

STUDIA IURISPRUDENTIAE DOCTORANDORUM
MISKOLCIENSIIUM

MISKOLCI DOKTORANDUSZOK
JOGTUDOMÁNYI TANULMÁNYAI

29.



MISKOLCI EGYETEM
ÁLLAM-ÉS JOGTUDOMÁNYI KAR
DEÁK FERENC ÁLLAM-ÉS JOGTUDOMÁNYI DOKTORI ISKOLA

**STUDIA IURISPRUDENTIAE DOCTORANDORUM
MISKOLCIENSIMUM**

MISKOLCI DOKTORANDUSZOK JOGTUDOMÁNYI TANULMÁNYAI
2025. évi 1. szám

Tomus 29

Szerkesztő:
Prof. Dr. Róth Erika

Technikai szerkesztő, a folyóirat titkára:
Dr. Sági Edit
Dr. Udvarhelyi Bence

A tanulmányok technikai szerkesztésében közreműködött:
dr. Harsányi Vivien, dr. Lengyel Bianka Panna, dr. Papp Laura, Ömer
Batuhan Dogan, Elgabaili Tira, dr. Kertész Tamás, Nguyet Thi Anh
Truong, Asmaa Mekkaoui, Oucif M'Hamed, Anh Ngoc Nguy

Kiadja:
Bíbor Kiadó Bt.
Felelős kiadó: dr. Borkuti Eszter

ISSN 1588-7901

MISKOLC, 2025.

Előszó

A Miskolci Egyetem Deák Ferenc Állam- és Jogtudományi Doktori Iskolája gondozásában megjelenő *Studia Iurisprudentiae Doctorandorum Miskolciensium* 2025. évi első száma ezúttal is a megszokott színes tartalommal jelenik meg. A magyar és külföldi doktoranduszok írásai igazolják, hogy a doktori képzésben résztvevők a klasszikus kutatási témák feldolgozása mellett olyan aktuális problémákra is választ keresnek, amelyek akár más tudományterületek művelőinek érdeklődésére is számot tarthatnak hazai és nemzetközi viszonylatban egyaránt.

Már megszokott, hogy a magyar nyelvű képzésben résztvevő hallgatók is szívesen és gyakran publikálják kutatási eredményeiket idegen nyelven. Ennek is köszönhető, hogy a most megjelenő dolgozatok többsége angol nyelvű. A külföldi doktoranduszok munkáiból pedig ezúttal is több, a magyar jogtudományi kutatásokban eddig kisebb hangsúllyal megjelent ország jogszabályi rendelkezéseit, jogalkalmazói gyakorlatát ismerhetjük meg.

A tartalom sokszínűsége a magyarázat arra, hogy nehéz nagyobb csoportokba rendezve bemutatni a kötetben szereplő írásokat, amelyek római jogi, közigazgatási jogi, büntetőjogi, polgári jogi és számos más jogágat érintő témákat dolgoznak fel.

Ali Hussein Eid az áruk nemzetközi adásvételi szerződéseiről szóló ENSZ egyezmény sajátosságait vázolja fel tanulmányában, elsősorban arra koncentrálva, hogy milyen előnyöket jelent az egyezmény a piaci szereplők számára. *Raheleh Soltanibabrehmand* és *Somayyeh Soltanibabrehmand* írása a nemzetközi magánjog szerepét mutatja be a szellemi tulajdonjogok online platformokon történő megsértésének megakadályozásában. Ezzel kapcsolatban az orosz és az uniós szabályok összehasonlító elemzésére vállalkoznak a szerzők.

Bajáky András Olivér a magister officiorumnak a császári államtanács működésében játszott szerepét vizsgálja római jogi tárgyú dolgozatában.

Balla Bulcsú a sértett által okozott kockázat büntetőjogi aspektusait vázolja fel, utalva arra, hogy az elkövető büntetőjogi felelősségének vizsgálata során ennek kiemelkedő jelentősége lehet. *Nshimiyimana Francois Régis* az Európa Tanács kiberbűnözés elleni küzdelemben játszott szerepét elsősorban a Budapesti Egyezményre és annak kiegészítő jegyzőkönyveire összpontosítva mutatja be, elemmezve azok alkalmazkodóképességét a folyamatosan változó kiberfenyegetésekhez és az újonnan megjelenő technológiákhoz. *Papp Dóra* dolgozatában a mesterséges intelligencia alkalmazásának lehetőségeit vizsgálja a büntető igazságszolgáltatás, azon belül is a büntetéskiszabás, elsősorban a súlyosító és az enyhítő körülmények értékelése során.

Dayka-Czifra Beáta a munka világának napjainkban zajló átalakulása, különösen az atipikus foglalkoztatási formák térnyerése révén felmerülő munkavédelmi problémákkal foglalkozik. A munkajogi tárgyú írások sorát gyarapítja *Kocsis Melinda* tanulmánya, amelyben a harmadik országbeli munkavállalók helyzetét vizsgálja az Európai Unióban.

Dominik Drdul fő célja a Szlovák Köztársaság Nemzeti Tanácsa szerepének bemutatása az Európai Unió jogalkotási folyamatában, valamint az EU politikai és jogi tevékenységének más területein.

Farkas Zsófia a nemzetközi fizetési rendszerek fejlődését és jelenlegi állapotát vizsgálja, két fő rendszerre, a SWIFT-re és a SEPA-ra összpontosítva, elsősorban a költséghatékonyság, a tranzakciók feldolgozásának időigénye és a biztonság szempontjából. *Hanin Ghanem* a közigazgatási szerződések sajátosságait, fogalmi kereteit elemzi, kiemelve azoknak a magánszerződésektől eltérő jellegét.

Hojnyák Dávid tanulmányából Carl Schmitt szuverenitás-elméletének főbb jellemzőit, megalkotásának körülményeit ismerhetjük meg, de ezt meghaladón arra is vállalkozik a szerző, hogy a Schmitt koncepciója kapcsán a koronavírus-járvánnyal összefüggésben felmerült kérdésekre reflektáljon.

Horváth Fábán László azokat a jogi eljárásokat mutatja be, amelyek a közigazgatási apparátus lecseréléséhez vezettek a II. világháború utáni években. *Kisszöllősi-Szántó Balázs* tanulmányában a devizahitel-ügyekben benyújtott alkotmányjogi panaszok alapján indult ügyek elemzését tűzte ki célként. *Lang-Fuksa Dorottya* a biztonság, fenntarthatóság, hatékonyság követelményeinek megfelelő svéd közlekedési kultúrát kívánja megismertetni az olvasóval és azt vizsgálja, hogy hogyan lehetne a Svédországban alkalmazott megoldásokat felhasználni más országok közlekedési kultúrájának javítása érdekében.

Maria Mastowicz az örökbefogadásra vonatkozó lengyelországi szabályozást dolgozza fel tanulmányában, elsősorban a gyermek származásának ismeretéhez való jog és az örökbefogadó családba való integráció közötti egyensúly megteremtése szempontjából. *Nyíkes Zita* dolgozata a jogi személy jó hírneve védelmének fontosságával foglalkozik az Európai Unió Bírósága és az Emberi Jogok Európai Bírósága előtt folyamatban volt ügyek alapján.

Nagy Csilla tanulmányának megírásához Stephen King Hasznos Holmik c. művét vette alapul, ennek felhasználásával mutatja be, hogyan lehet hivatali úton, közigazgatási eljárás során, jegyző előtti birtokvédelmi eljárás keretében, birtokperben, illetve mediáció segítségével rendezni a vitás helyzeteket, mielőtt a kapcsolatok visszavonhatatlanul tönkremennének.

Oshan Bayan Törökország Alkotmánybíróságának az alapvető jogok és szabadságok védelmében betöltött szerepét vizsgálja, különös tekintettel a szekularizmus, a politikai pártokra vonatkozó korlátozások és a nemek közötti egyenlőség értelmezésével kapcsolatos döntésekre. *Szűcszai Dóra* az életvégi döntéshozatalhoz való jog magyar, német, osztrák és svájci szabályozási modelljeinek összehasonlító jogi elemzésére vállalkozik, kiemelve a jogi keretek, az alkotmányos értelmezések és a szabályozási szemlélet közötti különbségeket.

A Szerkesztők bíznak benne, hogy az ezúttal is gazdag tartalommal megjelenő lapszámban minden kedves olvasónk talál több olyan tanulmányt, amely felkelti az érdeklődését és így a doktori képzésben résztvevők kutatási eredményei széles körben ismertté válnak.

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

TARTALOMJEGYZÉK

ALI HUSSEIN EID

The Role of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in Enhancing Certainty and Reducing Transaction Costs in International Trade 7

BAJÁKY ANDRÁS OLIVÉR

A magister officiorum szerepe a császári államtanács működésében.....25

BALLA BULCSÚ

Criminal law aspects of risk caused by the victim.....47

DAJKA-CZIFRA BEÁTA

Munkavédelmi kihívások megjelenése az atipikus munkavégzések tekintetében....61

MGR. DOMINIK DRDUL

The role of National Council of the Slovak Republic in the EU.....77

ZSÓFIA FARKAS

The role of international payment systems, with particular regard to SWIFT and SEPA schemes.....103

HANIN GHANEM

The Conceptual Framework for the Public Administration Contract..... 123

HOJNYÁK DÁVID

Carl Schmitt szuverenitás-elméletének vázlata.....143

HORVÁTH FÁBIÁN LÁSZLÓ

A közigazgatás „megtisztításának” eszköztára a II. világháború után Jogi eljárások a 1945–50 között.....155

KISSZÖLLŐSI-SZÁNTHÓ BALÁZS

On Constitutional Complaints Submitted in Foreign Currency Loan Cases.....169

KOCSIS MELINDA

Third-Country Workers in The European Union.....195

LANG-FUKSA DOROTTYA

Svéd út a fenntartható közlekedéshez.....211

MARIA MASŁOWIEC

Private Law Aspects of Protecting a Child's Right to Identity in the Context of Adoption in the Domestic Legal Regulations of Poland.....223

NYIKES ZITA

On What Ground the Legal Entity Has the Right to Protect Its Reputation?.....245

NSHIMIYIMANA FRANCOIS REGIS

Cybercrime and legal framework of the Council of Europe: A focus on the Budapest Convention and its protocols 265

NAGY CSILLA

Szomszédkonfliktusok az irodalomban: Kisvárosi szomszédkonfliktusok és lehetséges megoldásaik Stephen King: Hasznos Holmik c. művén keresztül.....287

OSHAN BAYAN

Features of Constitutional Court of Turkey.....309

PAPP DÓRA

Büntetéskiszabás és a mesterséges intelligencia – különös tekintettel az enyhítő és a súlyosító körülményekre.....329

RAHELEH SOLTANIBAHREHMAND – SOMAYYEH SOLTANIBAHREHMAND

The Role of Private International Law in Preventing Infringement of IP Rights Over the Internet: A Comparative Analysis of Russian and EU.....345

SZIKSZAI DÓRA

Legal comparison of the right of access to end-of-life decisions in Hungary and German-speaking countries.....361

ALI HUSSEIN EID*

The Role of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in Enhancing Certainty and Reducing Transaction Costs in International Trade

Abstract: The United Nations Convention on Contracts for the International Sale of Goods (CISG) was created to provide a modern, fair, and uniform set of rules for international sales contracts. By offering clarity and reducing transaction costs, the CISG plays an important role in making cross-border trade smoother and more predictable. It helps bridge the gap between countries with different legal systems and economic backgrounds, making international business easier for everyone involved. The CISG emerged from a long legislative process starting in the early 1900s, aiming to balance the interests of buyers and sellers. Over time, it has also inspired changes in national contract laws around the world. When businesses in different countries enter into a contract, the CISG applies automatically, removing the need for complicated legal procedures to figure out which country's laws should govern the deal. It can also apply when parties agree to it or when the law of a contracting state is applicable, offering a neutral and easily accepted set of rules for international contracts. The CISG is especially beneficial for small and medium-sized enterprises (SMEs) and businesses in developing countries, who may lack access to expensive legal advice and are more vulnerable in international negotiations. It ensures that these businesses aren't unfairly treated and helps maintain balance in contracts. The CISG applies to sales contracts between private companies, excluding consumer sales, services, and certain goods. It covers everything from how contracts are formed, to the responsibilities of both buyers and sellers, to what happens if one party doesn't fulfill their obligations. It also allows flexibility in how contracts are structured, though some countries may require certain contracts to be in writing. The CISG only applies to international transactions and doesn't interfere with domestic sales or contracts governed by other laws chosen by the parties. In short, the CISG provides a reliable and fair legal framework for global trade, making it an essential tool for anyone involved in international business.

Keywords: Global trade, Small and medium-sized enterprises (SMEs), Developing countries, Cross-border trade, Neutral rules.

1. Introduction

Historically, harsh commercial practices were often justified under strict legal frameworks, much like the rigor commercialis exemplified by the character Shylock

* Ali Hussein Eid, PhD student in international law at Deak Ferenc Doctoral school of law, Faculty of law of the University of Miskolc, Supervisor: Dr. Matyas Imre, Email address: aliheid95@gmail.com

in Shakespeare's *The Merchant of Venice*. These harsh practices were seen as necessary in an era where legal systems did not prioritize fairness or balance in commercial transactions. However, over time, domestic legal systems have evolved to become more equitable, introducing principles such as general equity clauses, restrictions on excluding liability in standardized contracts, and prohibitions against the abuse of rights. These developments reflect a growing trend toward protecting the weaker party in contractual relationships within national contexts.

