on the prisoners.

Special Report 2020[19]

AHC suggests the revision of the measures of absolute limitation imposed on the relations between prisoners and their family members, in relation to the limitations provided for in paragraph 2 of article 8 of the European Convention on Human Rights. HC recommends the possibility of finding alternative solutions in order to achieve physical contact between prisoners and family members (respecting the anti-Covid19 protocols, such as maintaining social distance, meeting through a separating glass, as well as the use of masks and gloves for participants meeting), according to a certain time and daily planning, giving prevalence to close gender relations.

The above recommendations seem to have borne fruit. This is because in a study of statistical years, we see an increase in the number of people who have been treated

[17] KSHSH, report on the human rights situation in escort and detention rooms in some police stations,2009.
[18] KSHSH, on the state of human rights in the directorates and police stations, in the institutions of detention and execution of criminal decisions, 2012
[19] KSHSH, special report, thematic monitoring mission, the institution of execution of criminal decisions "Ali Demi" (325), 2020

with the application of alternative punishment measures. Council of Europe report[20] points out that regarding the prison system, a new action plan has been drawn up for the period 2019 - 2022. The legislation on institutions for the execution of criminal decisions and the Prison Police must be amended to ensure compliance with European standards.

4. Convicted person personal data, their use and how can they be protected.

In the Albanian legislation, special laws are applied in which the fundamental acts are the basis. In terms of importance, with the aim of being as helpful as possible in facilitating the life of the individual in a certain society, the following laws have been drafted and approved:

- Law no. 9887/2008 "On protection of personal data", amended;
- Law no 119/2014 "On the right to information";
- Council of Ministers Decree Nr246/2018, "On the approval of the National Plan for European Integration 2018-2020";
- Law no. 81/2020 "On the rights and treatment of those sentenced to imprisonment and pre-trial detainees";
- Albanian civil status register, law no. 10 129, date 11.5.2009 "For the civil state", etj.

For convicted persons, the general regulation of prisons, which is approved by the decision of the Council of Ministers no. 209, dated 06.04.2022. In this decision, regarding data, confidentiality, information and their storage, there are some specific arrangements. In article 53, Meetings, visits. Correspondence and information, point 6 specifies: "Correspondence and visits may be restricted and supervised for reasons of conducting investigations, maintaining public order, security, preventing criminal offenses, but these restrictions, including special restrictions determined by court decision or prosecutor's order, must allow a minimum level of contacts."; thus, this article is at the service of both the individual (preserving personal information) and the institution (preserving issues of procedural aspects, such as investigations, etc.). In the unifying decision of the Supreme Court [21], The colleges assess that the circumstances related to the family members of the convicted can be taken into account by the courts, not as an essential condition, but as a circumstance that goes in favor of the request for conditional release, in the direction of the court's analysis for the reintegration of the convicted person after release.

[20] https://integrimi-ne-be.punetejashtme.gov.al/wp-content/uploads/2021/03/Raporti-KE_2020_DBE_8.03.2021_final.pdf (15/07/2023)

[21] No. 2, dated 25.5.2015

Article 111 explains how to proceed with providing information to the media and the public.

"1. Institutions for the execution of criminal decisions make the requested information available to the media and the public, with the exception of information or data that violate the right to private life, sensitive data or any other information, if the provision of this information violates the security of the institution or investigative and judicial processes, in implementation of the legislation on the right to information. 2. The responsible unit in the institution for providing information to third parties, processes the data of prisoners and the institution, in accordance with the legislation in force for the protection of personal data. 3. In the case when the information is requested by a third person, the legislation in force on the right to information shall be applied".

In the report of the Council of Europe, for the year 2020, for Albania, emphasis is placed on the protection of personal data, where it is necessary to continue with further efforts in terms of harmonizing the legislation on the protection of personal data with the General Regulation on the Protection of Data 2016/679 and Directive 2016/680. The focus is also on the fact that Albania has not yet signed the 2018 Protocol, which amends the Convention for the Protection of Individuals with regard to the automatic processing of personal data[22]. The use of data is carried out in accordance with the Constitution, Penal Code, Criminal Procedural Code, Law no. 9887/2008 "On protection of personal data", amended, Law no. 119/2014 "On the right to information", Law no. 80/2020 "For the Prison Police", Law no. 125/2021 "For the ratification of the agreement between the Republic of Albania and the United Kingdom of Great Britain and Northern Ireland on the transfer of convicted persons".

The data of convicted persons can be protected initially by storing them in special systems. the health data of the prisoners should not go outside this system. The files of prisoners and detainees in the country will be monitored by prosecutors in real time. The agreement of the General Prosecutor's Office with the Directorate of Prisons (2021), where all behavior and reporting on what happens inside prisons, including sensitive data, will pass through the sieve. Also, a suggestion for using and saving their personal data: Following the British special category data system under strict rules; Strengthening the data storage system in e-Albania or TIMS; Their DNA keep classified; Their ID only accessible for the institutions of high importance (Prosecution, Police, specific court) and family members. Physical ID prone of Prison Directory.

[22] EC annual Report for Albania 2020, pg. 34.

5. Conclusions

From all that was said above, after this short study, it is concluded that in our country, attention should be returned to the improvement of the criminal policy regarding punishments, the improvement of the legislation for the storage and processing of data, specifically of persons convicted. Therefore, it is suggested that:

1) Sentencing policies in Albania should not be only those related to the harshening of sentencing, but should be focused on the real analysis of the reasons for their malfunctioning as well as understanding where the problems are. Updating with the dynamic development of life in all its forms is a further step towards the solution.
2) Regarding the protection of data of convicted persons, a unique register should be implemented and be protected with a different standard for security reasons.
3) In court decisions, their identities should not become public. If otherwise, for this breach, the fine can be very high and those who did it, also face criminal charges.

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BÁLINT ANITA*

Az orvosszakmai fejlődés hatása az orvoslással, betegségekkel és fogyatékossággal kapcsolatos jogszabályokra az ókori Rómában

Absztrakt: Rómában a gyógyító tevékenység a birodalom fejlődésével változott. A kezdeti szakrális gyógyító tevékenység a császárkorra orvosi szaktevékenységgé vált, a specializálódás csúcspontja a Kr. u. 2. századra tehető. A gyógyításhoz gyógynövényeket és méreganyagokat is felhasználtak. A hódító Rómában a katonai egészségügy különleges jogi szabályozást nyert. Az ezen a területen kialakult rendszer hasonlóságot mutat a mai egészségügyi rendszerrel. Az állatorvoslás is jelentős fejlődésen ment keresztül. Az orvoslással, betegségekkel és fogyatékosságokkal kapcsolatos szabályok a szakmai fejlődést követve változtak.
Kulcsszavak: gyógyítás, ókori jogfejlődés, státuszváltozás, büntetés, felelősség, lex Aquilia

Abstract: In Rome, the healing activity changed parallel with the development of the Roman Empire. The initial sacrality healing activity became a real medical speciality during the imperial period. The peak of the specialization can be dated to the 2nd century AD. For the healing activity different herbs and poisons were also used. During the roman conquests the military healthcare received special legal regulations. The system developed in this area is similar to the current healthcare system. The veterinary system has also undergone significant development. The rules related to healers, treatments, diseases and disabilities have changed following the medical professional development.
Keywords: healing, ancient legal development, change of status, punishment, responsibility, lex Aquilia

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1. Bevezetés

A mai ember számára teljesen természetes, az alanyi jogon járó egészségügyi ellátás. Az ókori népeknél az egészségügyi ellátás rendszere évszázadok folyamán alakult ki. A Római Birodalomba az orvosi ismeretek a rómaiak által leigázott, illetve a velük kereskedelmi kapcsolatba lépő népektől (etruszkoktól, görögöktől, szabinoktól) kerültek át.[1] Az orvosok szakmai fejlődését és a kapcsolódó

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[1] BUDA J.: *Az egészségtudomány története orvoslástól az egészségfejlesztésig.* Pécsi Egyetem Egészségtudományi Kar Pécs, 2018, 56. Vö. ELLIOT, J. S.: *Outlines of Greek and Roman Medicine*. May 5, 2007, 2-3. ISO-8859-1.

jogszabályok változásait korszakonként vizsgálhatjuk. A tanulmány ezért az ókori Róma jogtudományának fejlődési korszakai szerint nyújt áttekintést az orvosokkal kapcsolatos joganyag legfontosabb részeiről.

2. Archaikus kor

Az első korszak az archaikus kor, mely Róma alapításától a Kr. e. 3. század közepéig, tehát a királyság és a korai köztársaság korára terjedt ki. Rómában a gyógyító tevékenység az első évszázadokban szoros kapcsolatban állt az istenekkel és a vallással, így a gyógyító tevékenység során leginkább mágikus elemeket használtak. A gyógyhelyeket ekkor a szentélyek jelentették, a gyógyítás maga pedig ima, ráolvasás, varázslat volt, amit a beavatott papok végeztek (animizmus).[2] Róma számos görög és egyiptomi gyógyító istent vett fel az istenségei közé, melyek a gyógyító tevékenység során a köztudatban is ismertek voltak.[3] Az egyik legismertebb gyógyító isten a görög Apollón, akit egy járvány kapcsán Apollo Medicus néven fogadtak be a Pantheonba, majd a járvány megszűnését követően templomot is emeltek tiszteletére.[4] (Ez a kapcsolati és hasonlati mágia).

A ház tagjainak betegsége esetén a gyógyítás leginkább a *pater familias* feladatai közé tartozott. A népi gyógyászat mágikus, rituális eljárásai mellett a gyógynövények, a méz és a bor is jelentős szerepet kaptak a betegek ellátásában.

A fő jogforrások ebben a korszakban a törzsi jog, szokásjog és a törvény voltak. A törvények között is találunk olyanokat, melyekben a betegségekkel, vagy a betegek kezelésével kapcsolatos előírások állnak. Ebben a korszakban már a fogyatékosság gyógyíthatatlanságával kapcsolatos szabályok is megtalálhatóak,[5] vagy olyanok is, amelyek éppen a gyermekek egészséges fejlődését szolgálták.[6]

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[2] HOFFMANN ZS. – T. HORVÁTH Á.: *Antik Medicina és Farmakológia.* JATEPRESS Szeged 2019, 150. Vö. JÓZSA L.: A kórházi rendszer kialakulása a bizánci birodalomban. *Comm. de Hist. Artis Med.* 214-217, 2011, 5-24.

[3] HOFFMANN ZS. – T. HORVÁTH Á.: *Antik Medicina és Farmakológia.* JATEPRESS Szeged 2019, 150.

[4] HOFFMANN ZS. – T. HORVÁTH Á.: *Antik Medicina és Farmakológia.* JATEPRESS Szeged 2019, 151.

[5] DION (2.15): Romulus a polgárok kötelességévé tette, hogy minden fiúgyermeket és az elsőszülött leánygyermeket neveljék fel, megölni pedig egy 3 év alatti gyermeket sem engedett, kivéve a csonkát vagy szörnyszülöttet, mindjárt születése után, de ezeket sem engedte a szülőknek kitenni, csak akkor, ha előzőleg öt közeli szomszédnak bemutatták, s ezt azok igazolták. Azokkal szemben pedig, akik ezen törvényeknek nem engedelmeskedtek, büntetéseket állapított meg, többek között azt, hogy vagyonukat felerészben kobozzák el. Ld. ZLINSZKY J.: *Állam és jog az ősi Rómában.* Akadémiai Kiadó, Budapest, 1997, 48. A XII táblás törvény szerint: IV. tábla 1. Gyorsan megöletett, mint a XII. táblás törvény szerint a különösen alaktalan szörnyszülött gyerek. Ld. uo. 56.

[6] Tullus Hostilius király idején: DION (3.22). „Törvényt hoztak, amely megparancsolta, hogy ha valakinek hármas ikrei születnének, nyújtsanak neki támogatást a gyermekek felserdüléséig a közélelmezésből." Ld. uo. 51.

A XII táblás törvény perjogi szabályai is foglalkoznak a betegekkel. Ha ugyanis a perbehívott alperes beteg volt, szekeret kellett érte küldeni.[7] Egyes vélemények szerint ezzel a szabállyal a betegek állapotának romlását kívánták megelőzni. Olyan szakirodalom is van, amely arról szól, milyen betegség esetén lehetetett szekeret kérni (pl. nátha, kartörés?)[8] Közegészségügyi és tűzrendészeti szabály pedig a XII táblás törvénynek az a rendelkezése, amely megtiltja a halottak városban való elégetését.[9]

A királyság korának végére Rómában az emberölés bűncselekményét már három tényállásba sorolták: emberölés (*homicidium*), rablógyilkosság (*sicarium*), illetve méregkeverés (*veneficium*).[10]

3. Préklasszikus kor

A második korszak a préklasszikus kor, mely a Kr. e. 3. század közepétől a Kr. e. 1. század végéig tartott. Ez a kései köztársaság kora és a *praetor*i jogfejlesztés korszaka. Fontos jogforrás a *praetori edictum*. A *praetor*i jogfejlesztés alapja, kulcsfogalma a méltányosság (*aequitas*). E korban a *praetor*ok oldották fel az ősi jog merevségét.

A birodalom terjeszkedésével a hódítások során leigázott népek közül is kerültek Rómába gyógyításban jártas, egészségügyi ismeretekkel rendelkező szakemberek. A Kr. e. 2. századig rabszolgák (*servi medici*) végezték a gyógyító tevékenységet, akik idegenek, főleg görögök voltak.[11]

Státuszukat tekintve az orvosi feladatok ellátását végzők ebben a korban elsősorban rabszolgák voltak[12] vagy felszabadított *libertus*ok (D. 40,5,41,6) is lehettek. A *manumissió*val felszabadított *libertus*nak felszabadítását követően meghatározott szolgálatokat kellett tennie a patrónusának (*operae officiales* és az *operae arteficiales*). Ha a felszabadított rabszolga *servi medici* volt, akkor a patrónusa kívánságait ellenérték nélkül (*gratis*) kellett teljesítenie (D. 38,1,27). A *lex Aelia Sentia* azonban megtiltotta a *patronus*nak, hogy a *libertus* szolgáltatásával nyereségre törekedjen (*mercedem capere*).[13]

[7] I. tábla 3.: Ha betegség vagy öregség akadályozza, (a perbehívónak) fogatot kell adnia. Ha akarja, a szekeret nem kell kipárnáznia. Ld. uo. 53.
[8] Vö. SEIDL, E.: War Begriffsjurisprudenz die Methode der Römer? *Archiv für Rechts- und Sozialphilosophie*, 1957/3, (43), 343-366, 344-345.
[9] X. tábla 1.: Halott embert a városban eltemetni és elégetni tilos. Ld. Zlinszky, 1997, 69.
[10] BELOW, K.-H.: *Der Arzt im römischen Recht*. C. H. Beck'sche Verlagsbuchhandlung, München 1953, 122.
[11] HOFFMANN ZS. – T. HORVÁTH Á.: *Antik Medicina és Farmakológia.* JATEPRESS Szeged 2019, 152.
[12] Egy császári rendelet a *servus medicus* értékét 60 *solidus*ban jelölte meg, ez az érték a köztársaság korában valószínűleg kisebb volt (C. 7, 7, 1,5).
[13] BELOW, K.-H.: *Der Arzt im römischen Recht*. C. H. Beck'sche Verlagsbuchhandlung, München 1953, 15.

Az orvosi tevékenységet *cives romani* is végezték, olyanok is, akik szabadon születettek (*ingenui*) voltak, de *peregrinus*ok is foglalkoztak orvoslással. A *peregrinus* orvosokkal kapcsolatban Suetonius leírja, hogy Caesar Kr. e. 46-ban „Rómában minden orvosnak s a szabad művészetek mestereinek megadta a polgárjogot, hogy ily módon a városban maradjanak, s ezzel a letelepedést a fővárosban mások szemében is kívánatossá tegye."[14] Az orvosi hivatás ebben a korban tehát nem egy meghatározott társadalmi „osztályt" jelentett, hanem az egyéni státusz befolyásolta az orvosi hivatás társadalmi megítélését.

Az orvoslással kapcsolatos büntetőjogi szabályok közül ebben a korszakban a Sulla által Kr. u. 81.-ben kibocsájtott *lex Cornelia di sicariis et veneficis* jelentős.[15] Eszerint büntetendő az is, aki emberölési célzattal mérget állít elő, vagy aki bizonyos mérgező növényeket, egyéb mérgező anyagokat (többek között bürök, mandragóra, sisakvirág, illetve a bőrmirigyeiben lévő méreganyagok miatt ide sorolták a szalamandrát is) ad át.[16] A *veneficium* tehát célzatos bűncselekménynek számított, de ha az orvos nem tudott róla, hogy az általa készített szert emberölési szándékkal vette meg tőle az elkövető, akkor nem vonták felelősségre.[17] A méregkeverőket szigetre való deportálással (amely a római polgárjog elvesztésével járt), és vagyonuktól való megfosztással sújtották (Marc. D. 48, 8, 3, 5).

Aki emberölést követett el, azt a megölt személy jogi helyzetének figyelembevétele nélkül büntették. A törvény célja a gyilkosok, mérgezők, magzatelhajtást végzők, emberáldozatot végzők és rosszindulatú varázslók megbüntetése volt, majd később a kasztrálás és körülmetélés büntetésére is alkalmazták. Iustinianus idejében, a Kr. u. 6. században még érvényben volt. Az orvos büntetőjogi felelősségét szándékosan elkövetett testi sértés esetén is meghatározták. A *lex Cornelia de sicariis* úgy rendelkezett, hogy önálló tettesként kell büntetni a kasztrálást végző orvost és azt a római polgárt is, aki önmagán vagy rabszolgáján a műtétet elvégeztette. Hadrianus császár rendeleteiben a tilalmat kiterjesztette a körülmetélésre (*circumcisio*) is.[18]

[14] Suet. Caes. 42, 1. (ford. Kis Ferencné)

[15] A törvényről részletesen ld. SÁRY P.: A lex Cornelia de sicariis et veneficis. *Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica*, XIX, 2001, 301-325.

[16] Marc. D. 48, 8, 3, 3.: Alio senatus consulto effectum est, ut pigmentarii, si cui temere cicutam salamandram aconitum pituocampas aut bubrostim mandragoram et id, quod lustramenti causa dederit cantharidas, poena teneantur huius legis. Vö. JUSZTINGER J.: A büntetőjog-dogmatika és a római jogtudomány Zlinszky János kutatásainak tükrében. *Iustum Aequum Salutare*, 2006/1, 46.

[17] NÖRR, D.: *Causa mortis*. Verlag C.H. Beck, München 1986, 99.

[18] Ulp. D. 48, 8, 4, 2: Idem divus Hadrianus rescripsit: „Constitutum quidem est, ne spadones fierent, eos autem, qui hoc crimine arguerentur, Cornelia legis poena teneri eorumque bona merito fisco meo vindicari debere, sed et in servos, qui spadones fecerint, ultimo supplicio animadvertendum esse: et qui hoc crimine tenentur, si non adfuerint, de absentibus quoque, tamquam lege Cornelia teneantur, pronuntiandum esse. (…) nemo enim liberum servumve invitum sinentemve castrate debet, neve quis se sponte castrandum praebere debet

A *lex Cornelia de sicariis et veneficis* büntetéseit Hadrianus alkalmazta a kasztrálást végzőkre is (D. 48, 8, 4, 2). A kasztrálást Dominitianus betiltotta, majd a kasztrálás büntetését Antonius Pius kiterjesztette a körülmetélést végzőkre is, a zsidók kivételével (D. 48, 8, 11). Az *edictum* ellen vétőkel szemben halálbüntetést kellett kiszabni. (D. 48, 8, 4, 2).

Ebben a korszakban született a *lex Aquilia* (Kr. e. 286), amely a – források szerint – az orvosok tevékenységére is vonatkozhatott. Ha ugyanis egy orvos beavatkozása során egy idegen rabszolgát megölt, akkor ez a cselekmény a *lex Aquilia* első *caput*ja alapján dologrongálásnak (*damnum iniuria datum*) minősült. Ebben az esetben az orvosnak a tulajdonos számára meg kellett térítenie azt a legmagasabb értéket, amelyet a *delictum* elkövetését megelőző egy évben a rabszolga elért. A *lex Aquilia* harmadik fejezete szerint a rabszolgát megsebesítő, illetve az őt „megrongáló" orvosnak az utolsó 30 napon belüli legmagasabb értéket kellett megfizetnie kártérítésként. A törvény pontosan meghatározta a károkozó cselekményeket: *occidere* (ölni), *urere* (égetni), *frangere* (törni), *rumpere* (zúzni). Ez utóbbi fogalmat kiterjesztően értelmezve alkalmazták „tönkretenni" értelemben is.[19] A törvény szerint azonban közömbös volt, hogy a cselekményt elkövető orvos rabszolga, *libertus* vagy szabad státuszú volt-e.

A *lex Aquilia* szerint az *iniuria* törvényi tényállási elem volt, tehát a károkozó cselekményt vétkesen és jogellenesen kellett elkövetni. A károkozást nemcsak szándékosan lehetett elkövetni (*dolus*), hanem gondatlanul is. A *culpa Aquiliana*-nak azonban tevőlegesnek kellett lennie (*culpa comissiva*). Emellett még okozati összefüggésnek kellett lennie az okozott kár és a cselekmény között.[20] A teljesítésnél azonban az orvos személye is lényeges volt, személyi tulajdonságai és képességei meghatározóak voltak. Kellő szakértelemmel kellett rendelkeznie, ha azonban ezeknek a képességeknek nem volt birtokában, szakismeret hiányában *imperitiá*ért felelt. Tevékenységéért tehát akkor is felelt, ha nem volt meg a szükséges hozzáértése a *facere*-kötelem teljesítéséhez. Ha az orvosi beavatkozástól a rabszolga meghalt vagy egyéb károsodást szenvedett, a rabszolga ura indíthatott az elkövetővel szemben *actio legis Aquiliae*-t.[21]

A *lex Aquilia* szerint volt felelősségre vonható az az orvos, aki erőszakkal adta be az orvosságot, vagy a beteget a gyógyszer szedésre beszélte rá – és abba mérget tett (D. 9, 2, 9, 1). Ulpianus – a közvetlen testi ráhatás hiánya miatt – *actio in factum*-ot javasolt arra az esetre, mikor a bába az orvosságot nem saját kezűleg adta be,

[19] Bővebben ld. HAUSMANINGER, H.: *Das Schadenersatzrecht der lex Aquilia*. Wien, Manz Verlag, 1987, 14-17.

[20] Vö. BENEDEK F. – PÓKECZ KOVÁCS A.: *Római magánjog*. Budapest, Ludovika Egyetemi Kiadó, 2023, 354.

[21] HAUSMANINGER, H.: *Das Schadenersatzrecht der lex Aquilia*. Wien, Manz Verlag, 1987, 24-25, 34.

hanem odaadta a rabszolganőnek, aki azt maga vette be (D. 9, 2, 9, pr.). Ha azonban a beteg nem volt rabszolga, akkor a *lex Aquilia* szabályai sem voltak alkalmazhatóak. Az orvos vállalkozóként is eljárhatott, ha a szolgálataiért pénzt kért. Ebben az esetben a *locatio conductio operis* szerződésből kifolyólag *actio locati*-val lehetett perelni az általa okozott károkért szabad embernek okozott sérelem esetén is.[22] Proculus szerint, ha egy orvos szakértelem nélkül operálta meg a rabszolgát, választani lehetett, hogy ellene a tulajdonos *actio ex locato*-t vagy *actio legis Aquiliae*-t indít (D. 9, 2, 7, 8). Gaius szerint, ha egy orvosságot rosszul alkalmaztak, vagy az orvos, bár jól végezte az operációt, de a további kezelést elmulasztotta, *culpa* miatt fog felelni (D. 9, 2, 8, pr.). A Digestában általános szabályt is találunk arra, hogy a szakmaiatlanul eljáró orvost felelősségre lehetett vonni: „A halálesetet nem szabad az orvosnak felróni, de tény, hogy felelős mindazért, amit a hozzáértés hiánya miatt okozott; mert az olyan személy által elkövetett hibát, aki veszélyes vészhelyzetben rossz tanácsot ad, nem szabad az emberi gyarlóságnak felróni, és hibátlannak tekinteni." (D. 1, 18, 6, 7).

4. Klasszikus kor

A *principatus* kora, mely a Kr. e. 1. század végétől a Kr. u. 3. század közepéig tartott. Ekkor volt a legfejlettebb a gazdaság és ez egy igen fejlett gazdasági és kereskedelmi jogi szabályozást kívánt meg. Ebben a korszakban már egyre többen engedhették meg maguknak az orvosi kezelést. Az egészségügyi személyzet iránti igény megnőtt, nem utolsó sorban az egészségügyi ellátást is igénylő városi proletariátus megjelenése miatt, amely a gazdag kereskedői osztály kialakulásához kapcsolódott.

Az orvosok ebben a korszakban szerezték meg az immunitást. Augustus ugyanis Antonius Musa orvosát[23] Kr.u. 10-ben felszabadította és házi orvosává emelte, valamint immunitással is felruházta. Az immunitás az orvosok és egyéb kiváltságosok számára a közterhektől és bizonyos közszolgálatoktól való mentességet jelentette, úgymint a katonaság vagy a gyámság.[24] Augustus alatt e jog valamennyi orvost megillette. Hadrianus császár megújította ezt a rendelkezést, Antonius Pius viszont az immunitást csupán az orvosok szűkebb körére korlátozta.

[22] A szakirodalomban eltérő álláspontok alakultak ki azzal kapcsolatban, hogy az orvos tevékenységét az *ars liberalis* vagy a *locatio conductio* körébe kell-e sorolni. Erről bővebben ld: MOLNÁR I.: Fejezetek a klasszikus kori locatio conductio köréből. *Acta Universitatis Szegediensis, Acta Juridica et Politica*, XXIX/2, 1982, 68-69.

[23] Suet. Aug. 59,1.

[24] MAYER F. K..: *Az orvostudomány története.* Budapest, 1927, 111. Vö. D. 27, 1, 6, 1. Grammatici, sophistae rhetores, medici qui dicuntur circitores ut a reliquis muneribus, ita etiam tutelae curaeque vacationem habent. D. 27, 1, 6, 2. Vö. BELOW, K.-H.: *Der Arzt im römischen Recht.* C. H. Beck'sche Verlagsbuchhandlung, München 1953, 22-30.

Ekkor már az orvosok két társadalmi osztályhoz is tartozhattak, a kiváltságos *honestiores* és a nem kiváltságos *humiliores* rendbe.[25]

Ebben a korszakban alapították az első hivatalos orvosképző intézeteket is, Kr. u. 14-ben.[26] Vespasianus reformjai az orvosok privilegizált helyzetét tovább erősítették (Vespasianus ediktuma az orvosok és a tanárok kiváltságáról Kr. u. 74.), valamint az oktatás támogatására irányultak. Vespasianus maga korán érdeklődést mutatott az orvostudomány iránt, pl. az alexandriai orvosokkal is konzultált a népi gyógymódokról[27]. Vespasianus *edictumát* az orvosok és a tanárok kiváltságáról december 27-én tették közzé a Capitoliumon, a 6. év Loos hónapjában. A kétnyelvű rendeletet tartalmazó márványkövet 1934-ben ásták ki a kis-ázsiai Pergamonban. Ebben az *edictum*ban a császár az immunitás mellett az orvosoknak menedékjogot adott, emellett korporációs jogot biztosított számukra, és védelemben részesítette őket a *ius vocatió*-val és az *iniuriá*val szemben is. A korporációs jog megadása előtt a *lex Iulia de collegis* (Kr. e. 21.) értelmében a képzettséghez kötött és taggyűlés összehívásával működő egyesületek alapításának feltétele a szenátus vagy a császár előzetes jóváhagyása volt.[28]

A menedékjog azt jelentette, hogy az orvosok és sebészek vallási kegyhelyeken, szent helyeken és templomokban egyesületeket alapíthattak, és ezeken a helyeken szentek és sérthetetlenek voltak. Aki ezt a menedékjogot megsértette, azt úgy tekintették mintha felségsértést követett volna el. Vespasianus *edictumá*ban foglalt orvosokat és tanárokat illető immunitást fia, Domitius vonta vissza egy *rescriptum*ában Kr. u. 93–94-ben.[29]

Ebben a korszakban az orvos büntetőjogi felelőssége emberölés esetén már eltérő volt, annak megfelelően, hogy a kiváltságos vagy nem kiváltságos rendbe tartozott. Ha egy orvos nem a megfelelő diagnózist adta, vagy az orvosságot nem megfelelő dózisban adagolta, vagy nem a megfelelő gyógymódot alkalmazta és a beteg életét vesztette, akkor a büntetés *honestior* és *humilior* esetében eltérő volt, vagyis kialakult egy kettős büntetési rendszer. (Ezekben az esetekben hiányzik a szándékosság, Paul. Sent. 5,23,19).

Az orvost gondatlanságból elkövetett emberölés esetén is felelősségre vonták, különös tekintettel a magzatelhajtásban való közreműködése miatt. Amennyiben az orvos a várandós nőnek magzatelhajtó szert adott és alacsonyabb rendű volt, akkor a szankció bányamunkára ítélés, ha pedig az előkelők társadalmi rétegéhez tartozott, vagyona felének elkobzása mellett egy szigetre száműzetés volt. E rendelkezést

[25] HORVÁTH V. – MÓCZI K.: *Az orvos jogállása az ókori Rómában.* In: KAPPEL G. – KIS KELEMEN B. – POZSÁRKÓ A. M. (szerk.): *Az egészségügy és a jog kapcsolata.* Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Óriás Nándor Szakkollégium, Pécs, 2020, 27.
[26] ROBERT, J-N.: *Az ókori Róma.* Korona Kiadó, Budapest 2006, 260.
[27] Tac. Hist. 4, 81.
[28] BELOW, K.-H.: *Der Arzt im römischen Recht.* C. H. Beck'sche Verlagsbuchhandlung, München 1953, 30.
[29] JOHNSON – COLEMAN-NORTON – BOURNE: *Ancient Roman Statutes.* Austin, 1961, 161.

alkalmazták akkor is, ha az elkövető nem rossz szándékkal követte el a tettet, mivel erkölcsileg elítélendő dolgot vitt véghez. Ha az italtól a magzat elhajtása mellett a várandós nő is meghalt, akkor az elkövetőt halálbüntetéssel sújtották. (D. 48, 19, 38, 5). Augustus a számkivetés szigorú formái *(aquae et ignis interdictio, deportatio)* helyett a *relegatiót* alkalmazta (pl. Ovidius ellen), amely rendszerint nem volt összekötve polgárjog csorbítással sem vagyonvesztéssel.

A császárkorban jelent meg az orvosok specializációja is, a specializálódás csúcspontja a Kr. u. 2. századra tehető. Különösen jelentős ekkor a szemészet és a fogászat kiválása és fejlődése. Ebben a korszakban vált el a sebészettől a nőgyógyászat is, és ekkor jutottak jelentősebb szerephez a bábák és női orvosok.[30]

Ekkor jelenik meg a városi egészségügyi szolgálat rendszere is, melynek orvosai ekkor már közpénzből fizetést is kaptak, valamint a szegényeket ingyenesen látták el. Kerületenként egy orvost alkalmaztak (*archiater populares* – népi főorvos), összesen 14-et. Ezek a főorvosok az orvosok felügyeletét látták el, illetve a leendő orvosok tanításával és vizsgáztatásával is meg voltak bízva.[31]

A császárkorban tehát már egy fejlett egészségügyi ellátási rendszer alakult ki. A városi orvosok *collegium*okba, orvoscéhekbe szerveződtek, a városokban rendelők működtek (*taberna medicinae*), az orvosok szakmánként is specializálódtak. A 3. század első felétől a szervezett orvosképzés is megjelent.[32]

A császárkorban az orvosok maguk négy különböző kategóriába tartozhattak: a római provinciák orvosai, az udvari orvosok, Róma városi orvosai, illetve a hadsereg orvosai. Az egyes orvosi csoportok között az orvosok jogi helyzete eltérő volt.

A provinciák orvosai *immunitas*szal rendelkeztek, és tevékenységükért fizetség járt. A Severus dinasztia uralkodása alatt jelentek meg a *medicus palatinus*-ok. Severus volt az első, aki udvarában saját fizetett orvost alkalmazott. A *medicus palatinus*ok mentesültek a közterhek alól, és egyéb adójogi kedvezményeket is kaptak. *In integrum restitutio* (C. 7, 35, 2, pr. Diocletian. et Maximian) és a *peculium quasi castrense* illette meg őket. Az első, kizárólag orvosokat képző intézmény is Alexander Severus (222–234) alatt létesült.[33]

Róma város (házi) orvosai vagy közösségi orvosai különleges pozíciót töltöttek be a városi társadalomban, általában különféle kiváltságokkal bírtak. A közösségi

30 HOFFMANN ZS. – T. HORVÁTH Á.: *Antik Medicina és Farmakológia.* JATEPRESS Szeged 2019, 181-182.

31 WITHINGTON, E. T.: Medical History from the earliest times. *The Hospital.* 1892 Aug 20; 12(308), 341-342.

32 ASBÓTH M. – FAZEKAS M. – KONCZ J.: *Egészségügyi jog és igazgatás*. ELTE Eötvös kiadó Budapest, 2020, 10. (Az egészségügyi közigazgatás kialakulása. Az állami feladatok változása az egészségügyben. A gyógyítás és egészségügy kezdetei.)

33 MIKONYA GY.: *Az európai egyetemek története.* ELTE Eötvös kiadó Budapest, 2014, 89. (ISBN 978 963 284 507 4) Vö. HOFFMANN ZS. – T. HORVÁTH Á.: *Antik Medicina és Farmakológia.* JATEPRESS Szeged 2019, 192.

orvos intézményének kialakulása azt mutatja, hogy a Római Birodalom terjeszkedő városaiban a lakosság orvosi egészségügyi ellátásának szükségességét az állam is belátta, ezért azt megszervezte és biztosította. Ezek az orvosok az elit orvosokhoz képest gyengébb képzettségűek voltak, így sok esetben rossz hírnevük volt, és a jövedelmük is messze elmaradt a római elit orvosokétól.[34]

A hadsereg orvosainak (*militium medici*) jogi helyzete egészen különlegesen alakult. Az orvosokat minden társadalmi státuszú csoportból toborozták, kivéve a rabszolgák közül. Specializált feladatokat láttak el (*medicus castrorum, medici*).

Plutarkhosz szerint már Ceasar Kr. e. 48-ban a Pharsalus és a Dyrrachium melletti csatája után a rómaiak szervezetten gondoskodtak a sebesültek és a betegek ellátásáról, minden katona kötőszereket hordott magánál.[35] Ezek a katonaorvosok (*medici ordinarius legiones*), a sebesültek ellátását a csatatér közelében felállított orvosi sátrakban végezték.

Egy Ulpianus által leírt jogeset arról tanúskodik, hogy már ebben a korszakban is az eset eldöntéséhez bábaasszonyok szakmai véleményére volt szükség. A fragmentum szerint: „Az isteni testvérek idején[36] megjelent egy férj, aki azt állította, hogy felesége terhes, aki ezt tagadta. Miután a császárokkal konzultáltak a témában, egy *rescriptum*ot intéztek Valerius Priscianushoz, a praetor urbánushoz, a következő szöveggel. „Úgy tűnik, Rutilius Severus valami rendkívüli dolgot kér, amikor gyámot kér feleségének, aki elvált tőle, és aki azt állítja, hogy nem terhes. Ezért senki sem fog meglepődni, ha Mi is új tervet és jogorvoslatot javasolunk. Ha a férj kitart követelése mellett, a legcélszerűbb lesz, ha kiválasztjuk egy tekintélyes asszony házát, ahová Domitia bemehet, és három, szakmájukban jártas és megbízható bábaasszony, miután kiválasztottátok, megvizsgálja őt. És ha mindannyian, vagy csak ketten közlik, hogy úgy tűnik, terhes, akkor az asszonyt rá kell venni, hogy fogadjon gyámot, mintha ő maga kérte volna. Ha nem szül gyermeket, akkor a férje tudja, hogy szégyenbe kerül, és hogy a jó hírneve is érintett lesz, és nem alaptalanul fogják azt állítani, hogy ezt azért találta ki, hogy a feleségét megkárosítsa. Ha azonban az említett nők mindegyike, vagy többségük kijelenti, hogy az asszony nem terhes, nem lesz ok a gyám kijelölésére" (D. 25, 4, 1).

Ulpianus szerint az orvos a tiszteletdíjáért *extra ordinem* eljárást indíthatott. Emellett a jogtudósok megengedték, hogy a páciens ellenigényét is az *extraordinaria cognitió*ban figyelembe vegyék. Fontos azonban, hogy szabad ember a neki okozott hegek, sebhelyek vagy másféle torzulások miatt nem érvényesíthetett igényeket, de ha az orvosnak fizetett díjat – akkor erre az összegre és a gyógyítás díjára, valamint

[34] MAYER F. K..: *Az orvostudomány története*. Budapest, 1927, 111. Vö. JÓZSA L.: A kórházi rendszer kialakulása a bizánci birodalomban. *Comm. de Hist. Artis Med.* 214-217, 2011, 5.
[35] DION: *Antiquitates Romanae* 9, 50.
[36] Marcus Aurelius és Lucius Verus (divorum fratrum) társcsászársága idején (161-169)

az okozott fogyatékosság miatt az elvesztett munka értékének pénzbeli összegére is lehetőssége volt igényeket érvényesíteni.[37]

5. Posztklasszikus kor

A Kr. u. 3. század közepétől 527-ig tartott, túlnyomóan a *dominatus* időszaka. A kor jellemzője a katonai és politikai instabilitás, a gazdasági hanyatlás, ami maga után vonta a jog hanyatlását is. A *dominatus* idején az orvosok továbbra is szerepet játszottak a társadalomban, de a közegészségügy és az egyéni egészségügyi ellátás, az orvosi ellátás sokszor háttérbe szorult.

A keresztényüldözések idején a keresztény mágiával gyógyítókat is perbe fogták. Rómában Kr. u. 282–283-ban zajlott Kozma és Damján ingyen tevékenykedő gyógyítók pere, ahol a vád keresztény mágiával való gyógyítás volt. A kihallgatásukat végző császár, Carus (Kr. u. 281–283) szabadon bocsátotta őket, ügyükben marasztaló büntető ítéletet nem született. Végül a saját – nem keresztény tanokat valló – orvostársaik mészárolták le őket.[38]

313-ban Nagy Constantinus kiadta a milánói *edictum*ot, amely véget vetett a keresztények üldözésének. A Római Birodalom is egyre inkább keresztényé vált, ennek vonzataként pedig a császár egyes tipikusan értelmiségi foglalkozásokat különféle kiváltságokban részesített. Az első ilyen rendelete 321-ben jelent meg, és az orvosok, tanítók és tanárok minden teherviselés alóli mentességét biztosította, valamint elrendelte munkabérük kifizetését is (C.Th. XIII. 3,1). Öt évvel később, 326-ban egy újabb rendelettel mentesítette a fő udvari és városi orvosokat (*archiatri*) minden tehertől és kötelezettségtől, sőt ezt az előjogukat fiaikra is kiterjesztette (C.Th. XIII, 3,2). Majd 333-ban Nagy Constantin megerősítette az előző császárok minden olyan rendelkezését, amelyek tehermentességet adtak az orvosoknak, és az orvosok feleségét és fiait is ebben a kedvezményben részesítette. Elrendelte, hogy az említettek nem kötelezhetők katonai szolgálatra, házukat pedig tilos szállásként elfoglalni (C.Th. XIII. 3,3). Kr.u. 362-ben Flavius Claudius Julianus császár a kerületi orvosok (*archiatri*) felmentését rendelte el minden közfunkció alól életük hátralévő részére (C. Th. XIII. 3. 4.).

6. Iustinianus kora (527–565)

Iustinianus emelte a Szt. Sámson-kórházat (*Orphanotropheion*), de emellett már az 5. századtól alapítottak *leprosorium*okat, lelencházakat, ahol a világi orvosok mellett

[37] Ulp. D. 50, 13, 1, 1; Gai. D. 9, 3, 7. I

[38] VANYÓ L.: *Ókeresztény írók* (szerk. Vanyó László) Ford. Bp., 1983-91: A Rómában elhunyt szent, ingyenes orvosoknak, a csodatevő Kozma és Damjánnak pályafutása (ford.: Orosz László).

szerzetesek is részt vettek a betegek ellátásában. Iustinianust is ilyen szerzetesorvosok kezelték. Aetius, aki Iustinianus *comes obsequii* címmel felruházott udvari orvosa volt, βιβλια ιατριχα εχχαιδεχα cím alatt orvosi gyűjteményes munkát adott ki.[39]

A mai kórházak ősét a zarándokok menhelyei (*noszokomeion*) és a konstantinápolyi kórházak (*xenodochium*) jelentették. Utóbbiban már elkülönítették a sebészi és a lázas (fertőző) betegeket. Az osztályokat főorvosok és „adjunktusok" vezették. Már a 4. században valamennyi beteg külön ágyon és tiszta, cserélt ágyneműn feküdt. Matracaikat évenként cserélték, a használtakat elégették, de voltak perforált matracaik is a magatehetetlen betegek ápolásának megkönnyítésére. Ezekből lettek az ispotályok, amelyek évszázadokon keresztül fennmaradtak[40]. A mai kórház őse csupán a birodalom keleti felében jelent meg a kereszténység évszázadaiban a *xenodokhium-hospitale* típusú, szegénygondozási feladatokat is ellátó, s egyértelműen a keresztény kultuszhoz kötődő intézmények formájában.[41]

A *Codex Iustiniani* számos orvosokkal és egészségüggyel kapcsolatos szabályt tartalmaz. A 10. könyv foglalkozik a professzorokkal és az orvosokkal. Emellett a 12. könyv tartalmazza Gordianusz császár rendelkezését a leszerelt fogyatékos katonák visszahelyezésének ügyében, melyet orvosi véleményhez kötöttek. (C. 12, 53, 6).

Iustinianus uralkodása alatt az orvosok nem kaptak közvetlenül a császári kormányzattól vagy az államtól fizetést, de a birodalom különböző részein magánpraxist folytathattak, így a betegektől vagy mecénásaiktól kaptak díjazást. Az egészségügyi ellátásban részt vevő kórházak fenntartása is az adományokból és a jótékonysági felajánlásokból történt.[42]

7. Összegzés

A Római Birodalomban az orvosok különböző korszakbeli társadalmi helyzetéről elmondható, hogy tevékenységi körük, társadalmi helyzetük és ezzel összefüggésben a szakma érdeme, hírneve rendkívül heterogén volt. Az orvosi szakma fejlődése a társadalom fejlődését követte, hiszen az orvosok száma az urbanizációval és a lakosság városokba való koncentrálódásával nőtt, ahogy Róma metropolisz lett. Az orvosok számának folyamatos növekedése jelentősen

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[39] KARAMANOU, G. – TSOUCALAS, K. – LAIOS, E. – DELIGEOROGLOU, E. – AGAPITOS, G. – ANDROUTSOS: Uterine cancer in the writings of Byzantine physicians. *JBUON* 2015; 20(4), 1645-1648.

[40] JÓZSA L.: A kórházi rendszer kialakulása a bizánci birodalomban. *Comm. de Hist. Artis Med.* 214-217, 2011, 5-24.

[41] JÓZSA L.: A kórházi rendszer kialakulása a bizánci birodalomban. *Comm. de Hist. Artis Med.* 214-217, 2011, 5-24.

[42] DMITRIEV, S.: Early byzantine public physicians. *Byzantion* 2017, Vol. 87, 2017, 207-231.

hozzájárult a római társadalom hellenizálódásához, amely a császárkorban érte el csúcspontját.

Az igények növekedésével azonban nemcsak az orvosok száma nőtt, hanem az orvosok minősége, működése és társadalmi helyzete is megváltozott. A birodalom fejlődése során az orvosi ellátás intézményesült, az orvosok presztízse is növekedett, valamint szakmai elkülönülés – specializáció jött létre –, melyet az egészségüggyel kapcsolatos szabályok változása és fejlődése is követett. A kezdeti archaikus jogszabályok, a jogfejlesztés eredményeképpen egyre inkább a megváltozott társadalmi igényekhez igazodtak.

Mivel az orvosok idővel nélkülözhetetlenné váltak a Római Birodalom mindennapos egészségügyi ellátásában, így idővel a római társadalom fontos részévé váltak. A rájuk vonatkozó, és a hozzájuk kapcsolódó egészségügyi problémák jogi szabályozása tévén nemcsak az orvostudomány, hanem a jogtudomány fejlődését is befolyásolták.

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A munka világában megjelenő új kihívások

Absztrakt: A munka meglétének szerepe jelentősen felértékelődött napjainkban. A COVID megjelenése változást hozott mind a munka, mind a magánélet terén és bizonyos munkaszervezési folyamatokat is felgyorsított. A munkavédelem célja az, hogy a munkahelyeken a munkavállalók részére biztosítsa a munkavállalók fizikai, mentális és szociális egészségét és biztonságát. Ennek fontos szempontja a munkavállalók védelme olyan kockázatoktól, amelyek sérüléseket, betegségeket vagy baleseteket okozhatnak. A közelmúltban újonnan megjelenő pszicho-szociális kockázatai jellemzően olyan technikai és szervezeti változásokból fakadnak, mint a munkaszerződések új formái, a munka bizonytalansága, az intenzívebb munka, a nagyfokú érzelmi teher, az idősödő munkaerő, valamint a munka és a magánélet egyensúlyának a felborulása. A kockázatértékelés szerepe, hogy az adott munkahelyen a munkavállalókat mi károsíthatja, veszélyeztetheti és milyen óvóintézkedések szükségesek az egészségkárosodás megelőzése érdekében. A kockázatértékelés elvégzéséhez nem feltétlenül kell minden esetben laboratóriumi vizsgálatokat, illetőleg műszeres méréseket végeztetni, költséges szolgáltatásokat igénybe venni. Az esetek legnagyobb részében a kockázatértékelés az eddig is meglevő munkavédelmi követelmények ellenőrzését, a hiányosságok megszűntetését jelenti, amelyben a legfontosabb eszköz a széles körű munkavédelmi ismeret.
Kulcsszavak: digitalizáció, munkavédelem, kockázatértékelés, pszichoszomatikus tényező

Abstract: The role of having a job has been significantly appreciated these days. The emergence of COVID brought changes in both work and private life and accelerated certain work organization processes. The purpose of occupational health and safety is to ensure the physical, mental, and social health and safety of employees at the workplace. An important aspect of this is the protection of employees from risks that can cause injuries, illnesses, or accidents. The recently emerging psycho-social risks typically arise from technical and organizational changes such as new forms of employment contracts, job insecurity, more intensive work, high emotional burden, an aging workforce, and disruption of work-life balance. The role of the risk assessment is to determine what can harm or endanger the employees in the given workplace and what protective measures are necessary to prevent health damage. To carry out a risk assessment, it is not necessary in all cases to have laboratory tests or instrumental measurements performed, or to use expensive services. In most cases, the risk assessment means checking existing occupational safety requirements and eliminating deficiencies, in which the most important tool is extensive occupational safety knowledge.
Keywords: digitization, occupational health and safety, risk assessment, psychosomatic factor

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1. Bevezetés

„A munka világának jövőjét három egymással összefüggő dimenzió határozza meg: a munkaerő, maga a munka tartalma és a munkavégzés helye. Mindhárom területen óriási változások zajlanak, amelyek már a pandémia előtt is láthatóan alakították a munka világát, ugyanakkor az elmúlt év ennek a változásnak a sebességét lényegesen felgyorsította.”[1]

A digitalizáció megjelenése gyorsan megváltoztatja a munka világát, új és korszerű munkavédelmi megoldásokat igényel. A digitalizáció azt is eredményezheti, hogy egyes munkavállalók jobban ki lesznek téve a munkavédelmi kockázatoknak, például az ergonómiai és biztonsági kockázatoknak. „Az új technológiák ugyanis olyan új élethelyzeteket is generálnak, amelyek azon a ponton túl lesznek, ami a kölcsönös alkalmazkodásból fakad. Olyan szabályokra van szükség, amelyek a lehető leggyorsabban képesek reagálni a kritikus helyzetekre. Ez a szabálytípus a szabvány. A szabványok alkalmazásának elsődleges terepe a munkahely, ahol az ember és gép együtt dolgozik.”[2] A munkavédelem célja a biztonságos, az egészségre nem ártalmas, a dolgozók testi épségét, egészségét, munkaerejét kímélő munkakörülmények megvalósítása. A munkakörnyezetben lévő kóroki (fizikai, kémiai, biológiai, ergonómiai, pszicho-szociális) tényezők szintjének feltárása, továbbá a végzett munkából és a munkakörnyezet hatásaiból adódó megterhelés mennyiségi meghatározására alkalmas eljárások, valamint olyan vizsgálatok, amelyek eredményeként javaslat tehető a munkából és a munkakörnyezetből származó egészségkárosító kockázatok kezelésére (csökkentésére). A közelmúlt újonnan megjelenő pszicho-szociális kockázatai jellemzően olyan technikai és szervezeti változásokból fakadnak, mint a munkaszerződések új formái, a munka bizonytalansága, az intenzívebb munka, a nagy érzelmi teher, az idősödő munkaerő, valamint a munka és a magánélet egyensúlyának a felborulása.

A kockázatértékelés a megelőzés jelenleg legkorszerűbbnek tekintett eszköze, amely a meglévő munkahely és munkakörnyezet valós állapotából indul ki és feltárja, illetve meghatározza mindazokat a valószínűsíthetően bekövetkező

[1] https://www2.deloitte.com/hu/hu/pages/emberi-eroforras/articles/igy-dolgozunk-holnap-milyen-lesz-a-munka-uj-vilaga.html (letöltés 2023.12.11.)

[2] MÉLYPATAKI G.: *Az Ipar 4.0. és a jog kapcsolata – Problémafelvetések a foglalkoztatás és szociális biztonság témaköre kapcsán.* https://edit.elte.hu/xmlui/static/pdf-viewer-master/external/pdfjs-2.1.266 dist/web/viewer.html?file=https://edit.elte.hu/xmlui/bitstream/handle/10831/95863/melypataki93.pdf?sequence=1&isAllowed=y (letöltés dátuma: 2023.12.12.)

egészségkárosító hatásokat és veszélyforrásokat, amelyek a munkafeladatokat végzőkre nézve veszélyt vagy egészségkárosodást jelenthetnek.

2. Digitalizáció

A technológiák megjelenése, mint a mesterséges intelligencia (AI), az együttműködő robotika, a digitális munkaügyi platformok és ezzel egyidejűleg a távmunkában dolgozó munkavállalók számának jelentős növekedése lehetőségeket kínál a munkavállalók és a munkáltatók számára, ugyanakkor új kihívásokat és kockázatokat is jelent a munkahelyi biztonság és egészségvédelem szempontjából.

„Az EU-OSHA célja az, hogy biztonságosabb és egészségesebb munkahelyeket garantáljon mindenki számára a munka digitális világában azáltal, hogy csökkenti a digitalizációnak a munkavállalók biztonságára és egészségére gyakorolt negatív hatásait, illetve maximalizálja a digitális technológiák által kínált megelőzési lehetőségeket. Ez most időszerűbb, mint valaha, mivel a gazdaság és a társadalom digitalizációja az Európai Unió széles körben hangoztatott kiemelt területe.”[3]

A digitális technológiák és a széles körű összekapcsolhatóság a nagyobb rugalmasság, illetve a munka és a magánélet közötti jobb egyensúly lehetőségét kínálja. Ezzel szembe az állandó elérhetőség iránt megnövekedett igény, rendszertelen munkaidőt, a munkahelyi és a magánélet közötti határ elmosódását és bizonytalan foglalkoztatási formákat is jelenthet.

„A digitalizáció és az automatizáció ugyanakkor változásokat hoz a munkahelyi struktúrában és a munkafolyamatokban is. Az egyszerűbb, rutinszerű feladatokat egyre inkább gépek és algoritmusok végzik, míg a munkavállalók szerepe inkább a kreatív gondolkodásra és az összetett problémamegoldásra összpontosulhat. Emellett megváltozhat a munkahelyi hierarchia és a szervezeti struktúra is, ahogy az emberek és a gépek közötti együttműködés dinamikája alakul.”[4]

A digitális platformon végzett munka minden olyan munka, amelyet valamilyen online platformon keresztül vagy annak közvetítésével végeznek. Az online platformok olyan digitális technológiákon működő online piacterek, amelyek lehetővé teszik a munkaerő iránti kereslet és a munkaerő-kínálat összehangolását.

„A hagyományos irodai munkavégzés mellett a távmunka és a hibrid, azaz a részben otthon, részben a munkahelyen történő munkavégzés is egyre elterjedtebb alternatívák, amelyek számos előnyt, de számos kihívást is jelenthetnek a munkavállalóknak és a munkáltatóknak egyaránt. Ahhoz, hogy a távolról történő munkavégzés valóban hatékony és mindkét fél számára kielégítő legyen, ki kell

[3] https://osha.europa.eu/sites/default/files/Digitalisation_and_OSH_HU.pdf (letöltés dátuma: 2023.12.13.)

[4] https://gazdasagielet.hu/2023/08/17/a-munkaeropiac-digitalizacioja-es-az-automatizacio-hatasa/ (letöltés dátuma: 2023.12.13.)

alakítani a megfelelő munkafolyamatokat és egy támogató infrastruktúrát."[5] A távmunka a távolból történő munkavégzés, melyet információs technológia segítségével végeznek a munkavállalók. Fontos és egyre növekvő szerepet tölt be a munkahelyeken, és jelentős hatással van a munkavállalók egészségére, jólétére és biztonságára.

A hibrid munkavégzést egyre több vállalat vezeti be, ami azt jelenti, hogy a kollégák dolgozhatnak otthonról is és az irodából is, vagy akár a kettőt váltogatva. Ahhoz azonban, hogy ez a rendszer működőképes legyen, újfajta gyakorlatok, megoldások bevezetésére van szükség.

Megjegyzendő, hogy egy cég eredményesen tudjon működni hibrid munkavégzéssel, bizonyos feltételeknek kell teljesülnie, melyek hiányában problémák merülhetnek fel a kommunikáció és a feladatok kiadásával és ellenőrzésével. Mindenképpen fontos, hogy a munkavállalók érezzék a céghez való tartozásukat és képesek legyenek kötődni a csapatukhoz vagy a felettesükhöz, ne érezzék azt, hogy kimaradnak a csapatmunkából.

3. Munkavédelem

A munkavédelem az egészséget nem veszélyeztető, biztonságos munkavégzés követelményeinek összességét, az egészséget nem károsító munkakörülmények, munkakörnyezet, munkaeszközök megteremtését és alkalmazását jelenti.

Az egészséget nem veszélyeztető és biztonságos munkavégzésre vonatkozó szabályokat úgy kell meghatározni, hogy végrehajtásuk megfelelő védelmet nyújtson a munkavállalókon túlmenően a munkavégzés hatókörében tartózkodónak és a szolgáltatást igénybe vevőnek is. A munkaeszközöket úgy kell kialakítani, hogy lehetőleg zárják ki a nem szervezett munkavégzés keretében történő rendeltetésszerű használat esetén is a balesetet, az egészségkárosodást.

54. § (1) Az egészséget nem veszélyeztető és biztonságos munkavégzés érdekében a munkáltató köteles figyelembe venni a következő általános követelményeket:
d) az emberi tényező figyelembevétele a munkahely kialakításánál, a munkaeszközök és munkafolyamat megválasztásánál, különös tekintettel az egyhangú, kötött ütemű munkavégzés időtartamának mérséklésére, illetve káros hatásának csökkentésére, a munkaidő beosztására, a munkavégzéssel járó pszicho-szociális kockázatok okozta igénybevétel elkerülésére.[6]

A munkavédelemnek fontos eleme a megfelelő tájékoztatás, amit a munkavégzést megelőzően kell a munkavállalóknak megadni. Emellett rendszeresen ellenőriznie szükséges a követelményeknek való megfelelést, a tudomására jutott

[5] https://www.profession.hu/cikk/a-tavmunka-es-a-hibrid-munkavegzes-kihivasai-es-megoldasai (letöltés dátuma: 2023.12.14.)
[6] 1993. évi XCIII. törvény a munkavédelemről 54. § (1) (d) bekezdés

rendellenességeket, bejelentéseket ki kell vizsgálnia és szükség esetén azonnal intézkednie kell az egészség vagy esetleg akár az emberi élet megóvása érdekében. A munkáltató feladata az új belépő dolgozók munkavédelmi oktatása, a védőeszközök állapotának felülvizsgálata, karbantartása, javítás vagy pótlása, de ugyanígy a foglalkozási megbetegedés vagy munkabaleset esetén meghatározott eljárás szigorú betartása is. A munkavállaló csak olyan munkára és akkor alkalmazható, ha az adott munka megfelel a testi/szellemi/pszichés állapotának, adottságainak, foglalkoztatása az egészségét, testi épségét károsan nem befolyásolja, foglalkoztatása nem jelent veszélyt a munkavállaló reprodukciós képességére, magzatára, mások egészségét, testi épségét nem veszélyezteti és a munkára foglalkozás-egészségügyi alkalmassági vizsgálat eredménye alapján alkalmasnak bizonyult. Tehát láthatjuk, hogy milyen fontos szerepe van a foglalkozás-egészségügyi szolgálatnak, mely közreműködik az egészséges munkakörnyezet kialakításában és az egészségkárosodások megelőzésében. Feladata egyrészt a munkahelyi megterhelések (fizikai, szellemi, lelki) és a munkakörnyezeti kóroki tényezők (fizikai, kémiai, biológiai, pszicho szociális, ergonómiai) felkutatása, folyamatos ellenőrzése, másrészt, hogy javaslatot tegyen arra, milyen módszerekkel lehet ezeket olyan szinten tartani, ami nem károsítja az egészséget.

A foglalkozás-egészségügyi szolgálat a munkavédelemről szóló törvény alapján részt vesz a munkavédelmi üzembe helyezésben, a munkabalesetek kivizsgálásában és segíti a munkáltatókat munkahigiénés, munkaegészségügyi és foglalkozás-egészségügyi tanácsadással.

A biztonságos és egészséges munkavégzés követelményeit műszaki, szervezési eszközökkel kell ellátni. A technológiát úgy kell kialakítani és olyan munkaeszközöket kell használni, hogy ne jelentsenek balesetveszélyt, a munka környezeti tényezői (levegő, zaj, hőmérséklet) egészségügyi ártalmat ne okozzanak. Amennyiben a műszaki védelem teljes körű biztonságot nem tud adni, mindenképpen használjuk az egyéni védőeszközöket, védőfelszereléseket.

A munkáltató kötelezettsége dolgozók egyéni védőfelszereléssel való ellátása, mely nem hárítható át a dolgozóra. Megfelelő védőeszköz kell, amely a munkahelyi veszélyforrások ellen megfelelő védelmet nyújt a munkavállalók részére. Olyan védőeszköz gyártható, forgalmazható, használható, amelynek érvényes munkavédelmi minősítése van, munkavédelmi szakértelem szükséges az egyéni védőfelszerelések megválasztásához. A munkáltató kötelessége az adott munkavégzéshez rendelt védőfelszerelés kiválasztása az ártalom alapján.

A munkáltató általában belső szabályzatban rögzíti a munkakört és a hozzá tartozó védőeszköz jegyzékét, meghatározza azokat a munkaköröket, amelyekben védőfelszerelést kell használni, és előírja a munkafeladat ellátásához szükséges védőfelszerelés típusát.

4. Pszicho-szociális kóroki tényezők

A munkavállaló kapcsolódik a mikró-és makró társadalmi intézményekhez a munkában és a magánéletben. Ezáltal pszicho-szociális terhelések, traumák az egyén valós érdekeinek, értékeinek és érzelmi elvárásainak mások általi tényleges megsértéséből erednek. A pszicho-szociális traumák súlyossága eltérő lehet, de mindig a munkavállaló és személyiségkörnyezete konfliktusáról van szó. Napjainkban gyakoribbak a pszicho-szociális kóroki tényezők, amelyek a munka világában érik a munkavállalókat.

Az Mvt. 87.§ 1/H. szerint: „A munkavállalót a munkahelyén érő azon hatások (konfliktusok, munkaszervezés, munkarend, foglalkoztatási jogviszony bizonytalansága stb.) összessége, amelyek befolyásolják az e hatásokra adott válaszreakcióit, illetőleg ezzel összefüggésben stressz, munkabaleset, lelki eredetű szervi (pszichoszomatikus) megbetegedés következik be"[7]

Pszichés tényezők a nagy koncentrációt igénylő munka, túl intenzív vagy egyhangú munka, éjszakai munka, egyedül vagy elszigetelten végzett munka, személyek fenyegetése, a feladatok, munkafolyamatok vagy munkavégzés szervezési hiányossága, összehangolatlansága, tisztázatlansága vagy áttekinthetetlensége, túl sok vagy túl kevés információ, emberi kapcsolati tényezők.

A pszicho-szociális kóroki tényezők pszichoszomatikus tüneteket, panaszokat okozhatnak, melynek számos fokozata létezik, a legjellemzőbb típusai: reggeli fáradtság, fejfájás, elalvási és alvási zavarok, gyomorfájdalom, vérnyomásváltozás által nem indokolt gyakori fokozott szívdobogás. Súlyosabb formái neurózis, szívritmuszavar, hipertónia.

A munkahelyi stressz megelőzésében kitüntetett a szerepe a munkavédelmi szakembereknek és a munkaegészségügyi szaktevékenységet ellátó szolgáltatók szakembereinek, mivel a kockázatértékelés és az átfogó munkahelyi megelőzési stratégia kialakítása munkavédelmi (munkabiztonsági és munka-egészségügyi) szaktevékenységnek minősül és kiterjed a munkavégzés idegi és lelki hatásaira, a munkakörnyezet pszicho-szociális kóroki tényezőire, a szociális kapcsolatokra is. A munkáltató megelőző intézkedései csak akkor lehetnek hatékonyak, ha a munkavállalókkal, illetve a munkavédelmi képviselőkkel is előzetesen konzultálnak, tanácskoznak.

A munkahelyi szervezet tehát számos pszicho-szociális terhelés, konfliktus forrása, például a munkavállaló elveszíti a munkáját és nem tudja a családja számára az anyagi biztonságot nyújtani, valamint, ha munkát kell vállalnia és sokat ingázik távol a családjától súlyos trauma érheti. A munkahelyi konfliktusok alakulhatnak ki a munkatársakkal, munkahelyi vezetőkkel.

„Napjainkban a munka világát jellemző technikai és szervezeti változások, az új és az újonnan kialakuló kockázati források és a túlzott idegi (mentális) és pszichés

[7] 1993. évi XCIII. törvény a munkavédelemről 87. § (1/H.) bekezdés

(lelki) megterhelések jelentik a legfőbb veszélyt a foglalkozási egészségre nézve. *Az európai munkavállalók közel egyharmada pszicho-szociális kóroki tényezőknek van kitéve*, fokozott pszichés terheléssel járó tevékenységet végez és a munkavégzése során fokozott baleseti veszéllyel is számolni kell, amelyek munkahelyi pszicho-szociális kockázatok kialakulásához vezethetnek. [EU – OSHA]"[8]

„A kockázati elemek arányának mértékét egy adott munkavégzéssel összefüggésben nagyban befolyásolja az, hogy mely iparágban, milyen anyagokkal és milyen technikai megoldások alkalmazásával történik. A kockázati tényezők spektruma széles a leesés elleni védelemtől a kémiai és egyéb jellegű expozíciókig. Számos jogszabály és egyéb más jellegű szakmaspecifikus szabály foglalkozik a kockázati tényezőkkel és azok kivédésével is, önmagában ennek az adott terület vizsgálatakor jelentős mértékű szabályanyagnak az áttekintését és rendszerezését is jelenti."[9]

5. Ergonómiai kóroki tényezők

Az ergonómia egy gyors ütemben fejlődő tudományterület, mely az ember-gép munkakörnyezet kapcsolatát vizsgáló tudományág, célja, hogy a munkakörnyezetet és munkaeszközöket az emberhez igazítsa. A kijelzők és a szabályozó műszerek, valamint a vezérlő szervek kialakítása és elhelyezése; a munkahelyek (ezen belül elsősorban az ülések) tervezése; a munka-környezet (zaj, világítás stb.) szabályozása. „Az ergonómia fő célja, hogy az emberi igények kielégítése mellett növelje a hatékonyságot és a megbízhatóságot. Kiderült ugyanis, hogy az ember képességeinek és a gép lehetőségeinek összekapcsolása - optimális környezeti feltételek mellett - lényegesen képes javítani a rendszer működését. Ez a szemlélet jellemezte az ergonómia történetének, és valamennyi területét."[10]

Napjainkban a számítógéppel dolgozók, gyakran panaszkodnak fáradtságra, idegességre, szembántalmakra, valamint fej, hát vagy kézfájásra. Ezek a panaszok a ergonomikus számitógépes környezet hiánya miatt és az ebből származtatható nem megfelelő testtartásból erednek. Az ergonómiai kóroki tényező hatása a fáradási jelenségekben nyilvánul meg jellemzően, elsősorban a musculoskeletalis rendszert (izomfáradás) és a központi idegrendszert (pszichés fáradás) érinti, tehát a szervek érintettsége az ülőmunkahelyek példáján jól bemutatható.

[8] https://www.nincsbaleset.hu/dokumentumok/23-a-munkahelyi-pszichoszocialis-kockazatok-kezelese (letöltés dátuma: 2023.12.15.)

[9] MÉLYPATAKI G.: A veszélyes anyagokkal foglalkozó üzemek létesítésével és működtetésével összefüggő munkajogi és társadalombiztosítási felelősségi kérdések. *Publicationes Universitatis Miskolcinensis Series Juridica et Politica*, Tomus XXXV, 2017, 366-380.

[10] UNGVÁRY Gy.: *Munkaegészségtan,* 2000, 621

Elmondhatjuk, hogy a munkavédelem és az ergonómia fogalma, különösen szellemi munkavégzés esetén jellegzetesen irodákban egybefonódik. Megjegyzendő, azokon a munkahelyeken, ahol az ergonomikus szempontok érvényesülnek, tapasztalni fogják, hogy a dolgozók közérzete javul, elhivatottabbak és motiváltabbak lesznek. Ezáltal a betegszabadságok száma pedig csökkeni fog, ha az irodában a számítógépes ergonómiai érvényesül. Egyre jobban felértékelődnek munkahelyváltásnál is az ergonómiai tényezők, fontos szempont a munkavállalónak a munkakörnyezet. Olyan munkahely kialakítása, ahol számítógépes munkát végeznek, meg kell, hogy feleljen az ergonómiai elvárásoknak a munkahelyen eltöltött idő mennyiségétől függetlenül is. Kérdésként felmerül, hogy a korábban beszerzett bútorok, munkaszékek, világítási rendszer nem felel meg a legújabb követelményeknek, a munkahelyek lecserélése vagy átalakítása a cégek számára komoly anyagi ráfordítást igényel, a dolgozók nem tudják megfelelően használni a munkahelyeiket és számítógépjüket, akkor a hatékonyságuk is romlik, ezáltal több időt töltenek betegállományban, amely szintén költségtöbbletet jelent. Mérlegelni kell, hogy az egyszeri ráfordítási költség lesz a kevesebb, vagy a hosszú idejű bevételcsökkenés okoz-e több kárt a cégek számára.

Nagyon fontos szempont tehát, hogy ha a munkavállaló vidám és egészséges környezetben végezze a munkáját, ahol az ergonomikus szempontokat figyelembe veszik, akkor a vállalat is sok új ötlethez és innovációhoz jut. Az elégedett és munkáját szerető munkavállaló energikus és elhivatott, ami növeli a produktivitást, ehhez elengedhetetlen a jó közérzet és szerethető környezet is.

6. Kockázatértékelés

A kockázatértékelés és a kockázatbecslés olyan jogintézmény, mely mind a munkavállalók testi épségének védelméhez, mind az egészségvédelemhez szorosan kapcsolódik. A kockázatértékelés feltárja a hiányosságokat, kockázatokat, veszélyeket, melyeknek a munkavállaló ki van téve, majd csökkentésére, megszüntetésére intézkedéseket határoz meg a felelősök és határidők megjelölésével. Kötelező dokumentum minden vállalkozásnál a kockázatértékelés, ha már 1 fő munkavállalója vagy akár segítő családtagja részt vesz a tevékenység végzésében. A kockázatértékelés elkészítése munkavédelmi- és foglalkozás-egészségügyi szaktevékenységnek minősül: vagyis munkavédelmi és üzemorvosi végzettséggel rendelkező szakemberek végezhetik el ezt a feladatot.

„A munkáltatónak rendelkeznie kell kockázatértékeléssel, amelyben köteles minőségileg, illetve szükség esetén mennyiségileg értékelni a munkavállalók egészségét és biztonságát veszélyeztető kockázatokat, különös tekintettel az alkalmazott munkaeszközökre, veszélyes anyagokra és keverékekre, a munkavállalókat érő terhelésekre, valamint a munkahelyek kialakítására.

A kockázatértékelés során a munkáltató azonosítja a várható veszélyeket (veszélyforrásokat, veszélyhelyzeteket), valamint a veszélyeztetettek körét, felbecsüli a veszély jellege (baleset, egészségkárosodás) szerint a veszélyeztetettség mértékét. A kockázatértékelés során az egészségvédelmi határértékkel szabályozott kóroki tényező előfordulása esetén munkahigiénés vizsgálatokkal kell gondoskodni az expozíció mértékének meghatározásáról.” [11]

„A kockázatértékelést öt lépésben lehet meghatározni. Első lépésben a veszélyeket és a veszélyeztetettek körét kell azonosítani, ami azt jelenti, hogy fel kell tárni, a kárt okozó, tényezőket, és a veszélynek kitett munkavállalókat. Második lépésben történik meg a kockázatok értékelése és rangsorolása. A felállított fontossági sorrend segít annak eldöntésében, hogy hol kell a leggyorsabban cselekedni és hol elegendő egy hosszú távú intézkedési programot összeállítani. A harmadik lépésben azt el kell eldönteni, hogy milyen intézkedéseket kell tenni, figyelemmel a hatályos jogszabályokra is, annak érdekében, hogy a munkavállalók és mások egészsége és biztonsága biztosítva legyen. Negyedik lépés feladta, a megelőző-és védőintézkedések bevezetése, annak meghatározása, hogy ki mikor, és mit tesz egy-egy feladat végrehajtása során, és melyek azok az eszközök, melyek az intézkedés végrehajtására szolgálnak. Végül az ötödik lépésben nyomon kell követni, és felül kell vizsgálni azt, hogy a bevezetett intézkedések működnek-e, illetve azokat végrehajtják-e.”[12]

A munkavédelem szempontjából a kockázatértékelésnek több formáját különböztethetjük meg: minőségi kockázatértékelés, mennyiségi kockázatértékelés.

„A munkáltató köteles minőségileg, illetve szükség szerint mennyiségileg értékelni a munkavállalók egészségét és biztonságát veszélyeztető kockázatokat, különös tekintettel az alkalmazott munkaeszközökre, veszélyes anyagokra és készítményekre, a munkavállalókat érő terhelésekre, valamint a munkahelyek kialakítására.” [13]

„Mádi Sarolta véleménye alapján fontos kérdés, hogy ki végezze a kockázatértékelést. Együtt kell működnie a munkabiztonsági és munka-egészségügyi szakembereknek. Németországban olyan szakember végezheti el a kockázatértékelést, ha részt vesz egy 2 éves tanfolyamon, mely a balesetbiztosító (DGUV) által szervezett. Magyarországon a munkáltatók nagy része nem rendelkezik szakemberekkel, szakértőket, külső vállalkozókat bíznak meg a feladat ellátásához, melyek különböző számítógépes programokat használ, ezáltal a

[11] 1993. évi XCIII törvény a munkavédelemről 54 § 2 (bekezdés)

[12] MÁDI S.: A kockázatértékelés és kockázatbecslés jelentősége a munkabiztonság területén. *Miskolci Jogi Szemle*, 2010/1, 78. https://www.mjsz.uni-miskolc.hu/files/egyeb/mjsz/201001/8_madisarolta.pdf (letöltés dátuma: 2023.12.18.)

[13] MÉLYPATAKI G.: A veszélyes anyagokkal foglalkozó üzemek létesítésével és működtetésével összefüggő munkajogi és társadalombiztosítási felelősségi kérdések. *Publicationes Universitatis Miskolcinensis Series Juridica et Politica*, Tomus XXXV, 2017, 366-380.

kockázatértékelések általánosságokat tartalmaznak és a munkahelyi sajátosságokat nem veszik figyelembe. (dr. Mádi Sarolta, Doktori (PhD) értekezés, 2016).” [14]

Elmondhatjuk, hogy a kockázatértékelés fejezi ki legjobban a munkavédelem legfontosabb alapelvét, a prevenciót. A prevenció fontossága, hogy felmérje a munkavállalókat érő várható kockázatokat és a munkáltató ezek ismeretében előzetes védőintézkedéseket tegyen. A munkáltatók sokszor megfeledkeznek erről a kötelezettségről, mely a munkavállalók tájékoztatásának, oktatásának a hiányát okozza, amely munkahelyi megbetegedéshez és munkahelyi balesethez vezet.

7. Összegzés

Összegzésként megállapítható, hogy a koronavírus-járványt követő átalakulás új szemléletet követel a munkavállalóktól és a munkaadóktól, felértékelődnek a korábban kevésbé figyelembe vett szempontok, a munkavállalók lelkiállapota és a munkavégzésük közérzetükre gyakorolt hatásai.

„A mesterséges intelligencia munkahelyi és munkaerőpiaci bevezetése mélyreható pszichológiai hatásokkal járhat a munkavállalókra nézve. A munkahely elvesztésétől való félelem, a jövővel kapcsolatos bizonytalanság és a csökkent emberi interakció fokozott stresszhez, szorongáshoz és munkahelyi bizonytalansághoz vezethet. Emellett bizonyos munkakörök leértékelődése és a mesterséges intelligencia automatizáló funkcióinak előtérbe kerülése aláásshatja a munkavállalók céltudatosságát és a munkával való elégedettségét. Az MI bevezetése által érintett munkavállalók pszichológiai jólétének prioritást kellene élvezni a vállalkozások és a politikai döntéshozók számára.”[15]

A távmunkában dolgozóknál elmosódhatnak a határok a munka és a magánélet között, ha a munkavégzés az otthonukból történik. Általában távmunkában egyedül töltjük a nap nagy részét, kevesebb lehetőségünk van a személyes interakcióra, ami magányérzetet és elszigeteltséget eredményezhet. A távmunkában tekintetében fontos, hogy legyen egy napirendünk, amivel különbséget teszünk a munkaórák és a pihenés között, illetve, ha tehetjük különítsünk el egy területet az otthonunkban, amit csak a munkavégzésre használunk.

„Az elmúlt 5 év adatai alapján megállapítható, hogy csökkent az ellenőrzött munkáltatók száma, valamint az ellenőrzött munkavállalók száma is. Ez az ellenőrző apparátus létszámcsökkenésének, valamint a pénzügyi eszközök szűkülésének az eredménye. A munkavédelmi ellenőrzések rendszere és hatékonysága azonban ezzel párhuzamosan növekedett, elsősorban az ellenőrzési irányelvek célirányosabb meghatározása, az ellenőrzési szervezet hatékonyabb működése folytán. A

[14] MÁDI S.: *Doktori (PhD) értekezés*, 2016.

[15] https://itbusiness.hu/technology/human_n/a-mesterseges-intelligencia-munkaeropiaci-hatasai (letöltés dátuma: 2023.12.19.)

szabálytalansággal érintett munkavállalók százalékos aránya nőtt, ami elsősorban azt mutatja, hogy a munkavédelmi ellenőrzések jelentős többsége olyan munkahelyekre irányul, ahol nem teljesülnek az egészséges és biztonságos munkavégzés feltételei."[16]„Változásra van szükség, ez pedig a munkahelyi kockázatok értékelésével kezdődik. Tudatosítanunk kell a munkáltatókban, biztonsági képviselőkben és szakpolitikai döntéshozókban, hogy a megfelelő kockázatértékelés a jó munkahelyi biztonság és egészségvédelem kulcsa"[17]

Felhasznált jogszabályok

1993. évi XCIII. törvény a munkavédelemről

1993. évi XCIII. törvény a munkavédelemről

1993. évi XCIII törvény a munkavédelemről

Felhasznált irodalom

BODROGI J.: *A munkavédelem, a foglalkozás-egészségügyi rendszer átalakítási irányai*. 2018. https://www.nincsbaleset.hu/dokumentumok/54-a-munkavedelem-a-foglalkozas-egeszsegugyi-rendszer-atalakitasi-iranyai (letöltés dátuma: 2023.12.20.)

MÁDI S.: *Doktori (PhD) értekezés*, 2016.

MÁDI S.: A kockázatértékelés és kockázatbecslés jelentősége a munkabiztonság területén. *Miskolci Jogi Szemle*, 2010/1. https://www.mjsz.uni-miskolc.hu/files/egyeb/mjsz/201001/8_madisarolta.pdf (letöltés dátuma: 2023.12.18.)

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DARNÓT SÁRA EDINA[*]

A jogcímhez kötöttség elvének érvényesülése az új Pp.-ben – az ítélet dolog kifogása és az elévülés tükrében

Absztrakt: A jogcímhez kötöttség a kérelemhez kötöttség szűkebb megnyilvánulása, amelynek célja, a perkoncentráció elősegítése és a perek kiszámíthatóbbá tétele. Az ítélt dolog kifogása és az elévülési kifogás tükrében azonban láthatjuk, hogy amellett, hogy a szűk értelemben vett eljárási igazság kiderítésére fókuszál, alkalmas arra, hogy a perek megduplázódásának alapjául szolgáljon, ezzel elmulasztva eleget tenni a bíróság alapvető kötelezettségének, hogy a jogvitákat véglegesen rendezze.
Kulcsszavak: jogcímhez kötöttség, ítélt dolog kifogása, elévülés, perben érvényesített igény, keresettel érvényesíteni kívánt jog

Abstract: The principle of being bound by the legal title is a narrower manifestation of the principle of being bound by the application, designed to facilitate the concentration of litigation and make it more predictable. However, in the light of the plea of res iudicata and the plea of limitation, it can be seen that, in addition to its focus on the narrowly defined procedural truth, it is liable to serve as a basis for the duplication of litigation, thereby failing to fulfil the court's fundamental duty to settle disputes definitively.
Keywords: principle of being bound by the legal title, plea of res iudicata, statutory limitation, right to be enforced in litigation

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1. Bevezetés

A jogcímhez kötöttség elve a perjogban ismert kérelemhez kötöttség elvének szűkített formája, amely az új Pp. kodifikációja során jelent meg a jogszabályszövegben, ezzel szakítva a korábban kialakult gyakorlattal. A perkoncentráció és a professzionális pervitel követelményének előtérbe helyezésével, az eljárás kiszámíthatóvá tétele és ezáltal viszonylagos igazságossága felülmúlta a már a régi Pp. módosításai során háttérbe szorult igényt az anyagi igazság kiderítésére a polgári perben.

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A bíróság jogcímhez kötött döntéshozatala valóban a koncentrált pervitelt segíti elő, hiszen a bíróságnak tulajdonképpen csupán arról kell döntenie, hogy a felperes perbe vitt igénye az általa megjelölt jogalapon fennáll-e az alperes védekezésével szemben, vagyis a felperes az igénye alátámasztásául megfelelő tényeket és bizonyítékokat szolgáltatott-e. Ha azonban kiderül, hogy a szolgáltatott tények és bizonyítékaik nem a megjelölt jogcím alapján támasztják alá a felperes igényét, a kereset elutasításának van helye. Érzékelhető, hogy ez a megoldás legkevésbé sem szolgálja az anyagi igazság kiderítését vagy az igazságos és tisztességes eljárást még annak ellenére sem, hogy a professzionális pervitelben deklarált elvárás a peres felekkel szemben, hogy igényeiket a *helyes* jogalapon terjesszék elő.

Szintén nem szolgálja ez a megoldás a perhatékonyságot sem, hiszen, ahogy a lentiekben kifejtem, a jogcímhez kötöttség elve mellett az ítélt dolog kifogása is a perben érvényesített jogcímre korlátozódik, ezzel teret adva a perek megduplázódásának, különböző jogalapokon, aminek – ahogy lent kifejtem – az elévülés sem szabhat korlátot.

2. A jogcímhez kötöttség elve a magyar Polgári Perrendtartásban

2.1. A jogcímhez kötöttség elvének fogalma, a szabályozás rendszere

A jogcímhez kötöttség elve leginkább úgy foglalható össze, hogy érvényesülése esetén a bíróság a kereset elbírálása során a felperes által megjelölt jogcímhez kötve van. Fontos megkülönböztetni a jogcímhez kötöttség elvét a perjogban mindenkor érvényesülő, kereseti kérelemhez kötöttség elvével: a különbséget a bírói gyakorlat akként fogalmazta meg, hogy „*a kereseti kérelemhez kötöttség nem jelent egyben jogcímhez kötöttséget. Nincsen akadálya annak, hogy ugyan a peres fél a szerződés érvénytelenségének megállapítását színleltség okán kérte, azt a másodfokú bíróság - figyelemmel a 2/2010. (VI. 28.) PK vélemény 5. a) pontjára, az elsőfokú eljárás során megállapított tényállás alapján - másik semmisségi ok, a jóerkölcsbe ütközés szempontjából bírálja el.*”[1] A régi Pp. alkalmazásával hozott döntés indokolásában a Kúria kifejtette, hogy „*a keresetlevél tartalmi követelményeként a Pp. 121. § (1) bekezdésének c) pontja kimondja, hogy a keresetlevélben az érvényesített jogot kell megjelölni, és az e) pont alapján fel kell tüntetni a bíróság döntésére irányuló határozott kérelmet. A kereset jogcímének meghatározása azonban nem tartalmi követelménye a keresetlevélnek. A Pp. 3. § (2) bekezdésében foglaltak szerint a bíróság - törvény eltérő rendelkezése hiányában - a felek által előterjesztett kérelmekhez és jognyilatkozatokhoz kötve van, de ezeket a (2) bekezdés alapján nem alakszerű megjelölésük, hanem tartalmuk szerint köteles figyelembe venni. A kereseti kérelemhez kötöttség szabályát pedig a Pp. 215. §-ának rendelkezése tartalmazza.*”

[1] BH2016. 172.

A legtöbb szerző a rendelkezési elv körében említi a kérelemhez kötöttség elvét, amelyet a Pp. a 2. § (2) bekezdésében nevesít. A hivatkozott szabály szerint a bíróság törvény eltérő rendelkezése hiányában a felek által előterjesztett kérelmekhez és jognyilatkozatokhoz kötve van. Ezzel a rendelkezéssel a Pp. - a régi Pp.-vel egyezően - egyértelművé teszi, hogy az "ügy urai" a peres felek, ők határozzák meg a per tárgyát és ezáltal a bíróság eljárási mozgásterét is.[2] A Pp. részletes szabályai a kérelemhez kötöttség elvét biztosítva kimondják, hogy az érdemi döntés nem terjedhet túl a kereseti kérelmen, az ellenkérelmen és a beszámítási kérelmen (ez a szabály a főkövetelés járulékaira is irányadó).[3] A jogcímhez kötöttség elve a kérelemhez kötöttség régi Pp.-ben is alkalmazott szabályán túlmutató, további megkötést jelent. Az új Pp. kodifikációja során került bele a jogszabály szövegébe, hogy a keresetlevél érdemi részében fel kell tüntetni az érvényesíteni kívánt jogot a jogalap megjelölése útján.[4] Ennek megfelelően egészült ki a Pp. 342. §-ban szabályozott, az ítélet terjedelmére vonatkozó szabály a (3) bekezdéssel, amely kimondja, hogy a törvény eltérő rendelkezése hiányában az érdemi döntés nem terjedhet ki olyan jogra, amelyet a fél a perben nem állított. Ezzel a rendelkezéssel a törvény a jogcímhez kötöttség perjogi intézményét vezeti be: a Pp. hatálybalépése után indult ügyekben a bíróság már nemcsak a felek kérelmeihez, de a felek által megjelölt jogcímhez is kötve van. Ez a kötöttség – a kérelemhez kötöttség elvével azonos módon – az eljárás során mindvégig, így a perorvoslati eljárásokban is érvényesül. Mindebből következően a Kúria szerint jogszabálysértő az érvényesített jogtól eltérő jogalapon meghozott, a keresetnek helyt adó ítélet, mert a bíróság a felperes által érvényesített joghoz kötve van.[5]

2.2. Az 1952. évi Pp.-ben alkalmazott ún. „kételemű pertárgyfogalom”

Az 1952-es Pp.-ben a keresetlevél tartalmai elemeit - az 1911. évi perrendtartással ellentétben - csupán a kereset alapjául szolgáló tények és annak bizonyítékai, valamint az ezek alapján támasztott igény megjelölése képezte. Az 1952-es Pp. 121. § (1) bekezdés c) pontja értelmében a keresettel érvényesíteni kívánt jogot az alapul szolgáló tények és azok bizonyítékai előadása útján kellett megjelölni, így elegendő volt, ha az a keresetlevélből megállapítható („kiolvasható”). Az érvényesített jogot tehát lényegében a tények jogi minősítésével, azaz jogi következtetéssel a bíróságnak és az alperesnek kellett meghatározni. Így előfordulhatott, hogy a felperes, az alperes és a bíróság akár három különböző dimenzióban mozgott eljárási cselekményeik

[2] GELENCSÉR, D. In: PETRIK F. (szerk.): *Polgári eljárásjog I-II. - új Pp. - Kommentár a gyakorlat számára*, frissítve: 2023. július 1.
[3] Pp. 342. § (1) bekezdés
[4] Pp. 170. § (2) bekezdés b) pontja
[5] Kúria Pfv.III.20.626/2022/4., megjelent: BH 2023.129.

megtételében, attól függően, hogy ki mit tekintett keresettel érvényesített jognak. Ezzel összhangban a régi Pp. kommentárja is kimondta, hogy érvényesíteni kívánt jogot, az annak alapjául szolgáló tényeknek és azok bizonyítékainak előadásával kellett megjelölni: az érvényesíteni kívánt jog, ha azt a kereset elemei között keressük, a kereset tárgya, amelyet olykor – tévesen – a kereset jogcímével azonosították[6]. A felperes az érvényesíteni kívánt jog megjelölésével hozta a bíróság tudomására, hogy mi az a jog, amely alapján a másik féllel szemben valamely követelése áll fenn, irányt mutat a bírósági döntéshez vezető úton. Megjelölése elengedhetetlenül szükséges volt, és hiányát nem pótolhatta a határozott kereseti kérelem, vagy a tényállítás, a jog megjelölésének egyértelműnek kellett lennie. A polgári perre vitt jogviták elbírálása tehát két alappilléren nyugodott: a tényálláson és a jogszabályon. (*ún. kételemű pertárgyfogalom*)

A bíróság még akkor sem volt a felperes által megjelölt jogcímhez kötve, ha a felperes keresete alapjául konkrét jogcímet jelölt meg. Számos alkalommal kimondta a bíróság elvi jelentőségű döntésekben, hogy „*a kérelemhez kötöttség nem jelent jogcímhez kötöttséget: ha a kereseti követelés az előterjesztetthez képest más jogcímen teljesíthető, a bíróság ezen a jogcímen helyt adhat a keresetnek. Ugyanez a szempont érvényesül az ellenkérelem tekintetében is: a bíróság a védekezéshez képest más jogcímen is elutasíthatja a keresetet, ha e más jogcím figyelembevételére adat áll rendelkezésre*”,[7] konkrét példával élve: „*amennyiben a szállító a megrendelő elállása esetén a követelésének jogcímét tévesen vételárban, és nem kártalanításban jelöli meg, a jogcím téves megjelölése nem eredményezheti a jogszerű követelés eljárásjogi okokból történő elutasítását, mivel a kereseti kérelemhez kötöttség nem jelenti egyúttal a jogcímhez kötöttséget is.*”[8] A bíróság tehát nem volt a felperes által konkrétan megjelölt jogszabályhelyekhez (jogcímhez) kötve, csupán a perbe vitt igény eldöntése volt a feladata.

A régi Pp.-t már az új Pp. kodifikációját megelőzően is számos kritika[9,10] érte az alkalmazott „kételemű pertárgyfogalom” kapcsán.[11] A kritikát megfogalmazó szerzők szerint ugyanis nem volt fenntartható az a gyakorlat,[12] amely a kereseti kérelemhez kötöttség körében a jogcímhez kötöttséget nem követeli meg, vagyis

[6] Ld. pl. EBH2004. 1143., BDT2007. 1543.
[7] BDT2008. 1823.
[8] BH2004. 250.
[9] HAUPT E.: A jogcímhez kötöttség kérdése a polgári perben. *Magyar Jog*, 2000/10., 605-616.
[10] VIRÁG Cs.: A jogcímhez kötöttség egyes kérdései a polgári perben. *Magyar Jog*, 2013/1., 27-36.
[11] WOPERA Zs.: Az új polgári perrendtartás elvi alapjai. *Jogtudomány Közlöny*, 2017/4., 153-161. [37]
[12] EH 2004.1143 „A bíróságnak a felek jognyilatkozataihoz való kötöttsége nem jelenti azt, hogyha valamelyik fél a perbeli jogviszony jogi minősítését illetően tévesen rossz jogcímet jelöl meg, azt a bíróság a határozata meghozatalánál nem minősíthesse a jogszabályi rendelkezéseknek megfelelően. Erre azonban csak akkor van lehetőség, ha a helyes minősítéshez valamennyi tény, bizonyíték, adat rendelkezésre áll [Pp. 3. § (2) és (3) bekezdés, 8. § (1) és (2) bekezdés, 141. § (2) és (6) bekezdés, 213. § (1) bekezdés, 215. §, 235. § (1) bekezdés].”

csupán az előadott tények és az azokra alapított kérelmek tekintetében köti a bíróságokat, ezzel teret adva az ún. meglepetés ítéleteknek. Egyes szerzők az új Pp. elméleti előkérdésének[13] és a bírói szerepfelfogás alappillérjének tartották annak tisztázását, hogy a bírónak miről kell döntenie egy polgári perben, mely problematika a "kérelemhez kötöttség vagy jogcímhez kötöttségben" foglalható össze. Ezzel kapcsolatban a Kiss Daisy és Németh János által jegyzett Nagykommentár[14] megjegyezte, hogy „*azzal azonban, hogy az „igazság kiderítése" a bíróság feladatai közül kikerült, és a bíróság tájékoztatási kötelezettsége is leszűkült az eljárásjogi kérdésekre, az alsóbb szintű bíróságokon felmerült az igény, hogy a bíróság az ítéletet a felperes által megjelölt jogcím vonatkozásában hozza meg*". A szerzők álláspontja szerint – vélhetően – az anyagi igazság kiderítése nem igényel jogcímhez kötöttséget. A bíróság feladata a kereseti kérelem alapjául szolgáló jogviszony elbírálása, és a döntését nem akadályozhatja az, hogy a felperes követelésének jogcímét helytelenül (tévesen) jelölte meg.[15] Amennyiben azonban az anyagi igazság kiderítése, mint elsődleges cél helyébe a perjogban a mindenkori eljárási igazság elérése kerül, a kereseti kérelemhez kötöttségen túl a jogcímhez kötöttség bevezetése válik szükségessé. A szerzők hozzáteszik, hogy „*az nem vitás, hogy a fair eljárás elvének sérelmével járhat, hogy a bírósági eljárásban valamely meghatározott jogcímen nyugvó követelés ténybeli alapjának bizonyítása zajlik, majd a bíróság egy másik jogcím alapján dönt* (vö. meglepetésítéletek problematikája – a szerző), *nem adva lehetőséget arra, hogy a fél az ezzel kapcsolatos álláspontját kifejtse, védekezését (bizonyítékait) előterjessze. Abban az esetben azonban, ha a jogcím téves megjelölésének a következménye a kereset elutasítása, indokolt megfontolni az ügyvédkényszer bevezetését a bíróságok előtti eljárásokban*" ezzel biztosítva az eljárási igazság kiderítése mellett az eljárás viszonylagos igazságosságát.

2.3. A 2016. évi Pp.-ben megjelenő ún. „háromelemű pertárgyfogalom"

Az új Pp. már a keresetlevél tartalmi elemeként követeli meg a jogalap megjelölését. A jogcímhez kötöttség elve tehát az új Pp. kodifikációja során került bele a Pp.-be. Ez látható a keresetlevél tartalmi elemeit szabályozó Pp. szakaszból is,[16] miszerint a keresetlevél érdemi részében fel kell tüntetni az érvényesíteni kívánt jogot a jogalap megjelölése útján, valamint az érvényesíteni kívánt jogot és a kereseti kérelmet megalapozó tényeket (*ún. háromelemű pertárgyfogalom*). Utóbbi két elem nem újdonság, eddig is valamennyi konkrét és releváns tény megjelölése szükséges volt, mert a régi Pp. 121. § (1) bekezdésének c) pontja is megkívánta mindezt és

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[13] OSZTOVITS A.: Új magyar Polgári perrendtartás szükségességéről. *Magyar Jog*, 2010/3., 158-163.
[14] KISS D. – NÉMETH J. (szerk): *Nagykommentár a Polgári Perrendtartásról szóló 1952. évi III. törvényhez* (archív) https://uj.jogtar.hu/#doc/db/300/id/A10Y1399.KK/ts/20140315/ (utolsó letöltés: 2024.01.10.)
[15] Szegedi Ítélőtábla Gf.I.30.350/2003. - BH2004. 250.
[16] Pp. 170. § (2) bekezdés b) pont

megkövetelte a kialakult bírói gyakorlat is. A keresetlevelek ennek megfelelően általában a már bevett szokás szerint tartalmazzák a fél tényelőadását, a keresetlevélben tehát továbbra is le kell írni a történeti tényállást, azt, hogy milyen események következtében, adatok alapján került sor a kereseti kérelem előterjesztésére, azt mi támasztja alá és miből lehet megállapítani annak megalapozottságát és szükség esetén az összegszerűségét.

A szabály bevezetésével párhuzamosan a jogalkotó elvetette azt a lehetőséget, hogy a bíróság a feleket anyagi jogról, a helyesnek tartott anyagi jogi minősítésről tájékoztathassa és koncepcionálisan új alapokra helyezte a szabályozást. A fél rendelkezési jogára, saját ügyének viteléért való egyéni felelősségére építő koncepció szellemével összhangban kötelező az érvényesíteni kívánt jog nevesítése. A keresetlevélben a felperesnek kifejezetten meg kell jelölni, hogy az alperessel szemben milyen jogalapon, mely jogát érvényesíti. Egyértelműen szükséges tehát megjelölni a konkrét jogszabályi rendelkezésre való hivatkozással a keresetlevéllel érvényesíteni kívánt alanyi jogot közvetlenül megalapozó, azt keletkeztető tárgyi jogi rendelkezést, egyéb ezt meghaladó feltételekre vonatkozó hivatkozás viszont már nem kötelező. A jogalapra történt hivatkozás a jogszabályhely pontos megjelölésével, vagy a jogszabályi rendelkezés tartalmával, annak az egyértelműen beazonosítható módon történő leírásával, vagy akár mindkettővel tehető meg [Például Ptk. 6:154. § (1) bekezdés, vagy a kötelezett késedelme folytán beállt érdekmúlás miatt a szerződéstől való elállási jog gyakorlása]. Ehhez párosul, hogy a bíróság érdemi döntésének korlátját szabályozó Pp. 342. § (3) bekezdése kimondja a fél által megjelölt joghoz való kötöttséget is, azaz az ún. jogcímhez kötöttséget amikor kimondja, hogy törvény eltérő rendelkezése hiányában az érdemi döntés nem terjedhet ki olyan jogra, amelyet a fél a perben nem állított.

A jogcímhez kötöttség elve tehát a kérelemhez kötöttség mindenkor érvényesülő alapelvének egy, a professzionális pervitelt és a perkoncentráció elvét előtérbe helyező új Pp.-ben megjelenő, szűkebb megvalósulása. Ez sem érvényesül azonban korlátlanul: a Kúria a BH2023. 246. sz. döntésében kimondta, hogy „a felperesnek keresetlevelében az érvényesíteni kívánt jogot kell megjelölnie a jogalap és az azt megalapozó tények feltüntetésével. Kártérítés iránti perben a Pp. alkalmazásában érvényesülő „jogcímhez kötöttség" a kártérítés iránti anyagi jog érvényesítéséhez való kötöttséget jelenti, ami nem azonos az anyagi jogi kárfogalomnak a Ptk. 6:522. § (2) bekezdése a), b) és c) pontjaiban a kártérítési kötelezettség terjedelme körében meghatározott kárösszetevőkhöz (kárfajtákhoz) való kötöttséggel." Indokolásában hozzáteszi, hogy a Pp. 170. § (2) bekezdés b) és c) pontjára tekintettel a felperesnek keresetlevelében az érvényesíteni kívánt jogot kell megjelölnie a jogalap és az azt megalapozó tények feltüntetésével. A Pp. alkalmazásában – az 1952. évi Pp.-vel szemben – érvényesülő „jogcímhez kötöttség" az adott ügyben a kártérítés iránti anyagi jog érvényesítéséhez való kötöttséget jelentette, ami nem azonos az anyagi jogi kárfogalomnak a Ptk. 6:522. § (2) bekezdése a), b) és c) pontjaiban a kártérítési kötelezettség terjedelme körében meghatározott kárösszetevőkhöz (kárfajtákhoz) való kötöttséggel. Jól szemlélteti a két elv közötti különbséget, ha az imént idézett Kúriai döntést összevetjük egy korábbi, régi Pp. alapján hozott, szintén kártérítéssel kapcsolatos ügyben hozott elvi döntéssel, miszerint *„a régi Pp. alapján elbírálandó ügyekben nem érvényesül a jogcímhez kötöttség, ezért a párhuzamos kártérítési igények kizárásáról rendelkező Ptk. 6:145. §-ából sem következik a tévesen a deliktuális felelősség szabályaira alapított kereset megalapozatlansága*."[17] A lényegi különbség tehát abban áll, hogy míg kereseti kérelemhez kötöttség érvényesülése mellett a jogcím téves megjelölése miatt a kártérítésre irányuló kereseti követelés nem volt elutasítható,[18] addig a jogcímhez kötöttség elvének értelmezése körében felmerül a kérdés, hogy hozható-e keresetnek érdemben helyt adó döntés, ha a felperes tévesen jelölte meg a keresetében szereplő kárösszetevőket (a fent idézett jogeset alapján erre nem terjed ki a jogcímhez kötöttség), de szerződésszegésből eredő kár téves érvényesítése esetén a bíróság (megjelölt jogcím hiányában) már nem dönthet deliktuális alapon megítélhető kártérítés mellett.

2.4. A jogcímhez kötöttség elvéből eredő probléma

Wopera Zsuzsa az új Pp. kodifikációja során[19] abban látta a háromelemű pertárgyfogalom bevezetésének a lehetőségét, hogy a peres feleknek ne csupán a keresetüket alátámasztó tényeket és bizonyítékokat, hanem a keresetük jogcímét is pontosan meg kelljen jelölniük (itt a szerző a jogcím megjelölésének lehetőségére utal, tévesen, ez ugyanis az új Pp.-ben nem lehetőség, hanem olyan kötelezettség, amelynek elmulasztása (különösen az új Pp. novelláris változtatását megelőző bírói gyakorlatban) a keresetlevél visszautasítását eredményezte), hogy a mai magyar (tételes, pozitív) magánjog kodifikáltsága, részletezettsége, a normatételezés precizitása ezt lehetővé teszi, mely feltételek nem álltak fenn sem a Plósz-féle Pp., sem a régi Pp. kodifikációja idején.[20] Ezzel szemben egyes szerzők[21] a jogcímhez kötöttség bevezetésének kritikáját fogalmazták meg, ugyanis álláspontjuk szerint *„az anyagi jogi rendelkezési jog eljárásjogi vetületeként megjelenő - a kereset tárgyával, azaz az érvényesített joggal való szabad rendelkezést leképező - jogcímhez kötöttség álláspontjának kialakulását követően nem lehet nem szembesülni azzal, hogy a perben érvényesített jog megkötése neutrális, technikai jellegű szabályának alkalmazása - az alaki jogi törvény előtti egyenlőség*

[17] BH2021. 43.
[18] BH1997. 530.
[19] WOPERA.: i.m. [40]
[20] WOPERA i.m. [41]
[21] ÉLESS T. – FARKAS Zs.: A polgári perről a tárgyalási elv megközelítésének változásai tükrében. *Magyar Jog*, 2010/1., 1-12.

alapelvének érvényesülése mellett, megfelelő kiegyensúlyozó mechanizmusok hiányában - a perbevitt jogviszony szereplőinek már meglévő társadalmi egyenlőtlenségét konzerválja."

Végső soron, a kérdés – mint minden perjogi tárgyú értekezésben – az, hogy vajon az új szabályozás az igazságosság, mégpedig az anyagi igazság érvényesülését szolgálja-e. Az 1952-es Pp. alapelvei és az azokon alapuló jogalkalmazás az anyagi jogi szabályoknak megfelelő döntéseket eredményezett, ugyanakkor elősegítette az ítélkezés kiszámíthatatlanságát, és a meglepetésítéletek problematikájához vezetett. Számos jogorvoslati kérelem arról szólt, hogy a bíróság tévesen értelmezte a keresetet, és helytelenül határozta meg az az érvényesített és a védekezés alapjául szolgáló jogot, függetlenül attól, hogy a felperes vagy az alperes arra hivatkozott-e. Ha a bíróság maga határozza meg a tényekből következő jogosultságot anélkül, hogy tájékoztatást adna a feleknek a minősítésről, akkor az érintett felek csak az elsőfokú ítéletből vagy a jogerős másodfokú ítéletből, esetleg a felülvizsgálati ítéletből tudhatják meg, hogy mely jogcímen bírálta el a bíróság az igényüket. Ez különösen az alperes számára problémás, mert nem kapott tájékoztatást arról, melyik jog alapján kellett volna védekeznie, ami megnehezítheti más tények vagy jogi érvek felhozását a védekezésében. A felperes számára is hátrányos lehet, mert nem igényét megfelelően előterjeszteni, sérült a bírósághoz fordulás joga a számára ismeretlen, meg nem jelölt jogalap tekintetében. Ebben az esetben az anyagi jogilag helyes döntés veszélyeztethette a tisztességes eljáráshoz való alapvető jogot. A meglepetésítélet egyik lehetséges „ellenszere" bíróság aktív közrehatása, a felek anyagi jog körében történő kioktatása azonban mind a törvény, mind a jogalkalmazók nagy része által elutasított gyakorlat.

Vitathatatlan, és az új Pp.-nek nem titkolt célja volt a „professzionális pervitel" megkövetelése a törvényszékek általános hatáskörű bírósággá emelése (és ezáltal a kötelező jogi képviselet főszabállyá tétele) által, amelyet a jogi képviselő nélkül eljáró felekkel szemben a bíró kioktatási kötelezettségének kiszélesítése ellensúlyoz. A bíróság szerepe (főszabály szerint, a jogi képviselővel eljáró felek mellett) arra szűkül, hogy a peres feleknek a perfelvétel során a bíróság közrehatásával (anyagi pervezetésével) kell tisztázniuk és pontosan megállapítaniuk az érvényesíteni kívánt jogot és megjelölniük követelésük jogcímét, vagyis, hogy a fél milyen tények alapján milyen jogot állít. A bíróság részére a Pp. az anyagi pervezetés keretében ad tehát lehetőséget a téves vagy ellentmondásos jogértelmezés tisztázására, de változatlanul nem ad lehetőséget arra, hogy a felet az anyagi jogról tájékoztassa, az anyagi pervezetés idáig nem terjedhet.[22] A tévesen megjelölt jogcím tehát szükségszerűen a kereset elutasításához vezet, kérdés azonban, hogy ez mennyiben szolgálja a koncentrált pervitelt és a bíróság azon feladatát, hogy az elé vitt jogvitákat véglegesen rendezze...

[22] Pp. 111. §, 237. §

A fent vázolt problémakör legmarkánsabb eljárásjogi kivetülése az ítélt dolog kifogása és az elévülési kifogás kapcsán érhető tetten: tegyük fel, hogy a felperes az első- és másodfokú bíróságon hozott, számára pozitív döntést követően a felülvizsgálati eljárásban szembesül azzal, hogy a Legfelsőbb Bíróság/Kúria álláspontja szerint a (régi Pp. alapján indult eljárásban) a megjelölt tények és azok bizonyítékai alapján keresete nem megalapozott, tehát a felülvizsgálati bíróság a másodfokú ítélet hatályon kívül helyezésével az elsőfokú ítélet megváltoztatása és a kereset elutasítása mellett dönt, mivel egy – az eljárásban korábban nem hivatkozott, és nem tárgyalt – jogszabályhely alapján kizártnak látja a felperesi igényérvényesítést. A felperes keresete jogerősen elutasításra kerül, a per tárgya ítélt dolgot képez, további igényérvényesítésre (ugyanazon jogalapon) nincs lehetőség. Mindez az új Pp.-ben érvényesülő jogcímhez kötöttség mellett nem lehetséges.[23] Sőt, ha a Kúria az első- és másodfokú bíróság által megállapított anyagi jogi minősítéssel nem ért egyet, kizárólag a határozat hatályon kívül helyezésére, és az első- vagy a másodfokú bíróság új eljárásra és új határozat hozatalára utasítására van lehetősége. Figyelemmel arra, hogy a Pp. jogcímhez kötöttséget vezet be, a Kúria is kötve van a fél által megjelölt és a jogerős ítéletben rögzített jogcímhez, ezért a felek jogviszonyát nem minősítheti át, erre kizárólag a perfelvétel körében - első vagy kivételesen másodfokon - van lehetőség.[24]

3. Az ítélt dolog kifogása és az elévülési kifogás

3.1. Az ítélt dolog kifogásának szabályai

A Pp. 176.§ (1) bekezdés d) pontja alapján a bíróság - hiánypótlási felhívás kiadását mellőzve - a keresetlevelet visszautasítja, ha a felek között ugyanabból a ténybeli alapból származó ugyanazon jog iránt indított más perben a perindítás joghatása már beállt vagy annak tárgyát már jogerősen elbírálták. Ehhez kapcsolódik az anyagi jogerőhatás szabályozása is, miszerint a Pp. 360.§ (1) bekezdés alapján a keresettel és az ellenkövetelés fennállta tekintetében érdemben elbírált beszámítással érvényesített jog tárgyában hozott ítélet jogereje kizárja, hogy ugyanabból a tényalapból származó ugyanazon jog iránt ugyanazok a felek - ideértve azok jogutódait is - egymás ellen új keresetet indíthassanak, vagy az ítéletben már elbírált jogot egymással szemben egyébként vitássá tehessék.

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[23] A bíróság az egész peres eljárás alatt az érvényesíteni kívánt joghoz, ezenfelül a másodfokú bíróság a fellebbezési eljárásban a fellebbezési kérelem korlátaihoz is kötve van. Ezért a másodfokú bíróság - ide nem értve a jogállítás a másodfokú eljárásban megengedett megváltoztatását - az elsőfokú ítéletet nem bírálhatja felül a keresettel érvényesített jogtól eltérő, a fellebbezésben megjelölt jogalapon [Fővárosi Ítélőtábla 9.Pf.20.213/2021/7.].

[24] GELENCSÉR, D. In: PETRIK F. (szerk.): *Polgári eljárásjog I-II. - új Pp. - Kommentár a gyakorlat számára*, frissítve: 2023. július 1.

A perfüggőséget és az anyagi jogerőhatást változatlanul az váltja ki, ha ugyanazon ténybeli alapból származó, ugyanazon jog iránt, ugyanazon felek, vagy jogutódaik között volt vagy van folyamatban másik bírósági peres eljárás. Miként illeszthető be az új Pp.-ben bevezetett ún. háromelemű pertárgyfogalom az ítélt dolog kifogásának szabályrendszerébe? Figyelemmel kell lenni arra is, hogy az anyagi jogerőhatás a kifejtetteken felül azt is eredményezi, hogy a felek a már elbírált jogot egymással szemben ismételten vitássá sem tehetik. A jogalap tekintetében tehát a Pp. Kommentár azon az állásponton van, hogy „*fenn kell maradnia az e tekintetben már kialakulóban lévő joggyakorlatnak, amely szerint ilyen esetekben is a keresetlevél visszautasításának van helye. Tipikus példa erre az, hogy ha valakit jogerős határozattal egy szerződés teljesítésére köteleztek, akkor ez a személy már nem indíthat újabb pert a szerződés érvénytelenségének a megállapítása iránt, mert ezzel ismételten vitássá tenné az ellenérdekű fél jogerős határozattal már elbírált azon jogát, hogy jogosult volt a szerződés teljesítését követelni.*" A Pp. Nagykommentár[25] szerint ahhoz, hogy a jogerő negatív hatása beálljon, teljesülnie kell három konjunktív feltételnek: a félazonosságnak, a tényazonosságnak és a jogazonosságnak. Másképp megfogalmazva: az ítélt dolog csak annak a jogvitának az újbóli elbírálását akadályozza, ahol mind a felek, mind a ténybeli alap, mind az elbírált jogviszony azonos. Ha e feltételek közül akár csak az egyik nem áll fenn, a *res iudicata* hatása nem érvényesül.

Kérdés tehát, hogy miként kell megítélni a régi Pp. alapján (az egyik lehetséges jogalapon) elutasított keresetet az új Pp. alapján indult új eljárásban, ha az alperes az ítélt dolog kifogására hivatkozik. Álláspontom szerint, amennyiben a régi Pp. alapján elbírált eljárásban a felperes meghatározott jogalapon érvényesített igényt, amire nézve a Kúria (az első- és másodfokú ítéletekkel ellentétesen, döntését korábban nem hivatkozott jogszabályra utalással) a keresetet elutasította, adott felperes az új Pp. szerint kifejezetten a Kúria ítélete alapjául szolgáló jogalaptól eltérő jogcímen (eltérő jogszabályhelyre hivatkozással) újabb keresetet indíthat anélkül, hogy a keresetlevél visszautasításának lenne helye az ítélt dolog miatt.

Álláspontom szerint tehát az új Pp. által bevezetett háromelemű pertárgyfogalom leszűkíti az ítélt dolog kifogására alapított alaki védekezés lehetőségét, azt ugyanis kizárólag a megítélt jogcímre korlátozza – másként fogalmazva: az új Pp. lehetővé teszi, hogy azonos felek között azonos tények alapján ismételt eljárás induljon pusztán azért, mert a felperes ezúttal másik jogcímet jelöl meg keresete jogalapjaként. Az összegszerűség tekintetében meg kell említeni a Kúria 6/2022. JEH számú jogegységi határozatát[26] a követelésrész érvényesítése esetén az anyagi jogerőhatás érvényesüléséről, amely még egy lépéssel tovább megy

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[25] WOPERA ZS. In: WOPERA Zs. (szerk.): *Nagykommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez* 2022. szeptember 1. időállapotú 2023. évi Jogtár-formátumú kiadás ISBN 978-963-594-184-1
[26] Jpe.III.60.027/2022/15.

ezen az érvelésen, amikor kimondja, hogy ha a fél az anyagi jogból eredő követelésének csak egy részét érvényesíti, az ítélet jogereje nem terjed ki a nem érvényesített követelésrészre. A még nem érvényesített követelésrészre újonnan megindított perben vizsgálhatók a keresettel érvényesített jog érdemben el nem bírált anyagi jogi feltételei. Az ilyen esetekben tehát a továbbiakban már nincs lehetőség a keresetlevél ez okból történő visszautasítására, a Kúria az ebben a kérdésben fennállt jogbizonytalanságot ilyen módon szüntette meg, az ezzel ellentétes határozatok a továbbiakban nem hivatkozhatók.

A fentiek alapján tehát tény- és jogazonosság esetén nem indítható újabb per, vagyis, ha a felek ugyanarra a történeti tényállásra kívánják alapozni keresetüket, feltéve, hogy az abból fakadóan érvényesített jogviszony is azonos, az ítélt dolognak minősül, és a keresetlevél visszautasításához vezet. A jogazonosság azonban az új Pp. értelmében kizárólag a keresetben kifejezetten megjelölt jogalap tekintetében vizsgálható. Mivel a bíróságnak a keresettel érvényesített jog elbírálására keletkezett közjogi kötelezettsége, az pedig az előzőek értelmében a megjelölt jogalap elbírálása a fél által megjelölt releváns tények tükrében, döntve az ezekre alapozott határozott kereseti kérelem felett. Ebből az is következik, hogy az anyagi jogerő nem terjedhet túl a fenti tény- és jogazonosságon, vagyis ha a fél azonos tényekre, de más, újonnan megjelölt, az esetleges korábbi perben el nem bírált jogalapra helyezi az új keresetét, az anyagi jogerő *res iudicata* hatása nem akadályozhatja az eszerint fél- és tényazonos, de nem jogazonos per elbírálásában.

Felmerül azonban, hogy az elévülési kifogás miként értelmezhető a háromelemű pertárgyfogalom kapcsán, vagyis, mi a sorsa a korábban jogcímként meg nem jelölt/el nem bírált jogalapnak?

3.2. Az elévülési kifogás szabályai

Az elévülés nem a keresetlevél visszautasítása körében veendő figyelembe, hiszen azt a bíróság hivatalból nem, csupán az alperes kifogása alapján vizsgálhatja – megállapítása viszont a kereset érdemi elutasításához vezet, így anyagi jogi kifogásnak[27] minősül annak ellenére, hogy elévülési kifogás esetén a bíróságnak először abban a kérdésben kell döntenie, hogy a perbeli követelés elévült-e,[28] gyakorlatilag az alaki kifogások és az érdemi védekezés közé ékelve. Az elévülésről a bíróság azonban nem külön határozatban, hanem az ítéletben határoz.

Ettől függetlenül, logikusnak tűnő válasz a fenti kérdésre, hogy amennyiben a felperes adott jogcímen nem érvényesített igényét a keresete elutasítása után új perben kívánja érvényesíteni, az alperes sikeresen hivatkozhat az igény elévülésére, mondván, hogy ha az eltérő jogalapra a korábbi per nem terjedt ki, akkor az az eljárás

[27] Pp. 7.§ (1) bekezdés 1. pont
[28] BH 2006.220.

az elévülést nem szakította meg,[29] így (egyéb feltételek fennállása esetén) az igény elévült. Az elévült követelést pedig bírósági eljárásban nem lehet érvényesíteni.[30] Az elévülés joghatása az, hogy az alanyi jog - noha az időmúlás ellenére fennmarad - elveszíti igényállapotát; pontosabban: az elévülés igényszüntető kifogást alapoz meg a kötelezett számára. Gyakorlatilag ez azt jelenti, hogy az elévülési idő eltelte után az alanyi jogot nem lehet bírósági eljárásban érvényesíteni.[31]

Az ellentmondás azonban álláspontom szerint látszólagos, ami a perben érvényesített igény és a keresetben érvényesíteni kívánt jog fogalompárosának értelmezésével feloldható. Egyértelmű, hogy az elévülés anyagi jogi intézmény, amelynél az elévüléssel érintett jogot/igényt az anyagi jogi igényfogalommal összefüggésben kell értelmezni, míg az ítélt dolog kifogásánál vizsgálandó jogazonosság eljárási jellegű, az eljárásjog fogalomrendszerében vizsgálandó.

4. A látszólagos ellentmondás feloldása: A perben érvényesített igény és a keresetben érvényesíteni kívánt jog

Ahogy fent kifejtettük, az új Pp. alapján indult ügyek keresetlevelében egyértelműen szükséges tehát megjelölni a konkrét jogszabályi rendelkezésre való hivatkozással a keresetlevéllel érvényesíteni kívánt alanyi jogot közvetlenül megalapozó, azt keletkeztető tárgyi jogi rendelkezést. A keresetben tehát kötelező jelleggel és egyértelműen elő kell adni a felperesnek az alperessel szemben érvényesíteni kívánt jogát és az előadott igény anyagi jogi jogalapját. A továbbiakban ez képezi a per tárgyát, a bíró döntésének kereteit, amiken nem terjeszkedhet túl, amiktől az ítéletében nem térhet el, és aminek eldöntésére közjogi kötelezettséggel tartozik.

Láttuk, hogy az ítélt dolog kifogása és az elévülési kifogás látszólag egymást kiegészítő, komplementert alkotó szabályok, vagyis egy, már korábban bíróság elé vitt és jogerősen elbírált igény kapcsán egyiknek, vagy másiknak feltétlenül érvényesülnie kell. Ahogy említettem, az ellentét azonban csupán látszólagos, mivel az elévülés anyagi jogi, míg az ítélt dolog kifogása eljárásjogi fogalomrendszerben értelmezhető.

A gyakorlatban korábban bizonytalanság volt a keresettel érvényesített jog, az igény és a jogalap elhatárolása tekintetében.[32] Ennek tisztázása érdekében az új Pp. meghatározza a jogalap, illetve a keresettel érvényesített jog fogalmát is.

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[29] Ptk. 6:25.§ (1) bekezdés c) pont
[30] Ptk. 6:23.§
[31] VÉKÁS L. In: GÁRDOS P. – VÉKÁS L. (szerk.): *Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez* 2023. január 1. időállapotú 2023. évi Jogtár-formátumú kiadás ISBN 978-963-594-197-1
[32] GELENCSÉR, D. In: PETRIK F. (szerk.): *Polgári eljárásjog I-II. - új Pp. - Kommentár a gyakorlat számára*, frissítve: 2023. július 1.

A Pp. 7. § (1) bekezdés 8. pontja a jogalapot akként definiálja, hogy az az anyagi jogi rendelkezés, amely az alanyi jogot közvetlenül keletkeztető tényeket meghatározza és annak alapján az igény támasztására feljogosít. A jogállítás alapvetően kétféle módon történhet: egyrészt a jog alapjául szolgáló konkrét jogszabályhely megjelölésével [pl. Ptk. 6:535. § (1) bekezdés], másrészt a jog alapjául szolgáló azon jogszabályi rendelkezési tartalomnak az egyértelműen azonosítható megnevezésével („jog neve" vagy másképpen „jogcím"), ami az érvényesített alanyi jogot adja (pl. veszélyes üzemi felelősségből eredő kár megtérítése iránti jog).[33] A keresettel érvényesített jog a Pp. 7.§ (1) bekezdés 11. pontja szerint az az alanyi jog, amelynek érvényesítését anyagi jogi jogszabály biztosítja. A keresettel érvényesített jog kifejezést a régi Pp. is használja, azt azonban nem definiálta, amely azt eredményezte, hogy a gyakorlatban sok esetben összemosódott ez a fogalom a jogalap és jogcím fogalmával.

A fogalmak tisztázása érdekében arra kell kitérni, hogy a magánjog tudománya (és a gyakorlat) alanyi jog alatt magánjogi jogalanyt megillető jogosultságot ért. Az igény az alanyi jog kikényszeríthető "bíróilag érvényesíthető" állapota, amely a perben a keresettel érvényesített jogként jelenik meg,[34] (*az igény anyagi jogi fogalma*) pl. esedékes kártérítés.

Ezzel szemben a Pp. szerint jogalap az az anyagi jogi jogszabályi rendelkezés, amely az alanyi jogot közvetlenül keletkeztető tényeket meghatározza és annak alapján az igény támasztására feljogosít, vagyis lényegében azt jelenti, hogy a jogalap a keresettel, viszontkeresettel, beszámítással érvényesített igénynek, vagy az ezekkel szembeni ellenkérelemben perbe vitt anyagi jogi kifogásnak (*az igény eljárásjogi fogalma*) az anyagi jog valamely konkrét jogszabályi rendelkezésén nyugvó jogi alapja (*a jogalap*), pl. a Ptk . 6:519.§ alapján érvényesített kártérítés.

Az ítélt dolog kifogása vitathatatlanul eljárási jellegű, alaki kifogás, amit a bíróság hivatalból is figyelembe vehet, és ami a keresetlevél visszautasításához (vagy annak elmaradása esetén az eljárás megszüntetéséhez[35]) vezet. Amennyiben ugyanazon felek között, ugyanazon tényalapból származóan, de eltérő jog iránt (eltérő jogalapon vagy eltérő jogviszony tekintetében) van folyamatban az eljárás, a keresetlevél visszautasításának az ítélt dolog kifogása alapján nincs helye. Az ugyanazon jog ebben az értelemben álláspontom szerint kizárólag a keresetben érvényesíteni kívánt jog, vagyis a jogalap lehet, lévén eljárásjogi fogalomrendszerbe ágyazott alaki kifogásról van szó. Így tehát, ha a felperes ugyanazon alperes ellen,

[33] GELENCSÉR, D. In: PETRIK F. (szerk.): *Polgári eljárásjog I-II. - új Pp. - Kommentár a gyakorlat számára*, frissítve: 2023. július 1.

[34] Az alanyi jog és az igény fogalmáról bővebben lásd: SZLADITS K.: *Magyar magánjog*, Első kötet, Budapest, Grill 1941, 188. és 201.

[35] Ld. Pp. 240.§ (1) bekezdés a) pont, miszerint a bíróság az eljárást hivatalból megszünteti, ha a keresetlevelet, viszontkereset-levelet már a 176. § (1) bekezdés a)–i) pontja alapján vissza kellett volna utasítani.

ugyanazon ténybeli alapból származó igényét más jogalapon kívánja érvényesíteni, az ítélt dolog kifogása nem lehet megalapozott.

Ezzel szemben, ahogy a fentiekben tárgyaltuk, az elévülés anyagi jogi jellegű jogintézmény, ezáltal nem a keresettel érvényesíteni kívánt joghoz, hanem a perben érvényesített igényhez kapcsolódik. A felperes tehát mindvégig azonos alperessel szemben (pl. volt munkáltatója) kíván ugyanazon ténybeli alapból származóan (pl. munkaviszony fennállása, alapja és körülményei), ugyanazon igényt (pl. elmaradt prémium megfizetése) érvényesíteni akkor is, ha az első perben (tévesen) pl. munkavállalói jogutódlásra hivatkozva teszi azt, ami a kereset elutasításához vezet, az új perben azonban (helyesen) pl. a munkaszerződés tartalmára hivatkozással teszi azt, és ezáltal igénye megállapítást nyer. A felperes igénye tehát mindvégig a munkabér (prémium) megfizetése volt, aminek elévülését a korábbi – jogerős bírósági döntéssel végződő – eljárás megszakította. Az újraindult elévülési határidőn belül megindított kereset, noha ugyanazon felek között, azonos ténybeli alapon zajlik, sem az ítélt dolog kifogása alapján nem utasítható vissza (mivel eltérő jogalapon érvényesíti igényét), sem az elévülés miatt nem utasítható el érdemben.[36]

5. Összegzés

A fentiek alapján látható, hogy a jogcímhez kötöttség az új Pp.-ben maradéktalanul érvényesül – ez azonban nem szolgálja sem a célként kitűzött perkoncentrációt, sem nem teszi alkalmassá a bíróságokat, hogy a jogvitákat véglegesen rendezzék, igazságot szolgáltassanak. A jogcímhez kötöttség elvének bevezetése a kizárólagos eljárási igazság megismerésének elősegítésére alkalmas. Azáltal azonban, hogy a jogcímhez kötöttség az ítéletek anyagi jogerőhatását és ezáltal az ítélt dolog kifogásának érvényesülési körét is leszűkíti, nem kizárt, hogy azonos felek között azonos tények alapján folyamatban lévő perek megsokszorozódjanak mindaddig, amíg a felek a „megfelelő", bíróság által „helyesnek vélt" jogalapot meg nem találják – ez értelemszerűen nem szolgálja a gazdaságosságot sem a felek, sem a bíróságok oldaláról. Ennek a jelenségnek az elévülés sem szabhat korlátot, hiszen, amíg a felperes azonos jogviszonyból eredő igényét érvényesíti különböző jogcímeken, az elévülés minden egyes téves jogcímen megindított, de az igény tekintetében érdemben elbírált döntés esetén megszakad és újra kezdődik.

Végső soron, ezzel az értelmezéssel arra a következtetésre juthatunk, hogy a professzionális pervitel mellett a jogcímhez kötöttség fentiekben felvázolt negatív

[36] A Kúria egy elvi jelentőségű eseti döntésében mondta ki (a régi Mt. alkalmazása mellett), hogy az elévülés vizsgálata során nem az igényérvényesítés jogcímének, hanem időpontjának van jelentősége. (EBH2017. M.20.)

következményei nem érvényesülnek, hiszen a mindenkori felperes mindig a „helyes" jogalapon indítja meg keresetét, és abban a perfelvétel alatt a bíróság legfeljebb támogatja, de semmiképpen sem készteti annak megváltoztatására, mert nem is szükséges. Mindebből arra lehet következtetni, hogy a mindenkori alperesek érdeke, hogy akkor is az általa helyesnek vélt jogcím szerinti védekezést adja elő (ezzel a felperesnek igényérvényesítését látszólag elősegítve), ha a felperes nem a helyes jogcímre hivatkozva állítja igényét, ugyanis, ha az alperes minden lehetséges jogcím tekintetében előadott védekezését a bíróság érdemben elbírálja, a felperesnek nem lesz olyan további jogcíme, amire ne terjedne ki az ítélet jogereje.

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Critical Theory "The European Union as a model"

Abstract: Critical theory denotes a school of academic thought which challenges dominant ways of exploring and explaining organizational phenomenon .While having a long legacy and being far from being a single body of thought, critical theory is typically associated with the Institute of Social Research at Frankfurt University. The so-called 'Frankfurt School' emerged in the 1930s and included such scholars as Max Horkheimer, Theodor Adorno, Herbert Marcuse, and somewhat later, Jürgen Habermas. A key theme of critical theory is to destabilize dominant modes of understanding by surfacing underlying assumptions and rendering power relations explicit. As Adorno and Horkheimer capture in the Dialectic of Enlightenment "what men want to learn from nature is how to use it in order wholly to dominate it and other men"[1]. A key theme of critical theory is to destabilize dominant modes of understanding by surfacing underlying assumptions and rendering power relations explicit. As Adorno and Horkheimer capture in the Dialectic of Enlightenment "what men want to learn from nature is how to use it in order wholly to dominate it and other men"[2]. Drawing on diverse intellectual traditions, critical theory seeks to expose the domination, control and suppression that hides behind that which at first appears neutral, progressive and necessary. Exemplifying this tendency, the logic and purpose of positivism is frequently a core object of critique for critical theorists. Allied to this is an emancipatory intent; critical theory not only reinterprets existing orders but offers alternative modes of understanding and being which liberate those silenced and shackled by conventional theory. In Horkheimer's terms the theory is critical in so far as it seeks "to liberate human beings from the circumstances that enslave them"[3]. The study seeks to apply critical theory to the reality of European society , the emergence of greater social interaction among citizens who participate in vibrant interaction across transnational civil society and within emerging global public spheres. In order to develop the framework for such a normative-practical praxeology for emerging multiperspectival institutions, pragmatism and Critical Theory once again suggest themselves: here Dewey's testable claim that it is the interaction of public and institutions that promotes democracy and democratic inquiry. However important giving greater powers to the European Parliament may be, parliamentary politics at best serves a mediating role among transnational and national institutions and is not the sole means to democratisation . Given that such institutions cannot

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[1] HORKHEIMER, M.: Traditional and Critical Theory. In: Horkheimer M., *Critical Theory: Selected Essays*. New York: Herder and Herder, 1972.

[2] HORKHEIMER, M.: Traditional and Critical Theory. In: Horkheimer M., *Critical Theory: Selected Essays*. New York: Herder and Herder, 1972.

[3] HARNEY B.: *Encyclopedia of Management "Critical Theory"*,ResearchGate, January 2014.

easily be scaled up and retain their full democratic character, it is necessary to look to a different institutional level: to the possibility of new forms of social inquiry that may be developing in the problem-solving mechanisms of the European Union.
Keywords: Critical Theory, Postmodernism, Europe Union, Multiperspectival Democracy

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1. The definition of Critical theory

The critical theory associated with the Frankfurt School is orientated toward uncovering the historical and social conditions of human oppression with the concurrent commitment to bringing about emancipation and liberation. In this respect, the defining character of critical theory as a mode of political theorizing is its unabashed attempt to understand the social and political world for the sake of radically transforming its institutions toward human betterment. As such, critical theory creatively integrates empirical, normative, and practical discourses in its theorizing. Indeed, As Brian Fay has noted, critical theory, as a part of the larger tradition of "critical social science," represents a variegated attempt "to understand in a rationally responsible manner the oppressive features of a society such that this understanding stimulates its audience to transform their society and thereby liberate themselves" .Yet, given Fay's characterization, "critical theory" or "critical social science" would then include not only aspects of the actual theories associated with the Frankfurt School (no matter which generation), but also relevant positions developed within feminism, critical pedagogy, and other political theoretical discourses which promote an emphasis on self-reflexive emancipation.

Moreover, and seemingly helping to make our task even more difficult, the term "critical theory" has been recently attached to a wide variety of theoretical approaches within the humanities, all of them in some way providing an important critical engagement with contemporary social and cultural life yet not drawing from either the metatheoretical position or the substantive political analysis associated with the Frankfurt School. Indeed, critical theory in the humanities has become increasingly connected to the poststructuralist or postmodern positions of Jacques Derrida, Michel Foucault, Gilles Deleuze, and others, all of whom seem to reflect theoretical positions that are highly critical of the Enlightenment foundations and emancipatory aims of the Frankfurt School[4].

2. The Enlightenment and Critical Theory

[4] MACDONALD, B. J.: *Critical Theory*. Wiley online library, 18 July 2014.

Critical theory has seemingly become a term associated with any critical appraisal of social and cultural life, and we might then be wondering about the specificity of this particular form of political theory. Interestingly, critical theory in this multiple sense, can be seen to have its genealogy in the extremely important developments associated with the Enlightenment. Of course, the latter represents a rather diverse array of movements and discourses, and it is one's attentiveness to the varieties of experience this multifaceted "event" helped to spawn that will allow one to understand the divergent strains of theory associated with the general moniker "critical theory." In general, the Enlightenment took hold in the west from the seventeenth century onward and represented the attempt to apply human reason to political, social, and cultural practices in order to more rationally organize human everyday life for the sake of autonomy and the flourishing of human potentiality. This implied, as is well known, the attempt to continually militate against the reigning superstitions, traditions, and practices (be they related to science, politics, morality, or religion)

Clearly, there are a number of different factors that are associated with the Enlightenment project and its influence is expressed in a wide variety of human endeavors. For our purposes, though, what becomes central is the embedded notion of "critique" that arises within this context, and which will be the discursive kernel for the nature of critical theory in all of its forms. As Immanuel Kant, the Enlightenment philosopher *par excellence*, noted in his short piece published in 1784, "An Answer to the Question: What Is Enlightenment?[5], what defines the Enlightenment is the consistent movement away from conditions of "immaturity," a context in which humans are afraid of autonomous forms of understanding and reasoning. This implies, for Kant, a resolute posture of daring to know and striving to think for oneself, and thus critically engaging in debate and discussion without feeling hemmed in by the reigning ideologies and authorities. In this way, true Enlightenment practices can flourish only where the public has civic freedom, and thus, as may be expected, there is an intimate connection between the conditions of reason and freedom, the latter theoretical and practical matrix being a hallmark of forms of critical theory. To engage in critique, then, is to constantly question the taken-for-granted understandings and practices associated with everyday social and cultural life, with the concomitant attachment to the importance of human reason being a guide toward human autonomy and emancipation. If the Enlightenment is the process of engendering humanity's reasoning capabilities against and beyond those practices which keep us docile and subjected to outside authority, it is clear how this injunction indeed connects to Kant's famous three *Critiques* (of "pure

[5] KANT, I.: An Answer to the Question: 'What Is Enlightenment? In: REISS H. (ed.): *Kant: Political Writings*. Cambridge: Cambridge University Press, 1991.

reason," "practical reason," and "judgment," connected to the human practices of science, morality, and art, respectively), works that undoubtedly represent the hallmark of his philosophical revolution. For, as Michel Foucault noted persuasively in his engagement of Kant's elaboration of the ethos of the Enlightenment, critique becomes necessary in the context of defining the conditions under which reason can be valid in determining "what can be known, what must be done, and what may be hoped"[6].

For Foucault, the philosophical ethos of the Enlightenment is a "permanent critique of our historical era" and a "reflective relation to the present". From this "critical attitude" associated with the Enlightenment, Foucault noted in another context, "critique" becomes the preferred "art of voluntary insubordination, that of reflected intractability"[7] .This is a particular attitude and techno that inheres in the Enlightenment, and one must thus be cautious about conflating this philosophical ethos with the particular principles or events or institutions that actually arose during a particular historical period. Moreover, Foucault argues that such an ethos is not necessarily intertwined with a form of humanism (a thematic that predefines what it means to be human, and that promotes the significant way in which humans are the creative center of social, cultural, and political transformations), given that this Enlightenment philosophical posture is one in which, for Foucault at least, "the critique of what we are is at one and same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them"[8], an experiment that applies as well to what it means to be human.

To bring Foucault in as an authority on the Enlightenment is a rather contentious issue; generally speaking, Foucault and other poststructuralist or postmodern thinkers are considered enemies of the Enlightenment, or, at the very least, overly critical of central components of this project. But what Foucault's positive portrayal of the ethos of the Enlightenment elucidates is that this is not really the case. In a sense, the versions of critical theory we mentioned at the beginning of the entry are all drawing sustenance from this Enlightenment ethos, if not necessarily from the particularities of the actual political and cultural programs, ideals, and theoretical positions that are generally gathered under the label of "Enlightenment." That is, the variety of forms of thought which currently go under the rubric "critical theory" are importantly intertwined with the position they take on the character of this discourse of critique that the Enlightenment initiates and Kant intimates and performs. With this in mind, we can point out two differing

[6] FOUCAULT, M.: What Is Enlightenment? In: RABINOW, P. (ed.), *Ethics: Subjectivity and Truth*, vol. 1 of *Essential Works of Michel Foucault, 1954–1984*.
[7] FOUCAULT, M.: What Is Critique? In RABINOW, P. – ROSE, N. (eds.), *The Essential Foucault: Selections from the Essential Works of Foucault 1954–1984*.
[8] FOUCAULT, M.: What Is Enlightenment? In: RABINOW, P. (ed.), *Ethics: Subjectivity and Truth*, vol. 1 of *Essential Works of Michel Foucault, 1954–1984*.

positions – critique as reconstruction and critique as deconstruction – in which the critical appraisal of existing limiting conditions and the opening of new possibilities are deeply intertwined, but also where there are different dispositions toward the conceptions of universal goals and human qualities associated with the Enlightenment.

But, as may seem apparent from the preceding remarks, if critique becomes important in defining the nature of Enlightenment philosophy, so do other important concepts. In attempting to characterize what is unique about the Continental tradition of philosophy (a tradition that includes such disparate theoretical positions as western Marxism, phenomenology, structuralism, and poststructuralism), Simon Critchley argues that this tradition is motivated by the "demand that things be otherwise[9], and that it enacts this demand through the interplay of three different notions: critique, praxis, and emancipation. No matter the particular theory within this tradition, there is a shared sense that one must always criticize current social and political practices in light of their promotion of emancipation and autonomy.

3. Critical Theory Vs Postmodernism

Critical theory is not postmodernism. The two theories have tended to be wrongly associated with one another by right-wing punditry, especially in the United States.

In sociological analysis, critical theory and postmodernism have competing ideas about power and how it operates in society. In fact, the two are at loggerheads and highly critical of one another. One could not write a PhD from a postmodernist perspective without articulating their critique of critical theory, for example.

Their differences are perhaps most notably visible in the famous Foucault vs Chomsky debate, with Foucault promoting the postmodernism perspective.

Their different views of power can be summarized as follows:

Critical Theory's View of Power: Power is exercised and leveraged by the powerful over the powerless. Power is held by the powerful and withheld from the weak and marginalized. It is used to set norms and values but also control who has to obey the laws (the weak) and who can evade them (the powerful).

Postmodernism's View of Power: Power exists in language and discourse. The way we speak about people shape their lived experiences. Power is not just oppressive but also productive – a marginalized person can use, subvert, and embrace power to make meaning in their life. For example, a drag queen may be

[9] CRITCHLEY, S: *A Very Short Introduction to Continental Philosophy*. Oxford: Oxford University Press, 2001.

oppressed, but she may also embrace a feminine identity and use it to talk her way into a club[10].

	Critical Theory	Postmodernism
View of truth	Truth is a social construct created and maintained by the powerful through processes such as indoctrination.	Truth a social construct, but is highly context-dependent.
View of power	Power is unequally distributed in society and used to maintain and reproduce social inequalities	Power is diffuse and operates at multiple levels, with no one group or individual holding ultimate power
View of identity	Identity is shaped by social and historical factors and can be a site of oppression,	Identity is fluid and constantly shifting, with no stable or fixed sense of self.
View of language	Language is a tool of power leveaged by the powerdul and used to construct and maintain dominant cultural narratives.	Language is unstable and indeterminate, with no fixed meanings or referents. Language can be used by both the powerful and powerless, and the powerless can subvert and mock the language of the powerful.
Political stance	Seeks to challenge and transform power structures in society in the pursuit of social justice and equality.	Rejects grand narratives and totalizing theories, emphasizing instead the value of difference and diversity.
Key Theorists	Herbert Marcuse, Theodore Adorno, Max Horkheimer, Jürgen Habermas	Michel Foucault, Jean Baurillard, Jacques Derrida, Judith Butler

4. The Emerging Ideal of a Multiperspectival Democracy: The European Union

The analysis thus far has taken a robust ideal of democracy for granted consisting of self-rule by the public deliberation of free and equal citizens—the ideal of deliberative democracy that informs both pragmatism and Critical Theory (Bohman 2004). Given the uneven and potentially contradictory consequences of globalization, it seems clear that current democratic institutions themselves cannot be responsive to all the dimensions of domination and subordination that are possible considering the scale and intensity of interconnectedness. What are the alternatives? It is not just a matter of exercising an institutional imagination within

[10] GREGORY P. C.: *Critical Theory In Sociology: Examples, Definition, Critique.* May 3, 2023.

broadly understood democratic norms and ideals. Informed by democratic ideals of non-domination, the practical knowledge needed to promote the democratising of uneven and hierarchical social relations requires an empirical analysis of current transformations and its embedded possibilities. The democratic ideal of autonomy leads David Held and others to emphasise the emerging structures of international law that produce a kind of binding power of collective decisions. Others look to ways of reforming the structures of representation of current international institutions . Still others look to the emergence of various institutions in the European Union (EU) to discuss the trend toward international constitutionalism or supranational deliberation.

According to the sort of plurality of perspectives endorsed by a pragmatist philosophy of social science, a historical account of the emergence of single and multiple institutions would be helpful. In Gerald Ruggie's masterful analysis of the development of a global order beyond the nation-state, he shows that the modern sovereign state and the social empowerment of citizens emerged within the same epistemic era as the single point perspective in painting, cartography, or optics. "The concept of sovereignty then represented merely the doctrinal counterpart of the application of single point perspective to the organization of political space[11]. Unbundling sovereignty would lead to new political possibilities, including the re-articulation of international political space in a new way that cannot be anticipated in dominant theories of international relations. Focusing on the shifts in the authority of states and the development of the European Union, Ruggie sees the "EU as the first multiperspectival polity to emerge in the modern era" and thus the emergence of a new political form. The concept of "the multiperspectival form" does seem to offer "a lens through which to view other possible instances of international transformation today. Such an account also applies to the theory of practical knowledge that might inform reflection on the possibilities of democracy in an era of uneven globalization.

If the political authority that now promotes globalization is to answer to democratic will formation, the institutions in which such public deliberation takes place must seek to become explicitly multiperspectival in Ruggie's sense. The positive conditions for such an extension of current political possibilities already exist in the fact of interdependence—the emergence of greater social interaction among citizens who participate in vibrant interaction across transnational civil society and within emerging global public spheres. In order to develop the framework for such a normative-practical praxeology for emerging multiperspectival institutions, pragmatism and Critical Theory once again suggest themselves: here Dewey's testable claim that it is the interaction of public and

[11] RUGGIE, G.: *Constructing the World Polity*, London: Routledge, 2000.

institutions that promotes democracy and democratic inquiry. However important giving greater powers to the European Parliament may be, parliamentary politics at best serves a mediating role among transnational and national institutions and is not the sole means to democratisation . Given that such institutions cannot easily be scaled up and retain their full democratic character, it is necessary to look to a different institutional level: to the possibility of new forms of social inquiry that may be developing in the problem-solving mechanisms of the European Union.

5. The Multiperspectival Public Sphere: The Critical and Innovative Potential of Transnational Interaction

How might new forms of inquiry emerge that are able to accommodate a greater number of perspectives and also remain democratic? Here we need again to distinguish between first- and second-order forms of deliberation, where the latter develops in order to accommodate an emergent public with new perspectives and interests. Dewey sees the normal, problem-solving functioning of democratic institutions as based on robust interaction between publics and institutions within a set of constrained alternatives. When the institutional alternatives implicitly address a different public than is currently constituted by evolving institutional practice and its consequences, the public may act indirectly and self-referentially by forming a new public with which the institutions must interact. This interaction initiates a process of democratic renewal in which publics organise and are organised by new emerging institutions with a different alternative set of political possibilities. Of course, this is a difficult process: "to form itself the public has to break existing political forms; this is hard to do because these forms are themselves the regular means for instituting political change"[12]. This sort of innovative process describes the emergence of those transnational publics that are indirectly affected by the new sorts of authoritative institutions brought about by managing "deregulation" and globalization. This account of democratic learning and innovation seems not to be limited by the scope of the institutions, even as the potential for domination also increases under current arrangements.

What sort of public sphere could play such a normative role? In differentiated modern societies (that is, societies divided into multiple economic and social spheres such as markets, a state, civil society and so on), one role of the distinctive communication that goes on in the public sphere is to raise topics or express concerns that cut across social spheres: it not only circulates information about the state and the economy, but it also establishes a forum for criticism in which the boundaries of these spheres are crossed, primarily in citizen's demands for mutual

[12] DEWEY: *The Public and Its Problems. The Later Works: 1925–1927* (Volume 2), Carbondale, IL: Southern Illinois University Press, 1988.

accountability. But the other side of this generalization is a requirement for communication that crosses social domains: such a generalization is necessary precisely because the public sphere has become less socially and culturally homogeneous and more internally differentiated than its early modern form[13]. Instead of appealing to an assumed common norm of "publicity" or a set of culturally specific practices of communication, a *cosmopolitan* public sphere is created when at least two culturally rooted public spheres begin to overlap and intersect, as when translations and conferences create a cosmopolitan public sphere in various academic disciplines. Instead of relying on the intrinsic features of the medium to expand communicative interaction, networks that are global in scope become publics only with the development and expansion of transnational civil society. The creation of such a civil society is a slow and difficult process that requires the highly reflexive forms of communication and boundary crossing and accountability typical of developed public spheres. On the basis of their common knowledge of violations of publicity, their members will develop the capacities of public reason to cross and negotiate boundaries and differences between persons, groups, and cultures.

In such boundary-crossing publics, the speed, scale, and intensity of communicative interaction facilitated by networks such as the Internet provides a positive and enabling condition for democratic deliberation and thus creates a potential space for cosmopolitan democracy. Such a development hardly demands that the public sphere be "integrated with media systems of matching scale that occupy the same social space as that over which economic and political decision will have an impact"[14] . But if the way to do this is through disaggregated networks (such as the Internet) rather than mass media, then we cannot expect that the global public sphere will no longer exhibit features of the form of the national public sphere. Rather, it will be a public of publics, of disaggregated networks embedded in a variety of institutions rather than an assumed unified national public sphere.

The emergence of transnational public spheres is informative for the practical goals of a critical theory of globalization. Once we examine the potential ways in which the Internet can expand the features of communicative interaction, whether or not the Internet is a public sphere is a practical question of possibility rather than a theoretical question about the fact of the matter. It depends not only on which institutions shape its framework but also on how participants contest and change these institutions and on how they interpret the Internet as a public space. It depends on the mediation of agency, not on technology. With the proliferation of non-governmental organizations (NGOs) and other forms of transnational civil

[13] *The Structural Transformation of the Public Sphere*, Cambridge: MIT Press, 1989.
[14] GARNHAM, N.: The Mass Media, Cultural Identity, and the Public Sphere in the Modern World. *Public Culture*, 1995, 254–276.

society organization, it is plausible to expect that two different and interacting levels of multiperspectival innovation may emerge: first, new institutions such as the European Union that are more adapted to multiple jurisdictions and levels of governance; and, second, a vibrant transnational civil society that produces public spheres around various institutions with the goal of making their forms of inquiry more transparent, accessible and open to a greater variety of actors and perspectives. This approach does not limit the sources of the democratic impulse to transnational civil society. Rather, the better alternative is to reject both bottom-up and top-down approaches in favour of vigorous interaction between publics and institutions as the ongoing source of democratization and institutional innovation.

According to a pragmatically inspired democratic experimentalism, attempts at democratisation and reform need not wait for publics to emerge; they can be constructed in various practices. Consultative NGOs may generally become too intertwined with institutions and thus do not generatively entrench their own conditions in this way. This practical difficulty is evident in the official civil society organizations of the European Union that fail to promote public deliberation. Without further conceptual and normative clarification, the appeal to various "bottom up" strategies of democratization remains normatively underdeveloped[15] . Even when informed by democratic aims, this form of politics cannot capture the complex interrelationships of civil society, the state and the market, especially given the background of inequalities and asymmetries that operate in processes of globalization. Apart from powerful corporate actors in civil society, NGOs from economically advantaged regions possess significant resources to influence and shape the formation of civil society in other contexts. A critical theory of such activity asks about the possibility of a strong connection between their powers in civil society with market forces[16].

Besides the spontaneous emergence of publics out of transnational associations, it is also possible to make use of self-consciously constructed publics of relevant stakeholders to act as "mini-publics" that are empowered to deliberate and make decisions[17] . Here we can include a variety of experiments, from participatory budgets to citizen boards and juries that have a variety of decision-making powers. Properly empowered and self-consciously constructed, mini-publics offer a strategy to get beyond the dilemma of insider consultation and outsider contestation that is a structural feature of civil society activity in currently existing international institutions. Since self-consciously created minipublics seek to include all relevant

[15] DRYZEK, J.: *Democracy in Capitalist Times*. Oxford: Oxford University Press, 1996.
[16] SILLIMAN, J.: Expanding Civil Society, Shrinking Political Spaces: The Case of Women NGOs. In: KING, Y. – SILLIMAN, J. (eds.), *Dangerous Intersections: Feminist Perspectives on Population, Development and the Environment*, Boston: Southend Press, 1998, 133–162.
[17] FUNG, A.: Recipes for Public Spheres. *Journal of Political Philosophy*, 11(3), 2003, 338–367.

stakeholders, they do not rely on representation as the mode of communicating interests, or even the inclusion of well-organized actors as a way of achieving effective implementation. Instead they open up a directly deliberative process within the institution that includes as many perspectives as possible and can be repeated when necessary. The minipublic is then an institutionally constructed intermediary, although it could act in such a way as to become an agent for the creation of a larger public with normative powers. In this capacity, minipublics may become open and expandable spaces for democratic experimentation. While many are issue or domain specific, such experiments often become models for democratic governance in dispersed and diverse polities. As Cohen and Rogers put it, the more specific and episodic practices aim at mutual benefits through improved coordination, experimental deliberative practices tied to larger political projects may redistribute power and advantage and in this way secure the conditions of democracy more generally[18].

The same point could be made about taking existing democratic institutions as the proper model for democratization. To look only at the constraints of size in relation to a particular form of political community begs the question of whether or not there are alternative linkages between democracy and the public sphere that are not simply scaled up. Such linkages might be more decentralized and polycentric than the national community requires. The issue here is the standard of evaluation, not whether some other public sphere or form of community "is totally or completely democratic, but whether it is adequately democratic given the kind of entity we take it to be". For a nation state to be democratic it requires a certain sort of public sphere sufficient to create a strong public via its connections to parliamentary debate. A transnational and thus polycentric and pluralist community, such as the European Union, requires a different sort of public sphere in order to promote sufficient democratic deliberation. Once a transnational and post-territorial polity rejects the assumption that it must be what Rawls calls "a single cooperative scheme in perpetuity," a more fluid and negotiable order might emerge with plural authority structures along a number of different dimensions rather than a single location for public authority and power. Without a single location of public power, a unified public sphere becomes an impediment to democracy rather than an enabling condition for mass participation in decisions at a single location of authority. The problem for an experimental institutional design of directly deliberative democracy is to create precisely the appropriate feedback relation between disaggregated publics and such a polycentric decision making process. The lesson for a critical theory of globalization is to see the extension of political space

[18] COHEN, J. – SABEL, C.: Sovereignty and Solidarity in the EU. In: ZEITLIN, J. – TRUBEK, D. (eds.): *Governing Work and Welfare in the New Economy: European and American Experiments*, Oxford: Oxford University Press, 2003, 345–375.

and the redistribution of political power not only as a constraint similar to complexity but also as an open field of opportunities for innovative, distributive, and multiperspectival forms of publicity and democracy.

A critical theory of globalization is a practical or praxeologically oriented theory that sees the "fact of globalization" in relation to the goal of realizing the norms of human emancipation and democracy. The central and still open questions for such a practically oriented social science are the following: what available forms of *praxis* are able to promote the transformations that could lead to new forms of democracy? What sort of practical knowledge is needed to make this possible and how might this knowledge be stabilised in institutionalised forms of democratic inquiry? What are the possibilities and opportunities for democracy at a higher level of aggregation that globalization makes possible? How might the public sphere be realized at the global level? The argument here suggests that such inquiry and institutions must go beyond single perspective understandings of democracy that dominate national political life as well as the various administrative *techne* that are common in the international sphere. A critical praxeology of realizing norms in multiperspectival institutions might add that it is also a reflexive question of putting such organization in the larger context of a project of human emancipation. Such an interactive account of publics and institutions gives a plausible practical meaning to the extending of the project of democracy to the global level. It also models in its own form of social science the mode of inquiry that this and other publics may employ in creating and assessing the possibilities for realizing democracy. A critical theory of globalization does not only point out the deficits of current practices, but shows the potential for properly organized publics to create new ones. Since the new practices need not be modeled on the old ones, it is not a theory of democracy as such, but of democratization.

6. Critical Theory Criticism

While being highly influential, critical theory is also probably the most heavily critiqued sociological theory. Below are just a few criticisms.

Lack of Nuance in its Critique of Power: Critical theory tends to see power in binary terms. Power is in the hands of the dominant group and absent from the marginalized. Many of its views seem to create dualisms: powerful versus powerless, men versus women, rich versus poor. Poststructuralism (postmodernism), on the other hand, sees power as something that is diffuse and, while tending to restrain the marginalized, can be manipulated and is much more context-dependent.

Extremely Impractical: Many critics would hold that critical theory's logical conclusion is communism. Indeed, many critical theorists historically embraced Marx – the writer of The Communist Manifesto. As the 20th Century demonstrated, communism is highly impractical and with the aim of putting power in the hands of the working-class, ends with dictatorship and oppression.

Subjective: Critical theory has a clear political goal. As a result, it is highly susceptible to criticisms of self-serving bias. Its focus is on finding and uprooting power structures, meaning it enters its analyses in a highly politicized way, rather than through with an intent to aproximate objectivity.

7. Conclusion

This critical and practical orientation gives rise to three different questions about critical social inquiry. First, does Critical Theory suggest a distinctive form of social inquiry? Second, what sort of knowledge does such inquiry provide in order to provide insight into social circumstances and justify social criticism of current ideals and institutions? Finally, what sort of verification does critical inquiry require? In light of the answers to these questions on the practical, democratic, and multiperspectival interpretation defended here, it is likely that Critical Theory is no longer a unique approach. Methodologically, it becomes more thoroughly pluralistic. Politically, it loses its capital letters as the aims and struggles of the age of globalization become more diverse and not automatically connected by the commitment to any particular holistic social theory. Given its own democratic aims, it would be hard to justify any other interpretation. In a period in which philosophy cooperates with empirical sciences and disciplines, Critical Theory offers an approach to distinctly normative issues that cooperates with the social sciences in a nonreductive way. Its domain is inquiry into the normative dimension of social activity, in particular how actors employ their practical knowledge and normative attitudes from complex perspectives in various sorts of contexts. It also must consider social facts as problematic situations from the point of view of variously situated agents.

This kind of normative practical knowledge is thus reflexive and finds its foothold in those ongoing, self-transforming normative enterprises such as democracy that are similarly reflexive in practice. By discussing democracy in this way, I have also tried to show just how deep the connections are between it and critical social science: critical theories are not democratic theories, but their practical consequences are assessed and verified in democratic practice and solved by inquiry into better democratic practice. Perhaps one of the more pernicious forms of ideology now is embodied in the appeal of the claim that there are no alternatives to present institutions. In this age of diminishing expectations, one important role that remains for the social scientifically informed, and normatively oriented democratic critic is to offer novel alternatives and creative possibilities in place of the defeatist claim that we are at the end of history. That would not only mean the end of inquiry, but also the end of democracy.

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DZHUSUPOV AKYLBEK*

Digital Contracting in the Kyrgyz Republic – What can we learn from European Union Law

Abstract: As a landlocked country the Kyrgyz Republic is less involved to global trade. However, the digitalization process is a good opportunity to equalize the opportunities. For this purpose, countries like Kyrgyz Republic can create a legal environment for the development of digital contracts and allow world businesses to trade with this region. Especially, when your neighbor is number one manufacturer of the world. To sell the Chinese goods to the world, especially to Europe, our country should establish the rules which are well known by European customers. Therefore, we must learn from EU law.

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1. Introduction

Kyrgyz Republic, also known as Kyrgyzstan, just like a Hungary is a landlocked country in the central part of the continent, with a population of more than 7,0 million people. It has borders with the People's Republic of China to the east, Kazakhstan to the north, Uzbekistan to the west and Tajikistan to the southwest. The territory at 199,951 square kilometers and most of them lies on large mountains. About 94% of the country rises over 1 000 m, and 40% at more than 3 000 m above sea level[1]. The som is the currency of Kyrgyz Republic (KGS), and its official languages are Kyrgyz and Russian.

On 31 August 1991, the Kyrgyz Republic declared its independence after the collapse of the USSR and started own journey as a state. In my view, since that time the Kyrgyz Republic has been in search of the own brand way of economic prosperity. Due to the reasons of neighboring with the second largest economy in the world (China), strong relationship with the natural resources biggest holder (Russia), landlocked highlands with cheap internet, we can concentrate on providing digital services for the rest of the world. Especially to be a part of the huge trade

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[1] General information about Kyrgyz Republic is available on official website of the National Investments Agency under the President of the Kyrgyz Republic https://invest.gov.kg/about-kyrgyz-republic/general-information/ (date of download: 21/12/2023);

between European Union and China/Russia. Because the military conflict in the East of Europe started by Russia will have the long-term negative effects to the direct relationship with two parts of the world. Apart from China and Russia the Kyrgyz Republic has perspective of being a partner to communicate with economically fast-growing India.

Nowadays, the Kyrgyz Republic is a member of the following international and regional political and economic organizations:

1) Shanghai Cooperation Organization (SCO)[2] along with the Republic of India, the Republic of Kazakhstan, the People's Republic of China, the Islamic Republic of Pakistan, the Russian Federation, the Republic of Tajikistan and the Republic of Uzbekistan *(The SCO focuses on cooperation with international and regional organizations)*;
2) Eurasian Economic Union (EAEU)[3] along with the Republic of Armenia, the Republic of Belarus and the Republic of Kazakhstan, the Russian Federation *(The EAEU provides for free movement of goods, services, capital and labor, pursues coordinated, harmonized and single policy in the sectors determined by the Treaty and international agreements within the Union)*;
3) Collective Security Treaty Organization[4] along with the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation, and the Republic of Tajikistan, cooperate in the. *(The objectives of the CSTO are the strengthening of peace, international and regional security and stability, the protection on a collective basis of the independence, territorial integrity and sovereignty of the member States)*;
4) Commonwealth of Independent States[5] (CIS) along with the Azerbaijan, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Moldova, the Russian Federation, the Republic of Turkmenistan, the Republic of Uzbekistan and Ukraine, are the members of *(According to the Charter of the CIS the objectives are the cooperation in political, economic, ecological, humanitarian, cultural and other field of development*.

The Kyrgyz Republic is a member of more than 100 international organizations, including the OSCE, the Antiterrorist Center of the CIS Member States, the World

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[2] Member states of the SCO published on official website https://eng.sectsco.org/20170109/192193.html (date of download: 21/12/2023);

[3] Member states of the EAEU published on official website https://eec.eaeunion.org/en/comission/about/(date of download: 21/12/2023);

[4] The Charter of Collective Security Treaty Organization. https://en.odkb-csto.org/structure/#:~:text=In%20accordance%20with%20Article%203,sovereignty%20of%20the%20member%20states (date of download: 21/12/2023);

[5] The historical information of the CIS is available on official website in Russian language https://e-cis.info/page/3509/80648/(date of download: 21/12/2023).

Bank and others. In 2004, Kyrgyzstan became one of the founding states of the Eurasian group (EAG is an associate member of the Financial Action Task Force).

The Kyrgyz Republic has joined a number of treaties under which an interested party may address a claim to a court of the Kyrgyz Republic on recognition and enforcement of a decision issued by a court or arbitration court of another country[6]. The principal treaties are:

- UN Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, joined by the Kyrgyz Republic in 1995;
- Convention on Legal Support and Legal Relations between the CIS Countries on Civil, Matrimonial, and Criminal cases of 22 January 1993, ratified by the Kyrgyz Republic in 1995.
- In 2004 the Kyrgyz Republic also ratified the Convention on Legal Support and Legal Relations on Civil, Matrimonial and Criminal Cases of 7 October 2002;
- A number of bilateral agreements on mutual legal support with European Union, Azerbaijan, Iran, India, China, Latvia, Mongolia, Russia, Tajikistan, Turkey, Kazakhstan, United Arab Emirates, Uzbekistan, and other nations.

In 2009, the Kyrgyz Republic recognized and enforced[7]:

- Decisions of other countries' arbitration courts established under the arbitration rules of the UN Commission for International Trade Law (UNCITRAL);
- Decisions of the courts of Armenia, Belarus, Kazakhstan, Latvia, Moldova, Russia, Tajikistan, Turkey, Turkmenistan, Ukraine, United Arab Emirates, and Uzbekistan on civil, matrimonial, and criminal cases;
- Decisions of the arbitration, economic and business courts of Azerbaijan, Moldova, Kazakhstan, Russia, and Tajikistan.

However, now the Kyrgyz Republic recognizes and enforces the decisions of more countries, and this is a huge step towards legal and economic integration to the global market.

The Kyrgyz government has undertaken various economic reforms to address these challenges, including improving the investment climate, increasing access to finance, and strengthening the rule of law. Additionally, the country has sought to

[6] KALIKOVA & ASSOCIATES: The information and reference guide "Business in the Kyrgyz Republic: Legal Aspects 2009". The official website of the international law firm. (p. 6). http://www.k-a.kg/sites/default/files/business_in_the_kyrgyz_republic_2009_eng.pdf (date of download: 21/12/2023);

[7] KALIKOVA & ASSOCIATES: The information and reference guide "Business in the Kyrgyz Republic: Legal Aspects 2009". The official website of the international law firm (p. 8). http://www.k-a.kg/sites/default/files/business_in_the_kyrgyz_republic_2009_eng.pdf (date of download: 21/12/2023).

enhance its economic integration with other countries in the region through various trade agreements and initiatives.

In the past, the Kyrgyz Republic has played an important role in trade between West and East within the Silk Road. Nowadays, the world is discussing a Digital Silk Road. *CHINA'S vague but much-vaunted Belt and Road Initiative (BRI) has been providing buzzword fodder for government leaders and official sloganeers since 2013, when the country launched the scheme to extend its political and economic influence abroad by investing in infrastructure and other big projects. The "belt" refers to an overland push across Eurasia and the "road" to a maritime route to South Asia and beyond. But in recent months some new rhetoric (consistent in its challenging use of metaphor) has been promoting a virtual dimension: a "digital Silk Road"*[8].

Nowadays we can think about Digital Silk Road with creating favorable conditions and legal environment for digital trade. This would help to make a step to global economic integration of the Kyrgyz Republic. Digital development is a big chance for landlocked countries to integrate to world economic relationships. Additionally, the internet is relatively cheap comparatively to other countries internet services. There are a broad variety of options for Internet access; they range from dial-up to wired broadband and Wi-Fi access and satellite-based Internet.

The development of digital contracting is aligned with the National Development programme of the Kyrgyz Republic until 2026. Particularly, the Government planning to attract investment to create national digital infrastructure which should be able to support the rapid growth of internet traffic and to meet new demands of digital relationship. The national digital infrastructure will include networks, data centers, cloud technologies, information and service access centers, digital platforms, including broadband and broadcasting. The digital infrastructure must be able to support the rapid growth of traffic, provide coverage with sufficient bandwidth to meet new needs[9].

[8] The Economist: China talks of building a "digital Silk Road". This article is available at https://www.economist.com/china/2018/05/31/china-talks-of-building-a-digital-silk-road?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=Cj0KCQjwmN2iBhCrARIsAG_G2i6vJ9obvx-yZJoUBVRX3p7BodJ06p7TBEbsJOn3p6FLh1OObqmlycMaAlduEALw_wcB&gclsrc=aw.ds (date of download: 21/12/2023).

[9] The National development programme of the Kyrgyz Republic until 2026. Article 4.2., paragraph 2. http://cbd.minjust.gov.kg/act/view/ru-ru/430700 (date of download: 21/12/2023). Original text as follows: "*Uluttuk sanariptik infratüzümgö tarmaktar, maalymattardy ishtep chyguu borborloru, bulut tekhnologii, maalymattarga zhana kyzmat körsötüüülörgö zhetüü borborloru, sanariptilar, anyn ichinen keňiri tilkellu ü baylanysh zhana radio berüü kiret. Sanariptik infratüzüm trafiktin tez ösüshün karmap turuuga, zhaňy kerektöölördü kanaattandyruu üchün zhetishtüü ötköruü zhöndömdüülügü menen kamsyz kyluuga zhöndö mdüü abalda boluuga tiyish*".

2. The concept of digital contracting and its relevance to the Kyrgyz Republic's economic development

Major obstacles to the investment climate in the Kyrgyz Republic are the poor condition of infrastructure, political volatility and the small size of the market[10]. The size of the market is an essential message in the document provided by the European Bank for Reconstruction and Development. I totally agree with their conclusion. The Kyrgyz Republic should concentrate efforts not only to attract investment to the country but provide services to all huge economically developed countries to trade with its neighbors like China and Russia. Even to be a platform for retail trading for European consumers while purchasing goods from China is a good option. For this purpose, a digital contracting is one of the ways to find an own way and to suggest world unique instrument to communicate and for sure it is a best way for landlocked country to integrate to the global market.

In the Kyrgyz Republic, digital contracting has the potential to play a significant role in the country's economic development. By enabling businesses to enter into contracts more efficiently and securely, digital contracting can reduce transaction costs and facilitate trade and investment. This, in turn, can lead to increased productivity, job creation, and economic growth. When I wrote “businesses” I mean mostly the economic players outside of the country. As I mentioned before the Kyrgyz Republic has chance for global integration by creating digital infrastructure, not only for itself, but for other parts of the world to trade with our neighbors like China and Russia.

The relevance of digital contracting to the Kyrgyz Republic's economic development is further underscored by the country's geographic location in Central Asia and its membership in various regional trade agreements. For instance, SCO and EAEU. As the country seeks to enhance its economic integration with other countries in the region, the use of digital contracting can facilitate cross-border trade and investment by providing a secure and efficient means of conducting business.

The Kyrgyz Republic also identifies the huge role of digital contracting in the economy. Particularly, the National development programme of Kyrgyz Republic until 2026 consist of the following statement: “The global digitalization and the rapid development of Internet technologies lead to changes in the development of almost all areas of the world economy. Considering these trends, the promotion of goods must also be carried out through digital platforms that bring together buyers, sellers, and service companies to sell and deliver goods to foreign and domestic consumers. For this purpose, will be created an ecosystem for the development of

[10] Commercial laws of the Kyrgyz Republic. An assessment by the EBRD. June 2015

electronic commerce. The regulatory and legal framework for conducting electronic commerce will be formed, which determine the principles of regulation, the procedure for processing transactions and the principles of taxation, the procedure for exchanging information between participants in the process and cybersecurity issues"[11].

Moreover, the COVID-19 pandemic has highlighted the importance of digital technologies in enabling businesses to operate remotely and maintain continuity in times of crisis. The Kyrgyz Republic has already revealed a strong trend in digitalising its government, as captured by the e-Government Development Index, which measures the readiness and capacity of national institutions to use ICTs to provide public services[12]. Kyrgyzstan was ranked amongst the top 10 reforming countries in 2018, along with Uzbekistan and Kazakhstan. This upward trend was largely carried by a higher e-participation index, with enhanced access to information and increased citizen's involvement in the decision making process. Digital contracting can help businesses in the Kyrgyz Republic to adapt to the new normal and continue to operate in a safe and efficient manner.

The new rules in digital contracts will eliminate the sidesteps situations in which users give up due to a complex process and the need to personify themselves in a commercial office, store or branch of the company they want to become clients, and, on the other hand, give the government the necessary tools to improve their digital processes in favour of the citizen, creating better and much more seamless relationships, reducing waiting, workload, and, overall, frustration.

[11] http://cbd.minjust.gov.kg/act/view/ru-ru/430700 (date of download: 21/12/2023). The National development program of Kyrgyz Republic until 2026. Global'naya tsifrovizatsiya i stremitel'noye razvitiye internet-tekhnologiy vedut k izmeneniyam v razvitii prakticheski vsekh sfer mirovoy ekonomiki. Uchityvaia eti trendy, prodvizheniye tovarov neobkhodimo takzhe osushestvliat' cherez tekhnologicheskiye platformy, ob"yedinyayushchiye pokupateley, prodavtsov i servisnyye kompanii dlya realizatsii i dostavki tovarov instrannym i vnutrennim potrebitaliam. Dlya etogo byla sozdana ekosistema dlya razvitiya elektronnoy torgovli. Budut sformirovany normativno-pravovyye osnovy vedeniya elektronnoi torgovli, opredeliaiushie prinstipy regulirovaniya, poriadok oformleniia sdelok I prinstipy nalogooblajeniya, poriadok obmena informaciey mejdu uchastnikami protsessa i voprosy kiberbezopasnosti

[12] OECD (2020): Supporting Firm Creation and Growth through Business Development Services in Kyrgyzstan, OECD Publishing, Paris https://www.oecd.org/eurasia/competitiveness-programme/central-asia/Supporting-Firm-Creation-and-Growth-through-Business-Development-Services-in-Kyrgyzstan-ENG.pdf (date of download: 21/12/2023).

3. A comprehensive legal analysis of Kyrgyz Republic laws and regulations relevant to digital contracting

Contracts. According to Article 395 (1) of the Civil code of the Kyrgyz Republic[13]: "*A contract may be entered into in any form provided for making transactions, unless the law establishes a specific form for such type of a contract. If the parties agree to enter into a contract in a certain form, it shall be deemed as entered into from the time it was structured in such form, even though such form is not required by law for such type of a contract".* These rules ensure the different participants of civil relationship to use any kind of form of the contract, unless such kind of contracts are obligatory by the law. For instance, purchase agreement of real estate should be concluded in written form with state registration in certain agencies. Such requirement is imperative rule, and all should follow it. However, in the other form of relationship you can use the form you like, therefore digital contracts are allowed as well.

Moreover, a contract in a written form may be entered into by drawing a single document signed by the parties, and by exchanging letters, telegrams, teletypes, telephoned telegrams, through fax or *electronic or other communication* or by other means which allow to establish authentically that the document derives from the contracting parties (Art. 395 (2))[14]. With these provisions the legislators of the Kyrgyz Republic allowed legal and natural persons uses not only paper based written contracts, but also through developing a single electronic document and signing by both parties. The important thing is it should be clear who exactly signed that contract.

"A transaction shall be made in written form by creation of a document which expresses the substance of the transaction and is signed by the person or persons making the transaction, or by persons properly authorized by them. Bilateral transactions may be made by exchange of documents, each signed by the party which originates it (paragraph 2 of Article 395)".

Electronic signature. The Civil code of KR also provides a regulation on enforcing a contract which signed by the electronic signature. Pursuant to Art. 176 (2): *"A facsimile reproduction of a signature by means of mechanical or other copying, electronic signature or any other analogue of a personal signature is permitted if provided for by law or by agreement of the parties".*

The electronic signature is vital for digital contracting because we could not even imagine concluding a contract without using the remote tools of acknowledging the contract by the parties. If in paper-based contract you usually use the handwritten

[13] The unofficial translation of the Civil code of the Kyrgyz Republic is available on website https://www.libertas-institut.com/de/Mittel-Osteuropa/Civil%20Code%20part%20I.pdf (date of download: 21/12/2023).

[14] The original version of the Civil code of the Kyrgyz Republic is available on website https://cbd.minjust.gov.kg/4?cl=ru-ru (date of download: 21/12/2023).

signature, so in digital contract you can use the electronic signature. According to the Law of the Kyrgyz Republic on Electronic Signature № 128 as of July 19th, 2017 (Law on Electronic Signature) this Law governs the relations on use of digital signatures when making civil transactions, rendering the state and municipal services, execution of the state and municipal functions, and also when making legally significant actions.

As it described in Article 2 of the Law on Electronic Signature *the digital (electronic) signature (ES) - information electronically which is attached to other information electronically and (or) is logically connected with it and which is used for determination of person on behalf of which information is signed*[15].

This Law allows of usage of two types of electronic signature:

1) Simple electronic signature;
2) Enhanced electronic signature (qualified, unqualified).

In accordance with Law on Electronic signature natural persons entitled to use the simple ES, because it can be presented in form of codes, shifr and this is equal to signing a document in a handwritten form. On the other hand, the enhanced ES is equal to signing a document in a handwritten form and putting a stamp on it. Therefore, this kind of electronic signature is more suitable for legal entities.

Court procedures. The Civil Procedural Code of the Kyrgyz Republic recognizes electronic document and contract as a written proof by allocating that "acts, documents, agreements, invoices, business correspondence and materials received through fax, electronic or any other communication device, the authenticity of which is proven, will be accepted as a written proof"[16]. Beside this, the legal act of the Cabinet of Ministers allows the parties to notary verify the websites in order to prove the existing file on certain time and date. Particularly, Testimony of a copy of Internet pages is allowed. For this purpose, the notary examines the information posted on the Internet. The Internet page shall be completely printed on paper, and it is mandatory to indicate the date of printing and the link of the webpage, set in automatic mode. After printing, the written version shall be compared with the electronic version[17] (Art. 156 Instruction for performing notarial acts by notaries of the Kyrgyz Republic).

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[15] The unofficial translation of the Law of the Kyrgyz Republic on Electronic Signature № 128 as of July 19th, 2017 is available on website https://cis-legislation.com/document.fwx?rgn=99019 (date of download: 21/12/2023).

[16] Civil Procedural Code of the Kyrgyz Republic, Article 80(1)

[17] The original version of Article 156 of the Instruction for performing notarial acts by notaries of the Kyrgyz Republic: "Veb-sayttın köçürmösün kübölöndürüügö uruksat berilet. Oşol ele uçurda notarius İnternette jaygaştırılgan maalımattı tekşeret: İnternet barakçası basılgan künün jana fayldın daregin mildettüü türdö körsötüü menen avtomattık türdö kagazga tolugu menen basılıp çıgat. Basma versiyası çıkkandan kiyin elektronduk versiyası menen salıştırılat.
Kübölöndürüü jazuusunda notarius İnternettegi barakçanın daregin, dokumenttin daregin, zarıl bolgon uçurda maalımattın atalışın, teksttik je grafikalık maalımatın, anın İnternet barakçasında jaygaşkan jerin

According to Article 428: "*In the Kyrgyz Republic, foreign court decisions, including those related to the approval of amicable agreements, are acknowledged and enforced if they are in accordance with the laws or international agreements that have been duly ratified and accepted by the Kyrgyz Republic or based on the principle of reciprocity*"[18].

4. A comprehensive legal analysis of EU laws and regulations relevant to digital contracting

The history of regulations relevant to digital contracting started from the Directive 1999/93/EC of the EU Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures. As well as the Kyrgyz Republic's Law on Electronic Signatures the purpose of this Directive is to facilitate the use of electronic signatures and to contribute to their legal recognition. It establishes a legal framework for electronic signatures and certain certification-services in order to ensure the proper functioning of the internal market[19]. This Directive presents the new definitions like "electronic signature", "signature-creation data", "signature-verification device", "certificate", "electronic-signature product".

It was the responsibility of Member States to guarantee that advanced electronic signatures, which utilize a qualified certificate and are generated by a secure-signature-creation device, fulfill the legal prerequisites of a signature for electronic data in a manner equivalent to how a handwritten signature satisfies those requirements for paper-based data. Moreover, these electronic signatures should be deemed admissible as evidence in legal proceedings.

European Parliament's resolution of 21 September 2010[20] on completing the internal market for e-commerce, stressed the importance of the security of electronic services, especially of electronic signatures, and of the need to create a public key infrastructure at pan-European level, and invited the Commission to set up a European validation authorities gateway to ensure the cross-border interoperability of electronic signatures and to increase the security of transactions carried out using the internet.

Then it was turn of the of European Council. In its conclusions of 4 February 2011 and of 23 October 2011, called on the Commission to create a digital single

körsötöt". (http://cbd.minjust.gov.kg/act/view/ru-ru/95038/65?cl=ky-kg&mode=tekst) (date of download: 21/12/2023).

[18] Civil Procedural Code of the Kyrgyz Republic. The original version is available on official website http://cbd.minjust.gov.kg/act/view/ru-ru/111521?cl=ru-ru (date of download: 21/12/2023);

[19] Directive 1999/93/EC of the EU Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures. *OJ L 13, 19.1.2000, p. 12–20.*

[20] Completing the internal market for e-commerce European Parliament resolution of 21 September 2010 on completing the internal market for e-commerce (2010/2012(INI)). *OJ C 50E , 21.2.2012, p. 1–15;*

market by 2015, to make rapid progress in key areas of the digital economy and to promote a fully integrated digital single market by facilitating the cross-border use of online services, with particular attention to facilitating secure electronic identification and authentication.

In many instances, EU individuals were unable to utilize their electronic identification for authentication purposes in different Member States due to the lack of recognition of national electronic identification schemes across Member States. This electronic barrier hinders service providers from fully capitalizing on the advantages offered by the internal market. The establishment of mutually recognized electronic identification means will promote the seamless cross-border provision of various services within the internal market and enable businesses to engage in cross-border operations with fewer hindrances when interacting with public authorities.

Pursuant to the provisions of Directive 1999/93/EC, to promote cross-border certification services and legal recognition of advanced electronic signatures from third countries, the Commission was proposed measures to ensure effective implementation of applicable standards and international agreements for certification services. When needed, the Commission was recommended to submit proposals to the Council, seeking mandates for negotiations of agreements with third countries and international organizations.

Having regard to the proposal from the European Commission the European Parliament and the Council of the European Union have adopted the Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC[21] (eIDAS Regulation), which establishes a framework for electronic identification and trust services for electronic transactions in the internal market. This Regulation enhances and expands the acquis of the Directive 1999/93/EC. According to Article 1, eIDAS Regulation:

a) lays down the conditions under which Member States recognise electronic identification means of natural and legal persons falling under a notified electronic identification scheme of another Member State;
b) lays down rules for trust services, in particular for electronic transactions; and
c) establishes a legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication.

[21] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. *OJ L 257, 28.8.2014, p. 73–114*

The second essential element for enforceability of the contract is identification of the parties which are going to be Parties. According to eIDAS Regulation: The objective is to bolster confidence in electronic transactions within the internal market. It aims to establish a shared basis for secure electronic interactions among citizens, businesses, and public authorities. This, in turn, will enhance the efficiency of both public and private online services, electronic business, and electronic commerce across the European Union. However, this Regulation does not affect national, or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form. The eIDAS certification sets the standards and criteria for simple electronic signature, advanced electronic signature, qualified electronic signature, qualified certificates and online trust services. Furthermore, it rules electronic transactions and their management[22].

The third essential part of the digital contracting is ensuring parties to protect personal data. The contract of B2C type means that one party is always a natural person. For the purpose of protection, the personal data the EU adopted General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)[23].

Processing shall be lawful only if it is necessary for the performance of a contract to which the natural person is party or in order to take steps at the request of the natural person prior to entering into a contract[24]. Of course, the mandatory rule is to get consent of the data subject to the processing of his or her personal data for one or more specific purposes. In this regard, the digital contract has advantages before other types of contracts, because with signing them the consumers are able at the same time to sign a consent for processing personal data. When determining if consent is given freely, particular consideration should be given to whether consent to process personal data, which is not essential for the execution of a contract, is a requirement for the performance of that contract, including the provision of a service.

Regulation (EU) 2016/679, commonly known as the GDPR, or any other relevant Union law on data protection, should fully apply to the processing of personal data in relation to contracts in Europe. It is important to note that none of

[22] Article prepared by the private company eID on "eIDAS: The Digital Identification Regulation for Europe" available on website https://www.electronicid.eu/en/blog/post/eidas-regulation-electronic-signature/en (date of download: 21/12/2023);

[23] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance)*OJ L 119, 4.5.2016, p. 1–88*

[24]Article 6(1) GDPR

the further mentioned Directives do not undermine the rights, obligations, and non-contractual remedies established by GDPR.

Instances of non-compliance with the requirements set forth in Regulation (EU) 2016/679, including fundamental principles such as data minimization, data protection by design, and data protection by default, may, depending on the circumstances, also be deemed as non-compliance with the subjective or objective conformity requirements outlined in other legal acts. For instance, if a trader explicitly assumes an obligation in the contract, or if the contract can be interpreted as such, which is linked to the trader's obligations under GDPR, such a contractual commitment can form part of the subjective conformity requirements. Another example is where non-compliance with the obligations under GDPR simultaneously renders the digital content or digital service unfit for its intended purpose, thereby constituting a lack of conformity with the objective requirement for conformity. This objective requirement necessitates that the digital content or digital service be suitable for its typical usage purposes compared to other digital content or digital services of a similar nature.

In summary, the application of data protection laws to the processing of personal data within the scope of relevant contracts is mandatory. Non-compliance with the obligations set forth in GDPR can influence the conformity assessment of the digital content or digital service, considering both subjective contractual commitments and objective fitness for purpose requirements.

To solve the problems of protecting consumer rights, harmonising the national contract law and improving the cross-border trade the European Parliament and the Council by the proposal of the European Commission on 20 May 2019 adopted Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services[25] and Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods[26].

The application of Directive (EU) 2019/770, which pertains to contracts for the supply of digital content and digital services, and Directive (EU) 2019/771, which focuses on contracts for the sale of goods, commenced on 1 January 2022. These directives aim to harmonize crucial rules governing consumer contracts throughout the European Union, resulting in a robust level of consumer protection and enhanced legal certainty for both consumers and traders engaged in countless everyday transactions involving goods, smart goods, digital content, and digital services.

[25] Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. *OJ L 136/1, 22.5.2019*

[26] Directive (EU) 2019/770 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. *OJ L 136/28, 22.5.2019*

The freedom of choice. According to Article 3(1) Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention): *"A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract"*. The parties' freedom to choose the applicable law considered one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations according to the European Parliament and the Council of European Union. Therefore, in Rome I[27] regulation there is an article (#3) with the same text. Thus, digital contracts are in harmony with private international law.

Furthermore, abovementioned Regulation should not interfere with the application of other instruments that contribute to the proper functioning of the EU internal market. If these instruments cannot be applied alongside the law designated by the rules of the Rome-I regulation, they should still be upheld. The application of the designated applicable law should not hinder the free movement of goods and services as regulated by Union instruments, such as Directive 2000/31/EC on legal aspects of information society services, including electronic commerce, in the Internal Market. Additionally, this regulation does not prevent parties from including a non-state law or an international convention into their contract through the method of reference. Therefore, it is favorable conditions for the parties to choose for instance: the International Institute for the Unification of Private Law (UNIDROIT)[28], HCCH (Hague Conference on Private International Law – Conférence de La Haye de droit international privé)[29] or United Nations Convention on Contracts for the International Sale of Goods (CISG). Principles as the rules of law governing their contract or, in case of a dispute, as the rules of law applicable to the substance of the dispute. According to Dr. István Erdős, Assistant professor and Lecturer the Department of International Private Law and European Economic Law at Eotvos Lorand University: *"It means in the present case that choosing*

[27] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). *OJ L 177, 4.7.2008, p. 6–16.*

[28] "*The UNIDROIT Principles provide a balanced set of rules covering virtually all the most important topics of general contract law, such as formation, interpretation, validity including illegality, performance, non-performance and remedies, assignment, set-off, plurality of obligors and of obligees, as well as the authority of agents and limitation periods*". UPICC Model Clauses for the use of the UNIDROIT Principles of international commercial contracts. https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/#:~:text=The%20UNIDROIT%20Principles%20provide%20a,obligees%2C%20as%20well%20as%20the (date of download: 21/12/2023);

[29] "*The HCCH's mission is to resolve these questions by providing internationally agreed solutions, developed through the negotiation, adoption, and operation of international treaties, the HCCH Conventions, to which States may become Contracting Parties, and soft law instruments, which may guide States in developing their own legislative solutions*". About the HCCH on the official website https://www.hcch.net/en/about (date of download: 21/12/2023);

directly the CISG would be considered as a choice of rules of law under the Rome I regulation, …"[30].

5. Compare and contrast the Kyrgyz Republic legal framework with the existing legal framework in the EU

There are a lot of similarities in legal frameworks of the Kyrgyz Republic and European Union. For instance, the followings are common for both of them:

1) Recognition of electronic means of concluding a contract;
2) Electronic commerce is legally allowed on their territories;
3) Electronic signature is available both for natural or legal persons;
4) Personal data is a vital part in digital contracting;

There are also differences between the Kyrgyz Republic and the European Union. They are as follows:

1) Contrary to the European Union the electronic seal and electronic time stamp are not introduced as a separate business tool to the national legislation of the Kyrgyz Republic. However, the using of enhanced electronic signature on the territory of the Kyrgyz Republic includes the seal of the legal entity;
2) The national legislation of the Kyrgyz Republic does not provide standardized contracts for digital relationship. However, the EU Law has certain provisions for digital content and services, as well as for digital sales of goods.
3) In opposite to EU Law the Kyrgyz Republic legislation does not allow parties to choose as governing law the non-state law. According to Article 1198(1) of Civil Code of the Kyrgyz Republic: "*The contract is governed by the law of the country chosen by agreement of the parties, unless otherwise provided by law*"[31]. However, pursuant to Rome-I regulation, parties can identify a non-state law or international convention in their contracts.

The following facts and figures emerged EU authorities to create digital contracts for Europe:

1) People avoid buying from websites in other countries because they do not trust that it will be problem-free;
2) At least 70 million consumers have experienced one or more problems with just four popular types of digital content (music, anti-virus, games and cloud storage) (2015);

[30] ERDŐS, I.: *Private International Law in Business Transactions. Contracts Non-contractual obligations*. Budapest, 2021.

[31] The original version of Civil Code of the Kyrgyz Republic as of 05.01.1998 #1 is available on official website http://cbd.minjust.gov.kg/act/view/ru-ru/5?cl=ru-ru (date of download: 21/12/2023).

3) Only 10% of consumers experiencing problems received remedies. As a result of those unresolved problems, consumers in the EU have suffered a financial and non-financial detriment estimated in the range of €9 - 11 billion (2015);

3) Traders do not sell cross-border because they are put off by the legal complexity. Contracts for supplying digital content are categorised differently from one country to another, either as sales contracts, services contracts or rental contracts. As a consequence, the remedies for consumers vary between countries;
4) An increasing number of consumers choose to make their purchases online (60% in 2017). However, the share of consumers buying from traders in their own country is more than double (52%) compared to those buying from other Member States (21%);
5) Only 10% of EU retailers sell online to consumers in other EU countries (2018);
6) While 58% of EU retailers declare being confident selling online, just half of them (27%) are ready to sell both domestically and to other EU countries. 30% are only confident to sell within their own country.
7) Differences in national contract laws remain an obstacle also for retailers selling offline. 42% of retailers selling offline and 46% of retailers selling online consider the costs of compliance with different consumer protection and contract law rules as important barriers to their cross-border sales[32].

The abovementioned statistic information should be considered by the Kyrgyz Republic authorities in developing the digital contacting and adoption of the new rules for them.

6. Identify potential legal reforms or amendments that could be adopted in the Kyrgyz Republic to align with EU law and enhance economic integration

First, in order to be compatible with the world countries and attract investors or customers to purchase through Kyrgyz platforms, the legislators of the country should develop the draft of contracts for usage. These drafts of contracts should include all minimum required items to create balanced relationship. For this purpose, let me show the efforts of the EU authorities in previous years.

The European Parliament's Resolution passed on 8 June 2011 emphasized the need for the development of "uniform European contract models" translated into all EU languages, accompanied by an online alternative dispute resolution system.

[32] Digital contract rules. An article on the official website of the European Commission. https://commission.europa.eu/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en (date of download: 21/12/2023).

This system would offer several benefits, including simplifying operations within the single market, reducing costs for businesses while addressing conflicting regulations, and providing legal certainty, consumer confidence, and a high level of consumer protection.

In this respect the Common European Sales Law (CESL) could be completed by a "toolbox" which needs to be appropriately based on the subsidiarity principle, notwithstanding the legal authority of Member States in terms of contractual and civil law. In this case it would be a "toolbox" offering the legal backdrop and the necessary basis for the operation of an optional legal system of a general nature; it would essentially mean introducing a list of standard clauses and standard terms which should be based on an assessment of mandatory national regulations on the subject of consumer protection within, but also beyond, the acquis communautaire in force in respect of consumer rights[33]. Although, this document finally was not adopted in this form, but it helped the European authorities to create these kinds of rules through other legislative acts as I mentioned above.

According to the opinion of the Italian Chambers of Commerce Union those standard contract models are expected to help consumers and businesses (especially SMEs) better understand their rights and obligations. Numbers of such contracts ought to be developed in order to meet the need for specific contract ecosystems (crafts, tourism, services, trade, real estate). The own impression was expressed by the Hugh Beale, Professor of Law, Warwick School of Law, Honorary QC, Honorary Member of the Hungarian Academy of Sciences and a Fellow of the British Academy. He stated, that "nonetheless, if the CESL succeeds it may be just the first in a series of measures that, ultimately, could cover increasing numbers of cross-border contracts. The model proposed is of an 'Optional Instrument' that the parties would be free to use or not to use[34]".

It may be valuable to consider enhancing consumer protection measures for digital content purchases. It is important to note that digital content is typically licensed rather than sold as physical goods. One potential solution could involve the development of standardized e-commerce contracts, negotiated between consumer associations, businesses, and the Kyrgyz Republic special agency, to address this issue collaboratively.

Second, currently the Kyrgyz Republic, as well as other, Central Asian countries does not permit accepting trust services of other states, including neighboring countries. There is also no permission for that within the framework of the economic integration organization. Nor Shanghai Cooperation Organization nor

[33] B2B and B2C clauses and general terms (conditions) in contracts: a viewpoint from the Italian companies. Italian Chambers of Commerce Union (16-17 pages) https://www.europarl.europa.eu/cmsdata/193176/20120530ATT46062EN-original.pdf (date of download: 21/12/2023).

[34] HIGH, B.: A Comparison of the Contract Sections of the New Hungarian Civil Code with English Law and the Proposed Common European Sales Law. *ELTE Law Journal* 2014.

Eurasian Economic Union did not adopt a legal act recognizing the trust services, including electronic signatures of partner countries. However, in order to contribute to their general cross-border use it, the European Union made it possible to use trust services as evidence in legal proceedings in all Member States.[35] Therefore, the qualified electronic signature, qualified electronic seal and qualified electronic time stamp issued in one EU Member State shall be recognised as a qualified electronic time stamp in all Member States (Articles 25(3), 35(3), 41(3)).

From 2015 there is a strong recommendation from the UNECE on promoting wider use of electronic documents by traders. Particularly, they ask to ensure the implementation of the law "On Electronic Document and Digital Signature"[36]. Immediate steps, as suggested by some State officials, include amending the laws governing the procedures and activities of individual State agencies, with a view to provide clear guidelines for implementing digital signatures. State agencies should also receive advanced training in this area, and equipped with the required tools and management information systems to ensure data storage security[37]. Therefore, the legal reforms must be directed to provide easy use of electronic signatures in every sphere of the business and none-business as well.

For the European authorities once, the objective was to establish a digital single market by 2015, focusing on key aspects of the digital economy and promoting seamless cross-border utilization of online services. Special emphasis is placed on facilitating secure electronic identification and authentication to achieve a fully integrated digital single market[38]. Therefore, the same goal should be achieved also by the Central Asian countries, including the Kyrgyz Republic.

Finally, to align with EU Law we should adopt the most provisions from the GDPR. It is for sure, that GDPR is becoming the most utilized Model Law in protection of personal data as it has detailed and well written rules. Therefore, the legislators from Kyrgyz Republic should be more operative in introducing those provisions. We should guarantee to the European customer that their sensitive information will be treated in a way they like.

Moreover, the expert community of the Kyrgyz Republic should monitor the planning changes and further development of the data protection rules. According to the research of Bálint Ferencz (PhD candidate researching the theoretical

[35] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. *OJ L 257, 28.8.2014, p. 73–114*

[36] This Law was abolished after the adoption of the Law on Electronic Signature.

[37] Regulatory and Procedural Barriers to Trade in Kyrgyzstan Needs Assessment. United Nations Economic Commission for Europe. (Page 21)

[38] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/ECOJ L 257, 28.8.2014, p. 73–114

relationship between law and informatics and examining current developments in the field of data policy, Artificial Intelligence, blockchain and smart contracts) and Bettina Büki (LL.M candidate focusing on digital and data economy, having experience in the European Commission Directorate General of Communication Networks, Content and Technology – Artificial Intelligence, Technologies and Systems for Digitising Industry), "*GDPR already put the European data protection policy on the global centre stage, it is apparent that the Commission would like to take a step further and aims to arrange a structure where both economic goals and data protection measures could co-exist in order to raise the EU to become a global challenger to China and the USA. In the last two years, the 'legislative pentagon' (i.e. Digital Services Act, Digital Market Act, Artificial Intelligence Act, Data Governance Act and the forthcoming Data Act) has shown the main aims of the Commission and key actions which are about to be taken*"[39]. It means that in near future the EU legislators will present a mixed rules of data protection.

7. Main findings and arguments presented in the article

As one of the reason of barriers to trade in Kyrgyz Republic is lack of using electronic tools. Therefore, even in the report of the United Nations Economic Commissions for Europe seven years ago there was the following recommendation. *Ensure the implementation of the law "On Electronic Document and Digital Signature". Immediate steps, as suggested by some State officials, include amending the laws governing the procedures and activities of individual State agencies, with a view to provide clear guidelines for implementing digital signatures. State agencies should also receive advanced training in this area, and equipped with the required tools and management information systems to ensure data storage security*[40].

In most European cases before 2014, citizens of one Member State could not use their electronic identification to authenticate themselves in another Member State because the national electronic identification schemes in their country are not recognised in other Member States. That electronic barrier excluded service providers from enjoying the full benefits of the internal market. Therefore, the Lawmakers of Kyrgyz Republic should allow using electronic identification of foreign countries. Mutually recognised electronic identification means will facilitate cross-border provision of numerous services in the internal market and enable businesses to operate on a cross-border basis without facing many obstacles in interactions with public authorities.

[39] FERENCZ B. – BÜKI B.: Three Ways of Secure Data Reusability in Europe: German Research Data Centres, Finnish Findata and the French Secure Access Data Centre. *ELTE Law Journal*, 2022.1.81.
[40] Regulatory and Procedural Barriers to Trade in Kyrgyzstan Needs Assessment. The report of the United Nations Economic Commission for Europe. (Page 21)

"The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention" (Article 3(2) Rome Convention 19 June 1980). This is the most useful advantage in digital contracts, because when you have access to internet you can make amendments to contract at any time. It is applicable even when you want to change the governing law.

One of the challenges is lack of the legal base for providing proofs. The court of the Kyrgyz Republic still accepts paper-based proofs during the cases. They do not accept electronic files because they trial case files includes only documents in paper format. At the same, the parties cannot just print necessary documents with using a stamp. Therefore, it is essential to develop the civil procedural legislation with including certain regulation on collecting files not only in paper-based format, but in electronic way too.

Another important part of the contacts is payment issues. In that regard, European authorities pay high attention to the electronic payment (e-payment), which is a process of paying for transactions without using cash by using an e-payment system or medium instead. It is too hard to imagine that someone will use cash during the concluding a contract through electronic means. The use of e-payment has expanded as the use of internet-based banking and e-commerce has grown. In modest international commercial transactions, e-payment frequently replaces using a credit or debit card[41].

I would like to notice that not all legal introductions will have success. New digital rules should be accepted by the market, and especially by the big tech player around the world, particularly by European one. In his article "The Rise and Fall of Common European Sales Law", Mr. Kiraly Miklos, Head of Department and Professor of Private International Law and European Economic Law and former Dean of ELTE University Faculty of Law, Member of Expert Group on a Common Frame of Reference in the area of European Contract Law shared with his predictions. *Despite all these uncertainties, one day the project of European contract law may come back to the legislative agenda. The idea is not completely forgotten; the CESL remains one of the reference texts for European contract law. The forty year long history of the preparation of the Statute of the European Company (SE), which quite suddenly brought results, may console those who supported and still support the development of CESL. However, in order to achieve this goal, political and institutional support and clear and visionary guidance are needed. The fate of European contract law depends on the institutional dynamics and future of the EU, too*[42].

[41] MIRIYEVA, N.: European Payments in the Digital Age. *ELTE Law Journal*, 2022.2.35.
[42] KIRÁLY M.: The Rise and Fall of Common European Sales Law. *ELTE Law Journal*, 2015.

8. Recommendations for legal reforms or policy changes to enhance the legal framework for digital contracting in the Kyrgyz Republic

My recommendations for legal reforms or policy changes based on my research after addressed not only for lawmakers, but for private companies or associations as well. Because I do believe that the Government of the Kyrgyz Republic has not so big power to change the policy of digital trading. The following recommendations are vital to enhance the legal framework for digital contracting:

1) Create the common platform for providing identity management and trust services for online identification of physical and legal persons as well as the use of trust services to provide assurances as to the quality of data in electronic form.
2) The basics of the digital contracting should not limit themselves in the context of commercial activities and trade-related services but should be available for using in other activities, such as contracts between employers and employees as well. According to the Labour code of the Kyrgyz Republic the employers are entitled to hire employees for remote works, and they can sign an agreement through internet tools. In this case, I suggest adopting the rules of the European Union;
3) Improve the rules to authenticate any website and links the website to the natural or legal person to whom the certificate is issued.The lack of the regulation in website authentication in Kyrgyz Republic prevents popularization of internet sales. Website authentication refers to the process of verifying the identity and legitimacy of a website or its users. It ensures that the website is genuine and can be trusted by confirming its ownership and security measures. Authentication mechanisms help to protect users from phishing attacks, fraud, and unauthorized access to sensitive information;
4) Issue a decree of the Board of the Supreme Court of the Kyrgyz Republic on digital contracts, electronic signatures and business relationship based on electronic means, in order to clarify judicial practice;
5) The Kyrgyz Republic should introduce a list of standard B2B, B2C digital contracts which should be based on an assessment of Model Law regulations on the subject of consumer and foreign customer protection. As a Model Law we should consider both the recommendations of international organizations where the Kyrgyz Republic is a member and also European Union standards;
6) It would be an advanced effort to establish the Online dispute settlement Centres which must hand down a judgment and then the judgment needs to be enforced in practice. The procedure for submitting claim as well as enforcement procedures should fully on electronic format. Additionally, the Kyrgyz Republic should enter all international conventions or conclude

bilateral agreements with other countries in order to guarantee the recognition and enforcement of this Online Centre's decision.

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The original version of the Civil code of the Kyrgyz Republic is available on website https://cbd.minjust.gov.kg/4?cl=ru-ru;

The unofficial translation of the Law of the Kyrgyz Republic on Electronic Signature № 128 as of July 19th, 2017 is available on website https://cis-legislation.com/document.fwx?rgn=99019;

The National development programme of the Kyrgyz Republic until 2026. Article 4.2., paragraph 2. http://cbd.minjust.gov.kg/act/view/ru-ru/430700;

Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. *OJ L 257, 28.8.2014, p. 73–114;*

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) *OJ L 119, 4.5.2016, p. 1–88;*

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). *OJ L 177, 4.7.2008, p. 6–16;*

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Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. *OJ L 136/1, 22.5.2019;*

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Public-private partnerships in developing countries

Abstract: This paper aims to highlight the importance of partnership between the public and private sectors in light of the transition to a market economy and the global trend for implementing infrastructure projects and public services, and to highlight the experiences of many developed and developing countries alike, between the public and private sectors. The study focused on the concept of the partnership strategy between the public and private sectors the relationship between them, and how to move from privatization to the stage of partnership between the public and private sectors and the difference between them, and then clarifying the classifications and types of partnership.
Keywords: partnership, private and public sector, privatization, infrastructure

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1. Introduction

It is customary for governments to undertake the task of establishing, maintaining, and rehabilitating the infrastructure necessary for most economic activities, such as roads, ports, factories, communications networks, electricity, and oil exploration. In fact, investment spending, especially in the field of infrastructure, has been low as a percentage of GDP over the past three decades in the whole world. However, in recent years, public-private partnerships have become a dominant phenomenon as a result of insufficient investments and increasing pressures on government budgets, in addition to public concern about the inefficiency of services provided by government institutions and agencies. Public-private partnerships have been applied mainly in the areas of infrastructure economic such as (wireless communications, energy, water, and roads).

But recently attention has begun to be paid to social infrastructure such as (health, education, and other services). It is known that these services were primarily provided by the public sector, as many of them require large investments, and require a long time before they begin to give returns, and governments are usually willing to continue providing these services due to their necessity for modern societies. However, the infrastructure services provided by the public sector were

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characterized in many cases by their low degree of efficiency, high prices, lack of spread, and neglect of their maintenance.

The issue of partnership between the public and private sectors has received great attention from governments, communities and research centers in various parts of the world after it became clear that the process of economic and social development depends on mobilizing and gathering all the capabilities of society, including the energies, resources and expertise of both the public and private sectors, to participate in institutional organizations that undertake the establishment and operation of projects of various types after the separate and independent sectoral institutional organizations faced challenges and difficulties in Achieving development goals at the targeted levels. Therefore, developed and developing countries alike seek to create institutional organizations, legislation, and systems to adopt participatory organizations in which all sectors of society contribute to directing, managing, and operating projects and businesses and developing them to serve their purposes. For example, in South Asia, participatory action is a necessity for comprehensive development, because governments are unable to improve social and economic development in the region alone. Through partnership, the efforts made by governments in this initiative can be integrated with the efforts of the private sector.

the partnership is based on providing public services through the state contracting with private sector companies to build, finance, and operate the infrastructure for public services. At the end of the contract period, the infrastructure assets transfer to state ownership, which leads to an increase in the size of the state's assets. This program offers many It is a contractual element that allows the private sector to contribute to the implementation of projects through multiple forms such as design, financing, construction, operation, management, maintenance, and other services. Here we raise the following main problem: Can an infrastructure investment strategy between the public and private sectors be a possible alternative to stimulate the process of economic diversification?

A partnership built on sound foundations between the public and private sectors is the ideal choice for providing services, whether from an administrative or strategic perspective. The importance of the study shows that the option of a partnership between the public and private sectors represents the only path for many economies around the world, and investment in infrastructure plays a major role in stimulating domestic product growth, developing the economy, and ensuring its sustainable growth. In addition to searching for the appropriate ground to attract investments and create many job opportunities in all sectors and for different social classes.

Through this paper, we aim to identify the importance of partnership between the public and private sectors in financing infrastructure and reducing the financial burden on the state. Highlighting the most important advantages, objectives, and justifications for partnership between the public and private sectors. clarifying the stages and steps leading to achieving the desired benefits when implementing a project on a participatory basis. Benefiting from the experiences of different countries in the field of partnership between the public and private sectors to reduce government spending, by assigning projects that require huge capital and investments to the private sector, which is characterized by administrative efficiency, the ability to respond to market requirements, and the speed of adapting to market indicators, especially in the field of education and health, and then providing the necessary funding for some sectors that the state cannot withdraw from, or leave to the private sector, which is called traditional goods (defense, security, judiciary).

2. The economic dimension of the emergence of partnership

Globalization has led to increased competition on the global stage, making national companies not only compete with each other; Rather, it is also subject to competition from other companies, whether in global or local markets, and as a result of the developments taking place on the global economic level, the concentration of wealth and the increase in liquidity, stimulates the search for new methods and areas of investment of an innovative, strategic nature, aiming to create new long-term investment projects, With high and guaranteed rates of return, the repercussions of globalization have accelerated the implementation of participatory projects, specifically with the development of the concept of public money, as governments (as investors or service providers) are exposed to the same problems that the private sector is exposed to. Citizens in all countries want to obtain better services and higher quality. But at a lower cost (without imposing additional taxes), the government is therefore moving towards market mechanisms, and since the foreign investments obtained by countries - especially developing ones - are mostly governed by political calculations, as most grants, loans and aid are often associated with conditions that affect the national sovereignty of the recipient country. In the face of the growing deficit in the budgets of developing countries in general, and non-petroleum in particular, and in the face of the failure of traditional financing resources to meet the country's needs, the idea emerged of searching for new formulas for financing infrastructure projects, by giving up its traditional role in monopolizing the establishment of this type of project, Providing the private sector with the opportunity to play its role in this field and to benefit from its energies and expertise. By following the formula of partnership between the public and private sectors, after this formula became closely linked to the developments taking place on the economic and social scene, as these developments played an important role at the international level in accelerating work in light of the widespread trend towards economic liberalization and removing restrictions imposed on International economic relations, which led to the rapid exchange of ideas and theories aimed at stimulating economic and social development.[1]

The idea of participatoryism appeared in the United States in the sixties of the last century, when it developed a method to simulate private sector investments in infrastructure, without marginalizing the obligation to activate the role of the state in the necessity of adopting the principle of cooperation to achieve development. The idea came to protect public interests, by ensuring government oversight of the proper performance of its projects, and at the same time to bring in potential new investments and added value from the private sector.[2]

Note that investors from the private sector were reluctant to invest in infrastructure, given that its projects require huge investments on the one hand, and on the other hand, because states establish these projects and provide public services to citizens for free or in exchange for nominal fees unless data occurred. A new change that changed the outlook on this issue. Countries (particularly those that adopted neo-liberal economic policies) have become unable to finance the establishment of infrastructure projects, which have become urgently needed to expand their establishment with urban expansion and the increasing movement of trade exchanges within the state, and between it and other countries, on the one hand, and on the other hand the increase in the volume of cash liquidity in international institutions and banks and among individuals, the narrow areas of regular investments and the inability of national economies to absorb this huge liquidity within the prevailing economic approach. Thus, it can be said: Participatory projects between the public and private sectors are not new or modern, but what is different is that they were presented in modern terms, which do not differ from previous projects except in that they are heading towards projects that were monopolized by the state through its public sector, specifically infrastructure projects and public facilities. However, what distinguishes projects based on a participatory basis is that they are contracted according to the project's outputs, that is, according to the type and quality of services provided by the private sector or the public sector.[3] However, in traditional contracting methods, the public sector and its procurement usually focus on the project's inputs. Participation is not just a division of labor between the public and private sectors. Rather, it is a change in the philosophy of development and a reconsideration of the role and responsibilities of the state and how to manage the affairs of the national economy through policies that make the private sector a partner of the state, in all areas of economic and social

[1] SIROB, R.: *Areas of application of partnership between the public and private sectors and its prospects in Syria*. Damascus Center for Research and Studies, 2017, p. 65

[2] SAEED SABRI, I.: *Build, Operate and Restore (BOT) contract in the reconstruction of endowments and public facilities*. Organization of the Islamic Conference, United Arab Emirates, nineteenth session, p. 2.

[3] SIROB, R.: *Areas of application of partnership between the public and private sectors and its prospects in Syria*. Damascus Center for Research and Studies, 2017, p. 7.

life. Participation between the public and private sectors is nothing but an expression. A new term that seeks to include all forms, relationships, and contracts that allow the private sector to implement and provide a public service.

3. The concept of partnership between the public and private sectors

There is no specific definition of the concept of partnership, but to define it, its scope and the frameworks that govern it must be determined, which are: concept, design, construction, financing, operation and maintenance, and the remaining value at the end of the contract.

Participation is defined as one of the forms of cooperation between the public and private sectors through which arrangements are made whereby the public sector can provide public and social goods and services by allowing the private sector to provide them instead of the public sector providing them itself, that is, directly.[4]

Some scholars believe that the partnership contract between the public and private sectors is an administrative contract under which a public sector person entrusts a private sector person to finance the investment related to the necessary works and equipment for the public facility and to manage, exploit and maintain them throughout the specified contract period in exchange for financial sums that the contracting administration is obligated to pay to him in a manner Fragmented throughout the contractual period, institutions from the public and private sectors undertake work on projects or provide services to citizens, especially in projects related to infrastructure.[5]

The British Committee for Partnership between the Sectors defined it as "a risk-sharing relationship between the public and private sectors based on a common ambition to achieve a desired goal for the country's public policy."[6]

The International Monetary Fund's definition of the term public-private partnership states: "Arrangements in which the private sector provides assets and services related to infrastructure that are traditionally provided by the government. Partnerships between the public and private sectors may arise through concession contracts and operating lease contracts. It can be used to undertake a wide range of social and economic infrastructure projects, although it is still mainly used for

[4] A partnership between the public sector (government) and the private sector. Department of Economic and Financial Studies in the Government of Dubai, UAE, 2010.
[5] DAKROURI, M. M.: *A study on partnership with the private sector with a focus on the Egyptian experience*. General Administration of Financial Research, Finance Research Administration, 2017, p. 4.
[6] AL-RASHID, A. M.: *Managing partnerships between the public and private sectors (concepts - models - applications)*. Cairo, Arab Organization for Administrative Development, second edition, 2007, p. 3.

infrastructure projects related to transportation (such as highways, bridges, and tunnels) and accommodation (such as hospitals, schools, and prisons).[7]

There are many other definitions of the term partnership between the public and private sectors, and although these definitions may not be different, they are incomplete. In any case, the essence of the concept of partnership must include at least the following features: the presence of partners from the public and private sectors, and agreement on goals. strategies, the existence of mutual benefits, major commitment of resources and diversity of activities, shared responsibility, and accountability.

4. The Benefits and advantages of public-private partnership:

The World Bank believes that partnerships between the public and private sectors achieve the goals of economic and social development, especially in less developed countries, where the role of the state is prominent in decision-making and policy-making, while the private sector has a greater role in implementing projects, given that it has proven great efficiency in managing Projects, unlike the government sector. The most important benefits of partnership can be mentioned in the following points[8]:

- Distributing the risks resulting from the establishment of these projects between more than one party, namely the partnership parties.
- Benefiting from the capital available in the private sector and the experience and knowledge it possesses in managing projects in which time is crucial, reducing the periods required for their implementation and thus improving the position of public administration.
- Partnership arrangements between the two sectors achieve better results than each team can achieve individually, through the partners' influence on each other's goals and values, by negotiating and reaching better work standards. On the other hand, there will be room to expand financial resources, as a result of the cooperation of the parties among them.
- Emphasizing the economic dimension, and giving it broader attention in relevant policies and project management, on economic foundations, to achieve social and economic gains, especially if the projects are carefully selected to achieve a higher return, and to benefit the largest number of citizens, whether they are beneficiaries, employees, or others. Resource providers or professional consultants.