Despite these advancements in domestic law, similar protections did not initially extend to international trade, creating a gap between the more equitable domestic systems and the more rigid international commercial practices. This disparity became particularly apparent in the context of international sales, where businesses operating under different legal systems were subject to varying standards, often leaving the weaker parties vulnerable.

In response to this issue, the United Nations Convention on Contracts for the International Sale of Goods (CISG) emerged as a key tool aimed at bridging this gap. By offering a set of uniform, fair, and predictable rules for international sales contracts, the CISG has significantly reduced the harshness of commercial practices that characterized previous legal frameworks, such as the 1964 ULIS (Uniform Law on International Sales). The CISG reflects an irreversible trend towards greater equity in international trade law, addressing the imbalance between domestic and international commercial practices.

This article will explore the impact of the CISG on international trade law, focusing on how it has contributed to creating a fairer, more balanced system for the protection of all parties involved in international sales contracts. It will also examine the broader implications of this shift towards equity and fairness in the global legal landscape.

2. Evolution of Fairness and Equity in International Trade: A Comparison of ULIS and the CISG

The *ULIS* and the *CISG* exhibit significant differences in their treatment of key contract issues, reflecting an evolution towards more equitable principles in international trade law. For instance, under *ULIS*, prompt action or response is often required from the other party, whereas the *CISG* does not mandate any immediate response or action. Similarly, while *ULIS* stipulates that if the price is not agreed upon, the buyer must pay the price generally charged by the seller, the *CISG* defines the price as that which is "charged at the time of the conclusion of the contract under comparable circumstances", offering a more context-dependent approach. Moreover, *ULIS* incorporates all implied usages into contracts, including those the parties usually consider applicable, even if they are domestic in nature. This strict approach assumes that parties are familiar with all relevant usages, thus

potentially introducing unintended terms into the contract. In contrast, the *CISG* limits the application of implied usages, signaling a shift towards protecting parties from unforeseen obligations. Another key distinction lies in the inspection of goods: while *ULIS* requires prompt inspection, the *CISG* only demands that goods be inspected "within as short a period as is practicable in the circumstances, allowing for more flexibility. Additionally, *ULIS* permits contract avoidance if the seller fears the buyer will not pay, whereas the *CISG* allows for suspension of performance only when it is clear that a substantial part of the obligations will not be fulfilled. This shift broadens the scope of protection under the *CISG*, extending safeguards to both parties involved in the contract. Regarding anticipatory breach, *ULIS* allows avoidance without further action, whereas the *CISG* requires the aggrieved party to inform the other party of their intention to avoid, allowing the other party to provide "adequate assurance of performance")¹. One of the most notable principles introduced by the *CISG* is the inclusion of a good faith clause, reflecting a broader trend towards fairness in international trade. The decrease in *rigor commercialis* from *ULIS* to *CISG* cannot be attributed solely to the 14-year gap between the two instruments, but rather to the broader shift in the composition of the drafting body. While *ULIS* primarily represented the interests of Western, developed nations, the UNCITRAL Working Group that created the *CISG* included countries from diverse global regions. This broader representation led to a decrease in the *rigor commercialis* that had historically benefited powerful Western nations. Although the balance of power in international trade still favors the strong, the *CISG* signals a clear trend towards greater compassion and protection for the weaker party, indicating an irreversible shift in international trade law towards more equitable and fair practices².

3. The Nature of CISG as Default Rules in Ensuring Legal Certainty:

The *CISG*, as outlined in its Preamble, was designed to establish a unified set of legal principles aimed at fostering uniformity in the regulation of international trade contracts.³ By addressing challenges such as legal and linguistic barriers, the *CISG* provides an efficient and standardized legal environment for cross-border sales. However, it is overly optimistic to assume that disputes arising from

¹ Voskuil, C. C. A., & Wade, J. A. (1983). Hague-Zagreb Essays 4 on the Law of International Trade, International Sales, Standard Forms, General Conditions, the Sole Distributor, International Arbitration, National Adjudication. Springer Netherlands, pp. 62-64.

² The American Journal of Comparative Law (1983). The American Journal of Comparative Law, Spring, 1983, Vol. 31, No. 2, Oxford University Press, pp. 335.

³ Felemegas, J. (2007): An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods as Uniform Sales Law. Cambridge University Press, pages (23-24).

misinterpretations of the convention can be entirely avoided.⁴ Therefore, understanding the intrinsic nature of the CISG is critical to maximizing its applicability and effectiveness.

The CISG's nature closely aligns with the concept of default rules, which is evident in several key features. Firstly, the CISG offers substantial flexibility by allowing contracting parties to opt-in or opt-out of its provisions. This flexibility, enshrined in Article 6, reflects the principle of party autonomy, enabling parties to determine whether to fully adopt, partially exclude, or completely replace the CISG with domestic law. Such provisions empower parties to customize their contractual terms while maintaining the freedom to exclude the convention entirely if it does not align with their preferences⁵.

Secondly, the CISG emphasizes the principle of good faith as a guiding mechanism for resolving contractual disputes. Article 7(1) stipulates that the interpretation of the CISG must consider its international character and the need to promote uniformity in its application, alongside the observance of good faith in international trade. Scholars argue that the principle of good faith serves as both an interpretative tool for judges and a guiding framework for parties in forming and interpreting agreements. Furthermore, the principle requires adherence to reasonableness and fairness, ensuring that the CISG remains consistent with its international character while avoiding reliance on domestic legal systems that could undermine its uniformity.⁶

Thirdly, the CISG incorporates a gap-filling mechanism under Article 7(2) to address issues not explicitly resolved within its provisions. This mechanism allows disputes to be settled based on the general principles underlying the convention or, where necessary, through private international law. By addressing gaps (*praeter legem*) within the scope of the CISG, this mechanism ensures that unforeseen issues—such as determining the place of business—can be resolved efficiently, thereby supporting the convention's overall aim of providing legal certainty.⁷ The CISG's ability to enhance legal certainty and facilitate international trade is further demonstrated through three key contributions. Firstly, its flexibility allows parties to autonomously select applicable rules, minimizing uncertainties while balancing the need for stability and adaptability.⁸ Secondly, the convention reduces

⁴ Komarov, A. S. (2005): Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG. *Journal of Law and Commerce*, 25, pages (75, 77).

⁵ Ben-Shahar, O., & Pottow, J. a. E. (2006). On the Stickiness of Default Rules. *Florida State University Law Review*, 33, 651.

⁶ Mimoso, M. J.; de Azevedo, L. C. (2022): The need for a harmonious interpretation of the rules applicable to international contracts. *Juridical Trip*, 12(1), pages (68-79).

⁷ Luo, J.; Guo, P. (2024): The uniform interpretation of the UN Sales Convention (CISG). Springer Nature Singapore Pte Ltd, page (114).

⁸ Tapia-Hoffmann, A. L. (2023): Legal Certainty and Central Bank Autonomy in Latin American Emerging Markets. Springer International Publishing, page (95).

transaction costs by offering a clear and coherent legal framework, thereby eliminating the need for complex negotiations and mitigating risks associated with misinterpretation of domestic laws. Lastly, the CISG promotes predictability and stability in contractual relationships through standardized provisions that align with the principles of clarity, coherence, and consistency.⁹

The CISG operates as a robust default framework that not only enhances legal certainty but also addresses the dynamic needs of international trade by offering flexibility, reducing transaction costs, and promoting legal uniformity and predictability. Its mechanisms, when effectively applied, provide a practical and efficient legal foundation for the governance of international sales contracts¹⁰.

4. The CISG and its Influence on National Legal Systems

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has had a significant influence on various national legal systems, shaping both the law of obligations and the law of sales. This influence can be observed in the way courts, scholars, legal practitioners, and lawmakers¹¹ in different jurisdictions have interacted with the CISG and incorporated its principles into their domestic legal frameworks. For instance, in the Netherlands, judges have relied on the CISG in numerous cases to interpret national laws relating to contract formation, breach of contract, and the non-conformity of goods sold. This demonstrates the CISG's increasing relevance as a model for domestic legal reform, although the impact of the CISG is not always straightforward.

The experience of the Scandinavian countries provides a notable example. Although these countries initially adopted identical laws for the regulation of sales transactions between parties in Denmark, Finland, Iceland, Norway, and Sweden (the Nordic Sales Acts), they excluded the CISG's application to Nordic sales. Despite this, most of these countries, with the exception of Denmark, have revised their national Sale of Goods Acts to align with many of the CISG's provisions, such as those concerning contract formation and the obligations of the parties. This has led to a situation where Scandinavian laws are not fully uniform, yet the CISG has still influenced the revision of their national laws.

In other parts of Europe, the CISG has played a pivotal role in the reform of national laws, such as the Law of Obligations Act in Estonia, which took effect in

⁹ Tapia-Hoffmann, A. L. (2023): *Legal Certainty and Central Bank Autonomy in Latin American Emerging Markets*. Springer International Publishing, page (21).

¹⁰ Chandra, E., & Lewiandy. (n.d.). *Ratifying the CISG: Establishing Default Rules as Legal Certainty for International Sales Contract*. Faculty of Law, Tarumanagara University, Jakarta, Indonesia, 2024, 4-6.

¹¹ Ferrari, F. (ed.). *The CISG and its Impact on National Legal Systems*. Sellier European Law Publishers, 2008, 4-6.

2013 and incorporated many CISG principles¹². Similarly, China has been significantly influenced by the CISG. The removal of its reservations to Article 11 of the CISG, which concerns the written form of contracts, is evidence of China's continued alignment with the CISG. In fact, the drafters of China's Civil Code have drawn heavily from the CISG, adopting its rules not only for sales transactions but for broader contract law issues¹³.

Interestingly, even the world's smallest economy, Tokelau, adopted the CISG as part of its domestic law in 1995, integrating the Convention's rules for both sale and contract law. This move underscores the global reach and versatility of the CISG. In some jurisdictions, there is ongoing discussion about the relevance of older national laws. For instance, in New Zealand, the Sale of Goods Act 1908 is seen as outdated, particularly with regard to contract remedies. Some legal scholars advocate for the direct incorporation of CISG rules into New Zealand's domestic law to modernize its legal framework. Australia, with its federal system, faces a similar challenge. The inconsistency in how different states have adopted English contract law and sale of goods regulations creates issues of legal complexity and information costs, paralleling the challenges faced in international trade. The CISG offers a potential solution by providing a uniform set of rules for all parties to follow, regardless of jurisdiction.

Even in Nigeria, the largest economy in Africa, there is growing interest in reforming the Sale of Goods Act, which is still based on outdated English law. In workshops conducted by the Nigerian Law Reform Commission, there has been increasing support for using the CISG as a model for domestic legal reform. Japan's gradual incorporation of CISG principles into its national legal system is another example. While Japan did not initially ratify the CISG, its rules have increasingly influenced the interpretation of national law, particularly in the context of contract avoidance. Previously, Japanese law allowed for avoidance of contracts in a broader range of cases, but the CISG's principle of limiting avoidance to cases of fundamental breach has now begun to shape domestic legal practice¹⁴.

Turkey's adoption of the CISG in 2010 and the subsequent reform of its Code of Obligations in 2012 are further evidence of the CISG's growing influence. The new Turkish law aligns closely with CISG rules, particularly regarding the passage of risk in sales contracts, demonstrating how the CISG has helped modernize national laws and make them more consistent with international standards¹⁵.

¹² Krull, I. "Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law." *Juridica International*, 2008, 14, 122.

¹³ Chen, L., & van Rhee, C. H. (Remco), eds. *Towards a Chinese Civil Code: Comparative and Historical Perspectives*. Leiden: Martinus Nijhoff Publishers, 2012, p. 247.

¹⁴ Sono, H. "Japan's Accession to the CISG: The Asia Factor." (2008) 25 *J Japan L* 195.

¹⁵ Demir, B. "Passing of Risk in Contract of Sale." Paper delivered at the 10th International Academic Conference, Vienna, 3 June 2014. International Institute of Social and Economic Sciences, available

Overall, the CISG has contributed to the reform of national sale of goods laws across the world, helping to harmonize international commercial transactions and reduce the legal complexities that often arise in cross-border trade. While challenges remain in certain jurisdictions, the CISG's influence continues to grow, promoting uniformity and efficiency in global trade law.

5. Can the CISG Benefit SMEs, and If So, How?

The CISG offers a potential legal safety net for SMEs by leveling the playing field without imposing additional burdens. Its value lies in providing a uniform legal framework that can help reduce transaction costs, particularly for businesses that actively select the laws governing their contracts and understand the associated legal risks. While larger enterprises are typically more sophisticated due to their resources, SMEs that utilize formal contracts, such as certain Austrian SMEs¹⁶, may also exhibit a degree of sophistication. These businesses can benefit from CISG by reducing the time and effort needed to navigate various foreign laws, instead opting for the national laws of CISG Contracting States to standardize their obligations across multiple contracts, thus achieving cost savings in both performance and dispute resolution stages.

However, these benefits are generally accessible only to businesses that invest in understanding their legal options and the costs associated with negotiating applicable laws. SMEs, however, often do not consider which law would be most advantageous for their transactions, and they typically forgo streamlining obligations, particularly because their limited volume of transactions offers fewer economies of scale. As a result, many SMEs proceed with informal agreements and no formal contractual terms, neglecting to consider clauses related to dispute resolution or choice of law.