[7] International Monetary Fund, Public-Private Partnerships, Prepared by the Fiscal Affairs Department, (In consultation with other departments, the World Bank, and the InterAmerican Development Bank) Approved by Teresa Ter-Minassian, March 12, 2004, p. 4.
[8] International Monetary Fund, Public-Private Partnerships, op cit, p. 4.

- Reaching an integrated and coherent approach in order to find solutions to the problem of unemployment, and developing long-term strategies that meet the needs of local environments and are compatible with their economic conditions. And Partnerships can encourage competition and innovation[9].

5. The Objectives of the public-private partnership[10]

The partnership process aims to change the government's activity from operating infrastructure and public services so that it focuses on setting policies for the infrastructure sector, setting priorities for its goals and projects, as well as monitoring these projects. Implementing investment projects on time and within the specified budget, while introducing the management and competencies of the private sector to the field of public services and involving it in bearing risks. In addition to introducing innovations in project designs, operation, and maintenance, as well as working to avoid the deterioration of assets and projects necessary for public services as a result of ineffective maintenance or ineffective operation.

Public-private partnerships are considered an advanced model for business activities that help increase private sector investments in all areas of economic and social activity in order to meet society's needs for goods and services using innovative methods. One of the most important justifications for resorting to the partnership method, especially for developing countries, is the inability of governments to achieve sustainable development alone and with its limited capabilities. In addition to the limited financial, human, and technological resources in the public sector due to the multiplicity of fields and projects that require implementation, the partnership works to reduce the intensity of competition between these fields through the exchange of commitments between the partners.

6. Requirements and principles of successful partnership:

For a successful partnership between the public and private sectors, there must be a common and realistic community vision for the partnership, based on the strengths and weaknesses of the community, and a common understanding of the potential of the region to be developed. There must also be an analysis of the feasibility of the project before contracting, which compares the performance of the

[9] LINDSAY, C.: Employment Through Partnerships: The Case of the New Deal for Young People. In: Montanheiro, L. et al (eds.): *The 6th International Conference of Public and Private Sector Partnerships: The Enabling Mix*, Sheffield University Press, U.K. 2000, p. 365-375.

[10] MUSTAFA EL-GAMAL, H.: Partnership between the public and private sectors as a tool for achieving sustainable development, *Journal of the Faculty of Sharia and Law in Tanta*, Issue 31, Part 4, 2016, p. 24.

public sector with the private sector, and determines the achievements it wants to achieve to ensure the government's ability to bear the provision of the required payment units in exchange for providing the service. In addition to the fact that the public sector client has a desire to accept the innovative solutions proposed by the private sector, it is also necessary to have effective oversight at all stages of the project.[11]

There are also many principles that must be in place so that the partnership process can achieve its desired goals, and among these principles are:1- Commitment and pledge, which is that development decisions are implemented according to a methodology and goals that define the role of each partner in light of an effective administrative climate in which each party pledges to adhere to the specified role. 2- Continuity The implementation of partnership projects between the state and the private sector often continues for long periods, and during this period it is possible that state policies will change, which in turn may lead to the cancellation of partnership projects. Therefore, appropriate time periods must be taken into account when implementing projects that have a degree of political sensitivity, and the general framework and management methodology must be determined in light of the market forces that govern the partnership. 3- Transparency means coordination between partners through a clear vision of the methods followed by each partner to implement the set goals, while dealing honestly and clearly with the internal and external variables that occur during the partnership period.[12]

7. The relationship between privatization and public-private partnership:

The privatization process was subjected to much criticism, due to the incorrect management of this process, which led to the sale of many profitable public sector-owned institutions and companies that were originally generating significant income for the state treasury, and paved the way for foreign companies to completely control the economic capabilities of the state, and give them the right to dispose of natural resources through transferring ownership to public companies. On the other hand, the global financial and economic crises that have faced the global economy several times since the beginning of the second millennium, the most prominent of which was the economic crisis in 2007, led to negative economic impacts on the majority of countries, manifested in decreased economic growth, high unemployment rates, and the emergence of many companies have laid off their

[11] SAREY EL-DIN, H. S.: *Different Images of Private Sector Participation in Providing Infrastructure Services*. Faculty of Law, Cairo University, 2000, p. 55.
[12] Department of Economic and Financial Studies, Department of Finance, Government of Dubai: Partnership between the public sector (government) and the private sector, 2010, p. 8.

workers to reduce the size of their losses, increase the deficit in the general budgets of countries, rise in external and internal public debt, and decline in direct foreign investments, which has greatly affected the ability of countries, especially developing countries, to establish and implement infrastructure projects, and the decline in the level of Public services, especially in light of expectations of increased demand for infrastructure projects and public services, which require investments estimated at approximately $5,300 billion until 2030, noting that investments in these projects amounted in 2009 and 2010 to about 700 billion dollars, including 180 billion for the United States, 300 billion for Europe, and 200 billion for China.[13]

Therefore, the need emerged to rearrange the roles between the public and private sectors, to overcome all the negatives that resulted from the privatization process, and address the state's inability to invest in capital projects as a result of the worsening deficit in its general budget, which requires allowing the private sector to participate in financing public projects infrastructure development, in addition to providing administrative and technical expertise in this field.

8. Classification of participatory projects and contracting methods:

The importance and necessity of entering the private sector in providing public goods and services is linked - essentially - to the characteristics of these goods and services after studying the economic and social reality in the country. Various studies have proven that the failure or success of any economic activity is not due to the nature of ownership, but rather to the efficiency of performance in general, the performance of Employees in particular, and the conditions under which the facility operates (the level of competition and restrictions on activities), and the nature of the goods and services provided, so we must deal with this issue, based on adopting an objective position, based on the needs of society and its goals in achieving development and establishing a strong economy ensures the well-being of all citizens and achieves social justice.

Some believe that four important criteria should be taken into account when making the decision to resort to partnership to provide public services and when determining priority projects, which are the importance of infrastructure, the technological level, the ease of collecting funds, in addition to the size of the production or consumption area.[14]

[13] AL-TAHER M. – MUWAFAQ Zarrouk, Q.: Activating the public-private partnership strategy as an option to stimulate economic diversification in light of some international experiences. *Al-Badil Al-Eqtisadiah Journal*, Volume 5, Issue 1, 2018, p. 119.

[14] AL-HELOU, M. – ALLAH, R. E.: *France*. Department of Economic and International Affairs, Ministry of Equipment, Transportation and Housing, 2002, p. 336.

- The importance of infrastructure: Any public service needs a facility for its production, and what is meant by infrastructure is the volume of investment necessary to establish it, that is, the extent of its dependence on physical capital. The importance of infrastructure ranges from one public good to another, and it is great when it is related to transport and communications (roads, ports, airports). Electricity and communications. On the contrary, this importance is less for social goods (education and health), and it is recommended that partnership be applied to facilities that require large capital from the private partner.
- Technological level: The degree of technology required varies from one public service to another and according to the method in which it will be provided. Some of them require simple technologies (road lighting or postal services) and some of them require complex technologies that change rapidly (communications, air transport, renewable energies). It is recommended that partnership be applied to services that require advanced technology and are subject to rapid change.
- Collection of money (fees): Public goods and services vary, based on the possibility of charging a price and the ability to measure them - some public goods and services can be charged a fee, according to consumption (communications, water, railway transport), but this cannot be applied to (defence and justice) they are purely public goods that cannot be divided, and the amount owed to the consumer is determined. Rather, their price is paid through the state's general treasury (financed through taxes); There are goods that can be paid for and fees charged for their consumption; But it is undesirable - for social or political reasons - to establish it on a participatory basis, such as education and health. In general, the more a fee can be imposed on a public good or service, the easier it is to involve the private sector in providing it.
- The size of the production area: The location and geographical dimension are characterized by two aspects, a technical nature and a legal nature. The more local the service is, the more the private sector can intervene in providing it (municipal services: urban transportation, water, and lighting), but if the market for goods and services is characterized by a national nature (security) or an international nature (defense, security, and research), it is not recommended for the private sector to intervene, for fear of compromising national security. Thus, the private sector can intervene in projects at the local level, and stay away - as much as possible - from projects which are characterized by a national dimension or which are characterized by the nature of a natural monopoly.

The following table shows the four criteria mentioned above that can be built upon when determining priority projects to make the decision to resort to participatory action. The numbers included in the table indicate the extent of the possibility and importance of private sector participation in implementing public service, as the criterion values range from (1 to 5), Number (5) indicates the necessity and importance of involving the private sector in implementing and providing public services, while Number (1) indicates a decrease in the importance contribution of the private sector to the implementation and provision of public services.

goods and services	Infrastructure	Technical degree	Fees	the size
Electricity	5	4	5	5
Water	5	4	5	5
Purification of used water	5	4	1	5
Air transport	2	5	5	4
Road transport	5	3	4	4
Railways	4	4	5	3
Urban transportation	4	2	2	5
Lighting	5	2	1	5
Postal services	1	2	5	3-5

To clarify further, purifying waste water requires very large investments in infrastructure (5), a high degree of technology (4), a fee cannot be imposed according to consumption (1), and its production area is of a local nature (5).
As for partnership models, they can be classified into four main categories:

- Management and lease contracts: In this type of contract, the private partner undertakes the management of an infrastructure project related to public services, for example, and its exploitation while remaining in public ownership of the project, which is a type of leasing.
- Concession contract: The public sector partner grants the right to the private sector partner to design, finance, implement, exploit, and maintenance of an infrastructure project, for a period ranging from 25 to 35 years, after which ownership of the project returns to the public sector.
- Greenfield projects: In this type of contract, the private sector or the joint sector undertakes the task of designing, financing, implementing, exploiting, and maintaining a new service project that did not previously exist for a specific period. At the end of the contract, it is not necessary for ownership of the project to return to the public sector, but rather it is determined by the contract that is agreed upon.

- Divestitures: These are contracts under which a private entity extends its control over state-owned infrastructure within the framework of the sale of public real estate assets or within the framework of the privatization process.

To clarify the most important types or forms of partnership contracts between the public and private sectors, the following table was prepared:[15]

Type of partnership contract	abbre-viation	Operation, and maintenance	Invest-ment	Property	Market risks	period
Management contract		private	public	public	public	3- 5
Leasing		private	public	public	Semi-private	8- 15
Rehabilitation, operation, transfer of ownership	ROT	private	private	public	Semi-private	20-30
Rehabilitation, lease, transfer of ownership	RLT	private	private	public	More for private	20-30
commercial		private	private	public	More for private	20-30
Build, rehabilitation, operation, transfer of ownership	BROT	private	private	public	private	20-30
Build, operate, transfer ownership	BOT	private	private	Semi-private	private	20-30
Build, own, operate, transfer ownership	BOOT	private	private	Semi-private	private	+30
Build, lease, own	BLO	private	private	private	private	+30
Build, own, operate	BOO	private	private	private	private	+30
Partial privatization		private	private	private	private	+30

[15] Transport and Tourism Division UNESCAP, Public Private Partnership in Infrastructure Development- An Introduction to issues from different perspective (Thailand: September 2007), Version 1, p. 16.

Total privatization		private	private	private	private	forever

Each of the above models has its pros and cons, and the characteristics of some sectors, the extent of technological development, regulations, laws, and the political outlook on services have a role in determining the suitability of a particular form of partnership, and the most common of these contracts are:

8. 1. Build, operate, and transfer ownership (BOT)

This method is considered a form of service provision whereby the government grants, for a limited period of time, one of the private financial consortiums, called the project company, the right to design, build, operate and manage a specific project proposed by the government, in addition to the right to commercial exploitation for a number of years agreed upon as sufficient. So that the project company recovers the construction costs in addition to achieving appropriate profits from the project revenues or any other benefits granted to the company within the agreement contract, and ownership of the project is transferred according to the terms of the contract or agreement to the public sector without compensation or in return that was agreed upon in advance. In the mid-eighties, specifically in 1984, the BOT was implemented through the Channel Tunnel Agreement linking France and Britain, between both the British and French governments on the one hand, and between the Euro Tunnel company on the other hand.

This method is characterized by transferring the risks of construction, operation and management to the private sector. In addition, the public sector benefits from the experience of the private sector in managing and maintaining projects and in transferring advanced technology. This method also represents an attractive factor for major national and foreign investments due to the magnitude of the business in which this method is used.

8.2. Build, own, operate, and transfer ownership (BOOT)

In this method, the public sector grants the private sector the right to establish a service project and finance it at its own expense, own its assets, operate the project, maintain it, and collect in exchange for providing the service, to pay the financing burdens and achieve an appropriate surplus profit for an agreed upon period, provided that ownership of the project assets is transferred to the state at the end of that period. Boot is considered a common application of the system of private projects for public benefit, where ownership of assets during the duration of the project is for the private sector, which is not the case in the types of contracts mentioned above. This method is characterized by transferring the risks of construction, operation and management to the private sector. In addition, investment and financing risks lie entirely with the private sector.

8.3. Build, own and operate (BOO)

This method is considered a method of complete privatization, in which the private sector is given responsibilities for construction, operation, and management in its entirety, in addition to its absolute ownership of the project assets. Operation or management in this manner is not linked to a specific time, nor is there an obligation on the private sector to transfer the assets to the state. This method is used for new projects that have not yet been established. This method is characterized by transferring the risks of construction, operation, and management to the private sector. In addition, the risks of investment and financing fall entirely on the private sector. Thus, it does not constitute investment burdens on the state and encourages national and foreign investments.

As a result, the main differences between the different types of partnership contracts revolve mainly around responsibility, and responsibility is for design, construction, operation, distribution of profits, degree of risk tolerance, and ownership.

9. Procedures for selecting participatory projects and areas of their application

Before approving the participatory option to implement any project, the participatory decision by the competent authority must be a clear decision, which can be achieved in two stages: The first stage: It consists of making a decision about the project’s worthiness, based on sound investment planning and project evaluation procedures (for example, using cost-benefit analysis), and then ranking all projects according to their returns (economic and/or social) and according to the planned priorities, which is We can call it "initial project preparation", at this stage, the method of implementing the project is not determined, but rather the project objectives and justifications are explained and the extent of its contribution to achieving economic and social objectives (raising economic growth rates, creating job opportunities, environmental impact, saving time) and the size of the project is determined in an expanded manner (whether additional New assets or current facilities will be developed) and the extent of the urgent need for it, detailing the required timetable for the project until the start of operations and service provision, and clarifying the status of the project in the context of the priorities of other projects, These studies and analyzes are called reference cases [16].The second stage: After determining the project points, according to the development objectives, the projects are sorted and a decision is made about how to implement them. Will they be done in the traditional way or on a participatory basis? That is, identifying projects that can be undertaken by the public sector and projects that can be presented on a participatory basis (This stage is called project approval.).To achieve this goal, the public sector comparator can be used, which is one of the most important quantitative measurement tools to evaluate the offers submitted by the private sector and compare between them to choose the offer that achieves the best value for money. The (public sector comparison) represents the cost adjusted for the potential risks of the project after determining the influences the competitiveness that characterizes the project if the public sector provides public services, and it includes the entire capital, and operational and administrative costs evaluated at the present value, as the project costs are estimated and adjusted after calculating the costs resulting from transferring risks, assuming that it will be implemented, financed, and designed by the public sector. (Traditional construction method). Value for money must not be determined based on cost effectiveness only, but must take into account the quality of the services provided. Value for money can be defined as "the least expensive option for the same outputs and at the same level of quality".[17]

10. Project implementation stages according to the participatory method

- Study the economic and social feasibility of the project and then request quotations. The government must prepare forms of documents and books of technical and financial conditions, contractual conditions, the project agreement, and tender conditions, and prepare a public sector comparator.
- Choosing the private partner and establishing the project company. The evaluation of price offers is not usually based on the financial and technical offer only, but must be based on the extent of the impact it will have in the future on the national economy (such as creating job opportunities, training and qualifying local workers, the extent of reliance on local resources, and technology transfer), which is known as the value for money test, and after selecting the winning bidder, the project company is formed.
- Follow-up and control: The implementation of the project approved for implementation must be monitored in a participatory framework submitting

[16] Akitoby B. – Hemming, R. – Schwartz, G.: *Public Investment and Public-Private Partnerships*. International Monetary Fund, Vol. 40, IMF, 2007, p. 10.
[17] Sarmento J. M.: Do Public-Private Partnerships Create Value for Money for the Public Sector? The Portuguese Experience. *OECD Journal on Budgeting*, Volume 1, 2010, p. 2.

periodic reports on tracking its implementation, by the time plan for implementing the project, and under the contract concluded between the public and private sectors.[18]

In short, participation must result in well-being, economic benefit, and social stability, and we should not rush to resort to participation. Rather, it is necessary to slow down the process of preparing the population, spread the culture of providing public services through the private sector and work to make them accept the concept of participatory action, and for the state to define its goals in an objective and accurate scientific manner, and to rehabilitate its directorates and institutions and provide a good regulatory framework.

11. Experiences of different countries in the field of partnership[19]

Europe: It is considered the leader in this type of contract, especially the United Kingdom, as it has completed several contracts in various sectors such as housing, transportation, sports, water, waste management, sanitation, communications, and energy. From 1987 until the end of 2007, about 9,000 contracts were concluded, which made Europe possess great experience. In the field of public service in several sectors, local and regional groups have also gained considerable experience in this field.

In the United Kingdom, from 1990 until the end of 2009, more than 900 partnership contracts were concluded between the public and private sectors with an estimated value of $110 billion, 700 of which were in effect until the end of 2011. As for France, after the issuance of the 2004 law on the partnership, 140 contracts were concluded from 2005 to 2011, with a value ranging between 9 and 10 billion euros, 30% of which were in the field of public lighting, 15% in the field of health, and 13% in the field of communications.

United States of America: America is distinguished from Europe by the difference in size and type of partnership contracts, as until the end of 2005 their number was very small, but in the years 2009 and 2010 it witnessed a significant increase and reached a value exceeding 180 billion dollars. As for the sectors, it began in the field of management Prisons and then expanded in the 1990s to include road construction projects, energy, public security, and technology.

Canada: Its experience began in 1980 and its rate has increased since 1990, but resort to it was little considering the number of contracts concluded in 2008, which included the construction of hospitals, schools, roads, cars, and light trains.

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[18] SIROB, R.: *Areas of application of partnership between the public and private sectors and its prospects in Syria.* Damascus Center for Research and Studies, 2017, p. 37.

[19] Data were obtained from the report of the Arab Labor Organization, Article Ten, 39th Session, Arab Republic of Egypt, 2012, p. 17.

Turkish experience :Turkey leads the world in the volume of government and private investments in infrastructure projects, as Turkey has implemented 40% of the volume of global investments in infrastructure, as the value of government and private investment in infrastructure in Türkiye is worth $44.7 billion.

The Syrian experience: The relationship between the public sector and the private sector was not interrupted, but the private sector's role was limited. Credit goes to the public sector in Syria since the seventies for building and constructing infrastructure, including dams, irrigation networks, land reclamation, roads, water, electricity, and communications. As for the private sector, its work has focused on the field of finance and insurance. Real estate, transportation, and equipment. However, in the ninth and tenth five-year plans, the contribution of the public sector declined in favor of the private sector in the GDP, as the public sector's contribution to the GDP in 2000 amounted to 43.66%, and in 2010 it reached 35.35%, and the GDP in 2000 was about 21 billion dollars. In 2010, it reached 35.35%. 2010, approximately $64 billion. This growth in GDP during that period is an indicator of the efficiency of the private sector's performance, and this encourages resorting to the "partnership" method with the private sector.

Conclusion

The partnership between the public and private sectors is considered an advanced model of business activities that helps increase private sector investments in all areas of economic and social activity with the aim of meeting society's needs for goods and services in innovative ways. One of the most important justifications for resorting to the partnership method, especially for developing countries, is the inability of governments to achieve sustainable development alone and with their limited capabilities. In addition to the limited financial, human and technological resources in the public sector due to the multiplicity of fields and projects that require implementation, the partnership works to reduce the intensity of competition between these fields through the exchange of commitments between the partners. Public-private partnerships provide a promising framework for public bodies to cooperate with private sector partners, leading to enhanced efficiency, innovation, and better service provision. However, they also present unique challenges and require careful structuring and oversight to ensure the public interest remains the priority. As the world faces increasing infrastructure needs and financial constraints, public-private partnerships are likely to continue to play a vital role in delivering public services and achieving sustainable development.

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JAFAAR SAKKOUR*

Assessing the Syrian Tax System: Current Issues and Future Perspectives on Local Taxes and Fiscal Autonomy

Abstract: The tax system in Syria is complex and influenced by changing legislation and different administrations over time. This study focuses on the balance between administrative centralization and decentralization, especially in Syria, and explores the legal frameworks that govern it. Decentralization in Syria has been shaped by laws such as the Municipalities Law of 1972 and the Administrative Organization Law No. 496 of 1957. Despite advocating for financial independence, the actual situation raises questions about the extent of true independence. This study compares Syria's financial landscape with other legal systems to highlight the challenges of achieving administrative decentralization.
Keywords: tax system, legislation, administrative centralization, decentralization, legislative authority, local taxes

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1. Introduction

Syria's tax framework reflects a delicate tapestry of complexities, shaped by the historical progression of legislative changes and the influence of diverse administrations throughout its development. Within this complex system, a combination of direct and indirect taxes operates, including central taxes applied throughout the country and local taxes levied on behalf of local governments, all strictly subject to constitutional mandates that unambiguously give the legislature sole authority to impose, modify, or abolish Taxes. Uncovering the layers of this multifaceted system prompts a deeper exploration of the dynamics of administrative centralization and decentralization within the nation. Thus, our attention turns to the crucial area of administrative decentralization, tracing its path since Syria's inception and highlighting its profound impact on the state's financial independence. This exploration aims to shed light on the complex interplay between administrative structures and financial policies and unravel the narrative of financial development in Syria.

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2. Syria's Tax System: Balancing Centralization and Decentralization Administrative Centralization in Syria

Centralization means concentrating power and authority in one center represented by the state. The well-known administrator L.D. White, "mentioned the process of transferring administrative power from a lower level to a higher level of government is called centralization. White said that centralization is simply a process of transferring from several centers to one center."[1] Centralization unifies administration and makes it emanate from a single source based on the capital, and centralization is based on the absolute exclusivity of the state in formulating decisions. Based on the definition, we conclude that centralization depends on a very important element, which is the concentration of the administrative, legislative, and executive functions in the hands of the central authority, and this is what seems initially clear in Syria regarding tax legislation. Article (81 of the Permanent Syrian Constitution of 1973 stipulates that no tax may be created, amended, or abolished except by-laws). [2]

We can infer from this text that the Syrian legislator settled on a general principle: every statute issued by the legislative body (Parliament) including regulations for the amount, rate, and collection of taxes, regardless of their type, falls under its purview. Since only the Syrian legislature is responsible for enacting tax laws and creating all taxes, this approach must be applied generally. As stated in Article 34 of the 1958 French Constitution, "The law defines the norms linked to the base, rate, and methods of collecting tax charges, whatever their type." [3]

In Egypt, Article (119) of the Egyptian Constitution stipulates the following: "Public taxes may not be established, amended, or abolished except by law, and no one may be exempted from paying them except in the circumstances specified by the law, and no one may be exempted from paying them except in the circumstances The law states it." No one may be required to pay taxes or other fees except within the limits of the law." It must be noted that Syrian legislators followed in the footsteps of French and Egyptian legislators.

Based on the Syrian Constitution, the local authorities do not possess the substantial authority to levy taxes. Consequently, the tax legislation presently enforced in the country's general budget comprises both direct and indirect taxes. When we consider the economic principle of tax distribution, which involves

[1] SAMBIT: *Centralization of Administration: Definition, Advantages, and Disadvantages* [Online]. Available at: https://www.yourarticlelibrary.com/public-administration/centralisation-of-administration-definition-advantages-and-disadvantages/63427/ (Accessed: 5 October 2023).
[2] Article 18 of the Constitution of the Syrian Arab Republic – 2012.
[3] Direction Générale des Finances Publiques: *Overview of the French Tax System*. Paris: Ministry of Economic Affairs, 2017, 6.

determining the tax and its impact on economic and social life, taxes in Syria are categorized as follows:

- Taxes on income, including labor and capital income taxes (tax on profits from industrial, commercial, and non-commercial professions and crafts) - labor income taxes and capital income taxes (tax on returns on circulating capital - Real estate revenue tax)
- Taxes on spending: consumer spending tax - customs tax - fiscal stamp duty
- Taxes on wealth and capital: vacant land tax, real estate fees, and automobile fees

Below we will provide a quick overview of some of the important taxes we mentioned:

2.1. Taxes on the income of industrial, commercial, and non-commercial professions and crafts

This tax is levied on the net profits resulting from the practice of industrial, commercial, and non-commercial professions and crafts, and other businesses and sources of income, except for what is subject to the salaries and wages tax, lump-sum income tax, real estate, and property tax. It includes income taxes generated in the public and private sectors.[4]

In terms of profits tax, Syrian law distinguishes between two categories of taxpayers: those who earn real profits and those who earn a lump-sum income. The real profits income tax applies to profits generated from industrial, commercial, and non-commercial activities, as well as other sources of income not subject to a different tax. This includes public sector institutions, joint-stock companies, limited liability companies, private hospitals, cinemas, alcohol factories, tourist offices, universities, and private schools.[5] On the other hand, the lump-sum income tax applies to those who practice industrial, commercial, or non-commercial trades or professions but do not fall under the category of real profits taxpayers. Their profits are estimated by preliminary, appellate, and legitimate committees. While this tax can generate significant revenue for the government, its contribution is relatively small. Many professions, such as doctors, engineers, and lawyers, fall under this tax group and their percentage is estimated beforehand[6]. It would be more efficient to include these taxes under local taxes managed by local councils, as they are better equipped to collect them, estimate their percentages, identify taxpayers, and

[4] AL-DABIT, M.: *The Role of Income Taxes in Financing the Public Budget*. Damascus: (Unpublished master's thesis): Damascus University, 2001, 69.
[5] Syrian Income Tax Law, Law No.24, para.2.
[6] ELIAS, N.: *The Citizen and the Tax Trilogy*. Al-Iqtisadia newspaper, 2008/2 [online]. Available at: https://iqtissadiya.com/ (Accessed: 4 October 2023).

monitor income in their respective areas. This would provide the government with significant financial resources, and fair taxation, and save time and effort.

2.2. Tax on salaries and wages

This tax was initially introduced in 1949 through Legislative Decree No. 85 and has remained active ever since. Its significance lies in the fact that it serves as a reliable and assured source of financial revenue, as it cannot be evaded since it is automatically deducted from the earnings of public sector employees.

2.3. Consumer spending fees

It is currently regulated by Decree Law No. 11 of 2015. It deals with the most important luxury and entertainment goods and services at rates ranging between 5% and 20%.

When goods and commodities are imported or exported, customs duties are imposed. There are two customs duties: those imposed on imports or foreign goods from other countries, and those imposed on exports. The new customs law is Law No. 38 of 2007, which contains all legal texts related to the regulation of customs duties.[7]

4. Stamp fee

It is currently regulated by Decree No. 44 in 2005. It can be said that taxes and fees recorded a relative increase concerning the rest of the taxes during the crisis, as the state tried to compensate for the shortfall in the occupational income tax and commercial and non-commercial industries.

As previously discussed in our overview of Syria's tax system, a centralized legal approach to taxes contrasts with the decentralized administrative and utility system specified in Legislative Decree No. 15 of 1971. This decree seeks to allocate responsibilities among various state-level administrative units, granting them authority over aspects such as the economy, culture, and arts. However, the landscape underwent substantial changes with the enactment of Law No. 107 of 2011, reshaping the state's regulatory framework significantly. Therefore, it becomes imperative to conduct an in-depth examination of administrative decentralization in Syria, encompassing its various forms and assessing its financial and tax independence.

[7] HDEWEH, N.: *Value Added Tax and its Impact on Economics and Society in Syria*. Damascus: PhD thesis: Damascus University, 2014, 41-50.

3. Administrative Decentralization in Syria

The 2002 Swedish final report on public administration defines decentralization as the process of transferring political and financial authority from the central government to the local level. Administrative decentralization involves delegating power, responsibility, and decision-making authority for delivering public services from the central government to local councils or governments. This form of decentralization yields positive outcomes, such as the central government relinquishing some powers to local levels and assuming a specialized control role for major obligations. This approach enhances efficiency and knowledge-sharing between the two parties. Administrative decentralization also promotes democratic principles and transparency. By involving citizens in decision-making through local councils, decentralization fosters increased civic participation. These councils, operating in a climate determined by the citizens, are subject to accountability by the central government and play a crucial role in bringing government closer to citizens, thereby reducing the workload of the central government.[8]

The distinction between administrative decentralization and political decentralization is crucial. This clarification is required because countries with a federal system or those that emphasize political centralization lack administration or local councils, except within states or regions. Local councils operate within the framework of political federalism at the third level, after the federal and state levels.[9] While local administration in less complex or smaller countries Like Syria comes at the second level after the national level.

The idea of administrative decentralization began to appear in Syria after it gained its independence from France in 1946, and was embodied in the issuance of legislation that formed the essential responsibilities of the state, such as the legislation issued in 1972 related to the administrative organization of local areas, called the Municipalities Law, according to which municipalities in the Syrian Arab Republic were divided into four grades. Then, in 1957, the Administrative Organizations Law No. 496 was issued, which included the division of the Syrian Arab Republic into governorates with legal personality, the governorates into regions, the regions into districts, and the districts into villages.

Syria's administrative decentralization was established through Local Administration Law No. 15 of 1971 and Law No. 107 of 2011. Law No. 15 was based on a scientific study of various experiences in other Arab and foreign countries. Its main objective was to allow citizens to participate in managing their

[8] ISUFAJ, M.: *Fiscal Autonomy of Local Government Governance*: *Flexibility and Responsiveness*, Economic Review, 1(1), 2017, 20-21.

[9] STEYTLER, N.: *Local Governments in Federal Systems: Deepening Federal Democracy?* Cheltenham: Edward Elgar Publishing, 2023, 123-124.

local affairs. The country was divided into four governorates, including the governorate, city, town, and rural units with a population of over 5,000. In addition, some units did not have this personality, such as the region, district, neighborhood, and farm or village with a population of less than 5,000. Local councils were elected to supervise the lower councils and the subordination of the lower councils to the higher councils. The councils were entrusted with responsibilities for the economy, culture, services, and all affairs of concern to citizens in the country. They were directly involved in the framework of general planning and the laws and regulations approved by the state. The local administration authorities were given sufficient financing means to carry out their tasks in a good manner, and local taxes and fees were imposed by law. [10]

We can notice that the Syrian Law No. 15 of 1971 adheres to three fundamental principles of administrative decentralization. Firstly, local units or groups actively represent distinct local interests. Secondly, independent legal status is conferred upon these entities. Lastly, the decentralization process entails local groups autonomously managing their affairs, with elected bodies ensuring representation and self-governance. The central authority provides resources for local bodies to fulfill their duties and oversees their activities.[11]

Based on observations, Law No. 15 of 1971 aimed to enhance administrative decentralization but resulted in a centralized system due to the overlapping of roles between central and local authorities. The central authority tends to have more control, limiting the local authority's roles. The hierarchical vertical control structure introduced by Local Administration Law No. (15) of 1971 highlights the centralized nature of the administrative system. The central authority exercises central control over the work of public institutions and bodies through legal provisions. However, the lack of clarity regarding the number of resources allocated to localities and the opaque method of distribution contributes to the extreme centralization of control over financing mechanisms for local plans. Moreover, funding for their implementation is slow to arrive.

Following the administrative decentralization experience and the identification of shortcomings in the initial attempt through the enactment of Law No. 15 of 1971, a new Local Administration Law, No. 107 of 2011, was introduced. The local administration system, contrary to being rigid, is recognized as an advanced framework that necessitates periodic amendments to align with evolving temporal dynamics and societal shifts.(An example from Britain can be cited to illustrate the evolution of local council powers. During the eighteenth century, councils had limited power which was applied through general laws or special additions to

[10] ISMAIL, A.: *Local Administrative Law*. Damascus: Syrian Virtual University Publication, 2018, 71-81.
[11] OOMMEN, M. A.: *Fiscal Decentralization to Local Governments in India.* Newcastle upon Tyne: Cambridge Scholars, 2020, 38.

individual authorities. However, in the twenty-first century, councils have been granted expanded powers that include modern social services and municipal projects.)[12]

It is noteworthy that the enactment of Law No. 107 of 2011 was not isolated from the broader context of Syria's socio-political landscape. The law emerged in response to the growing demands for political and democratic reforms, aiming to enhance the institutional structure, fortify oversight mechanisms, and bolster financial management practices.

Analyzing the foundational aspects of this law, particularly concerning local administration council elections, reveals numerous positive aspects. These positive attributes are poised to elevate the fulfillment of local needs, both in terms of service delivery and developmental initiatives.[13]

Through a comparison between Law No. 15 of 1971 and Law No. 107 of 2011, the following points appear:

The administrative restructuring brought significant changes, consolidating units into four levels: governorate, city, town, and municipality, which streamlined the previous five-tier system. The new legislation mandated temporary joint administrations between these units, enabling collaboration on shared projects. Coordinating offices were also established to ensure smooth cooperation among concerned parties during the execution of service and infrastructure initiatives.

To strengthen decentralization, the law introduced a significant procedural change: the head of the local council is now elected by its members, a departure from the earlier practice of appointment. The head of the local council assumes the role of the executive council head, except in the governorate center. In the latter case, the governor is designated as the executive office head for the governorate, which is a departure from the previous norm where the governor assumed both roles within the Governorate Council.

The law reinforces official administrative and judicial oversight mechanisms, complemented by popular oversight through citizen involvement. One significant aspect of the law is the authorization for governorates to initiate investment projects, allocating up to 25% of their independent budget for this purpose. This strategic move aims to augment the financial resources of administrative units, offering them a degree of fiscal autonomy and flexibility. The law prioritizes the financial affairs and autonomy of administrative units, recognizing the pivotal role of financial capabilities in enabling independence and facilitating essential local projects and services. The emphasis on financial independence underscores the

[12] RAY, M.: *Local Governments*. [Online]. Available at: https://www.britannica.com/topic/local-government (Accessed: 10 October 2023).
[13] ISMAIL, A.: *Local Administrative Law*. Damascus: Syrian Virtual University Publication, 2018, 82.

law's commitment to empowering administrative entities to effectively address local needs and aspirations.

5. Facial and tax autonomy of local administrative councils in Syria – Fiscal Autonomy

One of the most important components of the success of the administrative decentralization system represented by the local administration system in Syria is the provision of the necessary financial capabilities that allow the local units a great deal of independence and freedom of movement and help them achieve vital projects and services. To perform these tasks to the fullest extent, there must be sufficient income derived locally from the central government. And complete independence in making decisions regarding the use of these revenues. Due to the importance of this issue, the Syrian Local Administration Law paid special attention to the administrative affairs of local administrative units and its fiscal Autonomy.

In simple terms, fiscal Autonomy or fiscal decentralization means providing adequate financial resources to local governments to carry out their specified tasks. This process is known as fiscal decentralization, where local resources are greater than national financial resources for the state budget. The goal of this reform is to create more revenue for the local government, which can be used to improve the quality and quantity of local services and provide better support to the local community. This can be achieved by using transfers, which are income transfers from the central government to the local level.[14]

Fiscal autonomy can be achieved in various ways, but the most significant ones are as follows:

- Self-financing: This entails covering costs through revenue generated from users.
- Co-financing: Users play an active role in providing services and infrastructure by contributing both monetarily and through labor.
- Increasing domestic revenues: Countries can boost their revenues by implementing direct or indirect taxes or by selling assets.
- Intergovernmental transfers: Public revenues from taxes collected by the central government can be transferred to the local governments.
- Providing loans: Countries can also obtain loans from lending institutions and donors.[15]

[14] ISUFAJ, M.: *Fiscal Autonomy of Local Government Governance*: *Flexibility and Responsiveness*, Economic Review, 1(1), 2017, 23-24.
[15] ISUFAJ, M.: *Fiscal Autonomy of Local Government Governance*: *Flexibility and Responsiveness*, Economic Review, 1(1), 2017, 23-24.

In Syria, local administrative units have their own independent budget. This budget includes the unit's revenues and expenses, as well as the budgets of affiliated companies and institutions. This budget is separate from the general budget of the state but is still connected to it. The executive office of each unit prepares a draft budget in collaboration with a committee. The budget is then presented to the Provincial Council for approval. The independent budget's revenue is generated from popular labor revenues, local fees and costs imposed by the Provincial Councils, subsidies provided by the state to administrative units and municipalities, and savings from previous years.[16]

We strongly support the implementation of an independent budget for the governorate, which provides significant financial autonomy. An independent budget allows for flexibility and autonomy, enabling the governorate to make strategic decisions in executing important projects. This financial independence not only enhances the ability to undertake crucial initiatives but also positions the governorate to yield substantial economic returns.

One of the most significant advantages of an independent budget is its role in strengthening the financial foundation of various administrative units. By fostering a robust fiscal framework, the independent budget becomes an invaluable source of support for the multifaceted needs of the governorate. This financial reinforcement, which is crucially integrated into the fabric of administrative operations, is a testament to the foresight of the Syrian legislator who recognizes the practical significance of sustaining administrative units.

This commitment is evident in the emphasis placed on financial independence as a cornerstone for achieving administrative decentralization. Through the establishment and adherence to an independent budget, the Syrian legislator has effectively laid the groundwork for the successful implementation of administrative decentralization. This financial self-sufficiency not only instills a sense of empowerment at the local level but also ensures that decisions align with the unique needs and priorities of the governorate.

And the sources of revenue for administrative units with legal personality are determined according to Article 88 of the Local Administration Law, issued by Legislative Decree No. 15 of 1971. These sources include:

- Gifts, wills, and donations in compliance with applicable laws.
- Aid provided by international organizations.
- Fines resulting from violating local regulations.
- Loans, credit facilities, and other resources obtained from the private sector.
- Local taxes, fees, and charges.

[16] Para.144 of the Syrian Income Tax Law No. 24.

In our comprehensive exploration of the financial dynamics inherent to administrative units, it is incumbent upon us to recognize the pivotal role that local taxes play in not only furnishing these entities with substantial financial revenues but also in intricately shaping and delineating the contours of their financial independence; therefore, it becomes important for us to embark on a detailed and nuanced discussion that delves into the multifaceted landscape of local taxes and meticulously examines their applications within the specific context of Syria.

6. Tax autonomy

What are local taxes?

Returning to the origin of this idea, the idea of local taxes began in post-war Britain when the Layfield Commission was established in 1974 to review the funding of local governments in England, Scotland, and Wales. It addressed immediate concerns about large rises in interest rates following the structural reforms of the early 1970s and the longer-term issue of positive central government policy leading to increased domestic spending. The Layfield Commission called for a reduction in the proportion of local government spending funded by grant revenues to promote local self-governance and accountability. It proposed imposing a local income tax while maintaining the classification system. But in 1977, the Labor government rejected local income tax and proposed a unitary grant system for more central control over local authority spending. In 1981, the Conservative government considered introducing alternative local taxes but chose to impose stricter controls on spending rather than reform the classification system, which resulted in an increase in average revenues of about 30% in the period 1990/1991. It can be said that after several attempts the tax idea succeeded Local funding in Britain. At the same time, the idea of increasing decentralization and increasing the number of levels of government was spreading in other parts of Europe. In federal countries, for example, regional councils were created to achieve decentralization of state functions and express economic, cultural, and regional interests. Despite this, local funding was in many countries. Europe is weak, unlike Britain. This is due to the difficulty of establishing a fair and effective local tax. In Italy and the Netherlands, for example, less than 6% of local taxes come from it. Therefore, European countries have tried and are still trying to find more effective local tax formulas.[17]

and we can say that local tax refers to any financial imposition levied by the state, province, municipality, or other local governing bodies within their respective jurisdictions, local taxes are distinct revenue streams specifically earmarked for

[17] RIDGE, M. – SMITH, S.: *Local Taxation: Exploring Options and Debates.* 1st ed. London: The Institute for Fiscal Studies, 1991, 7-13.

funding essential local public services and infrastructure projects like education, healthcare, and infrastructure. These taxes play a vital role in sustaining the day-to-day operations of local governments and contributing to the development and maintenance of community services.

The scope and nature of local taxes can vary significantly, encompassing a diverse range of financial instruments tailored to meet the unique needs of individual localities. Common types of local taxes include property taxes, where individuals and businesses are taxed based on the assessed value of their real estate holdings, sales taxes applied to the purchase of goods and services within the locality, and income taxes imposed on the earnings of individuals and sometimes businesses residing or operating in the area.[18]

The local tax is different from the central general tax in two ways: - In terms of the entity on whose behalf the tax is imposed: The local tax is levied on behalf of the local councils, meaning that the proceeds of that tax enter their coffers. The revenues of the central general tax, which is levied on behalf of the central authority, are regarded as a source of income for the central public treasury.

As for the local tax's area of application, it only affects the local administrative unit where it is levied and not any other administrative units. While the central general tax is imposed uniformly across the nation and is not restricted to particular local administrative areas.

As we have previously mentioned, in Syria, the concept of administrative and regional decentralization is implemented through local administration units. These units are responsible for implementing the state's general policies within their local powers, under the supervision of central authorities. They have legal and financial independence, but their financial activities are subject to scrutiny by custodial bodies, thus creating decentralized financial bodies. Local administrative units establish their budgets independently of the general state budget and implement them after approval by competent authorities, but they are required to adhere to the central authority's instructions. The financial independence of the local administration units is determined in accordance with the general state plan and policy. The Local Administration Law No. 15 of 1971 stipulates that local taxes and fees, as well as percentages added to state taxes, are among the most important financial sources for local administration units. However, the intent of the legislator is unclear in this regard.

Local taxes and fees are the financial costs imposed by administrative units on the residents of the local area. The added percentages are an indirect method by which local governments rely on the central government to finance some services

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[18] KAGAN, J.: *Local Tax: What It Is and Types Communities Levy.* 2020 [Online]. Available at: https://www.investopedia.com/terms/l/localtax.asp/(Accessed: 15 October 2023)

if their tax powers are limited or their local tax resources are insufficient.[19] This method has been applied in Syria, where the Syrian legislator adopted the practice of adding to the central general taxes, income taxes, and real estate and property revenue taxes.

Under the laws governing income taxes, as well as real estate and real estate rental taxes, additions to these taxes are imposed for the benefit of municipalities as follows:

1. The regulations state that administrative units and municipalities should receive a share of not less than ten percent of the revenue collected through the real estate and plot tax, as per Legislative Decree No. /53/ dated 10/1/2006. This tax applies to all constructions, regardless of their type or specification, and is levied on the owner, whether natural or legal, as long as they are the beneficiary of the property. The tax is calculated annually based on the estimated value of the property and its annual revenue, determined by a specialized committee that takes into account factors such as location and area. However, this tax is not a primary source of funding for local administrative units, as its contribution to financing these units is weak due to its poorly estimated and irregular nature. In Syria, the resources for this tax are almost non-existent, and it accounts for only 0.6% of the total general taxes in the state, which results in a large imbalance.[20]
2. The distribution of income taxes and property revenue tax share among administrative units and municipalities is established at a rate of 10%. These taxes include a wide range such as labor and capital income tax, income tax on industrial, commercial, and non-commercial professions and crafts, salaries and wages tax, real profits, real estate trade, and lump sum income, among others. According to Law (24) of 2003, and its subsequent amendments, these percentages hold significant importance in the overall tax revenue.
3. All financial directorates across governorates, regions, and districts channel the designated share of administrative units from income taxes and real estate and property revenue tax to the Ministry of Local Administration's account. The Minister determines the subsequent distribution, extending to all administrative units following a structured framework:
   - 35% of the total revenues are earmarked and distributed with specific allocations:

[19] DEVAS, N.: *The challenges of decentralization. In Global Forum on Fighting Corruption*. Brasilia: Global Forum on Fighting Corruption, 2005, 8.

[20] HDEWEH, N.: *Value Added Tax and its Impact on Economics and Society in Syria*. Damascus: PhD thesis: Damascus University, 2014, 63.

- A. 15% is allocated to the city of Damascus, the capital, recognizing its central significance.
- B. 5% is directed towards administrative units with a touristic and archaeological character, subject to a decision by the Council of Ministers.
- C. 10% is designated for administrative units in development areas, determined by a decision of the Council of Ministers.
- D. 5% is assigned to seaport cities, guided by a decision of the Council of Ministers. These percentage allocations are subject to potential amendments decided by the Council of Ministers.
- The remaining 65% is distributed among all administrative units based on population figures sourced from civil registry records or the Central Bureau of Statistics, utilizing the higher of the two. This distribution is done in coordination with the councils of the administrative units, ensuring a fair and population-oriented distribution model.

This structured framework, established through legal provisions, seeks to ensure an equitable distribution of resources to administrative units and municipalities, recognizing factors such as the economic and tourism landscape, development priorities, and population density. The flexibility to amend percentages provides an adaptive approach to evolving needs and circumstances. [21]

In conclusion, the financial and tax independence of local administrative councils in Syria plays a pivotal role in the success of the administrative decentralization system. There is no doubt that ensuring sufficient financial capabilities enables local units to have the freedom to implement vital projects and services, which enhances their independence. Also, the Syrian Local Administration Law has laid a strong foundation for fiscal decentralization, emphasizing the importance of local financial resources.

However, the issue of the financial independence of local units has been controversial in Syria for a while. The Syrian legislator's commitment to financial independence appears in the legal texts, which allow local units to achieve revenues through various means, including local taxes and fees. At other times, we see Syrian legislators enacting laws that support administrative centralization. Therefore, this independence must be evaluated, especially with regard to local taxes and their enactment.

7. Assessing Syria's Local Administrative Councils' Autonomy in Finances and Taxes

[21] Syrian Legislative Decree No. (1).

Increasing the effectiveness of public service delivery is the primary goal of fiscal decentralization. This goal can only be achieved if local authorities enjoy a real degree of autonomy and safe and secure revenues. Several preconditions must be met before local governments can be described as independent: First, they must have a legal personality in order to sign contracts and enter into transactions with third parties. To fulfill their fiscal function, they must have sufficient funds from sources through collecting taxes and setting their own budget, The authority to raise its own funds independently, and to enact certain local taxes according to the needs of each state administrative unit.[22]

Article 89 of the Local Administration Law in Syria, as stated in Legislative Decree No. 15 of 1970 and amended by Legislative Decree No. 61 of 1974, outlines the following regulations:

1. Local taxes and fees are to be imposed by law.
2. A percentage of the taxes and fees collected by the state, municipalities, and administrative units with legal personality can be added by law for the benefit of these units. Additional rates may be added by the competent council and ratified by the Minister after the approval of the governorate council to enhance the financing capabilities of local projects. However, the combined percentages cannot exceed 10% of the tax or fee imposed on any taxpayer, even if multiple entities benefit from it.
3. Furthermore, impose local costs on new tax brackets to provide specific services and projects within the scope of the governorate for the current year by a decision of the governorate council ratified by the Minister of Local Administration. However, its effect cannot extend beyond the current year unless it is decided to extend it to the next year.[23]

We conclude from the articles of Law No. 89 that the Syrian legislator tried, by enacting certain laws, to provide sufficient financial resources and sufficient financial independence for local administrative councils or local governments, but is this independence complete or subject to central control? As we mentioned at the beginning of the presentation, the Syrian constitutional legislator restricted the authority to impose taxes of various types,[24] or to amend or abolish them, to the legislative authority, and although the first paragraph of Article (89) of the local law confirmed this principle, the second and third paragraphs departed from it. The second paragraph allowed local councils, after the approval of the Minister of Local Administration and the approval of the Governorate Council, to add specific

[22] THAPA, I.: *Local Government: Concept, Roles, and Importance for Contemporary Society.* Public Administration Campus, 4(10.13140), 2020, 4-5.
[23] The Syrian Local Administration Law No. 61 of 1974.
[24] Article 18 of the Constitution of Syria, 2012.

percentages to new tax brackets. The Provincial Council was also granted, after the approval of the Minister of Local Administration, the right to create new tax brackets that were not addressed by the legislator, provided that this was for a specific period. Here, two questions arise about the extent of the independence of administrative councils and the constitutionality of the second and third paragraphs of Article 89.

The answer here depends on ensuring that the financial resources of local public bodies are sufficient so that they can achieve their mission. If it is possible to impose independent local taxes that guarantee sufficient resources, there is no room for imposing local taxes linked to general taxes. If it is not possible or does not generate sufficient revenues, it is necessary to resort to local taxes linked to general taxes, whether in the original or supplementary form. This means that local councils can only impose these taxes to finance their own expenses. This means that the legitimacy of local councils imposing these taxes is linked to their need to finance their own expenses, which varies from one city to another. Therefore, the Local Administration Law set ceilings to ensure that these taxes do not exceed a certain limit. When part of the taxes are linked to other taxes, they are considered additional taxes, and when they are linked to services and projects implemented by the governorates, they are considered fees for those services. In both cases, the imposition of taxes and fees is considered constitutional.[25] In my opinion, this strengthens the centralization of the state because this decision violates one of the important principles of administrative decentralization, which is the independence of local bodies that have legal personality from the central authority. The independence meant here is financial, administrative and technical independence on the one hand, and the ability of administrative units to exercise their powers on the other hand, without commitment or restrictions from the central authority.

In comparison with the French legislation, which significantly influenced the Syrian legislator, the local administration system in France comprises the communes, the departments, and the overseas territories, possessing independent legal personality. However, their powers are not expansive, and the exercise of these powers is subject to supervision and control by the central government. Prior to 1982, all decisions of local authorities were subject to prior oversight, but the current practice involves the governor, representing the central authority, determining the legitimacy of these decisions.[26]

As for taxes, it turns out that the French constitutional legislator, as a result of the text of Article (34), decided that the legislative authority has jurisdiction over tax duties, that is, the rules related to the base, rate, and collection of tax duties. That is, the French positive constitution stipulates that it is not permissible to

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[25] MURAD, M. H.: *Finance of Local Public Bodies in the Arab Countries'*. Cairo: Arab Renaissance, 1962, 150.
[26] Council of Europe,1998, 5-31-41.

impose a tax except by law. Therefore, the local authorities do not have real powers to impose taxes, and this is also confirmed by the principle of self-government stipulated in Article (72) of the Constitution and the financial independence stipulated in the second paragraph of Article (72) of the Constitution. She said that local authorities have the right to fix direct tax rates (such as business taxes, housing taxes, and real estate taxes) within the limits of the rules stipulated in the law without exceeding this jurisdiction, and this jurisdiction is also restricted. Especially in terms of the necessity of distributing the tax burden fairly among taxpayers, as a result, the jurisdiction to impose taxes is the exclusive jurisdiction of the legislative authority in the state in accordance with the Constitution.[27]

8. Conclusion

Administrative decentralization in Syria, rooted in legislative laws and legal principles, has witnessed significant development, and the establishment of legal entities with self-government responsibilities, as described in local administration laws, reflects a commitment to the principles of decentralization and represents a major challenge for countries that have begun to implement them.

In conclusion, the study emphasizes the importance of evaluating the financial and tax independence of local administrative councils. It highlights the nuanced relationship between centralization and decentralization, emphasizing the need for a comprehensive examination of the implications of the principles of administrative decentralization. Syria's commitment to financial independence, as stipulated in its legal framework, requires constant scrutiny and adaptation to ensure the delicate balance between central authority and local autonomy.

List of legislation

Syrian Income Tax Law, Law No. 24 issued in 2003.

Syrian Local Administration Law No. 61 of 1974.

the Constitution of the Syrian Arab Republic - 2012

The French Constitution - October 4, 1958.

[27] Article 72 The French Constitution, 1958.

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Animals Put on Trial (Animal Trials in European History)

Abstract: The paper focuses on an enigmatic and unusual segment of medieval and early modern jurisprudence, namely animal trials. In these judicial proceedings, individual animals or a group of animals were tried together, before a secular or ecclesiastical court, accused of the commission of a criminal act. In all the known cases, the rules, and formalities inherent to every judicial procedure were of utmost importance and scrupulously respected. It was not uncommon for animals to be convicted and even sentenced to capital punishment. This historical phenomenon serves to highlight the changes in the functions and tasks of criminal law over the centuries, since today such a trial would be perceived as ludicrous at best. Criminal responsibility has evolved to become inseparable from the human status, only human beings can commit crimes nowadays; however, as this paper seeks to show with several intriguing historical examples, this was not a universal truth before the modern era. The paper therefore seeks to answer the following questions: when and where did animal trials emerge? Where were they the most prevalent? What types of animals were brought before the court? What is the *raison d'être* of these trials and how were they perceived by society and the scholars at the time?
Keywords: animal trials, ecclesiastical and secular trials, pig trials, absolute liability, competency to stand trial, moral agency, culpability

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"That souls of animals infuse themselves
Into the trunks of men: thy currish spirit
Govern'd a wolf, who, hang'd for human slaughter,
Even from the gallows did his fell soul fleet,
And, whilst thou lay'st in thy unhallow'd dam,
Infused itself in thee; for thy desires
Are wolvish, bloody, starved and ravenous."[1]
(Shakespeare)

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[1] Fragment form The Merchant of Venice. It contains Gratiano's words addressed to Shylock. http://shakespeare.mit.edu/merchant/full.html (date of download: 25.10.2023.)

1. Introduction

The purpose of this paper is to examine a historical phenomenon in European jurisprudence, namely, the appearance of animals as defendants in many of the court proceedings of the past. Animal trials, as a *sui generis* category, will be examined from several perspectives while attempting to answer the questions that arise in the course of the research. The main questions which this paper attempts to address are: when and where did these lawsuits arise? Where were they most common? What animals were prosecuted and in what courts were the lawsuits brought? What are the reasons for the development of this practice? The last question is the most difficult to answer, which is why the author of this paper will devote more space to it, by articulating and contrasting the different views that have emerged over time in the academic literature. The author will also try to enrich the paper with as many specific examples as possible to give a more authentic picture of the phenomenon.

To accurately delimit the topic, it is important to mention that this paper does not deal with trials by ordeal, trials against non-existent hybrids (e.g. chimeras) or other imaginary animals, nor with the role of animals in executions throughout history,[2] nor trials against inanimate objects or corpses, nor trials with animals as witnesses, nor, finally, trials of witches. The latter, in many cases, shows a resemblance to animal trials, explained in detail *infra*. Werewolf trials will only be discussed to the extent that a wolf is convicted, and not a human being for his ability to shapeshift into a wolf.[3] Cases of bestiality (zoophilia) and sodomy will only be discussed where the animal is found guilty of the act or, as a *corpus delicti*, is killed to remove the traces and negative effects of the crime committed.

2. The history of animal trials

In what follows, the author will try to answer the first two questions raised in the introduction, namely where and when animal trials arose and in what historical period they were most common. The typology will also be presented supported by most scholarly works—a view the author also subscribes to—according to which there were several categories of animal trials. Since there is no historical continuity

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[2] See for more detail, BELIZNAI, K.: *A bíbor méltóság, a sárga árulás. Szimbólumok és rituálék a jogtörténetben*, Balassi Kiadó, Budapest, 2014, 39–40. In Roman times, patricide was punished by what is known as the *poena cullei*, which involved sewing the offender into a sack with a rooster, a dog, a snake, and a monkey (each animal having its symbolism) and throwing the sack into the Tiber. In Germany, this tradition continued under the name of *Säcken. See* for more detail, EGMOND, F.: The Cock, the Dog, the Serpent, and the Monkey. Reception and Transmission of a Roman Punishment, or Historiography as History. *International Journal of the Classical Tradition, 1995/2(2),* 159–192.

[3] See for more detail, MEZEY, B.: Az állatok jogi perszonifikációja. Állatok a bíróság előtt - adalékok a törvénykezés történetéhez, In: SZABÓ, M., PESTI, S. (coord.): *„Jöjj el szabadság". Bihari Mihály 60. születésnapjára készült ünneplő kötet*, Rejtjel Kiadó, Budapest, 2003, 19–39, 25–32.

or direct link between animal trials and other, similar phenomena that have survived from antiquity,[4] and since the scope of this paper does not allow it, the latter will not be mentioned.

First, however, the author thinks that it is necessary to explain why the judgements were handed down in several forums and not just by one type of court. This was mainly due to the specific legal particularism of the Middle Ages. The diversity of legal levels in Europe at that time was remarkable, both in theory and in practice. In addition to the learned Roman glossaries, there was also royal law, canon law, common law, and the municipal law of cities, which for a long-time coexisted side by side. The law was much more personal, linked to the estates of the realm (the state of birth in society), and there were no legal rules applicable to all. Each of the coexisting laws was created by a different social group according to its own needs and each expressed a particular aspect of the culture of the time. These often-divergent rules constantly influenced each other, and their synergy created the unified legal system we know today.[5]

As explained in the previous paragraph, both civil and criminal justice were administered by royal, feudal, municipal, and ecclesiastical courts. Accordingly, animal-related cases were tried either by a secular court or by an ecclesiastical court, according to different procedural rules. "Since the heyday of litigation involving animals as defendants were marked by the fact that the separation of private law from criminal law, let alone private procedural law from the criminal procedure, had not yet been achieved (or not in full form), the various types of property damage often appeared as offences in proceedings against animals."[6] The legal culture of that period could therefore hardly be described as monolithic.[7]

2.1. Trials from the perspective of time – their evolution and frequency

Overall, animal trials occupy an important place in medieval jurisprudence. As for their number and distribution over time, various estimates have been made over the years, depending on the amount of material collected by each scholar on the subject. The most convincing evidence is to be found in the research and report of Barriat-Saint-Prix, who published a few extracts from the original documents of these trials.[8] This report contains a total of 93 cases recorded from the early 12th to

[4] In the scientific literature, they are called the precursors of the animal trials. For further information on them, see: MEZEY, B.: 25.
[5] COHEN, E.: Law, folklore and Animal Lore. *Past & Present, 1986/110,* 6–37, 12–13.
[6] MEZEY, B.: op.cit. 23.
[7] COHEN, E.: op.cit. 9.
[8] CARSON, H-L.: The Trial of Animals and Insects. A Little Known Chapter of Mediæval Jurisprudence. *Proceedings of the American Philosophical Society*, *1997/56(5),* 410–415, 411.

the mid-18th century. The Neapolitan writer Carlo D'Addosio extends the list to 144 trials that led to the execution or excommunication of the accused and also widens the period studied from 824 to 1845.[9] E. P. Evans finds criminal trials between the 9th and 20th centuries: The first case dates from 824 and concerns the punishment of moles in the Valle d'Aosta, and the last in chronological order is the case of a dog convicted of complicity in a Swiss criminal trial, tried in 1906.[10] An analysis of Evans' list of 196 cases yields the following results:

Century	9th	12th	13th	14th	15th	16th	17th	18th	19th
Number of trials	3	3	2	12	36	57	56	12	9

Table 1: Number of animal trials by century[11]

Animal trials are mentioned in the sources as an ancient custom,[12] although trials based on documentary evidence did not appear until the second half of the 13th century.[13] The emergence of such trials seems to have its roots in the early medieval (also known as *dark*) mentality, rather than in the era of Gothic rationalism, scholasticism, the great development of cities, etc., which Max Weber argues marked the beginning of the disfiguration of the world ("*die Entzauberung der Welt*").[14] Despite this contradiction, it is no coincidence that the frequency curve of animal trials is similar to that of witch trials,[15] peaking in the 16th and 17th centuries, although animal trials were certainly less frequent than trials of witches or wizards.

The fact that these legal proceedings survived in remote areas until the early 20th century is not surprising, since, as a kind of atavism, they often remain in sync with the prevailing recent past, especially in regions where the influence of Catholicism remained strong.[16] In countries with a Reformed confession of faith, animal trials have generally not survived. "As the *Geistlicher* council of the Protestant city of Bern put it in 1666: 'Since the ox has received no law, it cannot sin by breaking it. Therefore, it cannot be punished.'"[17] In Catholic France, however, even institutions as prestigious as the *Parlement de la Paris* (Supreme Court) upheld controversial

[9] ADDOSIO, C-D.: *Bestie Delinquenti*, Luigi Pierro, Napoli, 1882, 16–17.
[10] EVANS, E-P.: *The Criminal Prosecution and Capital Punishment of Animals*, William Heinemann, London, 1906.
[11] *Ibidem.*
[12] DINZELBACHER, P.: Animal Trials: A Multidisciplinary Approach. *The Journal of Interdisciplinary History, 2002/320(3),* 405–421, 411.
[13] COHEN, E.: op.cit. 11.
[14] DINZELBACHER, P.: op.cit. 412.
[15] *Ibidem.*
[16] *Ibidem.*
[17] *Ibidem.*

punishments against animals, sometimes even condemning the animal itself, as in 1575 and even in 1726. In 1791 France's National Convention, having been created in 1789, even sentenced to death a dog accused of aiding "enemies of the Revolution" (barking to signal for a counter-revolutionary the approaching mob).[18]

2.2. Typology of trials - secular and ecclesiastical trials

The geographical distribution of these trials is another mystery. Before proceeding to solve the puzzle, one needs to divide the set to which all animal trials belong into several subsets. A distinction must be made between actions before secular courts and actions before ecclesiastical courts. This novelty[19] and this distinction first appears in Karl von Amira's work, as its title suggests ("*Thierstrafen und Thierprocesse*", that is, animal punishment and animal trials).[20] Evans was criticised for not distinguishing between the two types of trials and yet he attempted to explain the reasons for animal trials. All he did was create a database of trials, a very useful compilation for researchers.

In the secular courts, it was mainly domestic animals that were sentenced, and in some cases wild animals if the latter could be captured and brought to trial. Usually and most often, animals were cited for committing an act resulting in human bodily harm or death. The defendant, as in the case of humans, was considered as autonomous subject and, as such, was held liable for their acts, even if the act was committed by several animals acting in concert. These trials were characterised by a rigorous evidentiary procedure, with witnesses being heard, on-the-spot inspections, and arrests if necessary. Interestingly, executions were also carried out only by professional executioners.

At this time, in the ecclesiastical courts, "prosecutions were directed against animals that appeared in swarms and were thus beyond human control",[21] that is, against small insects or rodents (e.g., grain beetles, locusts, rats, moles, or other pests, rodents that destroyed crops and vineyards), in other words, prosecutions were brought not against a specimen, but rather against the collective assembly of pests. This was necessary because the latter group would have been difficult to cite and summon to court, and therefore the trial was usually conducted either in the absence of the defendants, or several specimens were captured and brought into the courtroom representing the defendants' collective, as a proxy. Arguably, the liability of the group of summoned animals was considered to be joint.

[18] MEZEY, B.: op.cit. 33.
[19] COHEN, E.: 1 op.cit. 3.
[20] OSZTERN, S-P.: Legálisan vád alá helyezett állatok. *Ethnographia, 1908/19,* 321–344, 333.
[21] *Ibidem.*

In the case of ecclesiastical trials, there may have been no plaintiff, although most of the time an entire community of people would vehemently demand that the court excommunicate the group of pests or pronounce *anathema* on the defendants.[22] In many cases, both penalties were applied. The right to execute punishments, according to the two-sword theory—the political doctrine in the Catholic Church which states that the pope has supremacy over secular rulers and therefore the existence of ecclesiastical courts and ecclesiastical jurisdiction is also possible—has always belonged to the lay (secular) authority. For this reason, although ecclesiastical courts could pronounce such decisions (*anathema*, excommunication, banishment from the land, etc.) after deliberation, they were not, and often could not be, enforced by the secular authorities. For this reason, the condemnations of the ecclesiastical courts were often only apotropaic, intended to protect and shield the community from evil and malign influences.[23] "The pronouncement of an ecclesiastical curse [*anathema* falls into this category] had to be preceded by a trial before a judicial forum appointed by the Church for that purpose, by canon law. Even in other cases, it is only through this preliminary judicial assessment, a formal trial, that anathema acquires the necessary validity and effectiveness. Before they could therefore be cursed by the Church, these animals had to be brought before such a judicial forum."[24]

The formalities of the trial in both categories were observed with the utmost rigour, the solemnity of the trial being both essential and indispensable to the effectiveness of the ruling. "The most striking feature of these trials is the strict observance of the formalities of the proceedings against the animals. The animal defendant was summoned ceremoniously, following the rules, and treated as if it were a human being. When arrested, the animal was often dressed in human clothing, housed in the same manner in the prison, and allowed to eat the same food as other prisoners in the dungeon. They were subjected to the same interrogations under torture as their 'fellow human beings', were also subject to trial terms, and their execution was carried out in the same way as humans. The seriousness of the animal trials was ensured with the maximum possible publicity, as in other trials."[25] This was taken so seriously that when, on 9 June 1576, the executioner of Schweinfurt hanged a pig (which had mutilated a boy by biting off the boy's ear and at the same time biting off his hand) without due process, he was immediately removed from office for arbitrariness (taking the law into his own hands), contempt of court authority, and interference with law enforcement, and was never allowed to practice as an executioner again.

[22] For a precise distinction between the two modes of exclusion from the bosom of the church, see: EVANS, E-P.: op.cit. 52.
[23] OSZTERN, S-P.: op.cit. 333.
[24] *Ibidem.*
[25] MEZEY, B.: op.cit. 33–34.

According to Jen Girgen, Cohen distinguished a third type of litigation, a hybrid, composed of the previous elements provided for in the two broad types of animal trials. This new type emerged in 15th century Switzerland, combined ecclesiastical and secular trial traditions, and was largely a response to the witch-hunts that were then on the rise in Western Europe. In these trials, a secular court was required to try a single animal on charges of supernatural behaviour—not for harming or killing a human being, as seen in the earlier category of secular trials.[26]

2.3. Geographical distribution of the trials

As far as the geographical distribution of trials is concerned, the date and place of their occurrence varies according to the type of trial (ecclesiastical or secular) to which the legal action in question belongs.

Secular trials first appeared in the 13th century in the north and east of France, then spread to the Low Countries, Germany, and Italy.[27] It is exactly for this reason that secular court cases have remained the most widespread in France over the centuries.[28] According to Carson, this is also due to the fact that French historians have studied and documented older sources more thoroughly, and have thus been able to discover more such trials.[29] In short, we know of cases before secular courts in territories that are now found in Belgium, Denmark, France, Germany, Italy, Portugal, Russia, Spain, Switzerland, Turkey, England and Connecticut.[30] The question remains: How did the inhabitants of regions that preferred to judge animals differ mentally, legally, or otherwise from inhabitants of other countries who did not share this predisposition?[31]

What can be affirmed, however, is that animal trials were a sporadic phenomenon that appeared here and there, mainly in the Catholic regions mentioned above, but did not completely disappear until modern times. In some regions, such as northern France or Switzerland, we know of a relatively large number of such trials, while other regions, such as England and Scandinavia, seem to have been completely unaffected before the 18th century.

As far as England was concerned at the time, prosecutions of animals were quite rare. Dinzelbacher attributes this to a general resistance to the implementation of

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[26]GIRGEN, J.: The Historical and Contemporary Prosecution and Punishment of Animals. *Animal Law Review at Lewis & Clark Law School, 2003/9,* 97–133, 114–115.
[27] COHEN, E.: op.cit. 11.
[28] OSZTERN, S-P.: op.cit.333; CARSON, H-L.: op.cit. 411.
[29] CARSON, H-L.: op.cit. 412.
[30] *Idem.* 413.
[31] AMIRA, K. VON.: *Thierstrafen und Thierprocesse*, Verlag der Wagner'schen Universitatts-Buchhandlung, Innsbruck, 1891, 565, 559.

Roman law in England.[32] However, we do know of cases where certain animals were killed without being convicted. In 1677 (in the period of the witchcraft craze), Protestants in London, celebrating the anniversary of the coronation of Elizabeth I, placed live cats in a carved statue of Pope Innocent XI, set it on fire, and left the cats burning alive in the statue (the cat was considered a participant in witchcraft encounters, a satanic creature).[33]

The history of the church trials is less clear. A recurring motif in medieval hagiography is the holy man who exemplifies the reign of God's law by cursing pests, rodents, and other animals.[34] Before the 15th century, however, few records of animal-related church trials survive. As with secular trials, the phenomenon had a clearly visible geographical epicentre. The earliest trials all took place in Switzerland and the neighbouring regions of Savoy, Dauphiné, and the Italian Alps. This central geographical location made them much more widespread than the secular trials ever had. The role of the church in general should also be mentioned, as it was through its international network of ecclesiastical forums that these trials reached the New World. In the centuries that followed, ecclesiastical trials against animals took place not only in France, Germany, and Italy but also in Scandinavia, Spain, Canada, and Brazil.[35]

3. Case studies

In this chapter, an analysis is presented of exactly which types of animals have been condemned in secular and ecclesiastical courts, with one or more illustrative examples for each. The punishment meted out for the crime of sodomy will also be discussed.

3.1. Animals cited before a secular court

The majority of the sentences handed down by secular courts have been against pigs,[36] and especially infanticide pigs, but we also know of oxen, cows, horses, goats, donkeys,[37] and "sinful" dogs.[38] Horned domestic animals, capable of piercing with their horns, were often the subjects of these trials.[39] The punishment, like the trial

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[32] DINZELBACHER, P.: op.cit. 412.
[33] SAUNDERS, N-J.: *Állatszellemek*, Helikon Kiadó és a Magyar Könyvklub, Budapest, 1996, 77. *See* for more detail, https://alphahistory.com/pastpeculiar/1677-londoners-burn-live-cats-wicker-pope/ (date of download: 25.10.2023.)
[34] COHEN, E.: op.cit. 12–13.
[35] *Ibidem.*
[36] DINZELBACHER, P.: op.cit. 407.
[37] OSZTERN, S-P.: op.cit. 329.
[38] COHEN, E.: op.cit. 11.
[39] DINZELBACHER, P.: op.cit. 408.

itself, was not dissimilar to that for persons who had committed the same crimes: hanging, beheading, burning, drowning, and being buried alive, etc.[40]

3.1.1. Pig trials

In the following section, pig trials will be examined because the author considers that, due to their very high number, they represent a reference point, standard cases, and form of benchmark for the practice of secular courts.

First of all, the question must be answered: Why were the most frequent trials against pigs? It is well attested that the Eleusinian mysteries included the bathing of pigs as a symbolic act of purification from sin (*the mystagog*, that is, the initiate in the *epopteia*, the last ritual of knowledge of the mystery, took the neophytes to the beach to bathe the pigs).[41] In this rite, the religious historian Mircea Eliade identified the scapegoat in the pig, whose bathing symbolically represents initiation.[42] Immersion always carries the symbolism of death, while emergence from the water, as in the case of the pig bathing, signifies rebirth. According to Mezey, the pig is an ancient symbol of fertility,[43] desacralized and desecrated in Judeo-Christian culture, made into a symbol of sensuality, lust, greed, and base desires. This is also confirmed by the Lexicon of Christian Art, which states that "in the Bible, the pig was considered an unclean and evil animal [...] and its flesh was not to be eaten. The wild boar (the devil) in the forest destroys the vine (the people of Israel, in Christian terms, the Church of Christ [...]). The Gospel according to Saint Matthew reads: 'do not cast your pearls before swine, lest they trample them under their feet, and turn and tear you to pieces' [...]. Jesus casts out demons from the possessed in a herd of swine. In the Middle Ages, the pigs that the prodigal son had to guard were a symbol of the world and its sins. Hence the depiction of the personification of sins such as impurity, lust, and intemperance riding on pigs (Levoča, parish church, cycle of mural painting of virtues and sins, c. 1420). Synagogue [personification of Judaism] was also depicted astride pigs as a manifestation of the most intense hatred towards the Jews. In medieval temple carvings, the hunting of boars is probably interpreted as a pursuit of evil. As a useful domestic animal, a pig faithfully accompanies Anthony the Great, the Christian monk from Egypt. At the command of St Blaise of Sebastia, a wolf brings back the kidnapped pig."[44] Other arguments to explain the prevalence of trials against pigs are, firstly, the fact that they were the most

[40] BELIZNAI, K.: op.cit. 36.
[41] NÉMETH GY., RITOÓK ZS., SARKADY J., SZILÁGYI J-GY.: *Görög művelődéstörténet*, Osiris Kiadó, Budapest, 2006, 391–395.
[42] ELIADE, M.: *Az örök visszatérés mítosza - Avagy a mindenség és a történelem,* Európa Könyvkiadó, Budapest, 2006, 66–67.
[43] MEZEY, B.: op.cit. 21.
[44] SEIBERT, J.: A keresztény művészet lexikona, Corvina Kiadó, Budapest, 1986, 72.

numerous of domestic animals and, secondly, because "in the Middle Ages, they roamed the streets of villages and towns as freely as dogs do today in the streets of villages. And the patronage of St. Anthony of Padua made them practically immune."[45]

The following are specific examples that illustrate the general practices against pigs. We know that the first documented trial of this type dates back to 1266, from Fontenay-aux-Roses.[46] The following cases are described more fully in Appendix H of Evans' book.

In 1394, in the parish of Roumaygne, a pig was found guilty of the violent death of a baptised child, for which the pig was condemned to be hanged by executioner Jehan Petit. The execution was carried out in due course, in accordance with the strictures of the time. We know this from the fee slip issued to the executioner.[47]

In 1386, in Falais, Normandy, a sow that had attacked a child was tried and condemned after the child's death. An interesting feature of the execution was that, for killing the infant, the pig was dressed in human clothes before being executed. The hangman carried out the hanging with gloved hands to indicate that he was only the executioner, and thus not guilty of the animal's death.[48] This event was also depicted in a fresco in the Church of the Holy Trinity in Falais, showing the moment of execution, but unfortunately, this was erased in 1820 by "uninitiated hands." The fresco has survived, however, in the form of an engraving which appears on the first pages of Evans' book.[49]

On 5 September 1379, two herds of pigs were grazing together on the outskirts of the village of Saint-Marcel le-Jeuny. Three pigs, however, attacked Perri not Muet, the young son of the owner of one herd, who was trampled and battered so severely that he died of his injuries before his father could save him. "The court sentenced to death not only the three attacking pigs but also the other pigs in the herd who aided and abetted the brawl with their loud growling. The execution was eventually cancelled because the herd owner, on behalf of the pigs, appealed to Philip, Duke of Burgundy, for clemency."[50] The document granting the request has survived.[51] The three pigs who had committed the murder were eventually convicted and executed, but before that, they were mutilated as they had done to the victim, following the principle of mirroring the crime.

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[45] OSZTERN, S-P.: op.cit. 329.
[46] COHEN, E.: op.cit. 20.
[47] EVANS, E-P.: op.cit. 78.
[48] GIRGEN, J.: op.cit. 98.
[49] OSZTERN, S-P.: op.cit. 332.
[50] BELIZNAI, K.: op.cit. 36.
[51] *See* for more detail, EVANS, E-P.: op.cit. 343.

A pig was hanged at Mordaigne in 1394. "The executed animal was accused of having committed sacrilege on the sacred host [eucharist wafer, sacramental bread],"[52] by simply eating it.

"A pig was found worthy of death because it did not kill the boy it had attacked, but bit off his ear and then ate the piece—and all this happened on a Friday!"[53] Breaking the fast (*jejunium sextae*) ordered by the Church was invoked by the prosecution as an aggravating circumstance against the pig.[54]

Equally, it was not unusual for an animal accused of a capital crime to be sentenced to be burned alive for similar offences. Evans notes that this method of executing guilty animals was most common in the relatively enlightened 17th century ("an age of comparative enlightenment"), probably due to the proliferation of witch-hunts. Even in the same century, it was not uncommon for an animal so accused to be buried alive as a conviction.[55]

3.1.2. Hybrid trials from Switzerland

As already mentioned, there was also a specific type of trial for predominantly domesticated animals, which were held accountable in secular courts for behaviour considered supernatural, alien to their nature. This new type, which borrowed certain elements of the ecclesiastical trials, was invented in Switzerland, where people were fearful of witchcraft, and animals were brought to trial to be cleansed of their sins.

Here mention should be made of a case where an animal was brought before a secular court for committing an evil act. In 1474 an egg was found in the cage of a rooster in Basel.[56] The inhabitants of the city believed that the rooster had laid the egg, which was considered a diabolical sin because such an egg could be used by the witches in charge to create a basilisk according to the belief of the time. The rooster was considered to have made a pact with the devil. The defence tried to prove that, although the rooster's egg could have been used for black magic practices, the laying of the egg was instinctive and therefore not intentional, especially as it was not used for evil purposes; therefore, no punishment was necessary. After deliberation, the court found the rooster guilty of the "heinous and unnatural crime of egg-laying", as egg-laying and hatching itself was a punishable demonic act. The rooster was eventually burnt at the stake.[57]

[52] OSZTERN, S-P.: op.cit. 330.
[53] MEZEY, B.: op.cit. 25.
[54] EVANS, E-P.: op.cit. 157.
[55] *Idem.* 138–139.
[56] GIRGEN, J.: op.cit. 114.
[57] CARSON, H-L.: op.cit. 411.

3.2. Judgements of the ecclesiastical courts

Throughout history, entire groups of pests have been named as culprits. We know of lawsuits against moles, mice, rats, snakes, birds, snails, swallows, worms, locusts, caterpillars, termites, various species of beetles and flies, as well as other unspecified insects.[58] Even seemingly harmless species such as eels and dolphins have been targeted.[59] Since these animals were not under human control, it was necessary for the Church to intervene, exercising its supernatural functions in this case, to force them to leave any place that was a food source for humans.

The typical ecclesiastical procedure was roughly as follows: First, the victims made a complaint to the ecclesiastical tribunal, then the judge sent someone to investigate the extent of the alleged damage. The court always ordered public processions and prayers to appease the wrath of the heavens before the trial began.[60] If the prayers produced no result, the court would order all the groups of animals that had caused the damage to appear before the court and would appoint public defenders to represent the defendants.[61]

The lawyers appointed *ex offo* to defend the animals have taken their job very seriously, investing a lot of time, knowledge, and legal expertise into defending their clients. The defence relied mainly on three strategies: First, they used delaying tactics (raising various objections) to avoid a trial. Once the trial was underway, they could claim that the court had no jurisdiction over the animals. If this did not work, they tried to justify their clients' actions.[62] Condemned animals could be cursed (*anathema*) by the court under universal canon law if the sentence was not carried out, or they could be excluded from the bosom of the Church, condemning them to eternal damnation (when, according to many medieval philosophers, they could not go to heaven anyway).[63]

One of the most famous ecclesiastical trials against animals, a *non plus ultra* in this category, is the case of the rats of Autun. Bartholomew Chassenee (later a member of the *Parlement de Provence*, the supreme court of Provence) was the court-appointed defence counsel. In 1522, the rats from Autun were accused of destroying the barley harvest in the province. To justify his failure to bring the defendants before the court at the first summon, Chassenee first argued that they lived in several different localities, so a single summon was not apt to notify all the defendants. The court sustained the objection and issued a second summons in all the parishes

[58] GIRGEN, J.: op.cit. 101.
[59] *Ibidem.*
[60] COHEN, E.: op.cit. 14.
[61] SYKES, K.: Human Drama, Animal Trials: What The Medieval Animal Trials Can Teach Us About Justice For Animals. *Animal Law Review, 2011/17(2),* 273–311, 282–283.
[62] GIRGEN, J.: op.cit. 101.
[63] COHEN, E.: op.cit. 13.

inhabited by rats. When the rats failed to appear after the second summons, Chassenee explained that his clients' disobedience was now due to the length and difficulty of the journey; he also argued that the rats' fear of the cats they might encounter during the journey prevented them from fulfilling their obligation to appear.[64] Chassenee requested that all cats in the city be closed while the lawsuit was pending, of course, for the safety of his clients. The court adjourned the case because it was not possible to round up all the cats to allow the rats to report to the court. Chassenee won the case, his clients were not held liable. Bartholomew Chassenee is also the author of a guidebook on animal trials. "*Tractatus...de excommunicatione animalum*" served as a theoretical and practical guide for future jurists who would face such trials.[65]

The significance of this case lies in the fact that, during the persecution of the Waldensians in 1570, the heretics' lawyers managed to use Chassenee's argument in the above case as a precedent (the presence of heretics at the trial would have put their lives in danger), to save human lives. Interestingly, Chassenee was the judge who presided over the panel before which the Waldensian case was brought.[66]

In 1519, the municipality of Stelvio in Italy brought a lawsuit against a group of local moles that had damaged some plants while digging. The court designated an area for the moles to settle away from the municipality. When the moles failed to relocate voluntarily, the judge granted an additional fourteen-day reprieve for all defendants who were young or pregnant.[67]

In Germany, at an unknown date and place, the church cursed swallows because they lived on the roof of the church and would have their droppings landing on the heads of the believers at every service. Swallows were forbidden to enter the church under the curse of the Bishop of Trier, whose garment had been stained by the birds' excrement.[68]

In 1713, termites ravaged a monastery in Maranhao, Brazil. Not only did they eat the crops, but they also damaged the furniture. Their defender argued at the trial that termites are God's creatures, just like humans, and therefore cannot be harmed. The court was unable to challenge this argument on the merits and therefore only issued a warning to the termites, prescribing only that they refrain from harmful conduct.[69]

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[64] EVANS, E-P.: op.cit. 140.
[65] *See* for more detail, OSZTERN, S-P.: op.cit. 336.
[66] OSZTERN, S-P.: op.cit. 334.
[67] EVANS, E-P.: op.cit. 111–112.
[68] GIRGEN, J.: op.cit. 103.
[69] *Idem.* 100–101.

3.3. Bestiality

For sodomy "the criminal courts condemned the animal and the person [...] together. In the third book of Moses, it is written that '[i]f a man lies with an animal, he shall surely be put to death, and you shall kill the animal.' This legal regulation was also adopted by medieval states. A similar provision was contained in the *Constitutio Criminalis Carolina* of 1532, which stated that if a person sodomised an animal, the person who committed sodomy and the animal were to be burnt at the stake together. The Prussian *Allgemeines Landrecht* of 1794 also referred to this offence: a person who committed sodomy was sentenced to one or two years in the workhouse, after which the animal was burned together with the offender."[70] However, according to Cohen, the prevailing legal view at the time was that animals were merely innocent participants in these crimes, but whose destruction was necessary to remove the traces of the sin of promiscuity.[71]

There was another legal position in the Middle Ages, mentioned by Osztern and Mezey. "The medieval jurists never ceased to argue about whether or not cohabitation of a Christian man with a Jewish woman (*cum cognovit eam*) or vice versa should be classified as sodomy. The legal opinion of a very distinguished old jurist, Damhouder, was that such a 'sexual act' was indeed sodomy. He added that the same was true of Turks and Saracens. Such persons are, 'as it were, no different from animals, both in law and in our sacred faith.'"[72] According to this statement, animals are also guilty of this crime. A similar phenomenon is described by the Romanian romologist Petre Petcuţ, based on his extensive research in Romanian archives. He states that rape committed by a slave (this category included all Romani people in the Romanian principalities, the Danubian Principalities being slave states) was punishable by burning, that is, the same punishment as zoophilia. The latter, being of biblical origin, predated the institution of slavery; however, the punishment was mirrored and applied to the Romani.[73]

4. Explanations of the phenomenon

The purpose of this chapter, in light of the material presented in this paper, is to attempt to uncover the causes of animal trials. Only by presenting and analysing the various hypotheses can a complex picture and a viable explanation of the

[70] BELIZNAI, K.: op.cit. 38.
[71] COHEN, E.: op.cit. 18.
[72] OSZTERN, S-P.: op.cit. 332.
[73] PETCUŢ, P.: *Rromii. Scavie si libertate: construirea şi emanciparea unei noi categorii etnice şi sociale la nord de Dunăre,* Centrul National de Cultura a Romilor, Bucureşti, 2016, 71–72.

phenomenon be upheld. Over time, many theories have been developed to understand this historical anomaly, the most important of which are presented here.

According to Cohen, 19th century scholars attempted to understand this historical phenomenon through a cultural positivist approach.[74] They interpreted animal trials as the products of a more primitive society, a kind of residue, sediment left behind by a superstitious past. This was also the mistake made by Osztern and Evans. Osztern saw the key to understanding the phenomenon in animism, in the naïve anthropomorphisation of animals,[75] in the tendency of the man of the past to confuse humans with animals, attributing reason to the latter.

The theory of animal personification,[76] invented in 1871, is a theory close to this. Among other things, this reason appears in Mezey's work as a major factor in the development of these trials. This concept presupposes the endowment of the animal with human qualities, the product of which, according to him, is the fable,[77] but also the cult of animals as a religion in the New Kingdom of Egypt.[78] This seems to be confirmed by the fact that these trials were carried out with strict observance of procedural formalities (as if the culprits were human), but also by the fact that animals were often dressed in human clothing at the time of their execution and allowed to confess and receive the remission of sins that this entailed.

A common argument in academic literature is that these trials are a symptom of social crisis. The reason for this, in the opinion of the author, is that these symptoms would fit well with the general crisis of the late Middle Ages, for example, the Little Ice Age leading to the decline of agricultural production, the great plague of 1348, and the mass of flagellants and religious fanatics, because belief in eschatological doctrines, the growing millenarianism, and the announcement of the imminent Last Judgement would have provided fertile ground for such trials. This hypothesis is, in the author's opinion, anachronistic because it does not explain the link between witch trials and animal trials. Both phenomena reached their peak between the 16th and 18th centuries; therefore, their heyday was after the crisis at the end of the Middle Ages.[79]

According to a teleological interpretation, animal trials can be conceived as a historical category, a *causa sui*, that is, as a self-generating phenomenon. This hypothesis seems to be supported by the fact that already the second trial mentioned in the historical sources is interpreted by a contemporary author as a good livelihood for both the lawyers (who received a fee, as they were appointed *ex officio*) and the

[74] COHEN, E.: op.cit. 16.
[75] OSZTERN, S-P.: op.cit. 322.
[76] COHEN, E.: op.cit. 30.
[77] MEZEY, B.: op.cit. 39.
[78] KÁKOSY, L.: *Az ókori Egyiptom története és kultúrája,* Osiris Kiadó, Budapest, 1998, 333–339.
[79] DINZELBACHER, P.: op.cit. 412.

executioners.[80] According to this hypothesis, the first such trials would have stood as the basis of the subsequent trials, due to the phenomenon of historical *mimesis*.

One must concede that an important reason for the emergence of this phenomenon would have been the need to satisfy the desire for revenge against an animal that has committed an offence or an act of harm. Repressive measures were a legitimate expectation in the victim's imagination,[81] even if revenge could only be fulfilled in such a formal way. Mezey adds that, at first, justice was guided by the principle of responsibility for consequences, or, to put it another way, absolute and strict liability,[82] without considering whether a harmful act could be classified as a specific offence under the law and whether the act had been committed with moral agency and the form of culpability necessary for the crime to exist. Thus, *lex talionis* was enforced by punishing animals without discrimination.

Cohen also points out that it was an axiom in the Middle Ages and early modern Europe that God subordinated everything to man at the moment of creation, which is why in the belief of the man of the age he appeared as the mortal being at the apex of the universal hierarchy.[83] Since Darwin's theory of evolution, this belief has been overturned, the past of animals and humans have been merged due to the discovery of a common ancestor.

In many places, the ecclesiastical trial appears with an apotropaic purpose, the ancient technique of breaking curses and casting out demons in the Christian materialised in the incantations and rigid formalities of the procedure, where mispronunciation of certain formulas could even lead to the loss of the trial. The calming effect of such trials is undeniable.[84]

Dinzelbacher lists a total of six reasons for the formation of animal trials: insecurity arising from epidemics, economic crises, and social conflicts; the emergence of Roman law and judicial procedure in late medieval society; the religious subordination of all beings to ecclesiastical authority; the comfort derived from legal formalism and the ritualistic "magic" of state law enforcement; the interest of lawyers in pursuing a profitable and lucrative practice; and the tendency to personify animals in extreme situations.[85] This is not to say that other immediate and substantive conditions cannot be found in the emergence of the phenomenon, but these factors are an important step in overcoming the perception that animal trials have been nothing more than a mystical curiosity in legal history.[86]

[80] *Idem*. 421.
[81] MEZEY, B.: op.cit. 20–21.
[82] *Idem*. 25.
[83] COHEN, E.: op.cit. 30. and SAUNDERS, N-J.: op.cit. 16.
[84] DINZELBACHER, P.: op.cit. 412.
[85] *Idem*. 421.
[86] *Ibidem*.

Cohen ultimately concludes that animal trials were part of the system of universal justice, a general truth in the imagination of the time. Popular anthropomorphism and scholarly ideas of justice met in this type of trial. Animal trials defined man's relationship with the animal kingdom based on jurisprudence. At the same time, they reinforced the image of society as a just society. Finally, ecclesiastical trials established a community ritual of cleansing the environment of hostile forces.[87]

Cohen argued that the medieval and early modern intellectuals did not consider lawsuits against animals to be just. He cites as an example the fact that St. Thomas Aquinas condemned animal trials in his *Summa Theologia* but did not exclude the possibility that they might be justified in some cases. Descartes later described animals as "*automatons*", that is, instinctual beings who are therefore incapable of sinning.[88]

5. Conclusion

The legal sanctioning of animals seems to be a negative axiom[89] for today's society, but, as it has been shown, this has not always been the case throughout history. Although one might think that animals are no longer punished for their actions, this is still a recurrent phenomenon today.[90] The concealment of this historical phenomenon only allows the continuation of the inhumane practices to which some animals are subjected in some modern societies.

In this paper, the author has sought to point out that the phenomenon is not negligible from the point of view of modern man. Although these trials in many cases seem absurd or even amusing, they are not irrelevant. They reveal a lot about the nature of man (contemporary or not) in general and about the tendencies of animal personification. Animal trials are a worthy research topic for historians and deserve the attention of the public.

Fortunately, the focus is now on animal welfare, a paradigm shift that has been driven primarily by Darwin's theory of evolution. As the paper shows, medieval thought sometimes treated animals as humans, and sometimes even formally condemned them for their actions through legal fiction. The Age of Enlightenment both put an end to this practice unworthy of the modern era and implemented more firmly the idea of the superiority of human beings over the surrounding living creatures. We owe the end of this blind, poisonous, and callous anthropocentrism

[87] COHEN, E.: op.cit. 37.
[88] *Idem.* 6–37.
[89] OSZTERN, S-P.: op.cit. 321.
[90] GIRGEN, J.: op.cit. 122–129. and SYKES, K.: op.cit. 302–307. and HUMPHREY, N.: Bugs and Beasts Before the Law, In: HUMPHREY, N. (coord.): *The Mind Made Flesh: Essays from the Frontiers of Psychology and Evolution*, Oxford University Press, London, 2002, 235–254.

towards animals to Darwin's discovery. Since then, human beings have rightly been regarded as the only representative species of the kingdom of *Animalia* This progressive view of history shows that "[i]n the 21st century, it is high time to reflect on a catalogue of animal rights."[91]

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[91] MEZEY, B.: op.cit. 39.

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KŐRÖSY PÉTER KRISZTIÁN*

The Bős-Nagymaros Dam system conflict

Abstract: The present study aims to present the history of the Bős-Nagymaros Dam system, the agreement between the two countries (Czechoslovakia and Hungary), the stopping of the construction of the barrage system and the decision of the International Court of Justice. Overall, the study analyzes the controversies surrounding the Bős-Nagymaros Dam system and the legal aspects of the conflict.
Keywords: barrage, barrage system, Bős-Nagymaros, Bős-Nagymaros Dam system

Absztrakt: Jelen tanulmány célja, hogy bemutassa a Bős-nagymarosi Vízlépcsőrendszer történetét, az erről szóló, két ország (Csehszlovákia és Magyarország) közötti megállapodást, a gátrendszer építésének és leállításának körülményeit, valamint a Nemzetközi Bíróság döntését. Összességében a tanulmány a Bős-nagymarosi gátrendszer körüli vitákat és a konfliktus jogi vonatkozásait elemzi.
Kulcsszavak: vízlépcső, vízlépcsőrendszer, Bős-Nagymaros, Bős-nagymarosi vízlépcsőrendszer

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1. Introduction

With the onset of the oil crisis in 1973 both Hungary and Czechoslovakia tried to replace oil with other energy sources. This is when the idea of building the Bős-Nagymaros barrage system was raised again after the 1950s (the possibility of building a water pipeline system had already been raised during the dissolution of the Austro-Hungarian Empire and later during the Horthy era), to be used for the development of electricity. In 1956 the common economic organisation of the socialist countries (Comecon) took a decision to use the Danube section from Bratislava to the Black Sea for energy purposes, establishing a hydroelectric powerplant.[1]

In 1963 a concept for the construction of the barrage system began in cooperation with Czechoslovakia and Hungary and was later agreed on in 1973. By

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[1] BORBÁTH P.: *Mi a bős-nagymarosi vízlépcső igaz története?* (Online climate magazine.) https://xforest.hu/bos-nagymarosi-vizlepcso/ (Date of download: 20.11.2023.)

then, however, the programme was no longer just about the Danube-Kiliti diversion and the Bős hydroelectric power station, but also about a reservoir stretching all the way to Bratislava and the need to dam the Danube in Hungary, which is then returned to the Hungarian side at Szap. Also, a barrage system should be built at Nagymaros to regulate and re-inject the water released from the Kiliti reservoir of the Danube.[2] Although the construction of the Nagymaros barrage system started in 1977, due to concerns about environmental issues, the Government of Hungary stopped the process in 1989 on the Hungarian side while the Czechoslovak government decided to continue the construction on the other side unilaterally.

"The story of the Bős-Nagymaros barrage system, and more specifically the prevention of its construction in Hungary, is closely linked to the heyday of Hungarian environmental and conservation activism. Scientists and amateur conservationists raised their voices against the project and eventually succeeded in blocking the construction of the Nagymaros water step." – writes Péter Borbáth.[3]

The present study does not aim to examine the Bős-Nagymaros waterway from a conservation and ecological point of view, but to explore the environmental aspects of the resulting environmental dispute between the two countries regarding the construction of the waterway system, focusing on its legal implications. In this context, it first describes the agreement between the two countries which led to the start of construction, and finally analyzes the circumstances of the stoppage of the dam construction and the judgment of the International Court of Justice.

2. The conclusion and termination of the interstate treaty between Hungary and Czechoslovakia

The construction of the Bős-Nagymaros barrage system began in 1977 with a Czechoslovak-Hungarian intergovernmental agreement (through state succession Slovakia became the country of interest in 1993).

As János Bruhács writes: *"The treaty[4] on the Bős-Nagymaros Dam system is based on the consideration that since the Danube is a border river between Hungary and Czechoslovakia, unilateral utilisation of hydropower is not possible, on the contrary: only joint utilisation is conceivable, because the territory of the other country must be used for the placement of the structures and during the construction works. Without consent, this is neither de facto nor de jure possible. Hence the need for a jointly owned and operated system (the technical details of which cannot be*

[2] BORBÁTH P.: i.m. (Online climate magazine.)
[3] BORBÁTH P.: i.m. (Online climate magazine.)
[4] Treaty between the Republic of Hungary and the Czechoslovak Republic on the implementation and operation of the Gabcikovo-nagymaros Dam System. http://www.bos-nagymaros.hu/tervek/eredeti/allamkoziszerzodes.htm (Date of download: 20.11.2023.)

dealt with in a legal work) and the stipulation that the parties share equally in the benefits and advantages.”[5]

It is important to note that the treaty established a special rule for the case of pollution from the barrage system: *“The Contracting Parties shall ensure that the implementation and operation of the barrage system does not lead to a deterioration of the water quality of the Danube by means of the solutions foreseen in the joint convention plan.”*[6] (first point of the 15th article). In addition, the treaty differs from other international treaties on the same subject, in that it makes specific provision for the protection of the natural environment: *“The contracting parties shall ensure that the nature conservation requirements arising from the implementation and operation of the barrage system are met by the solutions envisaged in the joint convention plan.”*[7]

However, after a thorough review of the treaty of 1977, I found that it did not adequately address the thorough environmental aspects of the Danube water resources and drinking water base. No provisions were made about Hungary’s drinking water base or the habitats and survival of aquatic and coastal animals and plant species in the bilateral treaty. There were no case studies made before the investment either.

Regarding the case, it is also important to note that around this time Hungary also signed the bilateral border water convention with Czechoslovakia about water management.[8]

As Gergely Nyilas states: *“The main argument against the barrage system was that the Szigetköz would be destroyed due to the small amount of water that would reach the original riverbed, while the section after the service water channel would be subject to large fluctuations with the power plant would be running at its peak.”*[9]

Because of civil environmental protests, Hungary stopped constructions on June 2nd, 1989, when the national assembly – due to the continued social pressure – approved the Government’s decree of suspending the construction on 13th May. Later that year in October 1989 the Government decided that Hungary will permanently stop constructions regarding the barrage system of Nagymaros, which

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[5] BRUHÁCS J.: *Nemzetközi vízjog: A nemzetközi folyóvizek nem hajózási célú hasznosításának joga.* Budapest, Akadémiai Kiadó, 1986. 147.
[6] BRUHÁCS J.: i.m. 147.
[7] BRUHÁCS J.: i.m. 144.
[8] Decree 55/1978. (XII. 10.) of the Council of Ministers on the Proclamation of the Convention between the Government of the Hungarian People's Republic and the Government of the Czechoslovak Socialist Republic on the Regulation of Water Management Issues of the Border Waters Signed in Budapest on 31 May 1976. https://net.jogtar.hu/jogszabaly?docid=97800055.mt (Date of download: 22.11.2023.)
[9] NYILAS G.: *Most jól jött volna Bős-Nagymaros.* https://index.hu/belfold/2013/06/14/jol_jott_volna_bos-nagymaros_az_ar_ellen/

was followed by another interstate treaty[10] about the continued construction of Dunakili.

As I mentioned above Czechoslovakia (Slovakia) opted to unilaterally complete the planned system of the barrage system and divert the Danube to its own territory (so-called "Option C"). Considering this the Hungarian parliament approved governmental decree 26/1991. (IV. 23.)[11] on Governmental Tasks about the Barrage System of Bős-Nagymaros which stated: *"Recognizing that the installation of the barrage system or any of its main facilities would lead to serious ecological and economic disadvantages in all areas concerned, the National Assembly requests the Government to negotiate with the Governments of the Czech and Slovak Federal Republic on the implementation and installation of the Gabcikovo (Bős)-Nagymaros Dam System regarding the treaty signed in Budapest on the 16th of September 1977, furthermore all other agreements which were entered into a contract by the Parties or their organisations to execute interstate treaties to terminate mutual agreements."* This decision formulated the need of a new interstate treaty which would include the restoration and maintenance of the region's ecological and natural values – foremost the preservation of drinking water bases – while also including the protection against floods and the development of navigation adapted to the natural conditions of the area.

The decision 12/1992. (IV. 4.)[12] connected to the treaty of 1977 made between the Hungarian People's Republic and the Czechoslovakian Socialist Republic on the construction and execution of the Bős-Nagymatos Dam system authorized the government to *"terminate the 1977 Interstate Treaty – and all agreements concluded by the Parties or their organs for the purpose of implementing the Interstate Treaty -, if the Government of the Czech and Slovak Federal Republic does not stop work contrary to the 1977 Interstate Treaty by 30 April 1992, since the continuation of such work would frustrate the initiation of joint investigations and call into question their meaning."*

Finally, the Government of Hungary terminated the contract for the implementation of the water stepping system with effect from 25 May 1992.

[10] RAPALI V.: *A bős-nagymarosi vízlépcső építésének felfüggesztése.* https://kronologia-archivum.retorki.hu/kronologia/a-nagymarosi-vizlepcso-epitesenek-felfuggesztese (Date of download: 22.11.2023.)

[11] Decision 26/1991. (IV. 23.) of the National Assembly on Governmental Tasks About the Bős-Nagymaros Dam system. https://mkogy.jogtar.hu/jogszabaly?docid=991H0026.OGY (Date of download: 22.11.2023.)

[12] Decision 12/1992. (IV. 4.) of the National Assembly on the Treaty of 1977 Between the Hungarian People's Republic and the Czechoslovak Socialist Republic on the Implementation and Operation of the Bős-Nagymaros Dam System. https://jogkodex.hu/doc/6299479 (Date of download: 26.11.2023.)

3. The role of the International Court of Justice in the case of Bős-Nagymaros

In 1993 the dispute between the two countries over the construction of the water pipeline was finally referred to the International Court of Justice. The Court – following the argument of the Hungarian side – was confronted for the first time with a consistently constructed international environmental law argument in the case of Bős-Nagymaros.[13] As János Ede Szilágyi writes: *"In the debate – grossly simplified – the Parties tried to explain their reasonings through the principles of a pacta sunt servanda (Slovakia; the 'treaties must be respected') and clausula rebus sic stantibus (Hungary; the 'a significant change in circumstances')."*[14]

At the International Court of Justice Hungary referred firstly to environmental and ecological problems, and secondly to the second paragraph of the third article of the bilateral convention between the Government of the Hungarian People's Republic and the Government of the Czechoslovak Socialist Republic on the regulation of water management in border waters, according to which *"The Contracting Parties shall, unless otherwise agreed, be entitled to half of the natural water volume flowing through the border waters, that has not been increased by technical intervention."*[15]

Every state has certain rights and interests in their natural resources to use and utilise them. Those rights and interests are, however, limited in so far as they do not prejudice the interests of other states.[16]

However, the reference and argumentation of Hungary to the provisions of the bilateral convention on boundary waters was not taken into account by the International Court of Justice in the proceedings. The Court declared its verdict in 1997 which stated that Hungary unlawfully terminated and cancelled the treaty of 1977, but at the same time did not oblige Hungary to build the Nagymarosi section of the barrage system while also declaring that Slovakia unlawfully put the powerplant of Bős into service.

In the case of the Bős-Nagymaros Dam system the Court did not determine the liability of damages but found that the two litigants had committed a mutual

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[13] RAISZ A.: A környezetvédelem helye a nemzetközi jog rendszerében – avagy nemzetközi környezetjog bírói szemmel. *Miskolci Jogi Szemle: A Miskolci Egyetem Állam- és Jogtudományi Karának Folyóirata*, 2011/1, 99.

[14] SZILÁGYI J. E.: *Vízjog: Aktuális kihívások a vizek jogi szabályozásában.* University of Miskolc, Miskolc, 2013. 106.

[15] Decree 55/1978. (XII. 10.) of the Council of Ministers on the Proclamation of the Convention between the Government of the Hungarian People's Republic and the Government of the Czechoslovak Socialist Republic on the Regulation of Water Management Issues of the Border Waters Signed in Budapest on 31 May 1976. https://net.jogtar.hu/jogszabaly?docid=97800055.mt (Date of download: 22.11.2023.)

[16] ECKSTEIN G.: Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute Over GabcikovoNagymaros. *Suffolk Transnational Law Review*, 1995/19, 67. https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1246&context=facscholar (Date of download: 30.11.2023.)

infringement.[17] As Szilágyi states: *"In addition the judgment referred many issues to the parties' future cooperation, including the precise amount of water to be returned to the Danube's original bed. Following the judgment negotiations between the two countries started, but the final settlement of outstanding issues has been delayed repeatedly."*[18]

The case continued in 2000 after the Constitutional Court rejected a submission submitted by a member of Parliament, which would have wanted to oblige the Parliament and the Government to successfully close the case of Bős-Nagymaros.[19] *"The petitioner - at the time of filing his petition as a Member of Parliament, pursuant to Section 1 (c) and (e), Section 21 (3) (a) and Section 21 (4) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the Abtv.) - requested a declaration of unconstitutionality by omission. In its view, the applicant infringes the legislative obligation deriving from Articles 18 and 70/D of the Constitution and the obligation to adopt the necessary measures under a number of international treaties, including the Convention on Biological Diversity (Convention on Biological Diversity), as well as the provisions of Act LXXXI of 1995 on the ratification of the Convention on Biological Diversity (Convention on Biological Diversity). and the judgment of the International Court of Justice in on this matter, that the irreversible damage caused to the fauna and flora of the Szigetköz in the course of the construction of the Bős-Nagymaros Dam System has not been remedied by the Parliament and the Government through appropriate legislation."*[20] The decision of the Constitutional Court, while acknowledging that *"the National Assembly and the Government have committed an unconstitutional omission by failing to legislate to remedy the unsustainable situation which has developed and persisted in the Szigetköz since the Danube was dammed at Dunacsúny in October 1992, endangering wildlife and biodiversity, despite their obligations under the Constitution and international treaties"*[21], it denied that the Government had committed an unconstitutional legislative omission by not implementing the judgment of the International Court of Justice in the dispute over the construction of the Bős-Nagymaros Dam system, and also refused to order the Parliament or the Government to initiate new international court proceedings in relation to the dispute over the barrage system.

In 2011 the Parliamentary Commissioner for Future Generations (hereinafter: PCFG) has also dealt with the case – referring to the judgment of the International Court of Justice – stated that the Parties should endeavour to comply with the precautionary principle within its framework. According to him, considering the ecological viewpoints Hungary has the right to return all the water it needs to the

[17] LAMM V.: *A környezeti károkért való felelősség a nemzetközi jogban (Doktori értekezés)*. Széchenyi István University, Győr, 2012. 268.
[18] SZILÁGYI J. E.: i.m. 106.
[19] Decision 988/E/2000. of the Consitutional Court on Decision Rejecting the Application for a Declaration of Unconstitutionality by Omission. (Jogkódex) https://jogkodex.hu/doc/2882416 (Date of download: 30.11.2023.)
[20] Jogkódex: i.m. (Decision 988/E/2000. of the Constitutional Court.)
[21] Jogkódex: i.m. (Decision 988/E/2000. of the Constitutional Court.)

original Danube basin while also relinquishing its share of the production of electricity in Bős. The PCFG has also raised the prospect of a new case before the International Court of Justice, which it believes would be more favourable to settlement efforts than the current ruling.[22]

Of course, it is questionable how much a new court ruling would benefit future generations in terms of saving the wildlife of or hydropower production. In the case of Bős-Nagymaros, the International Court of Justice did not make full use of the principles and possibilities open to it for the application of international environmental law.[23] This was attributed by many to the fact that, although the development of international environmental law had gained momentum by the 1990s, the number of binding legal standards at international level was still very low.[24] As Anikó Raisz writes: *"In today's circumstances it is likely that the Court of Justice would rule in Hungary's favour, citing the precautionary principle[25] in addition to the principle of sustainable development, which is a principle that is based on international environmental arguments, and which the Court did not even elaborate in the judgment (only mentioned it)."*[26]

4. Closing Statements

Based on our current knowledge it would be difficult to predict the final outcome of the case pf the Bős-Nagymaros Dam system. A few years ago, however, the Hungarian and Slovakian Governments decided to continue the negotiations. In July 2017, the Slovak government asked the International Court of Justice to withdraw its application, to which the Hungarian government agreed. This is the current situation.[27]

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[22] Resolution of the Parliamentary Commissioner for Future Generations on the Development Policy of the Danube Valley and the Preservation of Ecosystem Services and Benefits. (Ügyszám: JNO-30-81/2011). https://www.jno.hu/hu/?&menu=allasfog&doc=af-jno-30-2011 (Date of download: 20.12.2023.)

[23] RAISZ A.: Magyarország felszín alatti vizei a nemzetközi jog újabb megközelítésében – Kincs, ami nincs? In: Raisz A. (ed.): *A nemzetközi környezetjog aktuális kihívásai*. University of Miskolc, Miskolc, 2012. 164.

[24] RAISZ A.: Nemzetközi környezetjogi alapelvek a gyakorlatban. In: Szalma J. (ed.): *A Magyar Tudomány Napja a Délvidéken 2014*. Újvidék: Vajdasági Magyar Tudományos Társaság, 2015. 263-264.

[25] The precautionary principle is an approach to risk management, where, if it is possible that a given policy or action might cause harm to the public or the environment and if there is still no scientific agreement on the issue, the policy or action in question should not be carried out. However, the policy or action may be reviewed when more scientific information becomes available. The principle is set out in Article 191 of the Treaty on the Functioning of the European Union (TFEU). https://eur-lex.europa.eu/EN/legal-content/glossary/precautionary-principle.html (Date of download: 30.12.2023.)

[26] RAISZ A. (2015): i.m. 263-264.

[27] RAISZ A. – SZILÁGYI J. E.: Cross border issues of the Hungarian water resources. *Rivista Quadrimestrale di Diritto dell'Ambiente*, 2017/7, (1). 93.

The legal significance of the case is that, as I mentioned above and as several studies have pointed out, the International Court of Justice was confronted for the first time with a systematic, coherently structured international environmental law argument in the case of Bős-Nagymaros.

Hungary's capacity to harness hydropower, a carbon-free renewable energy source, is very modest, due to the unresolved legal dispute over the Bős-Nagymaros barrage system. Given that we are a sub-water country and that the vast majority - around 90% - of the water on our territory comes from outside our borders, this case also highlights the need to further develop our bilateral water agreements.

The political significance of the case is also undeniable, as the socialist state-party could not deal with the environmental and nature conservation movement in the years before the regime change, so this also opened the way for democratic processes. Today, of course, it is still questionable whether the government would give up its environmentally friendly stance in favour of the original construction of the Bős-Nagymaros Dam system or the creation of a new hydroelectric power station in order to exploit hydropower and make economic profits.

The National Assembly adopted – by its decision 62/2022. (XII. 9.) – the 5th National Environmental Protection Programme (NEP)[28] until 2026, which – like the previous NEP programmes – also includes the remedy of the ecological problem of the Szigetköz. "*The construction of the Szigetköz recharge system on the salvage side and in the floodplain was justified by the groundwater level subsidence caused by the diversion of the Danube and the regional water shortage problems resulting from the drying out of the basins. The ecological problems (adverse changes in the living conditions of aquatic fauna), economic and landscape problems caused by water scarcity can only be solved by the full implementation of the water compensation system.*"[29] The Government of Hungary will provide funding for the operation of the Szigetköz environmental monitoring system from 2018.[30]

Even today there is worldwide opposition to the construction of hydropower plants because of their negative impacts on water and land. It is therefore clear that renewable energy sources (hydro, solar, wind) have their advantages and disadvantages. Of these, I prefer direct thermal and photovoltaic use of solar energy.

[28] National Environmental Programme (NEP). Ministry of Technology and Industry, 2022. https://njt.hu/document/e2/e2b4EJR_570563-2X08424.pdf (Date of download: 30.12.2023.)
[29] NEP: i.m. 92.
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Protection of environmental rights under Article 8 of the ECHR – example of Croatia

Abstract: Croatia ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as: Convention) back in 1997. Twenty-five years that have passed since than have seen a firm establishment of the Convention and the European Court of Human Rights (hereinafter referred to as: Court) as a guardian of human rights in many fields of life in Croatia. Given that the environmental harms are not explicitly mentioned in any of the articles of the Convention, its protection through the Court's system has developed based on jurisprudence. The existing jurisprudence concerning Croatia confirms this well-established and scientifically attested pattern. Over the course of the years, there have been quite a few decisions which the Court rendered against Croatia under Article 8 of the Convention and which are in substance concerned with environmental harms. They concern different aspects of interaction between environment and human rights. The cases involving Croatia which dealt with the issues of environmental harms under Article 8 and will be used in this article are cases Oluić, Udovičić, Jakšić, Turković and others, Tolić and others, Turković. Case Tolić and others thus concerns access to clean and healthy drinking water, case Oluić pollution from excessive noise, case Turković and others alleged pollution from the waste disposal site, while cases Udovičić and Jakšić provide additional examples of Court dealing with violation of claimant's rights under Article 8 due to excessive noises. Based on short analysis of each of them, the article aims to show how Croatia can provide a good example of the Court's dynamic interpretation of Article 8 as providing remedy for ecological harms. At the same time, the aforementioned cases show how Croatian national authorities, courts and administrative bodies equally, often failed to recognize environmental harms as those which can violate different categories of rights of citizens, including basic human rights.
Keywords: European Court of Human Rights, European Convention on Human Rights, Article 8, environmental rights, Croatia

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1. Introduction

It is well-know that, as a relatively old human rights instrument, the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as European Convention on Human Rights, hereinafter: Convention) contains no

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reference to environmental protection or protection of environmental rights. Therefore, the only way to protect the environment and peoples from human rights violations stemming from the environment-related causes was to interpret provisions contained in the Convention in a manner that would allow for subsuming environment related cases.

This was eventually achieved through so-called, dynamic interpretation of the Convention.[1] It appeared early in the practice of the European Court of Human Rights (hereinafter: Court) and (then-extant) European Commission of Human Rights[2], far before the former socialist states became members of the Council of Europe, parties to the Convention and, subsequently, fell under the jurisdiction of the Court. Established during the 1970s and 1980s with regard to other aspects of Court's jurisprudence,[3] beginning in the 1990s, dynamic interpretation of Article 8 of the Convention, began to be applied in environmental cases.[4]

As it is widely known, very first "environmental" cases under Article 8 involved alleged violations due to excessive noises coming from Heathrow airport (case Powell and Rayner v. the United Kingdom).[5] Noise pollution, as it will be shown in this paper, later became an area in which some of the first judgments in

[1] On the dynamic interpretation of the convention see, for instance: MOWBRAY, A.: The Creativity of the European Court of Human Rights. *Human Rights Law Review*, 2005/5(1), 57-79.

[2] The European Commission of Human Rights, created concurrently with the Court, was a body tasked with filtering individual applications and deciding which were to be submitted to the Court for eventual deliberation. It was abolished in 1998 when the Protocol no. 11 to the Convention came into force, with individual applications being allowed to proceed directly to the Court. See, generally: Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, *European Treaty Series*, no. 155, Council of Europe, Strasbourg, 1994, especially pp. 3-10. As the Court itself noted, after Protocol no. 11 came into force, "Thus, individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention." (judgement Mamatkulov and Askarov v. Turkey, paragraph 122).

[3] See, for example, judgment Tyrer v. the United Kingdom, in which the Court, back in 1978, delivering a judgment based on the Article 3 of the Convention (prohibition of torture or other inhuman or degrading treatment or punishment) expressly stated that "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions." (paragraph 31 of the judgement).

[4] Thus, the Manual on Human Rights and the Environment of the Council of Europe is able to point out that "As environmental concerns have become more important nationally and internationally since 1950, the case law of the Court has increasingly reflected the idea that human rights law and environmental law are mutually reinforcing." See: Manual on Human Rights and the Environment, 3rd Edition, Council of Europe, Strasbourg, 2022, p. 19.

[5] The case Powell and Rayner v. the United Kingdom involved applicants living near the Heathrow Airport, complaining about the noises from the airport. The Court examined their application under Article 8 of the Convention. In its judgment, the Court established that "In each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport" (paragraph 40 of the judgement).

environmental cases concerning Croatia were decided. Indeed, to frame such cases under a human rights framework and decide cases which have direct application in domestic legal systems, while not a novelty for European Court at a time first Croatian cases were dealt with, was a novelty in the Croatian legal system at the time. In that sense, Croatia, similarly to other states that joined the Council of Europe during the 1990s,[6] found itself within a new system of international jurisprudence to which many domestic lawyers had to adapt their understandings of judicial reasoning acquired so far.[7]

This article will thus first very briefly resolve on the nature and scope of environmental rights under article 8 of the Convention. Next, it will proceed with the review of cases that could be considered as falling into the category of "environmental" and were so far decided by the Court under article 8 against Croatia. After brief outlining of the facts of every case, the case will be positioned in the wider context of Court's jurisprudence. Finally, conclusions will be given.

2. Nature and Scope of Environmental Rights under Article 8 of the Convention

Rights contained in Article 8 of the Convention are an example of so-called qualified rights, those in realization of which a state can interfere, under specific circumstances and provided that such an interference is based on law and connected to specific societal goals which are in accordance with the Convention.[8] While this,

[6] Croatia formally joined the Council of Europe on the 6th November 1996, becoming the organization's 40th member state. On the process, see: PETRIČEVIĆ GOLOJUH, D.: *Hrvatska i Vijeće Europe: trnoviti put*. Ministarstvo vanjskih i europskih poslova Republike Hrvatske: Zagreb, 2018, especially 86 *et seq*. The same day, Croatia signed the Convention. Signing was followed by ratification and the Convention entered into force for Croatia on the 5th of November 1997. See: OMEJEC, J.: *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava: Strasburški aquis*. Novi informator: Zagreb, 2013, 34.

[7] As late judge Conforti, speaking to the Croatian audience back in 1999, rightly pointed out: "First of all, national officials and judges often do not even know about the Convention and even less about the Strasbourg case-law. Secondly, even if the Convention is known, and even if it should prevail over the ordinary laws, national officials and judges are reluctant to apply it when national law clearly goes in a different direction. This is because they are trained to deal with national law and the national law is what they normally apply. In other words, it is difficult to detach them from the direct relation with their own legal order." (see: CONFORTI, B.: The implementation of the European Convention on Human Rights in Member States. In: BAKOTIĆ, B. (ed.), *Pojedinac pred Europskim sudom za ljudska prava*. Pravni fakultet Sveučilišta u Zagrebu: Zagreb, 1999, p. 42). As expected, this has changed over the course of time and the awareness of Croatian judicial and other officials of the Convention and the Court has significantly improved.

[8] The test under which the Court decides on the appropriateness of such interference of a state is distinctively and commonly known in theory as a "test of necessity in a democratic society". The Court's view on this test, one of the core ones in the Court's judicial reasoning can be found, for example, in case Kovač v. Croatia, where the Court stated that: "The test of 'necessity in a democratic society' requires

in principle, stands opposite to the doctrine of judicial activism, which is in turn connected to the dynamic interpretation of the Convention forming a basis for its application in environmental cases, the Court found a way to combine the two by creative use of other three of the well-known interpretative doctrines found in its jurisprudence. First is the doctrine of margin of appreciation, which in environmental cases found its logical application ground.[9] As environmental cases are often very specific both in causes that create an event or series of events that finally become a basis for establishing a human rights violation, it is logical to leave the states with a certain margin of appreciation regarding the handling of such cases.[10] Second doctrine is that of horizontal effect, which is again crucial in environmental cases, as violations often do not stem from the state itself, but rather from other sources under control of the non-state actors. Finally, there is a doctrine of positive obligations, commonly found in not only in Court's jurisprudence, but also in works of human rights courts and other bodies across the world.[11] Within environmental cases, it finds its application with regard of the states' obligation to facilitate for an active approach towards protection and enjoyment of human

the Court to determine whether the interference complained of corresponded to a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. "

[9] On the doctrine of margin of appreciation see, for instance: SPIELMANN, D.: Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review? *CELS Working Paper Series*. Centre for European Legal Studies, University of Cambridge: Cambridge, 2012, 381-418.

[10] For an expression of Court's views on defining standards of scrutiny of margin of appreciation in environmental cases decided under Article 8 of the Convention see, for instance, case Giacomelli v. Italy, in which the Court iterated that: "The Court considers that in a case such as the present one, which involves government decisions affecting environmental issues, there are two aspects to the examination which it may carry out. Firstly, it may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual" (paragraph 79 of the judgement). Immediately following this assessment, the Court noted that: "It is for the national authorities to make the initial assessment of the "necessity" for an interference. They are in principle better placed than an international court to assess the requirements relating to the treatment of industrial waste in a particular local context and to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community." (paragraph 80 of the judgement).

[11] For an overview of interpretation of positive obligations in Court's practice, see: AKANDJI-KOMBE, J. F.: Positive Obligations under the European Convention on Human Rights. *Human Rights Handbooks Series*, no. 7. Council of Europe: Strasbourg, 2007/7., specifically 47-48 (concerning positive obligations in environmental cases under Article 8 of the Convention). Positive obligations are frequently cited by the United Nations treaty bodies, see, for example, general comments of the Human Rights Committee, available at: https://www.ohchr.org/en/treaty-bodies/ccpr/general-comments (Date of access: 27th October 2023).

rights.[12] All three doctrines found their way into the Croatian "environmental" cases decided by the Court under Article 8 of the Convention.

The following general insights into the Court's reasoning when dealing with applications concerning alleged violations of Article 8 in "environmental" cases can be made:

- The Court almost always reminds that there is no right to clean and healthy environment as such under Article 8 – therefore, environmental degradation or harm does not necessarily involve violation of Article 8
- There must be a direct harmful effect of the environmental activity on rights protected under Article 8 – therefore, causal link must be established
- Public authorities have positive obligations to secure the rights under Article 8 in "environmental" cases, which includes right to provide information on the potentially harmful activities
- Positive obligations do not exist only in cases where a state is directly responsible for an activity causing harm, rather they exist also in cases where private sector activities are causing harm – therefore, there is a horizontal effect of the protection under Article 8
- State has a relatively wide margin of appreciation in determining the balance to be struck in cases where decisions relevant to the environment affect private and family life – however, the balance is always subject to the proportionality test

By applying these doctrinal concepts on concrete applications over the years, the Court created a firm basis of cases linking human rights and the environment. In light of that, there are factual contexts which can be clearly identified as those in which such links often occur in front of the Court and violations of article 8 of the Convention are found. Those are, most commonly, cases of excessive interference into ones private and family life due to noises, smells, emissions, polluted and toxic substances and other similar pollutants.[13] Croatian cases that will be individually examined in the following chapter are based exactly against these typical factual backgrounds.

[12] AKANDJI-KOMBE, J. F.: Positive Obligations under the European Convention on Human Rights. *Human Rights Handbooks Series*, 2007/7., *ibid.*

[13] Compare: Manual on Human Rights and the Environment, p. 34., also: OFAK, L.: Primjena Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda u sporovima koji se tiču zaštite okoliša. In: KOPRIĆ, I. (ed.), *Europeizacija hrvatske javne uprave*. Pravni fakultet Sveučilišta u Zagrebu: Zagreb, 2014, 793.

3. Review of Individual "Environmental" Cases Concerning Croatia Decided by the Court

The following sections will outline four cases that the Court decided in "environmental" cases concerning Croatia, all of which included claims based on Article 8 of the Convention. The cases are named as follows: Oluić v. Croatia, Udovičić v. Croatia, Turković and others v. Croatia and Tolić and others v. Croatia. Cases Oluić and Udovičić concern noise pollution, case Turković and others alleged pollution from a waste disposal site, while the case Turković and others concerns alleged pollution of tap water.

3.1. Oluić v. Croatia: Excessive Noises from a Bar

The first case that should be mentioned is Oluić v. Croatia. Decided by the Court back in 2009, this case originates from the coastal city of Rijeka, where the applicant lived in a house shared with a bar. The noises from the bar were protruding to the flat of the applicant. This had been going on for years and, although complains were lodged in front of administrative bodies and domestic courts, nothing effectively happened, with decisions either not being reached or left unimplemented. The European Court finally found a violation of the Convention, specifically its Article 8. In doing so, the court reiterated two of the aforementioned doctrines, applying them in a concrete case. First of all, the Court pointed out that Article 8 contains positive obligations of a state to "take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of the Article 8". In doing so, the Court noted that

> *"Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance" (paragraph 46 of the judgment).*

Another important conclusion stemming from the Oluić judgment, which has, arguably, had an important impact on the understanding of the application of the European Convention in Croatia, is that the Court affirmed its doctrine of positive obligations stemming from Article 8 of the Convention.[14] The noise pollution was

[14] Environmental cases very often do not involve a public, but rather a private sector activity being a direct cause of human rights violations. With regard to that, the Court requires from public authorities

coming from a privately owned bar, the entity that had no connection with the state and was in no way under its control.[15] However, the Court found a violation of the Article 8, basing its finding on an assumption that "The present case does not concern interference by public authorities with the right to respect for the home, but their alleged failure to take action to put a stop to third-party breaches of the right relied on by the applicant" (paragraph 46 of the judgment) which, in turn, led to the conclusion that "In these circumstances, the Court finds that the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for her home and her private life" (paragraph 66 of the judgement).

While broadly similar to earlier cases concerning other Council of Europe member states (for example, Hatton and others v. the United Kingdom[16] or, more specifically, Moreno Gómez v. Spain[17]), the Oluić case was indeed important for Croatia as a case which raised awareness of domestic authorities on principles used by the Court in deciding on alleged violations of Article 8 in noise pollution context, but also in a more general context of right to healthy environment being inherent in the Article 8.[18]

Next case, Udovičić v. Croatia, reiterated some of the Court's views already mentioned in this case, while shedding light also on a minimum level of severity standard.

to take positive measures to safeguard rights enshrined under different provisions of the Convention. In environmental context, this was clearly expressed by the Court in, for example, case Guerra and others v. Italy, where the Court stated that: "However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life" (paragraph 58 of the Grand Chamber's judgement).

[15] As the Court observed in the case Moreno Gómez v. Spain: "Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" (paragraph 55 of the judgement).

[16] Case Hatton and others v. the United Kingdom concerned excessive noises from an international airport. While not finding a violation of Article 8 of the Convention due to a determination that the state has not failed to struck a fair balance between public interest of operating an international airport and individual interests of the complainants, it nevertheless stressed that: " Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly." (paragraph 98 of the Grand Chamber's judgement).

[17] Case Moreno Gómez v. Spain involved a complainant living in an area where multiple discotheques and night clubs were opened. The Court found a violation of Article 8 because "The facts show that the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances." (paragraph 61 of the judgement).

[18] Compare BATISTIĆ-KOS, V.: *Pozitivne obveze prema Europskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda.* Narodne novine: Zagreb, 2012, 242-243.

3.2. Udovičić v. Croatia and Jakšić v. Croatia: Re-examining of the Minimum Level of Severity Standard

Similar case Udovičić v. Croatia followed suit a few years later. The case concerned an applicant who had been living atop a bar and a shop in village called Cubinec, situated near the town of Križevci. Again, noise from the bar was protruding into the living quarters of the applicant, largely due to the inadequate noise insulation between the bar and living quarters situated directly atop of it. While the Court noted existing similarities between this case and Oluić, the most important dissimilarity was that the excessive noises in this case, unlike in Oluić, were not so frequent or prevalent, happening only on a few occasions in a relatively long timeframe of a few years. Therefore, the Court first had to deal with another concept applied in similar cases, and this is the test of minimum level of severity, which a situation must fulfil in order for a breach of Article 8 to be established.[19] The government argued that the minimum level of severity standard had not been reached due to infrequency of the noises and the position of the house in which both the bar and the applicants' home were located next to a busy road.[20] After a thorough analysis, the Court, however, found that, due to, primarily, timeframe (the noise being excessive only on occasions, but through a number of years), the standard had indeed been reached. In Court's words:

> *"In view of these findings, the Court is particularly mindful that the noise in question originated from a bar which had been operating for more than ten years in the building in which the applicant lives. Neither can it overlook eighty-seven attendances by police in connection with various disturbances created by its customers, which resulted in forty-two actions for minor offences against various individuals for breaches of public peace and order." (paragraph 148 of the judgement).*

Arguably more importantly, the Court in this case had to extensively deal with the procedural aspect of the rights guaranteed under Article 8,[21] unlike in the previous case Oluić. This was due to a fact that

[19] For a Court's assessment of the standard of minimum level of severity in the context of noise pollution, see, for example, judgement in case Grimkovskaya v. Ukraine, in which the Court stressed that: "an arguable claim under Article 8 may arise only where the hazard at issue attains a level of severity resulting in significant impairment of the applicant's ability to enjoy her home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life." (paragraph 58 of the judgement).

[20] For an insightful example of Court's analysis of minimum level of severity needed to establish a violation of Article 8 due to noise pollution, see case Deés v. Hungary (especially paragraphs 21-24).

[21] In case Bor v. Hungary, which involved excessive noises stemming from operations conducted at the railway station, the Court similarly observed: "The complaint about the noise disturbance was brought in the domestic courts in 1991. The Convention entered into force with regard to Hungary on 5 November 1992, and it took almost sixteen years from this date to carry out a proper balancing exercise

> *"In this respect the Court notes that despite a number of complaints by the applicant and proceedings instituted at the domestic level before the competent administrative authorities, for more than ten years these authorities had failed to adopt appropriate decisions in that regard." (paragraph 152 of the judgement).*

Finally, this fact made a primary argument for the Court to find a violation of Article 8, again drawing the attention of Croatian authorities to another aspect of the Article 8 applied to environmental cases.

In a similar case, Jakšić v. Croatia, the Court, however, reached an opposite conclusion. The case concerned applicants complaining about allegedly excessive noises coming from various commercial activities being conducted on a ground floor of a building, atop which living quarters of the applicants were located. Therefore, the case is factually very similar to previously mentioned cases Olujić v. Croatia and, especially, Udovičić v. Croatia. The latter case similarities with the application in Jakšić v. Croatia logically guided the Court to use the same standards in examining whether a violation under Article 8 could be established in this case. However, the Court reached an opposite conclusion, settling that in this case, no violation of Article 8 occurred. This is due to, in Court's words, referring to Oluić v. Croatia and Udovičić v. Croatia:

> *"Unlike in those cases, in the present case the domestic authorities reacted to each of the applicants' concerns promptly and efficiently. In particular, environmental health inspections were performed without delay whenever the applicants requested them and the competent inspectors ordered a number of noise-level measurements and expert evaluations." (paragraph 86 of the judgement).*

Moving away from noise pollution cases, the following sections will present two cases concerning alleged violations of Article 8 due to pollution from a waste disposal site and inadequate plumbing in a residential building. Both cases originated form the capital of Croatia, the city of Zagreb.

3.3. Turković and others v. Croatia: Individualized Harm and Appropriate Remedy

This case moves away from the noise pollution issues to another source of alleged pollution. Namely, the case Turković and others v. Croatia concerned

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and to reach an enforceable decision by the domestic courts. Therefore, the applicant remained unprotected against the excessive noise disturbance, which caused serious nuisance preventing him from enjoying his home, for an unacceptably long period." (paragraph 26 of the judgement). This led the Court to conclude that "However, it emphasises that the existence of a sanction system is not enough if it is not applied in a timely and effective manner. In this respect it draws attention once again to the fact that the domestic courts failed to determine any enforceable measures in order to assure that the applicant would not suffer any disproportionate individual burden for some sixteen years." (paragraph 27 of the judgement) applicants living in a very close vicinity to the main waste disposal site of the capital of Croatia, Zagreb. The site, named Jakuševec-Prudinec, is still active as to this day and, concerning that Zagreb is a city of almost eight hundred thousand inhabitants, indeed is an area with a significant potential to become a source of pollution. This has been acknowledged by the Zagreb city administration, included in the conditions of the ecological permit issued and the site was equipped with different technical solutions preventing negative environmental effects and pollution spilling out to the nearby inhabited areas.[22] Moreover, the city administration instituted specific, tailor-made payments and concessions as a compensation for a diminished market value of property situated near the waste disposal site.[23] Notwithstanding that, the applicants, a group of owners of such properties, petitioned the European Court with the application concerning alleged violations of Articles 8 and 13 of the Convention. Prior to lodging the application in front of the European Court, the applicants lodged a criminal complaint, which was, however, rejected on the grounds that no irregularities were found in management of the waste disposal site. The Court, while noting that "would need cogent elements to lead it to depart from the findings of fact reached by the domestic authorities" (paragraph 63 of the decision), never actually engaged in such a juridical endeavour. Rather, it dismissed the application based on a doctrine of appropriate remedy, stating that:

> *"The Court would also stress that in some instances it has held that an applicant cannot be dispensed from the obligation to use a remedy found by the Court to be the most appropriate avenue to address a particular Convention grievance, irrespective of the particular domestic arrangement of the available remedies to address the substance of his or her complaint." (paragraph 61 of the decision).*

The Court noted, quoting its earlier relevant case law,[24] that the remedy the applicants took (criminal complaint) is not the only one available nor necessarily the most appropriate one.

While the Court in the case Turković and others v. Croatia never proceeded to the merits, it would be interesting to see how the case would have resolved if it had proceeded to that stage. However, it is clear we will have to wait for another case to appear in front of the Court in order to see such a development.

[22] See: Ministry Confirms: Prudinec-Jakuševec Landfill Among the Most Regulated in Croatia, available at: https://www.zgh.hr/news/news-5871/ministry-confirms-prudinec-jakusevec-landfill-among-the-most-regulated-in-croatia/8909 (Date of access: 29th October 2023).

[23] For an assessment of data on the diminished market value of properties situated near the waste disposal sites in Croatia, including Jakuševec-Prudinec, see: Croatia: Cost of Environmental Degradation, World Bank, 2021, available at: https://documents1.worldbank.org/curated/en/929211613036393029/pdf/Croatia-Cost-of-Environmental-Degradation.pdf (Date of access: 29th October 2023), pp. 52-54.

[24] The Court primarily quoted its earlier decision in case Cokarić and others v. Croatia, which concerned an alleged violation of Article 1 of the Protocol 1 to the Convention.

Next case, Tolić and others v. Croatia similarly never proceeded to the merits phase. However, being built on a different set of circumstances, it is worth noting and briefly outlining the Court's reasoning in it.

3.4. Tolić and others v. Croatia: Positive Duties of Croatia Examined

The final case is Tolić and others v. Croatia. This case concerned a residential building in the Vrbani neighbourhood, situated at the southwest of the city of Zagreb. The building was constructed in 2005 and 2006 and right after the first tenants moved in. Soon afterwards, they noticed the poor quality of tap water within the building, which led to multiple analysis confirming that the tap water is indeed not suitable for human consumption. In this case, no violation of Article 8 was eventually established, but this did not prevent the Court to reiterate many already mentioned principles which guide the application of Article 8 in environmental matters. Namely, the Court reiterated that the state has a positive duty with regard to protection of Article 8 in environmental matters, which are, however, coupled with a certain margin of appreciation as to how it will fulfil them. The Court noted that:

> *"The State's positive obligations under Article 8 of the Convention implying that the authorities have a duty to apply criminal-law mechanisms of effective investigation and prosecution concern allegations of serious acts of violence by private parties. Nevertheless, only significant flaws in the application of the relevant mechanisms amount to a breach of the State's positive obligations under Article 8. Accordingly, the Court will not concern itself with allegations of errors or isolated omissions since it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators' criminal responsibility" (paragraph 93 of the decision).* [25]

Moreover, by reaching a conclusion that "the respondent State has taken all reasonable measures to secure the protection of the applicants' rights" (paragraph 101, final paragraph of the decision), the Court reiterated the horizontal effect that the Article 8 has in environmental matters. It is interesting to note that, while the judgement of the European Court was delivered back in mid-2019, last year (2022), finally the Croatian Supreme Court decided that the construction and engineering

[25] This is consistent with the Court's previous practice. For example, in case B.V. and others v. Croatia, the Court, in a different context (the case concerned acts of violence among neighbours) that: "Accordingly, the Court will not be concerned with allegations of errors or isolated omissions since it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators' criminal responsibility" (paragraph 151 of the decision).

companies are indeed liable for the faults during the construction, which led to hazardous plumbing being installed and water subsequently contaminated.[26]

4. Conclusions

In conclusion, Croatia is not an exceptional case. The Court's jurisprudence concerning Croatia confirms its stance in environmental cases, which basically presents balancing between dynamic interpretation of the Convention and judicial self-restraint by using, primarily, the concept of margin of appreciation. Regarding the latter, last two cases that were presented are notable, as they show how, despite dynamic interpretation continuing, the Court is not always an appropriate address for environmental claims, even if serious, as it is bound by its principles of interpretation of the Convention. Environmental harms are not a category that was meant to be included into the Convention's scope from the beginning. Rather, the Court slowly, but consistently developed it through its jurisprudence. Protection of private and family life under Article 8 of the Convention became one of focal points of such dynamic interpretation. This means that "environmental" cases are a field of Court's creativity, with practice that is developed regarding some types of environmental harms, while others remain relatively untouched by the Court's jurisprudence. In other words, one cannot always rely on the Court in "environmental" cases. However, it is unlikely this will prevent new "environmental" cases from Croatia to appear in front of the Court in the near future. This is both due to a settled practice of the Court in some areas of environment-related harms (noise protection, for example), but also, arguably, due to other types of cases coming in this ever-developing area of Court's practice.

Having all that in mind, Croatia can serve as a good case study of various interpretative doctrines and principles that the Court uses in its handling of "environmental" cases under Article 8 of the Convention. Finally, it is hard not to agree with professor Jasna Omejec, former president of Croatian Constitutional Court who, speaking at the Croatian Academy of Sciences and Arts in 2014, observed that: "in case domestic state and public authorities accepted the practice of the European Court developed until today regarding environment, however it might be narrow, non-comprehensive and underdeveloped, this would present a giant leap forward for the legal system of the Republic of Croatia".[27]

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[26] See case Rev 258/2016-5, available at (in Croatian): https://www.vsrh.hr/CustomPages/Static/HRV/Files/2022dok/Priopcenja/VSRH%20Rev%20258-2016-5-an.pdf (Date of access: 29th October 2023).

[27] OMEJEC, J.: *Zaštita okoliša u praksi Europskog suda za ljudska prava: uvodno izlaganje na skupu Upravnopravna zaštita okoliša – gdje smo bili, a gdje smo sada*. Hrvatska akademija znanosti i umjetnosti: Zagreb, 2014, p. 110. (author's translation).

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Marie Beyrich*

The PSPP judgment and the pitfalls of interpretation – Why the German Federal Constitutional Court's ruling does not fuel nationalist narratives

Abstract: This paper delves into two landmark cases adjudicated by the German Federal Constitutional Court (BVerfG), with a particular focus on their implications for EU law and their potential influence on nationalist narratives. The first case, concerning the PSPP, addressed the European Central Bank's Public Sector Purchase Program, where the German court unexpectedly declared EU actions as ultra vires, leading to extensive debate and criticism. In the second case, concerning the EU Own Resources Decision, the court adopted a more cautious stance. Furthermore, the paper examines generally the evolution of the jurisprudence of the German Federal Constitutional Court concerning the relationship between EU law and national law in the context of the principle of primacy of EU law. From the perspective of the BVerfG, this principle is only binding within the boundaries set by German constitutional law. The BVerfG reserves the right to review the compliance with these boundaries. This has led to a plethora of seminal decisions by the BVerfG in recent decades, significantly shaping the relationship between EU law and national law. This paper thoroughly explores these developments, with particular focus on the Solange II jurisprudence, as well as the jurisprudence of the BVerfG concerning the identity control and Ultra-vires-control.
Keywords: German Federal Constitutional Court, court ruling, PSPP judgment, 2020 EU Own Resources Decision, primacy of EU law, Ultra-vires-control, interpretation

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1. Introduction

On May 5th, 2020, the German Federal Constitutional Court ruled on several constitutional complaints against the European Central Bank's (ECB) Public Sector Purchase Program (PSPP). The judgment created significant controversy as the Federal Constitutional Court, for the first time, declared acts of the European Union as ultra vires. Not only is the decision itself unprecedented, but the language used by the Federal Constitutional Court is also noteworthy. It appeared predictable that nationalist movements, as seen in Poland and Hungary, would seek to exploit the

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judgment. However, the following explanations demonstrate why such attempts are bound to fail.

2. The primacy of EU law and its exceptions

Understanding the concept of the Ultra-vires-control is only possible when considered in the context of the principle of primacy of EU law. The German Federal Constitutional Court has, in its jurisprudence, developed the Ultra-vires-control as a mechanism that can override the primacy of EU law. The primacy of EU law is one of the fundamental principles that has evolved and was necessary with the ongoing process of Europeanization. This principle significantly governs the relationship between EU law and the national law of member states. The Court of Justice of the European Union (CJEU) has shaped this principle through its case law.

The BVerfG, too, has made a series of decisions over the past decades concerning the relationship between EU law and national law, establishing a significant line of jurisprudence that has shaped this relationship. Throughout this process, it has consistently emphasized that it recognizes the primacy of EU law. However, this recognition comes with a caveat. According to the BVerfG, the primacy of EU law has limits. These limits are monitored by the BVerfG itself, as it reviews acts of the EU to ensure they respect these boundaries. In cases where these boundaries are crossed, the BVerfG determines that EU law should not be applied and does not take precedence over national law.

For decades, the BVerfG assumed this guardian role, without ever conclusively deciding that an act of the EU should not be applied due to a breach of these limits. It almost seemed as if these limits only existed in theory. This perception changed, at the latest, with the PSPP judgment of 2020 and the successful implementation of the Ultra-vires-control, from the perspective of the complainants. However, when the BVerfG had the opportunity for an Ultra-vires-control in 2022, it reverted to the role it had exercised for decades, if not even more limited: the review of the limits that it never tires of emphasizing exist in theory, without conclusively determining a breach of these limits. Since 2022, it even seems that it has begun to withdraw from its prominent role, which it had held for so long, in shaping the ongoing process of Europeanization.

3. The Primacy of EU law: What is it and what is its basis?

The primacy of EU law is one of the fundamental principles in European law. It dictates that EU law takes precedence over conflicting national laws. In cases of conflict between EU law and national law, EU law prevails. This principle is essential for the effective functioning of the European Union, ensuring consistent application of EU regulations across member states.[1] The Court of Justice of the European Union (CJEU) established the basis for the primacy of EU law in the landmark case of Costa v. E.N.E.L. The CJEU articulated that EU law constitutes an autonomous legal source, meaning that EU law exists as an independent body of law, separate from the national laws of member states. Due to this autonomy, national regulations cannot challenge EU law, as doing so would undermine the "character as Community law" and question the "the legal basis of the Community itself".[2] Moreover, EU member states have transferred (some of) their sovereign rights to the EU for an unlimited duration, effectively limiting their own sovereign powers. This has created a body of law that binds both the nationals of member states and the member states themselves.[3] Failing to give precedence to EU law over national law in case of a conflict would endanger the objectives of the treaties, according to the CJEU.[4]

From the German perspective, the primacy of EU law is recognized but is grounded in the German constitution, known as the Basic Law (Grundgesetz). The German Federal Constitutional Court holds that Article 23 sec. 1 sentence 2 of the Basic Law allows for the exclusive jurisdiction of the Federal Republic of Germany within the scope of the Basic Law to be set aside, thus providing room for the direct applicability and enforceability of EU law. Article 23 sec. 1 sentence 2 of the Basic Law provides the possibility of attributing direct applicability and enforceability to EU law in Germany through a corresponding order of application ("Rechtsanwendungsbefehl"). This order of application has been issued through the ratification of the treaties of the European Union. As a result, this establishes the direct applicability of EU law in Germany and its primacy over national law.[5]

4. How can the primacy of EU law be overridden?

[1] Cf. STREINZ, R.: *EUV/AEUV: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union*. 3rd edition, 2018, Art. 4 EUV para. 35; CALLIESS C. – RUFFERT M.: *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta.* 6th edition, 2022, Art. 1 AEUV para. 17; GRABITZ E. – HILF M. – NETTESHEIM M.: *Das Recht der Europäischen Union*. 2023, Art. 1 AEUV para. 72 f.

[2] Cf. CJEU, Judgement of July 15, 1964 - C-6/64 (Costa v. E.N.E.L.), p. 594.

[3] Cf. ibid., p. 593.

[4] Cf. ibid., p. 594.

[5] Cf. the Federal Constitutional Court's judgment to Art. 24 of the Basic Law, which was later replaced by Art. 23 of the Basic Law, and its judgments to Art. 23 of the Basic Law, cf. BVerfG, Judgment of May 29, 1974 - 2 BvL 52/71; BVerfG, Judgement of October 22, 1986 - 2 BvR 197/83; BVerfG, Judgment of June 30, 2009 - 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.

However, Art. 23 sec. 1 sentence 2 of the Basic Law does not allow for an unlimited transfer of sovereignty rights to the European Union, and, as a result, EU law cannot be attributed limitless applicability, enforceability, and supremacy at national level. Instead, from a German perspective, constitutional limits must be observed because these effects arise from the Basic Law. The primacy of EU law can only apply within the boundaries set by the Basic Law. This provides the gateway for the Federal Constitutional Court to review EU law against the yardstick of the German Constitution, despite the ostensibly prevailing primacy of EU law. Such a review, in principle, contradicts the idea of supremacy. If EU law supersedes national law, including national constitutional law, then constitutional law cannot be the standard for reviewing EU law. EU law need not consider it in case of a collision; it takes precedence. However, due to the constitutional limits on the transfer of sovereignty rights mentioned earlier, the BVerfG has kept the door open to review EU law against constitutional law. These boundaries must not be exceeded, and that is what needs to be scrutinized. The BVerfG exercises this control because it is all about boundaries arising from constitutional law, which falls within the jurisdiction of the BVerfG. As a result, three more or less relevant control mechanisms have emerged from the BVerfG's decades-long jurisprudence, making it competent to assess EU law. Conversely, if complainants wish the BVerfG to review acts of the EU, they must substantiate why the contested act violates one of these control mechanisms.

5. From Solange I to Solange II

Initially, there was the mechanism established by the famous Solange I decision by the German Federal Constitutional Court. In 1974, the BVerfG ruled that the catalog of fundamental rights in the Basic Law was an inalienable essential element of the constitutional structure of the Federal Republic of Germany.[6] Article 24 of the Basic Law (now Article 23 of the Basic Law) did not allow for its relativization. From this, the BVerfG concluded: As long as the integration process of the Community is not so advanced that Community law contains a catalog of fundamental rights equivalent to the catalog in the Basic Law, submitting the matter to the Federal Constitutional Court is admissible and required when a provision of Community law that is relevant to the decision is considered inapplicable because

[6] Cf. BVerfG, Judgment of May 29, 1974 - 2 BvL 52/71 (ein „unaufgebbares, zur Verfassungsstruktur des Grundgesetzes gehörendes Essentiale der geltenden Verfassung der Bundesrepublik Deutschland").

and to the extent that it collides with one of the fundamental rights of the Basic Law.[7]

The integration process and the development of a catalog of fundamental rights at the European level continued to progress. As a result, the inevitable happened: the Solange II decision of the BVerfG followed the Solange I decision in 1986, which still applies today and makes it significantly more challenging for complainants to invoke this control mechanism. In the Solange II decision, the BVerfG determined that as long as the European Communities, especially the case law of the Court of Justice of the Communities, generally ensure effective protection of fundamental rights against the authority of the Communities, which is essentially equivalent to the fundamental rights protection required by the Basic Law, especially since the essence of fundamental rights is generally guaranteed, the Federal Constitutional Court will no longer review this law against the standards of the fundamental rights in the Basic Law.[8] In other words, one would have to argue that comparable protection of fundamental rights generally no longer exists at the EU level. However, the BVerfG, in its decision, acknowledged that fundamental rights protection at the EU level is now comparable to that of the Basic Law. As long as this generally remains the case, constitutional complaints against acts of the European Union can no longer utilize this control mechanism, effectively rendering it a rather blunt sword. Nevertheless, the decision remains remarkable because, at that time, the BVerfG withdrew significantly from the control of acts of the European Union. Even if a violation of fundamental rights exists, a constitutional complaint (at least through this control mechanism) against these acts remains inadmissible, as long as there is no general decline in fundamental rights standards at the EU level.

[7] Cf. ibid. („Solange der Integrationsprozeß der Gemeinschaft nicht so weit fortgeschritten ist, daß das Gemeinschaftsrecht einen […] Katalog von Grundrechten enthält, der dem Grundrechtskatalog des Grundgesetzes adäquat ist, ist […] die Vorlage […] an das Bundesverfassungsgericht […] zulässig und geboten, wenn […] [die] entscheidungserhebliche Vorschrift des Gemeinschaftsrechts […] für unanwendbar […] [gehalten wird], weil und soweit sie mit einem der Grundrechte des Grundgesetzes kollidiert.”).

[8] Cf. BVerfG, Judgment of October 22, 1986 - 2 BvR 197/83 („Solange die Europäischen Gemeinschaften, insbesondere die Rechtsprechung des Gerichtshofs der Gemeinschaften einen wirksamen Schutz der Grundrechte gegenüber der Hoheitsgewalt der Gemeinschaften generell gewährleisten, der dem vom Grundgesetz als unabdingbar gebotenen Grundrechtsschutz im wesentlichen gleichzuachten ist, zumal den Wesensgehalt der Grundrechte generell verbürgt, wird das Bundesverfassungsgericht […] dieses Recht […] nicht mehr am Maßstab der Grundrechte des Grundgesetzes überprüfen.”).

6. The Federal Constitutional Court's identity review

Another constitutional limit is created by Article 23 sec. 1 sentence 3 of the Basic Law, which refers to Article 79 sec. 3 of the Basic Law, known as the "eternity clause" (Ewigkeitsklausel). This clause regulates that parts of the constitution are unalterable, thereby establishing the untouchable core of the German constitution. It particularly refers to Article 1 and Article 20 of the Basic Law, covering human dignity (including the core of human dignity in every fundamental right) and fundamental principles such as the principles of democracy and the rule of law. Through Article 23 sec. 1 sentence 3 of the Basic Law, a limit is set on the extent to which sovereign powers can be transferred. Consequently, acts of the European Union must not affect the untouchable core of the constitution because this power cannot be transferred to the European Union. The German Federal Constitutional Court examines this in its identity review, which it established in connection with the Maastricht judgment[9] and elaborated further with the Lisbon judgment[10]. It states that European integration finds its limits in the "non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect."[11] The BVerfG asserted that it is the guardian of this identity.[12] The smoldering conflict between the BVerfG and the European Court of Justice reached its peak in the area of identity review in 2015. For the first time, the German Federal Constitutional Court identified a provision of European Union law that did not pass the German identity review. However, instead of provoking a direct conflict with the CJEU, it avoided one through an interpretation of the respective provision, which could sufficiently account for the minimum guarantees required by Article 1 sec. 1 of the Basic Law.[13] Nevertheless, the CJEU may not have been pleased with this. A year later, in 2016, the constitutional complaints against the Outright Monetary Transactions (OMT) program provided the BVerfG with the opportunity to elaborate on the requirements of identity review: "When conducting its identity review, the Federal Constitutional Court examines whether the principles declared by Art. 79 sec. 3 […] [of the Basic Law] to be inviolable are affected by transfers by the German legislature of sovereign powers or by acts of institutions, bodies, offices, and agencies of the European Union [...]. This concerns the safeguarding of the core of human dignity in fundamental rights [...] as well as the fundamental principles

[9] Cf. BVerfG, Judgment of October 12, 1993 - 2 BvR 2134/92, 2 BvR 2159/92.
[10] Cf. BVerfG, Judgment of June 30, 2009 - 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.
[11] Cf. ibid., para. 235.
[12] Cf. ibid., para. 218.
[13] Cf. BVerfG, Judgment of December 15, 2015 – 2 BvR 2735/14.

upon which the principles of democracy, of the rule of law, of the social state, and of the federal state of Art. 20 […] [of the Basic Law] are based."[14]

7. The Federal Constitutional Court's Ultra-vires-control

The Ultra-vires-control is another mechanism that allows the Federal Constitutional Court to review acts of the European Union. This limit arises from Article 23 sec. 1 sentence 2 of the Basic Law. After all, it is a general principle that to the extent that powers have been transferred to the European Union, EU laws can be made lawfully and can be accordingly supreme, but not beyond that. 'Ultra vires' is the Latin term for 'beyond one's powers'. If someone acts ultra vires, they are acting beyond their competence. This limit also applies to acts of the European Union. In the Lisbon judgment, the BVerfG explains that it examines whether "legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral."[15] The EU does not have unlimited power; it is limited by what the member states transferred to the EU. It cannot go beyond that. If it does, it exceeds its power; it acts ultra vires. The BVerfG reserves the right to review this as well. In the subsequent Honeywell decision, it tightened the requirements for a successful Ultra-vires-control. It stipulates that a "[b]reach of competences [...] [must be] sufficiently qualified."[16] To do so, the act must be "manifestly in breach of competences", and this must lead to a "structurally significant shift to the detriment of the Member States in the structure of competences."[17] In other words, what is needed is, first, that the breach of competence must be obvious, and second, that it leads to a significant shift in competence toward the EU and to the disadvantage of Germany. In addition, the case must be submitted to the CJEU for a preliminary ruling procedure under Article 267 TFEU before the BVerfG can make a decision. Ultimately, it is up to the CJEU to determine how EU law should be interpreted. Only when one knows how to understand EU law, one can examine whether the act goes beyond what the EU has been granted in terms of sovereign power, i.e., the act is ultra vires. The BVerfG formulates it as follows: "[T]he Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen."[18] In its judgment on the OMT program, the BVerfG

[14] Cf. BVerfG, Judgment of June 21, 2016 - 2 BvR 2728/13, para. 138.
[15] Cf. BVerfG, Judgment of June 30, 2009 - 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, para. 240.
[16] Cf. BVerfG, Judgment of July 6, 2010 - 2 BvR 2661/06, headnote # 1 a).
[17] Cf. ibid.
[18] Cf. ibid., headnote # 1 b).

succinctly summarizes what it examines in the Ultra-vires-control: It "examines whether acts of institutions, bodies, offices, and agencies of the European Union exceed the European integration agenda in a sufficiently qualified way and, therefore, lack democratic legitimation in Germany [...]."[19]

8. The Federal Constitutional Court's PSPP judgment

In the PSPP case, the German Federal Constitutional Court had another opportunity to address the relationship between EU law and national law, specifically through the instrument of Ultra-vires-control. Several constitutional complaints were lodged against the European Central Bank's PSPP, alleging that it had acted ultra vires. The judgment was delivered in May 2020 and caused a seismic shock. For the first time in its history, the BVerfG declared actions of EU bodies as ultra vires. The judgment was unexpected and largely met with criticism. There is a broad consensus that the response was not necessarily warranted by the circumstances, especially not in the tone employed.[20]

What was the PSPP about? In 2015, the European Central Bank (ECB) initiated a new program known as the Public Sector Purchase Program (PSPP), involving the purchase of government bonds. This program allowed member states to fund themselves by selling government bonds, with the aim of countering the looming threat of deflation and stimulating the economy. A number of individuals lodged constitutional complaints against the ECB's implementation of this purchase program. Their argument centered on the claim that the ECB's actions in implementing the program had exceeded its legitimate authority, means: it acted ultra vires. They argued as followed: According to the division of competencies within the European Union, monetary policy fell under the purview of the EU, not, however, economic policy. They contended that the program had such significant economic policy implications that the European Central Bank was effectively engaging in economic policy through its execution.

[19] Cf. BVerfG, Judgment of June 21, 2016 - 2 BvR 2728/13, para. 143.

[20] Cf. for example BASEDOW J. et al.: European integration: Quo vadis? A critical commentary on the PSPP judgment of the German Federal Constitutional Court of May 5, 2020. *International Journal of Constitutional Law*, Volume 19, Issue 1, 2021, 188–207, https://doi.org/10.1093/icon/moab017 (Date of Access: 16/07/2024); GRIMM D.: A Long Time Coming. *German Law Journal*, 21, 2020, 944-949; WEILER J.: Why Weiss? The I•CON symposium: Preface. *International Journal of Constitutional Law*, Volume 19, Issue 1, 2021, Pages 179–187, https://doi.org/10.1093/icon/moab026 (Date of Access: 16/07/2024); THIELE A.: VB vom Blatt: Das BVerfG und die Büchse der ultra-vires-Pandora. *Verfassungsblog*, 2020. https://verfassungsblog.de/vb-vom-blatt-das-bverfg-und-die-buechse-der-ultra-vires-pandora/(Date of Access: 16/07/2024); BRADE A. – GENTZSCH M.: PSPP mit „PEPP" Der währungspolitische Kontrollmaßstab des BVerfG als „Ultra-vires-Akt"? *Verfassungsblog*, 2020. https://verfassungsblog.de/pspp-mit-pepp/ (Date of Access: 16/07/2024).

In 2017, the German Federal Constitutional Court sought a preliminary ruling from the European Court of Justice regarding the interpretation of the decisive provisions of European Union law, particularly concerning the relevant decisions made by the European Central Bank in regards to the PSPP.[21] The European Court of Justice provided its response to these queries approximately a year later.[22] In its response, it concluded that there was no breach of European Union law by the European Central Bank. Subsequently, the case returned to the German Federal Constitutional Court and was finally resolved on May 5th, 2020.[23] Taking into account the interpretation provided by CJEU, the German Federal Constitutional Court determined that the European Central Bank had indeed overstepped its authority in making the contested decisions. Additionally, the German court found that the European Court of Justice had not sufficiently scrutinized these decisions.[24]

The core legal question revolved around whether these decisions should fall within the exclusive competence of the European Union, particularly the European Central Bank, in the realm of monetary policy. Alternatively, they might need to be categorized as measures related to economic policy, where the competence is only supportive in nature, which would likely exclude the decisions from the EU's purview. This determination, in turn, hinged on the extent to which the undeniable economic consequences of these measures should be considered. Disregarding these economic effects and concentrating solely on the monetary objectives of the decisions would lead to the conclusion that they fell within the competence of the central bank.

The German Federal Constitutional Court held that the economic consequences of the PSPP were pertinent and carried substantial significance. The reason why the ECB's decisions regarding the implementation of the PSPP are ultra vires was then based on proportionality. Because if the program already has significant economic policy implications, there needed to be a justification for why taking these measures at the European level does not unduly interfere with the competences of the Member States. All reasons for such justification must also satisfy a proportionality test. Because "[i]n the context of delimiting the competences between the European Union and the Member States, the principle of proportionality [...] are of great importance [...]. Disregarding these requirements potentially shifts the bases for the division of competences in the European Union, undermining the principle of conferral," as stated by the BVerfG.[25] It continues that "[a] programme for the purchase of government bonds only satisfies the principle of proportionality if it

[21] Cf. BVerfG, Request for a preliminary ruling of July 18, 2017 - 2 BvR 859/15.
[22] Cf. CJEU, Judgment of December 11, 2018 - C-493/17 (Weiss and others).
[23] Cf. BVerfG, Judgment of May 5, 2020 - 2 BvR 859/15.
[24] Cf. ibid.
[25] Cf. ibid., headnote # 6 a).

constitutes a suitable and necessary means for achieving the aim pursued; the principle of proportionality requires that the programme's monetary policy objective and the economic policy effects be identified, weighed and balanced against one another. Where a programme's monetary policy objective is pursued unconditionally and its economic policy effects are ignored, it manifestly disregards the principle of proportionality enshrined in Article 5(1) second sentence and Article 5(4) of the Treaty on European Union."[26] The German Federal Constitutional Court determined that the ECB did not meet these criteria. It concluded that the ECB's decisions regarding the PSPP contravened the principle of proportionality. The ECB failed to sufficiently assess and balance the economic policy consequences connected to the PSPP, which are inherently linked to this program, resulting from its substantial volume of over two trillion euros and a duration exceeding three years. As a result, there was a lack of balance and explanation, which constituted a breach of the principle of proportionality and thus exceeded the ECB's monetary policy authority.

In order to declare the acts of the European Central Bank as ultra vires, the BVerfG had to challenge the judgment of the CJEU and thus openly engage in the conflict. The criticism was clear and unequivocal, with a comparably brutal tone, as the following statements illustrate. While the explanations as to why it believes the ECB's decisions are ultra vires are relatively brief, it dedicates a particularly extensive discussion to the question of why the CJEU's decision, which upheld the ECB's resolutions, is also ultra vires. Here, too, the starting point is the question of proportionality. The BVerfG characterized the CJEU's assessment of proportionality as "meaningless."[27] It had "completely disregarded" the consequences of the PSPP in relation to economic policy.[28] Therefore, it did not weigh the "conflicting interests" against each other, omitting the "key element" of any proportionality review.[29] The CJEU's judgment is "simply not comprehensible" with respect to the proportionality assessment.[30] Because it completely ignored the actual effects of the PSPP in the proportionality assessment, specifically those related to economic policy, the BVerfG concludes that the "[j]udgment of the CJEU of 11 December 2018 manifestly exceeds the mandate conferred upon it in Art. 19(1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States."[31] In other words, the CJEU acted ultra vires in this case.

[26] Cf. ibid., headnote # 6 b).
[27] Cf. ibid., para. 133.
[28] Cf. ibid., para. 138.
[29] Cf. ibid.
[30] Cf. ibid., para. 116.
[31] Cf. ibid., para. 119.

However, it left the door open by providing the ECB with a three-month transitional period to thoroughly justify that the monetary policy goals pursued through the PSPP were proportionate to the economic and fiscal policy impacts, which necessarily result from implementing the PSPP. If this justification was provided, the decisions of the ECP in regards to the PSPP would not be considered ultra vires and could be applied in Germany.[32] The ECB successfully met this requirement, so there was never a deficiency in implementation.[33]

9. What followed afterward: The judgment on the 2020 EU Own Resources Decision

After not shying away from openly resolving the conflict in the PSPP case, there was great anticipation for the decision of the German Federal Constitutional Court in the EU Own Resources Decision case. Here again, complainants had accused the EU of acting ultra vires. It was the first opportunity for the BVerfG to take a stance once more after the 2020 uproar. Surprisingly, it issued a decision in which it not only toned down its language but also its outcome. This was particularly astonishing because the case was significantly more delicate concerning the potential undermining of Member State authorities compared to the PSPP case, offering another opportunity to take a position against the EU in the realm of Ultra-vires-control.

What was the case about? The constitutional complaints were directed against the German ratification act, through which the Council of the European Union's Own Resources Decision was ratified. The Own Resources Decision authorizes the European Commission to raise loans of up to 750 billion euros. These loans can be taken in addition to the EU's regular budget. In terms of amount, this loan sum is roughly equivalent to the EU's regular budget. It is intended to finance the "Next Generation EU" program, which was approved to mitigate the consequences of the COVID-19 pandemic.

The debate over increasing the EU's budget through loans is not a new one. It was clear that it would require a generous interpretation of the provisions of EU primary law to conclude that the Own Resources Decision was covered by it. There were also valid reasons to see it differently.[34] In other words, the BVerfG was presented with the opportunity to, with valid reasons, consider an EU act as ultra vires (once again). Remarkably, it did not take this path (despite opening the

[32] Cf. ibid.
[33] Cf. BVerfG, order of April 29, 2021 - 2 BvR 1651/15.
[34] Cf. the Dissenting Opinion published of one of the judges at the end of the decision, cf. BVerfG, Judgment of December 6, 2022 - 2 BvR 547/21, 2 BvR 798/21.

Pandora's Box of Ultra-vires-control in the PSPP judgment) but rather stepped back and recognized the EU act as still within the competences transferred to the EU.

The main issue at stake was primarily the EU's competence to take loans, in other words, to incur debt, and the substantive competence of the EU to use the funds raised through loans in the intended manner, essentially setting up a large-scale crisis redistribution program among the Member States.

The BVerfG expresses the outcome of its decision as follows: „Ultimately, it is not ascertainable that the 2020 EU Own Resources Decision amounts to a manifest violation of the European integration agenda. It is true that the Treaties do not appear to contain a specific competence […] that would allow the European Union to borrow on the capital markets […]. However, under exceptional circumstances, it does not appear (completely) implausible that the measure could be based on Art. 311(2) TFEU […] provided that the decision on own resources satisfies at least the following requirements […]. It is not entirely clear whether Art. 5 of the 2020 EU Own Resources Decision satisfies these requirements; […] it appears somewhat doubtful whether the Decision can be based on that provision […]. And yet […] it cannot ultimately be concluded that the measure manifestly lacks a sufficient legal basis in the Treaties […].”[35]

The BVerfG chose to interpret the provisions quite broadly, to the extent that it could argue that the Own Resources Decision was still covered by them. While it did not hesitate to thoroughly examine all objections, it consistently arrived at the following conclusions: It is "an at least tenable interpretation" of the respective provisions of EU Law,[36] that it "cannot be clearly ruled out" that the 2020 EU Own Resources Decision satisfies the requirements of the respective provision of EU primary law,[37] that the 2020 EU Own Resources Decision does not "manifestly exceed the competence" set out in the respective provisions of EU primary law,[38] that it is "not ascertainable" that the 2020 EU Own Resources Decision is a "manifest violation" of the European integration agenda,[39] that it does not appear "(completely) implausible" that it could be based on the respective provisions of the primary EU law,[40] and that it is not "manifestly evident" that the 2020 EU Own Resources Decision exceeds the competence of the EU given in the EU primary law.[41]

In this case, the Federal Constitutional Court has applied the Ultra-vires-control much more leniently than it did in the PSPP judgment. While it thoroughly examines

[35] Cf. BVerfG, Judgment of December 6, 2022 - 2 BvR 547/21, 2 BvR 798/21, para. 149.
[36] Cf. ibid., para. 182.
[37] Cf. ibid., para. 162.
[38] Cf. ibid., para. 171, 182 and 186.
[39] Cf. ibid., para. 149.
[40] Cf. ibid.
[41] Cf. ibid., para. 203.

the objections, it does not allow any of them to pass using an extremely broad interpretation of the respective provisions of the TFEU. The BVerfG adopts a different approach, using a much more cautious and restrained language that indicates its self-restraint.

10. (No) Support for Nationalist Narratives in Hungary and Poland?

The fear that the PSPP judgment could serve as a convenient tool for nationalist narratives was indeed a concern following the ruling by the German Federal Constitutional Court.[42] After all, the court decided that the measures of the ECB and the confirming judgment of the CJEU were ultra vires. At first glance, this decision could be readily exploited to support nationalist narratives. The German Federal Constitutional Court, a country known for its pro-European stance, a nation that is recognized for its commitment to a united Europe, is itself drawing limits on European legal acts. Even in this case, the highest court opposes European legal acts and the CJEU. The logic may suggest that if Germany, a pro-European nation, takes such a stance, it is perfectly acceptable for others to do so, especially Hungary or Poland. However, for various reasons, this logic is flawed. Using the PSPP judgment as an argument to bolster nationalist narratives lacks consistency for several reasons. While it may have classified acts of the European Union as ultra vires, it is too simplistic to repurpose it for nationalist arguments.

When it comes to Germany, a strong inclination towards European integration has always been apparent. Germany's unique historical experiences, notably in the postwar period and during the unification process around 1990, have likely played a pivotal role. Moreover, Germany's substantial economic influence as the largest economy and one of the most powerful EU member states may contribute to its enduring pro-European stance. Regardless of whether geopolitics or economic factors have been the primary driving force, there is little doubt that these considerations have profoundly influenced historical developments. Given this context, it is unsurprising that the German Federal Constitutional Court has primarily focused on matters other than protecting specific elements of German

[42] Cf. for example BRADE A. – GENTZSCH M.: PSPP mit „PEPP” Der währungspolitische Kontrollmaßstab des BVerfG als „Ultra-vires-Akt”? *Verfassungsblog*, 2020. https://verfassungsblog.de/pspp-mit-pepp/ (Date of Access: 16/07/2024); MAYER F.: Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG. *Verfassungsblog*, 2020. https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/ (Date of Access: 16/07/2024); GÄRDITZ K.: Herrschaftslegitimation und implizite Identitätskontrolle, Nachbemerkungen zum PSPP-Urteil des Bundesverfassungsgerichts. *Verfassungsblog*, 2020. https://verfassungsblog.de/herrschaftslegitimation-und-implizite-identitaetskontrolle/ (Date of Access: 16/07/2024).

national identity from potential encroachments by central authority. The opposite of what nationalist movements aim for.

The German Federal Constitutional Court has appeared to prioritize not so much the safeguarding of characteristics of German national identity against a pan-European standardization, but rather the regulation of the pace of European integration, especially in terms of upholding democratic and rule of law standards during this process. While there has been some variation in its rulings over time, the German Federal Constitutional Court has displayed a remarkable degree of consistency in this regard.

It is indeed debatable whether a single national court should assume this role: the role of monitoring the ongoing process of Europeanization with a focus on upholding fundamental principles such as democracy and the rule of law. This could be viewed critically, and an institution independent of member states would undoubtedly be desirable in this regard. Regardless of this question, it is still essential to note that the output produced by the Federal Constitutional Court of Germany in recent decades is legitimate. Advocating and actively working towards more democracy and the rule of law, as demonstrated by the prominent judgments of the BVerfG in recent decades, is something that hardly can be criticized.

Additionally, the responses to the PSPP judgment in Germany were overwhelmingly critical, with very little support for the BVerfG's decision on PSPP. Widespread irritation was expressed. Furthermore, the Commission commenced infringement proceedings against Germany.[43] Germany also felt the consequences from that side and was called to order. Certainly, it stirred quite a commotion. However, once the dust had settled, it appeared that the court and its standpoint had not notably advanced. In fact, the subsequent ruling portrayed a notably circumspect, perhaps even acquiescent, court. The future remains uncertain, and time will reveal the course of events. Nonetheless, currently, the likelihood of the German Federal Constitutional Court reverting to its previous level of assertiveness appears rather slim. The judgment on the EU Own Resources Decision indicates a shift in the German Federal Constitutional Court towards increased caution. However, it is possible that its perceived influence had been diminishing for some time, irrespective of its own decisions. The European Union has expanded, and while the German Federal Constitutional Court remains a crucial court for the

[43] The European Commission closed the infringement proceedings because Germany provided very strong commitments clearly recognizing the primacy of EU law, so the European Commission, cf. https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201 (Date of Access: 16/07/2024). The arguments put forth by the Commission for initiating the infringement procedure and Germany's counterarguments are officially not publicly accessible. A summary of the statement of the German government can be found here: https://verfassungsblog.de/verfahren-eingestellt-problem-gelost/ (Date of Access: 16/07/2024).

largest member state, there are now numerous member states, each with their own significant voices.

As a national court loses its influence, there arises an increasing necessity to rebalance the power for an influential judicial dialogue that shapes the future course of European supranationalism. This dialogue ensures the preservation, implementation, and sustained integration of core principles like democracy and the rule of law during the Europeanization process. The solution might lie in the prospect that a group of courts could collectively accomplish what is no longer attainable by a single court.

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Transferring Ownership Right to Real Estate in the Czech Republic and Procedures at the Cadastral Office

Abstract: This article deals with several sub-issues related to the original topic. The aim of this contribution will be firstly to explain what form the contract on the transfer of ownership rights to real estate must have and what are the specific content requirements for such contract, according to the law of the Czech Republic. Another aspect will be an explanation at which moment will the new person acquire the ownership rights to the real estate and why the law applies this particular method, since the moment of acquisition of the ownership right is not the same as the moment of conclusion of the contract. Furthermore, this contribution will be devoted to the short explanation concerning proceedings before the Cadastral Office of the Czech Republic, how the cadastral office assesses the contract, how long the proceedings at the cadastral office usually last, what are the administrative fees and so on. Part of this will also be an explanation of the basic legal principles that relate to proceedings before the cadastral office and which are essential in acquiring ownership rights. This article reflects the Czech legislation effective as of November 1, 2023.
Keywords: cadastral office; immovable thing; real estate; superficies solo cedit; principle of material publicity; transfer of right

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1. Introduction

Every person has a certain housing need, i.e. the need to stay in a certain place for the purpose of housing. However, this need is not entirely the same for all natural persons, but depends, among other things, on the socio-economic environment (whether at the level of individual states or continents) in which a particular natural person is present at a given moment.

In the overwhelming majority of cases, housing needs are met in real estate. It is not important whether it is an apartment located in a multi-storey building, a house, a villa with a garden and a pool, or a dormitory. Housing needs can be met

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on the basis of the right of use, or even through the right of ownership, which I will focus on in more detail in this article.

The subject of this article, in its first part, will be an analysis of the legal regulation of immovable property in the Czech Republic, including the issue of the transfer of ownership rights. In terms of public opinion, real estate is considered a good investment across human generations. Not only because of their considerable value, the process of transferring most real estate in the Czech Republic is relatively strictly formalized. Even if the transfer of real estate takes place on the basis of the free will of two or more persons, the transfer itself cannot be done without the issuance of a decision by a public authority (the decision de facto approves this transfer, although de jure the purpose of this decision is slightly different; this will be explained later). The body that decides on transfers in the Czech Republic are the cadastral authorities (cadastral offices). The second part of the presented article will be devoted to this formal process mentioned above.

2. Housing Need and Its Fulfilment

At a time when the market prices of real estate (and the associated rent prices of real estate) are reaching their historical highs, there are a lot of discussions, not only among the professional public, about whether citizens have the right to have their housing needs met, as well as whether this right can be classified as elementary human right (such as the right to life, health, inviolability of a person, etc.).

This right is reflected in a certain way by the signatory states (including the Czech Republic) of the International Covenant on Economic, Social and Cultural Rights, Article 11, paragraph 1 of which states, among other things, the following: "States, parties to the Covenant, recognize the right of every individual to an adequate standard of living for him and his family, including sufficient food, clothing, **an** apartment, and to the constant improvement of living conditions.". In the Czech Republic, the just-cited article manifests itself especially in the area of the protection of the rights of the tenant, who is considered to be the so-called weaker contracting party in the contractual relationship with the landlord.

There is no doubt that at present, and with regard to the wording of the international document just cited, the satisfaction of housing needs (or the right to housing as such) is realized in immovable property; regardless of whether these are used as a right of ownership or as a right of use, for example in the form of a lease.

3. Real Estate and Immovable Things

Pursuant to § 498, paragraph 1 of Act No. 89/2012 Coll., Civil Code, as amended (hereinafter referred to as the "Civil Code"), the following applies:

"Immovable things[1] are tracts of land and underground structures with a separate intended purpose, as well as in rem rights therein and rights declared by a statute to be immovable things. If another legal regulation provides that a certain thing is not a component part of a tract of land, and such a thing cannot be transferred from place to place without violating its substance, such a thing is also an immovable thing." As the commentary literature states, however, the above list is not exhaustive (taxative)[2], as a unit (residential or non-residential) is also considered an immovable thing (property), according to the § 1159 of the Civil Code.

It is surprising that the legislator neglected to mention a unit (residential or non-residential; also called a flat in English) explicitly in the part of the Civil Code dedicated to the general distribution of things. all the more so when the statistics published on the website of the Czech Statistical Office clearly show that the population living in housing units in the Czech Republic constitutes the majority of the total population. [3] A residential unit as such is therefore an immovable object in which the population in the country most often realizes the satisfaction of their housing needs.

With effect from January 1, 2014, the Czech legislator introduced into the legal system in relation to immovable property the roman principle traditionally called superficies solo cedit. This principle can be translated, for example, in the following way: "What whoever built on our land, even if he built in his own name, is ours

[1] It should be mentioned here that there is a certain translation problem that arises from the different understanding of the term "real estate" in the English language on the one hand and in the Czech legal terminology according to the Civil Code on the other hand. When literally translated into English, the Czech law actually uses the term "immovable thing" or it could be also translated as "immovable property". The translation may seem somewhat strange, because in English language the term "real estate" is commonly used for immovable things. But this is where the translation problem arises. The term "real estate" is incorrect from the point of view of Czech legal terminology, because according to Czech legislation, the subjective right connected to the immovable thing is also considered for a thing (§ 489 and § 498 of the Civil Code). Therefore, a subjective right is considered for a thing. But the term "real estate", as understood in the English language, is a typical reference to houses, plots of land, apartments and the like. This can be a translation problem in a situation where I am describing a right connected to real estate, which is considered for a thing according to Czech legislation, but in the English language, the term "real estate" can no longer be used for the right. So, for some simplification, I will mostly use the legal term "immovable thing" or a synonym "immovable property" in this article in order to properly describe the situation from the point of Czech law. The term "real estate" will be used more where there is a reference to typical thing-real estate that is understood in the English language as "real estate", for example a house.

[2] HUBKOVÁ, Pavlína. § 498 [Movables and Immovable Things]. In: PETROV, J. – VÍTISK, M. – BERAN, V. et al.: *Civil Code*. 2nd edition (2nd update). Prague: C.H. Beck, 2023, marg. no. 1.

[3] Czech Statistical Office Website. *Population living in apartments*. [Online]. Available at: https://www.czso.cz/documents/10180/20541807/3.pdf/381cbabe-9ca7-4f46-9568-88a7bb0504f6?version=1.0 (Accessed: 25/10/2023).

according to natural law, because the building gives way to (i.e. shares the legal fate of) the land." [4]

According to the current Civil Code, land ownership includes the space above and below the surface, buildings established on the land and other facilities, including what is embedded in the land or fixed in the walls, including vegetation that has grown on the land[5]; with the exception of temporary constructions. [6] It should be added that some special laws may regulate specific elements in the landscape that are not part of the land, despite the existence of a superficial principle; for example, surface and underground waters[7] are not currently part of the land (nor did they become with the effectivity of the Civil Code). There things are considered to be res extra commercium. [8] By introducing the aforementioned principle into the domestic legal system, the Czech Republic joined the majority of European states whose legal systems are also based on proven Roman law traditions. [9]

Personally, I believe that it was a rational step taken by the legislator with a positive impact, as it is undoubtedly in the interest of property owners that the ownership of the land and the building standing on this land be unified. This will also prevent certain speculations with the sale of buildings without land (and vice versa). This unfortunate practice happened quite often in the Czech Republic. Quite often, before January 1, 2014 (i.e. before the entry into force of the new Civil Code), it happened that the owner of the land and the owner of the house built on this land were two different persons. This situation caused a lot of controversy. If this happened only by a coincidence, then the owners were able to function side by side. However, there were also cases where this situation was caused on purpose and was then the subject of various speculations or illegal actions.

At the same time, however, it must be said that on the date when the new Civil Code came into force, not all buildings became part of the land. In cases where the building and the land had a different owners already before January 1, 2014, this did not happen, as this would be an impermissible interference with property rights by the state power. However, in the spirit of the superficial principle, the owner of the building has a legal right of pre-emption buy to the land if there is a different owner (and on the contrary).[10] Even because of this right of pre-emption buy, further unification of ownership of land and buildings standing on will occur in the future.

[4] BARTOŠEK, M. – ZPĚVÁK, K. (ed.): *Encyclopaedia of Roman Law*. Prague: Panorama, 1981, p. 431.
[5] Act No. 89/2012 Coll., Civil Code, as amended, § 507.
[6] Act No. 89/2012 Coll., Civil Code, as amended, § 506 subsection 1.
[7] Act No. 254/2001 Coll., on Water and on Amendments to Certain Acts (Water Act), as amended, Section 3, subsection 1.
[8] These are therefore things excluded from trading. This was also confirmed by the Czech Supreme Court in its judgment of June 4, 2008, file no. 22 Cdo 1244/2007.
[9] Czech Government: Explanatory report to Act No. 89/2012 Coll., Civil Code, to § 505 - §509.
[10] Act No. 89/2012 Coll., Civil Code, as amended, § 3056.

Some immovable things are subject to the registration of the real estate cadastre. The purpose of its existence is to provide the necessary information about ownership and other rights to individual immovable property without further public attention. [11] With regard to the focus of this article, in the following lines I will deal only with immovable things registered by the land register in accordance with the provisions of § 3 of Act No. 256/2013 Coll., on the land register (cadastral law), as amended (hereinafter only as the "Cadastral Act"). These are, for example, land, structures, buildings, units, construction rights, etc. At first glance, it is obvious that the most important immovable things are entered in the real estate cadastre - both in terms of their value and also due to the need to keep records and an overview of proprietary and other rights.

4. Differences in Acquiring Ownership Rights to Immovable Things (Property) and Movable Things (Property)

According to Article 11 paragraph 1 of the Constitutional Act No. 23/1991 Coll., which introduces the Charter Of Fundamental Rights and Freedom as a constitutional law of the Federal Assembly of the Czech and Slovak Federative Republic, as amended, everyone has the right to own property. This right, as follows from the very name of the legal regulation in question, is a right enshrined at the level of legal norms of constitutional law. With regard to the system of the Charter of Fundamental Rights and Freedoms, ownership right (right to own respectively) is thus one of the basic human rights and freedoms, which also include, for example, the right to life, the right to the inviolability of a person, the right to personal freedom, the guarantee of the prohibition of forced labour, etc. The domestic legislator attaches special importance to property rights. The manifestation of this right is undoubtedly the possibility to own both movable and immovable things.

If it concerns the acquisition of ownership rights to immovable things registered in the real estate cadastre (i.e. in the public list), this is fundamentally different from the acquisition of ownership rights to movable things in some aspects. The subject of this chapter will be a legal analysis of some of the differences.

The domestic legislator stipulated that everyone is entitled to choose any form for legal actions, as long as this choice is not restricted by contractual arrangements or the law.[12] In the given case, it is a manifestation of the so-called principle of informality of legal actions. In the Czech Republic, we currently distinguish between

[11] Judgment of the Regional Court in Ústí nad Labem of January 23, 2001, file no. 15 Ca 549/2000.
[12] Act No. 89/2012 Coll., Civil Code, as amended, § 559.

its two basic forms of legal action – established by law and according to the agreement of the parties (contractual).[13]

If it concerns the transfer of ownership rights to immovable things (property), in accordance with § 560 of the Civil Code, the mandatory form of legal action is written. In other words, according to the text of the law, the contracting parties are forced to conclude a contract together in written form (regardless of whether it will be a gift contract, a purchase contract or an exchange contract). Failure to comply with this written form results in the invalidity of such legal action. [14] This written form most often takes the form of a document as a material substrate on which the legal actions of the acting parties are either handwritten or directly printed.

In view of the rapid development of information technologies in the past decade, the law also allows the transfer of ownership rights to immovable property by means of a deed in electronic form. In accordance with the provisions of Section 7, Paragraph 1 of the Cadastral Act, such a document must be provided with a qualified electronic time stamp. If the document in electronic form is signed with an electronic signature, a recognized electronic signature must be used for signing. This form of deed is not used very often in practice for transfers of immovable property, mainly because of the legal requirements for a qualified electronic signature, which ordinary people normally do not have. From my own practice as an attorney-at-law, I know that the electronic form of the document was most often used in the country relatively recently during the so-called lockdowns related to the spread of the COVID-19 epidemic.

On the other hand, in the case of the transfer of movable property, it is possible to conclude most contracts in oral form, although from the point of view of legal certainty and possible litigation (and related evidence) it is also recommended to use the written form.

The signatures of the contracting parties on the contract, which transfers ownership of the immovable, must be officially verified. Generally speaking, official verification of a signature in the Czech Republic takes place in such a way that the person signing comes to a Czech office or post office. There is the "CzechPoint" service here, which enables official signature verification. The person signing must either sign himself in front of the official, or he can take the already written signature as his own and declare that this signature is his. The whole event takes about 5 minutes and there is no need to pre-order.

[13] HANDLAR, Jiří. § 559 [Form of Legal Actions]. In: LAVICKÝ, P. et al.: *Civil Code I. General part (§ 1−654)*. 2nd edition. Prague: C. H. Beck, 2022, p. 1781.

[14] BERAN, Vladimír. § 560 [Obligatory Written Form]. In: PETROV, J. – VÍTISK, M. – BERAN, V. et al.: *Civil Code*. 2nd edition (2nd update). Prague: C.H. Beck, 2023, marg. no. 1.

If the signatures are not officially verified, the cadastral office will not allow the entry[15] of the ownership right to the cadastre and will instead invite the proposer of the entry to prove their authenticity within a thirty-day period from the date of submission of the application for registration. [16] Authenticity can be proven, for example, by the signed person personally acknowledging before the cadastral office that it is their own signature or a copy of their own signature. The cadastral authorities also accept the attorney-at-law´s declaration of the authenticity of the handwritten signature. This declaration is equivalent to an official verification of the signature.[17]

This is also different from the transfer of the ownership right to movable property, as no public authority decides on these transfers, and there is no need for the contracting parties to the transfer agreement to provide officially certified signatures (most of the contracts by which the ownership right is transferred to movable property, there is no need to use a written form either).

As already mentioned above, public authorities, namely cadastral offices, which are evenly distributed in all regional towns of the Czech Republic, are a necessary link in the process of transferring immovable property. These bodies performing state administration decide whether or not to allow the proposed registration of the entry of the ownership right in the real estate cadastre. It must be said that the question of allowing the deposit of the ownership right is not based on a certain administrative discretion of the relevant cadastral office, as the free will of the contracting parties who have agreed on the transfer of the ownership right to the immovable object in a certain way is of course respected, however the agreement of the contracting parties cannot be boundless and must be in accordance with the relevant provisions of the Cadastral Act, possibly also related by-laws. [18] These generally binding regulations falling under the scope of legal norms of public law again do not limit free will in any way, but impose certain formal requirements on the legal action consisting in the transfer of immovable property - whether it is the proper specification of immovable property according to the Cadastral Act or the examination of the very effectiveness of the transfer contract equally mandatory. In the given case, this is again a diametrical difference compared to transfers of

[15] The Cadastral Act recognizes three types of submissions – entry, record and note. Entry is used for registration of constitution, change, termination, prescription of rights and recognition of their existence or non-existence [e. g. ownership right, mortgage lien]. Record is such a registration into the cadastre, by which the rights derived from the ownership right are registered (e. g. the right to deal with the state property management). Note is such a registration into the cadastre, by which significant information about real estate or owners is registered (e. g. execution order for sale of real estate).

[16] Act No. 256/2013 Coll., on the Real Estate Cadastre (Cadastral Act), as amended, § 7 subsection 2.

[17] Decree No. 357/2013 Coll., on the cadastre of real estate (cadastral decree), as amended, § 63 subsection 1 letter a), b) and c).

[18] For example, Decree No. 357/2013 Coll., on the real estate cadastre (cadastral decree), as amended.

movable property, which in principle are not decided by any public authorities, and the transfer of ownership rights to these movable properties is thus not conditioned by the formal registration of ownership rights in any public register.

5. Acquisition of Ownership Rights to Immovable Things

As already mentioned above, in the case of the transfer of the ownership right to an immovable thing, it is necessary to distinguish between whether it is an immovable object that is the subject of registration in the real estate cadastre or an immovable thing whose existence is not subject to any registration (the real estate cadastre does not register every smallest immovable thing). With regard to the chosen focus of this article, I will primarily focus on the transfer of ownership rights to immovable thing that is registered in this public register.

In the event that the immovable thing is not entered in the public register, then the legislator stipulated that the owner of the thing is determined upon its transfer according to the following rule: "If a party transfers the ownership right to an item not entered in the public register to various persons through successively concluded contracts, the person to whom the transferor issued the item first acquires the ownership right. If there is no such person, the person with whom the contract was concluded, which took effect first, acquires the right of ownership." [19]

In practice, such a thing is typically represented by, for example, a garden pergola, gazebo or cottage, which, according to the historical development of legislation, did not have to be registered in any public register at the time of its creation. From my experience, I know that there is a rather negligible amount of these immovable things. In the case of legal disputes over ownership of such things, care is taken to protect good faith. [20]

The situation is as follows for immovable things registered in the real estate register. The ownership right to an immovable thing registered in the real estate cadastre is acquired, without any exceptions, by allowing entry into the public list.[21]

This entry has substantive legal effects. The process of acquiring the ownership right to an immovable object registered in the real estate cadastre is a so-called two-phase process. First, it is necessary to conclude the relevant contract (the so-called entry document[22]). Subsequently, this document is submitted to the relevant cadastral office together with a formal proposal for entry of the ownership right. In the second phase of the transfer of immovable property, the public authority

[19] Act No. 89/2012 Coll., Civil Code, as amended, § 1100, subsection 1.
[20] ŠVESTKA, J. – DVOŘÁK, J. – FIALA, J. et al.: *Civil Code. Comment. Volume III*. Prague: Wolters Kluwer CR, 2014, p. 268.
[21] Act No. 256/2013 Coll., on the Real Estate Cadastre (Cadastral Act), as amended, § 11 subsection 1.
[22] Which can typically be considered a purchase contract, gift contract, exchange contract, etc.

(cadastral office) decides on the permission of enter of the ownership right in the real estate cadastre.

In principle, the cadastral office can decide in two legal ways - either it allows the proposed deposit of ownership rights in accordance with the provisions of § 18, subsection 1 of the Cadastral Act, or it does not allow it (denies the entry). [23]

If the cadastral office finds out that the proposal for a deposit has all mandatory requirements as of the date of its submission and the entry deed (contract) meets the criteria established by the Cadastral Act, [24] it is obliged to decide on the authorization of the proposed deposit of ownership rights.

The Constitutional Court of the Czech Republic has previously commented on the above as follows: "In a situation where the contracting parties express their will in a relevant manner, which there is no doubt about from the point of view of the examined conditions, the cadastral office will "fulfill" the will of the parties to the contractual relationship and make an entry in the form of an official constitutive registration. The document expressing the will of the parties to the contractual relationship is the legal title for its constitutive registration. The cadastre is public and everyone is entitled to inspect it." [25]

However, by law, the cadastral office cannot issue a decision to authorize an entry earlier than after the expiration of a twenty-day period from the date of sending information to the owners and other authorized persons that there is a legal change in the given property. [26] In other words, the cadastral office does not decide on the proposed deposit of the ownership right immediately, as soon as the proposal together with the deposit deed is delivered to it, but at the earliest after the above-mentioned period has expired. This time delay between the submission of a proposal for a deposit and the issuance of a decision by the cadastral office is justified as follows in the professional literature: "During the discussion of the cadastral law, legislators included the 20-day period in the text of the law for the purpose of protecting property owners and other beneficiaries, in the event that dishonest behaviour occurs in connection with the deposit procedure. The participants in the proceedings can then take steps to protect interests protected by law when they suspect such a situation, i.e. in particular that there is doubt about the authenticity of the signature on the deposit document." [27]

The specificity of the decision of the cadastral office, by which this public authority authorizes the proposed deposit of the ownership right in the real estate cadastre, is that in such a case the decision is not made in written form. Such a

[23] Act No. 256/2013 Coll., on the Real Estate Cadastre (Cadastral Act), as amended, § 7 subsection 2.
[24] Act No. 256/2013 Coll., on the Real Estate Cadastre (Cadastral Act), as amended, § 17.
[25] Resolution of the Constitutional Court of the Czech Republic of 8 July 1999, file no. Pl. ÚS 11/99.
[26] Act No. 256/2013 Coll., on the Real Estate Cadastre (Cadastral Act), as amended, § 16 subsection 1.
[27] SUSTROVA, D.: *Real estate cadastre from the point of view of practice and jurisprudence*. 1st edition. Prague: C.H. Beck, 2023, p. 65.

decision cannot even be delivered to the participants of the deposit procedure. In this sense, the Cadastral Act follows on from the previous legislation, as the decision to authorize an entry is traditionally made in the Czech Republic by signing the new information in the relevant administrative file (by making the entry, this positive decision of the relevant cadastral office acquires legal force). [28] Subsequently, the cadastral office will send the participants of the administrative procedure in question a so-called notification about the entry of the ownership right in the real estate cadastre. From which it is clear what entry was made and based on which title deed was the entry made.[29] For the sake of clarity, the newly entered data in the real estate cadastre are marked in red in the relevant written notice (which is not a decision, as mentioned above). According to the provisions of Section 18, paragraph 4 of the Cadastral Act, it follows that no ordinary or extraordinary remedy can be used against the decision of the cadastral office, which allows the entry of rights.

However, the decision of the cadastral office can also be negative for participants in the entry procedure. The cadastral office has the authority to reject a proposal for permission to entry an ownership rights, even though the contracting parties have freely agreed on the transfer of ownership rights to immovable property. By law, the cadastral office obligatorily proceeds with this if the deposit deed does not meet the attributes specified in § 17 of the Cadastral Act (for example, if the deposit deed is not drawn up in the prescribed form, if the content of the deposit deed does not justify the proposed deposit, if the participant in the deposit procedure is limited in the possibility of to dispose of the immovable property legally, etc.) or if the proposal for a deposit has lost its legal effects. [30] Before the cadastral office issues a negative decision, it firstly informs the participants of the proceedings in written form about the facts justifying the future negative decision and allows them to inform themselves with the information and documents for issuing the future decision (and possibly express their opinion), by personally inspecting the file material at the relevant cadastral office workplace designated for conducting a specific deposit procedure. It should be added that this is a right of the parties to the proceedings, which they may (but may not) use within the specified period. [31] I know from legal practice that in some cases, at this stage, it is possible to overturn the rejection decision of the cadastral office by presenting your legal opinion and possibly supplementing the missing documents, however, this is more the exception than the rule. However, from the point of view of the participant in the cadastral proceedings, it is always desirable that this participant actively

[28] Czech Government: Explanatory report to Act No. 256/2013 Coll. on the real estate cadastre (cadastral law), No. 256/2013 report; to § 18.
[29] Act No. 256/2013 Coll., on the Real Estate Cadastre (Cadastral Act), as amended, § 18 subsection 3.
[30] Act No. 256/2013 Coll., on the Real Estate Cadastre (Cadastral Act), as amended, § 18 subsection 1.
[31] SUSTROVA, D.: *Real estate cadastre from the point of view of practice and jurisprudence*. 1st edition. Prague: C.H. Beck, 2023, p. 66.

familiarizes himself with the position and attitude of the cadastral office and tries to agree on another adequate procedural procedure with the relevant authorized official. This procedure may also result in the eventual withdrawal of the proposal for the deposit of ownership rights. According to the provisions of Section 18, paragraph 5 of the Cadastral Act, no ordinary or extraordinary remedy is admissible against the decision to reject the deposit, with the exception of a lawsuit filed under Act No. 99/1963 Coll., Code of Civil Procedure. In this sense, the decision to allow the deposit and the decision to reject the deposit are different. Another difference lies in the fact that the latter type of decision is compulsorily drawn up in writing and delivered to the participants in their own hands.

At the end of this chapter, however, it should be emphasized to the reader that cadastral offices are not called upon to find law: "the cadastral office may only make basic and simple legal considerations based on the content of the documents it examines. It cannot resolve disputed legal issues (e.g. it cannot assess the conditions under which rights arise, expire, change their content, transfer to other persons, etc.) because it cannot deviate from its record-keeping role."[32]

Despite this just-mentioned role, however, cadastral offices in the Czech Republic as public authorities have a relatively stable and strong position, because in view of the absence of proper and extraordinary remedies against their decisions, each party to the proceedings is motivated to strictly adhere to the diction of the relevant standards of the Cadastral Act and related regulations. This reason is purely practical, since in the case of the transfer of immovable property as property of considerable value, the parties to the proceedings prefer the speed of registration, rather than the possible initiation of court proceedings, which may take several years, and the outcome of which cannot be reliably predicted in advance, not even by the parties authorized to provide legal services in all matters - i.e. advocates (attorneys-at-law).

6. Selected Principles of the Real Estate Cadastre

The subject of this chapter will be a legal analysis of selected elementary principles of the real estate cadastre. se principles are very important, as their purpose is, among other things, to provide protection to persons acting in good faith, or to enable persons (regardless of whether natural or legal entities) who show an interest in providing information or documents that are the subject of real estate cadastre registration. These legal principles are contained in generally binding legal regulations. The Civil Code contains the main principles that are applicable to all public lists (ie not only to the real estate cadastre). In the given case, it concerns the principle of material publicity, the principle of tabulation, the principle of priority

[32] Judgment of the Supreme Administrative Court of 16 May 2018, file no. 10 As 384/2017.

and the principle of formal publicity. The Cadastral Act also enshrines the principle of disposition, as well as the legal principle of legality. In this chapter, however, I will only focus on selected principles that make domestic legislation, for example, regarding the provision of personal data from the real estate register, compared to foreign legislation, unique to a certain extent.

6.1. Principle of Material Publicity

At the beginning of this sub-chapter, it should be mentioned that in the case of a two-phase process of acquiring ownership rights to immovable things, which are the subject of registration in the real estate cadastre, two elementary legal principles enshrined in constitutional law may be in conflict. One of these principles is the principle of the protection of property rights as a basic human right (which was discussed in more detail in the introduction to chapter no. 2) and the principle of legal certainty and the protection of good faith. [33]

The conflict of these legal principles in relation to immovable property has already been the subject of a ruling by the Constitutional Court of the Czech Republic, from which the following follows: "Since the principle of protecting the good faith of the new acquirer works against the principle of protecting the property rights of the original owner, it is necessary to find a practical concordance between the two conflicting principles in such a way that the maximum of both is preserved, and if this is not possible, then in such a way that the result is compatible with a general idea of justice.“ [34]

In other words, the Constitutional Court of the Czech Republic did not provide any "universal guidance" in this regard, on the basis of which it would be possible to decide legal disputes regarding ownership between the previous and the new owner of the immovable property in the future.

Commentary literature on the centre of the legal principles just mentioned states the following: "These principles then meet in practice in certain situations in such a way that their application is mutually exclusive and it is necessary to choose which of them will be given priority - whether the protection of the property right of the real owner or the protection of the legal certainty of the bona fide acquirer."[35]

The principle of material publicity, also referred to in the professional literature as the principle of good faith, stands on the imaginary "ladder" of the basic principles of the real estate cadastre. This principle follows from the provisions of § 984 of the Civil Code and is generally applicable to some other public lists (but

[33] SUSTROVA, D.: *Real estate cadastre from the point of view of practice and jurisprudence*. 1st edition. Prague: C.H. Beck, 2023, p. 7.
[34] Decision of the Constitutional Court of the Czech Republic of 11 May 2011, file no. II. ÚS 165/11.
[35] VRZALOVÁ, Lenka. § 984 [The principle of material publicity]. In: SPÁČIL, J. – KRÁLÍK, M. et al.: *Civil Code III. Real rights (§ 976–1474).* 2nd edition. Prague: C. H. Beck, 2021, p. 38, marg. no. 2.

not all). It is applicable only in cases where there is a discrepancy between the actual status and the legal status recorded in the public list. On the basis of this principle, it is legally possible for a person interested in acquiring the right of ownership when acquiring it from an unauthorized person and meeting the legal conditions to actually acquire the right of ownership in accordance with generally binding legal regulations, regardless of the will of the real owner. However, these conditions were set quite strictly by the legislator, and must be met cumulatively in order for the acquisition of ownership rights from an unauthorized person to occur: 1) the existence of a discrepancy between the actual status and the status entered in the public register – real estate cadastre; 2) the acquisition of the right took place on the basis of legal action, 3) the legal action was based on payment (i. e. not for free), 4) the acquirer acquired the right in good faith, 5) the acquirer acquired the right from a person entered in the public register, 6) the real owner did not exercise his right in accordance with the procedure established by law.[36]

6.2. Principle of Intabulation

As already mentioned above, the process of acquiring the ownership right to immovable property, which is the subject of real estate cadastre registration, is a so-called two-phase process. This two-phase nature can be characterized as follows: the basic condition is the creation of a binding relationship (typically the conclusion of a purchase contract, within the framework of which the contracting parties agree on the transfer of ownership rights to immovable property registered in the land registry), which has inter partes effects. As the Supreme Court of the Czech Republic[37] has previously ruled: "In order to acquire the ownership right to the immovable property thus contractually transferred and thus to complete the substantive legal effects erga omnes, it is necessary to deposit this ownership right in the real estate cadastre." [38]

If it is intabulation itself, then it is a process of recording the rights to immovable things, which are the subject of the registration of the real estate cadastre. The intabulation principle is applied in some legal systems, where ownership rights to immovable objects actually acquire legal protection only after they are intabulated (recorded) in the public register (i.e. in the case of the Czech Republic in the real estate cadastre). With the use of the intabulation principle, the transparency of (not only) ownership rights is ensured to a certain extent. Furthermore, this

[36] Act No. 89/2012 Coll., Civil Code, as amended, § 984.
[37] The Supreme Court, with its seat in Brno, is the highest judicial authority in matters falling within the jurisdiction of courts in civil and criminal proceedings, with the exception of matters decided by the Constitutional Court and the Supreme Administrative Court.
[38] Judgment of the Supreme Court of 31 March 2011, file no. 30 Cdo 3991/2010.

simultaneously reduces legal uncertainty in the event of potential disputes regarding this basic human right.

6.3. Principle of Formal Publicity

The principle of formal publicity is closely related to the above-mentioned principle of material publicity. This principle actually means that anyone has the right to view the public list (that is, also the real estate cadastre), without having to justify the realization of this right in any way, or prove that they have a legal interest in this view. This legal principle is specified in § 52 paragraph 1 of the Cadastral Act as follows: "Everyone has the right to inspect the cadastre, obtain descriptions, extracts or sketches from it for their own needs and obtain data from the collection of documents from it, unless otherwise stipulated." This is related to the rule enshrined in the Civil Code, according to which no one is excused for not knowing the data entered in the public register. After all, this follows from the logic of the matter, because if any person did not have the right to inspect the real estate cadastre, the legislator could not enshrine the mentioned rule that ignorance is no excuse (§ 980, subsection 1 of the Civil Code).

If it concerns data recorded in the real estate cadastre, then in the case of a natural person, his name, surname, birth date and address of permanent residence are recorded in the real estate cadastre. It also contains a special "birth number", which is unique number for every citizen of the Czech Republic (similar as the social security number in the United States, for example). At first glance, it is clear that this is relatively sensitive personal data, which in its entirety provides a clear identification of a specific natural person. If it concerns the registration of birth numbers and other personal information, this is justified, among other things, as follows: "Given that there are a number of persons registered in the cadastre who have the same name, surname and date of birth as another person registered in the cadastre (approx. 6,000 duplicated data and even about 150 tripled data), while the address is not from the series for reasons of reliable identification data, it is also necessary to keep the birth number for unambiguous identification of the owner."[39]

Regarding Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free movement of such data and on the repeal of Directive 95/46/EC (General Data Protection Regulation), then this does not apply to the provision of any data from the real estate cadastre. In the provisions of § 1 paragraph 1 of the Cadastral Act, it is stated that the real estate cadastre is a

[39] State Administration of Land Surveying and Cadastre website. *Real estate cadastre and personal data protection* [Online]. Available at: https://www.cuzk.cz/Je-dobre-vedet/Ochrana-osobnich-udaju/Katastr-nemovitosti-a-ochrana-osobnich-udaju.aspx (Accessed: 31/10/2023).

public list. Also, the GDPR makes an exception if the published data has been published based on legal provisions of the given state.[40] It follows that the subjects of personal data do not have to grant the administrator of personal data any consent to the processing of personal data, when the law expressly assumes that the personal data of persons will be processed and published in the manner prescribed by law.

In other words, anyone can look up (or request their provision) any data in the real estate cadastre (or such data that the real estate cadastre records in accordance with the law), while the relevant cadastral authorities are obliged to provide this data upon request, without any justification.

There is another point of interest in the Czech Republic regarding the registration of immovable property. The internet portal of Czech maps (mapy.cz), which is similar to the well-known maps.google.com, is owned by a private company. However, this portal is linked to the land registry records in the sense that, upon correctly entering any existing address in the Czech Republic, the user is also offered a link to the land registry website, and with two simple clicks it is thus possible to find out the owner's name, surname and residential address (or co-owners) of real estate located at the searched address. Although this may seem like a violation of the principles for publishing personal data, the opposite is true (and Czech courts and authorities do not have a problem with this yet). In essence, it "only" happened that a private company processed the IT connection between maps and data published in the real estate cadastre. This "only" resulted in the use of the legal principles of formal publicity (everyone has the right to look into the real estate cadastre without proving anything) and material publicity (everyone can have confidence in the status recorded in the real estate cadastre and this is binding) and the use of modern IT means to make it easier search. In other words, there is no problem with this procedure yet, since it is "only" applying the principle of formal publicity and material publicity.[41]

7. Conclusion

The satisfaction of housing needs is currently realized by natural persons in immovable property. In the Czech Republic, mainly in those that are subject to the registration of the real estate cadastre, which is a public list according to the law. The purpose of the real estate cadastre is to record rights to immovable property (not only those of ownership), as well as to provide information on ownership and other rights relating to specific real estate.

[40] Article 6 subsection 1 of the GDPR.
[41] This has been shown to the audience during my presentation of my contribution during the II. ASCEA international conference.

The transfer of the ownership right to an immovable object registered in the real estate cadastre is specific in many respects and differs from the transfer of this basic human right to other things (especially movable things) by, for example, establishing a mandatory form for legal proceedings and, in particular, the so-called two-phase transfer of ownership rights. Even if at the beginning of the transfer of the ownership right to an immovable object there is in most cases a contract (regardless of whether it is a purchase, gift or exchange), the acquisition of the ownership right to an immovable object, which is the subject of the registration of the real estate cadastre, takes place only on the basis of a complex legal fact (i.e. conclusion of the relevant contract and deposit of the ownership right in the real estate cadastre, based on a positive decision of the relevant cadastral office). In other words, the transfer of immovable property in which it is possible to satisfy the need for housing is ultimately always decided by the state, through its authorities, while respecting the free will of the transferor and the acquirer of these immovable property.

From this it can be concluded that the state attaches extraordinary importance to business transactions consisting in the transfer of immovable property. This fact can also be a manifestation of the individual's right to satisfy his housing needs, or the right to an apartment.

In view of the fact that the legislator excluded the use of ordinary and extraordinary remedies against the decision of the cadastral authorities, which affects, among other things, the transfer of immovable property, everyone is the addressee of the legal norms. That is, the future participant in the cadastral proceedings is effectively "motivated" to comply without further ado with all the mandatory requirements of this type of legal action, as well as to fulfill all the requirements of the Cadastral Act, including bylaws.

All activities of cadastral offices, or the management of the real estate cadastre is subject to several basic principles, such as the principle of material publicity, the principle of priority, the principle of intabulation or the principle of formal publicity.

From the point of view of the public, the combination of the principle of material and formal publicity is extremely important, as on the basis of which the good faith of acting persons is protected, as it is possible to obtain personal data of other persons registered in the real estate register, without any proof of legal interest or other legally relevant reason.

Although the transfer of ownership rights to immovable property may appear at first glance to be quite complicated and formalized in the country, it should be added that the rules set in this way guarantee a certain degree of security and transparency of transfers of ownership rights to immovable property, which are the subject of registration in the real estate cadastre. This is correct and desirable from my point of view. Real estate generally has a considerable market value, which always rises in the long term, and it is in the public interest that transfers of ownership rights to such things are under a certain "microscope" of the public authority, which enters into the transfer of ownership rights in its second phase.

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Unsuitable Environmental Conditions and the Right to Asylum – Rethinking Migration in the 21st Century

Abstract: The following article presents the issue of emerging migratory pressures of people who see inadequate environmental conditions as reasons for their movement. This reflection first offers a basic introduction to the notions of environmental migrants, particularly in the context of public international law, human rights law and specifically in comparison with the existing global refugee regime. Next, the different types of migration that can be subsumed under such population movements are introduced. Subsequently, possible ways of dealing with environmental migration in the future are outlined with their advantages and pitfalls.
Keywords: environmental migration, environmental degradation, climate change, climate refugees

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1. Introduction

At the beginning of September 2015, the then President of the European Commission, Jean-Claude Juncker, delivered, among others, the following sentence in his annual speech to the European Parliament *"[…] Climate change is one of the root causes of a new migration phenomenon. Climate refugees will become a new challenge - if we do not act swiftly."*[1] By the end of 2020, according to the International Organization for Migration (IOM), there were more than 60 million irregular migrants in the world, some of whom were also migrants due to poor environmental conditions. However, according to publicly available data, this number is growing steadily[2], and by the middle of this century it is estimated that the number of people migrating for environmental reasons could reach 1 billion.[3] So, what is the regime for people from

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[1] *State of the Union 2015: Time for Honesty, Unity and Solidarity*. [online].[cit. 15/11/2023] Available online: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_5614

[2] IOM. (n.d.). World Migration Report 2022. World migration report. [online].[cit. 10/11/2023] Available online: https://worldmigrationreport.iom.int/wmr-2022-interactive/

[3] *Kdo jsou environmentální migranti a jaká právní úprava se na ně vztahuje*. Ústav mezinárodních vztahů Expertise to impact. (n.d.). [online]. [cit. 20/11/2023] Available online: https://www.iir.cz/kdo-jsou-environmentalni-migranti-a-jaka-pravni-uprava-se-na-ne-vztahuje

this large group who migrate because of unsuitable environmental conditions? And is the time ripe for a slow rethink of global asylum policy?