Despite this, SMEs can still benefit from the CISG, as it often serves as the default law for their transactions. For SMEs that contract informally, trusting that some law will apply, the CISG is particularly beneficial as it provides a neutral, reliable legal framework¹⁷. CISG's "opt-out" nature works in favor of SMEs, as it automatically applies to international sales unless explicitly excluded, which is rare in SMEs' informal contracts. The CISG is widely adopted by 95 countries and is applicable to most international B2B sales, making it likely to govern cross-border

at:<http://www.iises.net/proceedings/10th-international-academic-conference-vienna/table-of-content?cid=2&iid=38&rid=1535> (date of download 12/1/2025).

¹⁶ Butler, P., "The CISG as the Tool for Successful MSME Participation in Global Trade," *Journal of Law & Commerce*, 2019, 38 JL & Com, 229-231.

¹⁷ Gabriel, H., "The Misplaced Reliance on Default Rules in International Sales Contracts," *Journal of Law & Commerce*, 2019, 38 JL & Com, 333-342.

transactions involving SMEs, especially where both parties are located in CISG Contracting States.

From my perspective, while the CISG does offer significant advantages as a default law for SMEs, its true potential is often underutilized due to the informal approach SMEs tend to take toward contracts. The lack of formal agreements means that many SMEs fail to fully harness the benefits of the CISG, and thus, the legal protection it offers may be insufficient if disputes do arise. Given the complexity of international trade and the challenges SMEs face in navigating legal frameworks, greater awareness and education regarding the CISG could help bridge this gap. Therefore, while the CISG is a valuable tool, its effectiveness depends largely on SMEs' willingness and ability to engage with it proactively rather than relying on its default application.

Given the absence of formal contracts and the high prevalence of CISG adoption, it is reasonable to conclude that CISG will often apply to SME transactions by default, acting as their "law of (non)-choice." While SMEs tend to prefer face-to-face or informal negotiations to resolve disputes amicably, in reality, disputes may escalate to litigation. In such cases, the application of the CISG can provide a valuable safety net.

6. Reducing Transaction Costs in International Sales Contracts under the CISG

The CISG represents a critical instrument in harmonizing international trade law, particularly through its impact on reducing transaction costs. Transaction costs in cross-border trade often arise from the complexities of negotiating, interpreting, and applying diverse national legal systems to sales contracts. By providing a uniform set of rules applicable to international sales, the CISG significantly mitigates these costs, offering businesses a practical and predictable legal framework.

One of the primary ways in which the CISG reduces transaction costs is by eliminating the need for parties to negotiate the applicable law. In traditional cross-border transactions, the absence of a unified legal system requires businesses to expend considerable time and resources in determining which jurisdiction's laws will govern their contracts. This process often involves hiring legal experts familiar with multiple legal systems, translating foreign legal codes, and resolving conflicts of laws. The CISG alleviates this burden by establishing a default legal framework that applies automatically when the contracting parties are located in member states, unless explicitly excluded by the parties. This not only streamlines the contracting

process but also reduces the uncertainty and costs associated with negotiating governing law provisions¹⁸.

The CISG provides a comprehensive and business-oriented set of rules that parties can readily incorporate into their contracts. The Convention addresses essential aspects of international sales, including the formation of contracts (Articles 14–24), obligations of the buyer and seller (Articles 30–60), and remedies for breach of contract (Articles 61–84). These provisions are designed to facilitate cross-border transactions by offering clear and predictable rules that reflect common commercial practices. For example, Article 50 allows the buyer to reduce the price proportionately in cases of non-conforming goods, thereby offering a practical remedy that avoids costly litigation. Such standardized solutions enable businesses to focus on the substantive terms of their transactions, such as pricing and delivery, rather than on legal technicalities.

In addition to reducing direct legal costs, the CISG enhances legal certainty and predictability, which are vital for minimizing indirect transaction costs. The uniform interpretation of the CISG, mandated by Article 7, promotes consistency across jurisdictions and reduces the risk of divergent legal outcomes. This is particularly important in international trade, where differences in legal traditions—such as those between common law and civil law systems—can create significant barriers to efficient contracting. The CISG's neutral and internationally accepted framework fosters trust between trading partners, especially in transactions involving parties from jurisdictions with varying levels of legal development.

The CISG minimizes the costs associated with dispute resolution. By providing a harmonized legal framework, the Convention reduces the need to rely on domestic laws that may be unfamiliar to one or both parties. This is particularly beneficial in arbitration or litigation, where proving and interpreting foreign law can be both time-consuming and expensive. Additionally, the CISG's provisions on dispute resolution, such as those relating to notification of non-conformity (Articles 38 and 39), encourage proactive communication between the parties, thereby reducing the likelihood of disputes escalating into costly legal battles.

The reduction in transaction costs under the CISG has broader implications for global trade. By lowering the legal and administrative barriers to cross-border transactions, the Convention promotes the participation of small and medium-sized enterprises (SMEs) in international markets. SMEs, which often lack the resources to navigate complex legal frameworks, benefit significantly from the CISG's

¹⁸ Pohl-Michalek, M. (2023). CISG Exclusion during Legal Proceedings. *The Chinese Journal of Comparative Law*, 11(1), 1-12.

accessibility and efficiency. This, in turn, contributes to the overall growth of international trade and economic integration¹⁹.

The CISG plays a pivotal role in reducing transaction costs in international sales contracts by providing a unified legal framework that simplifies the contracting process, enhances predictability, and minimizes the costs associated with legal disputes. By fostering legal harmonization and reducing the barriers to cross-border trade, the CISG not only benefits individual businesses but also strengthens the global trading system.

7. Software technology in CISG contracts

It is often asserted that legal frameworks struggle to keep pace with technological advancements. As technology evolves rapidly, legal gaps emerge, particularly in areas such as privacy law and intellectual property, where innovations like social media, smartphones, online platforms, drones, and digital surveillance have significantly transformed the legal landscape. These developments also necessitate a more dynamic adaptation of traditional legal institutions, including contract law. Historically, the regulation of sales transactions evolved gradually, with civil law drawing from the Roman *actio empti* and common law developing through writs of covenant and *assumpsit*. However, the speed of technological change has significantly accelerated, leading to transformations in legal principles within decades rather than centuries²⁰.

A key area affected by these advancements is software technology, which has fundamentally reshaped business operations and the nature of goods exchanged in international trade. Software encompasses not only traditional computer programs and operating systems but also various forms of digital operating information²¹. The United Nations Convention on Contracts for the International Sale of Goods (CISG), plays a central role in regulating international sales transactions. Given that the CISG was drafted in the 1970s, its provisions did not explicitly account for subsequent technological innovations. Notably, the drafters intentionally refrained from defining the term "goods" within the Convention to maintain flexibility in its

¹⁹ Kornet, N. (2013). The Interpretation and Fairness of Standardized Terms: Certainty and Predictability under the CESL and the CISG Compared. *Maastricht European Private Law Institute Working Paper No. 2013/8*, Faculty of Law, Maastricht University, 1-25. <http://www.ssrn.com>.

²⁰ The Oxford Online Dictionary defines software as 'the programs and other operating information used by a computer'. The Oxford online dictionary is available at <https://en.oxforddictionaries.com/definition/software>.

²¹ Andersen, C. B., and Schroeter, U. G. (eds.), *Haring International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday*, London: Wildy, Simmonds & Hill Publishing, 2008.

application²². Additionally, the CISG does not impose rigid formal requirements for contract formation, allowing agreements to be established through various means of communication. This adaptability has facilitated the incorporation of modern contract formation methods.

Furthermore, the Convention does not prescribe fixed timelines for the examination of goods or for notifying non-conformity, recognizing that such timeframes should be determined based on the specific circumstances of each transaction. Although some scholars view these open-ended provisions as weaknesses, they have proven instrumental in accommodating contemporary technological realities in international sales law. In this regard, Article 7 of the CISG serves as a crucial interpretative tool, ensuring that the Convention is applied in a manner that upholds its international character and promotes good faith in global trade. It also provides a mechanism for addressing legal issues not explicitly covered by the CISG by relying on its underlying principles. These gap-filling provisions have been widely recognized as effective in fostering legal uniformity, as evidenced by their adoption of subsequent international legal instruments.

8. Challenges of Concurrent Remedies and Uniform Interpretation under the CISG

Despite the clear advantages of the United Nations Convention on Contracts for the International Sale of Goods (CISG), its application to international commercial transactions continues to provoke criticism in certain legal systems. A closer examination reveals that much of this criticism is rooted in misunderstandings, and in cases where the concerns are valid, solutions can be developed. Two of the primary issues in this regard are the *uniform interpretation* of the CISG and the challenges posed by *concurrent remedies* under domestic law. Addressing these concerns is essential to ensuring the effective functioning of the CISG in diverse legal systems.

8.1. Uniform Interpretation

One of the most persistent critiques of the CISG is its vague terminology and imprecision, particularly in the use of terms like "reasonable" and "fundamental breach"²³. These criticisms are especially pronounced among practitioners from common law backgrounds, who are accustomed to highly detailed statutes. The

²² Mistelis, L., "Article 1," in Kröll, S., Mistelis, L., and Perales Viscasillas, P. (eds.), *UN Convention on Contracts for the International Sale of Goods: Commentary*, München: Hart Publishing, 2011, 31, para. 36.

²³ Takahashi, K.: Right to Terminate (Avoid) International Sales of Commodities. *Journal of Business Law* (2003)/102, 124.

flexibility of the CISG, inspired by continental civil law traditions, allows for a broader interpretation of its provisions. While this approach may be challenging for those from common law systems, it provides the CISG with the adaptability needed to address new legal and factual developments over time.

Unlike domestic legal systems with a central supreme court to oversee the interpretation of law, the CISG lacks a central judicial body. However, it relies on a comparative legal method that involves interpreting the Convention in light of foreign court decisions and arbitral awards, which have increasingly gained persuasive authority. This method has proven effective in ensuring that the CISG remains relevant and consistent across different jurisdictions²⁴.

Despite these efforts, it is essential to recognize that all uniform laws, including the CISG, must allow for a degree of *imprecision* in order to remain flexible and capable of adapting to future changes in international trade. This flexibility has led to gradual convergence in some areas of disagreement, such as the interpretation of the CISG, which deal with the buyer's obligation to examine goods and notify the seller in the event of non-conformity.

8.2. Concurrent Remedies

Another critical issue affecting the uniformity of the CISG is the potential concurrence of remedies under domestic law. The CISG focuses exclusively on the contractual relationship between the buyer and the seller. However, many legal systems allow for the possibility of additional remedies based on *tort law*. This raises the question of whether a party to a CISG sales contract can pursue concurrent remedies under domestic law, even if these remedies may lead to results that conflict with those provided by the CISG.

The problem arises particularly in cases involving non-conformity of goods. For instance, can a buyer rely on domestic tort concepts such as *culpa in contrahendo*, negligent misrepresentation, or *mistake*? Can the buyer recover purely economic loss caused by a defective product, or claim damages for property damage under tort law, especially in jurisdictions where tort law recognizes claims for damage to goods beyond the contract itself? These questions spark considerable debate, with civil law practitioners generally favoring a pro-CISG approach, while Anglo-American scholars often take a different stance²⁵.

To achieve the greatest level of uniformity, it is crucial that domestic laws—whether contractual or based on tort—do not override the CISG. As John Honnold

²⁴ Schlechtriem, P. "Commentary on Article 7." In *CISG: A Commentary on the United Nations Convention on Contracts for the International Sale of Goods*, 2nd ed., 2010/ para. 14.

²⁵ Lookofsky, J. M.: *In Dubio pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Pre-emption under the 1980 Vienna Sales Convention (CISG)*. *Duke Journal of Comparative & International Law*, 2003/13, 263-285.

stated, the CISG should displace any domestic rules that overlap with the issues addressed by the Convention. This means that remedies related to the non-conformity of goods—such as negligence in delivering non-conforming goods, negligent misrepresentation, or mistake—must be preempted by the CISG. However, the CISG does not cover all scenarios. For example, issues such as fraud or product liability in cases of damage to property other than the goods sold may still be governed by national law.

Similar challenges arise in the realm of procedural law. While the CISG does not address procedural issues, questions such as the burden of proof and standard of proof may determine the outcome of a case. There is increasing consensus that rigid distinctions between procedural and substantive law are outdated and unproductive. Instead, the analysis should focus on the general principles of the CISG, such as full compensation and equality between the parties, which require that the burden and standard of proof²⁶ be derived from the Convention itself. In contrast, the issue of compensation for legal costs should be decided according to domestic procedural law.

Despite the complexities of concurrent remedies and procedural issues, solutions are emerging. By focusing on the principles underlying the CISG and promoting its application in a way that displaces conflicting domestic laws, the CISG can continue to offer a unified and adaptable framework for international commercial transactions, while challenges related to the uniform interpretation of the CISG and the application of concurrent remedies remain, these issues are being addressed through a combination of comparative legal methods, international case law, and an evolving understanding of the Convention's principles. The CISG's flexibility and adaptability remain key strengths, ensuring its continued relevance and effectiveness in global trade.

In my opinion, I strongly align with the perspective that the CISG has been a global success. The criticisms directed at the Convention are often unfounded or can be addressed through a proper interpretation of its provisions. In my view, the success of the CISG underscores the importance of pursuing the unification of laws in the international arena. The harmonizing effect the CISG has had on domestic legal systems and its influence on other legal instruments demonstrate the superiority of a unified approach to commercial law.

I believe that relying solely on the competition of domestic legal systems will not provide a viable future for commercial law. Reducing transaction costs and increasing legal certainty for commercial parties is only achievable through further harmonization and unification. The CISG has made a significant contribution to

²⁶ Schwenzer, Ingeborg. "Rechtsuerfolgungskosten als Schaden." In *Melanges en l'honneur de Pierre Tervier*, 2008/425.

this goal, not only in resolving disputes but also in facilitating negotiations and drafting contracts by providing a common legal language.

Ultimately, while there may be some reluctance from traditional legal systems to embrace change, I am optimistic about the future. A new generation of lawyers, including myself, who are well-trained in the CISG, is ready to lead the way in advancing the application of uniform legal instruments. We recognize the advantages of the CISG and are eager to explore its potential to improve the global legal framework beyond national boundaries.

9. Conclusion

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has achieved remarkable global success in unifying and harmonizing international commercial law. While criticisms have been raised regarding its effectiveness, many of these concerns can either be dismissed as lacking substantive merit or addressed through a more precise interpretation of the Convention's provisions. The CISG's widespread adoption and influence illustrate that the pursuit of legal unification remains a viable and necessary approach to enhancing the predictability and efficiency of cross-border trade. By fostering consistency across diverse legal systems, the CISG has played a pivotal role in bridging the gap between civil and common law traditions, thereby facilitating smoother commercial transactions.

One of the key contributions of the CISG is its harmonizing effect on domestic legal frameworks, which has not only led to greater legal certainty but has also influenced the development of other uniform legal instruments. This success challenges the notion that competition among domestic legal systems alone offers a sustainable model for the future of commercial law. While legal diversity may generate valuable insights, the fragmentation of contract law across jurisdictions increases transaction costs, creates legal uncertainty, and complicates dispute resolution. In contrast, the CISG provides a standardized framework that reduces these inefficiencies by offering a common legal language and a shared understanding of fundamental contractual principles. This, in turn, streamlines contract negotiations, facilitates cross-border transactions, and minimizes the risks associated with legal discrepancies.

Despite its advantages, resistance to the CISG often stems from a reluctance to move beyond traditional national legal frameworks. Some legal practitioners remain hesitant to embrace a unified legal regime, preferring instead to rely on familiar domestic laws. However, such skepticism fails to acknowledge the long-term benefits of legal harmonization in fostering international trade and reducing transactional complexities. A new generation of legal professionals, trained in the principles of the CISG and equipped with a global perspective, is increasingly

recognizing the value of international legal unification. These emerging scholars and practitioners are not only well-versed in the Convention's application but are also actively contributing to its evolution through academic discourse and judicial interpretation.

Ultimately, the CISG exemplifies the potential of legal harmonization in shaping the future of international commercial law. While competition between legal systems can serve as a source of innovation, it does not eliminate the necessity of structured unification. As the global economy continues to evolve, further integration of uniform legal standards will be crucial in enhancing cross-border commercial stability. The CISG's success serves as compelling evidence that the unification of laws is not only a theoretical aspiration but a practical necessity for fostering a more predictable and efficient international trading environment

References:

1. Andersen, C. B., and Schroeter, U. G. (eds.), *Haring International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday*, London: Wildy, Simmonds & Hill Publishing, 2008.
2. Ben-Shahar, O., & Pottow, J. a. E. (2006). On the Stickiness of Default Rules. *Florida State University Law Review*, 33, 651.
3. Butler, P., "The CISG as the Tool for Successful MSME Participation in Global Trade," *Journal of Law & Commerce*, 2019, 38 JL & Com, 229-231.
4. Chandra, E., & Lewiandy. (n.d.). Ratifying the CISG: Establishing Default Rules as Legal Certainty for International Sales Contract. Faculty of Law, Tarumanagara University, Jakarta, Indonesia, 2024, 4-6.
5. Chen, L., & van Rhee, C. H. (Remco), eds. *Towards a Chinese Civil Code: Comparative and Historical Perspectives*. Leiden: Martinus Nijhoff Publishers, 2012, p. 247.
6. Demir, B. "Passing of Risk in Contract of Sale." Paper delivered at the 10th International Academic Conference, Vienna, 3 June 2014. International Institute of Social and Economic Sciences, available at: <http://www.iises.net/proceedings/10th-international-academic-conference-vienna/table-of-content?cid=2&iid=38&rid=1535> (date of download 12/1/2025).
7. Felemegas, J. (2007): *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods as Uniform Sales Law*. Cambridge University Press, pages (23-24).
8. Ferrari, F. (ed.). *The CISG and its Impact on National Legal Systems*. Sellier European Law Publishers, 2008, 4-6.

9. Gabriel, H., "The Misplaced Reliance on Default Rules in International Sales Contracts," *Journal of Law & Commerce*, 2019, 38 JL & Com, 333-342.
10. Komarov, A. S. (2005): Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG. *Journal of Law and Commerce*, 25, pages (75, 77).
11. Korner, N. (2013). The Interpretation and Fairness of Standardized Terms: Certainty and Predictability under the CESL and the CISG Compared. *Maastricht European Private Law Institute Working Paper No. 2013/8*, Faculty of Law, Maastricht University, 1-25. <http://www.ssrn.com>.
12. Krull, I. "Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law." *Juridica International*, 2008, 14, 122.
13. Lookofsky, J. M.: *In Dubio pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Pre-emption under the 1980 Vienna Sales Convention (CISG)*. *Duke Journal of Comparative & International Law*, 2003/13, 263-285.
14. Luo, J.; Guo, P. (2024): The uniform interpretation of the UN Sales Convention (CISG). Springer Nature Singapore Pte Ltd, page (114).
15. Mimoso, M. J.; de Azevedo, L. C. (2022): The need for a harmonious interpretation of the rules applicable to international contracts. *Juridical Trip*, 12(1), pages (68-79).
16. Mistelis, L., "Article 1," in Kröll, S., Mistelis, L., and Perales Viscasillas, P. (eds.), *UN Convention on Contracts for the International Sale of Goods: Commentary*, München: Hart Publishing, 2011, 31, para. 36.
17. Pohl-Michalek, M. (2023). CISG Exclusion during Legal Proceedings. *The Chinese Journal of Comparative Law*, 11(1), 1-12.
18. SCHLECHTRIEM, P. "Commentary on Article 7." *In CISG: A Commentary on the United Nations Convention on Contracts for the International Sale of Goods*, 2nd ed., 2010/ para. 14.
19. Schwenger, Ingeborg. "Rechtsuerfolgungskosten als Schaden." In *Melanges en l'honneur de Pierre Tervier*, 2008/425.
20. Sono, H. "Japan's Accession to the CISG: The Asia Factor." (2008) 25 J Japan L 195.
21. Takahashi, K. *Right to Terminate (Avoid) International Sales of Commodities*. *Journal of Business Law*, (2003)/102, 124.
22. Tapia-Hoffmann, A. L. (2023): Legal Certainty and Central Bank Autonomy in Latin American Emerging Markets. Springer International Publishing
23. The American Journal of Comparative Law (1983). The American Journal of Comparative Law, Spring, 1983, Vol. 31, No. 2, Oxford University Press, pp. 335.

24. The Oxford Online Dictionary defines software as ‘the programs and other operating information used by a computer’. The Oxford online dictionary is available at <https://en.oxforddictionaries.com/definition/software>
25. Voskuil, C. C. A., & Wade, J. A. (1983). *Hague-Zagreb Essays 4 on the Law of International Trade, International Sales, Standard Forms, General Conditions, the Sole Distributor, International Arbitration, National Adjudication*. Springer Netherlands, pp. 62-64.

BAJÁKY ANDRÁS OLIVÉR*

A magister officiorum szerepe a császári államtanács működésében (4-5. század)

Absztrakt: A *consistorium sacrum* a római császár tanácsadó testülete volt a dominátus időszakában. Az államtanács a késő Római Birodalom kormányzati csúcsszerveként politikai és igazgatási kérdésekkel foglalkozott, napjaink kormányaihoz hasonlóan. A testület tagjai a császár nevében feleltek egy vagy akár több igazgatási területért. Tanulmányom célja egy átfogó kép kialakítása a *consistorium sacrum* működéséről, a *magister officiorum* tanácsához kapcsolódó hatásköreiről, valamint a *magister officiorum* és az egyes udvari főméltóságok kapcsolatrendszeréről.

Kulcsszavak: magister officiorum, consistorium sacrum, quaestor sacri palatii, római igazgatástörténet, schola notariorum, suffragium

Abstract: The *consistorium sacrum* was an advisory college to the Roman emperor during the period of the dominate. As the apex governmental body of the late Roman Empire, the Council of State dealt with political and administrative matters, similar to modern governments nowadays. Its members were responsible for one or more areas of state administration on behalf of the emperor. The aim of my study is to provide a comprehensive picture of the functioning of the *consistorium sacrum*, the powers of the *magister officiorum* in relation to the council, and the relationship with certain court dignitaries.

Keywords: magister officiorum, consistorium sacrum, quaestor sacri palatii, history of roman administration, schola notariorum, suffragium

1. Bevezetés

Az államtanács a késő Római Birodalom központi igazgatási szerveként politikai és igazgatási kérdéseket tárgyalt. Hivatalosan és jogilag a császár volt minden törvény kizárólagos szerzője és ő volt felelős az államügyekért. A testületnek meghatározó szerepe volt a birodalom közügyeinek irányításában.¹ A tanács tagok a császár nevében feleltek egy vagy akár több igazgatási területért, ezért az intézmény tanulmányozása ilyenformán releváns lehet az egyes államok közigazgatásának felső szintű irányítását középpontba helyező tudományos vizsgálódások számára.

* Bajáky András Olivér: II. évfolyamos PhD hallgató, Nemzeti Közszerológati Egyetem – Közigazgatás-Tudományi Doktori Iskola. ORCID szám: 0009-0002-5448-8673, Témavezető: Prof. Dr. Pókecz Kovács Attila, Egyetemi tanár – Nemzeti Közszerológati Egyetem

¹ DEMANDT, A.: *Die Spätantike. Römische Geschichte von Diocletian bis Justinian 284-565*. München: C. H. Beck, 2007, 278-281.

Az államtanács működésének kapcsán a következő kutatási kérdések merülnek fel: Milyen szerepe volt a *magister officiorum*-nak a *consistorium* működésében? Milyen ügyrend szerint zajlottak az államtanács ülései? Milyen szervek segítették a *magister officiorum*-ot a tanácshoz kapcsolódó feladatai ellátásában? Hogyan nézett ki a kiválasztás és az előmenetel a tanács munkáját segítő szerveknél?

A *magister officiorum* politikai döntéshozatal befolyásoló tevékenységén túl a többi udvari főméltósággal (*quaestor sacri palatii*, *magister militum*, *comes sacrarum largitionum*, *comes rerum privatarum*) kialakított kapcsolatrendszer is vizsgálataim részét képezi.² A *magister officiorum* és a tanács mellett segítő feladatokat ellátó császári jegyzők kiválasztásának és előmenetelének vizsgálata kiemelt szerepet kap jelen tanulmányban. A *magister officiorum* és az egyéb udvari főméltóságok közötti kapcsolat és feladatmegosztás elemzésénél elsőként a *magister officiorum* és a *quaestor sacri palatii* viszonyában megjelenő hatásköri összeütközéseket és ezek jogi jelentőségét ismertetem.³ A *magister officiorum* és a *magister militum* között a katonai igazgatásban felmerülő kapcsolatot és annak a *consistorium*-hoz való viszonyát vizsgáltam. A *magister officiorum*-nak és a pénzügyi főosztályvezetőnek (*comes sacrarum largitionum*, *comes rerum privatarum*) az együttműködését a birodalom diplomáciai gyakorlatának tükrében elemeztem, kiegészítve a jogszolgáltatás kapcsán felmerülő problémával. A tanulmány keretében a kutatásaim során alkalmazott jogtörténeti forráselemző módszer segítségével a korabeli latin nyelvű primer jogforrások közül a *Codex Theodosianus* és a *Codex Justinianus* témához kapcsolódó egyes szöveghelyeit vizsgáltam.

2. A *consistorium sacrum* felépítése, hatáskörei

A *consistorium sacrum* jogelődjének tekinthető *consilium principis* létrehozása Augustus nevéhez köthető.⁴ A testület a principátus korszakában fokozatosan egyre nagyobb hatalomra és befolyásra tett szert, a Kr. u. 3. századra pedig a római igazgatás egyik legfontosabb elemévé vált.⁵ A 3. század végén Diocletianus császár új közbizalmi államformát adott a birodalomnak, mely később dominátus néven lett ismert. A közbizalmi rendszer átalakítása a teljes római igazgatás újjászervezésével járt, a folyamat pedig érintette a császár legfőbb tanácsadó szervét is.⁶ A *consistorium*, vagy más elnevezéssel *consistorium sacrum*, a késő Római Birodalomban is politikai

² PÓKECZ KOVÁCS A.: *Pénzügyi igazgatás a dominátus korában*. JURA 22: 1, 2016, 112-113, 115.

³ PÓKECZ KOVÁCS A.: *A quaestor sacri palatii tiszttsége a késő római császárság korában*. In: BÉLI G. – KORSÓSNÉ DELACASSE K. – HERGER Cs. (szerk.): *Ut Juris Ordo Exigit: Ünnepi tanulmányok Kajtár István 65. születésnapja tiszteletére*. Pécs: Publikon Kiadó, 2016, 237-244.

⁴ PÓKECZ KOVÁCS A.: *A principátus kormányzása és igazgatása Augustus uralmának idején* (kr. e. 27 - kr. u. 14). Glossa Iuridica 9:3-4, 2022, 79-81.

⁵ PÓKECZ KOVÁCS A.: *A principátus közbizalma*. Budapest-Pécs: Dialóg Campus Kiadó, 2016, 87; 89-90.