2. State of "play" today

As can be seen from the opening remarks, environmental migration, or the transboundary movement of people for inappropriate environmental reasons, will be one of the most significant challenges facing parts of the developed world in the future. However, even today, this issue is already significantly influencing the discourse of the biggest institutional-political players of today. If we look once again at the excerpt from the speech by the then President of the European Commission, Jean-Claude Juncker, we can note that perhaps the most significant fact is that, as in 2015, also today[4] in 2023 it is still not sufficiently reflected in the field of international law that climate change and its consequences for humans and their environment significantly affect the fundamental human rights and freedoms of individuals[5], which in turn intensifies the existing migratory pressures. So how does the international refugee and migration community reflect the issue of migration caused or exacerbated by climate change or other serious environmental damage?

First, the international legal regime does not define anything like environmental refugees in terms of a distinct category (1); furthermore, people who leave their current places of residence for reasons which may include environmental refugees are not subject to any special legal regime in terms of their protection (2); from which it can be concluded that environmental migration as a coherent group is not defined as a *legal concept* (3).

However, the fact that environmental migration and persons migrating for environmental reasons do not have a corresponding definition in the international legal regime does not mean that they are not defined at all. According to the definition published by the IOM, environmental migrants are defined as *"[P]ersons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad."*[6]

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[4] LUSTGARTEN, A.: *The Great Climate Migration has begun*. The New York Times, 2020. July 23. [online]. [cit. 22/11/2023] Available online: https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html

[5] OHCHR. *Frequently Asked Questions on Human Rights and Climate Change [Fact Sheet]*. United Nations (New York and Geneva: Office of the United Nations High Commissioner for Human Rights, 2021). p. 2–17.

[6] Environmental migration: IOM, UN Migration: Environmental Migration Portal. IOM, UN Migration | Environmental Migration Portal. (n.d.). [online]. [cit. 25/11/2023] Available online: https://environmentalmigration.iom.int/environmental-migration

As we can see from the generally accepted IOM definition, environmental migration therefore refers to people who *are* affected by adverse changes both immediately[7] but also as part of changes that occur gradually in their immediate environment. [8]

From the point of view of the general international law regime, it is important to distinguish between two concepts that are not entirely interchangeable.

Whereas in the case of an environmental refugee, it will be *„[someone who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."*[9]

Thus, in the case of an environmental *migrant* it is a person who is outside his or her country of origin and who at the same time wishes to reside in such new country for an unspecified period of time while doing so *voluntarily* and *does not have* the rights of a refugee[10] or a citizen of that country.[11]

As can be seen, there are fundamental differences between the above two concepts. The first is the aspect of will (*migrants*) versus the aspect of coercion (*refugees*). While the former is more of a factual element, the following element will be strictly formal in terms of the rules that govern the phenomena in question. While in the case of migration, and therefore migration for more or less environmental reasons, the regulation is national and entirely at the will of the individual states, in the case of refugees, and therefore also refugees for environmental reasons, it will always be the basis established by the international system and administered by the part of it that is called refugee law or international humanitarian law and the treaties and conventions linked to it. It is also important to mention the human rights dimension to the issue under discussion, which is increasingly being raised in relation to the cross-border movement of people due to inadequate living conditions and environment.

The human rights that can be, or are, discussed in the context of cross-border movement of persons are now quite clearly established by the general doctrine and

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[7] For example, sudden floods, widespread fires, hurricanes, or even wars that render a specific area uninhabitable.

[8] Here we will most often talk about desertification, rising sea levels or the general disappearance of drinking water.

[9] See art. (1(A)(2) of the 1951 Refugee Convention) Available online: http://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention.

[10] In this case, therefore, the environmental refugee whose reasons for claiming the right of asylum can be subsumed under the Refugee Convention.

[11] Migrant definition | UNHCR. (n.d.). UNHCR. [online]. [cit. 27/11/2023] Available online: https://emergency.unhcr.org/protection/legal-framework/migrant-definition#0

decision-making practice of regional human rights institutions.[12] The same is true in the case of significantly inadequate environmental conditions as a reason for leaving one's current place of residence and subsequently migrating to states that are more suitable in terms of living conditions for the person concerned. Most often and almost exclusively, we encounter human rights as the right to privacy and family life is the first to be referred to. Then there is freedom and security. The right to the protection of life. The right to adequate standard of living, as well as human rights of a collective nature.

A relatively watershed moment within the international recognition of the discussed topic was United Nations Human Rights Council Resolution 48/13 of 2021, in which the Council stated, that the effects of climate change interfere with the enjoyment of the human right[13] to a clean, healthy and sustainable environment and, together with the degradation of the environment, presents direct and indirect consequences for the enjoyment of all human rights and fundamental freedoms.

Of course, an unfit or unlivable environment may not be caused solely by the impacts of ongoing climate change, but the resolution makes clear that environmental degradation, together with the negative impacts of climate change, *have direct and indirect consequences on the enjoyment of all human rights and fundamental freedoms*. This is a statement that must be taken quite seriously from a body at the level of the United Nations Human Rights Council and can also be taken as a further step towards a future redefinition of global migration policy, or opening up the question of incorporating or creating a new category of the highest migration protection - asylum - also to matters of unlivable conditions in an inadequate environment.

That is is a view of today's environmental migration and the possible opening up of the future question of granting asylum[14] on environmental grounds.

3. Possible patheways

Before presenting the basic options for approaches to cross-border migration, it is useful to briefly return to definitions. I have already outlined the basic differences between environmental migrants and so-called environmental refugees.

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[12] OHCHR and climate change | ohchr. (n.d.). [online]. [cit. 28/11/2023] Available online: https://www.ohchr.org/en/climate-change

[13] In the same resolution, the Council recognized the right to a clean, healthy and sustainable environment as a fundamental human right that is essential to the enjoyment of other human rights and fundamental freedoms and to the existing international legal regime. In this regard, cf. paragraphs 1 and 2 of Council Resolution 48/13.

[14] It should be noted here that the term "asylum" is currently used only in the field of refugee law and in the context of the regime established by the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol of Implementation.

However, even within the category of environmental migration, it is not possible to speak of only one all-encompassing category. Providing an example is necessary in order to subsequently present different approaches, as certain ways of dealing with environmental migration will only be relevant for a certain, specific type of environmental migration.

I have already outlined that the key aspect in the case of environmental migration is volition, that is, migrants *are not*[15] in existential danger to their lives, but this does not mean that the given potential or actual danger is the same in all situations.

In 2007, the IMO distinguished environmental migrants into four categories, depending on the stage of their reason for migration.[16]

The first category is people who migrate because of a gradual change in the quality of the environment. For example, the only source of livelihood in a particular place is being depleted. In this case migration may be temporary or permanent.

The second category is people who migrate because of advanced degradation or inability to use the environment in a given place. Such a case may be, for example, the complete drying up of an area or the impossibility (and therefore not only the deterioration of the quality) of any activity for the sufficient survival of the inhabitants in a given place. In this case migration is almost always permanent.

The third category is people migrating as a result of an extreme event - for example, various hurricanes or major flood waves that can set back certain smaller and less developed countries with inadequate infrastructure by several decades. In this case migration is almost always temporary, however in some cases may also be permanent.

The fourth and final categorisation includes people who are forced to permanently change their place of residence, most often as a result of industrial or developmental changes in the area. Thus, the most common causes are deforestation and industrial or agricultural development in the Global South.[17] It should be noted here that in the vast majority of cases, this does not involve cross-border movement of people, but rather the movement of people within a single territorial unit. This migration within a state is always, by definition, permanent.

As can be seen, all these different species could be classified under the so-called environmental migration. Note that they contain different motivations. This is one of the reasons why it is so difficult to come to any kind of global consensus on this section of migration. Take, for example, refugee and asylum law. The basic motivation is survival and the preservation of one of the highest values - life and health. But is this always so obvious in the case of environmental migration?

[15] Compared to refugees under the Convention Relating to the Status of Refugees.
[16] IMO, Discussion Note: Migration and the Environment, MC/INF/288, November 2007.
[17] An interesting example is the clearing and loss of land by indigenous peoples in the Amazon rainforest.

Either way, the current regulation of environmental migration (in the broad sense) is now judged to be inadequate. As already mentioned, this is for several reasons. Almost no regulation applies to them, and what would already apply to some persons does so mainly because the persons in question fall under other categories that are much better and more comprehensively regulated.[18]

So, what are the solutions that can be observed in the discourse? The first is the adoption of some type of soft law document that would regulate the area more.

The international community has already attempted to do this with the adoption of the Global Compact for Migration by the United Nations General Assembly in 2018.[19] The problem, however, was that the compact is only general in nature and not enough attention is paid to environmental migration. Resistance from certain states may also be a problem, as they had quite a lot of reservations about adopting this non-binding legal institute anyway.[20]

The second option is to adopt some type of binding legal document. According to Bílková, there are basically only three types of such.[21]

The first would be the adoption of a new protocol to the 1951 *Convention Relating to the Status of Refugees*. This would bring the definition of "environmental migrant" (in the narrower sense) under the wing of the Convention. However, the question would be who to include in such a definition from among the above and who not. It is clear that embodying the broadest number of such migrants was counterproductive as it would lead to an overload of signatory states.

Another option would be the way through the 1992 Protocol to the *UN Framework Convention on Climate Change (*UNFCCC). Since the UNFCCC is the only real hard law climate document, and has a large number of signatories, the adoption of a supplementary protocol defining a "climate migrant" could be a type of solution. However, leaving aside the same problems as the previous point, here there would be the added aspect that the above would very likely have to be downgraded to environmental degradation (gradual or immediate) related to ongoing climate change. What would then be required in the case of people migrating from areas affected by significant environmental degradation not caused by climate change?

[18] For example, refugees from war zones or persons persecuted for reasons listed in the Convention Relating to the Status of Refugees.

[19] Global Compact for Safe, orderly and regular migration (A/RES/73/195). International Organization for Migration. (n.d.). https://www.iom.int/resources/global-compact-safe-orderly-and-regular-migration/res/73/195

[20] GOTEV, G.: Slovakia becomes 8th EU country to oppose Global Migration Pact, 2018. November 26. www.euractiv.com. [online]. [cit. 29/11/2023] Available online: https://www.euractiv.com/section/future-eu/news/slovakia-becomes-8th-eu-country-opposing-the-global-migration-pact/

[21] BÍLKOVÁ, V.: *Kdo jsou environmentální migranti a jaká právní úprava se na ně vztahuje*. Ústav mezinárodních vztahů - Expertise to impact. https://www.iir.cz/kdo-jsou-environmentalni-migranti-a-jaka-pravni-uprava-se-na-ne-vztahuje

The third option would be to adopt a separate instrument that would regulate the area of environmental migration separately and would clearly define the basic rules on the basis of which a person migrating from an area (State) would or would not fall within the definition. Accordingly, he/she would be further treated in the destination area (State).

4. Conclusion

It is more than obvious that the solution to this issue is not simple. We will certainly not see any hard law instrument regulating this issue in the near future. Even if the will of a large majority of states were to agree on a new sub-definition of an environmental migrant, it would still be unclear what categories of persons from the above division would fall under the definition of such an environmental migrant/refugee. Furthermore, such a document would certainly take more than five, or more likely up to ten, years to develop before a scientific and political consensus could be found. However, as can be seen, the pressures from certain international organisations, especially human rights bodies, are already coming.

In contrast, a soft law document specifically adopted to regulate this issue could be a type of solution, especially in the context of bringing the issue of environmental migrants into the global political-diplomatic discourse (if it is not already there).

Part of the solution would be strict compliance with climate commitments already made, especially by the world's major polluters, some of whom are often the destination of people who migrate because of (but not exclusively) unsuitable and unlivable environmental conditions.

Either way, the grounds for discussion on this topic will not stop anytime soon, for as Anne Peters, a prominent German-Swiss lawyer specializing in public international law and Director of the Max Planck Institute, wrote in a commentary at the end of 2018 on the then discussion around the adoption of the Global Compact for Migration, *„whatever short-term effects the current public debate on the Migration Compact will have for this text itself, it will not terminate the global efforts to regulate migration, because the need for global regulation — preceded and prepared by open and trans-national deliberations — will not go away.‘*[22] Because as the famous economic dictum goes – where there is demand, there should eventually be supply.

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Impact of Crime Circumstances on Judge's Punishment Discretion in French Law

Abstract: This article aims to illustrate the effects of the circumstances of the offense on the judge's discretion in individualizing the sentence: Human criminality is a social phenomenon that cannot be imagined or attributed to any civilization. The issue of the circumstances of crime is crucial in both theoretical and practical terms. It focuses on the injunctive legal requirements and encompasses both the criminal phenomenon and subordinate elements[1]. The judiciary's automated treatment of the elements of the crime in sentencing is due to the specialization in the auxiliary criminal law sciences and the failure of the injunctive texts to master the criminal law system. The research questions the French legislator's ability to apply the crime theory to ensure the accused's rights before the judge imposed a penalty, considering the crime's direct effect and the accused's personality compatibility. The French Criminal Code of 1992 addresses the circumstances of the crime in detail, despite it already being present since 1898. French jurist Raymond Salle emphasized that the punishment must be compatible with the crime's circumstances and the offender's personality[2], considering their past and future. This personalization of punishment is a manifestation of humanization, adapting the punishment to the perpetrator of the crime. The principle of individualization in French criminal legislation requires legislators to clearly outline each crime and provide courts with the necessary tools to adjust punishments based on the crime's circumstances. This produces an effect on all contributors or participants in the crime, even if they are ignorant of it. The circumstances of a crime can be divided into material and moral circumstances, as committing the crime after a previous determination to kill indicates a personality with a high degree of criminal danger, necessitating an increase in social prevention measures.[3] This research aims to examine the impact of crime circumstances on judicial punishment discretion in French law. It will involve a literature review, legal analysis, case study analysis, interviews, surveys, legislative analysis, comparative analysis, and statistical analysis. The study will also consider ethical considerations, participant confidentiality, and ethical standards in legal research. The findings will be synthesized to

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[1] The writer expresses them in TATE: *Technique of Judicial Interpretation in Louisiana.* and 22 LA. L. Revd. 727, 1962., TATE: *Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673, 1970., and TATE: *The Law Making Function of the Judge*, 28 LA. L. Revd. 211, 1968.

[2] MORROW: *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 Tut. L. Revd. 351, 537, 1943.

[3] Id. at 394. See also other articles by MORROW: *The Future of Codification in Louisiana*, 29 It. L. Revd. 249, 250, 1955., and MORROW: *An Approach to the Revision of the Louisiana Civil Code*, 23 Tut. L. Revd. 478, 479, 1949.

draw comprehensive conclusions about the influence of crime circumstances on judicial punishment discretion in French law. The research will be subjected to peer review and validation to ensure the validity and reliability of the research outcomes. The study will provide insights into practical applications of legal principles under examination.[4] The circumstances of the crime can be divided according to the effects generated by it into aggravating and mitigating circumstances. The French Law has several penalties that swing between the lowest and highest limits, allowing the judge to choose the penalty limit according to the criminal's circumstances. However, this authority granted to the judge is not absolute, as the legislator obliges the judge to explain his decision when granting the accused mitigating or aggravating circumstances[5].

Keywords: Crime circumstances, Judge's discretionary power, Individualization of punishment, French criminal legislation, Aggravating and mitigating circumstances, Penalty limits

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1. Introduction

In the ever-evolving landscape of criminal jurisprudence, the intricate relationship between the circumstances surrounding a crime and the ensuing legal ramifications has been a subject of profound exploration[6].

This research endeavors to delve into the nuanced evolution of criminal jurisprudence, particularly within the context of French legislation, where a paradigm shift has occurred, emphasizing the significance of the theory of the circumstances of the crime[7].

Rooted in the historical precedence set by ancient legal codes such as the Code of Hammurabi and Roman law, the French legislator has strategically redirected the focus from the victim-centric approach to a comprehensive evaluation of criminal behavior[8]. This redirection manifests in the French Criminal Code, a legal framework that empowers judges with discretionary authority, allowing them to tailor punishments based on the compelling necessities and specific circumstances surrounding each criminal act.

[4] DAINOW: *Civil Cone of Louisiana, "The Louisiana Civil Law,"* XV at XVII (1961 Ed.). See also, e.g. PASCAL: *A Report on the French Civil Code Revision Project*, and 25 TUL. L. REV. 205, 212-13, 1951.

[5] DANIO: *The Constitutional and Judicial Organization of France and Germany and Some Comparisons of Civil Lau and Common Law Systems*, 37 IND. L.J. 1, 11, 27-28, 43-44, 1961.

[6] Ireland, Louisiana's Legal System Reappraised, 11 TUL. L. REV. 585 (1937). Com Mint, Stare Decisis in Louisiana, 7 TUL. L. REV. 100 (1933).

[7] The 1937 dispute and the leading articles involved are briefly summarized in Bros-Man, a Controversy and a Challenge, 12 Tool. L. REV. 239 (1938).

[8] TUCKER: *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739, 757-59, 1955.

As the theoretical foundations of crime circumstances become a subject of ongoing debates among legal scholars, the practical application of these theories encounters challenges, notably in certain sections of the Moroccan Criminal Code[9]. This research aims to navigate the theoretical and practical significance of crime circumstances, exploring the implications for automated judicial treatment and the specialized knowledge required by judges in auxiliary criminal sciences.

Beyond the theoretical discourse, this study employs a methodological design grounded in the French double-division school, offering a comprehensive analysis of the nature and types of circumstances surrounding criminal acts. The exploration extends to the personalization of punishment within the fabric of French legislation, highlighting the legislator's emphasis on aligning punitive measures with both the circumstances of the crime and the individual characteristics of the offender[10].

Debates surrounding the extent of judges' powers in criminal legislation, coupled with considerations of constitutional principles and the relativity of equality in French criminal laws[11], provide a critical backdrop. Legal scholars' emphasis on the nuanced distinction between "formal equality" and "apparent equality" further contributes to the discourse on the delicate balance between individual rights and societal interests[12].

This research goes on to characterize the circumstances of a crime, delineating their three fundamental attributes and highlighting their crucial role in implementing the principle of individualization. The classification of circumstances based on their nature into material and personal aspects enriches our understanding of their influence on both tangible and moral elements of a crime[13].

As the study progresses, it scrutinizes aggravating circumstances, distinguishing between general and specific instances, with a spotlight on recidivism as a pertinent example. The importance of these circumstances in shaping judicial discretion for the personalized application of punishment is emphasized, adding layers of complexity to the evolving landscape of criminal justice[14].

An exploration of the controls guiding the judge's work, informed by discretionary power, underscores the necessity for precise criminal legislation to prevent multiple interpretations[15]. Aspects such as criminal seriousness, criminal

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[9] PLANIOL: *Civil Law Treatise* (1939) (Louisiana State Law Institute translation, 1969, 6 vols.); F. Gi.Ny, Method Of Interpretation and Sources of Private Positive Law, 2

[10] v. Standard Indemnity Company, 97 So. 2d 435 (La. App. 1st Cir. 1957), discussed in TATE: *„Policy" in Judicial Decisions*, 20 LA. L. Revd. 62, 72-74, 1959.

[11] PROSSER: *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1960., PROSSER: The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 1966.

[12] WHITE: *The Right of Recovery for Prenatal Injuries*, 12 LA. L. Revd. 383, 1952.

[13] LA. Civ. CODE art. 29 (1870); Cooper v. Black, 39 So.2d 352 (La. App. Or. 1923); Note, 12 LA. L. REV. 519 (1952).

[14] Majority and concurring opinions in Robichaux v. Huppenbauer, 258 La. 139, 245 So.2d 385 (1971).

[15] MALONE: *Comparative Negligence-Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 1945.

tendency, and the judge's reasoning for rulings emerge as pivotal considerations in this complex interplay.

The research extends its purview to the role of the personal file in criminal justice, illuminating its vital role in unraveling the intricacies of the offender's personality and circumstances[16]. Legislative requirements for file organization and criteria affecting conditional release conditions provide insights into the practical implementation of individualized justice.

Culminating in a reflection on criminal sociology's role in understanding mitigating circumstances, the research sheds light on external factors influencing criminal phenomena.

The examination of conditional release and judicial discretion[17], considering personal, family, and social life circumstances, underscores the dynamic nature of individualized justice in the contemporary legal landscape[18].

This research navigates the multifaceted dimensions of the modern criminal policy of individualizing punishment, highlighting the imperative for judges to possess broad authority. The delineation of the limits of the judge's authority in mitigating or aggravating penalties serves as a critical reminder of the delicate balance required in the pursuit of justice, with an emphasis on robust controls and restrictions within the framework of discretionary power[19].

2. The Evolutionary of Theories and their Application in the French Criminal Code

This research explores the evolution of legal theories, specifically their application within the French Criminal Code. The French legislator has strategically emphasized the theory of the circumstances of the crime. The study delves into the historical foundations, theoretical underpinnings, and practical implications of this evolution, unraveling its multifaceted dimensions within the context of the French legal system[20].

The research uses a methodological design grounded in the French double-division school to scrutinize the nature, types, and classifications of circumstances surrounding criminal acts, offering a nuanced perspective on the personalization of

[16] STONE: *Comparative Negligence*, 17 LA. BAR J. 15 (1969).
[17] K. IA.AWE.I.YN. THE COMMON LAW TRADITION: DECIDING APPEALS (1960), passim but esp. at 36-45, 62-76.
[18] Hubbert v. Mud, 187 So.2d 503 (La. App. 3d Cir. 1966), critically noted, 13 Loy. L. REV. 189 (1967) and 41 Tool. L. Rave. 942 (1967).
[19] Miami Corporation v. State, 186 La. 784, 173 So. 315 (1936), overruling State v. Ervin, 173 La. 507, 138 So. 84 (1931).
[20] Coulson v. Anthony Hamlin, Inc., 93 So.2d 557 (La. App. Or. 1955), off had 233 La. 798, 98 So.2d 193 (1957).

punishment enshrined in the Criminal Code of 1992. The exploration extends to debates over judges' powers, the characteristics of circumstances, and their profound influence on the delicate balance between law and reality[21].

The French Criminal Code reflects these theories, as they grant judges discretionary power when approving the punishment by increasing or mitigating it as a compelling necessity for the crime or act committed, taking into account the circumstances surrounding it from a legal standpoint. However, the practical application of the theory of the circumstances of the crime may face difficulties, as is evident in the judicial treatment of the penal texts that frame it, especially from Chapters 121 to 131 of the French Criminal Code[22].

This research provides a comprehensive understanding of the modern criminal policy of individualizing punishment within the French legal landscape, focusing on the evolution of legal theories and their application within the French Criminal Code[23].

3. Sentencing Dynamics: Exploring Personal, Concrete, and Mixed Circumstances in French Criminal Law

This research explores the dynamics of sentencing within French criminal law, focusing on personal, concrete, and mixed circumstances[24]. These circumstances significantly influence the severity and nature of criminal penalties, serving as crucial factors in the judge's discretionary power. The study aims to understand the nuanced distinctions between personal and concrete circumstances, their impact on criminal behavior, and their subsequent influence on the sentencing process[25].

3.1. The material circumstances

These circumstances are considered an element of the material element of the crime, which is represented by the criminality, whether negative or positive - and the relationship is in addition to the criminal result[26].

These circumstances add to the material element and increase or reduce the punishment, including those related to time, such as committing the crime of theft at night stipulated in the Criminal Code, where the penalty is transferred from one to five years, as it is inferred from this chapter that the crime Theft is considered a

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[21] Louisiana State Law Institute Translation, 1963. 39. Id., §§ 51-59, 92-108.
[22] G9NY, cited supra, note 38, passim (e.g. Sections 101, 106, 107)
[23] Hill v.Lundin & Associates, Inc., 260 La. 542, 256, So.2d 620 (1972) and Pierre v. Allstate Insurance Company, 257 La. 471, 242 So.2d 821 (1970)
[24] Naquin v. Calais, 181 So.2d 885 (La. App. 1st Cir. 1966)
[25] Anderson v. Rowan Drilling Co., 150 So.2d 828 (La. App. 3d Cir. 1963)
[26] Santo Bello v. New York, - U.S. , 92 S. Ct. 495 (1971).

misdemeanor[27]. However, by referring to the French criminal code, we find that it stipulates that the punishment be increased and limited to imprisonment from ten to twenty years if the theft is accompanied by at least two of the circumstances stipulated in the French criminal code, including committing the theft at night and committing it by two or more people.

These circumstances also include what relates to the place, such as a haunted house, and what relates to the means used in committing the crime, such as the use of forged keys in the crime of theft, for example. It is important to point out that the material circumstances, that is, the tangible ones, affect all contributors and participants in the crime, even if they are ignorant of them, according to the last paragraph of Chapter 130 of the Criminal Code[28].

3.2. Personal circumstances:

Those circumstances are that are associated with the moral element of the crime, and they have two forms. The first form assumes an increase in the seriousness of the criminal will, and the same applies to premeditation or premeditation in premeditated murder crimes[29]. The reason for this emphasis is that committing the crime after a previous determination to commit it indicates a personality with a high degree of criminal danger, and the prior determination to kill makes it easier for the perpetrator to carry out the crime and thus increases the risks to which the victim is exposed, which necessitates an increase in social prevention measures constituted by the criminal punishment. There is a group of jurists and criminologists who do not accept the evidence that these methods indicate the seriousness of the criminal personality, arguing that premeditation is the best criterion for determining the seriousness of the offender[30].

As for the second image, it assumes a characteristic of the offender and means an influence on the level of seriousness of the criminal personality. An example of this is the characteristic of the servant in the crime of theft, and the prescription of the doctor in the crime of abortion. After this paragraph, it should be noted that personal circumstances are limited to their shareholders, as the French legislator was keen to stipulate in Chapter 130 of the Code of Criminal Code that personal

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[27] Ordinance of February 2, 1945, art. 8, paragraphs 4 and 5.

[28] Decree no. 58-1304 of Dec. 23, 1958, concern ant application du C. proc. pan. Art D.16, 1.0. Dec. 4, 1958, p. 11776, Dall. (Lg.) 1959, 100.

[29] ROUVIER: *Théorie g6ndrale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd Edition, Dalloz Publishing House, 2005, page 69.

[30] Studii de Drept Romanesc. Year 15 (48), no. 1-2/2003. Page 19.

circumstances that result in aggravation, reduction, or exemption from the penalty do not affect anyone except those who have it[31].

3.3. Mixed circumstances

Arise when personal and concrete factors intertwine, creating a unique set of challenges for legal interpretation and sentencing. The study explores the nuanced nature of these circumstances, investigating how their convergence can significantly affect the description of a crime and subsequently influence the severity of penalties[32]. Through an in-depth analysis of relevant legal frameworks and case studies, the research aims to provide clarity on the complexities surrounding mixed circumstances. By examining their effects on the judicial decision-making process, this study contributes to a more comprehensive understanding of the dynamics involved in navigating mixed circumstances within criminal law.

4. Exploring the Theoretical and Practical Significance of Crime Circumstances

The importance of the circumstances of a crime lies in its theoretical and practical aspects. The theoretical level involves the injunctive legal requirements that deal with the circumstances of the crime, which is still the subject of interest and debate among researchers[33]. Crime is closely linked to humans as a social phenomenon, and most countries establish injunctive provisions that criminalize and punish based on the principle of legitimacy[34].

The nature of crime in modernity has led to the literature treating this theory as a fertile ground for assessing the penalty. However, it is deeper than that, encompassing forms related to the criminal phenomenon and a subsidiary element. The elements of the crime are also considered[35].

On the practical level, there is an automated treatment of the judiciary in considering the circumstances of the crime when estimating the penalty. This is due to their compulsion to specialize in auxiliary criminal sciences and the failure of the injunctive texts regulating this theory to extend and dominate the penal system. The quality of the text cannot be judged theoretically, as it always needs activation and application. Therefore, this presentation should be open to judicial rulings and decisions to be livelier.

[31] TERR: *Introduction gendrale au droit*, 7th Edition, Dalloz Publishing House. 2006, page 45.
[32] ROUBIER, op. Cit, page 76.
[33] MALAURIE. Op. Cit. Page 315.
[34] ROUBIER, op. Cit, page 80.
[35] VALLIMIRESCU: *Tratat de Enciclopedia dreptuhi*. Lumina Lex Publishing House. Bucharest, 1999, page 166.

The topic revolves around the ability of French law to apply the theory of crime circumstances to ensure the rights of the accused before the judge pronounced the penalty.

The proposed method and research plan consider reality as moving and law as static, with opposition and conflict arising from ambiguity and complexity. To highlight the relationship between the criminal and the circumstances in which the crime was committed, the methodologists use the dialectical approach and the descriptive approach.

This approach analyzes each aspect of the crime and its description, aiming to establish a harmonious relationship between the two. The judiciary plays a crucial role in regulating the rhythm of this harmony[36].

The central problem will be addressed using a methodological design based on the French double-division school. We first study the nature of the circumstances and types of the crime; secondly, we study the effects of the circumstances of the crime on the judge's discretion in determining the penalty.

There is almost unanimity on the part of jurisprudence and judiciary that a crime can only be committed if its material and moral elements are present. The material element is the criminal behavior, and the moral element is the criminal intent, knowledge of the nature of the behavior and the result it leads to, the will for the behavior and the result together for intentional crimes, and unintentional error for unintentional crimes. The two elements may be attached to a circumstance of the crime that is different from its description[37].

The French legislator addressed the circumstances of the crime in the Criminal Code of 1992 in Articles 24-132 to 70-132, which had already been present in the French Criminal Code since 1898. According to French jurist Raymond Salle, the punishment must be compatible with the circumstances of the crime and the personality of the offender. The personalization of punishment appears as a manifestation of its humanization, by adapting the punishment to the perpetrator of the crime.

The French Constitutional Council recognized the personal nature of punishment as a natural result of the principle of the necessity of punishments, which requires the legislator to stipulate each crime in a clear and precise manner and that each punishment must be proportionate to the crime committed and its circumstances. The principle of individualization applies to forcing the legislator to give the courts the necessary means to change the punishment according to the

[36] Quote from Vallimarescu, op. cit., page 364.
[37] DANIGOR – DOGARU – DANIGOR: *Teoria generala a dreptului*, C. H. Beck Publishing House, Bucharest. 2006, page 151.

circumstances of each crime and preventing the legislator from issuing rulings that meet the circumstances simultaneously[38].

The current Penal Code has enshrined this principle, as Article 1-132 states *"any punishment imposed must be individual"* and in the second paragraph within the limits under the law. The court determines the nature of the sentences and the system depending on the circumstances of the crime and the personality of the perpetrator[39].

Some researchers argue that the judge's powers in criminal legislation are not limited and are not framed by the principle of criminal legality, as stated in Article 8 of the French Declaration of the Rights of Man and the Citizen of 1789.

Therefore, we must distinguish between "formal equality" and "apparent equality," as Professor Muriel Delmas-Marty states: *"Strict formal equality prevents taking into account the specific characteristics of each case and each person."*

The theoretical significance of the circumstances of a crime lies in legal requirements dealing with its injunctive aspects, contributing to ongoing debates among researchers. At a practical level, automated judicial treatment considers these circumstances, relying on the specialization of judges in auxiliary criminal sciences[40].

5. Judicial Powers in the Context of French Criminal Legislation

This research delves into the nuanced landscape of judicial powers within the framework of French criminal legislation. Focusing on the intersection of constitutional principles, legal relativity, and the practical exercise of judicial authority, the study aims to unravel the complex dynamics that shape the role of judges in the French legal system. The exploration spans debate over the extent and limitations of judicial powers, with particular attention to the constitutional principle of equality. Emphasizing the relativity of equality in French criminal laws, the research scrutinizes the judge's role in considering the character and danger of the offender during sentencing[41].

The distinction between "formal equality" and "apparent equality" becomes a focal point, with scholars offering insights into the intricate balance required to uphold justice while considering the unique circumstances of each case. Through a comprehensive analysis,

[38] DJUVARA: *Teoria generalđ a dreptului (Enciclopedia juridica!)*. All Publishing House. Bucharest, 1995, page 473.
[39] BERGEL, op. cit. page 311.
[40] VALLIMARESCU, *Treaty of Law Encyclopedia*, Lumina Lex Publishing House, Bucharest, 1999.
[41] DANIGOR – DOGARU – DANIGOR: *General Law Theory*, C. H. Beck Publishing House, Bucharest, 2006.

This research contributes to a deeper understanding of how judges navigate their discretionary powers, ensuring a delicate equilibrium between legal principles and the demands of individual cases within the French criminal justice system[42].

5.1. Aggravating circumstances in French criminal law

French law allows judges to increase penalties under specific circumstances, as outlined in Articles 132-9 and 132-10 of the Criminal Code. For example, if a natural person is already definitively sentenced for a crime or offense punishable by ten years of imprisonment, committing a similar offense within ten years from the expiration or prescription of the previous sentence results in a doubling of the maximum imprisonment and fine incurred. Similarly, if the individual commits an offense punishable by a prison sentence of more than one year and less than ten years within five years from the expiration or prescription of the prior sentence, the maximum penalties are again doubled. Article 132-10 extends this provision to instances where a person, previously sentenced for an offense, repeats the same offense or an assimilated one within five years from the expiration or prescription of the previous sentence, leading to a doubling of maximum prison sentences and fines[43].

Aggravating circumstances in French criminal law refer to factors that increase the severity of penalties for crimes. These circumstances can be general or specific and can be applied to all crimes or a small number of crimes. Common examples of aggravating circumstances include recidivism, which involves the repetition of criminal behavior by an individual who has previously been convicted and punished, and the use of encryption means in information systems. Understanding these different types of recidivism is crucial for legal and criminal justice professionals to tailor interventions and sentencing strategies effectively[44].

The severity of harm inflicted by a crime may also be considered an aggravating circumstance. The extent of harm caused to victims is considered when determining the gravity of the offense. Prejudice to vulnerable persons, acts involving cruelty, torture, or inhumane treatment may be considered aggravating circumstances. Crimes committed as part of a gang or organized criminal activity may be treated more severely. Abuse of power or authority, racial or hate motivation, and aggravation based on the victim's status may also lead to increased penalties.

French criminal law aims to ensure that penalties are proportionate to the gravity of the offense and that aggravating circumstances are taken into account during sentencing to achieve justice and deterrence.

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[42] ALEXANDRESCO: *Romanian civil law, principles*, volume 1, Graphic Workshops SOCEC, Bucharest, 1926.
[43] MAZILU: *General Theory of Law*, 2nd edition, All Beck Publishing House, Bucharest, 2000.
[44] MIHAI: *Law foundations*, *volumes I II,* All Beck Publishing House, Bucharest, 2003.

5.2. Mitigating factors in French criminal law

French law grants discretionary powers to judges under Article 131.4-1, which emphasizes a nuanced and rehabilitative approach to criminal sentencing. This includes home detention under electronic surveillance, which acknowledges that traditional imprisonment may not always be the most effective means of addressing criminal behavior.[45]

The conditions imposed during home detention, such as the obligation to wear an electronic monitoring device and the specified reasons for permitted absences, illustrate a balanced approach, acknowledging the need for supervision while also facilitating the individual's participation in essential activities such as work, education, or medical treatment[46].

The provision allowing the court to implement assistance measures to support social reclassification underscores a holistic approach to criminal justice. Addressing the root causes of criminal behavior and providing necessary support can contribute to reducing the likelihood of reoffending. By offering assistance tailored to the individual's needs, the legal system aims not only to punish but also to actively contribute to the social rehabilitation and reintegration of the convicted person.

Mitigating factors in French criminal law include psychological or mental health issues, genuine remorse and rehabilitation efforts, first-time offender status, voluntary cooperation with authorities, age and maturity of the offender, no serious harm caused, duress or coercion, and circumstances of necessity. These factors underscore the principles of proportionality and individualization in sentencing, allowing the legal system to consider the unique circumstances of each case and tailor penalties accordingly[47].

Criminal sociology plays a crucial role in understanding criminal phenomena, emphasizing the examination of external factors. The French judiciary uses psychological expertise to determine mitigating circumstances, and for penalties ranging from twenty to ten years, compensation includes imprisonment for five to ten years or two to five years, or a prison sentence ranging from one to five years.

The powers granted to judges under Article 131.4-1 demonstrate a thoughtful and multifaceted approach to criminal justice in France, emphasizing individualized sentencing, electronic monitoring, and support for social reintegration[48].

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[45] MIHAI: *The Foundations offlaid. The Theory on the Beginning of Objective Law, volume III,* All Beck Publishing House, Bucharest, 2004.

[46] BERGEL : *Theorie gendrale du droit, 4th Edition*, Dalloz Publishing House.

[47] GRIDEL : *Le role de la Cour de Cassation Frangaise dans I 'laboration et la consicration,* op. cit, page 311.

[48] MALAURIE: *Anthology of legal thinking*, Humanities Publishing House, Bucharest, 1996.

The modern criminal policy of individualizing punishment requires judges to have broad authority to evaluate case elements, and evidence, prove guilt, and determine penalties and measures.

5.3. The Significance of Personal Files in the Adjudication Process of French Criminal Justice

The importance of the profile is highlighted in criminal justice because it helps judges determine the seriousness of the crime and the potential for mitigating circumstances. The French judiciary uses these criteria to ensure that the criminal's personality and circumstances are taken into account in the decision-making process[49].

The importance of the personal file is highlighted in criminal justice, as it is difficult for judges to know the personality of the offender without examining his actions and the perpetrator of the crime. The legislation was guided by the stipulation that this file should be at the disposal of the judge before he issues his ruling. One of the requirements of criminal justice is to research the circumstances of the crime to apply the principle of uniqueness of punishment by studying the personality of the offender. The positivist school is credited with making criminal thought move from the crime to the criminal, and the guidance was as we mentioned in the file above[50].

It discusses the organization of the profile and the criteria affecting the granting of conditions. Legislative regulation of the criminal’s file is required when the investigating judge is asked to conduct a preliminary investigation that includes investigating the character of the accused and the circumstances surrounding him, whether familial, economic, or social. This file accompanies the accused until his appearance before the criminal court. It becomes a comprehensive file about the personality of the accused and his various circumstances so that the reasons affecting the determination of the punishment are identified.

5.4. Criminal Sociology and Mitigating circumstances

Criminal sociology is considered one of the auxiliary disciplines of criminal sciences that attributes the causes of crime to the influence of the social environment and the social and economic factors that surround it. Care in this

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[49] HANGA: *Dreptul tehnicajuridica*, Lumina Lex Publishing House. Bucharest, 2000. page 80.

[50] LONESCU: *Justified fi jurisprudent in status de Drept*, Universal Juridical Publishing House, Bucharest, 2008, page 115.

science is based on studying external factors as well as the environment in which the criminal lives[51].

Naturally, the personal file includes information about the perpetrator, and the French judiciary uses this data during the deliberation process to grant him lenient conditions or not.

In France, sociology seeks to explain criminal phenomena by investigating their causes in the criminal's psychology, thoughts, and emotions. Criminal behavior finds its explanation in psychological and neurological pathological factors such as instinctive deviations, unbridled emotions, inferiority complexes, or psychological complexes. Tests and sessions conducted by psychiatrists with the accused and studying the criminal's personality are used to determine the basis for providing mitigating or aggravating circumstances[52].

The French Penal Code of 1810 introduced the concept of the psychological contract, which stipulated that there was no crime or misdemeanor if the perpetrator was in a state of madness, or at the time of sin, or when he committed it in the presence of force. He was unable to resist while committing it. The first doctors in France recognized the importance of "the need for psychological expertise in criminal cases" to understand the circumstances of the commission of an act while taking into account mitigating circumstances.

There are three personal criteria that the judge adopts in determining the conditions that must be met: the motives for the crime, whether they should be mitigated or not, and the behavior of the criminal during and after committing the crime. If the motive does not affect the commission of the crime and its responsibility[53], it affects the judge's authority to give conditions to the accused.

The importance of conditional release in judicial rulings lies in the circumstances of the criminal's personal, family, and social life. These circumstances include the offender's childhood environment, lack of parental care, and psychological complexes that create mitigating circumstances. The judge may waive the maximum penalty if there are mitigating symptoms, or exceed it if there is an aggravating circumstance[54].

The conditions are not legally specified, but are determined by law, and are applied whenever they exist, and the judge has no role in them. Circumstances are not legally determined, but rather a function of the judge's jurisdiction and discretion. The legislator determines the special conditions when they exist, and the judge has no opinion on them.

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[51] ROUBIER, op. cit. page 76.
[52] VIDA: *Orientating post-modernist in processual de create a dreptului*, Studii de Drept Romanesc, (45), no. 1-2/2000, page 28.
[53] Studii de Drept Romanesc.15 (48), no. 1-2/2003. Page 19.
[54] Id., art. 418, paragraph 3.

5.5. Judicial Work Oversight: A Study on Controls Based on the Judge's Discretionary Power

The judge's power to impose a sentence is not absolute but is restricted to ensure the correct application of the penalty.

The judge's reasoning for the sentence, if mitigating circumstances are granted, can lead to a correct assessment of the penalty or procedure assigned to the facts. If the court does not take into account mitigating circumstances or its presiding judge fails to ask, its decisions can be overturned and annulled[55].

The judge's power to reduce the penalty is relative, as the legislator obliges the judge to explain his decision to grant mitigating circumstances, exercise this power within the minimum and maximum limits set for the penalty, and set controls that help in estimating the penalty.

The study discusses the controls of the judge's work based on his discretionary power, which are determinants at the heart of the criminal legislator's work within the framework of the principle of legality. These controls are essential for the judge's freedom, whether it is interpreting or applying texts or dealing with the controls framing the principle of individualization of punishment[56].

The concept of criminal seriousness in French legislation is an extension of the positivist school led by Judge Gruffalo, who raised this idea as a basis for the appropriateness of punishment. Criminal competency indicates the permanent corruption of the criminal and determines the amount of evil expected to occur from them. The criterion for criminal danger is the criminal's lack of response to society, contrary to other customs.

The committed crime in itself is considered a clear expression of the gravity of the criminal danger inherent in the criminal. The judge reaches this danger through various means, such as the method of carrying out the crime or achieving its material element. The seriousness of the harm or danger resulting from the act and the extent of criminal intent, whether intentional or unintentional, are also considered[57].

The legal chapters within French criminal law delineate the limitations of the powers granted to judges, emphasizing the need for proportionality and careful consideration in sentencing. Article 131-19 outlines restrictions on the judge's authority in imposing a ban on issuing checks, while Article 131-18 restricts the judge's authority when dealing with contraventions. Article 131-15 places

[55] Decree no. 58-1304 of Dec. 23, 1958, concerning application du C. proc. pan. Art D.16, 1.0. Dec. 4, 1958, p. 11776, Dall. (Lg.) 1959, 100.
[56] Ordinance of February 2, 1945, art. 8, paragraphs 4 and 5.
[57] Constitution of October 4, 1958, and the law on the status of the magistracy.

constraints on the imposition of fines, emphasizing that fines cannot be imposed cumulatively with deprivation or restriction of rights penalties[58].

In the realm of socio-judicial monitoring, Article 131-20 limits the judge's powers to the specified duration of monitoring, ensuring that the monitoring period aligns with the severity of the offense and facilitates an appropriate balance between supervision and individual rights. Section 131-36-11 outlines the judge's limitations in ordering placement under mobile electronic surveillance, emphasizing the importance of a reliable and feasible monitoring system.

Articles 132.2 and 132-4 address concurrent offenses, limiting the judge to impose each penalty individually for concurrent offenses, preventing excessive punishment for multiple crimes. Article 132-8 establishes restrictions on the maximum penalty a judge can impose, tying it to the nature of the crime and the maximum penalty set by law[59].

Finally, Article 132-17 outlines minimum thresholds for imprisonment in cases of legal recidivism, aiming to strike a balance between punishment and rehabilitation.

6. Conclusion

It is clear from this study that the French legislator dealt with the circumstances of the crime as a fertile ground for individualizing the penalty with a kind of selectivity and ambiguity, starting from not specifying the nature or meaning of the controls represented by the criminal seriousness and criminal tendency to the reasoning or what is known as the reasoning for the rulings in the injunctive matter.

The criminal legislation must be precise and its concepts not subject to multiple interpretations so that the judge, when applying it, does not fall into the trap of wasting the rights of the citizen in general and the accused in particular, because the essence of the punishment that is based on the circumstances must include within it the philosophy of reforming the offender as a social patient, and thus He must be returned to society safe and sound.

There are two types of pluralism: formal and material. Formal pluralism occurs when a single criminal act can be described with several descriptions, while real or material pluralism occurs when multiple crimes are committed simultaneously or successively without an unappeasable ruling. In these cases, the judge imposes a single penalty for all crimes, provided they do not exceed the maximum limit legally prescribed. Recidivism is a reason for aggravating the penalty; Habit is also considered an aggravating circumstance.

[58] Decree no. 58-1304 of Dec. 23, 1958, concerning application du C. proc. pan. Art D.16, 1.0. Dec. 4, 1958, p. 11776, Dall. (Lg.) 1959, 100.

[59] Pierre v. Allstate Insurance Company, 257 La. 471, 242 So.2d 821 (1970)

The judge's discretionary power to individualize the penalty depends on the circumstances of the crime. Establishing justice and controlling and punishing perpetrators within the principle of legality is considered one of the most important obligations placed on the state. If the criminal has circumstances that make them worthy of clemency, the judge can issue a merciful ruling within a framework that does not conflict with the injunctive legal rule. However, in cases where the punishment does not align with the criminal's personality, the judge must apply the maximum penalties.

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RÁSI VIKTÓRIA ESZTER*

Fejezetek a kalózok jogi helyzetének történetéből

Absztrakt: A tanulmány célja hogy átfogó képet kapjunk a kalózok jogi megítélésének változásáról a történelem során, különös figyelemmel az ellenük való fellépés jellemző módjaira, az általuk gyakorta megvalósított bűncselekményekre, az ezekért kiszabott jellemző büntetésekre, a kalózkodás kialakulásának körülményeire és a rehabilitáció eseteire. A tanulmányban az ókori Róma, a középkor, a 18. század, a 19. századi Kína és napjaink kalózainak jogi helyzetét is bemutatom. Kutatásom során egyaránt felhasználtam magyar és külföldi cikkeket és köteteket, valamint, az adott korban született eredeti forrást.
Kulcsszavak: Kalóz, Róma, Kína, középkor, szomáliai kalózok

Abstract: The main goal of my study is to form a comprehensive picture of the legal status of pirates in various stages of history, paying special attention to the specific actions against pirates, the crimes they usually commited, the punishment they usually get, the conditions of formation of piracy, and the cases of rehabilitation. In this study i present the cases of pirates in ancient Rome, the middle age, the 18th century, the 19th century China and the modern age. For my research I used hungarian and foreign studies and books, and original resources from the said ages.
Keywords: Pirate, Rome, China, Middle age, Pirates of Somalia

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1. Bevezetés

"Minden állam ellenségei, minden nép ellenségei"[1] - Cicero ezekkel a szavakkal illette a kalózokat. A történelem során sok általános tévhit alakult ki velük kapcsolatban. A cikkem elsődleges célja az, hogy átfogó képet adjon a kalózok állami és jogi megítéléséről a történelem során, és hogy az adott kor államai hogyan tekintettek rájuk: ellenségként, eszközként vagy szükséges rosszként - mint azt a későbbiekben látni fogjuk, mind a három esetre találunk példát. A tanulmányomban olyan, a kalózkodás szempontjából fontos történelmi állomásokat mutatok be, mint az ókor - ezen belül az ókori Róma - a középkor, a 18. század - kiemelve Anglia szerepét a

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1 „Communishostisomnium, hostisgentiumomnium" (De officiis 3,29).

kalózok elleni küzdelemben. Szervezettsége és mérete miatt külön fejezetet szenteltem a 19. századi kínai kalózoknak, végül a 20-21. század kalózokra vonatkozó jogi értelmezését mutatom be, kiemelve a szomáliai kalózokat, és az ellenük tett fellépéseket. A tanulmány során a következő kérdésekre keresem a választ:

- Az egyes korokban milyen fogalmi keretek vonatkoztak a kalózokra? Az adott korban milyen tevékenységeket valósítottak meg a kalózok?
- Miért alakult ki és meddig maradt fenn az adott korban a kalózkodás?
- Az érintett államok hogyan viszonyultak a kalózokhoz? Milyen intézkedéseket tettek ellenük és ezek mennyire bizonyultak jogosnak és hatásosnak?
- Voltak-e olyan személyek, akik a kalózokat nem üldözendő bűnözőknek, hanem felhasználható erőforrásnak tekintették? Ha igen, ez a felhasználás milyen formában történt?

2. A kalózkodás kialakulása - kalózok az ókori Rómában

A szó szoros értelemben vett kalózkodás az ókorban jelent meg, nem sokkal azután, hogy a Földközi-tenger partvidékén létrejöttek a már hadsereggel és hadiflottával szervezett államalakulatok. Az ilyen államok közötti területeken élő, a társadalmi fejlődés korábbi szakaszaiban megrekedt népek esetében nem álltak fenn azok a feltételek, ami lehetővé tették volna az önálló gazdasági élet kialakulását, ezért létüket rablásból tudták fenntartani. [2]

Magáról a kalózkodásról nem maradt fenn antik jogi meghatározás így a kalózok általános fogalmának ókori értelmezését több forrás és feljegyzés alapján a következőképpen határozhatjuk meg: kalózok ez alapján azok a személyek, akik tengeren vagy tengerről a partra érkezve, illetve a szárazföld belsejében nyereségvágyból, erőszakkal megsértik mások személyi vagy vagyonbiztonságát. Az már az ókorban is általánosan elfogadott álláspont volt, hogy a kalózok különbség nélkül minden hajóra, partmenti városra és ezek minden lakójára veszélyt jelentenek, ezáltal minden állam ellenségeinek minősültek. Ez a következtetés tehát megegyezik Cicero a tanulmányom elején idézett szavaival.[3]

Az ókorban az államokat a kalózokhoz fűződő kapcsolatuk alapján két csoportba sorolhatjuk. Az első csoportban tartoznak azok az államok, amelyek a kalózokkal szövetkeztek, vagy legalábbis nem léptek fel aktívan ellenük, míg a másikba azok az államok, amelyek harcban álltak a kalózokkal. Róma kezdetben az első csoportba tartozott. Ennek az egyik kézenfekvő oka az volt, hogy míg világbirodalommá nem vált, Róma nem szentelt különösebb figyelmet a tengeri

[2] MARÓTI E.: *Kalózkodás a római polgárháborúk korában;* Budapest: Akadémiai kiadó 1972. 7.
[3] MARÓTI E.: 7-10.

kereskedelemnek. A szövetségeseit és saját polgárait megvédte a kalózoktól, de aktív szerepet nem vállalt az ellenük folyó harcban. A változás a Kr. e. 2. században a kilikia kalózok miatt következett be. [4]

A földrajzi természeti viszonyai, a társadalmi fejlődés elmaradása, és a zavaros politikai helyzet mind ideális központtá tette a kalózok számára a Kisázsia délkeleti partvidékén fekvő Kilikiát. A rajtaütések kezdetben Szíria ellen irányultak, ennek is köszönhető, hogy Róma sokáig nem vállalt aktív szerepet a kalózok elleni harcban, sőt az olcsó rabszolgakereskedelem miatt - ami a kalózoknak volt köszönhető - kényszerszövetség alakult ki közte és a kalózok között, melynek része volt az is, hogy eltűrte a garázdálkodásukat. A Kr. e. 2. század végére a római és itáliai kereskedők tengeri útjai már egyáltalán nem voltak biztonságosnak mondhatóak. A kalózok Róma ellenségeivel szövetkeztek, súlyos károkat okoztak, és a római polgárokat veszélyeztették, ekkora már egyáltalán nem voltak tekintettel a görög és római üzletemberek érdekeire, ami arra kényszerítette Rómát, hogy aktívan fellépjen ellenük.[5]

Az első fontosabb kísérlet erre Marcus Antonius nevéhez köthető, aki Kr. e. 102-100 között indított hadjáratot ellenük. A hadjárat - amelyben például a rodosziak is jelentős részt vállaltak - eredményeképpen M. Antonius több hajó felett is győzelmet aratott, és megalapozta a későbbi Cilicia tartomány alapjait. Kevésbé szerencsés eredménye a győzelmének az volt, hogy néhány évvel később az általa üldözött kalózok elrabolták a birtokáról M. Antonius lányát. [6]

Ebből az időszakból szintén fontos kezdeményezésként emelhetjük ki a Lex de piratis persequendist, ami a tengeri hajózás és kereskedelem biztonságának helyreállítását és védelmét célozta. Ezzel utasították a keleti provinciák helytartóit, a szövetséges görög városokat és keleti monarchiákat az aktív fellépésre: a cél az volt, hogy a kalózok kikötését, élelemhez és ivóvízhez való jutását valamint zsákmányuk eladását lehetetlenné tegyék. [7]

Kezdetben ezek a próbálkozások eredményesnek bizonyultak, és rövid időre úgy tűnt, hogy sikerült megszabadulni a kalózok fenyegetéseitől. A kalózkodás azonban ismét felvirázgott a Mithridatés elleni első háború idejében. Maga Mithridatés egyébként a kalózok támogatását élvezte Rómával szemben, később, a harmadik Mithridatési háború korában például egy veszélyes tengeri viharból mentették ki az uralkodót. A háború alatt megnőtt a kalózok száma, egyrészt maga a háború által okozott károk miatt, hiszen sokak megélhetése veszélybe került, másrészt nagy hatással volt a kalózok számára az is, hogy előbb Mithridatés felszabadította a rabszolgákat Kisázsia területén, majd Sulla a háború után visszaállította eredeti

[4] TARWACKA, A.: *Romans and Pirates Legal Perspective*, Waszawa: Wydawnictwo 2009. 26-31.
[5] MARÓTI E.: 17-33.
[6] MARÓTI E.: 33-36.
[7] MARÓTI E.: 37-38.

állapotukat, így aki csak tehette menekült és vagy Mithridatés vagy a kalózok szolgálatába állt.[8]

Mithridatéson kívül még két nevet érdemes megemlíteni az ókori Róma idejében, akik szövetségre léptek a kalózokkal Róma ellen. Az egyik közülük Quintus Sertorius volt, aki a háború után Sulla rezsimének megdöntése érdekében szövetkezett a kalózokkal, majd később magával Mithridatéssal is. [9]

A felsorolásunkban méltán kaphat helyet továbbá Sextus Pompeius, aki szintén a kalózokat használta fel Rómával szemben, ő azonban nem biztosította azt az önállóságot számukra, amit Mithridatés annak idején. A kalózok beolvadtak a haderejébe, és már csak mérsékelten volt jelen eredeti, fosztogató tevékenységük. [10]

A továbbiakban néhány érdekes jogi kérdést szeretnék a kalózok jogi helyzetével kapcsolatban bemutatni.

Felmerült egyrészt a kérdés, hogy a kalózokkal szembeni harc jogos és igazságos háborúnak minősül-e és ezáltal érdemes-e a fölöttük aratott győzelem a megünneplésre. Hogy ezt megvizsgáljuk, meg kell értenünk a rómaiak igazságos háborúról alkotott képét, vagyis a bellum iustumot. A bellum iustum feltételei közé tartozott többek között a jogos ok vagy indok, ami alapján a háborút indították, például egy terület jogtalan megszállása, vagy egy hivatalos személy - például uralkodó, politikai vezető, vagy követ - elleni méltatlan bánásmód. Ugyanígy az ellenféllel szemben is támasztott követelményeket, igazságos háborút ugyanis csak méltó ellenféllel szemben lehet vívni - hostis iustus et legitimus. Mint azt korábban említettük a kalózok megítélésük szerint a latrones vagy praedones kategóriák alá tartoztak, vagyis bűnözőknek, banditáknak számítottak, ráadásul nem rendelkeztek rendes, szervezett társadalommal és államapparátussal sem, így megállapítható, hogy az ellenük aratott győzelem nem minősült érdemesnek az ünneplésre.[11]

Mint azt a továbbiakban látni fogjuk, a kalózok által megvalósított bűncselekmények igen széles skálán mozogtak. Rómában nem használtak külön tényállást a kalózok által megvalósított bűncselekményekre, a kalózokat a büntetőjog már meglévő szabályai alapján vonták felelősségre. Rómában például a kalózokhoz is köthető a direptio ex naufragio, vagyis a hajótörés utáni eltulajdonítás, ami a rablással és lopással azonos megítélésben részesült. Ezt a bűncselekményt egy hajótörést szenvedett hajón, vagy a hajótörés eredményeképpen leomlott épületen lehetett megvalósítani az ott található értékek eltulajdonításával. Ugyanígy gyakori volt a kalózok körében a lex Fabia de plagio által megfogalmazott bűncselekmény,

[8] MARÓTI E.: 41-44. 62-64.
[9] MARÓTI E.: 52-58.
[10] MARÓTI E.: 87-91.
[11] TARWACKA, A.: 56-67.

a plágium, ami itt a szabad emberek rabszolgakénti adásvételét jelentette. Gyakoriak voltak a gyilkosság és az erőszakos bűncselekmények különböző fajtái is. [12]

A kalózok büntetőjogi megítélése - minthogy maga a kalózkodás is bűncselekménynek minősült - az áldozat szempontjából sem különbözött a más erőszakos bűncselekményeket elkövető személyekétől. Így például esetükben is beszélhetünk a jogos védelem kérdésköréről, vagyis ha valakit kalózok támadtak meg, jogában állt fellépni ellenük, és akár a támadók életének kioltásával is megvédeni magát.[13]

3. Kalózok a középkorban

A következő korszak, amit szeretnék bemutatni, a 13-14. század, és az akkori kalózkodás jellemzői. A középkori kalózkodás különböző módjait Marc Russon történész felsorolásából vázolhatjuk fel a legkönnyebben. Ez alapján ide tartozott a nyílt tengeri támadás a hajók ellen, legyen az egy magányos, vagy egy konvojba tartozó hajó. Kevésbé magától értetődő formája volt a kalózkodásnak a tengeri utak és ezek csomópontjainál történő lesben állás támadás céljából, vagy azok az esetek, amikor a kikötőkben és öblökben figyelték meg és követték áldozataikat azért, hogy rögtön a távozásuk után megtámadják őket. Ugyanígy ide sorolható a kereskedők szállítmányának csalással történő eltulajdonítása és későbbi értékesítése, valamint az is gyakori volt, hogy a kalózok a kikötőben támadták meg a partra szállt legénységet.[14]

Elmondható ezek alapján tehát, hogy az általuk megvalósított bűncselekmények nem álltak távol a római kori kalózok esetében megismertektől, elsősorban tehát idetartoztak az erőszakos cselekmények, a lopás, a rablás és a csalás.

További hasonlóság fedezhető fel azzal kapcsolatban is, ahogy az áldozataikkal bántak. A közhiedelemmel szemben a kalózok itt is ritkán végeztek az áldozataikkal. Ennek több oka is volt. Egyrészt az, hogy a legtöbb kalózt igazából csak a zsákmány könnyű megszerzése érdekelte. Sokan nem tartottak a felismerésüktől annyira, hogy végezzenek a hajó legénységével. Példa erre az az 1311-es eset, amit Edmund de Trevelwythe királyhoz intézett panaszából ismerhetünk meg. Trevelwytheot a hajóján annak társtulajdonosa, John Stonhard of la Welle támadta meg néhány tengerész kíséretében, Trevelwytheot elűzte a hajóról, és eladta annak rakományát saját gazdagodására. Bár Trevelwythe megsérült, de túlélte, és Stonhardnak jól láthatóan nem volt célja végezni vele. A legtöbb példa arra vonatkozóan, hogy a kalózok megölték áldozataikat, nem az egyszerű kalóztámadásokra vezethető vissza,

[12] TARWACKA, A.: 101-135.
[13] TARWACKA A.:135-138.
[14] HEEBØLL-HOLM, T. K.: *Ports, Piracy and Maritime War: Piracy in the English Channel and the Atlantic, c. 1280-c. 1330*, Boston: Brill, 2013. 36.

hanem azokra az esetekre, amikor háborúkban valamelyik fél megbízásából fosztogattak. [15]

A kalózok büntetőjogi megítélése a középkorban egy sokkal kevésbé tisztázott kérdéskör volt, mint az ókori Rómában. A középkorban ugyanis nagyon kevés esetben büntették a kalózkodást. Hogy ennek az okát megértsük, meg kell vizsgálnunk a kalózok által megvalósított két leggyakoribb bűncselekményt: az emberölést és a rablást. Elsőként tehát az emberölés és gyilkosság kapcsolatáról a 14-15. században. Gauvard úgy határolja el a kettőt, hogy míg az emberölés valamilyen sérelem megtorlásaként következik be, és így a társadalomban nagyobb elfogadásra talál, addig a gyilkosság esetén ez a tényező nem áll fenn.[16] Sokszor gyilkosságot például haszonszerzés céljából követnek el. És bár mind az emberölés, mind a gyilkosság különösen súlyos bűncselekménynek számított, a büntetés kiszabásakor nagy különbségek látszódtak az emberölés javára. Ebből a szempontból tehát ha például valamilyen királyi megbízásból fosztogattak, a kalózok hivatkozhattak erre az elkövetett bűncselekményeik esetében. Ugyanígy fontos tényezőnek számított a büntetés kiszabásakor a társadalmi státusz és a jó hírnév. A rablás mint büntetendő cselekmény irányából való megközelítéshez hozzátartozik, hogy sokáig a rablás és a lopás fogalmai összemosódtak csak úgy, mint a tolvaj és a rabló fogalma. Lyonban 1274-ben határozzák meg statikusan a rablás fogalmát. Ez alapján rablásnak az minősül, amikor egy személy az összes vagyonától, vagy vagyonának jelentős részétől erőszakkal fosztanak meg. És bár a rablás a lopásnál jóval súlyosabban büntetendő cselekménynek minősült, ritkán büntették a kalózokat, mivel felmerült a kártérítés lehetősége mint a büntetés elkerülése. Végső soron az áldozatok érdeke is az volt, hogy a káruk valamilyen mértékben megtérüljön. [17]

Nagyon kevés olyan eset leírása maradt fenn, amikor a kalózok tényleg büntetésben részesültek. Ebben a korban csupán egy szélesebb körben ismert halálbüntetésről beszélhetünk például, William Briggerho 1228-as kivégzésének esetéről. Ennek legfontosabb oka az volt, hogy a kalózok számára könnyű volt kegyelmet kérni katonai szolgálatukért cserébe.[18]

II. Edvárd például több kalózt is kegyelemben részesített annak eredményeképpen, hogy a skótok elleni harcában segítették. Ilyen kalóz volt például Robert és Stephen Alard és Robert Batayle is, akik királyi kegyelemben részesültek, majd nem sokkal ezután admirálissá nevezték ki őket. Stephen Alard remek példa a kereskedő, a kalóz és az admirális fogalmának összemosására, ami a kor kalózaira

[15] HEEBØLL-HOLM, T. K.:

[16] GAUVARD, C.: *Violence licite et violence illicite dans le royaume de France à la fin du Moyen Age,* Université de Paris I, Pantheon-Sorbonne 1999.

[17] HEEBØLL-HOLM, T. K.: 230-237.

[18] HEEBØLL-HOLM, T. K.: 239-243

vonatkozó újabb jellemzőt fed fel nekünk. A kalózkodás sokkal inkább minősülhetett előnynek mintsem hátránynak a különböző tisztségek megszerzésekor.[19]

4. Kalózok a 18. században.

Ahogy azt a középkorban is láthattuk, a kalózok által megvalósított cselekmények igen széles skálán mozogtak. A korai atlanti-óceáni kalózokat ezek alapján sorolták különböző kategóriákba. Ezek elsősorban angol és francia és holland elnevezést kaptak, sajnos a legtöbb fogalomnak nincs pontos magyar megfelelője. A pirate (angol) mint általános fogalom széleskörben használható volt a kalózokra, és a definíciója nem sokban különbözik a római kori kalózfogalomtól: olyan tengeri banditák vagy tengerészek, akik erővel szerzik meg valami vagy valaki felett a birtoklást. A privateer (angol) fogalom alá gyűjtött kalózok ugyanezeket a bűncselekményeket háború alatt valamilyen jogi vagy állami engedéllyel valósították meg, és a megszerzett javak egy részét tarthatták meg cserébe. A smugglers (angol), vagyis csempészek olyan kalózok voltak, akik az adók, nemzetközi blokádok elkerülésével kereskedtek a különböző illegális javakkal. A freebooter (holland) vérdíjért cserébe végezte a tevékenységét, ehhez a kategóriához hasonló volt a filibuster (angol), ezt a fogalmat azonban főleg a Latin-Amerika környékén tevékenykedő kalózokra használták. A buccaneer (francia) szót ugyancsak a kalózokra használták, ez eredetileg azonban olyan elűzött vagy kitaszított telepest jelentett, akinek túlélését az állattenyésztés vagy a vadászat biztosította, és aki az így szerzett és megfüstölt hússal kereskedett az átutazó hajók legénységével. Szintén francia kifejezés volt a Corsair, ami az Észak-Afrika partjainál használt gyors vitorlásra használták, innen ragadt át a gyakran ezekkel utazó zsoldosokra és kalózokra. [20]

A kalózok történetéből jelentősen kiemelkednek az angol-amerikai kalózok, akik 1716 és 1726 között tevékenykedtek a Karib-tenger, az Indiai Óceán és a Bahama-szigetek környékén[21]. Erről a korról már sokkal több információ áll a rendelkezésünkre, így többet tudhatunk meg a kalózok életmódjáról és a kalózhajók önigazgatásáról is. Ebben a korban körül-belül ötezer kalóz tevékenykedett: 1716-18 között 1800-2400, 1719-22 között 1500-2000, 1723-26 között pedig 1000-1500 közé tehető a kalózok száma, akik a fennmaradt források szerint 17-50 évesek voltak. A legtöbben életük korábbi szakaszában kereskedelmi és hadihajókon szolgáltak, ám mivel ezeken a körülmények aligha voltak jobbak, mint a kor

[19] HEEBØLL-HOLM, T. K.: 243-244.

[20] DAWDY. S. L.- BONNI J.: Towards a General Theory of Piracy. *Anthropological Quarterly*, 2012/3., 678.

[21] REDIKER, M.: Under the Banner of King Death': The Social World of Anglo-American Pirates, 1716 to 1726. *The William and Mary Quarterly*, 1981/2. 205–27.

börtöneiben, a kalózhajók sokaknak az életbenmaradást, vagy életszínvonaluk jelentős javulását jelentette.[22]

Érdemes megjegyeznünk, hogy a kalózok csoportjai a közhiedelemmel ellentétben nem az erőszakra épültek. A hajók mindegyike rendelkezett olyan szabályrendszerrel, ami egyaránt védte a legénység érdekeit, és biztosította a hűségüket. A kapitányt a legénység választotta, így a kapitány a legénységnek felelt. Az általános tévhittel ellentétben a kapitány nem minden esetben rendelkezett teljhatalommal. Három esetben volt korlátlan döntési joga a legénység felett: harc közben, egy hajó üldözésekor, illetve meneküléskor.[23] Minden más esetben a legénység többségi döntése volt mérvadó. A kapitány és a tisztek nem kaptak nagyobb adagot az élelemből sem. [24]

Jellemző volt, hogy nem a zsákmány egészét osztották fel a legénység között, egy részét közös vagyonként megtartották, ebből támogatták és kompenzálták például a legénység azon tagjait, akik maradandó sérülést szenvedtek. Ez is a legénység hűségét és összetartását biztosította.[25]

1716-26 között a kalózok két nagy csoportja alakult ki. Az egyik ág a Bahama-szigetek területén tevékenykedett és Benjamin Hornigold kapitány köré szerveződött, ide tartozott például a Feketeszakállként elhíresült Edward Teach kapitány, vagy John Phillips kapitány, akit a legénységével együtt 1724-ben végeztek ki, végetvetve így a kalózok ezen ágának .A másik csoport George Lowther és Edward Low kapitányok fellázadt legénységeinek találkozásából született 1722-ben, és William Fly kapitány és legénységének kivégzésével szűnt meg.[26]

A kalózokról alkotott társadalmi képet ebben a korban hűen tükrözik a Nicholas Trott bíró által mondottak Stede Bonnet kapitány és harminchárom fős legénységének 1718-as tárgyalásán, ahol a következő két fontos megállapítást tette: "A tengert Isten adta az emberek használatába, így az ugyanúgy uralom és birtoklás tárgya, mint a szárazföld."[27] ezzel visszautasítva a tenger jog nélküli állapotának feltételezését. A kalózokra kiszabott ítélet, és eljárásaik menetét továbbá hűen

[22] REDIKER, M.: Under the Banner of King Death': The Social World of Anglo-American Pirates, 1716 to 1726. *The William and Mary Quarterly*, 1981/2. 154–66.
[23] REDIKER M.: i.m.1988. 159.
[24] REDIKER M.: i.m. 1981. 209 -211.
[25] REDIKER M.: i.m. 1988. 160.
[26] REDIKER M.: i.m. 1981. 212-214.
[27] "...the Sea was given by God for the use of Men, and is subject to Dominion and Property, as well as the Land." - *Tryals of Major Stede Bonnet and other Pirates viz (...) Who were all condemn'd for PIRACY*. London: Rofe and Crown 1719. - A továbbiakban Tryals of Bonnet

tükrözi egy másik, a tárgyaláson tőle elhangzott mondat: "További előny vagy haszon nem várható önöktől, mint a példa, amit halálukkal állítunk."[28][29]

Ebben a korban a korábbiakkal szemben sokkal gyakoribb volt a kalózokra történő tényleges büntetés kiszabása, ezen belül is a kivégzés. Az 1700-as évek előtt a Brit Birodalomban a kalózok ügyei a commonlaw bíróságok hatáskörébe tartoztak, ám ezek az ítélkezés során nem bizonyultak hatékony eszköznek. A kalózok tárgyalásaira a gyorsabb eljárások érdekében később, 1700-tól Helyettes-tengernagyi ítélőszékeket (Vice-Admiralty courts) állítottak fel, melyek hét volt tengerésztisztből álltak, ezek a tisztek azonban aligha voltak bírónak nevezhetőek. A vádlottak nem kaptak jogi védelmet semmilyen módon. Halálbüntetéssel büntették a kalózokat és azokat, akik a tevékenységükben segédkeztek. Ezen a módon 400-600 kalózt végeztek ki. Hat hónapig terjedő börtönbüntetést kaptak azok, akik nem védték meg a hajójukat a kalózoktól.[30]

Bár a jogszabályok szigorúak voltak, a betartásuk annál nehezebbnek bizonyult. Egyrészt 1700 előtt az államok kevés erőforrást biztosítottak a kalózok elfogására, az angol flottában csupán 2 hajót jelöltek ki erre a célra. 1700 után ez a szám 24-re nőtt, közel 3500 fős legénységgel. További problémát jelentett, hogy - bár nem példanélküli, hiszen a feljegyzések alapján Edwart Teach és Black Bart kapitány is így vesztették életüket - nyílt ütközetekre elvétve került csak sor., mivel kalózok gyakran ezek elől a sekély vizű partszakaszokra és öblökbe menekültek. [31]

Érdekes kérdésnek bizonyul a nők helyzete a kalózhajókon, valamint a nők kapcsolata a kalózkodással. Erről egyrészt Charles Johnson kapitány A General History of the Pyrates[32] művében olvashatunk Anne Bonny és Mary Read tárgyalásával kapcsolatban. Johnson műve mellett Read és Bonny neve más, tőle független történelmi forrásokban is megjelenik, így például olvashatunk róluk John Rackam kapitány tárgyalásával[33] kapcsolatban is. [34]

Másik példa a kalózok tárgyalására Anne Bonny és Mary Read tárgyalása, akik arra hivatkozva érték el akasztásuk elnapolását, hogy mind a ketten várandósok

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[28] "...no further Good or Benefit can be expected from you but by the Example of your Deaths." - *Tryals of Bonnet*

[29] REDIKER M.: i.m. 1981. 218.

[30] BOOT, M.: Pirates, Then and Now: How Piracy Was Defeated in the Past and Can Be Again. *Foreign Affairs*, 2009/4, 100-101

[31] BOOT, Max.: 100-101.

[32] JOHNSON, C.: *A General History of the Pyrates, from Their first Rise and Settlement in the Island of Providence to the present Time. With the remarkable Actions and Adventures of the two Female Pyrates Mary Read and Anne Bonny;* London: Black-Boy 1724.

[33] *The Tryals of Captain John Rackam, and other Pirates, Viz. (...), Who were all Condemn'd for Piracy at the Town of St. Jago de la Vega in the Island of Jamaica on Wednesday and Thursday the Sixteenth and Seventeenth Days of November 1720. As also the Tryals of Mary Read and Anne Bonny alias Bonn, on Monday the 28th. Day of the said Month of November, at St. Jago de la Vega aforesaid, and of several others who were also condemn'd for Piracy.* Jamaica 1721.

[34] REDIKER, M.: When Women Pirates Sailed the Seas.*The Wilson Quarterly (1976-)* 1993/4. 105.

voltak. Ritka, de nem példa nélküli eset ez a női kalózokra. A legtöbb hajón a nők jelenlétét sem nézték jó szemmel, mivel úgy gondolták, hogy az a munkamorál rovására megy. A brit királyi flotta ugyanebből az okból szigorúan büntette a homoszexualitást is. Emellett a legtöbb tengerész a nőket a balszerencse jelének értelmezte. Ezeket a nézeteket sok kalóz is osztotta, így például Bartholomew Roberts, vagy William Snelgrave hajóján sem tartózkodhattak nők, ugyanakkor ritka példákat találunk arra, hogy nőket is felvettek a legénység soraiba, mely kivételeket maguknak küzdötték ki, mint Read és Bonny. Mind a ketten férfinak álcázva magukat kezdték meg pályafutásukat: Bonny a Calico Jack Rackam kapitány kalózhajóján, Read a holland haditengerészeten belül, ahonnan végül szintén Rackam hajójára került, ahol viszont már mindketten nőként szolgáltak. A tárgyalásukon a tanúk elmondása szerint Read és Bonny nem sokban különbözött a többi kalóztól, és elismertségüket az is bizonyította, hogy többször női ruhát is viseltek a hajón. A tárgyalásukon mind a kettejüket kötél általi halálra ítélték, azonban mind a ketten haladékot kaptak a korábban említett okokból kifolyólag. A női kalózokkal kapcsolatban a következő fejezetben is szót ejtünk. [35]

Az akasztással szemben alternatív megoldásnak számított I. György 1717-18-as kegyelmi rendelete, ami a királynak nyújtott szolgálatért szemben kegyelmet biztosított a kalózoknak. Ez a rendelet vegyes fogadtatásban részesült, sokan azért nem éltek a kegyelemmel, mert az csak bizonyos területeken elkövetett bűncselekményekre jogosította volna fel a kalózokat, és cselt sejtettek benne. [36] Végső soron megállapítható, hogy a kegyelmi rendelet nem érte el eredeti célját, és viszonylag kevés szerepet kapott az angol-amerikai kalózok 1726-ra tehető felőrlődésében.[37]

5. Kalózok Kínában

Úgy gondoltam a tanulmányomban külön fejezetet szentelek a Kína partjain a 17-19. században tevékenykedő kalózoknak. Kína viszonylag zárt tengerpolitikával rendelkezett, a tengeri kereskedelem nagyobb részétől elzárkózott, így ennek gyakorlása csempészetnek, tehát kalózkodásnak minősült. [38]

Az előző fejezetben ismertetett okok itt is relevánsak voltak a kalóz életpálya választásában, a legtöbben halászok közül kerültek ki, akik így próbálták meg elkerülni a szegénységet, amibe a korrupt társadalmi rendszer taszította őket. A 16. század közepén virágzott Kínában a partmenti kalózkodás. Egyes nagyobb

[35] REDIKER, M.: i.m. 1993. 102–110.
[36] REDIKER M.: i.m. 1988. 165.
[37] REDIKER M. i.m.1981. 219.
[38] MACKAY, J.:Pirate Nations: Maritime Pirates as Escape Societies in Late Imperial China. *Social Science History*, 2013/4. 2013. 556–57.

csoportok egészen nagy parti szakaszokat az irányításuk alá tudtak vonni, ugyanakkor nem volt példa nélküli az egészen kis, tíz fős legénységgel operáló kalózhajók esete sem. Ezeken a területeken a kalózok biztosítottak fennhatóságot és szabályrendszert.[39]

Kínában két kalózcsoportot érdemes megemlítenünk. Az egyik Zheng Zhilong és fia, Zheng Chenggong nevéhez köthető. Zheng Zhilong az általa uralt területeken védelmi pénzt, vagyis úgynevezett vízadót vezetett be, valamint kereskedelmi hajókat támadt meg tevékenységén belül, melyet kezdetben a Holland Kelet-Indiai Társaság (VOC) megbízásából végzett. A hollandok a segítségével próbáltak meg gazdasági szövetséget kikényszeríteni Kínától. A császárság azonban a hollandok helyett Zhenggel lépett szövetségre, aki ezek után oldalt váltott és később állandó tiszt lett a császári tengerészetben. Fia, Zheng Chenggong lett Taiwan első kínai vezetője. [40]

A Zheng-féle kalózflotta hatalmát árnyékhatalomként írhatjuk le a legkönnyebben, ami a nagyobb, császári hatalomból eredő struktúrákon élősködve maradt fenn, és mint a legtöbb árnyékhatalom, vezetőit nem sokkal élte túl. [41]

A másik nagyobb kínai kalózdinasztia Zheng Yihez és Zheng Yi Saohoz köthető a 19. század elején. Bár maga Zheng Yi hozta létre ezt az organizációt, elhíresülése sokkal inkább feleségének, Zheng Yi Saonak köszönhető. Zheng Yi Sao férje 1807-es halála után a szervezetüket egy 400 hajóból és 70.000 emberből álló flottává növesztette. A következő évben a feljegyzések már 2000 hajót említenek. Ez a flotta ásta alá kínai császári hatalmat Guangdong partjainál. Tevékenységük a rablástól a parti területek elfoglalásáig terjedt, de a biztonságos tengeri utak érdekében díjat is szedtek az áthaladó hajóktól. Zheng Yi Sao szabályai megnövelték azok számát, akik a kalóz életmódot választották. Egyik ilyen szabály volt az, hogy a hajóin vezető tisztséget azok kaphattak, akik legalább 8 hónapja szolgáltak a flottában. Szigorú szabályok védték a flottán belüli rendet is. Azokat, akik jogtalanul utasították a legénységet, vagy feletteseik parancsait megtagadták, lefejezéssel büntették. Főben járó bűnnek minősült a közös vagyonból történő lopás is. [42]

Végső soron azonban Zheng Yi Sao kalózbirodalmának is a pusztulás lett a sorsa. A legtöbb kalóz amnesztiát kapott, de a feljegyzések 350 olyan esetet is tartalmaznak, amikor szabadságvesztést vagy kivégzést rendeltek el. Ez azonban a korábban említett számok mellett elenyésző aránynak minősül.

[39] MacKay J.: 557.
[40] MacKay J.: 559-563
[41] MacKay J.: 563
[42] MacKay J.: 563-567

6. Kalózkodás napjainkig

A kalózok definíciója az elmúlt két évezredben apróbb változásokon ment csak keresztül, az alapját képező meghatározások változatlanul megmaradtak. Ezt láthatjuk a Harvard Egyetem jogi karán 1932-ben megjelent tanulmányában[43], ami a kalózkodás definícióját az alábbiak szerint határozza meg. Kalózkodásnak minősítette az erőszakos bűncselekményeket - ezen belül a rablást, a testi sértést, a szexuális erőszakot, a fogságba ejtést és rabságba taszítást valamint az emberölést - abban az esetben, ha e cselekmények célja valamilyen vagyontárgy jogtalan eltulajdonítása vagy megsemmisítése. Az ilyen tevékenységre történő felbujtás és az ebben való segédkezés is kalózkodásnak minősül a definíció alapján úgy, mint a kalózhajón történő tevékenységekben való szándékos részvétel. Ez párhuzamba állítható az 1700-as évek angol ítélkezési rendszerével, melyet már korábban megvizsgáltunk. [44]

A következő fontos mérföldkő a kalózkodás definíciójában az ENSZ 1982-es Tengerjogi Egyezménye (UNCLOS), ami a kalózok tevékenységeinek öt alapfeltételt szab. Az első ezek közül, hogy erőszakos és rongáló cselekménynek kell lennie. Fontos hogy személyes érdek fűződjön hozzá, tehát nem minősül kalóz tevékenységnek az, ha egy hajó legénysége valamilyen állami megbízás vagy engedély alapján követ el amúgy kalózkodásnak minősülő bűncselekményt. Vitás kérdést vetnek fel ilyen szempontból a Fülöp-szigetek kalóz tevékenységből fedezett forradalmai, mivel ezekben az esetekben tényleges állami felhatalmazásról nem beszélhetünk. A kalóz tevékenység további feltétele, hogy két járműnek kell benne részt vennie, egy támadónak és egy áldozatnak. Itt meg kell említenünk, hogy vízi járművek mellett légi járművek is alkalmasak lehetnek kalóz tevékenység folytatására. Fontos még, hogy a támadó jármű nem lehet állami tulajdonban. Az utolsó feltétel, hogy a támadás államterületen kívül történjen, például nyílt tengeren.[45]

Napjainkban a kalózokkal szembeni fellépés már teljes mértékben nemzetközi feladattá vált. Cicero tanulmányom elején bemutatott megállapítása a kalózokra a mai napig érvényes. Mint minden nép és minden állam ellenségei a kalózokkal, mint emberiesség elleni bűncselekmény elkövetőivel szemben univerzális vagy egyetemes joghatóság áll fenn, ez lehetővé teszi az államoknak büntetőjogi joghatóságuk

[43]Harvard Law School, *Research in International Law, Codification of International Law* 1932.

[44] CROCKETT, C. H.: Toward a Revision of the International Law of Piracy, *De Paul Law Review* 1976. 78-99.

[45] ANSARI, A. H.: Combating Piracy under the United Nations Convention on the Law of the Sea 1982. *Journal of the Indian Law Institute*, 2014/3. 320–347.

gyakorlását abban az esetben is, ha erre se a sértett, se a terhelt alapján nem kerülhetne sor. Ez a szabály viszont elsősorban a nyílt tengeren érvényesül.[46]

A kalózok bűncselekményének sértettjével kapcsolatban két iskola alakult ki. A naturalista iskola azt vallja, hogy a kalózkodás a nemzetközi jog ellen irányuló bűncselekmény, míg a pozitivista felfogás alapján belső jogi bűncselekménynek tekinthetjük. Ez utóbbi alapján a nemzetközi jogi vonatkozása az ilyen ügyeknek csupán az a kérdés, hogy egy állam milyen mértékben terjesztheti ki a joghatóságát a területén kívül egy olyan személyre, aki nem állampolgára. Ilyen szempontból problémát jelenthetnek azok az ügyek, amikben az elfogatás joga mellett az eljárás joga is valamelyik állam kezébe kerültek, ezek esetében ugyanis nem volt példa nélküli a kalózok elengedése vagy kiadatása.[47]

7. Szomáliai kalózok

A kétezres évek elején Szomália partjai mentén és az Indiai óceánon a kalózkodás újabb reneszánszát élte. 2006-tól kezdve növekedni kezdett a kalóztámadások száma. Ez 2008-ban 200 támadás volt, ebből 112-t lehorgonyzott hajókkal szemben követtek el, míg a többit mozgásban lévő hajókkal szemben. Ezen támadások felét szomáliai kalózok követték el. Fontos megjegyeznünk, hogy lehorgonyzott és kikötött hajók nem estek a szomáliaiak áldozatául. A szomáliai kalózok - ellentétben például a korábban említett Zheng Yi Sao által irányított kalózflottával - nem rendelkeznek kialakult belső szervezettel, nem kaptak külön kiképzést. [48]

Jellemző módszerük, hogy az anyahajóról több kisebb csónakba átszállva foglalják el az áldozatukat. A hajót ezután Szomália kikötőinek egyikébe viszik, ahol megkezdik a váltságdíjért folyó tárgyalást a hajó tulajdonosával illetve a hajó biztosítójával. Egy ilyen váltságdíj többnyire 500.000-től 2.000.000 dollárig terjed.[49]

Szomália több okból is alkalmasnak bizonyult arra, hogy környezetarében felvirágozzanak a különböző kalóz tevékenységek. Egyrészt gyenge államszervezettel rendelkezik, ezért a jog érvényesítése akadályokba ütközik és a védelmi politikája is rendszertelen. Másrészt a földrajzi adottságai is megfelelőek, hiszen több tengeri kereskedelmi út is a közelében található, és hosszú partszakasszal rendelkezik. Továbbá segítik a kalózok helyzetét a nemzeti és nemzetközi viták is.[50]

[46] PÁSZKA I. Á.: A tengeri kalózkodásra vonatkozó univerzális joghatóság érvényesülése a gyakorlatban, Iustum *Aequum Salutare*, 2021/3. 246-247.
[47] PÁSZKA I. Á.: 254-256.
[48] WEITZ, R.: Countering the Somali Pirates: Harmonizing the International Response. *Journal of Strategic Security*, 2009/3. 1–12.
[49] STRUWE, L. B.: For a Greater Horn of Africa Sea Patrol: A Strategic Analysis of the Somali Pirate Challenge, *Centre for Military Studies*, 2009. 16.
[50] STRUWE, Lars Bangert: 17.

A szomáliai kalózokkal szembeni fellépést az ENSZ a NATO és az Európai Unió egyaránt fontos feladatnak tartotta. Az ENSZ elsődleges célja a Világélelmezési program (WFP) szállítmányainak védelme volt, ezzel kapcsolatban több határozat is született 2008 óta. Az Európai Unió ugyanezért a célért indította 2008-ban az Atlanta operációt Szomália partjai mentén. Az Atlanta operáció megerősítésére a NATO 2009 óta 5 hajóból álló állandó jelenlétet biztosít Szomália partjain. Az ENSZ másik fontos lépése a szomáliai kalózok ügyével foglalkozó kontaktcsoport (CGPCS) létrehozása volt. A CGPCS főbb feladatai közé tartozik többek között a jogi keret megerősítése a kalózokkal szemben indított eljárások - úgy mint a letartóztatásuk és elítélésük - érdekében, vagy a kalózok tevékenységével kapcsolatos pénzáramlás követése.[51]

Bár mára már az említett lépéseknek köszönhetően jelentősen csökkent a szomáliai kalózok tevékenysége, teljes mértékben azonban nem szűnt meg, még a mai napig találunk a példát váltságdíj-követelésekre.

8. Összegzés

Összességében elmondható, hogy bár történelmi korokon átívelő megállapítás, hogy a kalózokkal szembeni fellépés minden állam érdeke, sok esetben az eredményes intézkedések mégis elmaradtak. Megállapítható továbbá az is, hogy a kalózok uralma bár mindig csak rövid ideig tudott fennmaradni eredményesen, minden alkalommal jelentős befolyást gyakorolt az érintett államok politikai helyzetére. A kalózkodás gyakran a társadalmilag és politikailag instabilabb területeken volt képes megvetni a lábát, és a legtöbb kalóz gazdaságilag valamilyen külső okból fennmaradni nem képes társadalmi rétegből került ki. Jellemző, hogy mivel a kalózok az említett esetekben árnyékhatalomként jelentek meg, és fennmaradásuk alapja a saját gazdasági erővel rendelkező államokon történő élősködés volt, így az igazán erősnek bizonyuló kalóz-birodalmak, vagy csoportok sem tudtak sokáig fennmaradni. A történelem során több uralkodó is értékes erőforrásként tekintett a kalózokra, és nem egyszer alkalmazták is őket háborúk során. Végső soron a kalózok célja mindig a társadalomtól független életbenmaradás volt, bár megkérdőjelezhetőek a módszerek, amikkel ezeket elérték.

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The Tryals of Captain John Rackam, and other Pirates, Viz. (...), Who were all Condemn'd for Piracy at the Town of St. Jago de la Vega in the Island of Jamaica on Wednesday and Thursday the Sixteenth and Seventeenth Days of November 1720. As also the Tryals of Mary Read and Anne Bonny alias Bonn, on Monday the 28th. Day of the said Month of November, at St. Jago de la Vega aforesaid, and of several others who were also condemn'd for Piracy. Jamaica 1721.

Tryals of Major Stede Bonnet and other Pirates viz (...) Who were all condemn'd for PIRACY. London: Rofe and Crown 1719.

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The Calas case, or a paradigm shift in criminal law

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1. Introduction

Throughout history, the law has been instrumental in shaping human behaviour, helping to bring about changes in society. A major change can take several centuries, either gradually or in the context of a revolutionary event, to bring about a rapid and radical transformation of the order of things.

In the Middle Ages, criminal trials were initially conducted under the accusatorial system, which is considered the least just and thorough method of prosecution. Proceedings are concentrated in one hand, the accused is merely the object and not the subject, he has no rights in the proceedings, and his defence is limited to the maximum allowed by the judge. In this period, the use of torture and the confession thus extracted were accepted and common practice.

In the 18th century, the Enlightenment inevitably brought changes in this area too. The movement aimed to break away from the dominant ideology of feudalism, a religion dominated by the Roman Catholic Church. The Enlightenment sought to transform society through a series of reforms, to disseminate scientific advances and ultimately to prepare for the overthrow of the feudal order and the triumph of the bourgeois revolutions. The time had come to reform criminal procedure, to lay down principles in line with the Declaration of Human Rights of 1789 and the aims of the movement.

During this revolutionary period, a criminal trial was taking place in a small French town, Toulouse. A trial that had harassed a family, made false accusations based on rumours and led to the torture and execution of the innocent father. The case was not blatant at the time, but it contained the typical flaws of the proceedings of the time, which the Enlightenment fought to correct. In my study, I will show how this case marked a turning point in the life of Voltaire, who was by then a renowned rebel throughout Europe, and how he took up the cause of his father's posthumous rehabilitation, rallying both the cultural and political elite to his side and making this case an important instrument in the fight against change.

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2. The criminal justice system of the time

In the 11th and 14th centuries, in the case of accusatory criminal proceedings, the collection of facts and evidence relating to a criminal case was the least objective of the criminal proceedings. In this period, in purely formal proceedings, superstition and religious tradition determined the evidence. According to their belief, the perpetrators of crimes were also guilty of crimes against God, and therefore the Almighty would declare Himself in the course of the defined proceedings, giving a clear indication of who was guilty and who was innocent. The perpetrators were subjected to so-called "divine judgments" in order to prove their guilt. This method came under attack from lawyers and philosophers of religion as early as the 12th century, yet the practice continued for a long time. Finally, it was banned by Pope Innocent III in 1215, by the Fourth Council of the Lateran, and its predecessor, the proof of fact, was linked to the inquisitorial procedure, also established by this Council. At that time, this was only true of canon law procedures.

Inquisitorial proceedings were initiated ex officio, independently of the will of the parties. The public prosecutor was rarely involved in the later stages of the proceedings, and as a rule both the investigation and the judgement were carried out by the judge (inquisitor) in one person. Proceedings were typically written and closed, and were conducted in complete seclusion from the public, but sentences were often carried out in public. This method allowed both the exercise of judicial arbitrariness and the manipulation of public opinion.

Initially, the conviction still required a confession from the accused, but after 1252[1] Pope Innocent IV allowed the confession to be extracted by torture. This method of inquisitorial procedure had become generally accepted and regularly used by 1300.

Later, by the end of the 18th century, torture interrogation was abolished throughout Europe, which strengthened the role of the judge's inner conviction, since the lack of confessions elicited by interrogation left the judge to decide whether the perpetrator was in denial or truly innocent.

The 17th and 18th centuries were the second stage in the development of theories of punishment, and the most important turning point of the Enlightenment, which brought new developments in both fundamental questions of penal theory. In the early Enlightenment, the question of the legitimacy of punishment was at the centre of interest, understandably so, since the denial of feudal despotism was a denial of the relationship between the new, even conceivable, civil state and its citizens. Having found the right solution in the

[1] In 1252, the martyr Saint Peter, Archbishop of Milan, was brutally murdered by some heretics on the road between Como and Milan.

contract theory of the state, their attention turned increasingly to defining the purpose of punishment.[2]

3. The Calas case

The story of Jean Calas, who was dragged through the mire and tortured, is told in Voltaire's Discourse on Toleration on the Occasion of the Death of Jean Calas (1763).

Voltaire portrays the respectable 68-year-old merchant from Toulouse as a quiet, law-abiding man and a good father. He refers to the Protestant faith of the family, which goes against the strong Catholic ethos of the time, but immediately shows that Calas was far from religiously fanatical, since he had a child who converted to Catholicism, and for whom he continued to provide apanage and employed a Catholic servant to educate his children. Of Jean Calas' five children, one son was not living at home at the time, spending his years as a servant abroad, and he brought up his two sons and two daughters in his house with his wife, in love and honour.

"One of Jean Calas's sons, Marc-Antoine, was a highly educated man; he was known as a restless, gloomy and impetuous young man. The young man, who could not make a living because he had no talent for commerce, and did not attempt the profession, nor could he become a lawyer, as he would have needed Catholic documents which he did not possess, decided to kill himself, and made his intention known to a friend; and after reading all that had ever been written about suicide, he was confirmed in his intention. One day, having gambled away all his money, he decided to carry out his plan. Nineteen-year-old Lavaisse, a friend of Marc-Antoine and the whole Calas family, the son of a famous Toulouse lawyer, whose pure and gentle morals were well known, had just the day before returned from Bordeaux, and happened to be dining at the Calas' that evening. The father, the mother, their eldest son Marc-Antoine, and their youngest, Pierre, were dining together. After dinner they went into a small drawing-room; Marc-Antoine had disappeared; when young Lavaisse, preparing to leave, went downstairs with Pierre Calas, they saw Marc-Antoine downstairs, by the shop, hanging by the door, in a shirt, his clothes folded and lying on the counter, his shirt untucked, his hair combed, and not a single wound or bruise on his body.

I won't go into all the details that the lawyers have already reported, nor will I write here about how the father and mother's desperate wails were heard by neighbours. Lavaisse and Pierre Calas ran frantically for a doctor and a policeman.[3]"

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[2] KABÓDI Cs. – LŐRINCZ J. – MEZEY B.: *Büntetéstani alapfogalmak*. Budapest: Rejtjel kiadó, 2005. p. 32.
[3] VOLTAIRE: *Válogatott filozófiai írásai.* Magyar Tudományos Akadémia Filozófiai Írók Tára Új Folyam XXXVII. kötet Akadémiai kiadó 1991. 256 p.

- Voltaire gave a detailed account of the evening's events and other details that would later be important in judging the case.

As the young men rushed for help and the parents mourned their dead son, a growing mob formed outside the house. Voltaire portrays the people of the small town as superstitious and impulsive, bigoted Catholics who regard anyone who does not practice their faith as devilish. As an example, he cites the terrible tradition of the people of the town commemorating the massacre of four thousand heretic citizens two hundred years earlier with a procession of lights and bonfires. One of the important aims of the writer's later struggle was to ban this tradition once and for all. Someone in the crowd shouted that Jean Calas himself had hanged his son. Slowly, the whole crowd took up the accusation, and a veritable lynch mob took to the streets. The story went from mouth to mouth and everyone added a little to it, first the version that Marc-Antoine wanted to convert to Catholicism the next day, that his family and young Lavaisse had strangled him to death, and then the story went on to say that Jean Calas had been murdered by his family and young Lavaisse, that the Protestants of the Languedoc[4] had met the night before and voted on who in their sect would kill the convert, and that Lavaisse had been chosen, and had rushed home from Bordeaux to Toulouse in twenty-four hours to help the family murder the boy.

The councillor on the scene was also incensed by the rumour, and feeling that his swift action would help his future career, he immediately launched an illegal and irregular procedure, and the families, the maid and Lavaisse were immediately handcuffed.

Voltaire does not mention it in his work, but other sources do, Ferenc Nagy writes: "The hanged body of the boy was cut from the rope by the family members, but they did not dare to admit the (murder/suicide) to the doctor who was called to help. They testified that the boy's body was found on the ground and his neck showed signs of hanging/strangulation. It should also be noted and taken into account that in this period of the 18th century, suiciders were considered murderers and were tried in court with their corpses face down and then 'scraped' in a deserted area outside the cemetery. The elderly Calas wanted to save his son from this humiliation and shame, even in death. This untruth became the basis for the murder charge.[5]

The case was not subsequently treated as a simple crime: in a small town where religious fanaticism was central to the issue, the fictional story that was woven around it was an excellent way to discredit Protestants. The fate of the Calas family was sealed, and it was unthinkable in those days that such a story could end in acquittal. Marc-Antoine, who, according to the public version, was the victim of

[4] Region France, in which Toulouse is located

[5] NAGY F.: *Régi és új tendenciák a büntetőjogban és a büntetőjog-tudományban.* Budapest: Akadémiai kiadó, 2016.

Protestant terror simply because he was planning to convert to Catholicism, was buried with great pomp. "A solemn ceremony was held in his honour as if he had been martyred: a skeleton was hung over the huge coffin, representing Marc-Antoine Calas, a palm branch was placed in one hand and a pen in the other, with which he was supposed to sign a renunciation of heresy, but with which he had in fact signed his father's death sentence. The unfortunate suicide was virtually canonised, and the people did indeed regard him as a saint; some prayed for help, others prayed at his tomb, others prayed for miracles, and some even told of the miracles he had performed. One monk pulled out his teeth to get a permanent relic. A bigoted woman who was hard of hearing declared that she could hear bells ringing. A windswept priest, after swallowing emetic, was cured. A record of the miraculous acts was kept. The writer of these lines has in his possession a document testifying that a young man from Toulouse went mad because he prayed night after night at the tomb of his new-found saint, but the miracle for which he prayed did not take place. Some of the judges were members of the company: from that moment on, Jean Calas' fate was sealed. His defeat was made all the more painful by the approach of the very special feast which the people of Toulouse celebrate every year to commemorate the massacre of four thousand Protestants. The year 1762 was the bicentenary. "[6]

13 judges met daily to judge the case. There was no consensus among them: some recommended the most severe punishment for the whole family and others were convinced of their innocence. There seemed no way that 68-year-old Calas, whose legs had long been swollen and weak, would have hanged his own son, who was very muscular and stronger than average, on his own. In fact, the entire party, the two parents, the brother, the guest son and the maid, would probably have been unable to do so. And there is no way that even if they had succeeded, the victim would have shown no signs of physical injury. Surely his clothing would not have been found pressed and folded to a similar end. It is also unlikely that if all this had happened, the Catholic servant who raised the boy as his own would not have immediately reported it and testified against the family.

It was obvious that if, despite all this, a murder had been committed, it could only have been committed together, the father certainly could not have done it alone, and yet the court sentenced him alone to the wheel-breaking. According to the reasoning of the verdict, the judges expected that the frail old man would not be able to resist the torture and would confess on the rack, and at the same time incriminate the other perpetrators. But their plan did not work, Jean Calas, dying on the wheel, called God to witness his innocence and asked him to forgive the judges for the sentence.

[6] VOLTAIRE: *Válogatott filozófiai írásai.* Magyar Tudományos Akadémia Filozófiai Írók Tára Új Folyam XXXVII. kötet Akadémiai kiadó 1991. 257 p.

The new situation required a new judgment, no more consistent than the previous one: the mother, their son Pierre, the young Lavaisse and the servant were acquitted, but in order to ensure that the new judgment was not in any way contradictory to the previous one, it was finally decided to banish Pierre Calas. The Calas daughters, who were not at home on the night of the incident, were separated from their mother and confined to a convent. "Mrs Calas, splashed with the blood of her husband, who held in her arms the body of her first-born son, whose second-born son had been banished, who had been deprived of her daughters, whose property had been confiscated, was left as alone as a finger, without a meal, without the faintest ray of hope, crumbling under the weight of her terrible misfortune."[7]

The crime itself, however brutal it may seem, was not uncommon in Europe at that time. The really interesting question is what made this case such a prime example of reform thinking on criminal procedure, which underlines the urgent need for change.

4. Voltaire and the Calas affair

Voltaire was the most famous philosopher of the Enlightenment. A fierce and committed advocate of religious tolerance, he defended the innocent, and it is no coincidence that at the time of the Calas affair he was living in exile in the Swiss village of Ferney. His estate was located four miles from Geneva, part of it in France, part in Switzerland and part in Germany, so that any problems he had with the authorities on his part of the estate belonging to another country were already safe.

Even before the Calas affair, he was already a renowned celebrity, sensitive to social problems, but his work was mainly confined to the literary sphere, less concerned with public affairs or the personal problems of oppressed minorities. It was in this context that the Calas affair marked a turning point in Voltaire's life, to the extent that he became one of the standard-bearers of the struggle for human rights.

When he first heard about the case, he gave credence to the court's verdict, and in a letter he mentions Calas as an example of Protestant fanaticism, who killed his own child to prevent him from converting to Catholicism. His opinion changed after he personally spoke to several Protestants who knew the Calas family, and what made him an obsessive defender of the innocently persecuted family was a personal conversation with Donat Calas, another son of Jean Calas, who was serving his apprenticeship in Nimes.

Voltaire then set to work very hard and persistently to rehabilitate the innocently convicted father. Over the next nine months, he wrote countless letters to use his

[7] VOLTAIRE: *Válogatott filozófiai írásai.* Magyar Tudományos Akadémia Filozófiai Írók Tára Új Folyam XXXVII. kötet Akadémiai kiadó 1991. 261 p.

influence to get the conviction commuted. He made a point of showing the flaws in the proceedings and the absurdity of the charges. He did this from a distance, since he himself could not return to France: he commissioned four lawyers to analyse the case in detail, to point out the flaws in the prosecution's case, and a merchant to travel to Toulouse and gather as much evidence as possible of Calas's innocence.

" [...] You will ask me, my divine angels, why I am so interested in this broken merchant of Toulouse," he wrote to D'Argental." I will tell you. First, because I am a man. Then because I see that when strangers talk about this matter, they condemn us. Is it really necessary for the name of France to stink all over the continent? [....] My divine angels, take all this under your wings, the tips of which I kiss tenderly and reverently."

5. Rehabilitation of Calas

The power of Voltaire's struggle lay in the publicity. As an exile himself, he could do nothing about it, but through his writings, which radiated indignation and a desire to act, he was able to spread his ideas to the widest circles. These writings were printed and spread like wildfire across France, where the feudal social order was in decline.

His "Treatise on Patience on the Occasion of the Death of Jean Calas" was written for the then awakening civil public, to make them aware of the outrageously unjust outcome of the criminal trial. His persistent advocacy campaign was ultimately successful. While France still looked like an absolute police state, behind the scenes change was already taking place. Thus, although Voltaire's works could not be officially distributed, they were being read by the highest officials of the state and the most influential people at the court of Versailles.

The Duke of Choiseul, the most influential member of the government, although officially banning Voltaire's writings, expressed his admiration for him as a private citizen. Antoine de Sartine, the former chief of police of Paris, himself distributed the work on the black market. Madame de Pompadour, the King's mistress, became an ardent supporter of Voltaire's cause and shaped the King's position. It was no longer only in France that the case caused a storm: King Frederick of Prussia, who had written to Voltaire, was greatly influenced by the treatise.

Finally, in March 1763, the court in Toulouse had to release the case file. Following a review, the Royal Council unanimously decided on 4 June 1764 to annul the judgment. Voltaire did not give up the fight, the aim was now to compensate the family. In the meantime, he was increasingly shifting the focus from the individual case to the flaws in the procedure: he wanted to bring about systemic change. He also demanded the banning of the church festival in Toulouse commemorating the massacre of thousands of Protestants every 17 May.

On 12 March 1765, three years after his execution, on the recommendation of forty senior members of the tribunal, the Court of Appeal posthumously rehabilitated Jean Calas. In April 1765, Calas's widow and family received £39,000 in compensation from King Louis XVI.