⁶ PÓKECZ KOVÁCS A.: *The development of state structure in the principatus from Tiberius to Diocletianus (AD 14-284)*. In: SZÓKE G. L. – BENKE J. et al. (szerk.): *Essays of Faculty of Law University of Pécs Yearbook 2015*. Pécs: Pécsi Tudományegyetem – Állam- és Jogtudományi Kar, 2016, 165-166.

tanácsadó testületként funkcionált.⁷ Alapítása I. Constantinus császár idejére vezethető vissza, a principátus idején működő *consilium principis* váltotta fel.⁸ A tanács tagságát illetően beszélhetünk állandó tagokról (*comites consistoriani*),⁹ ebbe a csoportba sorolhatjuk a legmagasabb rangú birodalmi tisztségviselőket, a *magister officiorum*ot, a *praefectus praetoriot*, a *quaestor sacri palatii*t, a *comes sacrarum largitionum*ot, a *comes rerum privatarum*ot, a *magister militum*ot a *magister equitum*ot és a *magister peditum*ot.¹⁰ Cicogna szerint az 5. század elején a szent hálóterem felügyelőjének tekinthető *praepositus sacri cubiculi* is az államtanács tagjává vált.¹¹ A tanácsstagok a birodalom polgári és katonai igazgatásának egy, illetőleg több területéért feleltek, a császár döntésétől függően. A császár szabadon kijelölhetett további tanácsstagokat.¹²

Az államtanács a különböző politikai és igazgatási kérdésekről szóló tanácskozások, a háborús ügyek, a császári rendeletek megvitatásának és az előléptetési ceremóniák lebonyolításának helyszínéül szolgált. A tanács volt továbbá a legmagasabb szintű bírósági fórum a birodalomban.¹³ A testület ezenkívül lehetőséget biztosított tagjai számára, hogy az üléseken felvehessenek számukra fontos kérdéseket, illetőleg befolyásolhassák a császárt.¹⁴ A hatékony feladatellátást egy szabályozott ügyrend segítette. A *magister officiorum* rangidős tisztségviselőként központi szerepet játszott a tanácsadó szerv működtetésében, ő léphetett be először a tanács üléstermébe, illetve ő szólalhatott fel elsőként a tanácsstagok közül.¹⁵

3. A tanács és a *magister officiorum* munkáját segítő szervek

A fentiekből láthattuk, hogy egy igen szerteágazó és változatos feladatokat ellátó szervekről van szó. A nagyszámú kötelezettség hatékony ellátása érdekében tehát egy

⁷ MOLNÁR I. – JAKAB É.: *Római jog*. Szeged: Leges Bt., Diligens Bt., 2015, 43-44.

⁸ JONES, A. H. M.: *The later Roman Empire 284-602. A social economic and administrative survey*. Volume I., Oxford: Basil Blackwell, 1964, 333-341.

CROOK, J.: *Consilium Principis. Imperial Councils and Counsellors from Augustus to Diocletian*. Cambridge: Cambridge University Press, 1955, 92-104.

⁹ BENEDEK F. – PÓKECZ KOVÁCS A.: *Római magánjog*. Budapest: Ludovika Egyetemi Kiadó, 2023, 49.

¹⁰ CLAUS, M.: *Der magister officiorum in der Spätantike (4.–6. Jahrhundert)*. *Das Amt und sein Einfluß auf die kaiserliche Politik*. München: C. H. Beck, 1980, 62.

BURY, J. B.: *History of the later Roman Empire. From the death of Theodosius II. to the death of Justinian*. Volume I., New York: Dover Publications Inc., 1958, 23-24.

¹¹ CICOONA, G.: *Consilium principis – Consistorium. Ricerche de diritto romano pubblico e di diritto privato*. Turin, 1902, 234.

¹² STEIN, E.: *Geschichte des spätrömischen Reiches. Band I. Vom römischen zum byzantinischen Staate (284-476 n. Chr.)*. Wien: L. W. Seidel & Sohn, 1928, 170.

¹³ KRAUSE, J.-U.: *Die Spätantike (284 bis 565 n. Chr.)*. In: GEHRKE, H.-J.; SCHNEIDER, H.: *Geschichte der Antike. Ein Studienbuch*. Berlin: J. B. Metzler, 2018, 448.

¹⁴ ELTON, H.: *The Roman Empire in Late Antiquity, A Political and Military History*. Cambridge: Cambridge University Press, 2018, 7.

¹⁵ PÓKECZ KOVÁCS A.: *A magister officiorum*. Scriptura, 2016/I. sz., 138.

idő után szükségessé vált több, a tanács munkáját segítő szervezet létrehozására. Ebbe a csoportba sorolható az *officium admissionum*, a *scrinium dispositionum* és a császári jegyzők testülete (*schola notariorum*).¹⁶ A következőkben e három hivatal felépítésére, feladatainak ismertetésére fókuszálok, ezt követően a *magister officiorum*-nak a *consistorium*-mal kapcsolatba hozható feladatainak ellátását támogató szerveket mutatom be.

A tanács munkájában az egyik legfontosabb támogató funkciót betöltő hivatal *officium admissionum*-nak hívták, amelynek élén a *magister admissionum* állt. Az *officium admissionum* feladatai közé tartozott többek között a *consistorium* üléseinek előkészítése. Az *officium* személyzete, az *admissionales* segítette a *magister officiorum*-ot a császári audienciák megszervezésében.¹⁷ A hivatal szervezeti felépítését tekintve négy osztályra tagozódott. Mindegyik osztály élén egy vezető állt, akit *proximus admissionum*-nak neveztek. Az osztályvezetők közvetlenül a *magister admissionum* irányítása alatt álltak.¹⁸

A *scrinium dispositionum* a 4. század második felében jött létre, önálló hivatalként. A hivatal kezdettől fogva a *magister officiorum*-nak volt alárendelve és csak neki tartozott felelősséggel. A hivatal élén a *magister dispositionum* állt.¹⁹ A hivatalvezető kötelezettsége volt a munkatervék összeállítása a császár és az udvari tisztségviselők részére, illetőleg az udvar utazási terveinek kidolgozása. A *scrinium dispositionum* a kancellária részét képező *scrinium memoriae* egyik alosztályaként funkcionált.²⁰ A császári kancellária ügyosztályainak (*scrinium memoriae*, *scrinium epistularum*, *scrinium libellorum*) *magisteri* olvasták fel a tanács tagjainak a provinciák és városok delegációi által a császári udvarnak címzett leveleket.²¹

A *notarii* (udvari írnokok, jegyzők) különböztek az eddig ismertetett szervektől, tekintve, hogy közvetlenül a császárnak tartoztak felelősséggel. A *magister officiorum* esetükben csak a névjegyzéket (*matricula*) vezette.²² A *notariusok* a *consistorium*-ban és a császár személye előtt zajló tárgyalásokról, ülésekről jegyzőkönyvet vezettek. A hivatalnoki kinevezések vonatkozásában a jegyzők készítették elő a kinevezési okmányokat.²³ A *notariusok* feleltek a császár levelezésével kapcsolatos feladatok ellátásáért is, emiatt különleges bizalmat élveztek.²⁴ Élükön a *primicerius notariorum* állt, aki a *magister officiorum*-tól függetlenül irányította a szervezetet. A *primicerius* legfontosabb feladata az egyes birodalmi főméltóságok és a többi magas rangú

¹⁶ CLAUS, M.: i.m. 18-19, 22-23.

¹⁷ BOAK, A. E. R.: *The Master of the Offices in the later Roman and Byzantine Empires*. In: BOAK, A. E. R. – DUNLAP, J. E.: *Two studies in later Roman and Byzantine Administration*. New York: The Macmillan Company, 1924, 92.

¹⁸ PÓKECZ KOVÁCS A.: *A magister officiorum*. i.m. 148.

¹⁹ CTh 6, 26, 2.

²⁰ BOAK, A. E. R.: i.m. 67.

²¹ CLAUS, M.: i.m. 16-17.

²² BOAK, A. E. R.: i.m. 65.

²³ CTh 6, 10, 2; CTh 6, 25, 7.

²⁴ POTTER, D. S.: *The Roman Empire at Bay AD 180-395*. London and New York: Routledge, 2004, 423.

hivatalnok protokolláris jegyzékének összeállítása volt.²⁵ A császári jegyzők testülete (*schola notariorum*) a tanácshoz kapcsolódó kötelezettségein túl egyfajta államvédelmi hatóságként is funkcionált a késő Római Birodalomban. Ennek megfelelően titkos megbízatásokat is kaptak az udvartól. Több esetben előfordult, hogy a *notarius*ok a titkosügynökökkel (*agentes in rebus*) közösen hajtottak végre missziókat, tipikus példaként említhető a római állam érdekeit és a császár személyét veszélyeztető egyének életének kioltása.²⁶ A két, rendészeti hatáskörökkel is rendelkező szervezet közötti átjárás lehetséges volt. Karrierútjukat tekintve egyes *notarius*ok később megszerezték a *consul* és a *magister officiorum* hivatali pozíciókat.²⁷

A *magister officiorum* felügyelete alatt álltak és mellette közvetlenül láttak el feladatokat a tolmácsok (*interpretes*), az ajtónállók (*decani*), a szállásmesterek (*mensores*), az istállómesterek (*stratores*), a fáklyahordozók (*lampadarii*) és a küldöncök (*cursores*).²⁸ A *magister officiorum*ot a külföldi küldöttségek fogadásának megszervezésében tolmácsok segítették. A tolmácsok testülete *interpretes diversarum gentium* elnevezéssel szerepel a fellelhető forrásokban.²⁹ Az ajtónállók alakulata (*schola decanorum*) felelt a császári lakosztályok és főbb termek, köztük az államtanács üléstermének őrzéséért. Ritkábban kisebb jelentőségű küldemények továbbításával is megbízták őket. A császárné szolgálatában is *decani* tisztséget viselő személyek álltak, feladataik közé tartozott a különböző üzenetek és meghívók továbbítása.³⁰ Az istállómesterek (*stratores*) csoportját a *tribunus stabuli*, később pedig a *comes stabuli* vezette. Feladatuk az istállók és a lovak biztosítása volt a császári udvar számára. Alkalmanként lovakat vásároltak a hadsereg számára. A fáklyahordozók (*lampadarii*) is a *magister officiorum* felügyelete alatt álltak. Clauss megállapítja, hogy hiányuk a keleti birodalomrészeire vonatkozó *Notitia Dignitatum*ban valószínűleg tévedés, mivel ott a *magister officiorum* személyzetében is szerepeltek. A küldöncök (*cursores*) híreket, üzeneteket továbbítottak a császári udvaron belül. Egyes hírvivők a császári háztartás női tagjainak közvetlen szolgálatában álltak.³¹ A *magister officiorum* felügyelete alatt állt az udvari szállásmesterek (*mensores*) testülete, az erről tanúskodó legkorábbi forrás egy 368-370 között keletkezett császári rendelet.³² A szállásmesterek kötelezettsége elsősorban az egyes méltóságok, a római császár vendégei és a külföldi követek elszállásolásának biztosítása volt Róma és Konstantinápoly városában. A szállásmesterek gondoskodtak továbbá az uralkodói

²⁵ CLAUSS, M.: i.m. 22.

²⁶ SÁRY P.: *Titkos ügynökök a császárkori Rómában*. Debreceni Szemle 10: 4 pp., 2002, 536.

²⁷ SINNIGEN, W. G.: *Two branches of the Late Roman Secret Service*. The American Journal of Philology 80:3, The Johns Hopkins University Press, 1959, 252.

STEIN, E.: i.m. 101.

BOAK, A. E. R.: i.m. 148-151.

²⁸ CLAUSS, M.: i.m. 19-21.

²⁹ ND Or. 11, 52; ND Occ. 9, 46.

³⁰ CTh 6, 33, 1

³¹ CLAUSS, M.: i.m. 21.

³² CTh 7, 8, 2.

család és az udvartartás elszállásolásáról a császár utazásai alatt. A szervezetet egy *primicerius* vezette. A *primicerius* tisztséget betöltő személyek két évnyi szolgálatot követően megkapták a titkosügynökök (*agentes in rebus*) szervezetének legalacsonyabb rangosztályát (*equites*).³³ A *schola mensorum* irányításában a legfontosabb feladat a számos egyedi szabályzat betartásának biztosítása és különösen annak figyelemmel kísérése volt, hogy ki kérheti a *hospitium*ot, és kinek kell azt megadni. A *magister officiorum* egyrészt elutasította a *hospitium*ra jogosultak túlzott követeléseit, másrészt gondoskodott arról, hogy a városok lakói teljesítsék kötelezettségeiket.³⁴

A keleti birodalomrészen a *magister officiorum* fennhatósága alatt működött a *scrinium barbarorum* elnevezésű ügyosztály. A *scrinium barbarorum*ot a *Notitia Dignitatum*ban említik először, kialakulása tehát valószínűsíthetően a 4. század végére tehető. A *Notitia Dignitatum* feljegyzései szerint a keleti birodalom területi igazgatási egységeit alkotó négy *diocesis*be (Asiana, Pontica, Oriens, Trákia és Illyricum együttesen) négy „segédalkalmazottat” (*subadiuvae*) neveztek ki, akik vagy a titkosügynökök testületéből (*schola agentum in rebus*), vagy más kancelláriai ügyosztályokról kerültek ki.³⁵ Ezek a hivatalnokok intézték a protokolláris ügyeket, valamint nyilvántartást vezettek a „barbárokkal” kapcsolatos ügyekről. Szerepet játszhattak a barbár államokból érkező látogató küldöttségek leveleinek, közölnivalóinak fordításában is. Bury úgy vélte, hogy a hivatal felügyeletet gyakorolt minden Konstantinápolyba látogató külföldi felett.³⁶

4. A *suffragium* megjelenési formái a tanács munkáját segítő jegyzőknél

Az általam vizsgált tisztségek, igazgatási szervezetek nem egyszer követtek el jogsértéseket. A hivatali visszaélések okai alapvetően a hivatalra ajánlás és a hivatalvásárlás intézményeiben keresendők.³⁷ Bár az egyes császárok rendeleti szabályozás útján törekedtek arra, hogy a hivatalvásárlás római közszolgálatban történő alkalmazását betiltsák, törekvéseik csak részben jártak sikerrel.³⁸ A római igazgatás rendszerének hatékony működtetése ugyanakkor megkövetelte volna, hogy a közhivatalokat betöltő egyéneket csak a hivatali feladatok ellátásához igazodó

³³ CTh 6, 34, 1.

³⁴ BOAK, A. E. R.: i.m. 81-82.; DELMAIRE, R.: *Les institutions du Bas-Empire romain de Constantin à Justinien. I. Les institutions civiles palatines*. Paris: CERF, 1995, 81.

³⁵ ND Or. 11, 45-49.

³⁶ BURY, J. B.: *The Imperial Administrative System in the Ninth Century: with a revised text of the Kletorologion of Philotheos*. London: Pub. for the British Academy by H. Frowde, 2011, 93.

³⁷ KELEMEN M.: *Az igazgatás szolgálata. Hivatalviselésben korlátozott tisztségviselők a Római Birodalomban*. Budapest: Menedzser Praxis, 2022, 134-139.

³⁸ SCHULLER, W.: *Ämterkauf im Römischen Reich*. Der Staat 19:1, 1980, 59.

objektív kritériumok (szolgálati idő, érdemek, hatékony munkavégzés) alapján válasszák ki.³⁹

A késő Római Birodalomban két előmeneteli forma létezett: az ajánlás alapján történő hivatalszerzés (*suffragium*), illetve az érdemen alapuló előmenetel. A *suffragium* intézménye a császári rendelettervezetek szövegében a tanács munkáját segítő jegyzők (*notarii*) esetében merül fel. A *Codex Iustinianus*-ban találunk olyan rendelkezést, amely a jegyzők esetében szabályozza az előmenetel kérdését. Az alábbi rendeletrészletben a teljesítmény alapú kiválasztás és előmenetel felé történő elmozdulást figyelhetjük meg:

CJ 12, 7, 2 (474): *Imperator Zeno Augustus ad Hilariano magistro officiorum.*

“Praeclaram nobilemque militiam spectabilium tribunorum notariorum, qui gloriosis obsequiis nonnihil rei publicae commoditatis adferunt et decoris, diversis beneficiorum titulis muniendam credidimus et augendam...”

*„...4. Illud praecipue prvisionem nostram flagitare perspeximus, ne per ambitionem aut gratiam aut cuiuslibet occasionis obtentu vel laborum seu sollicitudinum specie publicorum cuiquam liceat aliquando graduum seriem conturbare et temporum ratione calcata dudum militantibus anteferri et, quae longis prolixisque stipendiis defensa iam pollicetur senectus, gratiosa festinatione subripere....”*⁴⁰

Az idézett rendelkezés a császári jegyzők testületén belül a *tribunus et notarii* rangot viselő tisztségviselőkhoz kapcsolódó előmeneteli renddel foglalkozik. Ennek megfelelően az előmenetelnek a szolgálati idő hossza és az elért érdemek alapján kell történnie, a rendelkezés az előmenetel ajánlás alapú formáit (*ambitio, gratia*) kifejezetten tiltja. A császári rendelet részlet kizárja továbbá, hogy a jegyzőket a szükségesség alapján (*occasionis obtentu*), a munka és az igyekezet látszatának eredményeként (*laborum seu sollicitudinum specie*) léptessék elő.⁴¹

Sinnigen⁴² és Clauss⁴³ szerint a *magister officiorum* és a *notariusok* között további kapcsolatot jelentett, hogy több korábban *notarius*ként szolgálatot teljesítő személyből később *magister officiorum* lett. A hivatalok mesterének a tanácsban betöltött szerepe szempontjából tehát egyáltalán nem volt elhanyagolható, hogy az

³⁹ CTh 6, 22, 3; CTh 1, 9, 1; CTh 2, 29, 1; CTh 7, 1, 7; CTh 12, 1, 75; CTh 6, 14, 2; CTh 6, 18, 1; CJ 9, 27, 6; CJ 1, 3, 30.

⁴⁰ “Ügy véljük, hogy a *spectabilis* rangú jegyzői *tribunusok* kiváló és nemes szolgálatát, akik dicső szolgálataikkal előnyt és méltóságot hoznak az államnak, különféle juttatásokkal kell megerősíteni és felelmei...”; “...4. Észrevettük, hogy különös figyelmünkre van szükség annak érdekében, hogy senki sem zavarhatja meg az előléptetés szabályos rendjét korrupt kéréssel vagy befolyással, vagy bármilyen ürüggyel, vagy bármilyen közmunka vagy gondoskodás látszatával, és az időszámítás figyelmen kívül hagyásával nem részesülhet előnyben azokkal szemben, akik hosszú szolgálatot teljesítettek, és kivételezéssel ellopják azt, amit az öregkor, hosszú és hosszas kötelességteljesítés után ígér...” – saját fordítás Fred H. Blume munkája alapján: BLUME, F. H. – FRIER, B. W.: *The Codex Of Justinian. A New Annotated Translation With Parallel Latin And Greek Text.* Cambridge: Cambridge University Press, 2016, 2839, 2841.

⁴¹ KELEMEN M.: i.m. 2022, 151.

⁴² SINNIGEN, W. G.: i.m. 252.

⁴³ CLAUSS, M.: i.m. 22-23.

illető *notarius*ok érdemeik, vagy ajánlás alapján szerezték-e meg a pozíciót, tekintve, hogy a politikai események is nagyban befolyásolták a hivatalnokok karrierjét.⁴⁴ Az érdekem előtérbe helyezése a korábbi helyzethez képest feltételezi, hogy a császári rendelet kiadását megelőzően a *suffragium* tömeges előfordulása a szakmai előmenetelben csökkenthette a birodalom irányításának hatékonyságát. A *notarius*ok egyaránt teljesítettek igazgatási, egyházi, katonai, diplomáciai küldetéseket, ezáltal hosszabb időn keresztül figyelemmel kísérhették a konzisztóriumban folyó tárgyalásokat, megismerték az igazgatási hatáskörök széles körét, amellyel később *magister officiorum*ként foglalkozniuk kellett.⁴⁵

A császári jegyzőkkel kapcsolatosan találkozhatunk olyan rendelkezéssel is, amely a *suffragium*ot a hivatalvásárlás eszközeként tünteti fel. Ezt a kérdéskört szintén a *Codex Iustinianus* szabályozza:

CJ. 2,7,23: *Imperator Anastasius Augustus ad Eustathio praefectus praetorio.*

“Laudabile vitaeque hominum necessarium advocationis officium maxime principalibus praemiis oportet remunerari.

1. Ideoque iubemus viros clarissimos fisci pro tempore patronos fori tuae celsitudinis sollemni die festivitatis kalendarum Januariarum ipsius tantummodo anni, per quem tale peragunt officium, inter spectabiles sacri nostri consistorii comites divina nostrae serenitatis manu puncti consequi solacium.

*2. Et postquam tale deposuerint officium, si quidem filios ingenuos habeant, eos clarissimorum notariorum inseri consortio tribunorum, sacras solitas epistulas sine quadam suffragii solutione percepturos...”*⁴⁶

Anastasius császár rendelkezését Eustathius *praefectus praetorio*hoz címezte. A rendelet részlet tanúsága szerint a *praefectus praetorio* hivatalában ügyvédi tevékenységet végző személyeket a tanács tagjainak jelenlétében a császár ajándékokkal jutalmazta. Az ügyvédek szabadnak született fiai is jutalomban részesültek, ugyanis az ügyvédek hivatali idejének lejárta után privilégiumként bejegyezték őket a jegyzők rendjébe, ezáltal elnyerték a *tribunus et notarii* rangot, illetőleg császári oklevelet is kaptak. A rendelet értelmében a rendes eljárás keretében a jegyzői tisztség elnyeréséhez a jelölteknek ajánlódíjat kellett volna fizetniük. A *suffragium* a hivatalvásárlás jogszerű formájaként jelenik meg ebben a rendelkezésben. Az ügyvédekre vonatkozó szabályozás célja az lehetett, hogy jogi

⁴⁴ SÁRY P.: *Előadások a római büntetőjog köréből*. Miskolc: Miskolci Egyetemi Kiadó, 2011, 137-138.

⁴⁵ CLAUS, M.: i.m. 23.

⁴⁶ „Az ügyvédi hivatal dicséretes, az emberi életéhez szükséges, és császári jutalommal kell jutalmazni. 1. Elrendeljük tehát, hogy a felséged udvarában eljáró *viri clarissimi* kincstári ügyvédek az ünnepélyes újrési ünnepségen, kizárólag abban az évben, amikor e tisztséget betöltik, és a Császári Tanácsunk *spectabiles* grófjainak jelenlétében, ajándékokat kapjanak derűlátásunk áldott kezéből. 2. És miután letették ezt a tisztséget, szabadon született fiaikat, ha vannak, a *clarissimi notariusok* *tribunus*aik rendjébe írássák be, és megkapják a szokásos császári okleveles szabadalmat, anélkül, hogy ajánlódíjat (*suffragium*) fizetnének.” – saját fordítás Fred H. Blume munkája alapján: BLUME, F. H. – FRIER, B. W.: i.m. 469.

szaktudással rendelkező személyekkel bővítsék a *schola notariorum* testületét, ezáltal visszaszorítva a hivatalra ajánlás alapján történő kiválasztást, valamint kiküszöböljék azt a problémát, hogy a jegyzők szakértelme számos esetben alig terjedt túl az írástudáson. Tevékenységüket tekintve kedvezőtlen híruk voltak arról, hogy az egyszerű ügyleteket jogi szakzsargon használatával tették a jogban kevésbé jártasabb emberek számára nehezen értelmezhetővé, ennek háttérében pedig az állhatott, hogy soronként fizették őket.⁴⁷

A *suffragium* megítélése és értékelése számos szerzőt foglalkoztatott, az álláspontok igen színesek és eltérőek. Jones úgy vélte, ha a magas rangú állami tisztviselők rendszeresen ajánlottak volna jelölteket a rendelkezésükre álló betöltetlen, alacsonyabb rangú tisztségekre, akkor a *suffragium* intézménye akár egy egyszerű kiválasztási módszer lehetett volna, ennek hiányában azonban csak korrupciót eredményezett.⁴⁸ Lendon megállapítása szerint az ajánló (*suffragator*) megbecsülését és tiszteletét fejezte ki azzal, hogy egy betöltetlen álláshelyre ajánlotta saját jelöltjét, ilyen értelemben a *suffragium* pozitív megítélést kölcsönzött az ajánlott személynek.⁴⁹ Liebs véleménye szerint a rómaiak nem kizárólag bűncselekményként kezelték a *suffragiumot*, ugyanis jó néhány megengedő rendelkezéssel is találkozhatunk a közjogi szabályozásban.⁵⁰ Krause meglátása szerint a *suffragium* jogellenes mivolta abban nyilvánul meg, hogy az ajánló és az előlépni kívánó hivatalnok között nem áll fenn patrónusi-kliensi viszony és az ezzel járó személyes függés.⁵¹ Schuller értelmezésében a *suffragium* elsődleges problémáját az adta, hogy a közhivatalokat vételár megfizetése által megszerzők célja a vagyonszerzés volt, nem pedig a római közérdek szolgálata.⁵² További gondot jelentett, hogy a *suffragium* eszközeivel élő tisztviselők sok esetben szakmailag alkalmatlanok voltak a megszerezni kívánt hivatali pozíciókkal járó feladatkörök ellátására.⁵³

Álláspontom szerint a hivatali előmenetelt jellemző korrupció a nyugati birodalomrészt bukásához vezető út egyik legfontosabb eleme volt. A népvándorlás hatásai, a területi veszteségek, a belső lázadások, a kincstár elszegényedése mellett a saját érdekeiket érvényesíteni kívánó, korrupt és inkompetens hivatalnokok és tanácsadók okozták végül a birodalom vesztét. Egy erőskezdő uralkodó rendeleti szabályozás útján véglegesen útját állhatta volna a *suffragium* polgári igazgatásban való

⁴⁷ JONES, A. H. M.: i.m. 515-516.

⁴⁸ JONES, A. H. M.: i.m. 391-392.

⁴⁹ LENDON, J. E.: *Empire of Honour. The Art of Government in the Roman World*. Oxford: Oxford University Press, 2005, 186.

⁵⁰ LIEBS, D.: *Ämterkauf und Ämterpatronage in der Spätantike – Propaganda und Sachzwang bei Julian dem Abtrünnigen*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, 1978, 158-159. - CTh 6, 24, 3; CTh 1, 9, 1; CTh 6, 27, 8; CTh 6, 22, 2; CTh 7, 2, 1.

⁵¹ KRAUSE, J.-U.: *Spätantike Patronatsformen im Westen der Römischen Reiches*. München: C. H. Beck, 1987, 56-62.

⁵² SCHULLER, W.: i.m. 69-70.