In addition to the Calas case, Voltaire was active in other similar cases. His struggles and victories played a major role in the development of the human rights movement and have inspired generations of defenders ever since. It was the lessons of the case, and the confrontation with the injustices resulting from the feudal penal system, that inspired a then 25-year-old young man to write his thesis on the reform of penal legislation and sentencing. The young man's name was Cesare Beccaria and in 1764 he published his essay Crime and Punishment, which clearly set the direction for criminal procedure and whose principles remain among the most important principles of criminal procedure today.

7. Cesare Beccaria

The work of Cesare Beccaria and his ideas on the reform of the rules of criminal procedure alone justify the inclusion of a separate chapter on him in my dissertation. His epoch-making work continues to fundamentally define the principles of criminal law to this day.

At the time of Beccaria's birth, in France, disrespect for religious processions was punishable by death, and people could be executed on religious grounds on trial without evidence, under horrific torture.

As the first child of a wealthy family, Beccaria's parents expected him to build his family's reputation, but he was not at all willing to live up to the expectations of society, which he found stifling and rigid. He began his studies in Parma, as was the custom for the children of wealthy families of the time, and then went on to obtain a doctorate in law in Pavia, despite the fact that he was not interested in law.

His relationship with his family continued to deteriorate, and finally became irreparable when he proposed to his beloved Teresa De Blasco. The southern-born girl was considered inferior, but Beccaria's decision was not influenced by parental or social guidance. The apathetic, basically depressive, introverted young man then turned to philosophy. As a young and enthusiastic thinker, he wanted to become one of the great philosophers of enlightened Europe.

During this period, a series of academic circles were formed in Italy, where thinkers, writers and philosophers of the time discussed, among other things, current political, economic, moral and legal problems. Beccaria was introduced to the ideas of the Enlightenment in the early 1960s, and to an intellectual society which later became the Academia dei Pugni, the leading intellectual centre of the

Italian Enlightenment. The Academy was founded by the Verri brothers [Pietro (1728-1797) and Alessandro (1741-1816)] and the writers who were friends of theirs. The Academia's journal was the aforementioned Il Caffe , which appeared between 1764 and 1766 and published articles on a wide variety of subjects. It dealt with philosophy, economics, the arts, religion, as well as medical and legal subjects. The journal sought to reach a wide audience, and the uniform language it developed was a means of achieving this. Their articles criticised the exploitative, luxurious life of the aristocracy, fought against literary illiteracy and sought to present the latest scientific advances. Among the academies of the time, the dei Pugni stood out for its break with tradition and its wide range of subjects. Their aim was to create a community that would promote the intellectual development of Italy, to put an end to the remnants of feudalism that stood in the way of progress, and to help the Italian people to awaken to their own consciousness.

The editorial team of the paper was made up mostly of well-off young people who were captivated by the French Enlightenment. They led a lively social life, meeting to discuss innovation in various fields of science and laying the foundations for the Italian intellectual revolution. The young Beccaria was mainly interested in economics, mathematics, economic philosophy and politics, independently of his legal studies.

In 1764, Beccaria wrote his essay Dei delitti e delle pene (Crime and Punishment) , commissioned by the Verri brothers. Although the spirit of the Enlightenment was already sweeping Europe, and the revolutionary winds of change were clearly blowing, the work was published anonymously, and even the place of publication, Liverno, was not mentioned on the first edition. Beccaria, then 26 years old, knew his era well and knew that writing it was a serious threat to him. The work was a great success in Europe: the intellectual elite of the time were enthusiastic about it, Voltaire called Beccaria his brother, and D'Alembert said: 'This book is enough to give its author an immortal name. What a philosopher! What truths! What logic!" In 1766, Catherine the Great asked him to lead the work of reforming criminal law in Russia, but Beccaria declined the invitation.

In his work, Beccaria does not stop at criticising the criminal law of the time, but also proposes solutions, putting ideas down on paper ideas that would fundamentally determine the practice of criminal law in the following centuries and are still among its basic principles today. His ambition to make the system of punishment clear, transparent, predictable and just is clear, and he supplements his theory with concrete practical steps to achieve the goals he has outlined. His work has had a major impact on the development of criminal procedural law practice throughout Europe.

The Austrian legislation of the decade 1780-90 also shows the influence of Beccaria's principles of criminal law in some of its institutions.

In Poland Beccaria's work was first translated in 1772. Its first edition was a seminal work on Polish legislation, criminal procedure, the organisation of the judiciary and the science of criminal law.

In our country, the draft laws of 1790 and 1827, and even the proposals and laws of 1843 and 1878 are the carriers of the effects of the principles, theories and solutions.

In 1795, the new penal code of Brumaire 3 came into force in France, followed by the Napoleonic Code Penal of 1811, which, although amended, is still in force from 1 January 1811, and its content is dominated by the Beccaria theorems.

Switzerland, the present-day Netherlands, Belgium and the Italian states adopted the French Penal Code of 1811, and later the independent codes of Naples, Parma, Sardinia and Tuscany were based on the same principles.

The penal codes of the German states: Bavaria, Saxony, Württemberg, Brunswick and Hanover, which used the work of Feuerbach and Mittermaier, all reflect the French influence. Norway (1842), Russia (1845), Spain (1848) and Portugal (1852) also enacted penal codes showing signs of the development initiated by Beccaria. In England, Bentham, is the adaptor of these ideas, who influenced the entry of several new penal codes coming into force (1830). In Greece, codes adopting the principles of the Bavarian (Feuerbach's) Penal Code and in Turkey (1858) the French Code pénale were modelled on the Code pénale and came into effect.

6. Summary

I don't think that the reforms of the Enlightenment in criminal matters would not have happened without the Calas case, there would certainly have been a change. Yet I believe that it was a combination of many circumstances that made this case the starting point for change: the Calas case and its trial exposed the flaws of the old system, pointed out all the solutions that were worthy of change. It was a happy coincidence that Voltaire encountered the case while still in exile, and that he had the chance to meet one of the unfortunate family members in person, which further strengthened his will to act. This was helped by the style in which Voltaire put his thoughts on paper, which made each reader feel a little part of the case, and its subsequent rehabilitation, their aim. All this made this case so important that it could be the first step in the beginning of a very significant change in the field of criminal law.

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https://pendulum.444.hu/2021/10/08/voltaire-es-a-calas-ugy-avagy-az-emberi-jogi-mozgalom-szuletese (downloaded 2023.03.14)

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Pszichoszexuális változások serdülőkorban

Absztrakt: A szexuális fejlődés serdülőkortól kezdve kiemelt fontosságúvá válik az életünkben, befolyásolva saját személyiségünket, érzéseinket, gondolatainkat, viselkedésünket és társas kapcsolatainkat. Jelen írás azt igyekszik tárgyalni, hogy miként zajlik az emberi szexuális fejlődés, milyen fontos folyamatokkal és változásokkal jár főként a serdülőkorban, akár testi szinten, akár a különböző pszichológiai, illetve társas aspektusokban, és milyen hatások befolyásolják eközben adott társadalmi-, illetve egyéb környezeti kontextusba ágyazva, némileg a mai modernebb társadalomra helyezve a fókuszt.
Kulcsszavak: pszichoszexuális fejlődés, szexuális fejlődés, szexuális érés, szexuális aktivitás, szexuális viselkedés, serdülőkor

Abstract: Sexual development, starting in adolescence becomes a crucial part of our lives, affecting our personality, emotions, thoughts, behaviors and social connections. The current paper attempts to discuss how the human sexual development occurs, what important processes and changes it brings especially in adolescence, either on the physical level of the body, or in different psychological and social aspects, and what kind of effects influence it meanwhile in a certain sociocultural environment, partly focusing on the actual modern society.
Keywords: psychosexual development, sexual development, sexual maturation, sexual activity, sexual behavior, adolescence

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1. Bevezetés

A szexuális fejlődés, illetve az ezzel megjelenő szexuális aktivitás különösen serdülőkortól meghatározó szerepet kezd el betölteni a fiatalok életében. Amellett, hogy a pszichológiai fejlődés számos aspektusára kihat, az egyénen túl a társas kapcsolatok serdülőkori változásainak is az egyik fő mozgatórugójává válik. Az egyéni szinten túl viszont globálisabb, társadalmi szintű jelenségek is megfigyelhetők, ahogy különböző generációk mind egy kicsit, vagy akár jelentősen máshogy élik meg az aktuális szociokulturális és technológiai környezet által

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befolyásolva a saját szexuális fejlődésüket, többek között különbségeket mutatva a szexuális viselkedések terén, illetve magához a szexualitáshoz fűződő viszonyukkal kapcsolatban is. Azonban olyan potenciális negatív fejlődési hatások vagy akár komolyabb veszélyek is előfordulhatnak, amelyek az érdekességen túl indokolttá teszik a témával való foglalkozást, miközben napjaink társadalmában egyre több (és részben teljesen új) tényező játszik szerepet e téren is.

Bár a jelen cikk a serdülőkori szexuális fejlődés inkább egy általánosabb bemutatására irányul (helyenként kitekintve), magába foglalva a releváns testi és pszichológiai aspektusok lehetőséghez mérten nagy részét, a jövőre nézve a fókusz a potenciálisan negatív – többek között kriminológiai jelentőségű – kimenetelekhez vezető rizikótényezők felé is fordulni fog.

2. Nemi szerep, nemhez igazodás

A pszichoszexuális fejlődés fontos részét képezik a személyt gyakorlatilag születésétől kezdve érő szociális hatások, amelyek valamilyen nemi szerepet társítva az illetőhöz alapvető módon befolyásolják a viselkedését, gondolatait, érzéseit és identitását egyaránt. A különböző kultúrák eltérően határozzák meg a nemek társadalmilag kívánatos viselkedéseit, szerepeit, személyiségjellemzőit, amelyek egy adott kultúrán belül időben is változhatnak. Egy klasszikusnak mondható példa erre az érzelmek kimutatása, melyek napjaink némileg lazább, modern társadalmában jutott el oda, hogy férfiak részéről is elfogadottabb, de még mindig nem általánosan és egyforma mértékben. A kultúrák enyhébb vagy szigorúbb módon igyekeznek a nemek alapján megfelelő irányba terelni a fiait és lányait, amely során a viselkedések és tulajdonságok elsajátítása a nemhez igazodás folyamata[1].

A nemhez igazodás mikéntjére többféle elmélet is létezik, de adatokkal alátámaszthatóan alapvetően tanult folyamat. A szociális tanuláselméleten alapulva, a gyerekek megfigyelés és saját tapasztalat útján adott környezetben megtanulják, hogy mik a nemüknek megfelelő helyes és helytelen viselkedések (melyek pozitív vagy negatív következményekkel járnak), amelyek esetén a két nem között jellemzően van valamekkora eltérés[2] [3]. Kisgyerekkorban a társas környezet viszonyulásán túl már maga a fizikai környezet, az öltözékek, a játékok is másfélék, amelyeket eleinte leginkább a szülők alakítanak. De nem csupán a szülők serkentik a nemi sztereotípiák alapján a fiús vagy lányos tulajdonságokat és viselkedéseket, hanem a kortársak is legalább annyira, ahogy a gyermek interakcióba kerül velük

[1] ATKINSON - HILGARD: Nemi identitás és nemhez igazodás. In: *Pszichológia*, 2005, 118-121.

[2] BANDURA A.: *Social foundations of thought and action: A social cognitive theory.* Englewood Cliffs, NJ: Prentice-Hall Inc., 1986.

[3] BUSSEY K.: A social-cognitive appraisal of sex-role development. *Australian Journal of Psychology, 1983/35*(2), 135-143.

például a játszótéren, vagy később az óvoda-, illetve iskolarendszerbe kerülve[4] [5]. Azonban nem egyszerűen egy külső viselkedéses kontroll befolyásolja, hanem saját magukban is elkezd kialakulni egy nemi identitás, amelynek megfelelően az ahhoz illő dolgokat igyekeznek ők maguk is követni. Egy további elmélet szerint nem szándékoltan, de a gyerekek olyan üzeneteket kapnak nap, mint nap a környezetükből, amely azt erősíti, hogy a világot a nemek szemüvegén keresztül nézzék, mert a kultúra ezt a szempontot kiemelten kezeli, sok nyelv esetén a névmások szintjén is megjelenve. Ezáltal kialakul bennük egyfajta nemi séma[6] [7] [8]. A nemi szemüveget pedig önmagukra is megtanulják vonatkoztatni és magukat is azon keresztül nézni, mely a nemi identitás és az önértékelés alapjává is válik. Az elmélet fontos aspektusa az is, hogy a gyerekek annyira igazodnak a nemekhez, amennyire a kultúra kiemeli. Manapság viszont a szélsőségesen liberális nézetek térhódításával a hagyományos nemi szerepek eltűnőben vannak, és a nemek jelentőségének elmosódása felé zajlik egy ideológiai alapú változás bizonyos nyugati társadalmakban. A nemhez igazodás egy már születéstől tartó folyamat, de végigkíséri a fiatal életét a serdülőkorban is, ahol mondhatni új lendületet kap az egész a szexuális fejlődés intenzív változásaival, ahogy a testi változások beindulnak és megjelenik a szexuális motiváció, illetve az utóbb említett társas közeg jelentőségének növekedésével és újfajta kapcsolatokkal.

3. Serdülőkor

A serdülőkor az egyedfejlődés során egy kiemelten fontos időszak, amely számos jelentős változással jár testi és mentális szinten egyaránt. Az egyik talán legfontosabb része a szexualitással kapcsolatos, amely – bár valójában a kisgyerekkorban sem idegen – ebben a fejlődési szakaszban indul intenzív fejlődésnek és válik innentől a személy életének fontos részévé. A szexuális fejlődés több jelentős testi változással jár együtt, azonban nem csupán egy egyszerű érési folyamat – noha testi szinten zömében az, markáns egyéni különbségekkel –, hanem viselkedéses aspektusában alapvetően tanult folyamat, amely már sok állatfaj esetében sem olyan ösztönös, mint amilyennek sokáig gondolták. A pszichoszexuális fejlődés korszerű elmélete a

[4] FAGOT B. I.: The influence of sex of child on parental reactions to toddler children. *Child development, 1978/49*(2), 459-465.
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[8] BEM S. L.: *The lenses of gender: Transforming the debate on sexual inequality*. New Haven, CT: Yale University Press, 1993.

biológiai nemmel való identifikálódást és az adott nemre és életkorra érvényesnek tartott nemi szerep megtanulását tartja döntőnek.

Átlagosan nagyjából tizenkét éves kortól a tizenéves kor végéig tartó életszakaszként tartható számon (valakinél viszont jóval korábban), amikor is a fiatal személyiség szexuálisan éretté válik, és egyúttal a családjától független egyénként kezdi meghatározni önmagát. Napjainkban, legalábbis a modern társadalmakban azonban már néhány évtizede megfigyelhető, hogy az ezzel járó testi változások megjelenése – és ezáltal a szexuális aktivitás potenciális beindulása a fiatal életében – átlagosan egyre előrébb tolódott a korábbi korokhoz képest. A pubertás amellett, hogy a személyiségfejlődés szempontjából is jelentős időszak, a szexuális érésnek az az időszaka, amely során szaporodásra képes, biológiailag érett felnőtté alakul a személy, ami testi szinten gyors növekedéssel, illetve a szaporítószervek és a másodlagos nemi jellegek kifejlődésével jár együtt. Fontos momentuma lányok esetén az első menstruáció megjelenése, fiúk esetén pedig az első magömlés. Egyének között viszont igen nagy változatosságot mutathat a testi érés üteme és mértéke. Vannak későn, illetve korán érő személyek, mely a hetedik-nyolcadik osztályos tanulók között válik a legszembetűnőbbé[9].

A serdülőkort jellemzően a határok feszegetése, új dolgok kipróbálása, a magasabb mértékű kockázatvállalás jellemez, miközben a hormonrendszer óriási alakuláson megy át, és az agy is jelentős fejlődésben van (amelyen belül a prefrontális kérgi terület kifejezetten hosszú ideig fejlődik, még a fiatal felnőttkorba is benyúlva), összefüggésben bizonyos magasabb szintű (ún. végrehajtó) funkciókkal, például az önkontrollal, az átgondolt tervezéssel és a következmények belátásával. Eközben a fiatal keresi a helyét a világban és a személyiségfejlődésének egy új fontos szakaszán megy át. Önállósági törekvéseivel együtt pedig a kortárs kapcsolatai is hangsúlyosabbá válnak és jelentősen változnak. Bár viharos életszakaszként szoktak tekinteni rá, a kutatások alapján valójában nem feltétlenül olyan kaotikus időszak – legalábbis maradandóan – a legtöbb embernél[10], inkább azoknál az, akik eleve zűrösebbek. Az esetleges problémák összefüggésben állnak a hormonális változásokkal, és a testi változások személyes és társas hatásaival[11]. A korán vagy későn érés a szexuális aspektusok mellett egyéb mentális és viselkedéses tényezőket is befolyásolhat, a két nemnél másként[12]. Fiúknál a korán érők elégedettebbek lehetnek a testükkel és könnyebben kerülnek magasabb társas pozícióba, de az önkontroll és érzelmi stabilitás terén gyengébben jellemezhetők, és nagyobb valószínűséggel vonódnak be problémás (pl. alkohollal vagy droggal kapcsolatos)

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[9] ATKINSON - HILGARD: Serdülőkori fejlődés. In: *Pszichológia*, 2005, 122-127.

[10] STEINBERG L. – MORRIS A. S.: Adolescent development. *Annual review of psychology, 2001/52*(1), 83-110.

[11] BUCHANAN C. M. – ECCLES J. S. – BECKER J. B.: Are adolescents the victims of raging hormones? Evidence for activational effects of hormones on moods and behavior at adolescence. *Psychological bulletin, 1992/111*(1), 62-107.

[12] COLE - COLE: A serdülőkori fejlődés biológiai és szociális alapjai. In: *Fejlődéslélektan*, 2006, 602-639.

tevékenységekbe[13], ami összefüggésben lehet azzal, hogy számukra a serdülőkor nagy változásai gyorsabban következnek be, és még kevésbé kezelhetők. Ehhez képest, bár a későn érők az iskolában rosszabbul érezhetik magukat aktuálisan, később kiegyensúlyozottabb fiatalok (fiatal felnőttek) válhatnak belőlük, ahogy beérnek. Lányok esetén másként alakul a helyzet, ott a korai érők között nagyobb arányban fordul elő depresszióra és szorongásra hajlamos fiatal, alacsonyabb önértékeléssel és kevésbé elégedett testképpel (amely összefüggésben áll a kulturálisan jellemzően karcsú testalkat előtérbe helyezésével is), mert a korai érés náluk még előnytelenebb változást hoz, mint a későn érőknél[14], amely legalábbis ideiglenesen távolabb vihet a szépségideáltól alkatilag. Azáltal, hogy szexuálisan érettebbek a többieknél, ugyan népszerűbbek lehetnek, de több érzelmi és viselkedéses problémával is együtt járhat. Hamarabb kerülhetnek szexuális kapcsolatba, esetükben a párkapcsolat is jellemzőbb, akár alacsonyabb iskolázottsági szintet érhetnek el, illetve a fiatalkori terhesség veszélye is magasabb a korábban kezdődő szexuális aktivitásból fakadóan[15]. A későn érő lányoknál, bár kezdetben negatívabb az énképük, a változások bekövetkezte után könnyebben rendeződhet a dolog. A szexuális érés ütemének hosszú távú hatásai viszont kevésbé egyértelműek és alátámaszthatóak megfelelő mennyiségű adattal. A néhány évtizeddel ezelőtti kutatási eredmények óta bekövetkezett szociokulturális és technológiai változások miatt pedig ma lehet, hogy a teljes kép is másként fest.

Mindezen változások mellett a serdülőkor fontos része az identitásképzés is, amelynek során kialakul, hogy miként határozzák meg önmagukat[16]. Az egyszerűbb társadalmakban, ahol kevesebb az azonosulási modell és a lehetséges szerep, az identitás kialakítása könnyebb folyamat, de a modern társadalom összetettsége és gyors változásai mellett a fiataloknak nehezebb dolguk van, éppen ezért az identitáskrízis (az identitás keresés) időszaka intenzívebb és jobban elhúzódó lehet. Az élet különböző nagy területein kell valamiként megtalálniuk magukat, melyek közül az egyik a szexualitás és a nemi identitás kérdése (a hivatás és az ideológia mellett). A kognitív éréssel párhuzamosan egyre elvontabb képet alkotnak önmagukról, és a társas összehasonlítással szemben a személyes mércék nagyobb teret kezdenek kapni. Az énfogalmuk még helyzetről helyzetre változhat különböző kapcsolatokban, és gyakran előfordulhat, hogy másnak mutatják, mint amilyennek valójában gondolják magukat, közegtől és szituációtól függően.

[13] WILLIAMS J. M. - DUNLOP L. C.: Pubertal timing and self-reported delinquency among male adolescents. *Journal of adolescence, 1999/22*(1), 157-171.
[14] GE X. – CONGER, R. D. – ELDER JR G. H.: Coming of age too early: Pubertal influences on girls' vulnerability to psychological distress. *Child development, 1996/67*(6), 3386-3400.
[15] CASPI A. – MOFFITT T. E.: Individual differences are accentuated during periods of social change: the sample case of girls at puberty. *Journal of personality and social psychology, 1991/61*(1), 157-168.
[16] ATKINSON - HILGARD: Serdülőkori fejlődés. In: *Pszichológia*, 2005, 122-127.

4. A szexuális fejlődés testi változásai

Bár e cikk témája alapvetően a szexuális fejlődés pszichológiai aspektusaira fókuszál, fontos kitérni az ezt alapozó, illetve kísérő testi változásokra is, melyek összefonódnak az előbbiekkel, így a teljesebb kép érdekében röviden ezeket is áttekintjük. A szexuális fejlődés testi szinten tulajdonképpen egy érési folyamat, noha a kapott genetikai tulajdonságok mellett a környezeti tényezők is befolyásolják. Legintenzívebb szakasza a serdülőkorban zajlik, bár a biológiai nem alapján kezdetektől elválaszthatatlan részünk, és már a serdülőkor előtt (prepubertás) is bizonyos alapvető változások történnek. A korai szexuális fejlődés során az androgének (hormonok) hatására a – nagy mennyiség esetén férfi – nemi szervek kialakulása következik be, emellett viszont többek között az agy fejlődését is befolyásolják, maszkulinabbá téve azt[17]. Állatkísérletekből azt is tudjuk, hogy az anya általi korai hormonális hatások a szexuális aktivitás szintjét és a későbbi szexuális viselkedést is befolyásolhatják[18]. Embernél ugyan ennél jóval bonyolultabb a kép és az efféle hatás elenyészőbb, de valamifajta csekélyebb szerepe a szexuális motivációban a korai hormonális hatásoknak is lehet, noha az állatokhoz képest az emberi viselkedés jóval hormon-függetlenebb. Sokféle kutatás foglalkozott azzal a kérdéskörrel is, bár máig vitatott, hogy a hormonok vagy a későbbi környezet határozza-e meg a kialakuló nemi identitást, illetve a nemi orientációt. Általánosságban azonban inkább az az álláspont, hogy a szociális és kulturális hatások döntőbb szerepet játszanak, de a biológiai tényezőknek is lehet némi hatása.

Az emberi hormonrendszer a pubertás során óriási átalakulásan megy át, fontos agyi változásokkal egyetemben, amelyeknek a viselkedésre, gondolatokra, érzésekre, azon túl pedig a társas interakciókra és kapcsolatokra is nagy hatással van. A hipotalamusz gonadotropfelszabadító faktorokat választ ki, amelyek az agyalapi mirigyet serkentik, ami gonadotrop nevű nemi hormonokat bocsát a véráramba. Ez utóbbiak az ivarmirigyekhez jutnak el, ahol kifejtik hatásukat (nőknél a petefészkekben, férfiaknál a herékben), aktiválva azokat, amelyek így további nemi hormonokat választanak ki a véráramba. A két nemnél viszont alapvetően másként zajlanak a dolgok.

Nők esetén a hipotalamusz az említett faktorokat körülbelül 28 naponkénti ciklusokban termeli, az agyalapi mirigy pedig szintén ennek megfelelő ciklusokban kétféle gonadotrop hormont állít elő, a follikulusz stimuláló hormont (FSH) és a luteinizáló hormont (LH). Ezek közül az FSH a petefészkekre hat és a tüszők érését serkenti, amelyek ösztrogént, mint női nemi hormont juttatnak a vérbe, a test szexuális fejlődését vezényelve, egyúttal az agy szexuális motivációját serkentve. Az

[17] ATKINSON - HILGARD: Nemek és szexualitás. In: *Pszichológia*, 2005, 400-412.
[18] WARD I. L.: Sexual behavior: The product of perinatal hormonal and prepubertal social factors. In: Gerall A. A. - Moltz H. - Ward I. L. (Eds.) *Sexual differentiation*. Plenum Press, 1992, 157-180.

LH pedig némi késéssel, az érett petesejt tüszőből kiszabadulásáért (ovuláció) felelős, amely során még egy női nemi hormon is felszabadul, a progeszteron, ami amellett, hogy a méhet felkészíti a megtermékenyített pete beágyazódására, szintén az agy szexuális motivációját serkentheti egyes állatfajokban.

Férfiaknál a hipotalamusz azokat a bizonyos gonadotropfelszabadító faktorokat nem ciklikusan, hanem folyamatosan termeli, és így az agyalapi mirigy is folyamatosan termeli a gonadotrop hormonját, ami viszont ez esetben egyedüliként az intersticiális sejteket stimuláló hormon (ICSH). Ez a heréket a spermiumok termelésére készteti, emellett pedig beindítja az androgének (férfi nemi hormonok), különösképpen a tesztoszteron kiválasztását. A tesztoszteron és a többi androgén a férfias testi jellemzők kialakulásáért felelős, és a nemi vágy erőteljes fokozója.

Az elsődleges nemi szervek alakulásán túl egyéb változások is történnek a testtel, formálva a másodlagos nemi jellegeket. Lányoknál kifejlődik a mellük, és kikerekedik a csípőjük (emiatt tűnhetnek fejlődés közben ideiglenesen kövérebbnek), a fiúk válla kiszélesedik, és jelentős izomzat fejlődik (ekkor válnak általánosságban erősebbé a lányoknál), illetve a hangjuk is mélyül, bár az egyéni különbségek a változások terén is nagyok lehetnek és eltérő üteműek. Emellett pedig, bár nem kifejezetten nemi jelleg, de minden serdülő jelentős növekedésnek indul, az életszakasz végére nagyjából a felnőttkori magasságukat elérve. A verejtékmirigyek működése is fokozódik, illetve szőrzet jelenik meg különböző helyeken (hónaljszőrzet, fanszőrzet, arcszőrzet)[19].

A testi változásokat tekintve nagy jelentősége van az agyban lezajló változásoknak is. A hormonális változásokon túl az agyi szinapszisok is átrendeződnek, jelentős részük megszűnik, újfajta kapcsolatoknak adva teret. A serdülőkorig a kisgyerek világának alapvetően ő a középpontja, rengeteg szinaptikus kapcsolattal, ami több, mint a mi kell. Csakhogy innen biológiai szempontból is fontos váltás kezd bekövetkezni serdülőkorban[20]. Mások (is) fontossá kezdenek válni, másokra kezd irányulni a figyelem, és egyrészről ez a kortárs baráti kapcsolatokat is érinti, amik szintén komolyodnak, mint azelőtt, de ami a szexualitás szempontjából még fontosabb, hogy elkezdenek másfajta módon is érdeklődni mások iránt (klasszikusan a másik nem, de általánosabban a számukra egzotikusabb nem iránt), ezeknek a teljesen újfajta tapasztalatoknak pedig teret kell engedni. Az agy a serdülőkor alatt még tovább nő. A prefrontális kéreg, mint a legkésőbb beérő agyterület, a pubertás alatt még javában fejlődik, miközben több jelentős funkcióért is az felel (előre tervezés, impulzus kontroll, a viselkedéses következmények megértése és a megfelelő viselkedés irányítója), így ennek éretlensége a serdülők olykor kockázatosabb, meggondolatlan viselkedésének is az egyik oka. Az amigdalában pedig tesztoszteron receptorok fejlődnek ki, így az eddigi életéhez

[19] COLE - COLE: A serdülőkori fejlődés biológiai és szociális alapjai. In: *Fejlődéslélektan*, 2006, 602-639.
[20] TAYLOR J. B.: *The Neuroanatomical Transformation of the Teenage Brain*. TED Talk, 2013.

képest a serdülő személy többször tapasztalja meg az agresszió érzését is, mint korábban.

A legtöbb fajnál a szexuális arousal (izgalmi szint) szorosan együtt jár a hormonok szintjével a vérben, az embernél viszont szinte egyedülálló módon jóval kevésbé függ össze, illetve a szexuális izgalom és vágy is némileg különválasztandó. A szexuális működésben számos kémiai anyag részt vesz az érzések és viselkedés egyes aspektusait befolyásolva, melyek most mellőzésre kerülnek, azonban közülük a tesztoszteron az egyik legfontosabb szexhormonnak tekinthető. Amellett, hogy a magzati fejlődés alatt, majd serdülőkor idején a nemi jegyek kialakításában játszik alapvető szerepet, specifikus agyterületek aktiválása révén a szexuális viselkedést irányítja. Elsősorban férfiaknál a spontán megjelenő szexuális vágyat nagymértékben meghatározza, vagyis a szexuális ingerek jelenléte nélküli szexuális tartalmú gondolatok előfordulását[21] [22], mely nőknél is hasonlóan hat, csak ott alapvetően jóval alacsonyabb a szintje herék hiányában (csak egy másodlagos forrásból termelődik enyhe mértékben, bár az ösztrogén is kiegészíti). Ugyanakkor alacsony szintje mellett is működőképes marad a szexuális funkcionálás megfelelő inger jelenlétében, a kialakítható szexuális izgalmi állapotot kevéssé befolyásolja. Viszont mindkét nemnél igaz, hogy mindemellett a szexuális vágy fő tényezői az érzelmi és kapcsolati tényezők. Ahogy férfiak esetén a herék eltávolításával, úgy nők esetén a petefészkek eltávolításával vagy a menopauzával sem szűnik meg a szexuális aktivitás, ami az állatvilágban egyedülálló. Nőknél már kis mennyiségű nemi hormon emeli a szexuális vágyat, ami általában adott is, így alapvetően a szexuális viselkedést nem ez befolyásolja az embernél. Állatoknál a termékenységi ciklussal együtt járó hormonváltozások a szexuális viselkedést nagyban befolyásolják, főemlősöknél azonban függetlenedik tőle, noha valójában itt is kimutatható némi enyhébb hatása a hormonoknak (az ovuláció periódusában legnagyobb a szexuális aktivitásuk, de gyakorlatilag minden időszakban közösülnek). Az embernél is zajlanak a háttérben ezek a biokémiai folyamatok, de azt mondhatjuk, hogy a szociális és érzelmi tényezők a szexuális aktivitás elsődleges irányítói[23].

5. Pszichoszexuális aspektusok

A sok hormonális, illetve testi változás közepette, nem beszélve külön az agyat érintő változásokról, amelyek egyszer csak elkezdődnek valamikor a serdülőkorba lépve (egyénenként változó időben és mértékben), a fiatalt teljesen újszerű élmények érik önmagával kapcsolatban is, amely során a személyiség szintjén is csak most kezd felépülni igazán, akár újra az alapjairól, miközben a társas környezettel való viszonya

[21] DAVIDSON J. M.: Sexual emotions, hormones, and behavior. *Advances, 1989/6*(2), 56-58.
[22] HEVESI K.: *Szex - A psziché labirintusában*. Budapest: Kulcslyuk Kiadó, 2013.
[23] ATKINSON - HILGARD: Nemek és szexualitás. In: *Pszichológia*, 2005, 400-412.

is megváltozik. A változások közvetlen, illetve közvetett oka, hogy a szexualitás aktívan belép a személy életébe testi, illetve érzelmi és viselkedéses szinten egyaránt. Valamikor egyszer csak bekövetkezik fiúk esetén az első magömlés, lányoknál pedig az első menstruáció is, amely jelentős új – utóbbiak számára nem kifejezetten kellemes – saját élmény, akár teljesen váratlanul, amely innentől az életük része lesz. Amellett, hogy közvetlenül a szexuális jellegű változásokkal kapcsolatban is éreznek valamit, az új testalkat, kultúránkban a média által is felerősítve, különösen lányok esetén negatív önértékeléshez vezethet (a természetes testi változások kövérkésebb alkatot okozhatnak legalábbis ideiglenesen)[24], egy elérhetetlen vagy csak nehezen elérhető testi ideált állítva (a karcsú nő), amely ráadásul a szexuális fejlődésükkel saját maguk számára is hangsúlyosabbá válik (nőként a testi külső, részben evolúciós örökségként még érzékenyebb pillére az önértékelésnek[25]), amely akkor is zavaró lehet, ha valaki még tudatosan nem kifejezetten érdeklődik szexuálisan, csupán már azonosult női nemi identitásával. Nem olyan ritkán táplálkozási (és testkép-) zavarokhoz is vezethet, ami reális veszély lehet a fiatalok körében (és bár tipikusan lány probléma, a mai modernebb társadalomban már a fiúk között is gyakoribbá vált az előfordulása). Például egy szélsőséges anorexia akár halálhoz is vezető, veszélyes állapottá válhat. A táplálkozási zavarok kialakulása mögött ugyanakkor gyakran állhatnak családi problémák is, amelyek ebben a formában jelennek meg tünetként valakinél, például az érzékenyebbé váló, éppen kamasz fiatalnál.

A tapasztalat szerepe a szexuális viselkedésben, aktivitásban már a legtöbb emlősfajnál kimutatható, de az ember esetén különösen alapvető jelentőségű, ugyanis régi elképzelésekkel ellentétben a szex sokkal inkább tanult, mint ösztönös viselkedés. Főemlősöknél a normális heteroszexuális viselkedés nemcsak a hormonokon és a specifikus szexuális válaszok kialakulásán múlik, hanem az ellenkező nemű állatok közötti érzelmi kötődésen is. Az egészen korai hatások közül már a serdülőkor alatt relevánssá válhat a szexualitás szempontjából is a megfelelő kötődési stílus kialakulása az elsődleges gondozóval való pozitív kapcsolat által, amely a későbbi társas kapcsolatok alapját adja, beleértve az egészséges szexuális jellegű partnerkapcsolat kialakításának lehetőségét is[26], mely igazán a fiatal felnőttkorban csúcsosodik ki.

A serdülőkori szexuális éréssel, fejlődéssel együtt megjelenik a viselkedések egy újabb fő tényezője, a szexuális motiváció, vagyis a nemi vágy, amely jellegében nem homeosztatikus motiváció (tehát nem egy hiányállapotot kíván megszüntetni az éhséggel ellentétben), illetve társas motívum, tehát alapvetően másik személyre irányul[27]. Szexuális fejlődésünk nagyon fontos aspektusa a szexuális viselkedés és az

[24] COLE - COLE: A serdülőkori fejlődés biológiai és szociális alapjai. In: *Fejlődéslélektan*, 2006, 602-639.
[25] HEVESI K.: *Szex - A psziché labirintusában*. Budapest: Kulcslyuk Kiadó, 2013.
[26] HEVESI K.: *Szex - A psziché labirintusában*. Budapest: Kulcslyuk Kiadó, 2013.
[27] BÁNYAI É. – VARGA K.: *Affektív pszichológia*. Budapest: Medicina Könyvkiadó Zrt., 2014, 173-198.

azt kísérő érzelmek, melyek részben biológiailag, részben pedig környezetileg meghatározottak, illetve a kettő kölcsönhatásában. Ahhoz, hogy egy személynek később a felnőttkorban kielégítő szociális és szexuális élményei legyenek, megfelelő nemi identitásra van szüksége, összhangban a saját nemével, amelyen keresztül egészségesen átélheti azokat.

A szexualitással még valami kialakul, mégpedig az ahhoz szorosan kapcsolódó nemi orientáció. Ami bizonyos formában látszólag kisgyerekkorban is megjelenhet (a kisfiúk és kislányok közötti interakció során), bár az inkább tanult kulturális és környezeti hatásoknak köszönhető, és még nem valódi szexuális tartalom, szexuális érzés van mögötte, a szexuális motiváció hiányában. A szexuális orientáció azt jelzi, hogy valaki milyen mértékben vonzódik szexuálisan az ellenkező nemű és/vagy azonos nemű személyekhez, azaz röviden a szexuális vágy irányát adja meg. Ez sok szakember szerint egy kontinuum alapján képzelhető el a kizárólagos heteroszexualitás és a kizárólagos homoszexualitás között. Tartalmát nézve pedig különböző aspektusokból áll (erotikus vonzódás, szexuális viselkedés, romantikus vonzódás), nem egy egységes jellemző, melyek személyen belül is eltérhetnek. Vonzódhat valaki úgy a saját neméhez, hogy sohasem létesít vele szexuális kapcsolatot, és tarthatja magát heteroszexuálisnak valaki úgy is, hogy azonos neműekkel is szeretkezik (de más szempontból, érzelmileg nem érdeklik). Sőt az egyes összetevők egy személyen belül sem teljesen állandóak. A nemi orientáció kialakulása kapcsán sok vita van, és nincs teljes egyetértés a szakemberek között sem, mindenesetre már serdülőkorban a felnőtt szexualitás megjelenésével általában eldől, hogy általánosságban melyik nem iránt éreznek szexuális vonzalmat[28].

Új énünk és önértékelésünk fontos új részét kezdi képezni serdülőkortól a szexuális önértékelésünk is, vagyis, hogy akár lányként, akár fiúként mennyire tartjuk vonzónak (szexuálisan értékesnek) magunkat, és mennyire vagyunk elégedettek saját magunkkal e tekintetben (a külső mellett akár viselkedéses téren is). Ennek nem csupán abban van jelentősége, hogy mennyire érezzük kényelmesen magunkat szexuális szituációkban és mennyire tudjuk élvezni ezen interakciókat, cselekvéseket, hanem a kockázatos szexuális viselkedések kisebb előfordulásával is összefüggést találtak[29]. Abban azonban, hogy milyen tulajdonságokkal és viselkedésekkel számít valaki vonzó személynek a nemén belül, az aktuális társas-, illetve kulturális közeg játszik meghatározó szerepet, amely akár egészen rossz, sőt veszélyes irányba is elvihet, különösen, ha önértékelésünk erősen függ a társas környezettől. Természetesen egy társadalmon belül is nagyon különböző alcsoportokra bukkanhatunk, ahol egészen más értékek és irányelvek érvényesülnek a nemekre és

[28] ATKINSON - HILGARD: Nemek és szexualitás. In: *Pszichológia*, 2005, 400-412.
[29] SCHICK V. R. – CALABRESE S. K. – RIMA B. N. – ZUCKER A. N.: Genital appearance dissatisfaction: Implications for women's genital image self-consciousness, sexual esteem, sexual satisfaction, and sexual risk. *Psychology of Women Quarterly, 2010/34*(3), 394-404.

a szexualitásra vonatkozóan is, például egy vallásossal szemben egy teljesen ateista közeg esetében.

A serdülőkor, aktívan behozva a szexualitást a fiatalok életébe, a szexuális motiváció megjelenésével és a jelentős szexuális jellegű testi változások által, új viselkedésekhez és potenciálisan a – jó esetben kortárs – kapcsolatok egy új, izgalmas fajtájához, a szexuális kapcsolathoz is vezet (melynek kellemesebb elnevezésű és kapcsolatfókuszú formáját párkapcsolatnak hívhatjuk). A kortárskapcsolatok szerveződése és azon belül a szexuális kapcsolatok alakulása a mára még szabadabb kultúra, illetve a modern technológiai környezet (főként közösségi média) miatt is változik, mint akár csak pár évtizeddel ezelőtt volt, közben pedig a nemi szerepek, nemek közötti viszony is korántsem a régi, másfajta kapcsolati dinamikákat (is) eredményezve. Ennek ellenére a lehetségesen megjelenő szexuális viselkedések köre emberi adottságainkból fakadóan – bár a kreativitásnak szexuális téren is távoli a határa és gyakorlatilag bármi válhat erotikus ingerré[30] – valamennyire állandó. Általánosságban a serdülők szexuális tevékenysége a környezeti tényezők (adott kulturális környezet) függvénye. Bár a szexuális érés testi szinten lezajlik magától (némileg környezeti tényezők által befolyásolva és akár nagy egyéni különbségekkel), maga a szexuális viselkedés ember esetén lényegében tanult, bonyolult folyamat[31]. Ebbe nem csupán már maga a szexuális aktus tartozik bele (ami a legtöbb állattal ellentétben nálunk nem ösztönös), hanem a számtalan szexuális magatartásforma, illetve mindenféle szexuális jellegű viselkedés is, ami egyáltalán oda vezet, hogy lesz bármiféle szex, ráadásul eredendően a szexualitás tárgya sem tisztázott (csak jó esetben természetesen kialakul úgy, ahogy kell, de közben lehet, hogy néhány parafíliával is kiegészül[32]). A saját tapasztalat mellett megfigyelés és – napjainkra még jellemzőbben – a média által is elsajátítódhatnak a nemi szerepekkel kapcsolatos társas viselkedések. Történeti időben, és kultúrák között is különböző a szexuális viselkedések repertoárja és előfordulása. Például a petting gyakorisága (nemi szervek egyesülése nélküli erotikus simogatás, szeretkezés) az amerikai társadalomban az 1900-as évektől kezdve egyre csak nőtt. Az orális szex pedig, míg egyes csoportokban teljesen szokványos, máshol sokkal kevésbé elterjedt[33].

6. Szexuális viselkedés

Emberek esetén, mint az élet majdnem minden területét, kulturális tényezők is befolyásolják a nemi viselkedést, valamilyen módon és mértékben szabályozva.

[30] HEVESI K.: *Szex - A psziché labirintusában*. Budapest: Kulcslyuk Kiadó, 2013.

[31] COLE - COLE: A serdülőkori fejlődés biológiai és szociális alapjai. In: *Fejlődéslélektan*, 2006, 602-639.

[32] HEVESI K.: *Szextrém - Perverziók, szexfüggőség és ártalmatlan különcségeink*. Budapest: Kulcslyuk Kiadó, 2014.

[33] MICHAEL R. T. – GAGNON J. H. – LAUMANN E. O. – KOLATA G.: *Sex in America: A definitive survey.* Boston: Little, Brown and Co., 1994.

Különböző társadalmakban akár rendkívül eltérő szokások alakultak ki, viszont általánosságban a szigorúan korlátozó társadalmakról elmondható, hogy igyekeznek ellenőrizni a serdülőkor előtti szexuális viselkedést, illetve akadályozni, hogy a gyerekek bármit megtudjanak a szexuális életről, dolgokról[34]. Sőt nem csupán a gyerekek esetén, de még az érettebb fiatal felnőttek házasság előtti szexuális tevékenységét is rossz szemmel nézik. Az amerikai társadalmon belül ennek kapcsán jelentős változás következett be az elmúlt több évtized alatt, melynek során jóval szexuálisan megengedőbbé vált (sőt, a mai viszonyokat nézve helyenként már-már extrémen liberális), és már a fiatalkorúnak számító személyek nagyrésze is szerez szexuális tapasztalatot (a nemi aktust is beleértve) hivatalos nagykorúsága előtt. A nemi élet kezdete fokozatosan előbbre tolódott[35] (nem csupán az USA-ban, hanem általánosságban ehhez hasonló tendencia indult el az egész nyugati társadalomban). A szexuális életben bekövetkezett változás a lányok körében még nagyobb volt, mondhatni ők voltak azok, akik fokozatosan még inkább egyre felszabadultabbá váltak szexuálisan a korábbihoz képest, ami több mindennel is összefüggésbe hozható a kulturális hozzáállás mellett, például a fogamzásgátlás újfajta lehetőségeivel, amely hatékonyan lecsökkentette a teherbeesés kockázatát (így az attól való félelmet is) és a feminizmus terjedésével. Ezt a fajta jelentős változást a szexuális aktivitás mintázatában (az USA-ban az 1970-es évekre) a társadalomkutatók szexuális forradalomnak nevezték el[36]. Ebben némi megtorpanást váltott ki a szexuálisan terjedő betegségek megugrása és az azoktól való félelem, de alapvetően a tendencia folytatódott, és ma egy elég szabados légkör van jelen ezen a téren a nyugati társadalmakban. Noha a két nem között vannak eltérések a szexuális attitűdök tekintetében, a jelenség következtében a viselkedés szintjén a lányok közelíteni kezdtek a fiúkhoz. Azonban a szexuális aktivitás nagyobb szabadsága még önmagában nem feltétlenül jelenti azt, hogy biztonságos és kielégítő interakciók jönnek létre, amelyek mindkét fél számára ideálisak, csak azt, hogy több és tartalmasabb, változatosabb szexuális interakció fordul elő, amely különösen a fiatalabbaknál (azon belül is még inkább lányoknál) a szexuális vágy és kíváncsiság kiszolgálásán túl, a sebezhetőség és kihasználhatóság szempontjából problémás lehet.

A szexuális aktivitás hasonlóbbá válása mellett továbbra is jelen vannak olyan – evolúciósnak mondható sajátosságbeli – különbségek is, amelyek általánosságban eltérő értékekkel és stratégiákkal járnak együtt a két nemnél[37]. Emiatt, bár mindkét nem számára fontos értékek, a fiúknál a partner fizikai jellemzői

[34] ATKINSON - HILGARD: Nemek és szexualitás. In: *Pszichológia*, 2005, 400-412.
[35] LAUMANN E. O. – GAGNON J. H. – MICHAEL R. T. – MICHAELS S.: *The social organization of sexuality: Sexual practices in the United States*. Chicago: University of Chicago Press, 1994.
[36] ATKINSON - HILGARD: Nemek és szexualitás. In: *Pszichológia*, 2005, 400-412.
[37] BUSS D. M. – LARSEN R. J. – WESTEN D. – SEMMELROTH J.: Sex differences in jealousy: Evolution, physiology, and psychology. *Psychological science, 1992/3*(4), 251-256.

jelentőségteljesebbek, míg lányoknál az érzelmi tényezőkön, intimitáson van a nagyobb hangsúly. A szexualitásnak nem csupán egyetlen célja lehet, hanem több mindenhez szolgálhat eszközként (a szaporodáson, sőt még az örömszerzésen is túl). Emiatt fordulhat elő például az is, hogy egy fizikálisan kevésbé élvezetes szexuális együttlét mellett is a kapcsolat megléte miatt fenntarthatja azt egy lány (ha legalább időnként megélheti benne az intimitás igényét), nem beszélve a befolyásoló társas hatásokról (például önmagában azzal, hogy partnere van, előrébb lehet társas pozícióban, sőt, ha még nem is akárki az illető). Érdekességként viszont azt is érdemes lehet megemlíteni, hogy egyes – főként távolkeleti – országokban a fiatal Z- és Alfa generációsok körében már olyan tendenciák is előfordulnak, melyet követve éppenhogy drasztikusan minimalizálják a szexuális aktivitásukat, amely összefügghet a modern információs-technológiai társadalommal is.

Maga a szexuális tevékenység különféle forgatókönyvek mentén történhet, amelyet különösen még egy tapasztalatlan, kevésbé magabiztos fiatal próbál követni. A forgatókönyvről kialakult kép több forrásból is származhat, de általánosságban az őt körülvevő szociokulturális környezetből ered (akár a közvetlen társas közeg, akár a manapság még hangsúlyosabbá váló média közeg), és ez a forgatókönyv szándékol útmutatást adni arról, hogy milyen elemeknek és hogyan kellene, hogy részei legyenek a szexuális együttlétnek, illetve, hogy mi az egyes résztvevők szerepe benne (főként a nemek alapján)[38]. A mai modern korszakban, amellett, hogy szexuálisan szabadabb társadalomban élünk, és mindkét nem szexuálisan aktív (bár a szexuális kettős mérce is jelen van még mindig), a modern technológiai és médiakörnyezet által sok fiatal számára sokszor a – férfiközpontú, és a nőket mindig szexéhes, szexet élvező félnek beállító – pornófilmek és egyéb szexuális médiatartalmak adnak, több szempontból félrevezető iránymutatást, amelyet egyébként szexuális motivációból és kíváncsiságból jó eséllyel fogyasztanak is, vagy legalábbis tapasztalnak belőle valamennyit. Az egészséges szexualitás kialakításához viszont a fiatal számára fontos a fokozatosság és az önkéntesség. Még javában meg kell ismernie saját magát ebből az új szempontból is, amit nem jó erőltetni.

A két nem biológiai különbségei eltérő tapasztalatokat tesznek lehetővé a test erotikus lehetőségeit illetően is. A fiúk természetesebben kerülnek közeli kapcsolatba a szexuális öröm elsődleges forrását jelentő testrészükkel, a péniszükkel, és a nemi éréstől számítva az első orgazmus élményüket hamarabb élik át, amely könnyebben is következik be, mint a másik nemnél, így valószínűbben is válhatnak elkötelezetté a szexuális aktivitás iránt (amellett, hogy a szexuális késztetés is általában nagyobb). Lányok esetén bonyolultabb a helyzet, mert a saját test szexuális ingerlése kevésbé jön magától (bár abban némileg kulturális tényezők is szerepet játszanak), miközben alapvetően rejtettebb örömforrásokat is rejt, és kevésbé is centralizált, mint az ellentétes nemnél, ezért több felfedeznivalót igényel. Egyúttal

[38] COLE - COLE: A serdülőkori fejlődés biológiai és szociális alapjai. In: *Fejlődéslélektan*, 2006, 602-639.

az orgazmus bekövetkezése is egy összetettebb folyamat és valamelyest más jellegű is, mint a fiúknál (ahol szinte garantált, amennyiben nem lép közbe valamilyen szexuális zavar vagy komolyabb szorongás), például a többszörös orgazmus lehetőségére is gondolva, amennyiben sikerül eljutni oda[39]. Tehát több szexuális önismeretet igényel a saját oldalról, illetve partner esetén figyelmet az ő részéről, nem beszélve a kapcsolat intimitásáról, amely náluk jellemzően még hangsúlyosabb tényező. A szexualitással kapcsolatos kultúra és a biológiai nemi különbségek pedig a korai szexuális élményekre is hatással vannak. Mindezek mellett a társas nyomás is szerepet játszik abban, hogy egyáltalán kialakít-e egy serdülő szexuális kapcsolatot, illetve, hogy konkrétan mi történik ennek során és hogyan (gondolva például a lelki felkészültségre vagy a beleegyezés valódi őszinteségének kérdésére).

A nemi éréssel bekövetkező testi változások biológiailag megalapozzák az érett szexuális viselkedést, amely ugyanakkor intellektuálisan, érzelmileg és szociálisan is lassabban válik éretté, értve ez alatt a mentálisan és testileg is egészséges, örömteli, átgondolt és felelősségvállaló szexualitást[40]. A testi érettség még nem jelent lelki érettséget is. Amíg ezt a vágyott állapotot eléri a fiatal (ha eléri), addig a szexuális viselkedésrepertoár számos változatát próbálja ki, hogy megtalálja a nemi identitásának, szexuális orientációjának és egyéni preferenciáinak megfelelő szexuális magatartásformákat. Sőt a mai ideológiák közül némelyik még a nemi identitás és orientáció felől is teljesen nyitott kérdésként kezeli a szexualitást, és a tekintetben is kísérletezésre buzdítja a fiatalokat. A szexualitás nagyon fontos örömforrás, de vannak benne lépcsőfokok, melyeket nem érdemes átugrani. Ideális esetben a nemi élet fokozatosan indul, és a fiatalok mély és intim kapcsolatban fedezik fel a kölcsönös gyönyör természetét, ami jó kezdet a tartós, egészséges építő kapcsolatok kialakítása és a későbbi kiegyensúlyozott magánélet, családi élet szempontjából. A meggondolatlanul, alkalmatlan körülmények között, mély és kölcsönös vonzalom nélkül bekövetkező aktusok kiábrándítóak lehetnek, és a korai rossz élmények, a csalódás kihathat a későbbi szexuális életre, az pedig általában véve a testi és mentális jóllétre is. A nem megfelelő szexuális védekezés vagy annak teljes hiánya pedig a szexuális úton terjedő betegségekhez, illetve lányoknál nem kívánt terhességhez is vezethet, ami a felnőttekhez képest még valószínűbben következhet be, mert a tizenéves fiatalok még fogékonyabbak a társas hatásokra és a kockázatvállalásra, meggondolatlan cselekvésre, miközben jellemzően kevesebb tapasztalattal is rendelkeznek.

A szexuális viselkedésrepertoáron belül különféle szinteken különböztethetjük meg a szexuális aktivitást. Az absztinencia (önmegtartóztatás) a serdülőkori szexuális

[39] HEVESI K.: *Szex - A psziché labirintusában*. Budapest: Kulcslyuk Kiadó, 2013.
[40] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.

viselkedés kiindulópontjának tekinthető, a szexuális tevékenység hiányának, amelyből aztán fokozatosan válik egy szexuálisan aktívabb szemméllyé a fiatal, egyre szélesebb szexuális repertoárral rendelkezve, ahogy felfedezi saját magát, illetve ilyen jellegű kapcsolatokat is kialakít másokkal[41]. A fogalom jelentősége a teherbeesés vagy a szexuális úton terjedő betegségek elkerülése kapcsán is felmerülhet. Kultúrától függően változik, hogy mennyire várják el a szextől való tartózkodást a fiataloktól. Maga a fogalom sem egységes értelmű, eltérés van abban, hogy ki mit tekint ennek: már a szexuális gondolatokat, vágyakat is, vagy csupán a tényleges partner-szexet, sőt azon belül is különbséget lehet tenni a fokozatokban[42] [43]. Az absztinencia akkor releváns kérdés, ha a fiatalban már valóban keletkezik szexuális vágy. A szexuális érdeklődés, gondolatok nem feltétlenül vezetnek szexuális izgalomhoz, de a megfelelő hormonok magas szintje valószínűsíti a szexuális késztetéseket, a szexuális jellegű gondolatok és késztetések együttesen pedig valószínűsítik az absztinencia átlépését (azaz valamilyen szexuális aktivitás bekövetkezését egy partnerrel), ha a helyzet úgy alakul még előzetes elhatározás mellett is[44], összefüggésben a még fejlődésben lévő aggyal[45]. Korai serdülőkorban a tudatos absztinencia azt is jelezheti, hogy a fiatal még nem érzi magát késznek a szexre, különösen egy partnerrel. Azt is találták, hogy akik tudatosan és pozitívan tekintenek az önmegtartóztatásra (akár például vallási okból, vagy olyan személyes értékrendből, ami kiemeli), azok ténylegesen jobban meg is tudják tartani hosszabb távon is[46] [47]. Az egész serdülőkorú populációt tekintve, még a szexuálisan szabad társadalmi változások ellenére is ez a legjellemzőbb „státusz”.

A maszturbáció (önkielégítés) a saját test szexuális kényeztetése partner bevonása nélkül, mely a természetes szexuális fejlődés része, sőt rendszeres végzése

[41] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.
[42] BERSAMIN M. M. – FISHER D. A. – WALKER S. – HILL D. L. – GRUBE J. W.: Defining virginity and abstinence: Adolescents' interpretations of sexual behaviors. *Journal of Adolescent Health, 2007/41*(2), 182-188.
[43] BYERS E. S. – HENDERSON J. – HOBSON K. M.: University students' definitions of sexual abstinence and having sex. *Archives of Sexual Behavior, 2009/38*, 665-674.
[44] FORTENBERRY J. D. – HENSEL D. J.: The association of sexual interest and sexual behaviors among adolescent women: A daily diary perspective. *Hormones and Behavior, 2011/59*(5), 739-744.
[45] STEINBERG L. – ALBERT D. – CAUFFMAN E. – BANICH M. – GRAHAM S. – WOOLARD J.: Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology, 2008/44*(6), 1764-1778.
[46] MASTERS N. T. – BEADNELL B. A. – MORRISON D. M. – HOPPE M. J. – GILLMORE M. R.: The opposite of sex? Adolescents' thoughts about abstinence and sex, and their sexual behavior. *Perspectives on Sexual and Reproductive Health, 2008/40*(2), 87-93.
[47] BUHI E. R. – GOODSON P. – NEILANDS T. B. – BLUNT H.: Adolescent sexual abstinence: A test of an integrative theoretical framework. *Health Education and Behavior, 2011/38*(1), 63-79.

(normál keretek között) hozzájárulhat az egészség megőrzéséhez is[48]. Az, hogy miként tekintenek rá, változott az idők során, és a téves elképzeléseket javarészt sikerült eloszlatni, de a tudományos nézetek ellenére[49] gyakran még mindig kulturális és vallási elutasítás tárgya, és kevés szó szokott esni róla még egy szexuális oktatás (felvilágosítás) keretében is, vagy a szexualitás témájára amúgy is ritkán kitérő családon belüli beszélgetések alkalmával[50]. Valójában már valamelyest kisgyermekkorban is előforduló viselkedés, de alapvetően a komolyabb jelentősége serdülőkortól van. Átlagosan a fiúk hamarabb és nagyobb arányban is kezdenek maszturbálni[51]. Ez részben magyarázható az általában a nemek között mérhető szexuális érdeklődés különbségével, viszont a társadalom is másként kezeli a fiúk és a lányok szexualitását, és előbbiektől nemcsak természetesebbnek tartja, de magasabb szintű szexuális érdeklődést és aktivitást is vár el, ami cselekvésre is jobban ösztönöz, illetve például egy önbevallásos felmérés során is befolyásolhatja az eredményeket (mindkét nemnél annak megfelelő irányba). Emellett pedig olyan testi jellegű okai is vannak, minthogy a fiúk bármilyen szexuális tevékenység nélkül is közelebbi, természetesebb kapcsolatba kerülnek a péniszükkel, ami a – lányoknál funkcionálisan anatómiailag azonos – klitorisszal (csikló) ellentétben nemhogy nincs elrejtve, de egy – saját maguk számára is – jól látható külső testrész, amelyet pisilés miatt még rendszeresebben használnak, sőt közben gyakran megfogják. Lányok esetén viszont, kulturális és testi okokból is általánosságban kevesebb és más a tapasztalatuk e téren, a klitorisz pedig alapvetően csak szexuális ingerlés során kerül érintésre (ha valaki már ott tart), ráadásul a női orgazmus készség sokkal inkább tanult, ez viszont hatással van a partner-szex során átélt eseményekre is, ezért az örömteli szexualitás eléréséhez náluk még fontosabb, hogy külön is felfedezzék a saját testüket, amelynek legjobb módja az önkielégítés[52]. A maszturbáció a partner-szex megjelenésével sem tűnik el teljesen a fiatalok, illetve a felnőttek szexuális repertoárjából, vagyis a szerepe még azután is fontos marad.

A valamely másik személlyel végzett szexuális tevékenységek összességét partner-szexnek nevezzük, ami lényegében bármit magába foglalhat, ami szexuális

[48] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.

[49] COLEMAN E.: Masturbation as a means of achieving sexual health. *Journal of Psychology and Human Sexuality, 2002/14*(2-3), 5-16.

[50] ROBBINS C. L. – SCHICK V. – REECE M. – HERBENICK D. – SANDERS S. A. – DODGE B. – FORTENBERRY J. D.: Prevalence, frequency, and associations of masturbation with partnered sexual behaviors among US adolescents. *Archives of Pediatrics and Adolescent Medicine, 2011/165*(12), 1087-1093.

[51] ROBBINS C. L. – SCHICK V. – REECE M. – HERBENICK D. – SANDERS S. A. – DODGE B. – FORTENBERRY J. D.: Prevalence, frequency, and associations of masturbation with partnered sexual behaviors among US adolescents. *Archives of Pediatrics and Adolescent Medicine, 2011/165*(12), 1087-1093.

[52] HEVESI K.: *Szex - A psziché labirintusában*. Budapest: Kulcslyuk Kiadó, 2013.

tartalmú[53]. A közösülésen kívül ide tartozik a csók, az erotikus simogatás, a kézzel történő kielégítés, a közös maszturbáció, az orális és az anális szex is. Ezen belül funkció szerint megkülönböztethetünk kapcsolati, rekreációs és reproduktív szexuális aktivitásokat is, de utóbbi a fiatalkorúaknál még ritkán fordul elő, mivel több okból sem cél még az utódnemzés ilyen fiatalon (legalábbis a mi kultúránkban), annak bekövetkezte inkább igen kellemetlen esemény, amely emiatt gyakran végződik abortusszal is. Ezen kívül viszont egyéb célból is részt vehet valaki szexuális aktivitásban, például pénzért, népszerűségért, vagy a hatalom hatására, amelynek akár hosszútávú negatív hatásai lehetnek, és amelynek a lányok vannak kitéve a leginkább. Serdülőkorban legtöbbször partneri viszonyban, „együttjárás" alkalmával kerül sor partner-szexre, de itt is előfordul kapcsolaton kívül barátság extrákkal jellegű kapcsolatok, leginkább az ismerősségi körből, melyek nagy varianciát mutatnak, és egy részükben behatolással járó szexre nem is feltétlenül kerül sor[54].

A korábban már említett szexuális forgatókönyvekben a csókolózás a leggyakoribb és egyben a felnőttek, illetve még a közmédia által is legelfogadottabb szexuális aktivitás a serdülők körében[55], amely többek között fontos kifejezése az intimitásnak, és a további szexuális izgalmat is megalapozza[56]. Egyben ez szokott lenni a legelső lépcsőfoka is az intim együttléteknek, a legelső – partnerrel folytatott – szexuális élmény megszerzésének, illetve az egészen fiatal serdülőknél még ez számít a legfőbb szexuális interakciónak. A csókolózással tipikusan együtt jár a simogatás (petting) is vagy követi azt. Ha ez fokozatosan a partnerek ruhamegválásához vezet, könnyedén átvezethet pl. a szex orális formáihoz, vagy akár közösüléshez a folytatásban. Az orális (az egyik fél szájának a másik fél genitáliájával érintkező) szex egyre gyakoribbá, elfogadottá, sőt már-már elvárttá vált a serdülők körében is napjainkra[57]. Emellett pedig kezd teret hódítani az anális közösülés is. Ez részben általánosságban véve a szexuálisan nyitottabb kultúra hozadéka, jelentős részben viszont összefügg a pornófogyasztással, ami több

[53] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.

[54] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.

[55] CALLISTER M. – STERN L. A. – COYNE S. M. – ROBINSON T. – BENNION, E.: Evaluation of sexual content in teen-centered films from 1980 to 2007. *Mass Communication and Society, 2011/14*(4), 454-474.

[56] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.

[57] GRUNSEIT A. – RICHTERS J. – CRAWFORD J. – SONG A. – KIPPAX S.: Stability and change in sexual practices among first-year Australian university students (1990-1999). *Archives of Sexual Behavior, 2005/34*(5), 569-582.

szempontból is káros lehet a fiatalok még fejlődő szexualitására, és azt sugallja, mintha bizonyos – a pornófilmekben látott elemeknek – már kötelezően részének kellene lennie a szexuális együttlétnek, ezért sok fiatal választja ezt a közösülési formát a hagyományos mellett, vagy akár helyett, noha az utóbbi különösen lányoknak kellemetlen, sőt fájdalmas is lehet. Emellett az is meghúzódik mögötte, hogy ezekben az esetekben a teherbe esés kockázata nem áll fenn, noha a nemi úton terjedő betegségek nagy részét így is el lehet kapni védekezés nélkül, ha viszont még nem került rá sor, szigorúan véve nem jár a szüzesség elvesztésével[58] [59]. Ugyanakkor az orális szexre úgy is lehet tekinteni, mint egy viszonylag biztonságos, mégis már alkalmas eszközre arra, hogy önmagát és partnerét alaposabban kiismerjük intimebb módon, és hozzájárulhat ahhoz, hogy akár közösen tovább fejlődjenek egy egészséges szexualitás felé[60].

Ezek elterjedtségén túl viszont még mindig a nemi szervek bevonásával járó közösülés (természetes esetben a vaginális koitusz, bár a felvilágosultabb szerzők már óvatosabban kötik le a klasszikus nemi felállásra) jelenti a szexuális tevékenység legmagasabb fokozatát[61]. Ennek első alkalma rendszerint kiemelt jelentőséggel bíró fontos szexuális mérföldkő (némely kultúrában komoly társas esemény), ami a szüzesség elvesztését jelenti, és a legtöbb kultúrában ezt tekintik a szexuális élet valódi kezdetének, egyfajta beavatásnak. Ez lányok esetén különösen jelentősnek tartott, hiszen testi velejárója is van, melyhez gyakran félelmek is társulnak, és nem megfelelő módon valóban fájdalommal is járhat, kellemetlen első élményeket okozva[62]. Emiatt is fontos a szexuális önismeret-szerzés még lehetőleg a tényleges partner-szex előtt, a megfelelő állapot és persze az ideális partner (akit személy szerint ténylegesen kívánnak és aki kellően figyelmes velük). Ettől függetlenül a fiúk számára sem jelentéktelen esemény, és az ő esetük sem teljesen könnyű, akiknek esetlegesen nagy elvárásokkal kell megküzdeniük, amihez a pornó inkább rossz mintát nyújt, és egyfajta teljesítési kényszert érezhetnek, ami valószínűbben vezethet kudarcélményhez.

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[58] CORNELL J. L. – HALPERN-FELSHER B. L.: Adolescents tell us why teens have oral sex. *Journal of Adolescent Health, 2006/38*(3), 299-301.

[59] HALPERN-FELSHER B. L. – CORNELL J. L. – KROPP R. Y. – TSCHANN, J. M.: Oral versus vaginal sex among adolescents: Perceptions, attitudes, and behavior. *Pediatrics, 2005/115*(4), 845-851.

[60] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.

[61] FORTENBERRY J. D.: Sexual development in adolescents. In: BROMBERG D. S. – O'DONOHUE W. T. (Eds.) *Handbook of child and adolescent sexuality: Developmental and forensic psychology*. Elsevier Academic Press, 2013, 171-192.

[62] TANNER A. E. – HENSEL D. J. – FORTENBERRY J. D.: A prospective study of the sexual, emotional, and behavioral correlates associated with young women's first and usual coital events. *Journal of Adolescent Health, 2010/47*(1), 20-25.

7. Konklúzió

Ebben a cikkben igyekeztem – ha nem is teljes körű, de – megfelelő áttekintést adni arról, hogy milyen, elsősorban a szexualitást érintő testi változások történnek a serdülőkorú fiatalokban, illetve, hogy ezekkel együtt milyen pszichológiai vonatkozású folyamatok zajlanak. A fő fókuszunkban azt tárgyaltuk, hogy a szexualitás, mint jelentős új tényező megjelenése miként befolyásol bizonyos pszichológiai aspektusokat, és miként alakul a szexuális viselkedés a fiatalok körében, miközben a szociokulturális hatásokról is szó esett.

A jelen írásban felhasznált források egy jelentős része a mai viszonylatban réginek mondható kutatási eredményeket is tartalmazott, amelyeknek bár lehetnek ugyan általános érvényű igazságai is, eme általánosabb témafelvezetés után a jövőben elsősorban az aktuális állapotra fogunk fókuszálni, hiszen gyorsan változó világunkban a mai modern szociokulturális és technológiai közeg jelentősen befolyásolhatja az új generációk (pszichoszexuális) fejlődését, amely fő kutatási témám tárgya is, ezen belül pedig természetesen kiemelt figyelmet fognak kapni a hazai viszonyok is.

A kommunikációnak fontos szerepe van az ideális, mindkét fél számára élvezetes szexuális interakciók létrejöttében is, ugyanakkor a megfelelő társadalmi szintű információátadással is sokat lehetne javítani potenciális problémák, kudarcok, akár veszélyek elkerülésében. Kultúránk egyrészről a szexualitás fontosságát hangsúlyozza szinte lépten-nyomon, eközben viszont nem ad kellő segítséget hozzá, és beszédtémaként még mindig sokszor tabu családon belül is, pedig sokat lehetne segíteni egy serdülő fiatalnak, ha megfelelő és tapasztalt személyektől kaphatnának információkat akár már az elején, akik hasznos instrukciók mellett egyúttal a szexualitás örömteli oldalát is hangsúlyoznák, és ahhoz segítenék hozzá az újonnan kezdőket, hogy ezáltal közelebb kerüljenek a szexuális-, közvetve pedig a testi és mentális egészség eléréséhez[63]. A szexuális fejlődés egy hosszú folyamat, időbe telik hozzászoknia egy serdülőnek és teljesen kiismernie teste új lehetőségeit és egyéni preferenciáit ezen a téren is. Különösen lányok esetén sok – nem feltétlenül magától értetődő – felfedezni való akad, mely a későbbi élvezhetőbb szexuális élet alapját adhatja. Ugyanakkor ne feledjük, hogy fontos a fokozatosság és az önkéntesség is: mindenkinek megvan a saját fejlődési tempója, és nem muszáj olyat csinálnunk (idő előtt), amit még nem szeretnénk.

[63] HEVESI K.: *Szextrém - Perverziók, szexfüggőség és ártalmatlan különcségeink*. Budapest: Kulcslyuk Kiadó, 2014.

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Data Protection, balancing Human Rights and Security Concerns

Abstract: There is no unified international legal frame work for regulating data protection. Instead we have international human rights law guaranteeing privacy, such as ICCPR and UDHR. The rapid development of technology and the internet has exacerbated the situation, giving rise to new legal and security challenges. Consequently, states have had to intervene to protect people's data and national security. However, the gap in international law has led to a variety of regulations and mechanisms, creating a complex landscape for addressing these issues. There has been a failure to strike a balance between the protection of national security on one hand and the protection of people's data on the other hand. In this paper we are going to explain the relevant international law landscape, states' practice, and how the violation of data protection has been justified under the pretext of national security. Additionally, practical solutions to address these challenges will be proposed.
Keywords: Data Protection, National Security, Human Rights, International Law.

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1. Introduction

More power brings more responsibility, and more developments bring more challenges, necessitating legislative intervention. After the unprecedented development in the digital age, numerous challenges came into existence. Undoubtedly, the complex world created by this rapid technological advancement made the regulation itself problematic due to its multidimensional effects and intertwined interests, legislators must strike a balance between various rights and interests, considering both the people's right to have their personal data protected, and their right to security. Additionally, there is a delicate to be maintained between the need for free data flow and the need for privacy protection. Given the multitude of opposing interests, more challenges and controversies are inevitable.

Governments have the right to protect national security and public order, as international law allows states to impose restrictions on certain rights. However, there is another obligation under international law, namely the right to privacy. What is the concept of data protection and how does it relate to privacy? Are existing

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international and regional frameworks sufficient for data protection? To what extent have legislators in different countries maintained the balance between the necessity of protecting national security on one hand and the protection of data privacy on the other hand?

This article aims to discuss the concepts of data protection and privacy, highlighting the difference between them, examining the applicable international law, and exploring states' intervention in this right under the pretext of national security and other society concerns. The goal is to analyze states' practice and how the right to data protection has been undermined for in the name of society concerns. And to explain how the gap in international law gives state a I leeway to have a lot of intervention in people's privacy. Additionally, we aim to propose mechanisms to resolve this dilemma, maintaining in a balance between data and privacy protection on one side, and the protection of societal peace and security on the other. The research holds great significance due to its exploration of situations where data protection has been compromised in the pursuit of national security and other societal concerns, the study puts forward specific mechanisms to tackle such interference, with the goal of restoring a balance between opposing interests. In the light of rapid development technology, which present increasing security complexities and state interference, it became crucial to establish clear boundaries and unified comprehension of national security. Therefore, the study plays an important role in shaping conversations around these pivotal concerns.

2. The concept of data protection and privacy

Privacy and data protection share a close connection. The inception of initial data protection laws in the early 1970s, along with their subsequent advancements, have been focused on addressing challenges arising from the advent of new technologies[1]. Privacy and data protection, integral issues within internet governance, are interconnected. Privacy, defined as a citizen's right to control personal information and make decisions about its disclosure, is a fundamental human right[2]. Notably, discussions on law and policy regarding data protection often favor defining privacy in terms of information control[3]. The historical relationship between privacy and data protection highlights the latter as a newer concept, often viewed as a facet of privacy. Privacy, rooted in autonomy and control over physical and psychological aspects, extends to safeguarding ideas and

[1] ANDRADE, D. – NUNO GOMES, N.: *Data protection, privacy and identity: distinguishing concepts and articulating rights*. Springer Berlin Heidelberg, 2011. 91

[2] DigWatch.: Privacy and Data Protection. https://dig.watch/topics/privacy-and-data-protection, (date of download 10/11/2023).

[3] BYGRAVE, L.: Privacy and data protection in an international perspective. *Scandinavian studies in law 56*, 2010/32, 165-200, 170

information. In Europe, this aspect is legally regulated as data protection, evolving into a distinct concept with its own laws and institutions[4].

While 'data protection' and 'privacy' are interconnected but not identical, data protection law aims to grant individuals rights in processing their data and subject such processing to defined safeguards. The inception of data protection laws in Europe in the 1970s was further defined by a landmark 1983 judgment by the German Federal Constitutional Court, later adopted by the EU through the Data Protection Directive 95/46[5].

Calls for an international framework often blend the terms 'data protection' and 'privacy.' International efforts, like the resolution from the 30th International Conference in Strasbourg, recognize the interconnection between the two by addressing them in the same legal or policy framework,[6] For example GDPR[7] and APEC[8] exemplify combining data protection and privacy in their frameworks. The 'Global Privacy Standard,' published in November 2006, frequently mentions 'privacy' but focuses on principles like consent, purpose limitation, and access rights, traditionally considered key concepts of data protection law [9]. Efforts to bridge the gap between data protection and privacy emphasize their intertwined nature in legal and policy frameworks.

However, the rapid development of internet has given data protection more peculiarity and uniqueness, widening its scope to the point where it can no longer be adequately covered by traditional rules of privacy. In the digital age, privacy and the protection of personal data are under threat from the widespread use of internet-based communications, which are notoriously hard to regulate; the emergence of data-hungry apps like social media, search engines, and targeted advertising platforms; and the use of various online surveillance techniques by both public and private organizations[10].

In conclusion, the intertwined nature of privacy and data protection within the realm of internet governance is evident. Privacy, recognized as a fundamental human right, involves the control of personal information, while data protection

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[4] BLUME, P.: Data protection and privacy–basic concepts in a changing world. *Scandinavian Studies in Law ICT Legal Issues 56,* 2010/32, 151-164, 153

[5] CHRISTOPHER, K.: An international legal framework for data protection: Issues and prospects. *Computer law & security review 25*, 2009/4, 307-317. 309

[6] KUNER, C.: op. cit. 309

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[8] The APEC Privacy Framework was adopted by the Asia-Pacific Economic Cooperation (APEC) and was finalized in 2005. You can find the full text and details of the framework on the APEC website.

[9] CHRISTOPHER, K.: op. cit. 308

[10] FENG, K. – PAPADOPOULOS, S.: Data Protection in the Digital Age: A Comparative Study. *Comparative and International Law Journal of Southern Africa*, 2018/51, 261-287, 262

serves as the legal mechanism to ensure this right. The historical evolution of data protection, often considered a facet of privacy, has resulted in distinct legal frameworks in Europe and internationally. The ongoing dialogue emphasizes the interconnectedness of these concepts, recognizing their shared principles in legal and policy discussions. The call for an international framework further underscores the need to address both data protection and privacy in a unified manner. As the discussion continues, the harmonization of these concepts remains crucial in shaping effective and comprehensive governance in the digital era.

Additionally, it is essential to acknowledge that privacy predates data protection and serves as its foundation. Being integral to privacy, the latter acts as the gateway to numerous international covenants. Positioned within the realm of human rights, data protection emerged in response to technological advancements and the surge in cyberspace. Although data protection considered an integral part of privacy and human rights, in the contemporary landscape, it has evolved into a highly complex unprecedented area of technology development, requiring further rules and regulations at the international level.

3. International Law Framework

With its definition drawn from international law, particularly Universal Declaration of Human Rights (UDHR) [11] and the International Covenant on Civil and Political Rights (ICCPR)[12], data protection is recognized as a fundamental human right. Although they don't specifically address data protection, these international frameworks ensure people's privacy in their personal space. Regionally, there are legally enforceable international agreements, like the Council of Europe Convention for the Protection of Persons with Respect to Automatic Processing of Personal Data (ETS 108) [13], and the European Convention on Human Rights (ECHR), which incorporates the right to data protection within the broader context of privacy.[14] The European Court of Human Rights has interpreted Article 8 of the ECHR to cover privacy and data protection issues[15]. Moreover, the Court made a significant advancement by in 2014 in the case of Digital Rights Ireland Ltd. It acknowledged the distinctiveness of the right to data protection from the right to privacy. Furthermore, the court emphasized the importance of implementing "fair

[11] UDHR (Universal Declaration of Human Rights): A/RES/217(III) adopted on December 10, 1948.
[12] ICCPR (International Covenant on Civil and Political Rights): A/RES/2200(XXI) adopted on December 16, 1966.
[13] CHRISTOPHER, K.: op. cit. 309
[14] European Convention on Human Rights, opened for signature Nov. 4, 1950, ETS No. 5, 213 UNTS 221.
[15] See: Case 11801/85 Kruslin v. France, EU: 1990, Case 28341/95 Rotaru v. Romania EU: 2000-V

information principles" when handling personal data[16]. This indicates that the court wants to give a higher threshold and protection to the data privacy more than what classic rules of privacy could provide.

Privacy became increasingly vulnerable as cyberspace grew, leading to further expansion of international efforts. The constant threat to people's privacy through the internet has been the driving force behind international concerns in this regard.

In contrast to the significant progress made in the field of cyberspace and the associated complexities surrounding data protection, the Human Rights Committee has yet to establish a precise set of obligations pertaining to privacy law. It has only acknowledged a few of its essential elements. Laws must govern the collection and storage of personal data, whether by governmental agencies or by private persons or organizations. States must take appropriate action to guarantee that personal information about individuals never ends up in the hands of those not legally permitted to receive, process, or use it, and that it is never used for activities that are inconsistent with the Covenant[17].

The UDHR (Article 12), ICCPR (Article 17), guarantee the right to privacy without explicit mention of national security concerns. Whereas the ICCPR allows derogation from the protection of certain rights and freedoms under the justification of national security, such as in cases of freedom of expression and the state of emergency. In contrast, Article 8 of ECHR allows interference in data for national security concerns. However, none of these conventions offer detailed explanations regarding the concept and the scope of national security.

Drawing from a wealth of European Court of Human Rights (ECtHR) case law and Article 8 of the 1950 European Convention on Human Rights (ECHR), the Council of Europe (CoE) has endorsed more robust and enforceable standards of protection. This body of legal precedent emphasizes the duty on the part of States to safeguard citizens' privacy as well as the restrictions placed on that right by important public interests or other people's rights. A number of CoE resolutions and, in the end, Convention 108 in 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data further supported various facets of data protection[18]. The article 9 of the convention allowed certain derogations for the protection of state security, without any further details regarding the meaning or the scope of security concept.

[16] Joined Cases 293/12 & 594/12 Digital Rights Ireland v. Minister for Commc'ns, EU: 2014. PALMIERI, I. – NICHOLAS F.: Data protection in an increasingly globalized world. *Ind. LJ* 94 (2019): 297-329, 307.
[17] CCPR General Comment No. 16
[18] BURRI, M.: Privacy and Data Protection. *The Oxford Handbook on International Trade Law,* 2nd edn, 2021, 745-767.

The Organization for Economic Co-operation and Development (OECD) Privacy Guidelines 1980, and the Convention 108, are two of the first data protection frameworks with international aspirations and global influence[19].

The primary goals of the OECD Guidelines are to reflect privacy standards and to make it easier for law enforcement to obtain information freely. Basic principles from the Guidelines, such as collection limitation, data quality, purpose specification, use limitation, security safeguards, transparency, individual participation, and accountability, can be incorporated into national privacy laws[20]. The Guidelines were redesigned in 2013 and are still an essential source of information for OECD internal policies and processes. The OECD has played a pivotal role in formulating laws safeguarding personal data for a considerable duration[21]. The OECD guidelines don't explicitly mention national security as a legal ground for data interference, they only deal with security implicitly in another dimension, namely the balance between data protection and free flow of information.

Another international framework is the 2005 APEC Privacy Framework[22] APEC is an important part of the regional landscape of modern Asia[23] , contains a set of implementation guidelines and principles designed to create efficient privacy protection without impeding information flows within the 21-nation APEC region. The Cross-Border Privacy Rules (CBPR) system was created by APEC[24]. Companies can join the system, which is a government-backed data privacy certification, to show that they comply with globally recognized data privacy protections. The APEC Privacy Framework, approved by APEC Leaders in 2005 and revised in 2015, is implemented by the CBPR system.[25] The APEC framework followed similar steps to the OECD, only touches implicitly upon national security in the context of the balance between the free flow of information and data protection, and does not specifically address national security concerning data privacy (human rights).

[19] PHILLIPS, Mark.: International data-sharing norms: from the OECD to the General Data Protection Regulation (GDPR). *Human genetics*, 2018/137, 575-582, 575

[20] CCDCOE.: The OECD Issues Revised Privacy Guidelines. https://ccdcoe.org/incyder-articles/the-oecd-issues-revised-privacy-guidelines/ (date of download: 7/11/2023).

[21] OECD. (2023). Personal Data Protection at the OECD. Retrieved November 6, 2023, from www.oecd.org/general/data-protection.htm

[22] The APEC Privacy Framework was adopted by the Asia-Pacific Economic Cooperation (APEC) and was finalized in 2005. You can find the full text and details of the framework on the APEC website.

[23] BISLEY, N.: *Asia-Pacific Economic Cooperation*. London: Routledge, 2012, 350

[24] BURRI, M.: op. cit. 750

[25] Asia-Pacific Economic Cooperation. What is the Cross-Border Privacy Rules System. APEC - Asia-Pacific Economic Cooperation, https://www.apec.org/about-us/about-apec/fact-sheets/what-is-the-cross-border-privacy-rules-system (date of download: 7/11/2023).

In 1990, the UN General Assembly adopted Guidelines for the Regulation of Computerized Personal Data Files[26], which contains A number of significant principles, including lawfulness and fairness, accuracy, purpose-specification, interested-person access, non-discrimination, authority to make exceptions, security, supervision, and sanctions, transborder data flows relevance, and adequate data collection. The principle number 6 of the guidelines provides states the right to derogate from the principles 1-4, for the protection of national security. However, the guidelines don't contain any definition or details about the concept of national security.

Prominent figures in the public and private spheres have advocated for an international legal framework pertaining to data protection and privacy in recent times[27]. For example, the 'Montreux Declaration,' published in 2005 by the 27th International Conference of Data Protection and Privacy Commissioners, called on the UN to draft a legally binding declaration outlining enforceable human rights for data protection and privacy, but the declaration does not explicitly mention national security[28]. Subsequent conferences of data protection commissioners, such as the UN-sponsored World Summit on the Information Society (WSIS) in Tunis in 2005 and the 30th International Conference in Strasbourg in 2008, echoed this plea[29]. They didn't explicitly mention national security in the context of data privacy, however they emphasize the need of secure use of technology.

For the benefit of the International Law Commission ILC, the UN Office of Legal Affairs' Codification Division produced a report in 2006 titled "Protection of Personal Data in Transborder Flow of Information". According to the report, a number of core principles of data protection are revealed by "international binding and non-binding instruments, as well as the national legislation adopted by States, and judicial decisions". However, it is unlikely that these principles have gained widespread acceptance among States. Since the existence of an independent data protection authority is generally regarded as a prerequisite for an adequate data protection regime (at least under European views of data protection), the number of States with data protection authorities is a good indicator of the number of states with data protection laws [30].

[26] Guidelines for the Regulation of Computerized Personal Data Files: Adopted by General Assembly resolution 45/95 on December 14, 1990.
[27] KUNER, C.: op. cit. 309
[28] Montreux Declaration: The protection of personal data and privacy in a globalized world - a universal right respecting diversities (14-16 September 2005).
[29] 30th International Conference of Data Protection and Privacy Commissioners, Strasbourg, 17 October 2008: Resolution on the urgent need for protecting privacy in a borderless world, and for reaching a Joint Proposal for setting International Standards on Privacy and Personal Data Protection.
[30] KUNER, C.: op. cit. 310

In conclusion, it's crucial to remember that there isn't presently a single, legally-binding international framework for data protection. Rather, what we have are either insufficient international frame works, or regional accords and policies that are limited in their global reach to particular regions. (ICCPR) and (UDHR) offer a fundamental framework for privacy rights, but they don't contain specific and comprehensive data protection clauses.

With Convention 108, the Council of Europe (CoE) has taken the lead in creating legally binding standards, albeit these are exclusive to the European Union. The Asia-Pacific Economic Cooperation (APEC) Privacy Framework and the Cross-Border Privacy Rules (CBPR) system are two regional initiatives that have made significant contributions, along with the Organization for Economic Co-operation and Development's (OECD) Privacy Guidelines but they are not binding. However, they are non-binding documents, and limited to certain states.

The lack of a single, legally binding international framework is a significant challenge in the field of data protection. Numerous organizations, including the International Conference of Data Protection and Privacy Commissioners, have voiced their support for the creation of such a framework. The need for more comprehensive and globally applicable regulations to protect people's privacy rights in the face of developing technologies and growing data threats is highlighted by the changing cyber landscape. There is an urgent need for more focused efforts within international law to establish unified and comprehensive regulations addressing data protection on a global scale, given the ever-expanding reach of the internet and the growing vulnerability of personal data.

Although progress has been made at the regional level, a concerted effort within international law is necessary. The continuous conversation concerning the safeguarding of personal information emphasizes how urgent it is to establish a single, global framework that guarantees strong privacy.

4. National Security and Data Protection

States are entitled to take action to safeguard public order, national security, welfare and security of their subjects, even if the action contains sometimes infringements of people's privacy rights. Such interference is allowed by international law to some extent for the protection of certain society interests. But the question is how far states can stray from their obligations under international law and violate privacy. It's not easy to strike balance between these conflicting interests. Notably, the lack of legally binding international law framework dealing with data protection make it even worse. Unchecked state interference has been made possible by gaps in international law, leading states to enact arbitrary laws. Although the enforcement mechanisms of the application of international human rights law is not that clear, implementing international human rights law in a wider context could be beneficial.

Human rights legislation, such as Article 5 of the ECHR and Article 9 of the ICCPR, enshrines negative security against the state; nevertheless, the meaning of these rights is not always obvious. In the context of negative security as a whole, the negative right to security is regarded as having minimal significance[31].

However, human rights law failed to offer a more comprehensive solution to the intricate nature of security, particularly the possibility that governments could abuse it to control risk and promote fear. There are paradoxes surrounding security, such as the impossibility of achieving total security and the possible harm that security measures may cause to social cohesion and individual freedom. Human rights law should take a more active role in evaluating and examining security objectives, holding authorities accountable for their actions, and elevating the individual to the position of primary security reference. A more comprehensive understanding of security within the framework of human rights law will support more informed and balanced public discussions on security-related topics[32].

Existing privacy international laws are insufficient, especially with the vast and complex field of data protection in the digital age. These rules are based on international human rights laws like Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of International Covenant on Civil and Political Rights (ICCPR). Both Articles highlight people's rights to be protected from arbitrary or unlawful attacks on their honor and reputation and to be free from unjustified entry into their personal lives, families, homes, and communications. While not every interference is prohibited, those deemed justified are permissible. It is crucial to explore the concept of 'arbitrary' to understand that only unjustified, or capricious interference are disallowed.

In its General Comment Number 16[33], the Human Rights Committee provides an explanation of article 17 of the covenant, stating that the article guarantees protection against attacks on reputation, honor, and against arbitrary or unlawful interference in individual's privacy, home, family, as well as correspondences. And this right has to be protected against any interference whether by the state or non-state actors. The Committee recommends that in order to uphold these rights, states enact laws. The Committee is concerned, nonetheless, that state reports do not go into enough information about how this right is protected by law, regulation, or the courts. Noting the existing dearth of information on this in reports, highlights the

[31] KEMPEN, V. – HEIN, P.: Four concepts of security – A human rights perspective. *Human Rights Law Review* 13, 2013/1, 1-23, 10
[32] KEMPEN, V. – HEIN, P.: op. cit. 13-15
[33] CCPR General Comment No. 16: Article 17 (Right to Privacy) - Adopted at the Thirty-second Session of the Human Rights Committee on 8 April 1988, para10.

significance of explicit measures in state legislation to address both unlawful and arbitrary interference. The committee argues that "arbitrary interference" as the safeguarding of the rights included in the article, that the word refers to the interference that provided by law. The inclusion of the arbitrariness is to assure that even when the law authorize interference, it should be adhering to purposes, ideals, and directives of the covenant. It highlights that the interference be appropriate under the circumstances.

All these human rights documents, including the HRC general comment, lack clear indications of permissible and impermissible actions. Consequently, there is no definitive rule upon which we can rely to assess the permissibility or impermissibility of laws and regulations in different countries. As a result, each state must intervene and regulate this area according to its interests. Even the existing clear rules in international human rights law often fail to be adequately implemented by states. The laws and regulations of many countries reflect a different paradigm in dealing with privacy, including data protection. The latter is frequently undermined and violated under the pretext of protecting certain societal interests, particularly national security. The balance often tips in favor of national security at the expense of data protection, especially when safeguarding the nation against national emergencies. National security is solely governed at the national level, and the lack of a clear and precise definition of national security in international law has paved the way for abusing this concept. Each state adopts a different interpretation and view it according to its interests. While it is understood that laws often avoid providing definitions to allow for more flexible application, especially with terms like ‘security’ that states prefer to control, there should at least be some boundaries to prevent the misuse of this ambiguous term. The Human Rights Committee should have played a more significant role, and new explanations addressing emerging challenges associated with the internet and technology should have been provided for the concept of privacy.

5. State Practice

Privacy and data protection laws are typically regulated at the national level, there are various approaches to these regulations. Banisar and Davies distinguished four models in 1999: sector-specific laws, self-regulation, comprehensive laws, and privacy technologies[34].

Regardless of the type of regulations a state has, the question of arbitrariness remains unchanged. In this chapter we will delve into some examples of laws from

[34] DE BUSSER, E.: Big Data: The Conflict Between Protecting Privacy and Securing Nations. *Policy*, 2002/ 9, 330, 6

various countries to illustrate how violations of data protection have been justified in the name of national security.

After September 11th attacks, the U.S. congress passed the PATRIOT Act[35], accordingly, reduced the scope of judicial oversights, public accountability, and legal challenges to government searches while increasing the government's surveillance capacity. The law made it difficult to evade by granting the government access to all data stored within its boundaries including information from all American corporations. Sections 15, 13, 18, and 14 of the act increased government surveillance in four areas: intelligence, records, secret, and trap and trace searches[36]. For the purpose of conducting national security investigations, government agencies in charge of specific foreign intelligence investigations may issue NSLs to acquire customer transaction data from banks, credit agencies, and communication providers[37].

The Electronic Communications Privacy Act (ECPA) 1986 requires the government to obtain a warrant, based on probable cause and approved by a judge, in order to access private messages (voice mails, text messages, social media messages, and emails) that are stored by online service providers and can be up to 180 days old. Notwithstanding, the ECPA permits the government to obtain messages that are more than 180 days old by means of an administrative subpoena, necessitating merely a proof of relevance to an inquiry—a less stringent legal requirement than probable cause. Furthermore, regardless of the subject's age, the government can obtain private documents with an administrative subpoena, including pictures, journal entries, bank statements, and medical records saved to cloud storage services like Dropbox.[38]

The Fourth Amendment of the United States Constitution guarantees privacy rights by requiring warrants for law enforcement and intelligence data collection to be obtained on the basis of probable cause. Relying on the bases that the warrant requirement can be time-consuming, alternative techniques are employed to speed up the process, such as administrative subpoenas and national security letters (NSLs), which enable faster data acquisition without the requirement for a traditional warrant but are subject to particular legal requirements and oversight[39].

[35] (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).
[36] American Civil Liberties Union (ACLU). "Surveillance Under the USA/PATRIOT Act. https://www.aclu.org/documents/surveillance-under-usapatriot-act (date of download: 09/11/2023).
[37] DE BUSSER, E.: op. cit. 8
[38] COPE, S.: *The SEC Wants to Read Your Emails Without a Warrant: How it and other civil agencies are trying to undermine important privacy reform*. December 8, 2015, https://slate.com/technology/2015/12/ecpa-reform-the-sec-wants-to-undermine-important-email-privacy-legislation.html (date of download: 27/11/2023)
[39] DE BUSSER, E.: op. cit. 7

This can rise concerns about the potential for abusing data privacy under the pretext of national security, even though it is subject to specific requirements.

In 2013, Edward Snowden, the agency of united states national security (NSA), leaked extensive mass surveillance programs, revealing the interception of American communications since December 2005. The privacy protections of the U.S. constitution and congress were being violated by the NSA's acquisition of a large number of copies of citizens' communications, as evidenced by allegations that emerged in a May USA Today article and legislative directions[40].

Since the middle of the 20th century, the United States has seen the advancement of human rights as at odds with fundamental issues of national security. It is frequently viewed as a luxury that is pursued when there is spare diplomatic capacity and there is no threat to national security[41].

According to the Court of Justice of the European Union (CJEU) ruling in the Privacy International (C-512/17) case, the E-Privacy Directive (Directive 2002/58/EC)[42] was infringed by UK regulations permitting intelligence services to obtain bulk communications data. The court's ruling highlighted how the indiscriminate transfer of location and traffic data, which went beyond what was (strictly necessary), violated both privacy and Charter rights. The Telecommunications Act 1984 (Section 94), the Regulation of Investigatory Powers Act 2000 (Sections 21(4) and 21(6)), and the Investigatory Powers Act 2016 (Sch. 10 para. 99, s.252) were among the pertinent pieces of law. This ruling highlights the significance of legislative conformity with EU privacy standards and raises questions about the suitability of UK data protection legislation following Brexit[43].

Legal battles surrounded the UK's Investigatory Powers Act (IPA 2016), also known as the Snooper's Charter, raising issues with UK intelligence agencies' indiscriminate surveillance and mass collection of personal data, faces many criticisms, which centered on the inadequacy of the legal basis, the absence of accountability, and the insufficient oversight, alleging that the Article 8 right to a private life of UK citizens was violated. In his first annual report, UN privacy chief Joe Cannataci attacked the UK's proposed surveillance laws, saying they (run counter) to recent privacy rulings in Europe and might have (ramifications) in other nations. Joe Cannataci, the UN's privacy chief, criticized the UK's proposed

[40] Electronic Frontier Foundation.: NSA Spying. https://www.eff.org/nsa-spying (date of download: 09/11/2023).

[41] BURKE-WHITE, W.: Human rights and national security: the strategic correlation. *Harv. Hum. Rts. J.* 2004/17, 249- 280, 251

[42] DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002

[43] COGENS, J.: Individual Privacy versus National Security: Where is the Line? *Lamb Chambers*, https://www.lambchambers.co.uk/jus-cogens/individual-privacy-versus-national-security-where-is-the-line/ (date of download: 24/11/2023).

surveillance laws in his first annual report, arguing that they go against recent European privacy rulings and might have unintended consequences in other nations[44].

In Australia, Critics claimed that by allowing law enforcement and security agencies to access encrypted data without appropriate judicial oversight, Australian law infringed upon the rights of individuals. One restriction that may prevent Australians from contesting laws in court is the lack of constitutional privacy protections[45].

The Chaines Personal Information Protection Law[46] governs the gathering of data by governmental bodies, with certain exemptions granted in cases where the government is (acting in the public interest). This carve-out could support the Chinese government's extensive data collection, raising questions about the scope of governmental monitoring and its effects on personal privacy[47].

India - Personal Data Protection Bill[48], The Bill gives the national government the authority to handle citizen data without the individuals' express consent. Before processing personal data, private entities are required to obtain consent from their customers or users, with certain exceptions for (legitimate uses)[49]. In situations when national security or law and order are deemed to be in jeopardy, the law exempts government entities from prosecution. In the purpose of maintaining public order and national security, the aforementioned measure gives the central government the power to exclude government entities from some data protection regulations. The rights of data principals and the duties of data fiduciaries (apart from data security) do not apply in some situations, such as those involving the prevention, investigation, and prosecution of offenses. It's important to note that the measure does not require government organizations to erase personal data once it serves its intended purpose. As such, questions have been raised concerning the proportionality of these exemptions as they would enable government organizations

[44] WIRED.: *UN Warns UK's IP Bill 'Undermines' the Right to Privacy*. https://www.wired.co.uk/article/un-privacy-ip-bill-not-compliant-international-law (date of download: 09/11/2023).

[45] DOCHE, C. – SELBY, J.: Australian Government Missed the Point with New Encryption Bill. *Australian Outlook*, 2019, https://www.internationalaffairs.org.au/australianoutlook/australian-government-missed-point-with-new-encryption-bill/ (date of download: 09/11/2023).

[46] China Briefing team.: The PRC Personal Information Protection Law (Final): A Full Translation. China Briefing, Passed on August 20, 2021, in effect since November 1, 2021

[47] PEREZ, C.: Why China's New Data Security Law Is a Warning for the Future of Data Governance. *Foreign Policy*, 2022, https://foreignpolicy.com/2022/01/28/china-data-governance-security-law-privacy/ (date of download: 09/11/2023)

[48] The Digital Personal Data Protection Bill, 2023, Ministry of Electronics and Information Technology, November 18, 2022.

[49] GONZALEZ, B.: India's data protection bill passes lower house of Parliament, raises privacy concerns. *Biometric Update*, 2023, https://www.biometricupdate.com/202308/indias-data-protection-bill-passes-lower-house-of-parliament-raises-privacy-concerns (date of download 09/11/2023).

to gather and exploit citizen data for extensive monitoring under the guise of national security[50].

Although privacy is vital, focusing only on privacy can run counter to other significant social values and impede advancement in fields like social justice, science, and public health. In order to strike a balance between the public interest and individual privacy, regulations pertaining to the misuse of technologies such as facial recognition should take precedence over outright bans. There is a need for a nuanced strategy that recognizes the conflict between privacy rights and the advantages of data collection for problems like discrimination, social justice, and healthcare disparities[51].

To sum up, the discussion surrounding state policy and surveillance legislation indicates a nuanced relationship between the need for national security and the preservation of personal privacy. The difficulties in defining precise boundaries for state intervention are highlighted by the lack of an all-encompassing international legal framework for data protection. Different strategies are reflected in the ongoing effort to strike a balance between security and civil liberties, as demonstrated by the Investigatory Powers Act and the USA PATRIOT Act. The extent of privacy violations is demonstrated by Edward Snowden's revelations, underscoring the necessity of strong safeguards. Laws in Australia and China have come under fire, highlighting the implications of inadequate privacy protections on a global scale. In the end, finding a harmonious balance in the constantly changing world of privacy and surveillance remains a difficult task.

Everyone has the right to privacy and security, and the government has the duty to guarantee both, and balancing these two opposing interests. Sometimes, finding the right balance is not easy. The protection of societal interests is necessary, but it should not come at the expense of violating people's privacy, and vice versa. However, many laws regulating data protection violate these rights under the banner of national security or other societal concerns.

6. Conclusion

There is an inadequate international legal framework for data protection. The current framework is limited to three main categories: firstly, international human rights low which falls short and cannot fully accommodate all aspects of data protection, particularly in light of advancing technologies and internet developments. Secondly non-internationally binding roles such as those contained

[50] PRS Legislative Research. "The Digital Personal Data Protection Bill, 2023." Date of download November 24, 2023. https://prsindia.org/billtrack/digital-personal-data-protection-bill-2023.
[51] LOBEL, O.: *The Problem with Too Much Data Privacy*. 2022, https://time.com/6224484/data-privacy-problem/ (date of download: 19/11/2023).

in OECD, APEC, and UN guidelines for computerized personal data file lack the necessary effectiveness. Thirdly rules within the EU, like GDPR are confined to a specific region namely EU countries. This gap resulted in a lack of clear and sufficient standards to measure states' practice, leads to a variety of forms and mechanisms employed by states' in regulating data protection, and consequently increasing state interference and a failure to achieve a balance between the imperatives of national security and data protection. Many jurisdictions interfere in data personal data under the pretext of national security. Regarding the concept of national security, neither OCED nor APEC framework didn't mention it explicitly, and they only address it indirectly in the context of balancing free flow of data against data protection. As for UDHR and ICCPR, while they provide states the right to derogate from certain obligations for example: the protection of freedom of expression and the state of emergency…etc. they don't mention national security in the context of privacy,

National security is recognized by many documents in international law as a legitimate ground for derogation from certain international law obligations, but it is not limitless, and states are not free to interpret it as they please. However, since there are no definition or clear boundaries for it in international law the issue remains controversial.

7. Recommendations

- The need for international efforts to establish unified, binding legal rules for data protection is evident. this could involve adopting international non-binding rules of data protection, as well as regional rules like those in GDPR in the EU, or creating new rules, that define clearly which act and which type of interference is prohibited to prevent enacting abusive laws at the national level, especially with the trans-border nature of data protection.
- There must be effort to provide at least some clarity to the concept of national security by establishing new boundaries, especially if it is not possible to offer a comprehensive definition.
- NGOs can play important role in educating and raising awareness among individuals to help them understand their rights and obligations regarding data, creating pressure on governments to show more respect for human rights.
- Continues updates to these rules are imperative due to the rapid development nature of this area.

List of legislation

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002

The APEC Privacy Framework was adopted by the Asia-Pacific Economic Cooperation (APEC) and was finalized in 2005.

UDHR (Universal Declaration of Human Rights): A/RES/217(III) adopted on December 10, 1948.

ICCPR (International Covenant on Civil and Political Rights): A/RES/2200(XXI) adopted on December 16, 1966.

European Convention on Human Rights, opened for signature Nov. 4, 1950, ETS No. 5, 213 UNTS 221.

CCPR General Comment No. 16: Article 17 (Right to Privacy) - Adopted at the Thirty-second Session of the Human Rights Committee on 8 April 1988, para10.

Guidelines for the Regulation of Computerized Personal Data Files: Adopted by General Assembly resolution 45/95 on December 14, 1990.

Montreux Declaration: The protection of personal data and privacy in a globalized world - a universal right respecting diversities (14-16 September 2005).

30th International Conference of Data Protection and Privacy Commissioners, Strasbourg, 17 October 2008: Resolution on the urgent need for protecting privacy in a borderless world, and for reaching a Joint Proposal for setting International Standards on Privacy and Personal Data Protection.

Court cases

Case 11801/85 Kruslin v. France, EU: 1990

Case 28341/95 Rotaru v. Romania EU: 2000-V

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CCDCOE.: The OECD Issues Revised Privacy Guidelines. https://ccdcoe.org/incyder-articles/the-oecd-issues-revised-privacy-guidelines/ (date of download: 7/11/2023).

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SÁRI MIKLÓS*

A magánjog „közjogiasodása”

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Az állam hatályos jogszabályainak rendszerezett összessége alkotja a jogrendszert. Egy ország jogrendszere egy és egységes. Egy gyakorló jogásznak a jogrendszer egységéből kell kiindulnia és a jogtudomány feladata, hogy a jogrendszer egészét építse, fejlessze, mert a jogágak között nem lehetnek falak, sokkal inkább ajtókat kell kitárni.[1] A jogrendszer egyes elemei koherensek, ennek megfelelően az egyes jogi normák egymással nem lehetnek ellentétesek.