⁵³ SCHULLER, W.: i.m. 58, 65.

alkalmazásának, ahogyan azt Iustinianus császár tette 535-ben, a keleti birodalomrészben.⁵⁴

5. A *magister officiorum* és az államtanács

A *magister officiorum* 325-től kezdve állandó tagja volt a *consistorium sacrum*nak.⁵⁵ A dominátus korszakában a diplomácia jelentősége nagymértékben megnőtt, tekintve, hogy a rómaiak fokozatosan felhagytak a hódító hadjáratokkal és a megszerzett területek megvédésére rendezkedtek be. A külföldi népcsoportokkal, államalakulatokkal (germán törzsek, Szasszanida Birodalom, hunok stb.) való kapcsolattartás diplomáciai jellege megerősödött, ez a folyamat testet öltött a közjogi szabályozásban is a *ius gentium* és a szokásjog mellett.⁵⁶ A *magister officiorum* ennek megfelelően felelős volt a *consistorium*ban lebonyolított császári audienciák előkészítéséért mind a magánszemélyek, a különböző hivatalnokok és a külföldi államok követei esetében.⁵⁷ A *magister officiorum* a tanács állandó tagjaként és a császár tanácsadójaként jelen volt a fogadásoknál, a magas rangú személyek, például a szenátorok esetében ő állhatott a tanácsterem függönye elé és vezethette be a kegyelteket.⁵⁸ A *magister officiorum* és az államtanács viszonyában kiemelendő, hogy a hivatalok mestere az ügynökhálózat és az állami postaszolgálat (*cursus publicus*) révén információs előnyre tett szert a tanács többi tagjával szemben. Ez a tény lehetőséget adott a *magister officiorum* számára, hogy közvetlenül a császár, közvetve pedig a tanács döntéseit befolyásolja saját érdekeinek megfelelően, ezt a megállapítást csak tovább erősíti a *consistorium* munkáját segítő szerveknél bemutatott *scrinium dispositionum*, amely a császár munkarendjének összeállításáért felelt és a *magister officiorum* irányítása alatt állt.⁵⁹

A külföldi államok által küldött követek szintén a *magister officiorum* felügyelete alatt álltak, attól kezdve, hogy átlépték a római állam határát. Kíséretet adott a követek mellé, fogadta illetve vendégül látta őket. Bemutatta őket a császárnak, gondoskodott az ilyenkor szokásos ajándékok előkészítéséről.⁶⁰ A kapcsolattartás és általában a diplomáciai levelezés kezelése céljából a *magister officiorum*ot egy tolmácsokból álló testület (*interpretes diversarum gentium*) segítette saját hivatalán belül.⁶¹ Előfordult, hogy maga a *magister officiorum* is követi megbízottként teljesített szolgálatot külföldi államokban, a birodalom érdekeit képviselve. A tény, hogy élvezte a császár bizalmát és pozíciója, illetve az a befolyás, amelyet hivatala

⁵⁴ JONES, A. H. M.: i.m. 394-395.

⁵⁵ BOAK, A. E. R.: i.m. 31.

⁵⁶ CTh 6, 26, 1; CJ 12, 19, 11; ND Or. 11, 16; ND Occ. 9, 11; ND Or. 11, 52; ND Occ. 9, 46.

⁵⁷ BOAK, A. E. R.: i.m. 94-95; 98-100.

⁵⁸ BOAK, A. E. R.: i.m. 92.

⁵⁹ CLAUS, M.: i.m. 18.

⁶⁰ CLAUS, M.: i.m. 61-63.

⁶¹ ND Or. 11, 46.

biztosított számára a külügyek irányításában, alkalmassá tették a diplomáciai kiküldetésekből való aktív szerepvállalásra.⁶²

6. A *magister officiorum* kapcsolata az egyéb udvari főméltóságokkal

A *magister officiorum* és az egyéb udvari főméltóságok kapcsolatának teljeskörű elemzése a területi korlátok miatt nem valósítható meg, ezért jelen tanulmány keretei között a polgári igazgatás egyes területeit irányító tisztségviselőkre (*quaestor sacri palatii*, *comes sacrarum largitionum*, *comes rerum privatarum*) és a katonai igazgatás élén álló *magister militum*ra fókuszálunk.

6.1. A *magister officiorum* és a *quaestor sacri palatii*

A *magister officiorum* és a *quaestor sacri palatii* kapcsolatát illetően a császári rendeletalkotásban találkozhatunk jogi problémával. Erről a *Codex Theodosianus*ban olvashatunk. II. Theodosius császár 415-ben elrendelte, hogy 40 *praepositurae* kinevezését a *scrinium memoriae* ügyosztályáról kell kiadni. A rendelkezés továbbá megtiltotta a katonai főparancsnoknak, hogy az érintett kinevezések kiadásának és a nyilvántartásba való bejegyzésének a folyamatába beavatkozzon:

CTh. 1,8,1 (415): *Imperatores Honorius et Theodosius Augusti ad Florentio magistro militum.*

“*Viro illustri quaestore Eustathio suggerente cognovimus per innovationem quorundam a minore laterculo praeposituras fuisse sublatas, quod iam in alteram consuetudinem derivatum ex integro revocare nolimus. Quadraginta vero praeposituras minori laterculo pro infra scripta instructione eius restitui praecipimus, ut de scrinio memoriae de cetero emittantur, observaturo sublimitatis tuae officio, ut nihil de memorato numero sibi usurpet, quo pro parte habeat inconcussum quod contra rationem fuerat immutatum.*”⁶³

A Sallustius *quaestor*hoz címzett 424-es rendelkezés már a teljes nyilvántartás méltóságaira (*praepositurae*, *tribunatus*, *praefecturae*) vonatkozóan állapítja meg a felügyeleti jogkört és azt, hogy a kinevezések kiadása a *scrinium memoriae* kancelláriai ügyosztály feladata:

CTh. 1,8,2 (424): *Imperator Theodosius Augustus ad Sallustio viro illustri comiti et quaestori.*

⁶² BOAK, A. E. R.: i.m. 96.

⁶³ „Eustathius *illustis quaestor* jelentéséből megtudtuk, hogy a *praepositurae*-kat bizonyos személyek újítása miatt törölték a *duces*ek alá tartozó tisztségviselők nyilvántartásából (*minus laterculum*). Most, hogy az eredeti gyakorlat más szokássá alakult át, a Mi akarunk, hogy ne állítsuk vissza teljesen. De elrendeljük, hogy negyven *praepositurae*-t állítsanak vissza a nyilvántartásba, annak alább leírt rendje szerint, úgy, hogy ezentúl ezeket a *scrinium memoriae* ügyosztályából adják ki. A felséged hivatala tartsa be, hogy a fent említett szövegből egyet sem sajátít ki magának, amivel részben zavartalanul megtarthatja a fent említett szokást, amelyet szabályellenesen megváltoztattak.” – saját fordítás Clyde Pharr munkája alapján: PHARR, C. – DAVIDSON, T. S. – PHARR, M. B.: *The Theodosian Code and Novels and the Sirmundian Constitutions*. Princeton: Princeton University Press, 1952, 20.

*“Laterculi curam totius scias ad tuae sublimitatis sollicitudinem pertinere, ita ut tuo arbitratu ex scrinio memoriae totius minoris laterculi dignitates, hoc est praepositurae omnes, tribunatus et praefecturae iuxta consuetudinem priscam clementiae meae auctoritate deinceps emittantur.”*⁶⁴

Ugyanebben az évben a császár Helio *magister officiorum*-nak címzett rendeletében tájékoztatja az udvari főméltóságot, hogy a *quaestor sacri palatii* és a *magister militum* eredeti hatásköreit állítja vissza a *duces*ek tisztségviselőinek nyilvántartását illetően, a nyilvántartás felügyelete tehát teljes mértékben a *quaestor sacri palatii* kötelezettsége, a *magister militum* korábbi kinevezési és bejegyzési jogkörei pedig megszűnnek:

C.Th. 1,8,3 (424): *Imperator Theodosius Augustus ad Helioni comiti et magistro officiorum.*

*“Omnes minoris laterculi dignitates, quae sub cura quidem ac sollicitudine viri illustris quaestoris esse antea videbantur, postea vero vel universae vel mediae ad magistrorum militum potestatem dispositionemque transierant, placuit nunc clementiae meae vetusti temporis more renovato ad prisca deinceps iura revocare.”*⁶⁵

Az idézett szöveghelyek a *magister officiorum* és a *quaestor sacri palatii* és a *magister militum* kapcsolatáról rendelkeznek. A *quaestor sacri palatii* a keleti birodalomrészben a *scrinium memoriae* hivatalán keresztül felügyelte a *laterculum minus*, ami a tartományokon belül legmagasabb katonai tisztséget betöltő *duces*-ek alá tartozó tisztségviselők nyilvántartása volt.⁶⁶ Nyugaton Flavius Stilicho *magister militum* hatáskörébe tartozott ez a feladat. A nyilvántartásban szereplő tisztségviselők kinevezése tartozhatott a *quaestor sacri palatii*-hoz és a *magister officiorum*-hoz is, tekintve, hogy mindketten gyakoroltak jogköröket a *scrinium memoriae* hivatalnokai felett. A rendelet javaslatát nagy valószínűséggel a *quaestor sacri palatii* jelentése adta, maga a rendelet a *magister militum*-nak szólt, a *quaestor sacri palatii* és a *magister officiorum* pedig egyidejűleg kapott értesítést. Helio, a keleti birodalom régense és *magister officiorum*a, akinek a *scrinium* végző soron alárendeltje volt, bizonyára döntő befolyással volt az egész rendeletre.⁶⁷

A *magister officiorum* és a *quaestor sacri palatii* között további kapcsolatot jelentett, hogy a *magister officiorum* kapta meg a *quaestor sacri palatii* által szerkesztett császári rendeleteket, gondoskodott továbbításukról és kihirdetésükről. A rendeletek szövegének szerkesztését ténylegesen azonban a *magister memoriae* végezte, aki a *quaestor sacri palatii*-nak tartozott felelősséggel a *Notitia Dignitatum* feljegyzései

⁶⁴ „Tudnia kell, hogy a *duces*ek alá tartozó tisztségviselők nyilvántartásának (*minus laterculum*) felügyelete a Te Fenséged feladata, így az Ön ítélete alapján a teljes nyilvántartás méltóságaira, vagyis az összes *praepositurae*-re, *tribunatus*-ra és a *praefecturae*-re való kinevezéseket ezentúl a régi szokás szerint a *scrinium memoriae* ügyosztályából kell kiadni, Kegyelemességem felhatalmazása alatt.” – saját fordítás Clyde Pharr munkája alapján: PHARR, C. - DAVIDSON, T. S. – PHARR, M. B.: i.m. 20.

⁶⁵ „Ami a *duces*ek alá tartozó tisztségviselők nyilvántartásának (*minus laterculum*) minden olyan méltóságát illeti, amelyek a jelek szerint korábban az *illustris quaestor* felügyelete és felelőssége alá tartoztak, de később vagy az egészet, vagy a felét a *magister militum* ellenőrzése és rendelkezése alá vonták, most úgy tetszett Kegyelemnemnek, hogy megújítja a régi idők szokását, és ezentúl visszahelyezi ezeket a méltóságokat eredeti státuszukba.” – saját fordítás Clyde Pharr munkája alapján: PHARR, C. - DAVIDSON, T. S. – PHARR, M. B.: i.m. 20.

⁶⁶ BOAK, A. E. R.: i.m. 85.

⁶⁷ CLAUSS, M.: i.m. 17.

szerint.⁶⁸ A *quaestor sacri palatii* és a *magister officiorum* szorosan együttműködött egymással, ennek oka abban keresendő, hogy a *quaestor sacri palatii* nem rendelkezett saját hivatali apparátussal, ezért jogalkotási feladataiban a császári kancelláriához tartozó *scrinium memoriae* ügyosztály segítette.⁶⁹ A *quaestor sacri palatii* saját maga választhatta ki hivatali segédjeit az ügyosztályokról, kiosztásukat azonban a *magister officiorum* ellenőrizte.⁷⁰ A császári jogalkotás során a *scrinium memoriae* hivatalnokai által elkövetett esetleges jogsértések, hivatali visszaélések hatásköri összeütközésekhez vezethettek a *magister officiorum* és a *quaestor sacri palatii* között. A *magister officiorum* felettesi jogokat gyakorolt az ügyosztályokon dolgozó hivatalnokok felett, a *quaestor sacri palatii* segítő hivatalnokok tevékenységükért viszont nem a *magister officiorum*-nak feleltek közvetlenül, hanem a *quaestor sacri palatii*-nak.⁷¹ Delmaire álláspontja szerint a keleti birodalomrészen a kancelláriai hivatalnokok feletti kizárólagos bírói ítékezés jogát az 5. század során fokozatosan a *magister officiorum* szerezte meg.⁷² A postai szolgáltatást engedély nélkül nyújtó személyek bűncselekményeinek elbírálását Clauss szerint a *magister officiorum* a *praefectus praetorio*-val közösen végezte.⁷³ Ez alapján feltételezhető, hogy a nyugati birodalomban a *magister officiorum* együtt járt el a *quaestor sacri palatii*-val a kancelláriai hivatalnokok jogsértéseinek elbírálásánál.⁷⁴

Véleményem szerint a hatásköri összeütközés jogi úton történő feloldása a nyugati birodalomrészen nem történt meg az 5. század során sem, mégpedig a gyengekező Honorius császár uralkodásától kezdődő folyamatos belpolitikai válságok, a népvándorlás hatásai, a katonai parancsnokok nagymértékű befolyása, a területi veszteségek és a kincstár elszegényedése miatt.