Az egységes jogrendszer dogmatikailag közjogra és magánjogra osztható. Hans Kelsen szerint "a jogállam fogalmával összeegyeztethetetlen a közjog és magánjog elválasztása".[2] A jogrendszer felosztása bár jogdogmatikailag lehetséges, de szükséges-e? Horváth Attila szavaival a jogrendszer tagozódása nem öncél, hanem a jog logikus felépítéséből adódik.[3]

A közjog-magánjog elválasztás lehet jogelméleti jellegű, jogdogmatikai jellegű vagy pozitívjogi jellegű. Előbbi esetben a jogrendet csupán az áttekinthető strukturálás ill. magyarázat miatt osztjuk két részre. A középső esetben különféle jogi problémák megoldásához használjuk érveléseinkben a kettéosztást (amennyiben ezt a joggyakorlat is teszi, s nem csupán jogtudósi munkákban történik ez, akkor a fogalom jogdogmatikai és pozitívjogi egyszerre). A harmadik esetben (amennyiben egyúttal nem jogdogmatikai is a fogalom) pedig szövegszerűleg a pozitív jog valamely normatív aktusa maga előfeltételezi a kettéosztást, s említi a kérdéses fogalmakat.[4]

A magánjog és a közjog elhatárolásánál elsőként Ulpianus nevét kell említeni, aki először osztotta a jogrendszert: magánjogra és közjogra. Az általa a Digestában meghatározott fogalom szerint „Közjog az a jog, amely a római állam státuszát

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[1] NOCHTA T.: A magánjog és a közjog viszonyáról az új Ptk. alapján is. *Jogtudományi Közlöny*, 2016/10. 481-490.

[2] KELSEN, H.: Zur Lehre vom öffentlichen Rechtsgeschäft. *Archiv des öffentlichen Rechts*. 1913. 218.

[3] HORVÁTH A.: *A magyar magánjog történetének alapjai*. Budapest: Gondolat kiadó, 2006. 14.

[4] JAKAB A.: *A magyar jogrendszer szerkezete*. Miskolc PhD értekezés, 2005.

érinti, a magánjog pedig az a jog, amely a magánfelek hasznára van.”[5] A jog e két főcsoportra való tényleges tagolása már a polgári jogtudomány jellegzetes terméke.[6] A jogrendszer két ágának határai elmosódnak.[7] Dr. Buza László és Dr. Vitéz Moór Gyula 1943-ban már egymásra reflektálva[8] erről polemizálnak. Nyilvánvaló, hogy nincs kizárólagos közérdek s hogy viszont a magánérdeket a jogrend csak a közérdek-szabta korlátozások közt engedi érvényesülni. A közjog és a magánjog ellentéte a jus cogens és a jus dispositivum ellentétében pusztán nem ragadható meg. A magánjog fogalma nem azonos a diszpozitív jog fogalmával, de az a meglátás helyes, hogy a magánjog a magánautonómia érvényesülésének ad helyet. Ott azonban, ahol az egyes magáncselekvése az állami parancshoz való alkalmazkodás, ahol tehát a magáncselekvésben állami akarat s nem az illető spontán akarata jut kifejezésre, már közjogról van szó. A jus cogens, ha az államhatalom az érdekeltek akaratától függetlenül nem kényszeríti ki betartását, magánjog és nem közjog.[9] A közjog és a magánjog éles elválasztása az európai kontinensen megfelelt a forradalomban győztes polgár „kétalanyú” jogi helyzetének az állampolgár és az autonóm polgár kettős státuszának. A klasszikus gazdasági liberalizmus jelmondata, a „laissez faire, laissez passer”, tehát az államnak a gazdasági életbe történő mindennemű beavatkozását elvető tétele gyakorlattá lett: az állam hatalma politikai szerepkörre szorult vissza. Ez az éjjeliőr állam, amely nem befolyásolja az autonóm polgárok gazdasági tevékenységeit. Fő feladata az államnak a jogi körülmények kialakítása, illetve a közbiztonság biztosítása. Így a közjog a politikai állam és az állampolgár jogává vált, amelyben politikai kényszer biztosította a rendet, kiépítve az ehhez szükséges politikai intézményeket. a magánjog pedig a polgári társadalom tulajdoni és vagyoni rendjének, az autonóm polgárnak az individuális jogává „szűkült”, amely az árujellegű tulajdoni és egyéb vagyoni viszonyok feltételrendszerének a biztosításával megteremtette ennek a politikai államnak a gazdasági alapját.[10] A közjog és a magánjog vegytisztán nem különíthető el egymástól, sokszor egy jogszabályon belül is fellelhető mindkettő jegyei.[11]

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[5] D.1, 1, 1, 2, vö. Hármakönyv. Prologus,2. § 3.

[6] LÁBADY T.: *A magánjog általános tana*. Budapest: Szent István Társulat – Az Apostoli Szentszék Könyvkiadója, 2017. 20.

[7] Grosschmid Béni szép hasonlata szerint: *„A magánjog és a köz- vagy nyilvánjog határai nem egyenes vonalak, miként az Amerikai Egyesült Államok egyes államai közti határok. Hanem csipkések…”.*

[8] BÚZA L.: A közjog és a magánjog fogalmi elhatárolásának kérdése; Dr. Vitéz Moór Gyula: Az állam joga és a magánosok joga. In: Dr. Martonyi János szakosztályi titkár (szerk.): *Az Erdélyi Múzeum-Egyesület Jog-, Közgazdaság- és Társadalomtudományi Szakosztályának értekezései*. Kolozsvár 1943.

[9] BÚZA L.: im. 1943. 16.,

[10] LÁBADY T.: im. 2017. 20-21.

[11] VITÉZ M. Gy.: im. 1943. „Az állami tevékenységnek és a magáncselekvésnek más természetű érintkezése is van. Vitéz Moór Gyula is több helyen nyomatékosan hangsúlyozza az állami tevékenységnek és a „privátautonómiának" ezt az érintkezését. Az „érintkezés" kifejezés nem is egészen szabatos, mert érintkezés az is, ha a közjogi és a magánjogi szabályoknak egymástól élesen elhatárolt

A közjog és a magánjog típus jellemzői felvázolhatók:

A közjog alanya az állampolgár, aki az állammal vagy annak szerveivel kerül jogviszonyba, amelyet alá-fölé rendeltségi viszony jellemez. A közjog szabályozási tárgya a közigazgatási jog, a közösségi együttélés szabályozása, a társadalmi rend felépítésének és fenntartásának a szabályozása. Célja az államszervezet működési rendjének leírása, az állami szervek létrehozatalának és működési rendjének szabályozása. Az állam a köz akaratát hordozza, főhatalommal bír. A jogszabályi keretek között kényszerít, büntet, jutalmaz. Engedélyezés, parancs, tilalom, diszkrecionális jogkör jelenik meg szabályozási eszközei között. A jogállamiság követelményéből következik, hogy az állami szervek csak jogszabályi felhatalmazás alapján és a jogszabályok adta keretek között gyakorolhatják hatásköreiket, láthatják el feladataikat. A közjog feladata az állampolgár védelme az állammal, annak szerveivel és hatalmával szemben. A magánjoggal szemben a közjogban nem vagy csak nagyon ritkán jelennek meg diszpozitív szabályok.

A magánjogot ezzel szemben a diszpozitív szabályozás jellemzi, szabályozási eszközei között ritkán jelennek meg kogens szabályok. A magánjogi jogviszonyban a felek mellérendeltségi jogviszonyban állnak egymással. Egyenjogú felek állnak egymással „szemben", illetve egymás mellett. Központi eleme a magántulajdon, a tulajdoni jog, amely alanyi jog. A magánjogi jogügyletben megjelenő feleket kölcsönösen jogok illetik és kötelezettségek terhelik. Jogviszonyukat az akarati autonómia jellemzi. A magánjogban megjelenő jogok többsége alanyi jog, vagyis a magánjog alanyát, bármilyen feltétel nélkül megilleti. „A magánjog tehát a magánélet viszonyai befolyásolásának, szervezésének és védelmezésének jogi rendje, amely a személyek, valamint ezek civil- és gazdasági korporációi vagyoni és nemvagyoni, személyi viszonyait biztosítja, továbbá intézményesen védi a személyek árujellegű vagyoni kapcsolatait."[12]

A címválasztással kapcsolatban felmerül a kérdés, hogy a magánjog közjogiasodik vagy a közjog magánjogosodik? Én az előbbi mellett döntöttem és

területe érinti egymást, anélkül, hogy a legkisebb mértékben összefolynának s a határ bizonytalanná válnék. A közjog és a magánjog elhatárolása szempontjából éppen azok a vitás és érdekes esetek, amelyekben több van az egyszerű
'érintkezésnél. Az előbb láttuk, hogy az állami tevékenység és a magáncselekvés egységes aktussá olvadhat össze; más eset az, amikor ilyen összeolvadás nincs, de a jog rendelkezése szerint a magáncselekvés szükségképen bizonyos meghatározott állami ténykedést von maga után. Ezt látjuk pl. a büntetendő cselekményeknél, hol a magánszemély ténykedése (a büntetendő cselekmény) hivatalból bizonyos állami aktusokat, a büntető eljárás megindítását s a büntetés kiszabását és végrehajtását eredményezi. Vitéz Moór Gyula az általa kifejtett elmélet logikus folyományaként állítja fel azt a tételt, hogy az anyagi büntetőjog magánjog, mert „magánegyének tiltott cselekvéseiről van tényálladékaiban szó". Éppen ez a tétele az, amelyet Finkey első sorban kifogásol s amely bizonyára Finkeyn kívül is sokaknál ellentmondást váltott ki.

[12] LÁBADY T.: im. 2017. 20.

ebben nagy szerepe van Lábady professzor magával ragadó gondolatainak[13], aki a magánjogról olyan fennkölten és magasztosan nyilatkozik, hogy az olvasó, különösen ha jogász, nem tudja kivonni magát a hatása alól. A magánjog Gustav Radbruch szép metaforája szerint, mint: „Herzkammer allen Rechts” („minden jogok szívkamrája”), a római jog legnagyobb és legfontosabb öröksége[14].

A magánjognak a történelem során számos, többek között a közjog által generált kihívásra kellett reagálnia:

Az első és eredendő, Vékás Lajos gondolatával élve az „örökölt törés”[15], amely a kereskedelmi jog viszonylagos különállását jelenti a magánjogon belül. A kereskedelmi joggal kapcsolatban fontos kiemelni, hogy az eredetileg a közjogi szabályokat is magában foglalta és a XIX. sz.-i formájában már egy profiltisztítás eredményeként jelent meg.[16] A hatályos magyar Ptk-ban[17] a monista elv érvényesül, ami gyakorlatilag azt jelenti, hogy mind az ún. kereskedelmi (státus- és dinamikus, részben), mind a szűkebb értelemben vett, felek mellérendelésén alapuló polgári jogi kapcsolatait egyaránt szabályozza. A mai nemzetközi polgári jogi, európai jogirodalom, pl. a belga, megerősíti, hogy a magánjog körébe tartozik a polgári jog (droit civil), a kereskedelmi jog (droit commercial), a nemzetközi magánjog (droit international privé), szemben a közjoggal (droit public)[18], ami nem jelenti azt, hogy a kereskedelmi jog mindenhol a polgári törvénykönyv részét képezi.

A XIX. században Európa különböző országaiban eltérő időpontban, de sor került a jobbágyfelszabadításokra. Franciaországban 1789. augusztus 4-én eltörölték a parasztságot sújtó személyi és dologi terheket. A német államokban reformtörvények sorával kísérelték meg a jobbágyi függőséget felszámolni, mely folyamatok végső betetőzése 1848-ban következett be. Magyarországon a jobbágyfelszabadítás vagy örökváltság a reformkor alapvető kérdése volt. Az „Április törvények” megszüntették az úrbéres szolgáltatásokat, azonban sok jogi

[13] Gustav Radbruch szép metaforája szerint a magánjog: „„„Herzkammer allen Rechts” („minden jogok szívkamrája”), azaz a társadalom jogának meghatározó, legjellemzőbb, és annak struktúráját legközvetlenebbül kifejező ága. „Uralkodáshoz szokott jogág” (Sólyom László), amely finomságában, dogmatikai kidolgozottságában és totalitás-igényében sok tekintetben megelőzi a többi jogágat. A magánjog tagadhatatlanul a jog egészének „legsikeresebb műformája” és mint olyan: átmenet filozófia, etika és a jogrendszer között. A magánjog végső soron a személy egész életére, mindenfajta társadalmi kapcsolatára kiterjed; mint jog, egyaránt formalizálja a személy individuális és közösségi vonatkozásait.” / LÁBADY T.: im. 2017. 19./

[14] André Malraux szerint például „Róma nem győzelmei és hódításai, hanem az általa megteremtett római jog révén méltó csodálatunkra, melynek legfontosabb princípiuma: pacta sunt servanda. /HAMZA G.: Megjegyzések a római jogszerepéről a jogászképzésben, In: *Ünnepi Tanulmányok V. A bonis bona discere. Festgabe für János Zlinszky.* Bibor Verlag, Miskolc, 1998. 569-585./

[15] VÉKÁS L.: A magánjog kihívásai - Történeti visszapillantás és mérleg. *Magyar Jog*, 2023/7-8, 389-390

[16] MENYHÁRD A.: Az új Polgári Törvénykönyv koncepciójának vitája az ELTE Állam- és Jogtudományi Karán. *Polgári Jogi Kodifikáció*, 2002/4. 35-37.

[17] 2013. évi V. törvény a Polgári Törvénykönyvről

[18] SZALMA J.: *Összegezés az új Polgári Törvénykönyvről*, 1.

kérdés nyitva maradt, amiket végül a forradalom és szabadságharc leverése után, csak az 1853-as úrbéri pátens, illetve kárpótlási és földtehermentesítési parancs szabályozott. Oroszországban és Lengyelországban 1861-ben, illetve 1863-ban születik meg a jobbágyok felszabadítását kimondó uralkodói határozat.[19] A jobbágyság intézményének felszámolása az egész feudális jog- és tulajdonrendszer átalakulását vonta maga után, és radikális eszközökkel megnyitotta az utat a polgári fejlődés, a kapitalizálódás felé. A tulajdonviszonyok megváltoztak, a kiváltságok és monopóliumok megszűnésével együtt a személyi kötöttségek is megszűntek. A közigazgatás a bíráskodással együtt átalakult. Nagy tömegeknek volt szüksége hitelre, így a hitelforgalom megindult és ezzel együtt a földforgalom is fellendült. A korábban függőségben élő néptömegek felszabadulásával megjelent a szabad munkaerő, akinek dolgoznia kellett. A célom nem a probléma mélyebb elemzése, de érzékeltetve a magánjog előtt álló feladatokat: a jobbágyok felszabadításával egyidejűleg meg kellett oldani lakhatásuk, jövőbeni megélhetésük, munkájuk, fizetési kötelezettségük jogi kereteit. A középkori jogrendszer átalakulásával egyre nagyobb a jelentősége a munkaviszonynak, amely kötődik magánjoghoz, mivel alapja a magánautonómiából táplálkozó szerződés. A munkaviszony azonban egy sajátos jogviszony, amelyek arra vezethető vissza, hogy a felek egyensúlyi helyzete szinte fogalmilag hiányzik. S éppen az egyensúly megteremtése céljából a munkajogviszonyra vonatkozó szabályok kógens jelleggel alakítják e jogviszony tartalmát. A magánjogi kódexek szintjén először a német BGB-ben jelentek meg az állami beavatkozás jeleként kógens normák: a Dienstvertrag szabályai közé kényszerítő normákat kényszerült beiktatni.[20]

A XX. század elejétől bekövetkező gazdasági, társadalmi és politikai változások nyomán radikális módosulások következtek be az európai országok magánjogi rendszereiben. Az első világháborút követő gazdasági nehézségek, növekvő infláció, majd gazdasági világválság hatásaival az „éjjeliőr” állam nem tudott mit kezdeni, elvárás volt már az álammal szemben, hogy ne csak a szerzett jogokat védelmezze magánjogi szabályokkal, hanem magánjogi segítség kellett a társadalmi egyenlőtlenségek leküzdéséhez is. Ez az elvárás már alkotmányos követelményekben is megjelenik.[21] A Weimari Alkotmány 151. cikkének (1) bekezdésében rögzíti, hogy: „A gazdasági élet rendjének meg kell felelnie az

[19] HOMOKI NAGY M.: A jobbágyi terhek megszüntetésének egy lehetséges módja. *Acta Univers Itatis Szegediensis De Attila József Nominatae Acta Juridica et Politica*, Szeged, 1994. 5.
[20] VÉKÁS L.: Opponensi vélemény Kiss György: "Alapjogok kollíziója a munkajogban" című akadémiai doktori értekezéséről. *Közjogi Szemle*, 2008/2. 54-64.
[21] HORVÁTH A.: *A magyar magánjog történetének alapjai*. Budapest: Gondolat kiadó, 2006. 71.

igazságosság elveinek azzal a céllal, hogy mindenki számára biztosítsa a méltó életet. Az egyén gazdasági szabadságát e határok között kell biztosítani.”[22]

A magánjog eszközeivel próbálták legalizálni a XX. századi diktatúrák az ideológiai alapon végrehajtott, közjogi alapokon álló törvénytelenségeket. A magánjog szemszögéből a legradikálisabb kihívás talán és a legnagyobb „mélység” a magántulajdon nélküli magánjog[23] volt.

Magyarországon a közjogi rendszerváltást követően lezajlott és a magánjogi és közjogi jegyeket is magán hordozó privatizáció, további bizonyítéka annak, hogy a közjog és magánjog határai nem különülnek el mereven egymástól. Ez a folyamat a jelenben még inkább tetten érhető. Mi alapján dönthető el, hogy egy jogviszony magánjogi vagy közjogi. És egyáltalán szüksége - e az ebbéli döntés?

Két példán keresztül szeretném érzékeltetni és megválaszolni a magam által feltett kérdést: a közterület-használati jogviszonyt szeretném összehasonlítani a támogatási jogviszonnyal.

A Kúria összevont polgári-gazdasági-munkaügyi és közigazgatási jogegységi tanácsa a Kúria Közigazgatási Kollégiuma és Polgári Kollégiuma kollégiumvezetőinek indítványa alapján a közterület-használati jogviszony közjogi (közigazgatási) vagy magánjogi (polgári jogi) jellegének megítélése, továbbá az ilyen tárgyú perben eljáró bíróság meghatározásának tárgyában lefolytatott jogegységi eljárásban 1/2022. számú KPJE jogegységi határozatot (a továbbiakban: jogegységi határozat) hozott, amelyben kimondta, hogy:

1. A közterület-használati jogviszony közjogi jogviszony.
2. A közterület-használati jogviszonnyal kapcsolatos jogvita elbírálása a közigazgatási ügyekben eljáró bíróság hatáskörébe tartozik.

A közterület –használati jogviszony, a Kúria döntése alapján tehát közjogi jogviszony. A kúriai döntés a bírósági gyakorlatban a közterületi jogviszony komplex jellegéből adódó kettős megítélésnek kívánt véget vetni.

A támogatási jogviszony az államháztartásról szóló 2011. évi CXCV. törvény (a továbbiakban: Áht.) 48. § (4) bekezdése alapján a támogatói okirattal vagy támogatási szerződéssel létrejövő támogatási jogviszony létesítésére irányuló eljárással és a támogató döntéseivel kapcsolatos jogviták eldöntése polgári peres eljárásban kezdeményezhető. Horváth M. Tamás a közszerződésekről szóló tanulmányában[24] kifejti, hogy a támogatási viszonyokra, mint közszerződési típusokra a szakaszosság jellemző, vagyis a jogviszony különböző fázisai időben elkülönülten mutatnak közjogi, illetve magánjogi jellegzetességet. Elkülöníti az odaítélés szakaszát a

[22] „Die Ordnung des Wirtschaftslebens muß den Grundsätzen der Gerechtigkeit mit dem Ziele der Gewährleistung eines menschenwürdigen Daseins für alle entsprechen. In diesen Grenzen ist die wirtschaftliche Freiheit des einzelnen zu sichern.

[23] VÉKÁS L.: A magánjog kihívásai - Történeti visszapillantás és mérleg. *Magyar Jog*, 2023/7-8. 389-390.

[24] HORVÁTH M T.: Boncasztalon. A közszerződési jogviszonyok organikus kapcsolati egységei. *Jogtudomáyi Közlöny*, 2023/10. 454-462.

megállapodástól és annak teljesítésétől, valamint a támogatás felhasználásának ellenőrzésétől. Míg a közpénzek odaítélése során közjogi jogviszony keletkezik a döntésre jogosult közigazgatási szerv és a pályázó között, addig a támogatási szerződés megkötését követően tisztán polgári jogi jogviszony jön létre, amely a felhasználás ellenőrzése és az ennek nyomán alkalmazott jogkövetkezmények és esetleges szankciók kapcsán viszont ismét közjogi jelleget ölt.[25] Vagyis az Áht. rendelkezés nem jelenti azt, hogy a támogatási jogviszonynak ne lennének közjogi elemei, de a szerződéses jogviszonyban álló felek közötti jogvita esetében polgári bíróság, magánjogi szabályok alapján fog eljárni.

A Kúriának a közterület használati jogviszony tárgyában hozott jogegységi határozatának indokai ismeretében érdemesnek tartom azokat a támogatási jogviszonyra rávetíteni és ezeken keresztül elemezni, hogy a helyes-e a támogatási jogviszonyból eredő jogvitákat polgári peres útra terelni.

A jogegységi határozat indokolásában rögzíti, hogy a közterület használati szerződések egyrészről az önkormányzatok, másrészről gazdasági társaságok vagy mangánszemélyek között kerülnek megkötésre. Kiemeli a jogegységi tanács, hogy ezek a jogviszonyok két jogi aktus eredményeképpen jönnek létre. Feltétele az ilyen típusú szerződések létrejöttének illetve megszűnésének, az önkormányzat képviselő-testületének határozata majd ezt követően a felek (a határozatban foglalt felhatalmazás alapján az önkormányzat részéről a polgármester, illetve az önkormányzat képviseletében eljáró szervezet vagy gazdasági társaság) közötti írásbeli szerződés. A közterület-használati jogviszonyban az önkormányzat nem magántulajdonosi minőségében jelenik meg, hanem mint aköztulajdonnal való rendelkezésre, törvényi felhatalmazással bíró jogalany. Az önkormányzat, mint tulajdonos helyzete azért is sajátos, mert nemcsak szerződő félként vesz részt a jogviszonyban, hanem szabályozója is az önmagát érintő jogviszonynak, melyben a helyi közhatalom az Alaptörvény 32. cikk (1) bekezdésében kapott felhatalmazás alapján eredeti jogalkotói jogkörében alkot normatív aktust (önkormányzati rendeletet).[26] A közterület rendeltetéstől eltérő használatát az önkormányzat nem tulajdonosi jogkörében, hanem a helyi közhatalom gyakorlójaként állapítja meg. A közterület-használat szabályozása közjogi, közigazgatási jellegű szabályozást jelent.[27] A közterület használatának vonatkozásában szerződés jön létre a felek között, de a jogegységi tanács álláspontja szerint az önkormányzat a közterület-használat szabályozása terén alkalmazhat ugyan polgári jogi viszonyelemeket is, de csak a maga helyén és összefüggésében felfogva, az alapul fekvő közigazgatási jogviszonyba

[25] HORVÁTH M T.: im. 457.
[26] Kúria 1/2022. számú KPJE határozata, Indokolás [31]
[27] Uo.: Indokolás [33]

ágyazottan, a koherencia követelményének érvényesítése mellett.[28] Vagyis az alkalmazott polgári jogi elemek nem írják felül a jogviszony közjogi jellegét.

A jogegységi határozat felvázol további szempontokat is, melyek a közterület-használati jogviszony jogági jellegének meghatározásában segítségül szolgálhatnak:

a) egyenlőségi elhatárolás: a felek egymáshoz való viszonya, amely lehet horizontális vagy vertikális;
b) autonómia elhatárolás: a jogviszony tartalmát a felek mennyiben alakíthatják;
c) érdek alapú elhatárolás: magánérdek – közérdek szétválasztása;
d) kényszer alapú elhatárolás: van-e mód a közvetlen kényszer pl. bírság alkalmazására;
e) formai elhatárolás: mennyiben tekinthetőek a vonatkozó szabályok kógensnek vagy diszpozitívnak.[29]

A Kúria által felvázolt szempontok alapján áttekintem a közterület-használati és a támogatási jogviszony sajátosságait:

a) Az egyenlőségi elhatárolás alapján megvizsgálva a támogatási jogviszonyt kijelenthető, hogy a szabályozási keretek 7 éves programozási időszakokhoz kötődnek, és a programozási időszakot követően változnak. A támogató nem jogosult szabályozni a támogatási jogviszonyt, a szabályozásra az uniós szervek és a Kormány, kormányrendeletben jogosult. Ugyanakkor a támogató jogosult a pályázati feltételek (Általános Szerződési Feltételek, Pénzügyi Szabályzatok, szerződés tervezet) meghatározására, amelyek mentén a támogatást igénylők pályázataikat benyújthatják. Bár nem teljes mértékben azonos a helyzete a támogatónak és a közterület használati szerződést kötő önkormányzatnak, de kijelenthető, hogy támogató is sajátos helyzetben van, amely nem a magánjogra jellemző mellérendeltségi, hanem inkább a közjogi jogviszonyra jellemző alá-fölé rendeltségi, vagyis vertikális viszonyként írható le. A támogató arra is jogosult, hogy döntést hozzon arról, hogy a benyújtott pályázatot elfogadja és támogatásra alkalmasnak minősíti. A támogató döntése (természetesen pozitív tartalmú) meghozatalát követően, amelyre határozat formájában kerül sor, van lehetőség arra, hogy a felek támogatási szerződést kössenek.[30] A pályázó jogköre annyira terjed ki, hogy vagy elfogadja a szerződési feltételeket vagy nem. Ez egybecseng a jogegységi határozatban is kifejtett, a közterületet díj ellenében használati jogot szerző személy jogaival, amikor indokolása [34] pontjában rögzíti, hogy „a díjfizetési kötelezettség megállapítása körében ugyan értelmezhető az egyenértékűség és a felek egybehangzó akarata, szerződési szabadságról azonban nincs szó, az egyik félnek ugyanis csak a

[28] Uo.: Indokolás [38]
[29] Uo.: Indokolás [19]
[30] A támogatási szerződést dolgozatom terjedelmére tekintettel nem határolom el a támogatási okirattól, mivel általánosságban kijelenthető, hogy a támogatási szerződés alapján megvalósuló támogatási jogviszonyra vonatkozó feltételeket a támogatói okirat alapján megvalósuló jogviszonyokra is megfelelően alkalmazni kell.

feltételek elfogadására vagy el nem fogadására van lehetősége, azok alakítására nincs befolyással".

Az közterület-használati jogviszonyban az önkormányzat nem szokványos magánjogi szerződő fél, hiszen a másik féllel való akarategyezés elérését részéről jelentősen megtámogatja az a körülmény, hogy egyben szabályozója is az önmagát érintő viszonynak. A közterület-használatra vonatkozó rendelet megalkotásával, a közhatalom jogán meghatározhatja mindenkire kötelező norma alkotásával azt az alapvető viszonylatot, amelyben aztán „mellérendeltség" keretei között a szerződő magánféllel tárgyalhat. Világos lehet ebből már, hogy a szerződés másik alanyának garanciális jogait csak közjogi eszközökkel lehet biztosítani, hiszen a felek egyenjogúsága, akarategyezősége ebben az egyenlőtlen alaphelyzetben másképp aligha biztosítható. Ezt a helyzetet általában az ügyfél pozíciójával határozzák meg a jogszabályok, mégpedig közigazgatási jogviszony keretében.[31]

Kijelenthető, hogy a jogegységi határozatban leírtak alapján sem a közterület használati jogviszony, sem a támogatási jogviszony esetében nem beszélhetünk a magánjogra jellemző horizontális jogviszonyra a felek között, inkább mindkét esetben a felek viszonyára a vertikalitás jellemző.

b) A helyi önkormányzat vagyona törzsvagyon vagy üzleti vagyon lehet[32], amelyek vonatkozásában az önkormányzatnak eltérő jogkörei vannak. A szabályozás alapján megállapítható, hogy a helyi önkormányzat tulajdonában álló egyes közterületek a helyi önkormányzat kizárólagos tulajdonát képező nemzeti vagyonba tartoznak, azaz a forgalomképtelen törzsvagyonba. Az önkormányzat mint tulajdonos helyzete azért is sajátos, mert nemcsak szerződő félként vesz részt a jogviszonyban, hanem szabályozója is egyben az önmagát érintő jogviszonynak. Meghozza azt az önkormányzati rendeletet, amely az általa kötendő közterület-használati szerződés tartalmi elemeit meghatározza és ami alapján a szerződést megköti.

A támogatási szerződés esetében a támogató határozza meg a kiírásra kerülő pályázatot, annak feltételeit, tartalmi elemeit, így a támogatási szerződés tervezetét is ő állítja össze. A támogatási igény benyújtásával egyidejűleg a pályázó nyilatkozik, hogy elfogadja a pályázati feltételeket, így azok alakítására nincsen lehetősége.

Autonómia elhatárolás alapján kijelenthető, hogy sem a közterület-használati jogviszony esetében a használatba vevőnek, sem a támogatási jogviszony esetében a támogatást igénylőnek nincsen lehetősége és jogköre arra, hogy a jogviszonyt alakítsa, annak tartalmi elemeire hatással legyen, erre csupán az önkormányzatnak, illetve a támogatást nyújtó szervnek van lehetősége.

c) A tisztán magánjogi jogviszonyban a jogviszony a felek érdekét szolgálja. A közérdek megjelenése egy olyan tényező, amely a közjogi elemet visz a jogviszonyba.

[31] A Kúria Önkormányzati Tanácsának Köf.5033/2017/4. számú határozata [40]

[32] A nemzeti vagyonról szóló 2011. évi CXCVI. törvény 5. (1) és (2) bekezdései

A szerződő felek érdekét mind a területhasználati jogviszony, mind pedig a támogatási jogviszony szolgálja, de mi a helyzet a közérdekkel?

A felek között létrejött támogatási jogviszony a klasszikus polgári jogi szerződések sorában elfoglalt helye tekintetében atipikus jogviszony. Tartalmát tekintve egy olyan jogviszony, amelyben a támogató arra vállal kötelezettséget, hogy az Európai Unió és Magyarország támogatási feltételeinek a kedvezményezett általi teljesítése esetén vissza nem térítendő európai uniós és a magyar központi költségvetésből származó támogatást biztosít a támogatási szerződésben rögzített projekt megvalósításához. A támogató csak a támogatási szerződésnek vagy a támogatói okiratnak, jogszabálynak, egyéb, a támogatói intézményrendszer előírásának megfelelő szabályszerű projekt esetére vállal kötelezettséget a támogatás kifizetésére: amennyiben a projekt szabálytalannak minősül, úgy köteles azt visszatartani, illetve a már kifizetett támogatási összegeket a kedvezményezettől visszakövetelni. Az uniós támogatás – és az ezzel együtt automatikusan nyújtott hazai költségvetési támogatás – egy olyan quasi ingyenes juttatás, amely csak és kizárólag abban az esetben jár a kedvezményezett részére, ha valamennyi szerződéses, és jogszabályi rendelkezésnek, illetve a pályázati feltételeknek eleget tesz. Ezen atipikus jogviszony tartalmát, így a támogató és a kedvezményezett jogait és kötelezettségeit, valamint a támogatások folyósítására és felhasználására vonatkozó rendelkezéseket, vagy a támogatói okirat megsértése esetén a támogató és a képviseletében eljáró szervek által alkalmazandó jogkövetkezményeket uniós és magyar jogszabályok, illetve a támogató által közzétett, a pályázati kiírások részét képező, további előírásokat tartalmazó dokumentumok határozzák meg.

A Kúria Kfv.IV.35.017/2014/9. számú ítélete szerint: „Támogatás megszerzésével az állam és a támogatott személy között tartós, hosszú távú támogatási jogviszony jön létre, amely a támogatott személy számára a források kötött felhasználásának kötelezettségét, évekre történő elköteleződését eredményezi. A támogatási összeget a támogatott csak meghatározott célra, a meghatározott szerződéses, illetve jogszabályi keretek között használhatja fel." A támogatási jogviszony természetére jellemző, hogy olyan atipikus szerződés, amelynek következtében a Támogató és a Kedvezményezett között speciális jogviszony jön létre, amely szigorú eljárásrendet, elszámolást jelent a biztosítékokat és az ellenőrzést is magában foglalja. A speciális jogviszony jellemzője, hogy a Támogató ellenőrzi, szankcionálja a jogviszonyt. A jogviszony jellemzője az, hogy a Támogató kifejezetten meghatározott célra szánta a forrást, rögzített célt kívánt finanszírozni, meghatározott feltételrendszer mentén. Ebből következik az is, hogy szigorú elszámolási kötelezettség és az ellenőrzési jogosítványok telepítésére kerül sor a szerződésben a támogató oldalára. A Kfv.I.35.333/2011/8. szám alatti kúriai határozat szerint „… a hatóságnak nincs mérlegelési joga, a visszafizetési kötelezettség méltányosságból nem engedhető el." A Kúria a Kfv.IV.35.676/2014/4. számú határozatában kiemelte azt is, hogy a költségvetési forrás felhasználását transzparens módon kell követni, ez indokolja a vonatkozó jogszabályi előírások kógens jellegét. A Kúria ezen döntésében hangsúlyozta, hogy: „A jogszerű működés szükséges feltétele az is, hogy a költségvetési források felhasználása utólag, egyértelműen követhető legyen." A támogatási jogviszonyok elbírálásánál azonban mindig alapvető szempont az, hogy a támogatás során közpénzek meghatározott cél érdekében történő juttatásáról van szó. „..A pénzügyi támogatások körében minden esetben érvényesülnek a támogatás ellenőrzésére vonatkozó jogszabályi előírások, amely közelebbről azt jelenti, hogy valamely szervezetnek kötelezően vizsgálni kell a pénzügyi támogatás cél szerinti felhasználását…". A Támogatási Szerződés, vagy bármely irányadó jogszabályi előírás megszegése önmagában is alapot ad a támogatónak az elállásra. A pénzügyi érdeksérelem megállapításához nem kell valamilyen összegszerűen meghatározható kárt vagy egyéb vagyoni hátrányt kimutatni, a pénzügyi érdeksérelem, illetve annak veszélye megállapítható, ha a közpénzek nem szabályszerű felhasználása a költségvetésben indokolatlan kiadási tételt eredményez (Kúria Pfv.V.20.699/2020/6.). A kialakult és következetes bírói gyakorlat azt támasztja alá, hogy a közpénzek felhasználásához kötődő elállási jog gyakorlása során szigorúbb feltételrendszer érvényesül, hasonló jellegű szerződésszegés az Irányító Hatóság elállási jogának a gyakorlását megalapozza (BH2019. 304.)

A támogatási szerződés atipikus szerződés, tekintettel arra, hogy a szerződés tartalmát uniós és hazai jogszabályok határozzák meg, valamint olyan, a támogató által előre meghatározott szerződéses rendelkezések, amelyek szintén kötelező tartalmi elemek (így pl: Felhívás, Útmutató, ÁSZF stb.), így a kedvezményezett szerződéskötési szabadsága gyakorlatilag ezek elfogadására vagy elutasítására szűkül. Az állami és uniós források megfelelő célra történő felhasználását ellenőrzik a támogatásokat odaítélő szervek és azok felettes szervei, valamint a jogszabályban nevesített külső ellenőrző szervek. Az ilyen jogviszonyból közvetlen vagyoni előnye kizárólag a kedvezményezettnek származik, a támogatásból megvalósított fejlesztés, eszközbeszerzés stb. csak a projekt eredményes megvalósítását, és amennyiben a projekt szempontjából releváns, a fenntartási időszak eredményes teljesítését követően kerül be a kedvezményezett vagyonába. Közvetlen anyagi előnye a támogatási jogviszonyból a támogatottnak származik, a másik oldalon a köz érdekében végzett támogatotti cselekményt szolgálja a közpénz felhasználása. A támogató a támogatási rendszert működteti, anyagi előnye nincsen az ügyletből.

A fentiekben jellemzett szigorú eljárásrend és a támogatónak biztosított széles jogkörök a közpénzek felhasználása kapcsán a közérdek biztosítását szolgálják és a közérdek csorbulásának elkerülése érdekében követel a támogatótól a magánjogra nem jellemző, szigorú és méltányossági jogköröket elutasító fellépést.

A joggyakorlat abból indul ki, hogy a közterület véges közjószág, amelyet alapvetően bárki szabadon használhat, ugyanakkor a tartós egyéni igénybevétel csak szabályozott módon, meghatározott feltételek között történhet.[33] A közterület-használattal kapcsolatos helyi szabályozásban jelenik meg a közérdek. Amennyiben a közérdek az önkormányzati rendeletben tetten érhető módon sérül, akkor az megtámadható a Kúrián, amelyet a Kúria Önkormányzati Tanácsa normakontroll-eljárás keretében. A közterület-használati jogviszony esetében a használó, pénzügyi ellenszolgáltatás ellenében, általában anyagi haszonszerzés reményében használja az önkormányzat tulajdonába tartozó területet. A köz érdekét az önkormányzat képviseli, amely a jogviszonyban nem magántulajdonosi minőségében jelenik meg, hanem mint a köztulajdonnal való rendelkezésre felhatalmazással bíró jogalany.[34] A helyi önkormányzatok tulajdona köztulajdon, amely feladataik ellátását szolgálja.[35]

d) Közvetlen kényszer alkalmazására ad e lehetőséget a szabályozás a két jogviszony keretében?

A támogatási jogviszony atipikus jellegéből következik, hogy olyan közszerződés, amelyre a szakaszosság jellemző, vagyis a jogviszony különböző fázisaiban elkülönülnek a közjogi, illetve magánjogi jellegzetességek.[36] Elkülöníthető az odaítélés szakasza, a támogatási szerződés megkötésének szakasza, a felhasználás ellenőrzése és az ennek nyomán alkalmazott jogkövetkezmények szakasza.

Az odaítélés szakasza keretében a pályázati anyagot, a támogatási szerződés tervezetét is a támogató[37] önállóan állítja össze és a támogatási igény elbírálásáról önállóan dönt. Közvetlen kényszert nem kell alkalmaznia, mivel a támogató kizárólagos döntési jogkörrel rendelkezik a támogatási igény elfogadásával kapcsolatban. A támogatói okirat vagy támogatási szerződés megsértése esetén a támogató és a képviseletében eljáró szervek által alkalmazandó jogkövetkezményeket uniós és magyar jogszabályok, illetve a támogató által közzétett, a pályázati kiírások részét képező, további előírásokat tartalmazó dokumentumok határozzák meg. A támogató nemcsak ellenőrzi, adott esetben szankcionálja is a jogviszonyt. Ez nem csak joga, hanem kötelezettsége is a támogatónak, hiszen „… a hatóságnak nincs mérlegelési joga, a visszafizetési kötelezettség méltányosságból nem engedhető el.”[38] A Támogatási Szerződés, vagy bármely irányadó jogszabályi előírás megszegése önmagában is alapot adott az alperes részére az elállásra. A pénzügyi érdeksérelem megállapításához nem kell valamilyen összegszerűen meghatározható kárt vagy egyéb vagyoni hátrányt kimutatni, a pénzügyi érdeksérelem, illetve annak veszélye megállapítható, ha a

[33] BORDÁS P.: Kié a köztér? A közterület-használat közjogi gyakorlata. *Jogtudomáyi Közlöny*, 2023/1. 35.
[34] A Kúria Önkormányzati Tanácsának Köf.5033/2017/4. számú határozata [27]
[35] Alaptörvény 32. cikk (6) bekezdés
[36] HORVÁTH M T.: Boncasztalon. A közszerződési jogviszonyok organikus kapcsolati egységei. *Jogtudomáyi Közlöny*, 2023/10.
[37] Irányító Hatóság
[38] Kúria Kfv.I.35.333/2011/8. számú határozata

közpénzek nem szabályszerű felhasználása a költségvetésben indokolatlan kiadási tételt eredményez. A szabálytalansági eljárással érintett támogatási szerződés szerinti kedvezményezett, akire nézve a szabálytalansági döntés a támogatási jogviszonyból származó jogokat vagy kötelezettségeket állapít meg, módosít, illetve megszüntet, a döntés jogszabálysértő vagy támogatási szerződésbe vagy felhívásba ütközése esetén a szabálytalansági döntés ellen egy alkalommal, jogorvoslattal élhet. A támogatási szerződéstől elállás vagy a támogatói okirat visszavonásával egyidejűleg a támogató a már kifizetett támogatási összeget visszaköveteléséről is dönt, amely összeg így adók módjára behajtható köztartozásnak minősül és az összeget a NAV a támogató döntése alapján megpróbálja végrehajtani. Ebben az esetben a kedvezményezett jobban jár, ha a követelést önként teljesíti, még akkor is, ha annak jogszerűségét vitatja és a döntés ellen polgári peres eljárást kezdeményez, mivel a NAV az összeget a végrehajtási költségekkel növelve fogja végrehajtani.

A közterület helyben alkalmazandó szabályait a helyi közhatalom, a helyi önkormányzat fogja rendezni rendelet keretében. A konkrét szerződés megkötésére az önkormányzati rendelet által felhatalmazott személy és a használó között csak ezt követően kerülhet sor. A szerződés tartalmi elemeit (pl.: a használat ellenértékének összegét) a rendelet szabályozza, így a szerződési szabadság a képviselőtestület által hozott rendelet által meghúzott határok között mozog. A szerződés megszüntetésére szintén csak önkormányzati döntést követően van lehetőség. A szerződési kapcsolat a közigazgatási anyagi és eljárási jogviszony körébe illeszkedő módon[39] lehetséges, közvetlen kényszer alkalmazására nincsen szükség, mivel a felek nem mellérendelt jogviszonyban vannak.

e) Formai szempontból mindkét esetkörben a szabályok kógensek. A polgári jogi elemek ellenére sem a támogatásijogviszonyt, sem a terület-használati jogviszonyt nem jellemzi diszpozitív szabályozás.

A támogatási jogviszony vonatkozásában a fentiekben vázolt módon a támogató köteles a vonatkozó szabályok szigorú betartása felett őrködni és szabályszegés esetében a leg szigorúbb módon fel kell lépnie a kedvezményezettel szemben. A méltányosság gyakorlása kizárt. A támogatási szerződéstől elálláshoz nem kell – a magánjogi szabályokkal ellentétben – konkrét kárt összegszerűen bizonyítani, elég, ha támogató a kár veszélyét valószínűsíti. Ez az élő szabály azonban a polgári peres bíróságokon sokszor nehezen talál megértésre és elfogadásra.

A terület-használati jogviszonyra vonatkozó szabályok szintén kötelezőek, mivel azokat önkormányzati rendelet foglalja magába, így azok szabad megállapodás tárgyát nem képezhetik.

A fentiekben a közterület-használati jogviszony és a támogatási jogviszony sajátos és egymással rokon vonásai nem eredményeznek azonos jogterületi

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[39] PAPP T.: A közterület használat joggyakorlata magánjogi szempontból. *Jogtudományi Közlöny*, 2022/4. 147-153

besorolást. Az Kúria által hozott 1/2022 KPJE jogegységi határozat – bár sokak által vitatott[40] - értelmében közjogi jogviszony és az azzal kapcsolatos jogvita közigazgatási bíróság hatáskörébe tartozik.

Az Áht. 48. § (4) bekezdése rögzíti, hogy a támogatói okirattal vagy támogatási szerződéssel létrejövő támogatási jogviszony létesítésére irányuló eljárással és a támogató döntéseivel kapcsolatos jogviták eldöntése polgári peres eljárásban kezdeményezhető.

A magánjog és a közjog határai elmosódnak. Ez a folyamat a jogtudomány és a gyakorlat szempontjából okoz nehézségeket, mivel pl.: polgári bírák nehezen boldogulnak a támogatási szerződés közjogi vonásaival. Azonban a gazdasági és társadalmi viszonyok folyamatos változásai a hagyományos jogfelfogásra is hatással vannak és létrehoznak olyan „együttműködéseket" közjog és magánjog között, amelyek elméleti síkon talán nem kívánatosak, a gyakorlatban azonban a legtöbb esetben hasznosak.

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The issue of inheritance of surrogate mothers

Abstract: Surrogacy is a promising treatment for infertility.It can solve many of the intolerable difficulties faced by infertile couples and their families. At the same time it is a kind of contractual arrangement between the commissioning parents and the woman carrying the child in pregnancy (the birth mother). First of all we will present the issue of surrogacy. In the following we will have to analyse the surrogate mother's vocation to inherit de cuius, i.e. we can thus determine whether a parent through assisted human reproduction with a third party donor, i.e. a surrogate mother, could be considered as a privileged ascendant, thus having a vocation to inherit. In another argument we will discuss its contractuality and show that surrogacy does not properly belong to the realm of contractual freedom, but rather to the limitation of contractual freedom. Man, human flourishing and the common good require both the affirmation and limitation of this freedom, given that the parties to a contract are rational beings, but imperfectly so. While it is a deep-seated human desire to have a genetic child, the lack of which can be deeply disappointing and painful, surrogacy contracts inherently dehumanize the biological mother and child. After analyzing the competing interests and costs of surrogacy, we may conclude that surrogacy should be banned, or be more severely regulated, as it is contrary to a public policy that is oriented toward human flourishing, or being more fully human.
Keywords: surrogacy, family law, succession law, surrogate mother, Romania, inheritance of the surrogate mother

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1. Introduction

1.1. Justification of the choice of topic

The topic chosen by me, i.e. the issue of inheritance of surrogate mothers, involves a very interesting issue and one that is particularly rare in Romanian jurisprudence, but which is nevertheless relevant because it has become much more frequently used in practice than in the past. The definition of the surrogate mother can only be determined with difficulty, probably because of this aspect the institution could not be fully legislated. A surrogate mother, is a woman who is implanted with a zygote resulting from the fertilisation of an ovum and a

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spermatozoon, cells which have nothing in common with the woman who will carry the pregnancy. By law, the surrogate mother cannot receive any remuneration for giving birth. The topicality of this issue is that many more people who are unable to have children naturally may choose to consider having a child with the help of a surrogate mother. This is very important not only from the point of view of families, but also from the point of view of the population.

In view of the lack of regulation in this area, research on the subject is of particular importance, taking into account the development of knowledge on surrogacy and the need to create regulation of legal situations resulting from the birth of children from surrogate mothers.

1.2. Purpose of the research

The purpose of the research on the issue of inheritance of surrogate mothers is to analyse the lack of specific regulation of this issue from the point of view of family law, and from the point of view of succession law, even if, according to the law, the surrogate mother is not entitled to receive any remuneration for giving birth. However - in the event of the death of the child, if the de cuius has no heirs, can the surrogate mother receive a share of the legal inheritance or not, and if so, by what title and under what conditions?

1.3. Main subject and structure of the work

The main focus of this study is, as the title suggests, the issue of inheritance, in a case that cannot be considered a common one, that of the inheritance of a surrogate mother.

In this paper, we will first investigate the branches of law concerned by this topic.

The first branch of law is family law, so we will first discuss this branch of law in general, analysing its characteristics, then we will turn our attention to the subject of surrogacy, by studying maternity, then we will examine the main issue, i.e. after presenting family law in general, and after studying maternity, we will talk about surrogacy.

The second area of law dealt with by the issue of the surrogate mother's inheritance is succession law. Just as we have presented the issue from the perspective of family law, we will also present it from the perspective of succession law. First, as in the analysis of the first branch, we will study the law of succession in a general way, by analysing its characteristics, the ways of inheriting and the shares that can be acquired from the de cuius succession. Following the general analysis of this branch of law, we will take a closer look at inheritance from descendants. Through this analysis of the subject we will look in more detail at the share of each heir, and how they inherit. And finally we come to our main theme: the possibility of inheritance of the surrogate mother. Here we will consider whether it is possible for a surrogate mother to inherit after de cuius, or whether this is impossible by law. If the answer to the question of the surrogate mother's inheritance is yes, then we will study how she can inherit after the de cuius, and more importantly what her share of the inheritance would be.

The last area of law to be examined in detail on the issue of surrogate mother inheritance will be the law of obligations, and in particular contracts. We will look at the contract between the parties, i.e. between the commissioning parents and the woman carrying the child, i.e. the surrogate mother. We will discuss in more depth whether there is a freedom to contract or a limitation of the freedom to contract in our case. We will discuss various aspects which will reveal the problems in contracting with a surrogate mother, and at the end of this discussion we will talk about some ethical issues which in my opinion should be regulated more strictly in the case of this contract.

On the other hand, we will discuss the surrogate mother as a member of the family of de cuius. Our analysis will include, among other things, a series of hypothetical, thought-provoking questions, such as is a surrogate mother a family member? In case of death of de cuius can she receive a share of the inheritance? If she can receive a share of the inheritance, can she also do so if there are other heirs or only if the surrogate mother is the sole heir? After trying to find some answers to these questions we will go through the regulation of heirs, i.e. we will normally see who are considered as heirs and then finally we will try to look at our topic in particular, i.e. to see if the surrogate mother can or cannot be considered as an heir, and if the answer is yes, then we will try to determine what her share of this inheritance would be.

To support this theme, we will deal in a third part with national and international case law on this topic, analyzing some cases with particular relevance to the surrogacy issue.

Finally, we will formulate three conclusions on this topic. The first conclusion will be given by the answer to the question whether it is ethical for commissioning parents to contract with a surrogate mother. The second conclusion will be of the greatest importance with regard to our topic, this one referring to the question, whether there is the possibility for a surrogate mother to inherit, and we will discuss in more detail, whether the surrogate mother has this possibility; we will specify the cause, the possibility and the share of this. If she cannot inherit then our analysis in conclusion will be restricted to explaining why a surrogate mother cannot inherit after de cuius. At the end of this study, in conclusion, we will mention some ideas for completing the legislation on the present problem, the issue of inheritance in the case of surrogate mothers.

2. Areas of law covered by the topic

2.1. Concordances between surrogacy and family law

2.1.1. About family law in general

Family law was regulated by specific rules long before the Family Code came into force, i.e. before 1953. It was a branch of law and a sub-branch of legal science before the Family Code came into force. The Civil Code of 1864 regulated family relations, so it cannot be said that this branch of law would not have been adequately regulated.[1]

Family law is the branch of law which brings together the legal rules governing personal and property relations arising from marriage, kinship, adoption or other relationships assimilated by law, through the aspects of family relations.[2]

The subject matter of this branch of law is, on the one hand, relationships relating to marriage, kinship and adoption and, on the other hand, relationships assimilated to family relationships through certain subjects.[3]

The family, as the fundamental unit of society, is a kind of nucleus that unites spouses and their descendants. The family is considered the primary social group.[4]

In order to define the concept of family, we need to look at it from several angles, the most relevant being the sociological and legal aspects of the concept of family.

Analysing the sociological aspect of this notion, the family can be defined as that specific form of human community which is made up of a group of people who are united by marriage, filiation or adoption. It is characterised by community of life, or mutual interests.[5]

By analysing the provisions of the Civil Code (art. 258) we can get a kind of definition of the family from a legal point of view: "the family is based on the freely consented marriage between the spouses, on their equality, and on the right and duty of the parents to ensure the upbringing and education of their children". This

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[1] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris.* Cluj-Napoca, 2021, 30.

[2] FILIPESCU, P.: *Tratat de dreptul familiei*. Ed. ALL, Bucureşti, 1993*,* 11.

[3] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris.* Cluj-Napoca, 2021, 31.

[4] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris.* Cluj-Napoca, 2021, 33.

[5] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris.* Cluj-Napoca, 2021, 35.

group of persons is legally characterised by the specific rights and obligations of its members, which are part of the content of family legal relationships.[6]

A comparison can be made between the concept of family in the legal sense and that of family in the sociological sense. They have many elements in common, but there are situations where these elements do not overlap.

So we can speak of family relationships that are not regulated by family law but exist in the sociological sense of family. One such case is cohabitation, also known as common-law unions.

The opposite is the case where there is no family relationship in the sociological sense, but it is nevertheless regulated by the Civil Code as a series of relationships assimilated to family relationships. An example of such a case could be the relationship between former spouses regarding legal maintenance obligations.[7]

We can therefore define the family in a broad sense as a form of organisation, a group of people called 'family', between whom there are rights and obligations arising from marriage, kinship, or any other relationship assimilated to family relations, of life together.[8]

A very important aspect of family law is the general principles of family law. As fundamental rules of organisation of the subject, we will retain the following principles:

the principle of protection of marriage and family, of the interests of mother and child;

the principle of marriage freely entered into between the spouses. Strictly speaking, this principle, which has constitutional value, presents the will of the future spouses as the only subjective factor relevant to the conclusion of marriage;

the principle of equality in rights and duties of the spouses;

the principle of mutual moral and material support between family members;

the principle of monogamy. This being fully in line with the traditions of our cultural society, family law prohibits marriage between persons who, at the time of the conclusion of the marriage, have the status of married persons.[9]

2.1.2. Maternity

In a broad sense, filiation is a legal relationship existing between a person and his or her ascendants, i.e. descent (usually biological, sometimes civil). In a narrow

[6] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris.* Cluj-Napoca, 2021, 36.
[7] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris.* Cluj-Napoca, 2021, 37.
[8] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris.* Cluj-Napoca, 2021, 37.
[9] FLORIAN, E.: *Dreptul familiei.* Ed. C.H. Beck, Bucureşti, 2006, 2.

sense, this notion characterises a person's relationship of descent from his or her parents, the relationship between a child and his or her parents.[10]

Filiation to the mother, i.e. maternity, results from the birth of the child by a particular woman. It therefore comprises two factual elements:

the fact that a particular woman has given birth to a child;

the identity of the child claiming maternity with that of the child born by that woman, in other words, that this child and not another was born by the woman.

As regards the mother's marital status at the time of the child's birth, this is of no relevance in establishing parentage from the mother, since the Civil Code admits the same means of proof without distinction as to whether maternity is to be established by marriage or out of wedlock. We may ask the question, what are the methods of establishing maternity?

Most frequently, proof is provided by the birth certificate consolidated by the use of the civil status according to this certificate, this is provided for in Art. 421 para. (2) of the Civil Code. By analysing Article 415 of the Civil Code we can see that if the birth has not been registered in the civil status register, or if the child has been listed in the civil status register as having been born to unknown parents, its maternity can be established by confirming the mother. Finally, if, for whatever reason, it is impossible to prove maternal filiation by means of the birth certificate, and if the reality of the birth certificate is disputed, maternity is established in accordance with Article 422 of the Civil Code, i.e. before the courts by any means of evidence.[11]

Affiliation can be classified by several aspects. These aspects are:

filiation in relation to the parent against whom it is established (filiation to the mother or filiation to the father);

filiation in relation to the nature of the relationship between the parents (within or outside marriage);

filiation classified according to its source (natural, artificial or adoptive).[12]

In order to establish maternity, the following aspects must be proven cumulatively:

the fact of the child's birth;

the identity of the child born with the one whose filiation is intended to be established;

in the case of filiation by marriage, proof of marriage is required.[13]

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[10] IONAŞCU, A. – MUREŞAN, M. – COSTIN, M-N. – URSA V.: *Filiaţia şi ocrotirea minorilor*. Ed. Dacia, Cluj-Napoca, 1980, 14.

[11] FLORIAN, E.: *Dreptul familiei*. Ed. C.H. Beck, Bucureşti, 2006, 30.

[12] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris*. Cluj-Napoca, 2021, 331.

[13] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris*. Cluj-Napoca, 2021, 332.

Maternity can be established by several methods, these are:

establishing filiation from the mother by presenting the birth certificate and by using the concordant civil status;

it can also be established by recognising the mother, if the birth was not recorded in the civil status register, or if the child born was recorded in the register as a child born to unknown parents;

filiation may also be established by a court decision.[14]

2.1.3. Surrogate mother

Surrogacy is a promising treatment for infertility. It can solve many of the intolerable difficulties faced by infertile couples and their families. Although initially seen as a doubtful method whose ethics may be questioned, evidence shows that surrogacy arrangements are more acceptable now than when it was first introduced. Therefore, changes in attitudes to surrogacy decision-making can be seen in some countries, but there are still indications of the degree of divergence between the discourse and actual practice of different forms of surrogacy around the world.

Social, ethical and legal[15] issues are the subject of major debate and disagreement in the case of natural or partial surrogacy or total surrogacy without genetic link. Surrogacy with genetic gestation can be largely free of social, legal and moral complications. It is an excellent choice of infertility treatment if the couple wants their own genetic child, but the topic still requires more thought and discussion.[16]

Surrogacy literally means "replacement." The terms "surrogacy" or "surrogate mother" are usually women who carry and deliver children for another couple. When the surrogate mother is inseminated with the husband's semen from the couple, the procedure is known as direct surrogacy or traditional surrogacy. Gestational surrogacy occurs when a sperm and ovum from one couple are fertilised through in vitro fertilisation (IVF)[17] and transferred to a surrogate mother, this is also called genetic gestational surrogacy. When a sperm or ovum is donated by a third party, fertilised by IVF and transferred to a surrogate mother, this is called partial gestational surrogacy. When both sperm and ovum are donated by a third party, fertilised by IVF, and the resulting embryo is transferred to a surrogate mother, the procedure is called full gestational surrogacy. In gestational surrogacy,

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[14] VOICU, A-V. – SZTRANYICZKI, Sz.: Dreptul român civil. Dreptul familiei. *Forum Iuris*. Cluj-Napoca, 2021, 332.

[15] See more details in: SZTRANYICZKI, Sz. – COLȚEA, A.: Should Surrogacy Be Legally Regulated in Romania?. *Acta Universitatis Sapientiae, Legal Studies*, volume 10, number 1., 2021*,* 129-143.

[16] https://www.researchgate.net/publication/299947629_Surrogacy (date of download: 02/04/2023).

[17] See more details in: SZTRANYICZKI, Sz.: Paternitate după moarte: aspecte ale procedurii fertilizării in vitro post-mortem. *Revista de dreptul familiei*, nr. 2/2021*,* 395-414.

the surrogate mother is not genetically related and will be free of maternal responsibility after the birth of the child.[18]

Surrogacy is an arrangement between the „assignee" and the surrogate mother, whereby the surrogate mother carries the newborn child and hands it over to the assignee shortly after birth. Lack of income-earning opportunities, a disadvantaged financial situation, discrimination and other economic factors often push women into the surrogacy role. These factors call into question the validity of surrogate mothers' contribution to an already unbalanced power structure.[19] Another issue is that surrogacy contracts usually turn children into a kind of commodity that is "sold" on the surrogacy market, legally or illegally, with or without an associated financial transaction. In the case of all surrogacy contracts, it is true that the mother gives up the child to the co-contractor, as part of a prior surrender plan. By taking this step, the child not only loses its birth mother, but is also exposed to the risk of statelessness and faces the possibility of rejection by the co-contractor.[20]

Surrogacy contracts deny children the right to their genetic identity. Children who are conceived in this way are never allowed to know their biological mother or parents if sperm or ovum donation has preceded implantation.[21] They are also denied the right to know or have contact with their biological mother or both biological parents.[22] Surrogacy contracts subordinate the rights of the child to the contractual wishes of the parties, leaving behind the relationship with the biological mother and the biological family and making it impossible to raise the child in a biological family. By their very nature, surrogacy contracts also undermine the child's right to family reunification and identity. Most women who apply to be surrogate mothers come from socially vulnerable backgrounds, are generally poorly educated and financially dependent on others. Women who struggle with material constraints have no real freedom of choice or are not on an equal footing with surrogate mothers in terms of material differences. Nor can we forget the other children of surrogate mothers. Unlike adoption, there are no monitoring processes to determine whether employers are fit to raise children. The legal instrument in question is very complex and raises many questions with few answers, not only in the field of jurisprudence but also in the fields of health and psychology. The starting point for the analysis of surrogacy in the Romanian legal system is an indispensable

[18] https://www.researchgate.net/publication/299947629_Surrogacy (date of download: 02/04/2023).
[19] SZTRANYICZKI, Sz.: Szükséges-e a béranyaság romániai törvényesítése? *Erdélyi Jogélet*, 3/2022, 58.
[20] SZTRANYICZKI, Sz.: Szükséges-e a béranyaság romániai törvényesítése? *Erdélyi Jogélet*, 3/2022, 58.
[21] LUDDEN, J.. *Donor-Conceived Children Seek Missing Identities*, https://www.npr.org/2011/09/18/140477014/donor-conceived-children-seek-missing-identities?t=1623832083300 (date of download: 01/04/2023).
[22] The Convention on the Rights of the Child, art. 9 para. (3).

examination of the case law of the European Court of Human Rights[23] and the legal solutions of other countries.

Romanian legislation does not provide for the possibility of using a surrogate mother, Articles 441-447 of the Romanian Civil Code provide for the legal possibility of human reproduction only through a medically assisted third party donor. The legal institution of surrogacy was not regulated even before the entry into force of the current Civil Code.[24] Consequently, the Romanian legal framework neither prohibits nor authorises the procedure in question, which, according to the literature, is an implicitly supported legal institution.[25] Article 408 para. (1) of the Civil Code provides that maternal descent derives from the fact of birth, i.e. there is a presumption of maternity in favour of the natural mother. In the absence of a legal provision, the only option available to the parties concerned is the option of a traditional altruistic maternal or gestational placement. This observation is in accordance with the provisions of Article 60 of the Civil Code and Article 26 para. (2) of the Constitution, which provides that a private person is free to dispose of himself, provided that he does not infringe the rights and freedoms of others, public order and morality.[26] Public order is the peace of the state and of society, which is expressed by respect for the written and unwritten rules of a country. The private law legal perception has a very narrow understanding of public order as the unconditional application of the most important principles and institutions underlying the legal system. Laws relating to public order are legally binding. A surrogacy contract does not conflict with binding public policy, in which case neither the public interest of society, nor the rights and freedoms of others, nor public morality are violated.

Surrogacy services under Article 66 of the Civil Code, i.e. prohibition of transactions for consideration. In this sense, "Any act which has as its object the conferring of a patrimonial value on the human body, its elements or its products is subject to absolute nullity, except in the cases expressly provided for by law." As a result, although in principle the service of surrogacy is feasible, no pecuniary value can be accepted as consideration. In other words, in Romania, surrogacy can only be conceived as a disinterested service to help childless couples who wish to have children. If any consideration were accepted, the dignity of the surrogate mother

[23] https://www.echr.coe.int/Documents/FS_Surrogacy_ENG.pdf (date of download: 01/04/2023).

[24] See more details in: SZTRANYICZKI, Sz.: Se impune reglementarea legală a procedurii maternităţii surogat în România? *Revista de dreptul familiei*, nr. 2/2020, 267-281.

[25] FLORIAN, E.: Filiaţia: între obsesia adevărului biologic şi mistificare legală. *Revista Română de Drept Privat*, 2018, 117.

[26] UNGUREANU, C. T.: Contractul internaţional de externalizare a maternităţii. *Revista de Ştiinţe Juridice*, 2019, 9.; CERCEL, S.: Consideraţii privind dreptul asupra propriului corp. *Revista de Studii Juridice*, 2009, 7.; IRINESCU, L.: Copilul, un dar sau un drept?. *Revista de Dreptul Familiei*, 2019, 208.

would be undermined.[27] In Romania, however, "there is a market for surrogate mothers, where the laws of supply and demand operate" and "the fees charged can be as high as €50,000".[28] However, a court ruling in one case decided otherwise, stating that a woman cannot become a surrogate mother because "renting the uterus is contrary to the principle of the inviolability of the human body, and the pregnancy carried for another [results in an obligation] null and void, despite the fact that there is no legal restriction in this respect [...] it was considered that such transactions transfer interests protected by public order and public morality, such as personal status, such as marital status, public health, etc."[29]

2.2. Concordances between surrogacy and succession law

2.2.1. Succession law in general

Inheritance can be defined as the transmission of the patrimony of a deceased person (de cuius) to one or more living persons, his or her heirs. This patrimony includes the assets of the inheritance, i.e. all the rights of the de cuius, but also the liabilities of the inheritance, i.e. the debts of the deceased, which can be valued pecuniarily. The succession estate comprises all the assets and rights of the deceased as well as all his liabilities at the date of the opening of the succession.[30]

There are two forms of inheritance:

legal inheritance and

testamentary inheritance.

We speak of legal inheritance if the devolution of the succession is determined by law, because the de cuius did not leave a will, or the will that the deceased left is not capable of producing legal effects.[31] In the case of a testamentary legacy, the will of the testator is expressed in a unilateral legal act called a will. A will is a legal act for the purpose of death, and it transfers the inheritance to the persons entitled to it, i.e. the legatees.

Only the legatee can be an heir by particular title, so in the case of legal inheritance the whole estate, or a fraction of it, will be passed on, but no individually

[27] WALKER, R. – VAN ZYL, L.: Beyond Altruism: A Case for Compensated Surrogate Motherhood. In: SHAW R. M. (ed.): *Bioethics Beyond Altruism.* Palgrave Macmillan, 2017, 165.

[28] NICOLESCU, C.: Protecţia dreptului la viaţă privată şi de familie în cazul copilului născut de o mamă surogat" – variaţiuni mioritice pe o temă europeană. In NICOLAE, M. – RIZOIU, R. – TOMA-DĂUCEANU, I-L.: *In Honorem Valeriu Stoica.* Drepturi, libertăţi şi puteri la începutul mileniului al III-lea,Universul Juridic, Bucureşti, 2018, 1081.

[29] https://legeaz.net/spete-civil-curtea-de-apel-craiova-2016/stabilire-maternitate-decizia-1048-17-02-2016-4iy (Accessed : 01.04.2023.).

[30] VERESS, E. – SZÉKELY, J.: *Drept Civil. Moştenirea. Liberalităţile.* Ed. C. H. Beck, Bucureşti, 2020, 1.

[31] VERESS, E. – SZÉKELY, J.: *Drept Civil. Moştenirea. Liberalităţile.* Ed. C. H. Beck, Bucureşti, 2020, 2.

determined assets can be inherited. In the case of testamentary inheritance, the legatee may be universal, and is entitled to the whole of his de cuius estate, or to that part of the estate which remains after the legatees by universal title and the legatees by particular title have been bequeathed. In the case of testamentary inheritance, legatees may also be legatees by universal title, but they are entitled to only a fraction of the estate. Also in the case of testamentary inheritance, there may be legatees by particular title, who are entitled to specific assets of the succession.[32]

These two forms of inheritance can exist simultaneously.

There are categories of heirs protected by law, in favour of whom a reserved portion of the estate is set aside, a situation in which the deceased cannot dispose of his assets absolutely freely. If this reserved portion of the succession is affected by the legatees established by the de cuius, the reserved heirs will nevertheless acquire the reserved portion by operation of law, while the legatees will acquire only what belongs to the remaining available share. Any excess of the available share will be subject to reduction, thereby limiting the de cuius's absolute freedom of disposition by will.[33]

The transmission of the inheritance has the following legal characteristics: it is a transmission on account of death, universal, unitary, indivisible and gratuitous.[34]

A number of general conditions must be met in order to inherit.

The general conditions of the right to inherit are the capacity to inherit, the right to inherit and that the person is not unworthy to inherit. These are set out in Articles 957-962 of the Civil Code.

2.2.2. Inheritance from descendants

The basis for the legal devolution of the inheritance is the family relationship between the deceased and those entitled to inherit, or the status of surviving spouse.[35] In the absence of relatives called upon to inherit in these categories, as well as the surviving spouse, the inheritance shall be assigned to the commune, town or, where appropriate, municipality in whose territorial area the property is located at the date of opening of the inheritance.[36]

The four classes of heirs are as follows:

- Class I - this comprises the lineal descendants of the de cuius, i.e. the de cuius' children, grandchildren, great-grandchildren, etc. without limit of rank;

[32] VERESS, E. – SZÉKELY, J.: *Drept Civil. Moştenirea. Liberalităţile.* Ed. C. H. Beck, Bucureşti, 2020, 2.
[33] VERESS, E. – SZÉKELY, J.: *Drept Civil. Moştenirea. Liberalităţile.* Ed. C. H. Beck, Bucureşti, 2020, 3.
[34] VERESS, E. – SZÉKELY, J.: *Drept Civil. Moştenirea. Liberalităţile.* Ed. C. H. Beck, Bucureşti, 2020, 5.
[35] Art. 963. Civil Code.
[36] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile.* Universul Juridic, Bucureşti, 2013, 3.

- Class II - this comprises the decedent's ascendants and privileged collaterals, i.e. the decedent's parents as well as the decedent's brothers and sisters and their descendants up to and including the fourth degree.

- class III - this comprises the decedent's ordinary ascendants, i.e. his grandparents and great-grandparents, with no limit to the degree;

- class IV - this comprises the ordinary collaterals, i.e. uncles, aunts, first cousins, brothers and sisters of the decedent's grandparents.[37]

After specifying the classes of heirs, we will talk about inheritance from descendants, or in other words inheritance of the second class, i.e. of ascendants and privileged collaterals.

Privileged ascendants are the parents of the deceased, by marriage, out of wedlock, adoption or assisted human reproduction with a third party donor.

There is no doubt that the parents by marriage as well as the mother out of wedlock would be entitled to inherit. A questionable issue, however, is that of the father out of wedlock and the parents of the deceased in the case of adoption with limited effects; for this reason some clarifications should be included.[38]

Since there is no express legal text concerning the inheritance rights of the father outside the marriage and, as a principle, no one has a right of succession without an express legal consecration, today we can no longer question his right to inherit his deceased child. The basis of this right is the objective filiation link between parent and child, as well as the principle of equality of the sexes and reciprocity of the right to inherit. On the other hand, Article 500 of the Civil Code, as well as Article 106 of the former Family Code, stipulates that "The parent has no right to the child's property and the child has no right to the parent's property, except the right to inheritance and maintenance". Thus, even if not directly, the legislator recognises the father outside marriage as the heir to his child when it provides that a parent has no rights over the child's property other than the right to inherit and the right to maintenance.[39]

If the filiation of the child out of wedlock has been established by acknowledgement, and this acknowledgement has been made solely for the purpose of creating a right of succession for the father, the acknowledgement shall be deemed to be absolutely null and void.[40]

The parents will be entitled to inherit their child even if the marriage has been declared null and void or voidable, since the nullity of the marriage has no effect on the children, who retain their status as children of the marriage.[41]

[37] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile.* Universul Juridic, Bucureşti, 2013, 4.
[38] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile.* Universul Juridic, Bucureşti, 2013, 14.
[39] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile.* Universul Juridic, Bucureşti, 2013, 14.
[40] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile.* Universul Juridic, Bucureşti, 2013, 14.
[41] Art. 305 Civil Code

It should be noted that in the case of adoption with full effects, the adoptee is no longer related to his or her natural parents, regardless of whether they are married or not; they have no right of inheritance to the adopted child. In the case of adoption with limited effects, however, there is a much more complex problem: the adopted child's natural parents' right to inherit is maintained, because their family ties are maintained. Both the adopters and the child's natural parents have a right of inheritance.[42]

Since the Civil Code regulates medically assisted human reproduction with a third party donor, parents who have consented to this method of human reproduction have the status of privileged ascendants with a right to inherit. However, the third-party donor does not have the right to inherit.[43]

2.2.3. Possibility of inheritance of the surrogate mother

As we clarified before, surrogate mother is usually a woman who carries and delivers a child for the benefit of another couple. This way of human reproduction can be of two kinds, direct surrogacy, or gestational surrogacy. We speak of direct surrogacy, or traditional surrogacy when the surrogate mother is inseminated with the semen of the husband of the couple in question.[44] The other way, i.e. gestational surrogacy, is when a sperm and egg from one couple are fertilised by IVF and transferred to a surrogate mother.[45] These modalities are similar to those classified as medically assisted human reproduction with third-party donor.

From the above-mentioned inheritance law we can conclude that the surrogate mother can be considered as an ascendant of the child born (de cuius), the privileged ascendants being the parents of the deceased, by marriage, parents out of wedlock, parents by adoption or those of assisted human reproduction with a third party donor.[46]

From this detail we can draw a conclusion that the surrogate mother, being assimilated to the parent through assisted human reproduction with a third party donor, could have a right to inherit the deceased child. The Civil Code regulates medically assisted human reproduction with a third party donor, with parents who have consented to this method of human reproduction having a right to inherit as privileged ascendants. The third party donor will not be entitled to inherit.[47]

[42] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile*. Universul Juridic, Bucureşti, 2013, 14.
[43] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile*. Universul Juridic, Bucureşti, 2013, 14.
[44] https://www.researchgate.net/publication/299947629_Surrogacy (date of download: 14/04/2023).
[45] https://www.researchgate.net/publication/299947629_Surrogacy (date of download: 14/04/2023).
[46] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile*. Universul Juridic, Bucureşti, 2013, 14.
[47] BACACI, A. – COMĂNIȚĂ, G.: *Drept civil. Succesiunile*. Universul Juridic, Bucureşti, 2013, 14.

However, the lack of necessary regulation of this legal issue leaves room for doubts and uncertainties.

An undoubted problem in acquiring the right to inherit the deceased child of the surrogate mother in my opinion could be, that this right is only useful in the context of direct surrogacy, where the surrogate mother does not give up the child in favour of the assignee couple; as such she will remain the biological mother of the child, the surrogate mother would have the necessary inheritance vocation to inherit from the de cuius as a privileged ascendant. Thus the former surrogate mother would become a mother out of wedlock, and there would be no doubt as to the claim of the mother out of wedlock.

2.3. Concordances in surrogacy and contracts

2.3.1. The contract between the parties

A surrogacy contract is an agreement between the assignee parents (also called commissioners) and the woman carrying the child, the natural or surrogate mother. The child is conceived through an IVF procedure using the genetic material of the assignee parents, a donor or a combination of these, and then implanted in the womb of the birth mother. She then carries the child to term, gives birth to it, and under the contract terms hands the child over to the assignee parents, she having no rights or responsibilities for the child. Instead, the surrogate mother is paid for her services.[48]

Such contracts are big business, a global industry estimated at $6 billion. It is growing; it is sought by couples with fertility problems, singles and same-sex couples.

Often the arrangement is viewed through the prism of freedom of contract.

The practice is somewhat unregulated and this leads to a kind of "jurisdictional chaos".[49]

Indeed, the surrogacy industry has been called the "Wild West" by a prominent surrogacy lawyer who was sent to federal prison for her involvement in baby-selling schemes purporting to be legitimate surrogacy arrangements.[50] The disbarred lawyer said this was just the "tip of the iceberg" in terms of abuses in the surrogacy industry in the United States. She was not alone in the baby-selling ring: another high-profile

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[48] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 754.

[49] DRABIAK, K.: Ethics, Law and Commercial Surrogacy: A Call for Uniformity. *Journal of Law, Medicine & Ethics*, vol. 35., 2007, 302–303.

[50] Convicted Surrogacy Attorney: I'm Tip of Iceberg, NBC San Diego (29.02.2012) http://www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-AbuseSelling-Babies-140942313.html (date of download: 16/04/2023).

lawyer and a surrogate were also part of the operation. The owner of a surrogacy agency, sentenced to prison for fraud, said: "Here's a little secret for you all. There's a lot of treachery and cheating in IVF/surrogacy because there's a lot of money to be made."[51]

2.3.2. Freedom to contract, or limitation of freedom to contract?

Surrogacy contracts do not fall within the realm of contractual freedom, but rather within that of the limitation of contractual freedom. The human being, the improvement of the human condition and the common good require both the affirmation and limitation of this freedom, given that the parties to a contract are rational but imperfect beings. Specifically, with regard to surrogacy, although it is a deep-seated human desire to have a genetic child, the absence of which can be deeply disappointing and painful, surrogacy contracts inherently exploit the birth mother and child. Having weighed the competing interests and costs of surrogacy, we can conclude that surrogacy should be banned, or more severely regulated, because it may be contrary to a public policy geared towards human flourishing, or being more fully human.[52]

At the heart of surrogacy issues is the tension between contractual freedom and public policy aimed at improving the human condition. People are free to enter into contracts and, as a rule, courts respect contractual freedom. In general, people enter into a contract because the agreement improves life in some way, indeed. Thus, it is good for the state not to stand in the way of such agreements. The law has long recognized that certain contracts are void as contrary to public policy, certain things are not left - properly - to the consent of the parties and their freedom to contract. The question of interest is therefore: what makes certain contracts not in the wide open space of freedom of contract, but outside the limits of that freedom.[53]

2.3.3. Ethical issues

Although the deep desire to have a genetic offspring is engraved in our being, surrogacy has costs that need to be weighed. Assignee (commissioning) parents have a strong and innate desire to have a child with their own genetic makeup; after being affected by the deep pain and devastation of infertility, the child obtained through surrogacy is greatly desired and loved. But at what cost to the individual and the

[51] LEWIN T.: A Surrogacy Agency that Delivered Heartache, New York Times (27.07.2014), https://nyti.ms/1l5VkkC (date of download: 16/04/2023).
[52] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 759.
[53] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 761.

common good? In other words, against the meritorious interest of one party to the surrogacy contract, how might surrogacy affect the other party to the contract? Moreover, how would it affect the resulting child, whom the contract brings into existence and whose existence is thus irreversibly marked by the contract, but who is not a party to it?[54]

Important links between birth mother and child are trivialised.

Although the genetic constitution of the child (often of the commissioning parents) is indisputably important and fundamental as a matter of identity, the growing science of epigenetics, attests to the biological parentage of the birth mother as well, regardless of the source of the DNA of the child born through surrogacy.

Oxytocin, a hormone present in greater quantities during pregnancy and released during birth promotes the bond between mother and newborn, linking baby to mother and mother to baby.[55]

The loss of strong ties between mother and child through surrogacy contracts is an extreme alienation, this eventuality is the cause of "market invasion" in a deeply private domain. This is so because the womb should not be considered or treated as a "commodity." Studies show that many women consider themselves a mother to a child they carry in their wombs, even if the baby is not genetically related to them; in their minds, the gestational bond links them to the child as much as a genetic bond.[56]

The writers of the popular 90s comedy TV show Friends put it like this when Phoebe, one of the characters on the show became a surrogate for her half-brother and his wife: "I'm just the oven, it's totally their meatloaf." But certain things are not appropriate to be surrendered by contract being too sacred. The womb and gestational services should not be alienable because pregnancy or gestation is different from other kinds of work women do and can provide under contract. It is part of who a woman is, at her core.[57] It is not and should not be considered an employment contract. Those who argue that a surrogacy contract is nothing more than a contract for the provision of services are missing this important aspect.

The surrogate mother is in a situation where commissioning parents, almost always wealthier, exercise their freedom to enter into reproductive contracts by entering into a contract with her. But her consent to the contract in this case can be

[54] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 774.
[55] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 775.
[56] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 777.
[57] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 780.

influenced by exploitation and is vulnerable to abuse. Surrogacy disproportionately involves poorer and less educated women signing a contract to be surrogate mothers. The reality is that few women would agree to provide their gestational services for purely altruistic reasons, even though a desire to help can be mixed with pecuniary interests.[58]

Concern that women are exploited in surrogacy contracts drives public policy considerations against them. If things in life are measured by their value and monetized, it is supposed to be in the direction of the full development of human possibilities or human flourishing. But the commercialization of the womb, and therefore the woman's body, leads to the exact opposite of human development. It trivialises the important and powerful bonds between mother and child born, treats the womb as merely an object, makes motherhood transactional and alienable, even in the face of questionable consent in what is supposed to be the context of freedom of contract, and knowingly introduces risks for the birth mother in relation to surrogacy. These are the costs of surrogacy not needing to assume or require commissioning parents to think of the birth mother in such stark terms. Rather, they are inherent in the surrogacy contract. Certain things are not appropriate to contract away, they are too sacred. Because embodiment matters and is constitutive of our humanity, when we sell our bodies, we sell who we are, we "sell our souls".[59]

Applying the practical reasoning to surrogacy and contracts, surrogacy arrangements are properly outside the bounds of contract law. Contractual freedom lies within these limits, but what is not properly contracted for, even when based on consent, lies outside them. Practical rationality requires that contractual freedom be limited in the case of surrogacy, even if it affirms this freedom in general. It is this limitation that protects human development, given that human beings are imperfectly rational beings. Practical rationality guides a community towards justice, the common good and a fuller humanity.[60]

3. Jurisprudence

In this chapter I will present some relevant cases on surrogacy.

[58] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 785.
[59] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 789.
[60] ALLEN, A-A.: Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human. *Harvard Journal of Law & Public Policy,* vol. 41 nr. 3/2018, 811.

3.1. Mennesson v. France and Labassee v. France (26 June 2014)

These cases concern the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who benefited from this treatment. In both cases, the applicants complained in particular that, to the detriment of the best interests of the children, they were unable to obtain recognition in France of parent-child relationships which had been legally established abroad. The European Court of Human Rights found, first of all, that in the present cases, Article 8, the right to respect for private and family life, of the European Convention on Human Rights was applicable to both its "family life" and "private life" aspects. On the one hand, there was indeed no doubt that the applicants had cared for the children as parents since their birth and that they had lived together in a way which was indistinguishable from "family life" in the accepted sense of the term. On the other hand, the right to identity was an integral part of the concept of privacy and there was a direct link between the privacy of children born as a result of surrogate treatment and the legal determination of their parentage. Next, the Court observed that the interference with the applicants' right to respect for their private and family life resulting from the refusal of the French authorities to recognise the legal parent-child relationship was "in accordance with the law" within the meaning of Article 8 of the Convention. The Court also accepted that the interference in question pursued two of the legitimate aims listed in Article 8, namely "protection of health" and "protection of the rights and freedoms of others". It noted in this regard that the refusal of the French authorities to recognise the legal relationship between children born as a result of surrogacy treatment abroad and the couples who had benefited from such treatment was based on a desire to discourage French nationals from resorting outside France to a reproductive technique prohibited in that country, with the aim, in the authorities' view, of protecting the children and the surrogate mother. Finally, examining whether the interference was "necessary in a democratic society", the Court stressed that a wide margin of appreciation must be left to the states in making decisions on surrogacy, given the difficult ethical issues involved and the lack of consensus on these matters in Europe. However, this margin of appreciation was narrow when it came to parentage, which involves an essential aspect of the identity of individuals. The Court also had to verify whether a fair balance had been struck between the interests of the State and those of the individuals directly involved, with particular reference to the fundamental principle that, whenever children are involved, their best interests must prevail. In both cases, the Court held that there had been no violation of Article 8 of the Convention in respect of the applicants' right to respect for their right to family life and no violation of Article 8 of the Convention in respect of the children's right to family life. children's right to respect for their private life.

The Court noted, in particular, that the French authorities, although aware that the children had been identified in the United States as the children of Mr and Mrs Mennesson and Mr and Mrs Labassee, nevertheless denied them that status under French law. She felt that this undermined the children's identity within French society. In addition, the Court noted that the case law completely precluded the establishment of a legal relationship between children born as a result of - legal - surrogacy treatment abroad and their biological father's children. This went beyond the wide margin of appreciation left to the states in the sphere of surrogacy decisions.[61]

4. Conclusions

In a first overview, we looked at what a surrogate mother is and what surrogacy is. Surrogacy is an arrangement between the assignee and the surrogate mother, whereby the woman, i.e. the surrogate mother, carries the newborn child and hands it over to the assignee shortly after birth.

A frequently mentioned issue in relation to this topic is the ethics of surrogacy. Taking into account some important aspects we can show that in the vast majority of cases surrogacy is more of a business and in no way can it be considered ethical.

A first argument could be the loss of the strong bonds between mother and child through surrogacy contracts, which constitutes an extreme alienation, this eventuality is the cause of the "market invasion" in a deeply private field. This is so because the womb should not be considered or treated as a "commodity."

A second argument would be that women are exploited in surrogacy contracts. If things in life are measured by their value and monetized, it is supposed to be in the direction of the full development of human possibilities or human flourishing. But the commercialization of the womb, and therefore the woman's body, leads to the exact opposite of this desideratum. It trivialises the important and powerful bonds between mother and child born, treats the womb as merely an object, makes motherhood transactional and alienable, even in the face of questionable consent in what is supposed to be the context of freedom of contract, and knowingly introduces risks for the birth mother in relation to surrogacy.

We can conclude that a surrogacy contract cannot be considered an ethical contract. The only way in my opinion in which this contract could be ethical is if it happened in a purely altruistic way in between the parties.

Another very important statement in terms of the theme of this work is the inheritance of the surrogate mother.

As has been stated several times throughout this paper the surrogate mother can only inherit in one way after the de cuius and this method could only be achieved in

[61] https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf (date of download: 21/04/2023).

the context of direct surrogacy, whereby the surrogate mother does not give up the child in favour of the assignee couple, so she will remain the biological mother of the child, whereby the surrogate mother has the necessary vocation of inheritance to inherit from the de cuius as a privileged ascendant. Thus the former surrogate mother would become a mother out of wedlock, and there would be no doubt as to the call of the mother out of wedlock to inherit.

The most important thing according to the deductions in the issue of inheritance of the surrogate mother and especially in the issue of surrogacy is to legislate this area in a similar way to human reproduction with third party donors.

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An overview of Iranian laws concerning the criminal liability of legal entities

Abstract: The concept of holding legal entities accountable for criminal offenses has evolved over time, facing challenges related to criminal intent and societal perceptions. Prior to the Islamic Revolution in Iran, criminal responsibility for legal entities was not explicitly addressed in various laws, leading to inconsistent approaches. However, after the revolution, several laws were enacted that established the responsibility and punishment of crimes for legal entities. The cybercrime law approved in 2009 was particularly significant, explicitly addressing the criminal liability of legal entities in cybercrimes. The enactment of the Islamic Penal Code in 2013 further solidified the principle of criminal liability for legal entities, emphasizing that both natural persons and legal entities can be held responsible for criminal behavior.
Keywords: Criminal liability, legal entity, Iranian laws, Criminal Proceeding

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1. Introduction

During the period from 1870 to 1930, the concept that criminal intent is necessary for committing a crime posed challenges to holding legal entities accountable. However, when legal entities failed to fulfill their assigned obligations according to the law, they could be held criminally liable for acts of omission. The only guarantee for enforcing this liability was the payment of monetary penalties. This responsibility stemmed from the perception that legal entities were established to carry out specific duties and obligations, and if they were negligent or unable to fulfill those obligations, they, rather than their individual members, were held responsible. The theory of vicarious liability was commonly used to attribute criminal liability to legal entities during this period[1]. The evolution of criminal liability for legal entities faced significant obstacles due to the nature of traditional criminal law and the issue of criminal intent. Legislators believed that legal entities could not commit crimes against individuals, provide false testimony, or betray the

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[1] BIRLA, R.: *Stages of capital: Law, culture, and market governance in late colonial India*. Duke University Press, 2009.

country, as these crimes were characterized by the corrupt intentions of individuals. Such acts were seen as violations of social obligations assigned to natural persons, and legal entities were not deemed to have these obligations, therefore excluding them from being recognized as criminals. Additionally, there was a prevailing belief that committing a crime required a voluntary act based on understanding and consciousness, which surpassed the abilities and capabilities of a legal entity[2].

By the late 1940s, significant progress was made in shaping the modern concept of criminal liability for legal entities beyond simple material crimes and vicarious liability. This advancement was driven by the emergence of the doctrine of genuine originality, which argued that legal entities should be directly responsible for committing criminal offenses, even those requiring criminal intent. Under this new form of responsibility, legal entities were held personally accountable for their actions because they could be identified with the actions of their managers and senior officers[3]. It was assumed that these actions represented the entity's own actions. However, in cases involving material crimes, legal entities were only held responsible based on the previous theory of substitution. Following these developments, legal experts defined and elucidated the concept of criminal liability for legal entities. The definition of a crime involving legal entities is not fundamentally different from general criminal laws. However, in general, the crime of a legal entity refers to any unlawful activity undertaken by the principal agent in the guise of a legal entity, seeking to further the entity's material interests rather than the personal interests of individuals. It is important to recognize that the relative complexity and elusive consequences of criminal activities involving legal entities are often concealed from society, while the resulting physical and economic damages can be substantial[4].

Throughout different laws before and after the Islamic Revolution, legal entities were recognized in Iran. However, it is important to note that specific provisions regarding the criminal liability of legal entities were absent from the legal framework. It was not until significant developments in the legal system that this issue was addressed. One notable milestone occurred in 2009 with the introduction of cybercrime legislation, which provided a comprehensive framework for addressing criminal offenses committed by legal entities in the context of cyber activities. Another crucial development took place in 2013 with the enactment of the Islamic Penal Code, which included provisions explicitly addressing the criminal liability of legal entities. These legislative advancements marked significant progress in the legal system, establishing a clear framework for holding legal entities accountable for their

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[2] SOLTANI, S., – RAMAZANI, A.: Criminal Liability and Crime and Punishment Proportionality in the Crime of Legal Entities. *J. Pol. & L.*, 2016/9, 61.

[3] LAUFER, W. S.: *Corporate bodies and guilty minds: The failure of corporate criminal liability*. University of Chicago Press, 2008.

[4] HALL, J.: *General principles of criminal law*. The Lawbook Exchange, Ltd., 2010.

criminal actions and ensuring greater transparency and justice in the legal landscape of Iran.

2. Before the Islamic Revolution in Iran

The issue of criminal liability for legal entities remains a contentious topic in criminal law across different countries. The lack of a consistent and universally accepted doctrine in this area has led to varying approaches and conflicting procedures in different legal systems. In ancient times, judicial systems in uncivilized societies held an extreme belief regarding criminal responsibility, extending it to animals, objects, and even the deceased, subjecting them to trials and punishments[5]. Conversely, a notion emerged in legal systems that granted immunity from responsibility to the upper classes of society, which contradicted the principle of universal criminal responsibility[6].Over time, this perspective gradually lost credibility. While the principle of universal criminal responsibility extended liability to all natural persons, no criminal responsibility was initially attributed to legal entities. Consequently, individuals protected by legal entities could potentially be exempt from criminal liability.

To gain a better understanding of the concept of a legal entity and its liability, it is important to refer to its definition. A legal entity refers to any business or organization that possesses legal rights and obligations, including the ability to file taxes. It is an entity that can enter into contracts, either as a supplier or a vendor, and can be involved in legal disputes as a plaintiff or defendant. Legal entities are structured in a way that offers protection for personal assets, shielding them from potential litigation and legal consequences[7].The level of protection and tax responsibilities may vary depending on the type of entity. While the concept of a legal entity is globally understood as a company or organization with legal rights and responsibilities, its specific form may vary. Article 587 of Iran's Trade Law states that government and municipal institutions and organizations possess legal personality from the moment of their creation without the need for registration[8].This implies that legal personality is applicable to all types of companies, institutions, and similar entities that are established by the will of their founders. In defining a legal person, it can be described as a hypothetical and

[5] HASNAS, J.: The centenary of a mistake: One hundred years of corporate criminal liability. *Am. Crim. L. Rev.*, 2009/46, 1359.
[6] TOMBS, S. – WHYTE, D.: *Scrutinizing the powerful: Crime, contemporary political economy, and critical social research.* Unmasking the Crimes of the Powerful, 2003. 3-48.
[7] BEBCHUK, L. A. – HAMDANI, A.: The elusive quest for global governance standards. *U. pa. L. rev.*, 2008/157, 1263.
[8] FARD, M. R. M. – ZADEH, M. K. E. – TABIBI, M.: The Study of Structural Vulnerability of Islamic Councils in Iran's System of Law. *Journal of Politics and Law*, 2016/9(10), 194-202.

credible entity created by humans for a specific purpose and capable of being a party to legal actions or possessing rights.

According to the laws of Iran, the concept of legal personality was initially introduced in the Trade Law of 1925 and further elaborated upon in the Trade Law of 1932[9]. Although Iran's legal system has a relatively short history, the principles of legal personality and its associated responsibilities can be understood within the context of Islamic jurisprudence and law. The notion of collective responsibility beyond individual members and the concept of individual responsibility both play a role in this understanding. The term "legal entity" was first used in the Iranian Trade Law of 1925, and subsequent laws, such as articles 1335 and 1002 of the Civil Code, also mention legal entities[10]. While a specific definition of legal entities is lacking in Iranian laws, combining information from various sources and examining relevant legal articles allows for a reasonable understanding of their definition. Prior to the Islamic Revolution of Iran in 1979, other laws in different fields referred to the criminal responsibility of legal entities. For instance, Article 4 and 5 of the regulations on medical and pharmaceutical affairs and food and beverage, approved in 1955, mentioned the closure of institutions as a measure to enforce violations committed by legal entities[11]. Similarly, Article 15 of the Security Measures, approved in 1960, stated that fines and institution closures could be imposed as punishments for legal entity violations. Additionally, Article 8 of the Law on Translation of Books, Publications, and Audio Works, approved in 1973, stated that damages resulting from a legal entity's violation would be borne by the responsible natural person whose decision led to the crime[12]. Article 109 of the Social Security Law, approved in 1975, further specified that if the employer is a legal entity, criminal liability under the law would be attributed to the company or any other person whose actions or omissions caused loss or damage to the organization or the insurance company[13]. It appears that in these aforementioned laws, the Iranian legislator aimed to hold the material agent accountable for crimes committed by legal entities, thereby encompassing those individuals who participated in making wrongful decisions in some capacity[14].

[9] SOKHANVAR, M. – HOSEYNI, S. A.: Possibility or impossibility of rehabilitation of legal entities and its condition in trade law act of 1311 looking to trade reform bill. *Journal of Legal Research*, 2014/13(26), 57-70.
[10] HABIBZADE, M. J. – SHARIFI, M. – ISAEI TAFRESHI, M. – FARAJIHA, M.: Transformation of Criminal Liability of The Legal Persons In Iran. *The Judiciarys Law Journal*, 2013/77(82), 117-159.
[11] PIROUZ, A. S. – NAJAFI, S.: The approach of criminal law towards drug sales in cyberspace. *Journal of Advanced Pharmacy Education & Research*, Apr-Jun, 2019/9(S2).
[12] MALMIR, M. – ZAR ROKH, E. – AGHA MIR ALI AKBAR, M.: Manipulation and Distortion in Literal and Artistic Works Under Iranian Criminal Law: Criminological Study. *Forensic Research & Criminology International Journal* ISSN, 2015. 2469-2794.
[13] NIKOPOUR, H.: *Business cycles and policy making in social insurance systems the case of Iran (1962-2004).* 2005.
[14] MESSKOUB, M.: Social policy in Iran in the twentieth century. *Iranian Studies*, 2006/39(2), 227-252.

3. After the Islamic Revolution in Iran

Following the Islamic Revolution of Iran in 1979, several laws were enacted in various fields, establishing the responsibility and punishment of crimes for legal entities. The Iranian Constitution, specifically Article 172, establishes the Court of Administrative Justice, which is tasked with addressing violations committed by legal entities[15]. Article 11 of the Court of Administrative Justice Law, approved in 1982, outlines the jurisdiction, limits, and powers of this court, specifically mentioning government entities, municipalities, revolutionary organizations, and their affiliated institutions[16]. Furthermore, the 1989 Government Penalties Law, in Article 17, includes fines as a form of punishment for legal entities[17]. Additionally Iranian Trade Association Law (1980)[18], specifies in Article 76 that in cases where legal entities are held liable according to this law, the managing director or responsible manager of the legal entity, who issued the order, shall be considered the perpetrator, and the punishment shall be imposed on them. These laws reflect the recognition of legal entities as independent entities with their own responsibility and the establishment of mechanisms for holding them accountable for their actions. The focus is often directed towards the individuals who occupy key positions within the legal entity and are deemed responsible for the decisions and actions taken on its behalf.

In the mentioned laws and regulations, the Iranian legislator has addressed the criminal responsibility of legal entities on a case-by-case basis. However, it was in the cybercrime law approved in 2009 that the legislator specifically and comprehensively addressed the criminal liability of legal entities. This law dedicates its sixth chapter to the issue of criminal liability of legal entities in cybercrimes. One of the significant changes introduced by this law is the establishment of criminal liability for legal entities, as outlined in Articles 19 and 20[19]. Article 19 states that a legal entity will be held criminally liable in the following cases, when cybercrimes are committed in the name of the legal entity and in line with its interests:

[15] ZAR ROKH, E.: Iranian judicial system (court's structure). *Islamic Law and Law of the Muslim World Paper*, 2007. (07-02).
[16] MAZHARI, M. – KHELEJAN, F. J. – MONADI, F.: A comparative study on the duties of the authorities handling the violation and breach of law by the administrative units in Iran and France. *PalArch's Journal of Archaeology of Egypt/Egyptology*, 2021/18(4), 2248-2268.
[17] YUSOFF, J. Z. M. – MOUSAVI, S. – DUSUKI, F. N. – RASTEGARI, B.: A critical legal analysis on the minimum age of criminal responsibility in the new Islamic punishment act of Iran. *UUM Journal of Legal Studies*, 2014/5, 31-50.
[18] IRANIAN TRADE ASSOCIATION LAW. Retrieved from [https://rc.majlis.ir/fa/law/show/94011] (1980).
[19] PAKZAD, B. – GHASSEMI, GH. Cybercrimes in Iran: Perspectives, Policies and Legislations. *Proc. ISP C*, 2012. 139.

a) When the manager of a legal entity commits a computer crime.

b) When the manager of a legal entity issues an order to commit a computer crime and the crime is carried out.

c) Whenever an employee of a legal entity commits a computer crime with the knowledge of the manager or due to the manager's lack of supervision.

d) When the activities of a legal entity, either in whole or in part, are dedicated to committing computer crimes.

These provisions establish the accountability of legal entities for cybercrimes and acknowledge the obligation of both managers and employees of the legal entity to be held responsible for their involvement in such offenses. By addressing the criminal liability of legal entities in the cybercrime law, the Iranian legislator has taken a significant stride in ensuring that organizations are held accountable for their actions in the digital domain. An important aspect that requires examination in this context is the discussion of proportional responsibilities and the interplay between the criminal liability of natural persons and legal entities. Note 2 of Article 19 does not perceive the criminal responsibility of legal entities as an impediment to the punishment of natural persons. However, the wording of the aforementioned article is somewhat misleading as it lacks explicit mention of the relationship between these two forms of responsibility. Nonetheless, it is important to acknowledge that punishment cannot be imposed until an individual is deemed responsible. Therefore, the content of Note 2 implies the possibility of simultaneous liability for both the legal entity and the natural persons who are affiliated with it. The discussion on the relationship between the responsibility of natural persons and legal entities delves into the various forms of connection between these two types of liability. It should be noted that these responsibilities share a common foundation and origin, as they arise from the serious breaches of obligations owed to society at large.

In the past decade, the Iranian legislator explicitly incorporated the criminal liability of legal entities into the Islamic Penal Code of 2013. This delay in implementing the law may be attributed to the influence of the French criminal justice system, which traditionally held a limited view on criminal liability for legal entities. In the French legal system, monetary penalties against legal entities are not accepted unless criminal responsibility of the natural persons comprising the entity is proven. However, civil liability resulting from wrongful acts has been acknowledged in French labor law for nearly eighty years, dating back to around 1940. Article 143 of the Islamic Penal Code stipulates that criminal responsibility primarily rests with natural persons, while legal entities bear criminal responsibility when their legal representative commits a crime in their name or in pursuit of their interests. The criminal liability of legal entities does not absolve the liability of natural persons who commit crimes[20]. The enactment of this law not only establishes the general principle of criminal liability for legal entities but also paves the way for the criminal liability of government legal entities in the realm of entrepreneurship. When the actions of natural persons have the potential or actual benefit for a legal entity whose domain is business and commercial affairs, the legal entity should be held accountable. Article 143 emphasizes that the criminal liability of a legal entity does not nullify the criminal liability of a natural person who commits a crime, thus invoking the principle of multiple liability. To attribute a crime to a legal entity, it is necessary to establish the involvement of the legal representative and prove all the elements, both material and mental, of the crime as specified in the law. Consequently, both the culpable legal representative and the legal entity are subject to their respective legal punishments[21].

4. Punishment of Legal Entities

Regarding the criminal liability of legal entities, as mentioned before, it is a contentious issue, and despite the amendment of the Penal Code and the allocation of conditions and obstacles to criminal liability, especially the criminal liability of legal entities, it has not yet obtained a precise and solid position in the provisions of the Islamic Penal Code. According to Article 20 of the new Islamic Penal Code, if a legal entity is held criminally liable under Article 143 of this law, in addition to the punishment of the natural person who committed the crime, up to three of the following measures may be imposed on the entity:

- Dissolution of the legal entity.
- Prohibition from engaging in one or more professional or social activities permanently or for a maximum period of five years.
- Prohibition from publicly soliciting for capital increase permanently or for a maximum period of five years.
- Prohibition from issuing commercial documents for a maximum period of five years.
- Monetary fines.
- Confiscation of property.
- Publication of the conviction judgment through media outlets.

The apparent interpretation of Article 20 suggests that a legal entity is only subject to punishment if the natural person who committed the crime is also

[20] SHARIFI, M.: Criminal liability of legal Persons in Iran and the French penal system. *The Quarterly Journal of Judicial Law Views*, 2023/21(75), 81-116.
[21] KARIMI, F. – ARDEBILI, M. A.: Criminal Liability for other Behavior by Looking at Vote in Courts. *International Journal of Multicultural and Multireligious Understanding*, 2021/8(9), 220-233.

punished[22]. This is because the article considers the punishment of the legal entity in addition to the punishment of the natural person. However, this logic is not reasonable because it is possible for the natural person to be exempt from liability in certain aspects, but it does not mean that the legal entity should remain immune from prosecution and punishment. When the accusation is directed at a legal entity, although the criminal liability and the extent of involvement of both the legal and natural persons are considered separately, it is questionable whether it is correct to pursue the natural person who is accused of committing the crime. If, during the proceedings, it is established, for example, that decisions were made by the legal entity without observing the quorum of the board of directors or the general assembly, or that the mentioned body was unlawfully appointed, then the legal entity may not be held responsible. Additionally, it can be imagined that the legal entity, under coercion or duress, engaged in unlawful activities or deviated from its legal obligations, in which case it may not bear criminal liability. The extent to which these issues are addressed and discussed in legal proceedings is still unclear. These matters, along with many others, such as suspension or conversion of penalties, reduction or aggravation of penalties, have not yet received judicial rulings or opinions, and legal scholars have not extensively addressed these topics.

Article 21 of the new law states that the number of monetary fines applicable to legal entities is a minimum of twice and a maximum of four times the amount specified in the law for the commission of the offense by natural persons. Furthermore, article 22 addresses the dissolution of legal entities and the confiscation of their assets. It discussed that the dissolution of a legal entity and the confiscation of its assets are implemented when the entity has been established to commit a crime or, in pursuing its initial legitimate purpose, has exclusively changed its activities towards the commission of a crime[23].

However, lawmakers always strive to hold the physical perpetrator responsible for the commission of a crime, meaning those who have actively attempted to carry out unlawful decisions. With this perspective, the criminal liability of legal entities is inconceivable without the criminal liability of natural persons. However, sometimes, despite strong evidence of the crime, due to the breadth and organizational complexity of legal entities, it can be difficult to attribute the crime to the actions of a specific manager. This is one of the reasons that have strengthened the identification of criminal liability for legal entities. Additionally, one aspect in which the criminal liability of legal entities has an advantage over the liability of natural persons is the ease of enforcement of penalties in cases where the directors or

[22] RANJBAR, H. – NOURAEI, Y. – ROKNI, M.: Sentence Enforcement Postponement of and Penalty Suspension in Legal Entities. *Mediterranean Journal of Social Sciences*, 2016/7(5 S1), 119.
[23] ABDOLLAHI, A. – BIABANI, N.: Subordinate penalties of legal entities and rehabilitation from these punishments. *Criminal Law Research*, 2022/13(1), 151-176.

managers of the legal entity are insolvent, as the assets of the legal entity alone can compensate for the payment of monetary fines.

5. Conclusion

The article discusses the evolution of criminal liability for legal entities in Iran before and after the Islamic Revolution. Prior to the revolution, criminal responsibility for legal entities was not explicitly addressed in various laws, but scattered laws mentioned punishments such as institution closures and fines for violations committed by legal entities. After the revolution, several laws were enacted to establish the responsibility and punishment of crimes for legal entities. The Court of Administrative Justice was established, and fines were recognized as a form of punishment for legal entities. However, it was in the cybercrime law approved in 2009 that the legislator comprehensively addressed the criminal liability of legal entities, specifically in the context of cybercrimes. The law outlined cases where legal entities could be held criminally liable, including when managers, employees, or the activities of the entity are involved in computer crimes. The Islamic Penal Code of 2013 further recognized the criminal liability of legal entities and emphasized that their liability does not absolve the liability of natural persons who commit crimes.

The evolution of criminal liability for legal entities in Iran reflects a gradual recognition of their responsibility for criminal acts. Initially, the concept of criminal liability for legal entities was not well-established, and the focus was on holding individual members accountable. However, over time, laws were enacted to address the responsibility of legal entities, including fines and institution closures. The cybercrime law of 2009 marked a significant step in explicitly recognizing the criminal liability of legal entities in the context of cybercrimes. Subsequently, the Islamic Penal Code of 2013 solidified the general principle of criminal liability for legal entities and established that their liability does not exempt natural persons from responsibility. Overall, these developments demonstrate the growing recognition of legal entities as independent entities with their own accountability, ensuring that organizations are held responsible for their actions in various domains, including cybercrimes. Despite the amendment of the Penal Code and the allocation of conditions and obstacles to criminal liability, especially the criminal liability of legal entities, it has not yet obtained a precise and solid position in the provisions of the Islamic Penal Code.

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SIPOS ALEXANDRA*

Mutatnak-e új mintázatokat az új típusú szerek? – A kábítószer helyzet aktualitásai Magyarországon

Absztrakt

Az új pszichoaktív szerek kábítószerpiacon történő tömeges megjelenése a magyarországi kábítószer-helyzet átalakulását eredményezte. Tanulmányomban, az epidemiológiai indikátorok mentén a hazai kábítószerhelyzet bemutatására törekszem. A legfrissebb kutatási eredmények tükrében ismertetem a droghasználat trendjeit a felnőtt- és fiatalkorú népesség körében, kitérek a kábítószerrel összefüggő fertőző betegségekkel és halálozással kapcsolatos adatokra, illetve a kezelési és prevenciós lehetőségekre. Továbbá, statisztikai adatokra támaszkodva bemutatom a kábítószer-bűnözés alakulását az elmúlt évek vonatkozásában.
A tanulmányom során kiemelt figyelmet fordítok az új pszichoaktív szerek megjelenése okozta változásokra, illetve arra, hogy az új szerek megjelenése eredményezett-e új mintázatokat.
Kulcsszavak: új pszichoaktív szerek, klasszikus szerek, kábítószerhelyzet, kábítószer-bűnözés, kezelés és prevenció

Abstract
The mass appearance of new psychoactive substances on the drugs market has led to a transformation of the drugs situation in Hungary. In my study, I aim to present the drug situation in Hungary along the lines of epidemiological indicators. In the light of the latest research findings, I will present trends in drug use among the adult and juvenile population, data on drug-related infectious diseases and mortality, and treatment and prevention options. I will also present trends in drug-related crime in recent years, drawing on statistical data.
In my study, I will pay particular attention to the changes caused by the emergence of new psychoactive substances and whether the emergence of new substances has resulted in new patterns.
Keywords: new psychoactive substances, classic illegal drugs, drug situation, drug related crime, treatment and prevention

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1. Bevezető gondolatok

Magyarországon az új pszichoaktív szerek tömeges megjelenése a 2009-es évre tehető. Az újonnan megjelent szerek közül legelterjedtebbé a szintetikus katinonok (pl. mefedron, kristály), a szintetikus kannabinoid származékok (pl. herbál, biofű) és az újfajta amfetaminok váltak, amelyek az ecstasyhoz hasonló hatást fejtenek ki. A szintetikus katinonok és az újfajta amfetaminok elterjedésének oka visszavezethető 2008-ra, amikor a hatóságok lefoglaltak egy Dél-Kelet-Ázsiából Hollandia felé tartó, több tonnányi szafrol-olaj szállítmányt. Ez a természetes alapanyagokból kinyerhető anyag az ecstasy tabletták egyik alapanyagát jelenti. A lefoglalást követően az ecstasy piacon hiány állt be, amely hiányt azonban pótolni kellett. Ennek hatására jelentek meg tömegesen az első új pszichoaktív szerek.[1]

A témában 2010 óta rendelkezésünkre álló felmérési és kutatási eredményeik, illetve tapasztalatok alapján elmondható, hogy az új pszichoaktív szerek megjelenése és rohamos elterjedése alapjaiban alakította át a kábítószer piacot azáltal, hogy a klasszikus, problémás használati mintázatban jellemző szereket (pl. heroin, kokain, amfetamin, marihuána) vissza szorította.

Tanulmányomban arra a kérdésre keresem a választ, hogy kábítószerpiacon jelentkező paradigmaváltás[2] vezetett-e új mintázatokhoz a kábítóprobléma egyes aspektusainak és a kábítószer-fogyasztás mintázatainak tekintetében.

A kábítószerprobléma epidemiológiai jellemzőiről, annak jellegéből és normatív megítéléséből adódóan nehéz hiteles képet adni. Az objektív, tényszerű, időben és nemzetközileg összehasonlítható adatok leírására a Kábítószer és Kábítószerfüggőség Európai Megfigyelőközpontja (*European Monotoring Centre for Drugs and Drug Addiction*, *továbbiakban: EMCDDA*) öt főindikátort hozott létre:[3]

1. Normálpopulációs vizsgálatok
2. Problémás kábítószer-fogyasztás
3. Kezelési igény
4. Kábítószerrel összefüggő halálozás
5. Kábítószerrel összefüggő fertőző betegségek

Magyarország esetében a rendszerváltást megelőző időszakról elsősorban bűnügyi statisztikai adatokkal rendelkezünk. Az EMCDDA által meghatározott indikátorokhoz kapcsolódó adatok mérése megkésve, az 1990-es évektől kezdődően

[1] SÁROSI P.: A pszichoterápiától a rave partikig: Az MDMA kultúrtörténete. Előadás: Drogriporter Szabadegyetem, Central European University, Budapest. 2020. január 16.

[2] RÁCZ J.: A kábítószer-probléma átalakulása a 80-as évektől. Nemzeti Drog Fókuszpont 10. éves jubileumi konferenciája, Budapest, 2014. november 11.

[3] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016

indult meg, azóta azonban valamennyi indikátorra nézve folyik adatgyűjtés. A hazai kábítószerhelyzet alakulásáról a Nemzeti Drogfókuszpont által, minden évben elkészített jelentés nyújt átfogó információt.[4] Az éves beszámolók az EMCDDA által meghatározott öt kulcsindikátor mentén készítik el. A dolgozatomban a rövid definíciós kérdések tisztázást követően, az egyes indikátorok mentén ismertetem az új pszichoaktív szerek szerhasználati mintázatokban bekövetkezett változásait. A tanulmányban kitérek az új típusú szerek kábítószer-bűnözésben való megjelenésére is, amely indikátor ugyan az EMCDDA által meghatározottak között nem szerepel, de az aktualitási kérdésektől nem lehet elválasztani. Az ismertetés során elsősorban a Nemzeti Drogfókuszpont éves jelentéseit és a témában elvégzett kutatások eredményeit veszem alapul.

2. Klasszikus kábítószerek és új pszichoaktív anyagok definiálása

A kábítószerek esetében a fogalmak meghatározása rendkívül sokszínű, amely a jelenséggel kapcsolatos terminológiában jelentős zűrzavart okoz. A köznyelvben a kábítószer és a drog kifejezést gyakran egymás szinonimájaként használjuk, és értünk alatta minden olyan szert, amit a jog értelmében tiltott használni. Azonban ameddig a kábítószer jogi fogalom, addig a drog kifejezés eltér a jogi értelmezéstől, és magába foglalja a legitim pszichoaktív anyagokat (pl. alkohol) is.[5] A fogalmi kérdések kavalkádját tovább fokozta az új pszichoaktív anyagok kifejezés megjelenése. Az egyértelműség kedvéért, mindenekelőtt fontosnak tartom a kábítószer és az új pszichoaktív anyag fogalmi pontosítását, egymástól való elválasztását.

Új pszichoaktív anyag alatt a forgalomban újonnan megjelent, kábítószerpiacon jelenleg kapható, dizájner drogok gyűjtőnéven is ismert[6], gyógyászati felhasználással nem rendelkező anyagokat vagy vegyületcsoportokat értjük.[7]A központi idegrendszer működésének befolyásolása révén alkalmas a tudatállapot, a viselkedés vagy az érzékelés megváltoztatására, módosítására. Hasonló mértékű, vagy nagyobb fenyegetettséget jelentenek a közegészségügyre, mint az ENSZ 1961. évi New York-i Egységes Kábítószer- egyezményét kihirdető jogszabály (2005. évi XXX. törvény), illetve az ENSZ 1971. évi bécsi Pszichoaktív Anyagokra vonatkozó Egyezményét kihirdető jogszabály (2005. évi XXX. törvény,

[4] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016

[5] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016

[6] SZÉCSI J. - SÍK D.: Szerhasználat egy hátrányos helyzetű járás szegregátumaiban. Esély, 2016, 28. évf. 2.sz.: 115-131.

[7] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016

illetve a 2013. évi CCXIX törvény) mellékletének jegyzékeiben található anyagok, de azokban nem szerepel.[8]

Ezzel szemben klasszikus kábítószerek alatt azokat az anyagokat kell érteni, amelyek a fent említett 1961. évi New York-i Egységes Kábítószer- egyezmény és az 1971. évi bécsi Pszichotróp Anyagokra vonatkozó Egyezmény jegyzékein feltűntetésre kerültek.[9]

3. Normálpopulációs vizsgálatok eredményei, mint kulcsindikátor

A normálpopulációs vizsgálatok eredményei egyike az EMCDDA által használt kulcsindikátoroknak. Az 1990-es évektől kezdődően mind a fiatalkorúak, mind a felnőttek körében végeznek vizsgálatokat a kábítószer-használattal összefüggésben, amelyeknek segítségével információt szerezhetünk a kábítószer használat elterjedtségéről és jellemzőiről. Az iskoláskorúak esetében az Európai iskolavizsgálat az alkohol és egyéb drogfogyasztási szokásokról (*European School Survey Project on Alcohol and Other Drugs*, továbbiakbak: ESPAD), az Iskolás korú gyerekek egészségmagatartása (Health Behaviour in School-aged Children, továbbiakban: HBSC) és az Ifjúságkutatás vizsgálja a szerhasználati szokásokat. A felnőttkorú (18-64) közötti lakosság kábítószer-használati jellemzőinek vizsgálata az Országos Lakossági Adatfelvétel az Addiktológiai Problémákról (továbbiakban: OLAAP) kutatás feladata.

3.1. Európai iskolavizsgálat az alkohol és egyéb drogfogyasztási szokásokról – ESPAD - kutatás eredményei

Az ESPAD kutatást 1995-ben végezték el először, azzal a céllal, hogy adatokat gyűjtsön a fiatalok dohányzással, alkohol és kábítószer-fogyasztással kapcsolatos szokásairól. A felmérésre azóta négy évente kerül sor, a 16. életévüket betöltött, nappali iskolarendben tanuló diákok körében. Az így rendelkezésünkre álló adatoknak köszönhetően időben és nemzetközileg összehasonlítható adatokat kapunk, amelyeknek segítségével mérhetővé válnak az egyes szerek fogyasztásban bekövetkező változások. [10] A vizsgálat során figyelembe kell venni, hogy a szerhasználatban folyamatos változások mennek végbe, így a lekérdezendő adatsort időről – időre módosítani szükséges. Az önkitölős módszerrel lekérdezett kérdőívek mindig tartalmazzák az EMCDDA által meghatározott standard kérdéseket, illetve

[8] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016
[9] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016
[10] ELEKES ZS. -ARNOLD P.- BENCSIK N.: Iskolások egészségkárosító magatartása 25 év távlatában. A 2019. évi ESPAD kutatás magyarországi eredményei. Budapest, 2020

ezek kiegészítésre kerülnek hazai, specifikus kérdésekkel is[11]. Az új pszichoaktív szerek 2010-től kezdődő tömeges elterjedésére reagálva, a 2015. évi felmérésbe kerültek be először az új típusú szerekre vonatkozó kérdések. A legfrissebb rendelkezésre álló adatok a 2019.évi vizsgálatból származnak.

Tanulmányom ezen részében a 2015. és 2019. évi ESPAD adatokra támaszkodva, annak bemutatására törekszem, hogy az egyes szocioökonómiai tényezőket figyelembe véve tapasztalható-e eltérés a klasszikus kábítószerek és az új pszichoaktív szerek fogyasztása között.

Az új típusú szerek megjelenése és térhódítás a fiatalok körében egyértelműen megmutatkozik. A leggyakrabban használt tiltott szer, a korábbi felmérésekhez hasonlóan, továbbra is a marihuána, de ezt szorosan követik az ÚPSZ-ek.[12] Az eredmények alapján a felmérésben résztvevők 18,7%-a nyilatkozott úgy, hogy élete során fogyasztott már valamilyen klasszikus vagy új pszichoaktív szert. A 2015. évi és a 2019. évi felmérés között az új típusú szerek életprevalencia érték tekintetében valamelyest csökkenés volt tapasztalható, amíg a 2015-ben a megkérdezettek 6,9%-a válaszolt úgy, hogy élete során fogyasztott már valamilyen új pszichoaktív szert, addig 2019-ben ez az arány már csak 4,6% volt. Nemzetközi összehasonlításban, mindkét évben a vizsgálatban résztvevő országok átlagánaknak megfelelő volt a hazai eredmény az új pszichoaktív szerek tekintetében, amíg a klasszikus szerek az átlag alatt maradtak. Amíg a klasszikus szer használatára a többszöri alkalommal való használat jellemző, addig a dizájnerek inkább csak egyszeri kipróbálás, kísérletezés szintjén jelennek meg. [13]

A *család*, mint elsődleges szocializációs közeg jelentős hatással van a kábítószer-használatra is. Amíg annak a lehetősége, hogy a gyermek teljes családban, vérszerinti szülőkkel nő fel, erős protektív tényezőként jelentkezik, addig a nevelésbe vett és örökbefogadott gyermekek esetében a családnélküliség jelentős rizikótényezőt mutat, mind a klasszikus szerek, mind az új pszichoaktív szerek tekintetében. Azok a gyermekek, akik vérszerinti szülő nélkül nőttek fel arányban fordulnak az új típusú szerekhez, mint a klasszikushoz.

A család összetétele is szignifikáns eredményeket mutat. A mozaikcsaládban felnővő gyerekek nagyobb eséllyel fordulnak az új típusú szerekhez, mint az egy szülővel felnővők. A klasszikus szerek tekintetében a családi összetétel nem mutat

[11] ARNOLD, P., BENCSIK, N., & ELEKES, Z.: Új szerek — új mintázatok? Dizájnerdrogok és klasszikus tiltott szerek társadalmi mintázata egy európai iskolai felmérés, az ESPAD hazai adatai alapján. *Egészségfejlesztés*, *62*(4), 13-30. https://doi.org/10.24365/ef.v62i4.7004
[12] ELEKES ZS. -ARNOLD P.- BENCSIK N.: Iskolások egészségkárosító magatartása 25 év távlatában. A 2019. évi ESPAD kutatás magyarországi eredményei. Budapest, 2020
[13] ARNOLD, P., BENCSIK, N., & ELEKES, Z.: Új szerek — új mintázatok? Dizájnerdrogok és klasszikus tiltott szerek társadalmi mintázata egy európai iskolai felmérés, az ESPAD hazai adatai alapján. *Egészségfejlesztés*, *62*(4), 13-30. https://doi.org/10.24365/ef.v62i4.7004

különbséget a két szertípus között. A szubjektív jólét is befolyásolja szerhasználatot. A klasszikus szerek fogyasztása a tehetősebb családok gyermekei között jelenik meg, az új típusú szerek pedig a rosszabb anyagi helyzetű gyermekeknél. Azokban a családokban, ahol a szülők magas iskolai végzettséggel rendelkeznek, sokkal inkább a klasszikus szerhasználat a jellemző. Amíg az alacsony iskolai végzettségű szülők esetén a dizájnerek kerülnek előtérben a fogyasztott szerek szempontjából.
A szubjektív családi mutatók közül a szülői kontroll és a családik kapcsolatok mutatnak szignifikáns eredményeket a szerfogyasztással kapcsolatban. Az alacsony szülői kontroll és a gyenge érzelmi kapcsolat rizikófaktorként jelentkezik mind a klasszikus, mind az új típusú szerek esetében.
Területi megoszlás szempontjából az új pszichoaktív szerek használata nem mutat szignifikáns eltérést az egyes település típusok és a település mérete szerint, ugyanolyan valószínűséggel fordul elő a nagyvárosban, mint a vidéki kisvárosban. Ezzel szemben a klasszikus szerek inkább a fővárosban és a nagyobb városokban jelentősebbek. Az *oktatási intézmények* vizsgálata során több szempontot is szükséges figyelembe venni a vizsgálat során (pl. iskolatípus, iskola fenntartója, iskola területi elhelyezkedése stb.) A klasszikus szerek mindegyik mutatóval szignifikáns összefüggést mutatnak, amíg az új típusú szerek esetében, csak az iskola típusával van szoros összefüggés. A szakiskolai képzésben résztvevők körében az új típusú szerek fogyasztása gyakoribb, mint a klasszikus szereké. Az iskola presztízsének növekedésével ez a tendencia megfordulni látszik, a gimnáziumokban már a klasszikus szerek életprevalencia értéke magasabb, az új pszichoaktív szerekkel szemben. Az oktatással összefüggésben jelentős protektív tényezőként jelenik meg az iskolai integráltság. Az igazolatlan (vagy akár igazolt) iskolai hiányzások magas száma gyakran jár együtt valamilyen klasszikus vagy pszichoaktív kábítószer használattal. Az *egészségtudatosság és mentális egészség mutató* valamint a szerhasználat között mind a klasszikus szerek, mind az új típusú szerek esetében csupán gyenge kapcsolat található. A mentális betegségek (pl. depresszió, szorongásos zavarok), a kirekesztettség érzése és az elszigeteltség növeli mindkét szertípus használatának esélyét. A *szociális kapcsolatokat* vizsgálva eltérő tendencia figyelhető meg a klasszikus szerek és az új pszichoaktív szerek fogyasztása tekintetében. Azok a fiatalok, akik erős baráti kapcsolatokkal, kiterjedt szociális hálóval rendelkeznek és többször járnak társaságba, inkább a klasszikus szerek – főleg marihuána - fogyasztását részesítik előnyben. A baráti kapcsolatokkal elégedetlenebb, elszigeteltebben élő fiatalok nagyobb eséllyel fordulnak az új pszichoaktív szerek fogyasztása felé. *Szabadidő* eltöltése szempontjából protektív tényezőként jelentkezik az alacsonyabb társas aktivitás. Azon fiatalok, akik a szabadidejük a családjukkal, vagy egyéni szabadidős tevékenységekkel (pl internetezés, sportolás, kirándulás) töltik, kisebb

eséllyel fogyasztanak valamilyen kábítószert, mint azok, akik szociális szempontból aktívabban (pl. bandázással, bulizással) töltik el a szabadidejüket.[14]

A fiatalkorú populáció körében elvégzett kutatás eredményei is némileg arra engednek következtetni, hogy a rosszabb társadalmi helyzetben lévők körében magasabb az új pszichoaktív szerek használatának valószínűsége és aránya. Azonban ezekből az eredményekből nem lehet egyértelmű következtetést levonni. Az ESPAD kutatás jelentős korlátja, hogy a vizsgálat a 16. életévet betöltött, nappali iskolarendben tanuló, a felmérés napján az iskolában megjelent diákok országos reprezentatív mintáján készül, osztályos lekérdezéssel, önkitöltős módszerrel. A szegregáltan vagy valamely sérülékeny csoporthoz tartozó fiatalok esetében azonban az a jellemző, hogy iskolaköteles korhatár, azaz a 16. életév betöltésével az iskolarendszerből lemorzsolódnak. Ezen társadalmi csoportok esetében sokkal gyakoribb, hogy ha gyermek 16 éves korát követően részt is vesz az oktatásban, akkor nem nappali iskolarendben tanulnak, hanem magántanulói státuszban. Illetve ezen gyermekek esetében gyakoribb az iskolából való lógás, így nagyobb eséllyel nem jelennek meg a vizsgálat napján az oktatási intézményben. Ezen okok miatt azok a sérülékeny csoportok, akik esetében az új pszichoaktív szerek használata feltételezhetően magasabb arányú, a mintába nem kerülnek be, ami az adatok torzítását eredményezheti.

3.2. Országos Lakossági Adatfelvétel az Addiktológiai Problémákról (OLAAP) vizsgálat eredményei

Az Országos Lakossági Adatfelvétel az Addiktológiai Problémákról felmérés a felnőttkorú (18-64 év) lakosság körében végzett célzott drogepidemiológiai vizsgálat, amelyet 2001 óta, négyévente végeznek. Célja, hogy átfogó képet kapjunk a populáció addiktológiai problémáiról. A legfrissebb adatfelvétel 2019-ben készült. [15]

A 2019-ben készült felmérés eredményei alapján elmondható, hogy a 18-64 év közötti népesség 7,9%-a fogyasztott már élte során valamilyen kábítószert. Ezzel az adattal Magyarország - Törökországot megelőzően - Európában a második legjobb

[14] ARNOLD, P., BENCSIK, N., & ELEKES, Z.: Új szerek — új mintázatok? Dizájnerdrogok és klasszikus tiltott szerek társadalmi mintázata egy európai iskolai felmérés, az ESPAD hazai adatai alapján. *Egészségfejlesztés*, *62*(4), 13-30. https://doi.org/10.24365/ef.v62i4.7004

[15] PAKSI B. – PILLÓK P. – MAGI A. – DEMETROVICSZ ZS. – FELVINCZI K. (2021). Az Országos Lakossági Adatfelvétel az Addiktológiai Problémákról 2019 reprezentatív lakossági felmérés módszertana. Neuropsychopharmacologia Hungarica, 23(1), 184-207.

adattal rendelkezik, ha pedig csak az Európai Uniót vesszük figyelembe, akkor Magyarország a legkevésbé kábítószer-fertőzött ország.[16]

Annak köszönhetően, hogy a felmérést 2001 óta rendszeresen elkészítik, időben összehasonlítható adatokkal rendelkezünk. Ezek alapján elmondható, hogy a felnőtt lakosság körében a kábítószerhasználat életprevalencia értéke az ezredforduló után folyamatosan növekedett, majd stagnált, végül csökkenésnek indult.[17] A csökkenő érték méréséből egyrész az adatfelvétel korlátaira következtethetünk, amely magával vonja a további módszertani elemekkel való kiegészítés szükségességét a hitelesebb eredmények érdekében. Másrészt figyelembe kell venni a kábítószer kérdéssel kapcsolatos kutatások esetén, a normatív és társadalmi megítélés miatt felmerülő bizalmatlanságot és a konformitásból és önreflexiós feszültségekből adódó torzítások is.[18]

A szerhasználat életprevalencia csökkenést csak abban az esetben lehetne megfigyelni, ha a 18-64 év közötti életkorba „belépő fiatalok" életprevalencia értéke alacsonyabb lenne, mint az ebből a korosztályból „kilépő" 64 év feletti személyeké. Azonban ahogy korábban, a fiatalkorúak körében végzett normálpopulációs vizsgálatok eredményeinél ismertettem, az életprevalencia érték körükben 18,7%, amely jelentősen magasabb a felnőttkorú populációnál, így a valaha szertfogyasztók számának csökkenését feltételekkel kell kezelni.

Az új pszichoaktív szerek egyre növekvő jelentősége a felnőttkorú népesség körében is megmutatkozik. A korábbi évek eredményeinak megfelelően a leggyakrabban fogyasztott szer továbbra is a kannabisz, azonban ezzel holtversenyben legnépszerűbbek az új pszichoaktív szerek.[19]

Az OLAAP adatokat ez idáig még nem elemezték abból a szempontból, hogy az új pszichoaktív szerek milyen társadalmi-demográfiai mintázatokat mutatnak a felnőttkorú populáció körében. A tiltott droghasználat – a klasszikus szerek és az új pszichoaktív szerek – szociodemográfiai és pszichológiai mintázatairól azonban készült átfogó elemzés, így jelen tanulmányban ezeknek a bemutatására van lehetőség.

Közepesen erős szignifikancia található az életkor, a vallási integráció és a családban előforduló deviáns minták tekintetében. Az életkor tekintetében 35 év alattiak esetében nagyobb a kábítószer érintettség valószínűsége, mint az idősebb

[16] PAKSI B. – PILLÓK P. (2022): Drogfogyasztás szerk. Paksi B. – Demetrovics Zs.In. Addiktológiai Problémák Magyarországon Budapest ELTE – PPK, L'Harmattan

[17] PAKSI B. – PILLÓK P. (2022): Drogfogyasztás szerk. Paksi B. – Demetrovics Zs.In. Addiktológiai Problémák Magyarországon Budapest ELTE – PPK, L'Harmattan

[18] PAKSI B. – PILLÓK P. – MAGI A. – DEMETROVICSZ ZS. – FELVINCZI K. (2021). Az Országos Lakossági Adatfelvétel az Addiktológiai Problémákról 2019 reprezentatív lakossági felmérés módszertana. Neuropsychopharmacologia Hungarica, 23(1), 184-207.

[19] PAKSI B. – PILLÓK P. (2022): Drogfogyasztás szerk. Paksi B. – Demetrovics Zs.In. Addiktológiai Problémák Magyarországon Budapest ELTE – PPK, L'Harmattan

korosztályban. A legkisebb arányban az 55-64 év közötti korosztály érintett. A vallási integráció esetében, a valamely egyházhoz tartozás protektív tényezőként jelenik meg. Az ateizmus vagy a vallásosságában bizonytalanság együtt jár a a kábítószerhasználat életprevalencia értékének növekedésével. A családi mintákat tekintve pedig rizikófaktort jelent, ha a családban vagy a közvetlen környezetben vannak deviáns minták. Gyenge kapcsolatot találhatunk a nem, az anyagi státusz, az iskolai végzettség, az urbanizáció és társas kapcsolatok vizsgálata során. A nemek tekintetében elmondható, hogy a kábítószer használat továbbira is „férfias jelenség", a férfiak esetében az életprevalencia érték magasabb, mint a nők esetében. Az OLAAP vizsgálat azt találta, hogy a kábítószerfogyasztásban nagyobb eséllyel érintettek azok, akik az átlagos vagy annál jobb anyagi körülmények között, nagyobb településen (50 ezer lakosnál nagyobb) élnek és felsőfokú végzettséggel rendelkeznek. Azon személyek között, akik társas kapcsolataikkal (barátok) elégedettek, de családi vagy párkapcsolatukkal elégedetlenek, szignifikánsan nagyobb a szerfogyasztók aránya. [20]

4. Problémás kábítószer-fogyasztás indikátor

Az EMCDDA definíciója szerint problémás kábítószer-fogyasztásnak tekintjük az intravénás vagy tartós és rendszeres szerhasználatot, amely hosszútávon tényleges károkat okoz, a függőségen túl egészségügyi, pszichológiai és szociális szempontokból is. Arra való tekintettel, hogy a kábítószert injektálók csoportja egy rejtőzködő, nehezen hozzáférhető csoport, a szerhasználat ezen mintázatainak mérésére a populációs vizsgálatok eredményei hatékonyan nem alkalmazhatóak.[21] A problémás kábítószer-fogyasztás indikátor feladata a magas kockázatú használat prevalenciájának becslése, a kezelt vagy kezelésbe nem kerülő problémás szerhasználó populáció szerhasználati mintázatainak feltárása.[22]

Az intravénás szerhasználók populációjának becslése legutóbb 2010-ben, majd 2015-ben történt meg. 2010-ben a kábítószert injektálók elérése majdnem teljeskörű volt. 2014 után a két jelentős tűcsere program bezárásával az adatok hozzáférhetősége is jelentősen lecsökkent, így a 2015-ös vizsgálaton már a populációnak csak egy része volt elérhető. A két időpont között, illetve a 2015 óta eltelt időben nem készült hasonló felmérés, így a változások dinamikájáról nincsen

[20] PAKSI B. – PILLÓK P. (2022): Drogfogyasztás szerk. Paksi B. – Demetrovics Zs.In. Addiktológiai Problémák Magyarországon Budapest ELTE – PPK, L'Harmattan

[21] NYÍRÁDI ADRIENN: A drogfogyasztás nemzetközi indikátorai. Szöveggyűjtemény A szociálpolitikus és szociális munkás képzés megújítása az ELTE és a BCE együttmuködésében (SZOCMEG)" címu, TÁMOP 4.1.2-08/2/A/KMR- 2009-0043 számú projekt megvalósítása során késztendo tananyagok elektronikus publikációja. Budapest, 2009

[22] NEMZETI DROG FÓKUSZPONT: A Kábítószer-helyzet Magyarországon 2004-2014, a Nemzeti Drogfókuszpont jubileumi összefoglaló kiadványa. Budapest, 2014

információnk.[23] A tűcsere programok folyamatos visszaszorulása, így a rendelkezésre álló adatok csökkenése, a legproblémásabb szerhasználó csoportról rendelkezésre álló információk csökkenését is eredményezte.

A becsléseket a fogás-visszafogás módszerével végezték el mindkét vizsgálat alkalmával. A fogás – visszafogás módszere különböző forrásokból származó adatokat kapcsol össze (pl. rendőrségi, egészségügyi adatbázisok). Összerendezi a rendelkezésre álló adatokat, úgy, hogy abban az esetben, ha egy személy több adatbázisban is szerepel, akkor az egyezéseket megszűnteti és egy személy csak egyszer szerepel a listán. Az egyik adatbázisban sem szereplő személyek számáról pedig további feltételek bevezetésével készül becslés.[24]

A 2015-ben végzett becslés során – az előző, 2010-es felméréshez hasonlóan – az Országos Epidemiológiai központ (OEK) által, 2006 óta végzett, a tűcsere programok által szervezett ujjbegyből vett HIV/Hepatitis C vírus szűrés adatait használták fel. A vizsgálatban két év – 2014 és 2015 – adatait használták fel. A kutatók becslései alapján az intravénás szerhasználók száma (klasszikus és új pszichoaktív szerek összesen) a 2014-2015-ös időszakban 7799 fő.

Bár a szerhasználatban résztvevők számának dinamikájáról hosszútávú következtetéseket nem vonhatunk le, de azt látjuk, hogy a 2010-ben elvégzett kutatás eredményéhez képest (5699 fő), az intravénás szerhasználók száma körülbelül 2000 fővel emelkedett. [25]

Az kábítószert injektálók a szerfogyasztó populációban is egy kifejezetten sérülékeny csoportnak tekinthető, és ez volt az a csoport, amelyet az új pszichoaktív szerek térnyerése is kiemelkedően érintett. Függetlenül a nemtől, kortól és a korábban használt kábítószertől, az ÚPSZ-ek váltak a domináns szerré. [26]

5. Kezelésbe lépők száma indikátor

Az EMCDDA által használt további kulcsindikátor a kezelésbe lépők populációjának vizsgálata, amely a kezelési igény alapján írható le.

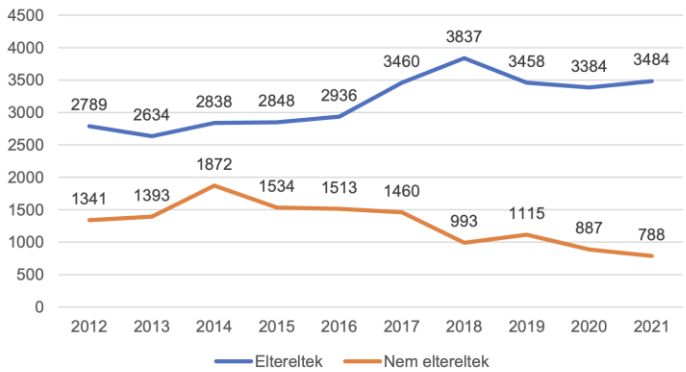
[23] Csák Róbert (2017): Intravénás szerhasználók kockázati magatartása és az azt befolyásoló strukturális tényezők a 2010-2015 közötti időszakban. Doktori értekezés

[24] NYÍRÁDI ADRIENN: A drogfogyasztás nemzetközi indikátorai. Szöveggyűjtemény A szociálpolitikus és szociális munkás képzés megújítása az ELTE és a BCE együttmuködésében (SZOCMEG)" címu, TÁMOP 4.1.2-08/2/A/KMR- 2009-0043 számú projekt megvalósítása során készítendo tananyagok elektronikus publikációja. Budapest, 2009

[25] Csák Róbert (2017): Intravénás szerhasználók kockázati magatartása és az azt befolyásoló strukturális tényezők a 2010-2015 közötti időszakban. Doktori értekezés

[26] Csák Róbert (2017): Intravénás szerhasználók kockázati magatartása és az azt befolyásoló strukturális tényezők a 2010-2015 közötti időszakban. Doktori értekezés

72. ábra. ***Kezelésbe lépők számának alakulása a beutalás eredete függvényében, 2012 és 2021 között (fő)***



Forrás: Péterfi 2022a – TDI adatok 2021

A magyarországi rendszer sajátossága, hogy a kezelésbe lépők túlnyomó része (81,6%) a büntetőeljárás alternatívájaként igénybe vehető kezelési vagy prevenciós jogi lehetőség, az elterelés intézménye miatt kerül kezelésbe. Ebből kifolyólag a kezelésbe lépők számát jelentősen befolyásolni tudják a jogszabályi változások és az aktuális törvényi feltételek, amelyek meghatározzák az elterelés jogintézményéhez való hozzáférést. A jogszabályi változások mellett a kábítószer rendészeti aktivitás is fontos befolyásoló tényező a kezelésbe lépők számának vonatkozásában. Az új pszichoaktív szerekkel elkövetett bűncselekmények esetén az elterelés intézménye nem alkalmazható addig, amíg az adott szer fel nem kerül a kábítószer- és pszichotróp listára. Ameddig az anyag kábítószernek nem minősül, addig az ezekkel való visszaélések esetében szabálysértési eljárás indul.[27]

2021-ben összesen 4283 fő lépett kezelésbe, amelynek 81,6%-a a büntetőeljárás elkerülése érdekében. Esetükben az elsődlegesen használt szer a kannabisz volt. Az önként, tehát nem a büntetőeljárás elkerülése érdekében, kezelésbe lépők között szintén a kannabisz volt az elsődlegesen használt szer, azonban itt 2009-et követően jelentős átrendeződés volt a használt szerek tekintetében. A korábbi magasabb arányú ópiát-használatot felváltotta a stimulánsok és az egyéb szerek használata, így a 2010-es évek elején egyre nagyobb igény volt az új típusú szerekkel kapcsolatos kezelésre is. 2014 és 2016 között az új pszichoaktív szerek miatt kezelésbe lépők voltak a legmagasabb arányban, majd megjelenésük lassú csökkenésnek indult és ismét visszavette a vezető szerepet a kannabisz. Annak ellenére, hogy az új pszichoaktív szerek a felnőtt lakosság körében az élvonalban van

[27] NEMZETI DROG FÓKUSZPONT – 2022. évi jelentése

a használt szerek tekintetében, az ÚPSZ miatt kezelésbe lépők aránya azonban folyamatosan csökken (2020-ban a kezelést kezdők 8,2%-a esetében volt az elsődlegesen használt szer). Ebből arra következtethetünk, hogy az új pszichoaktív szereket fogyasztó személyek jelentősen alul reprezentáltak a kezelési adatokban. Ennek hátterében feltehetőleg a speciálisabb fogyasztói jellemzők és motivációk állnak (pl. fiatalabb korban történik az első kipróbálás, intenzívebb/gyakoribb használat jellemző, gyakoribb a sürgősségi beavatkozások szükségessége, motiválatlanság és kilátástalanság gátolja a segítség kérését). [28]
A nem elterelés miatt kezelésbe lépők szocioökonómiai jellemzői az elmúlt 1,5-2 évtizedben nem változtak jelentősen. Felülreprezentáltak a rendezett lakhatási körülmények között élő, legalább középfokú végzettséggel rendelkező személyek. Jelentősebb változás a gazdasági aktivitás mutatóban volt megfigyelhető. 2006 és 2013 között radikálisan megemelkedett a munkanélküliek aránya, amelynek hátterében feltehetőleg a 2008-as gazdasági válság áll.[29]
Ez is alátámasztja az új pszichoaktív szerek miatt kezelésbe kerültek alul reprezentáltságát, mivel azt feltételezzük, hogy az új típusú szerek a társadalomból kiszorult, alacsonyabb társadalmi rétegek körében terjed a leginkább.

6. Kábítószerrel összefüggő halálozások száma indikátor

A kábítószerrel összefüggésben lévő halálozások egy rendkívül komplex fogalom, amely a különböző szemszögekből értelmezhető. Szakpolitikai és közegészségügyi szempontból a kérdéskör vizsgálata három részterületre osztható:
- A szerhasználattal közvetlen összefüggésbe hozható halálozások, vagy másnéven túladagolások
- Azok a halálesetek, amelyek a kábítószer használattal közvetetten hozhatóak összefüggésbe. (pl. kábítószer hatása alatt történt belesetek, azon bűncselekmények áldozatai, akik kábítószer hatása alatt álló személy által váltak áldozattá. Illetve ide tartoznak azok a személyek is, akik a szerfogyasztás következtében kialakult betegségben veszítették életüket.
- A kábítószer-fogyasztók halandóságát vizsgáló kohorsz kutatások eredményei. [30]

Az EMCDDA által használt indikátor a részterületek közül a szerhasználattal közvetlenül és közvetetten kapcsolatba hozható halálesetek számát tartalmazza. A

[28] Nemzeti Drog Fókuszpont – 2022. évi jelentése
[29] Nemzeti Drog Fókuszpont: A Kábítószer-helyzet Magyarországon 2004-2014, a Nemzeti Drogfókuszpont jubileumi összefoglaló kiadványa. Budapest, 2014
[30] Nemzeti Drog Fókuszpont: A Kábítószer-helyzet Magyarországon 2004-2014, a Nemzeti Drogfókuszpont jubileumi összefoglaló kiadványa. Budapest, 2014

harmadik részterület, a kábítószer-fogyasztók halandóságát vizsgáló kohorsz kutatások eredményei az indikátornak közvetlenül nem képezik részét.

Magyarországon a szerfogyasztással közvetlenül összefüggésben lévő halálozások száma az elmúlt évtizedekben nem változott radikálisan. Évente kb. 35-40 halálesetet okoznak a túladagolások. Jelentős átalakulás volt megfigyelhető azonban a túladagolásokat okozó szerek tekintetében. 2010 előtt a halálesetek szinte kizárólag az utcai heroin tisztaságával és elérhetőségével voltak összefüggésben. 2010-ben a heroin elérhetőségének drasztikus csökkenésével a halálozások száma is visszaesett, majd 2012-től az új pszichoaktív szerek tömeges megjelenésével és elterjedésével a halálesetek száma ismét emelkedni kezdet. 2013-ban, a halálozások száma ismét elérte a 2010-es évet megelőző szintet, de az elhunytak szerhasználati mintázata jelentősen átalakult. 2017-től kezdődően a kábítószernek nem minősülő, új pszichoaktív szerek váltak dominánssá a halálozások tekintetében.[31]

Egy - egy új pszichoaktív szer piacra kerülés jelentősen befolyásolta a túladagolásos esetek számának alakulását. 2016-ban például a kristály néven elhíresült etil-hexadron, 2020-ban a Bika néven ismertté vált, 4F-MDMB-BICA okozott magasabb számú túladagolást.[32]

Szertípus	**'09**	**'10**	**'11**	**'12**	**'13**	**'14**	**'15**	**'16**	**'17**	**'18**	**'19**	**'20**	**'21**
Opiát és egyéb szer okozta mérgezés	28	12	6	8	3	10	8	6	9	4	7	3	17
metadon (egyéb kábítószer nélkül) okozta túladagolás	2	2	4	6	9	2	4	1	1	1	3	2	0
egyéb, nem opiát típusú kábítószer vagy **új pszichoaktív szer** okozta mérgezés	1	3	3	7	15	4	10	**20**	12	11	18	**43**	25
egyéb szer okozta mérgezés	0	0	1	4	4	7	3	2	11	17	15	0	0
összesen	**31**	**17**	**14**	**25**	**31**	**23**	**25**	**29**	**33**	**33**	**43**	**48**	**42**

1. ábra - Saját szerkesztés

2021-ben összesen 42 mérgezéses eset történt, amelynek több, mint a felét okozta új pszichoaktív szer, elsősorban szintetikus kannabinoid. Ez az adat Európai viszonylatban is kimagasló érték, tekintve, hogy Magyarországon kívül kizárólag Törökország és Németország jelentett az új típusú szerekhez köthető haláleseteket.[33]

A kábítószer használattal közvetetten összefüggésbe hozható halálesetekről a halálozási regiszterbe rögzített adatokból nyerhetünk információkat. 2021-ben 78

[31] NEMZETI DROG FÓKUSZPONT: A Kábítószer-helyzet Magyarországon 2004-2014, a Nemzeti Drogfókuszpont jubileumi összefoglaló kiadványa. Budapest, 2014
[32] NEMZETI DROG FÓKUSZPONT – 2022. évi jelentése
[33] NEMZETI DROG FÓKUSZPONT – 2022. évi jelentése

olyan esetet regisztráltak, amely a szerfogyasztással hozható összefüggésbe. Az indirekt halálesetek közül a két kategóriát tudunk megkülönböztetni: a drogfogyasztás hosszútávú káros hatásai következtében természetes halált haltak, valamint az erőszakos cselekmény következtében elhunytak. 32 esetben közlekedési baleset, 6 esetben pedig emberölés és 25 esetben öngyilkosság áldozatává vált a szerhasználó. 12 olyan esetet regisztráltak, ahol a halálozás a hosszútávú kábítószer-fogyasztás okozta szövődmények miatt következett be.[34]

7. Kábítószerrel összefüggő fertőző betegségek indikátor

Az EMCDDA által használt, a kábítószerrel összefüggő fertőző betegségek indikátor célja, hogy a fertőzöttségi adatokból összehasonlítható és érvényes adatok álljanak rendelkezésre. A kulcsindikátor legfőképp az intravénás szerhasználók körében releváns. Intravénás szerhasználónak kell tekinteni minden olyan személyt, aki élete során legalább egyszer nem gyógyászati célból injektált valamilyen szert.[35]A kábítószerrel összefüggésben lévő fertőző betegségek esetében elsősorban a HIV, a Hepatitis B és a Hepatitis C fertőzést szükséges megemlíteni. A betegségekkel kapcsolatos hazai adatok a 2006 óta folyó országos szeroprevalencia vizsgálatokból származnak.

A kábítószer fogyasztással összefüggésbe hozható HIV fertőzés prevalencia értéke hazánkban elenyésző. Először 2014-ben diagnosztizáltak 2 fő esetében, ezt követően 2015-ben és 2018-ban 1-1 fő személyében, majd 2019-ben 3 esetet azonosítottak.[36]

Az intravénás szerhasználattal kapcsolatban a legjelentősebb fertőző betegség hazánkban – és a legtöbb országban egyaránt – a HVC, azaz a Hepatitis C vírus. A Hepatitis C vírus esetében 2011-ig a vírus éves prevalenciája a szerhasználók között körülbelül 25% volt, és az ópiát injektálók körében magasabb arányban jelentkezett, mint a stimuláns injektálók körében. Az ezt követő években ez az arány közel megduplázódott (2014-ben 48,7%) és az arány megfordult, a stimuláns injektálók körében lett magasabb a prevalencia érték.[37] és azóta ezen a szinten maradt. Az Hepatitis C vírus prevalencia értékének megkétszereződése és az arányok átalakulása mögött feltehetőleg a kábítószerpiac átrendeződése, és az ópiát injektálásról az új pszichoaktív szerek injektálására való átváltás áll. Az ÚPSZ-ek rövidebb ideig fejtik ki hatásukat, mint az ópiátok, így ugyanazon eredmény eléréséhez gyakoribb

[34] Nemzeti Drog Fókuszpont – 2022. évi jelentése
[35]Nyíradi Adrienn: A drogfogyasztás nemzetközi indikátorai. Szöveggyűjtemény A szociálpolitikus és szociális munkás képzés megújítása az ELTE és a BCE együttmuködésében (SZOCMEG)" címu, TÁMOP 4.1.2-08/2/A/KMR- 2009-0043 számú projekt megvalósítása során készítendo tananyagok elektronikus publikációja. Budapest, 2009
[36] Nemzeti Drog Fókuszpont: 2022. évi jelentés
[37]Nemzeti Drog Fókuszpont: 2022. évi jelentés

injektálás szükséges. Ugyanerre az időpontra tehető a két legnagyobb budapesti tűcsere program megszűntetése is. Tehát a gyakoribb injektálás miatt a kereslet megnőtt volna a fecskendők cserélésére, de a kínálat pont ebben az időszakban csökkent le, így gyakoribbá vált egyazon tű többszöri használata is. [38]

8. Az új pszichoaktív szerek megjelenése a kábítószer bűnözésben

Az EMCDDA öt főindikátora között nem szerepel ugyan, de a kábítószer-probléma ismertetése során elengedhetetlen a kábítószer-bűnözés tendenciáiban való változások bemutatása.

A hazai jogrendbe az új pszichoaktív anyag kifejezést az 2011. évi CLXXVI. törvény iktatta be. A kifejezés azóta jogszabályi környezetünk részévé vált, eleinte azonban jellemzően csak a kínálati oldalt érintette. A büntető törvénykönyv is bővült az Új pszichoaktív anyaggal visszaélés szakaszával. [39]2014. január 1-től birtoklásuk kriminalizálása révén tiltottá vált a fogyasztásuk is (Btk. 184./B§ és 184/C§). [40]Az új pszichoaktív anyaggal visszaélés bűncselekményének tényállásai követik a kábítószerre vonatkozó bűncselekmények struktúráját, azonban enyhébb büntetési tételeket határoz meg. [41]Minősített esetei tulajdonképpen azonosak, de nem tartalmazza a jelentős mennyiségre történő elkövetést. Ezen felül nem jelenik meg benne a büntethetőséget megszűntető ok, azaz az elterelés lehetősége sem. Privilegizált esetei a csekély mennyiséggel való elkövetésre vonatkoznak. (Csák – Rácz – Márványkövi 2017) Azonban ameddig a csekély mennyiség kínálása és átadása, azaz a kábítószer-probléma kínálati oldala büntetőjogi kategóriaként jelenik meg (Btk. 184.§ (4)), addig 2016. január 1-je óta a csekély mennyiségű új pszichoaktív anyag megszerzése vagy tartása szabálysértésnek minősül. (Szabs.tv. 199/B§).[42]

A kábítószerrel kapcsolatos bűncselekményekről és a bűncselekményt elkövetők jellemzőiről a Legfőbb Ügyészség Egységes Nyomozóhatósági és Ügyészségi Bűnügyi Statisztikai Rendszer (ENYÜBS) adatai alapján kaphatunk információkat. A ENYÜBS rendszerben akkor kerül rögzítésre, amikor a nyomozati szakasz lezárul, így annak megítélése, hogy egy adott évben mennyi az alkövetett bűncselekmények száma, attól függ, hogy az adott évben hány eljárás került lezárásra, ami az adatok torzulását eredményezi.

[38] NEMZETI DROG FÓKUSZPONT: 2019. évi jelentés
[39] CSÁK R.-MÁRVÁNYKÖVI F.- RÁCZ J.: Új pszichoaktív szerek (ÚPSZ) használók vizsgálata vidéki szegregátumokban.Magyar Addiktológiai Társaság. Budapest, 2017
[40] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016
[41] NEMZETI DROG FÓKUSZPONT – 2019. évi jelentés
[42] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016

A statisztika korlátai más bűncselekmények esetében is megmutatkoznak, azonban a kábítószerekkel kapcsolatos bűncselekmények egy egyik olyan bűncselekmény típus, amelyben a legnagyobb a látencia (egyes számítások szerint legalább huszonötször annyi ember fogyaszt kábítószert, mint amennyi a hatóságok tudomására jut).[43] Így a problémával kapcsolatban rendelkezésre álló adatok csak nagy fenntartásokkal kezelhetőek.

2021-ben 7504 kábítószerhez vagy pszichoaktív anyaghoz köthető bűncselekmény miatt indított nyomozás került lezárásra. A regisztrált 7504 bűncselekményt 8398 személy követte el. A kábítószer bűnözés továbbra is „a fiatal férfiak problémája", a regisztrált elkövetők 88%-a férfi, 65%-ban 30 év alatti. Az idősebb korosztályokban egyre alacsonyabb az elkövetők aránya. Az elkövetők feléről nem rendelkezünk adattal az iskolai végzettséget tekintve, de minél magasabb a végzettség, annál alacsonyabb az elkövetés aránya.[44]

Az 7504 kábítószerhez köthető bűncselekmény közül 589 eset került rögzítésre új pszichoaktív szer miatt (az összes bűncselekmény 7,9%-a). Az új pszichoaktív szerek között az egyéb kategóriába tartozó új szerek tették ki az esetek 48,9%-t. 10%-ban szintetikus katinonnal és 21,1%-ban szintetikus kannabionoiddal való visszaélés miatt indult az eljárás. Ezek az adatok a korábbi évek adataitól nem mutatnak jelentősebb eltérést.[45]

Új típusú szerek esetében a csekély mennyiségű tartás szabálysértési eljárást von maga után. 2021-ben 1659 szabálysértési eljárás indult, ahol a leggyakrabban alkalmazott szankció a pénzbírság kiszabása volt (átlag körülbelül 73.000 Ft büntetéssel), amelyből a kiszabott büntetések 37%-a került kifizetésre. Új pszichoaktív szerre elkövetett bűncselekmény esetén nincs lehetőség az elterelésre.[46]

A 2021-ben ismertté vált kábítószer bűncselekmények közül a kábítószer birtoklás – saját használat céljából való megszerzés és tartás – esetében az új pszichoaktív szerekhez csupán az esetek 1,4%-a volt köthető.

A kínálati oldal – kábítószer termesztése vagy előállítása, kábítószerrel való kereskedelem – tekintetében az új pszichoaktív szerekre elkövetett bűncselekmények a második helyen állnak 30,2%-kal. Főleg a csekély mennyiségre elkövetett bűncselekmények esetén volt jelentős, a jelentős mennyiség esetében nem.[47]

[43] LÉVAY M. - RITTER I.: Az alkoholfogyasztás, a kábítószer-probléma és a bűnözés összefüggései In: Kriminológia szerk. Borbíró A. - Gönczöl K.- Kerezsi K. -Lévay Miklós. Budapest, 2016
[44] NEMZETI DROG FÓKUSZPONT: 2022. évi jelentés
[45] NEMZETI DROG FÓKUSZPONT: 2022. évi jelentés
[46] NEMZETI DROG FÓKUSZPONT: 2022. évi jelentés
[47] NEMZETI DROG FÓKUSZPONT: 2022. évi jelentés

9. Összegző gondolatok

Összességében elmondható, hogy a 2010-es évek elején egy paradigma váltás történt mind a kábítószerpiacon, mind az egészségügyi kezelés és ellátás tekintetében. Az 1995-től 2010-ig tartó ópiát- és amfetamin korszakot felváltotta az új pszichoaktív szerek korszaka.[48] Dolgozatomban a rövid definíciós problémák ismertetését követően igyekeztem átfogó képet adni arról, hogy a kábítószerpiacon végbement átalakulások, milyen változásokat okoztak – amennyiben okoztak – a szerhasználat mintázataiban.

Elmondható, hogy az EMCDDA által használt öt kulcsindikátor – populációs vizsgálatok, kábítószer problémával kapcsolatos halálozások és fertőző betegségek száma, problémás kábítószerfogyasztás és kezelésbe lépők száma - mentén végzett vizsgálatok eredményei is arra engednek következtetni, hogy az új pszichoaktív szerek megjelenése és tömeges elterjedése jelentősen átalakította a kábítószerpiacot és így a szerfogyasztásban tapasztalt korábbi mintáztokat is. Egyértelmű következtetések levonására azonban ezek az adatok nem alkalmasak. A társadalmi állapotokra érzékeny, rejtett magatartások elterjedtségének mérésére irányuló kutatások – mint amilyenek a kábítószer-használattal kapcsolatos kutatások – érvényessége és hatékonysága megkérdőjelezhető, a rendelkezésre álló statisztikai adatok pedig korlátokba ütköznek. Ahogy a normál populációs vizsgálatok eredményeinél, illetve a kezelésbe lépők szocioökonómiai jellemzőinél is láttuk, a mintákba elsősorban a legalább alsó - középosztálybeli személyek kerülnek be. A problémás kábítószerfogyasztók populációjának megismerésére irányuló becslések alkalmasabbak voltak a marginalizált társadalmi csoportok reprezentációjára, azonban a tűcsere programok elérhetőségének folyamatos visszaszorulása, a rendelkezésre álló adatok csökkenésével is járt.

Tanulmányomban röviden kitértem az új pszichoaktív szerek kábítószer-bűnözésben való megjelenésére is. Bár az EMCDDA által meghatározott kulcsindikátorok között nem szerepel, de a mintázatok változásának megismeréséhez szorosan hozzátartozik. Ez alapján azt látjuk, hogy a kábítószer bűnözés kínálati oldalán az új pszichoaktív szerek jelentős megjelenése figyelhető meg. A kínálati cselekmények miatt indult büntetőeljárások, a kábítószerrel kapcsolatos bűncselekmények 30,2%-t teszik ki. Azonban a keresleti oldali cselekmények – kábítószer saját célra történő megszerzése és tartása – csak elenyésző számban jelennek meg a statisztikában.

Összességében elmondható, hogy a rendelkezésre álló kutatási eredmények és az egyelőre anekdotikus elbeszélések arra engednek következtetni, hogy az új pszichoaktív szerek okozta problémák elsősorban a szegregáltan, a társadalom

[48] RÁCZ J.: A kábítószer-probléma átalakulása a 80-as évektől. Nemzeti Drog Fókuszpont 10. éves jubileumi konferenciája, Budapest, 2014. november 11.

peremére szorult társadalmi csoportok (gyermekvédelmi intézményben felnövők, hajléktalanok, büntetés-végrehajtási intézetből szabadultak, prostituáltak stb.) körében okoznak kiemelten nagy problémát. Ahhoz, hogy egyértelmű választ tudjunk adni arra a kérdésre, hogy mutatnak-e új mintázatokat az új pszichoaktív szerek, további kutatások elvégzése szükséges, amelyek a vizsgálat tárgyává teszik a marginalizált társadalmi csoportokat is.

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A javítóintézeti letartóztatás

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1. Bevezetés

Tanulmányomban a javítóintézeti letartóztatással foglalkozom. Az első részben a gyermek- és fiatalkorúakat érintő kriminálstatisztikai adatokról, valamint a javítóintézeti letartóztatás normatív kereteiről lesz szó. Ezt követi egy tipikusnak mondható javítóintézeti életút felvázolása, végül pedig azokat a dilemmákat mutatom be, melyek a kényszerintézkedés ezen fajtájának létrejötte óta különböző fórumokon – kerekasztal beszélgetésen, előadásokon, publikációkban – hangzottak el vagy jelentek meg.

A javítóintézeti letartóztatás intézményét a büntető jogszabályok módosításáról szóló 1995. évi XLI. törvény hozta létre, 1996 óta van jelen a hazai gyakorlatban. Korábban a büntetés-végrehajtási intézetekben foganatosították ezt, a(z) – akkor még *előzetes letartóztatás*nak nevezett – kényszerintézkedést. Létrejöttét aktív szakmai diskurzus övezte és övezi a mai napig is, az intézkedés létjogosultsága mellett- és ellen is felszólalnak a szakemberek.[1]
Aggodalomra adott okot, hogy a büntetés-végrehajtási[2] intézetekben végrehajtott letartóztatás során nagyfokú unalom jellemezte a fiatalok mindennapjait, hosszú hónapok teltek el tanulás vagy munka nélkül. Ez teret adott nekik arra, hogy különböző – a bűnelkövetéshez vagy az intézeti léthez kapcsolódó – praktikákat tanulhassanak egymástól. A törvényhozók azonban szkeptikusak voltak azzal kapcsolatban, hogy javítóintézeti keretek között biztosítani lehet a biztonságos őrzést, meg lehet előzni a szökéseket, el lehet különíteni a bűntársakat egymástól, valamint biztosítani lehet a tárgyalásokon és kihallgatásokon való részvételt. A javítóintézeti letartóztatás intézményével kapcsolatban az elvárás az volt, hogy a kijelölt intézetekben (Rákospalota és Szőlő utca) biztosítani kell a szökések megelőzését, a biztonságos őrzést, ugyanakkor ezek között a szigorú keretek között érvényesülnie kell a pedagógiai elvárásoknak is.[3]

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[1] B. Aczél 2000; EUB-1/2010. Jegyzőkönyv az Országgyűlés Alkotmányügyi, igazságügyi és ügyrendi bizottsága Ellenőrző bizottságának; Both 2010; Lantos 2015
[2] a továbbiakban: bv.
[3] B. Aczél, 2000

2. Kriminálstatisztikai adatok

A bűnelkövetőkre vonatkozó krimiálstatisztikai adatok kapcsán fontos megjegyezni, hogy 2018-ban adatgyűjtési módosítás lépett életbe. 2018 előtt a regisztrált elkövetőkről-, 2018 után már a regisztrált elkövetésekről állnak rendelkezésünkre információk, tehát egy személy többször is bekerülhet a statisztikába. Ez a változtatás nem teszi lehetővé a korábbi adatok összehasonlítását a jelenleg rendelkezésünkre álló adatokkal. További fontos adalék a táblázatok értelmezéséhez: az itt bemutatott statisztika nem választja szét az életkoruknál fogva büntethető gyermekkorú személyeket a nem-büntethető gyermekkorúaktól.

A KSH és a Legfőbb Ügyészség adatai alapján megállapítható, hogy a lányok továbbra is kisebb hányadát teszik ki a bűnelkövetésnek. 2022-ben a gyermekkorúak által elkövetett cselekmények száma növekedésnek indult, azonban az összes bűncselekményen belül 2% alatt van ennek aránya.[4] A fiatalkorúak elkövetésének száma 2019 óta stagnál, kiugró változás nem figyelhető meg.

Kor-csoport	Elkövetők				Elkövetések				
	2015	2016	2017	2018. I. félév	2018 II. félév	2019	2020	2021	2022
Gyk. (0-13)	1375	1662	1409	873	300	1826	1743	1743	2352
Fk. (14-17)	7872	7675	6492	3405	3697	7863	8064	7666	7942

Gyermek-és fiatalkorú elkövetők és elkövetések 2015-2022 [5]

Kor-cso-port	2020			2021			2022		
	Össz.	ffi	nő	Össz.	ffi	nő	Össz.	ffi	nő
Gyk. (0-13)	1734	1399	328	1763	1463	291	2352	1906	436
Fk. (14-17)	8064	6652	1410	7666	6249	1415	7942	6495	1455

[4] Hintalovon Gyermekjogi Alapítvány
[5] KSH - Legfőbb Ügyészség, 2023

Gyermek-és fiatalkorú elkövetések megoszlása nemek szerint [6]

A javítóintézeti letartóztatásra vonatkozó statisztikai adatok alapján megállapítható, hogy 2019 óta enyhe, nem számottevő csökkenést mutat a letartóztatásba bekerülők száma. A gyermek- és fiatalkorúak, korcsoport szerinti megoszlásával kapcsolatosan nem találhatók adatok, mivel vagy 12-17 éves kor között foglalják össze az adatokat[7] vagy nem különböztetik meg egymástól a javítóintézeti nevelésre és letartóztatást.[8]

Év	Letartóztatásba bekerülők	Letartóztatása megszűnt	Dec. 31-én letartóztatásban lévők
2019	152	138	109
2020	134	140	103
2021	137	148	92
2022	131	128	95

A javítóintézeti letartóztatásra vonatkozó adatok 2019-2022[9]

3. Normatív keret

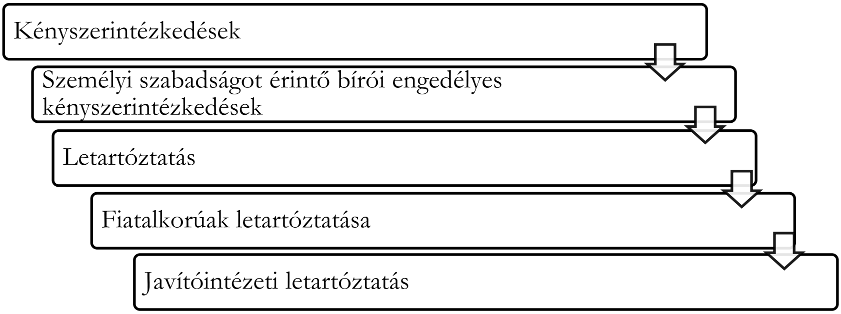
A 2017. évi XC. törvény a büntetőeljárásról[10] XCV. fejezete részletezi a fiatalkorúak elleni büntetőeljárásra vonatkozó szabályokat, a jogszabály rendelkezéseit az ezen fejezetben található eltérésekkel kell alkalmazni a korcsoportra vonatkozóan. A Be. 677. §-a határozza meg a fiatalkorú elleni büntetőeljárás célját: *„A fiatalkorú elleni büntetőeljárást úgy kell lefolytatni, hogy az a fiatalkorú nevelésének, illetve testi, értelmi, erkölcsi és érzelmi fejlődésének az előmozdításával biztosítsa a fiatalkorú társadalmi beilleszkedését, és azt, hogy a fiatalkorú ne kövessen el újabb bűncselekményt."*

A büntethetőségi korhatár 14 év, bizonyos cselekmények esetén 12 év.[11] Ennek értelmében, a büntetőeljárásnak azzal a fiatallal szemben van helye, aki a cselekmény elkövetésekor tizenkettedik életévét betöltötte, de a tizennyolcadikat nem.

Mielőtt rátérek a javítóintézetben foganatosított letartóztatás normatív alapjainak ismertetésére, bemutatom helyét a kényszerintézkedések között. Az

[6] Legfőbb Ügyészség, 2023
[7] KSH 2020
[8] KSH, 2022
[9] KSH
[10] a továbbiakban: Be.
[11] ld.: Btk. 16.§

alábbi ábra szemlélteti azt a folyamatot, mely alapján kontextusba helyezem a fent nevezett jogintézményt, a Be. alapján.



4. Kényszerintézkedések

A javítóintézetben foganatosított letartóztatás kényszerintézkedés. A kényszerintézkedések alkalmazásának általános szabályai a Be a XLIII. fejezetében szerepelnek. A 271. § (1) szerint *„A kényszerintézkedés elrendelésekor, illetve végrehajtása során arra kell törekedni, hogy annak alkalmazása az érintett alapvető jogainak a korlátozását csak a legszükségesebb mértékben és ideig eredményezze.”*

4.1. Személyi szabadságot érintő bírói engedélyes kényszerintézkedések

A Be. XLV. fejezete tartalmazza a személyi szabadságot érintő bírói engedélyes kényszerintézkedések általános szabályait. A 276. § (1) a)-b) alapján személyi szabadságot érintő kényszerintézkedésnek akkor van helye, ha:

> *a) a terhelt bűncselekmény elkövetésével megalapozottan gyanúsítható vagy vele szemben vádat emeltek, és*
>
> *b) a személyi szabadságot érintő bírói engedélyes kényszerintézkedés céljának eléréséhez ez szükséges, és az elérni kívánt cél más módon nem biztosítható.*

A (2) magába foglalja azokat a helyzeteket, melyek fennállása esetén elrendelhető a személyi szabadságot érintő bírói engedélyes kényszerintézkedés annak érdekében, hogy biztosítani lehessen a terhelt megjelenését az eljárás során. Ilyen esetek lehetnek a szökés, vagy szökési kísérlet, az elrejtőzés, vagy ezek magas kockázata; más személyek megfélemlítése, jogellenes befolyásolása, bizonyításhoz szükséges eszköz/elektronikus adat/vagyonelkobzás alá eső dolog megsemmisítése, meghamisítása vagy elrejtése; valamint az eljárás tárgyát képező bűncselekmény folytatása, vagy újabb bűncselekmény elkövetésének kockázata.

4.2. Letartóztatás

A letartóztatásra vonatkozó szabályok a Be. XLVII. fejezetében találhatók. *„A letartóztatás a terhelt személyi szabadságának bírói elvonása a jogerős ügydöntő határozat meghozatala előtt.”*[12] Ezen jogintézményt a legsúlyosabb kényszerintézkedés a büntetőeljáráson belül, a büntetőügyben eljáró hatóságok – jogszabály alapján meghatározott esetekben és módon – alkalmazzák annak érdekében, hogy a büntetőeljárás sikeresen végbe tudjon menni.[13]

4.3. A fiatalkorúak letartóztatása

A fiatalkorú letartóztatása annyiban más a felnőttekéhez képest, hogy a Be. 276. § (2) bekezdésében található okok mellett megjelenik a bűncselekmény különös tárgyi súlya meglétének követelménye, annak meghatározása azonban nem található egyik jogszabályban sem. A bírói gyakorlat alapján olyan kiemelkedő súlyú cselekmények alapozhatják meg a különös tárgyi súly feltételének meglétét, mint az élet elleni cselekmények, emberrablás, a betöréses lopás minősített esetei, a rablás és az erőszakos nemi bűncselekmények. Nehéz helyzetben van a letartóztatás elrendeléséről döntő bíró azon cselekmények vonatkozásában, melyek nem kiemelkedő súlyúak, de sorozatjellegben, többször követi el őket egy adott személy.[14]

A letartóztatás megszűnik a tizennegyedik életévét be nem töltő fiatal esetén egy-, a tizennegyedik életévét betöltött terhelt vonatkozásában két év leteltével.[15] Helyszíne lehet bv. intézet vagy javítóintézet. A *2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról*[16] alapján, a tizennegyedik életévét be nem töltött fiatalt minden esetben javítóintézetben-, más esetekben pedig – bírói mérlegelés alapján – vagy javítóintézetben, vagy bv. intézetben helyezik el. A bíróság megváltoztathatja a végrehajtás helyét, az ügyészség, a terhelt, a védő, vagy a törvényes képviselő kezdeményezésére.

4.4. A javítóintézetben foganatosított letartóztatás

A javítóintézetben foganatosított letartóztatás rendtartására vonatkozó rendelkezéseket a Bv. tv., valamint *1/2015. (I. 14.) EMMI rendelet a javítóintézetek*

[12] Be. 297. § (1))
[13] Farkas, Róth 2019
[14] Dénes, 2010; Dr. Nagy, Nagyné Dr. Gál 2018
[15] Be 688. § (2)
[16] a továbbiakban: Bv. tv.

rendtartásáról[17] tartalmazza. Elsőként fontos megkülönböztetni a javítóintézeti letartóztatást a javítóintézeti neveléstől. Előbbi egy, a büntetőeljárás során alkalmazható kényszerintézkedés, utóbbi pedig a bíróság által elrendelt, szabadságelvonással járó intézkedés. Célját, valamint a végrehajtás rendjét tekintve hasonló a két terület, azonban bizonyos rendelkezések mentén eltér egymástól e két jogintézmény. A jogszabály szerint egy javítóintézetben, a legfiatalabb letartóztatott személy tizenkettő-, a legidősebb huszonegy éves lehet.[18]
Magyarországon négy javítóintézetben foganatosítják a fiatalkorúak letartóztatását, mindegyik más profillal rendelkezik:

- Budapesti Javítóintézet (fiúk részére; letartóztatás)
- Debreceni Javítóintézet (fiúk részére; letartóztatás, javítóintézeti nevelés, utógondozás)
- Nagykanizsai Javítóintézet (fiúk részére; letartóztatás, javítóintézeti nevelés, utógondozás)
- Rákospalotai Javítóintézet (lányok részére; letartóztatás, javítóintézeti nevelés, speciális gyermekotthoni részleg, utógondozás)

A Bv. tv. 414. § (1) tartalmazza azokat a szabályokat, melyek a javítóintézeti nevelés során alkalmazandók, a javítóintézeti letartóztatás során azonban nem. Utóbbi végrehajtására szigorúbb szabályok irányadók. A javítóintézeti nevelés során van, de javítóintézeti letartóztatás esetében nincs:

- kimenő, eltávozás, szabadság;
- családterápiás foglalkozás javítóintézeten kívül;
- engedéllyel történő távollét;
- javítóintézeti nevelés félbeszakítása;
- jutalmazás gyanánt egyéni vagy csoportos kulturális, vagy sportrendezvényen való részvétel, kimenő, eltávozás, szabadság;
- fegyelmi büntetés gyanánt: kimenő-, eltávozás megvonása, a soron következő szabadságból való kizárás, zárt jellegű javítóintézeti részlegben való elhelyezés;
- zárt jellegű javítóintézeti részleg;
- ideiglenes elbocsátás és elbocsátás a javítóintézetből.

Bizonyos esetekben a növendék – engedéllyel – elhagyhatja az intézetet, ilyen lehet például egy súlyosan beteg hozzátartozó meglátogatása, családtag temetése, vagy a fiatalkorú kórházi kezelése. Minden ilyen esetben rendőri kísérettel tartózkodhat az adott helyen.[19]

A javítóintézetben foganatosított letartóztatás tehát – ahogy azt már említettem – bírósági határozat következtében indul meg. Célja *„a fiatalkorú társadalmi*

[17] a továbbiakban: Rendtartás
[18] Bv. tv. 413. § (2) a)-d)
[19] Bv. tv 418.§

beilleszkedésének elősegítése, ennek érdekében beilleszkedési zavarai enyhítése, pszichés állapota rendezése, iskolázottsága, szakmai képzettsége fejlesztése, az alapvető erkölcsi normák elfogadtatása, az egészséges életmódra való felkészítése."[20] A javítóintézetek fenntartója a Szociális és Gyermekvédelmi Főigazgatóság (SZGYF), irányítását és felügyeletét a Belügyminisztérium, törvényességi felügyeletét pedig a Legfőbb Ügyészség látja el.
A javítóintézet, a letartóztatás során együttműködik az intézetben elhelyezett fiatal szülőjével, más törvényes képviselőjével, vagy gyermekvédelmi gyámjával, őket tájékoztatja a fiatalkorú egészségi állapotáról, iskolázottságáról, illetve annak alakulásáról.[21]

A Gyvt-ben foglaltak alapján, a javítóintézeti letartóztatás a gyermekvédelmi rendszer része, a Bv. tv-ben és az Rendtartásban meghatározottak szerint kell végrehajtani. Egyfajta kettősség fedezhető fel a szabályozás tekintetében, ugyanis a végrehajtás során egyszerre kell meríteni a büntetés-végrehajtás és a gyermekvédelem gyakorlatából. Az intézet biztonsági követelményeit a bv. intézetekben felhalmozott szakmai tapasztalatokkal összhangban kell kialakítani, a nevelés, gondozás, felügyelet, oktatás, képzés és munkafoglalkoztatás pedig a Gyvt. alapján történik. További két fontos dokumentum a javítóintézet Szakmai programja, valamint Házirendje, amelyekkel a későbbiekben foglalkozom.

A végrehajtás során el kell különíteni a fiúkat a lányoktól, illetve egyéb szempontok szerint (életkor, egészségügyi- és nevelési szempontok), további csoportok is létrehozhatók. A tizenhat évnél fiatalabbakat – lehetőség szerint – külön kell elhelyezni a náluk idősebb társaiktól, kivéve, ha ez a fiatalkorú érdekeivel ellentétes. Ha a fiatalkorúnak anyaként kerül letartóztatásba, kérelmére vele együtt is elhelyezhetik az intézet által, erre a célra létrehozott csoportban.

Befogadáskor minden olyan tárgyat letétbe kell helyezni, aminek birtoklása jogszabályba ütközik, ami veszélyes lehet a közbiztonságra, a javítóintézet rendjére, biztonságára, illetve amely alkalmas bűncselekmény elkövetésére.
Bár a bv. intézetekben saját ruhájukat hordják a letartóztatottak, a javítóintézetekben az intézet által biztosított ruhákat viselik a növendékek. Saját ruha viselését a Rendtartás ezt a törvényes képviselő hozzájárulásához és az igazgató engedélyéhez köti. Az Alapvető Jogok Biztosa szerint megfontolásra érdemes ez a kérdés, hiszen a saját ruha viselése *„hozzájárulhatna az uniformizált környezet károsító hatásának oldásához, növelhetné az önbecsülést, motiváló, jótékony hatású lehet a reintegrációban."*[22] A gyakorlati tapasztalat szerint a növendékek különböző anyagi helyzete miatt a saját ruha viselése növelheti az egyenlőtlenséget a fiatalok között, frusztrációt és konfliktust okozva a mindennapokban. *„Az egységes ruházat biztosítása mögötti szándék,*

[20] Rendtartás, 344. §
[21] Rendtartás, 3.§
[22] AJB-493/2018, 13.o.

hogy elkerülhető legyen a márkás ruházatból fakadó feszültség, irigység, esetleges lopások, valamint a háttérben meghúzódó cél az egyenlőség szellemiségének fenntartása.”[23]

A fiatal befogadása után, a nevelő egyéni nevelési tervet készít a növendék számára, az intézetben lefolytatott szakértői vizsgálatok, valamint a beérkezett dokumentumok (családi kapcsolatok, korábbi pedagógiai- és pszichológiai vélemények, befogadáskor tapasztalt viselkedés, és minden egyéb, egyéni beszélgetések során szerzett információ) alapján. Ha szükséges, a pszichológus egyéni gondozási tervet készít számára.[24]

Folyamatos kontroll jellemzi a végrehajtást, a rendtartás előírja a rendészi jelenlétet, valamint a Bv. tv. is magába foglalja, hogy „ébresztőtől-takarodóig” gondoskodni kell a növendékek permanens felügyeletéről, tevékenységük irányításáról, éjszakánként pedig a hálószobák ellenőrzéséről.[25] Ezen túl olyan technikai eszközökre is szükség van, melyek a biztonsági rendszer működéséhez szükségesek, például biztonsági kamerákra, elektromos kapukra, vagy személyi riasztóra.[26] Szigorúan strukturált beosztás szerint telnek tehát a mindennapok, az intézet házirendjében – melyet az igazgató állapít meg, és a felelős miniszter hagy jóvá – részletesen le kell írni az intézetben elhelyezett fiatalok napi-és hetirendjét.

- Napi- és hetirend megállapítása, végrehajtása
  - tanulás, szabadidő
  - önkiszolgáló tevékenység (háló és egyéb közös helységek takarítása, ruházat, ágynemű tisztítása, javítása stb.)
  - munkafoglalkoztatás és az intézet környezetének – az önkiszolgáló tevékenység körébe nem tartozó – rendben tartása
- Viselkedésre, valamint másokkal szemben tanúsított magatartásra vonatkozó követelmények
- Kapcsolattartás módja, ellenőrzése
- Látogatás rendje
- Vallásgyakorlás
- Panaszjog gyakorlása
- Az intézetbe bevihető személyes használati tárgyak köre, tárolása, védelme
- Zsebpénz felhasználása
- Ruházattal, ágyneművel való ellátás
- Tisztálkodási szerekkel való ellátás
- Dohányzás
- Szabad levegőn tartózkodás
- Sportolás, szabadidős tevékenysége

A házirend tartalma[27]

[23] Magyar Helsinki Bizottság, 2014, 6.o.
[24] Bv. tv. 346-347. §
[25] Bv. tv. 346. § (4)
[26] Rendtartás, 58. §
[27] Rendtartás, 5. §

A külvilággal való kapcsolattartást a Bv. tv. szabályozza, eszerint a fiatal – ellenőrzött – kapcsolatot tarthat hozzátartozójával, szülői felügyeleti jogát gyakorló szülőjével, illetve más törvényes képviselővel, ha nem merül fel olyan ok, mely kizárhatná a kapcsolattartást. A kapcsolattartás levélküldés, telefon, csomag, látogatás, rendkívüli látogatás, családi konzultáció, valamint családterápia formájában valósulhat meg. Az ellenőrzött kapcsolattartás során minden esetben jelen van egy harmadik személy, aki hallja többek között a telefonbeszélgetést vagy a látogatáson elhangzottakat, illetve – szúrópróbaszerűen – elolvassa és ellenőrzi a kiküldött és befogadott levelek tartalmát. A kapcsolattartás valamennyi formája, biztonsági szempontból indokolt esetben megszakítható.[28] Ellenőrzés nélküli kapcsolattartásra jogosult többek között védőjével, és gyermekvédelmi gyámjával. Az intézet igazgatója – a fiatalkorú kérelmére – engedélyezheti az eddig felsoroltakon kívül, más személyekkel történő kapcsolattartást is, amennyiben az ügyész erre engedélyt ad.[29]

A javítóintézet tárgyi feltételei közé tartozik többek között olyan helységek kialakítása, melyek alkalmasak a szabadidő hasznos eltöltésére, közösségi tevékenységekre (könyvtár, szakkör), sportolásra, vallásgyakorlásra, látogatók fogadására, terápiás foglalkozásra.[30] Biztonsági elkülönítő helységet kell létesíteni annak érdekében, hogy az ön-vagy közveszélyes magatartást tanúsító fiatalokat addig el lehessen helyezni, amíg az elkülönítésre okot adó magatartás megszűnik.[31] Rendkívüli eseménynek számít az intézetben a szökés, ha valakit biztonsági elkülönítőbe helyeznek vagy átszállítanak bv. egészségügyi intézetébe, vagy az IMEI-be.[32] A rendkívüli eseményekről jegyzőkönyvet kell felvenni, és meg kell küldeni a fenntartónak és a törvényességet ellátó ügyészségnek is.[33]

A letartóztatást foganatosító javítóintézetben folyó nevelés célját, alapelveket és módszereket az intézet szakmai programja tartalmazza, mely elkészítésében részt vesz a nevelőtestület. A program magába foglalja többek között az intézetben elhelyezett fiatalok nevelési és ellátási szükségleteit, a javítóintézeti letartóztatás célját, alapelveit, feladatait, valamint az ezekhez kapcsolódó gondozási, nevelési, ellátási, képzési, fejlesztési és terápiás célú tevékenységeit. Tartalmazza még az intézeten kívül és belül történő együttműködés módját; az ellátott fiatalok jogainak, valamint kötelezettségeinek teljesítésével kapcsolatos feladatokat és módszereket; a munkatársak felkészülése biztosításának módjait és formáit, az antidiszkriminációs

[28] Bv. tv. 357-361.§
[29] Bv. tv. 419. § és Rendtartás 60. § (2)
[30] Rendtartás, 9.§
[31] Rendtartás, 10§
[32] 27/2018. (XI.19.) SZGYFK Szabályzat
[33] Rendtartás, 11.§

oktatásukra vonatkozó tervet. A szakmai program felülvizsgálatáról és módosításáról gondoskodni kell.[34]

A munkakörökre és képesítési előírásokra vonatkozó követelmények lehetővé teszik, hogy a szakemberek – a megfelelő szaktudás birtokában – holisztikus szemlélettel forduljanak az intézetben elhelyezett fiatalok felé.

8. § (2b) A Szociális, gyermekjóléti és gyermekvédelmi szolgáltatás, ellátás vezető szakmacsoportba tartozó munkakörök:

a) intézményvezető,
b) intézményvezető-helyettes,
c) gazdasági vezető,
d) szervezeti egység vezetője,
e) javítóintézeti otthonvezető.

(2c)* A 2. melléklet szerinti nem vezetői munkakörök közül

a) a Gyermekvédelmi gondozás, nevelés, fejlesztés szakmacsoportba tartozó munkakörök:
aa) fejlesztőpedagógus,
ab) gyógypedagógus,
ac) iskolai tanár, tanító,
ad) nevelő,
ae) orvos,
af) szakoktató, munkaoktató;

b) a Gyermekvédelmi gondozás, nevelés, fejlesztés asszisztenciája szakmacsoportba tartozó munkakörök:
ba) ápoló,
bb) gyermekfelügyelő,
bc) rendész;

c) a Gyermeki jogokat védő szakértői tevékenység, tanácsadás szakmacsoportba tartozó munkakörök:
ca) növendékügyi előadó,
cb) pszichiáter,
cc) pszichológus,
cd) utógondozó.

Munkakörök és képesítési előírások[35]

A letartóztatás végrehajtási helyének megváltoztatása indítványozását az ügyész, a terhelt vagy az intézet igazgatója kezdeményezheti abban az esetben, ha a fiatal *„(...)tartósan szembeszegül a javítóintézet rendjével, társai vagy a javítóintézeti dolgozók testi épségét, illetve a javítóintézet biztonságát súlyosan veszélyeztető magatartást tanúsít (...)”* [36]

A letartóztatás, a lejárat napján vagy megszüntető rendelkezés napján szűnik meg.[37]

[34] Rendtartás 6. §
[35] Rendtartás, 8. §
[36] Bv. tv. 415. § (1)
[37] Bv. tv. 421. §

5. Bekerüléstől a szabadulásig

Az alábbiakban áttekintem a javítóintézeti letartóztatásban eltöltött folyamatot. Mivel minden eset egyedi, nehéz egy tipikusnak mondható utat felvázolni. Minden javítóintézet ugyanazon követelmények alapján dolgozza ki házirendjét, melyek intézetenként különbözhetnek. Ez abból adódik egyrészt, hogy minden intézetnek van némi mozgástere a szokások kialakításában, másrészt pedig a letartóztatást foganatosító javítóintézetek Magyarországon egy, kettő, de akár három profilúak is lehetnek, ami befolyásolhatja a házirend kialakítását. Az alábbiakban a Budapesti-, és a Debreceni Javítóintézet házirendje alapján mutatom be a mindennapokat.

Mielőtt rátérek a javítóintézeti letartóztatásra, fontos kitérni pár mondat erejéig az őrizetre, mely a letartóztatás előszobájának is nevezhető. Nem törvényszerű, azonban sok esetben jellemző, hogy megelőzi a letartóztatást.[38] Abban az esetben rendelhető el, ha tettenérés történt, de az elkövető személyazonossága nem megállapítható, ha fennáll a megalapozott gyanú, ha valószínűsíthető az elkövető tekintetében a személyi szabadságot érintő bírói engedélyes kényszerintézkedés elrendelése, vagy ha a tárgyaláson rendzavarást követett el. Az őrizet maximális tartama 72 óra, helyszíne rendőrségi fogda.[39]

Tételezzük fel, hogy a javítóintézeti letartóztatást őrizet előzi meg. Az „előszoba" hasonlatot megragadva tehát, az őrizet az első momentuma annak a hosszú folyamatnak, melyen a javítóintézeti letartóztatásban elhelyezett fiatalok végig mennek. Rövidsége ellenére jelentőségteljes periódusnak számít, hiszen a fiatal itt találkozik először a büntetőeljárás szereplőivel, itt alakítja ki prekoncepcióit velük szemben, valamint az elkövetkező időszakra vonatkozóan. Már ezen a ponton szükséges olyan hatást gyakorolni rá, melyek elősegítik a Be. által meghatározott, a fiatalkorúak büntetőeljárására vonatkozó célok elérését, valamint a nemzetközi dokumentumokban is deklarált alapelvek érvényesítését.

A javítóintézetbe rendőri kísérettel érkezik meg a fiatal. Befogadásakor először orvosi vizsgálaton megy keresztül, ha szükséges, az intézetnek gondoskodnia kell egészségügyi elkülönítéséről. Ezután, az intézet erre kijelölt munkatársa tájékoztatást nyújt a fiatalnak a letartóztatással kapcsolatosan. Ahogy az Rendtartásban is olvasható, *„A befogadáskor írásban és röviden szóban, valamint a befogadást követő legfeljebb 72 órán belül részletesen szóban – a fiatalkorú számára érthető megfogalmazással – tájékoztatni kell a fiatalkorút."*[40] Ez a fajta odafigyelés indokolt a növendékek tekintetében, hiszen a fiatalkorú bűnelkövetőkre jellemzők a kommunikációs nehézségek, mint a beszédprodukció, mind a beszédértés területén.[41] Arra is kitér a rendelet, hogy ha a

[38] Farkas, Róth, 2018
[39] Be 274. § és Bv. tv. 427. § (2)
[40] 16.§ (1)
[41] Snow - Powell, 2004

fiatalkorú személy nem tud olvasni, akkor két tanú jelenlétében írásba kell foglalni a tájékoztatás megtörténtét, valamint annak tudomásul vételét.
A családban nevelkedő fiatalok esetében a javítóintézet megkeresi a területileg illetékes gyámhivatalt annak érdekében, hogy naprakész környezettanulmány készüljön róla. A gyermekvédelmi szakellátásból érkező fiatalok vonatkozásában – szintén az illetékes gyámhivatal felkeresése útján – be kell szerezni a korábban elkészített pedagógiai és pszichológiai véleményeket, a fiatal egészségi állapotára vonatkozó adatokat, ezek mellett pedig tájékoztatást kell kérni az eddigi életútjáról, valamint családi kapcsolatairól.

6. A szabálytanulás időszaka

A javítóintézeti letartóztatás megkezdésének következő állomása a befogadó csoport. Ezen csoport funkciója szerint átmenetet tud képezni a bekerülés előtti élettér, és a letartóztatással járó, szigorúan strukturált, szabályozott és ellenőrzött környezet között. Sokan itt szembesülnek először a rácsokkal, határolókapukkal, biztonsági kamerákkal, vagy a köszönésre és – az épületben történő mozgás mikéntjére – vonatkozó szabályokkal. A fiatal még nem vehet részt a munkafoglalkoztatáson, nem jár iskolába a többiekkel, hanem saját csoportjában, órarend szerinti foglalkozásokon vesz részt. Ez egy nagyon nehéz krízisidőszak a fiatal intézeti életében, hiszen be kell illeszkednie az intézet szigorú rendjébe, valamint saját csoportjába. Itt tanulja meg többek között azt, hogy csak felügyelettel mozoghat, kijelölt útvonalon és területen az intézeten belül, napközben nem tartózkodhat engedély nélkül, egyedül a hálószobájában, vagy, hogy engedélyt kell kérnie a mosdó használatához, és azt is csak akkor teheti meg, ha nem tartózkodik más növendék a vizesblokkban.[42] Sok esetben jellemző az ellenállás, főleg azon növendékek részéről, akiknek vannak korábbról intézeti tapasztalatai. *„Az első napok után csillapulnak ezek a szorongások és lassan elkezd a fiatal is tájékozódni, Keresi azokat, akikhez bizalmas lehet, és kezdi várni a kihallgatásokat, a tárgyalások időpontját.”* [43]
Csoportos elkövetési alakzat esetén elkülönítik a növendékeket, a bűntársak közül csak egy tartózkodhat befogadó csoportban, a többi személy egyből állandó nevelési csoportba kerül, ahol nehezebb felvenni a ritmust, mivel nincs átmenet. Ez a helyzet kihívást jelent a növendéknek és a nevelőknek egyaránt.
A kezdeti időszakban többet találkozhat pszichológussal, terapeutával, gyógypedagógussal, fejlesztőpedagógussal, annak érdekében, hogy beilleszkedésének megsegítése több oldalról is biztosítva legyen.[44] A befogadó csoportban maximum egy hónapot tölthet el a fiatal, amíg az intézet által összeállított – egy pszichológusból, egy gyógypedagógusból és egy orvosból álló –

[42] Budapesti Javítóintézet Házirend, 2019; Debreceni Javítóintézet Házirend, 2021
[43] B. Aczél, 2000. 24.o.
[44] Budapesti Javítóintézet Házirend, 2019

szakértői csoport eldönti, hogy melyik nevelési csoportban helyezik el. Döntésüket a fiatalkorú szükségleteire alapozzák, figyelmet fordítva a – fogyatékossága, személyiségzavara vagy egészségi állapota tekintetében – sajátos nevelési, oktatási igényeire. Ezután a szakértői csoport tagjai javaslatot tesznek az intézet igazgatójának az elhelyezésre vonatkozóan.[45]

7. A „szürke" hétköznapok

A letartóztatott fiatal, a befogadó csoport után átkerül az ún. nevelési csoportba, ahol maximum 12 fő tartózkodhat. Speciális csoportokat – melyek maximális létszáma 8 fő – kell továbbá létrehozni azoknak a növendékeknek is, akik szenvedélybetegek, vagy súlyos beilleszkedési zavarokkal, esetleg személyiségzavarokkal küzdenek.[46] A hetirend intézetenként változik, azonban általánosnak mondható, hogy hétköznapokon délelőttönként iskolában, vagy munkafoglalkoztatáson-, délután pedig különböző kötött és kötetlen foglalkozásokon vesznek részt. A Gyvt. alapján, a javítóintézetnek kell biztosítania a fiatalok oktatásának és foglalkoztatásának feltételeit, melyet úgy oldanak meg az intézmények, hogy külsős iskolákkal kötnek együttműködési megállapodást.
A mindennapokban szükség van egy olyan motivációs rendszerre, ami egyértelmű minden fiatal számára, kiszámítható, következetes és egymás tiszteletén alapul. A jutalmazás és az elmarasztalás protokollja a Rendtartásban és a javítóintézet Házirendjében olvasható, a fokozatosság elvén és rendszeres időközönként (naponta-hetente-havonta-negyedévente) lezajló értékelés alapján történik. A Budapesti Javítóintézetben például egy alaposan kidolgozott fokozatrendszer alapján folyik az értékelés, minden fokozathoz egyéni jutalmak kapcsolódnak, például plusz látogatási idő, saját tárgyak körének növelése, munkadíj emelése.[47]

A javítóintézet házirendje szerint éli a mindennapjait, iskolába jár, dolgozik, délután pedig a nevelőotthoni csoportjában tartózkodik. Nagyon fontos, hogy legyen napi-, és hetirend, hiszen az intézetből történő eltávozás kizárása miatt sokkal feszültebbek a fiatalok. Ezeket a szigorúan strukturált, sokszor monoton napokat pedig időnként megtöri egy-egy kihallgatás, szembesítés, előkészítő ülés vagy tárgyalás. A fiatalok hangulatára rányomja a bélyegét ez a bizonytalanságokkal teli várakozás – főleg a tárgyalás előtti- és az elnapolt vagy sikertelen tárgyalás utáni napokon –, ami hatással van interakcióikra és magatartásukra is. Fontos, hogy a fiatallal foglalkozó felnőttek ne keltsenek hamis reményeket, ne adjanak tanácsot és ne jósoljanak semmiféle végkifejletet a növendék ügyével kapcsolatban.[48] A fiatalok

[45] Bv. tv. 350.§
[46] Gyvt. 66/M. §
[47] Budapesti Javítóintézet Házirend, 2019; Debreceni Javítóintézet Házirend, 2021
[48] B. Aczél 2000

eddigi életútja, az intézeti lét bizonytalansága, a bezártság és az életkori sajátosságokból fakadó – vagy azon túli – nehézségekkel való megküzdést hivatottak segíteni az intézetben dolgozó pszichológiai és mentálhigiénés ellátást biztosító munkatársak.

8. Élet a javítóintézeti letartóztatás után

Ahogy az feljebb olvasható, a letartóztatás a lejárat napján vagy megszüntető rendelkezés napján szűnik meg. Jelen tanulmányban a javítóintézeti letartóztatásból történő távozás négy formáját különböztetem meg:

1. Jogerős javítóintézeti nevelés megkezdése
2. Szabadságvesztés büntetés letöltésének megkezdése
3. Szabadulás
4. Szabadlábra helyezés

Az első három esetben lezárult az eljárást, a fiatal egy másik intézménybe kerül, vagy végleg szabadul. A negyedik eset, tehát a szabadlábra helyezés esetén nincs vége az eljárásnak, további eljárási cselekmények várnak a fiatalra, de otthonában – gyermekvédelmi szakellátásban élőként gyermekotthonban, vagy nevelőszülőknél – lehet, munkát vállalhat, vagy iskolába járhat. Ez a kimenet kiszámíthatóságában különbözik az első három esettől, ugyanis az eljárás bármely szakaszában megtörténhet, hiszen a kényszerintézkedés fenntartása csak a leginkább szükséges esetben indokolt. Ez abban az esetben jelent problémát, ha egy konstruktív élethelyzetet kell a háta mögött hagynia, mert a büntetőeljárás végeztével be kell vonulnia vagy javító- vagy bv. intézetbe.

9. Dilemmák

Ahogy az jelen tanulmány elején is olvasható, a javítóintézeti letartóztatást számos dilemma övezte és övezi a mai napig. A következőkben azokat a véleményeket, álláspontokat mutatom be és állítom egymás mellé, melyek felmerültek a téma kapcsán szervezett kerekasztal beszélgetéseken, publikációkban, kutatásokban, szakmai jelentésekben. A javítóintézeti letartóztatás témája számos szakembert mozgatott meg az elmúlt két évtizedben. Az alábbiakban olvasható vélemények, meglátások a kutatók és jogvédő szervezetek mellett olyan szakemberektől származnak, akik munkájuk során, a javítóintézeti letartóztatás alatt álló fiatalokkal rendszeresen találkoztak, tehát élő tapasztalatuk volt a kényszerintézkedéssel kapcsolatban.

I.

A büntetés-végrehajtási intézet nem arra rendezkedett be, hogy fiatalokat neveljen, erre a célra hatékonyabb megoldás lehet a javítóintézetben foganatosított letartóztatás.[49]

vs.

Csak azért nem rendelhet el a bíró javítóintézeti letartóztatást, mert ott kiemelkedő nevelési munka folyik. [50]

A fiatalkorúak igazságszolgáltatása során figyelembe kell venni a gyermek- és fiatalkorúak életkori sajátosságait, azonban a cselekményre foganatosított reakciónak illeszkednie kell a büntetőjog kereteibe. Ez a két szempont igen nehezen egyeztethető össze.[51]
Dénes Veronika szerint szemléletváltásra van szükség, a fiatalkorú elkövetőre elsősorban olyan gyermekként kell tekinteni, aki nevelhető. Egy Svájcban megvalósuló példát hoz fel, miszerint létezik olyan védőintézkedés, ami lehetővé teszi annak végrehajtását nevelőszülőknél, valamint zárt- vagy terápiás intézetekben. Hozzáteszi, szerinte a javítóintézeti letartóztatásnak „előrehozott nevelésnek" kell lennie.[52] Hatvani Erzsébet közös szakmai elvek megfogalmazását szorgalmazza, hiszen a büntetőeljárás során született döntést befolyásolja az eljáró személyisége, ami különböző szempontokon alapuló értékelést, így különböző következményeket eredményezhet. [53]

II.

A kényszerű bezárás lehetőséget ad arra, hogy a növendékek több osztályfokot is elvégezhessenek.[54]

vs.

Az eljárás hossza miatt a fiatalok eltávolodnak a cselekményüktől, így kevésbé tudják megérteni annak súlyát.[55]

A javítóintézeti letartóztatásból fakadó kényszer-bezártság egyik legtöbbet emlegetett hozadéka a fiatalok tanulmányi fejlődése. Ennek igénye azonban nagy terhet ró a javítóintézetre, ugyanis az itt dolgozókra hárul az alacsony iskolai

[49] Dénes in Both, 2010
[50] Bodor in Both, 2010
[51] Kerezsi, 2007
[52] Dénes in Both, 2010
[53] Hatvani in Both, 2010
[54] B. Aczél, 2000
[55] B. Aczél, 2000

végzettség és a sikertelenségből fakadó tanulási hátrányok csökkentése.[56] A fiatal által elért osztályfok nem garantálja az osztályfokhoz tartozó tudás meglétét. Nem ritka, hogy egy 9. osztályt végző növendék nem ismeri a matematikai alapműveleteket. Az Alapvető Jogok Biztosa szerint, a sikeres reintegráció érdekében indokolt lenne tanulásra kötelezni azokat a javítóintézeti növendékeket is, akik ugyan már nem tankötelesek, de még nem rendelkeznek alapfokú végzettséggel[57]

A bezártság előnyei és hátrányai sokszor felmerülnek a javítóintézeti letartóztatás kapcsán. Lakhelyelhagyási tilalom esetén a zárt intézeti létből fakadó káros hatások kivédhetők. Egyes vélemények szerint azonban fiatalkorúak esetén nem javasolt lakhelyelhagyási tilalom alkalmazása, mert nem lehet ellenőrizni. *„Abban a pillanatban azonban, mikor a fiatalkorú terhelt napi rendszerességgel távozhat otthonából, fel kell adni mindazon célok megvalósulásának realitását, melyre tekintettel a kényszerintézkedés elrendelésére sor került.”*[58]

A különféle kimenők és szabadságok hiányában sokkal nehezebb motiválni a javítóintézeti letartóztatásban elhelyezett fiatalokat, mint a javítóintézeti nevelést töltő társaikat. Motivációjuk bázisát a közelgő tárgyalásukra készülő nevelői jellemzés adja, hiszen, ha a bíróságon azt látják, hogy javuló tendenciát mutat viselkedése, kedvezőbb ítéletet remélhetnek.[59] A tartalmas, részletes nevelői vélemény segíti a bírót a szankció megválasztásánál.[60]

III.

A fiatal kiszakad a deviáns közegből, megismer más értékeket, az új közeg eddig ismeretlen igényeket kelthet fel benne. [61]
vs.
Az intézetben elért pozitív változások nem hasznosíthatóak szabadulás után, amennyiben a fiatal abba a diszfunkcionális környezetbe tér vissza, melyből érkezett.[62]

Fontos megemlíteni, hogy nem csak a szabadulás után nehezen hasznosíthatók a pozitív változások, hanem akkor is, amikor a fiatal egy másik intézménybe (javítóintézet vagy büntetés-végrehajtási intézet) távozik. Egységes információs rendszer hiányában, az új helyen, a fiatalt fogadó munkatársaknak nincs tudomása arról, hogy milyen folyamatokba kezdtek bele a növendékkel, meddig jutottak el

56 Dr. Lénárd - Rácz, 2014
57 AJB-493/2018.
58 Laczkovics, 2010 110. o.
59 B. Aczél, 2000
60 Dr. Frech, 2010
61 B. Aczél in Both, 2010
62 Dr. Lénárd - Rácz, 2014

abban előző gondozási helyén.[63] Erre a felvetésre megnyugtató válaszként szolgálhat a nemrég bevezetett Javítóintézeti Informatikai Rendszer, azaz a „JIR", mely felület tartalmaz minden olyan információt a fiatalról, melyre szüksége van a vele foglalkozó szakembereknek, a nevelési folyamat fenntartásához.[64]

IV.

Nincsenek büntetett előélethez fűződő hátrányok. („Tiszta" erkölcsi bizonyítvány.)[65]
vs.
Ha valaki tudomást szerez arról, hogy egy adott fiatal volt korábban javítóintézetben, bűnözőként fog rá tekinteni.[66]

Hiába törekszik a jogi szabályozás a stigmatizáció elkerülésére, a társadalom attitűdjének formálásában kevesebb szerepe van, azonban ezen kívül is vannak olyan reintegrációt segítő lehetőségek, melyekhez hozzá tudna járulni a jogalkotó.
A javítóintézeti letartóztatás végeztével nem áll a fiatal rendelkezésére egyetlen olyan eszköz sem, mely segíthetné a társadalomba történő visszailleszkedését. Míg a javítóintézeti nevelés megszűnése előtt az intézet – a gyermekjóléti szolgálat segítségével – előkészíti a fiatal családba való visszatérését vagy önálló életének megkezdését,[67] addig a letartóztatásból szabaduló fiatalnak ezt jó esetben a családja segítségével, rosszabb esetben önállóan kell megoldania. A család ritkán tudja felkészülten fogadni a szabaduló fiatalt, az ezzel kapcsolatos segítő mechanizmusok pedig jelenleg nem állnak rendelkezésükre. Ahhoz, hogy a szabadulás utáni lét ne hidegzuhanyként érje a fiatalt, fontos a fokozatosság elvének betartása. Ehhez pedig az utógondozói hálózat működtetése elengedhetetlen, ami nélkül a fiatal újabb sikertelenséget él át. A reintegráció érdekében fontos lenne nyitni a szabad világ felé, azonban erre nincs lehetőség. Érdemes lenne érdekeltté tenni a munkáltatókat ezeknek a fiataloknak a foglalkoztatásában, az intézet pedig biztosíthatna egy nevelőt annak érdekében, hogy ellenőrizze és segítse a fiatalokat a munkavégzés során.[68]

Ha a fiatal kórházi fekvőbeteg ellátásra szorul – és nem büntetés-végrehajtási kórházban kezelik –, állandó rendőri felügyeletet kell számára biztosítani. Ez egyrészt a rendőrség számára jelent nagy terhet, másrészt a fiatalkorúnak is

[63] Hatvani in Both, 2010
[64] Debreceni Javítóintézet honlapja, https://dji.hu/jir/jirfelhasznaloiutmutato (Utolsó letöltés ideje: 2024. január 3.)
[65] Dr. Lénárd - Rácz, 2014
[66] Dr. Lénárd - Rácz, 2014
[67] Bv. tv. 382.§ (3)
[68] Dr. Lénárd és Rácz, 2014

frusztráló lehet, hiszen a rendőr állandó jelenléte, a kórházi ágyhoz bilincselt fiatal kellemetlen helyzetet idézhet elő a növendék számára, betegtársai és a kórház dolgozói előtt. Ez a probléma akkor is fennáll, amikor tartósan beteg (pl. cukorbeteg) növendéket helyeznek letartóztatásba.[69]

V.

A tárgyi súly figyelembevétele mellett fontos lenne a fiatalkorú személyi körülményeire is tekintettel lenni a kényszerintézkedés elrendelése során. *„Viszonylag súlyosabb bűncselekmény gyanúja esetén is mellőzhető lehet az előzetes letartóztatás akkor, ha a terhelt olyan családi körülmények között él, mely garantálhatja a hatósággal történő együttműködést, a bűnismétlés veszélyének minimalizálását.”*[70]

vs.

A bírákat nem befolyásolhatja az, hogy a fiatal esetleg sokszorosan hátrányos környezetben él.[71]

Ezt a szembenállást oldja fel Hatvani Erzsébet hozzászólása, miszerint valóban nem terjed ki az igazságszolgáltatás feladata a társadalmi problémák megoldására, azonban ugyanolyan mértékben kell figyelembe venni a fiatalkorú személyi körülményeit, mint a bűncselekmény tárgyi súlyát. A pártfogó felügyelő feladata ezen életkörülmények és a bűncselekmény elkövetését befolyásoló körülmények feltárása. Javaslatot tesz személyre szabott magatartási szabályokat, ezeket azonban sokszor nem veszik elég komolyan sem a bírók, sem az ügyészek, sem a pártfogók.[72] Dr. Laczkovics elfogadja azt az alapelvet, miszerint a büntetőeljárásnak nem feladata más intézményrendszerek hiányosságának pótlása, azonban véleménye szerint a gyermekek lehetséges védelmét is figyelembe kell venni a büntetőhatalom érvényesítése mellett.[73]

10. Összefoglalás

Jelen tanulmány a javítóintézeti letartóztatással kapcsolatos statisztikák, valamint a jogszabályok bemutatását követően felvázol egy tipikusnak mondható intézeti életutat, végül kitér azokra a dilemmákra, melyek a kényszerintézkedés elmúlt közel harminc évében felmerültek. A javítóintézetben foganatosított letartóztatás létrejöttét szakmai viták előzték meg, az évek során keletkezett tapasztalatokat pedig aktív szakmai fórumokon osztották meg egymással az érintett szakemberek. A

[69] Karanedev, 2010
[70] Dr. Laczkovics in Both, 2010
[71] Bodor in Both, 2010
[72] Hatvani in Both, 2010
[73] Dr. Laczkovics in Both, 2010

normatív keretek részletesek és adottak, a gyakorlatban történő alkalmazhatóság kapcsán évről-évre felmerülő dilemmák indokolják, hogy tovább folytatódjon a szakmai értekezés az adott kényszerintézkedésről. A gyermek- és fiatalkorú bűnelkövetők reintegrációja – a büntetőjogi reakciók mellett – megköveteli a pedagógiai eszközök adekvát alkalmazását is, a célok elérése szükségelteti a büntetőeljárásban dolgozó szakemberek szoros együttműködését.

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