6.2. A *magister officiorum* és a *magister militum*

A *magister officiorum* és a *magister militum* között további kapcsolat fedezhető fel a katonai igazgatásban, mégpedig a határmenti csapatok megszervezését illetően. Erről a problémakörrel a *Codex Iustinianus*-ban olvashatunk:

CJ. 1,31,4 (443): *Imperatores Theodosius et Valentinianus Augusti ad Nomo magistro officiorum.*

⁶⁸ ND Or. 19, 6; ND Occ. 17, 11.

⁶⁹ HARRIES, J.: *The Roman Imperial Quaestor from Constantine to Theodosius II.* The Journal of Roman Studies 1988/78. sz., 159-164.; CTh 14, 9, 2.

⁷⁰ CJ 12, 19, 13-15.

⁷¹ KELLY, C.: *Bureaucracy and Government.* In: LENSKEI, N. E.: *The Cambridge Companion to the Age of Constantine.* Cambridge: Cambridge University Press, 2005, 187-188.

⁷² DELMAIRE, R.: i.m. 93.

⁷³ CLAUS, M.: i.m. 78-79.

⁷⁴ PÓKECZ KOVÁCS A.: *A magister officiorum.* i.m. 141, 143.

*“Curae perpetuae tui culminis credimus iniungendum, ut super omni limite sub tua iurisdictione constituto, quemadmodum se militum numerus habeat castrorumque ac clusurarum cura procedat, quotannis significare nobis propria suggestione procuret.”*⁷⁵

II. Theodosius és III. Valentinianus 443-as rendelkezését *Nomus magister officiorum*-nak címezték. A rendelet értelmében a két uralkodó a *magister officiorum* kötelezettségévé tette a birodalom határán kiépített erődök és katonai táborok állapotának felmérését, valamint a katonák létszámát tanúsító nyilvántartás készítését. Az udvari főtisztviselőnek e tevékenységéről évente jelentést kellett tennie a császárnak. A forrásban található *“omni limite sub tua iurisdictione constituto”* kifejezés a *magister officiorum*-nak a határmenti csapatok feletti jogszolgáltató hatáskörét is feltételezi.⁷⁶

Részletesebb leírást találunk a *magister officiorum*-nak a határmenti csapatokkal és erődítményekkel kapcsolatos feladatairól II. Theodosius Novelláiban:

Novellae Theodosi 24,5 (443): *Imperatores Theodosius et Valentinianus Augusti ad Nomo magistro officiorum.*

*“Id autem curae perpetuae tui culminis credimus iniungendum, ut tam Thracici quam Inlyrici nec non etiam Orientalis ac Pontici limitis, Aegyptiaci insuper Thebaici Libyci quemadmodum se militum numerus habeat castrorumque ac clusurarum cura procedat, quotannis mense Ianuario in sacro consistorio significare nobis propria suggestione procures, ut, uniuscuiusque tam industria quam desidia nostris auribus intimata, et strenui digna praemia consequantur et in dissimulatores competens indignatio proferatur...”*⁷⁷

A forrásrészlet II. Theodosius és III. Valentinianus császárok *Nomus magister officiorum*-nak címezték 443-ban. A rendelet részlet kimondja, hogy a határmenti csapatok létszámáról, az erődítmények és katonai táborok állapotáról, illetőleg a folyami őrhajókról évente kellett jelentést tennie az udvari főtisztviselőnek, tevékenységéről a *consistorium sacrum*-ban kellett beszámolni. A rendelkezés meghatározza a Keleti Birodalom határmenti régióit (Thrákia és Illyricum provinciák határmenti területei, Pontus provincia határai, a Keleti határvidék, azaz a Szasszanida Birodalommal határos területek, Théba és Líbia határai Afrikában). A *magister officiorum* által tett jelentés függvényében a császár dönthetett a határ

⁷⁵ „Úgy véljük, hogy Eminenciádnak kötelessége lesz, hogy évente személyes jelentésben számoljon be nekünk a katonák létszámáról, valamint arról, hogy a táborok és erődök hogyan állnak az Ön fennhatósága alá tartozó minden határon.” – saját fordítás Fred H. Blume munkája alapján: BLUME, F. H. – FRIER, B. W.: i.m. 351.

⁷⁶ CLAUS, M.: i.m. 54-55.

⁷⁷ „Sőt, úgy véljük, hogy ezt örökös felelősségként kell előírni Excellenciádnak, nevezetesen, hogy évente január havában a szent császári konzisztóriumban gondoskodj arról, hogy saját jelentésedben jelezd Nekünk, hogyan áll a katonák száma, és hogyan halad a táborok és a folyami őrhajók gondozása Thrákia és Illyricum, valamint Keleten és Pontus határain, továbbá az egyiptomi Théba és Líbia határain. Így, amikor mindenkinek a szorgalma, mind a tétlensége a mi fülünk elé kerül, a szorgalmasak méltó jutalmat kaphatnak, és megfelelő haraggal sújthatjuk a színleelőket.” – saját fordítás Clyde Pharr munkája alapján: PHARR, C. – DAVIDSON, T. S. – PHARR, M. B.: i.m. 512.

védelmét ellátó katonák megjutalmazásáról vagy megbüntetéséről. A büntetések kiszabását a császár feltételezhetően a *magister officiorum* gondjaira bízta.⁷⁸

Az elemzett szabályozás azért tekinthető jelentősnek, mivel ellentétben állt azzal az általános gyakorlattal, hogy a katonai tisztviselők nem gyakorolhattak joghatóságot a polgári igazgatásban dolgozók felett. A *magister officiorum* így ebből a szempontból kivételnek tekinthető, mivel polgári és katonai tisztviselők is a fennhatósága alá tartoztak.⁷⁹ Korábban a határőrök (*limites, limitanei*) a katonai főparancsnok, azaz a *magister militum* joghatósága alá tartoztak, és ez utóbbi még továbbra is gyakorolt bizonyos bírói hatalmat felettük, bár e hatalom jellege nem tisztázott.⁸⁰ A *magister officiorum* joghatóságának kiterjesztése tehát a *magister militum* joghatóságába való beavatkozásnak tekinthető, azzal a céllal, hogy a határok és helyőrségeik ellenőrzését szigorúbban a császári udvar felügyelete alá vonják. A szabályozás célja az lehetett, hogy az uralkodók hiteles jelentést kapjanak a birodalom védelmének állapotáról egy olyan külső tisztviselőn keresztül, aki nem volt közvetlenül érintett a katonai létesítmények építésében, karbantartásában, a határ őrzésében és a katonák elszállásolásában. Ehhez a polgári igazgatás egy tisztviselőjét kellett alkalmazni a katonák ellenőrzése végett. Valószínűleg a *magister officiorum* volt a legalkalmasabb személy e feladat ellátására, hiszen hatalma alatt állt az egész birodalmat átszövő titkosügynök hálózat (*schola agentum in rebus*). A *magister officiorum* a nyugati birodalomrészben nem gyakorolta ezt a jogkört, feltehetően a katonai főparancsnokok kivételes befolyása miatt.⁸¹

6.3. A *magister officiorum* és a pénzügyi kérdésekkel foglalkozó udvari főméltóságok

A *magister officiorum* és a *comes sacrarum largitionum*, valamint a *comes rerum privatarum* közötti kapcsolat elsődlegesen a *magister officiorum*nak a külügyi, diplomáciai hatásköreiben nyilvánul meg.⁸² A hivatalok mestere a külföldi követek fogadásánál összeállított egy listát, amely tartalmazta az egyes követeknek szánt ajándékokat. A listát a császár jóváhagyását követően a *magister officiorum* átadta a *comes sacrarum largitionum*nak, akinek fő feladata az ajándékok összekészítése volt. A hivatalok mesterének a követek, megbízottak fogadásánál gondoskodnia kellett a megfelelő berendezéssel ellátott szálláshelyekről a fővárosban. A *comes rerum privatarum* kötelezettsége a vendégek lakhelyeinek előkészítése és anyagi finanszírozása volt,

⁷⁸ KELEMEN M.: *A Birodalom kormányzása. A Késő-római Birodalom közszolgálati – jogi források alapján.* Budapest: ELTE Állam- és Jogtudományi Kar, 2007, 21.

⁷⁹ BOAK, A. E. R.: i.m. 41.

⁸⁰ CJ 12, 59, 8.

⁸¹ BOAK, A. E. R.: i.m. 41-42, 90.

⁸² CLAUS, M.: i.m. 64-67.; DELMARIE, R.: i.m. 83-84.

még hozzá a *magister officiorum* írásos utasítása alapján.⁸³ A *comes rerum privatarum* ennek megfelelően együttműködhetett a szállásmesterekkel (*mensores*).

A *comes sacrarum largitionum* és a *comes rerum privatarum* kapcsán érdemes még néhány szót ejteni a két udvari főtisztviselő alárendeltjeiről, az ő esetükben is találkozhatunk jogi problémával, amelynek részleteit a *Codex Iustinianus* tartalmazza:

CJ 12, 23, 12 (424-425): *Imperatores Theodosius Augustus, et Valentinianus Caesar ad Maximino comiti sacrarum largitionum.*

“Viros devotos palatinos non oportere in hac regia urbe apud virum illustrem praefectum urbis litigare compelli, nisi de aedificatione domorum et servitutibus et annonis orta videatur causa; in aliis vero causis tam pecuniariis quam criminalibus apud viros illustres tantummodo comites suos respondere.”

“1. Rectoribus autem provinciarum intra administrationis suae fines inter praesentes palatinos nec causis publicis occupatos cognoscere tam pro civili quam pro criminali causa permittimus, sic tamen, ut non aliter criminalis sententia adversus eos proferatur, nisi ex suggestione provincialis iudicii vir illustris comes sub quo militat certioratus hoc ei permiserit.”⁸⁴

A rendelkezés értelmében a *comes sacrarum largitionum* és a *comes rerum privatarum* hivatalnokai (*palatinus*) nem voltak arra kötelezhetőek, hogy perbeli képviselőt lássanak el a *praefectus urbi* bíróságán, kivéve egyes városrendészeti ügyeket (építkezés, szolgalmi jogok, élelmezés). II. Theodosius és III. Valentinianus császárok 424-425 körül keletkezett rendelete kimondja, hogy ezek a hivatalnokok egyfajta kiváltsággként egy eset kivételével a két udvari főméltóság bíróságai előtt felelhettek az ellenük felhozott vádakra.⁸⁵ A kivétel arra az esetre vonatkozott, amikor az érintett *palatinus* tisztségviselő nem közügyekkel foglalkoztak, ilyenkor a tartományi helytartók eljárhattak velük szemben polgári és büntetőügyekben is, büntetőügyekben azonban csak akkor, ha a vádlott személy felett felügyeletet gyakorló *illustris* rangú *comes* (tehát vagy a *comes sacrarum largitionum* vagy a *comes rerum privatarum*) ezt külön engedélyezte. Hatékonyasági szempontból az erre irányuló császári rendelkezés nagyon hasznosnak bizonyult, a jogsértésekkel érintett hivatalnokokat nem kellett külső bíróság elé idézni, amelynek következtében fennállt a veszélye annak, hogy túl hosszú ideig nem tudták volna ellátni a palotában végzett feladataikat.⁸⁶

⁸³ BOAK, A. E. R.: i.m. 94-95.

⁸⁴ „E császárváros odaadó *palatinus* tisztviselői nem kötelezhetőek arra, hogy a *praefectus urbi* - aki *illustris* rangú személy - előtt pereskedjenek, kivéve olyan ügyekben, amelyek látszólag az épületek építésével, a szolgalmi jogokkal és az élelmezéssel (*annonae*) kapcsolatosak. Minden más polgári és büntetőügyben csak a saját *comes*-ek, azaz az *illustris* rangú személyek előtt kell felelniük.” ; “1. Mindazonáltal megengedjük a tartományok helytartóinak (*restores*), hogy joghatóságuk (*administratio*) határain belül polgári és büntetőügyekben egyaránt tárgyaljanak olyan, ott lakó *palatinus* tisztviselőket érintő ügyekben, akik nem közügyekkel foglalkoznak, azzal a korlátozással azonban, hogy büntetőügyben nem lehet ellenük ítéletet hozni, kivéve, ha a tartományi bíróság ajánlására (*suggestio*) az *illustris* rangú *comes*, aki alatt a vádlott szolgál, ezt engedélyezi.” – saját fordítás Fred H. Blume munkája alapján: BLUME, F. H. – FRIER, B. W.: i.m. 2901.

⁸⁵ BOAK, A. E. R.: i.m. 41.

⁸⁶ BOAK, A. E. R.: i.m. 41.

Az elemzett forráshely értelmében a *comes sacrarum largitionum* és a *comes rerum privatarum* alárendeltjei nem tartoztak a *magister officiorum* felügyelete alá. A szabályozást megelőzően azonban nem kizárt, hogy a *magister officiorum* is eljárhatott a két pénzügyi tisztségviselő beosztottjai által elkövetett jogsértések ügyében. A rendelet szövegében használt *palatinus* kifejezés ugyanis kezdetben a császári palotában szolgálatot teljesítő civil személyekre (birodalmi ügynökökre, kancelláriai hivatalnokokra) vonatkozott, a 4. század közepétől alkalmazták a két pénzügyi kérdésekkel foglalkozó udvari főméltóság alkalmazottainak megnevezésére.⁸⁷ A pénzügyi udvari főméltóságok alá tartozó igazgatási szervezet állandósulásával már nem tartoztak a *magister officiorum* felügyelete alá a *palatinus* tisztviselők. Véleményem szerint a *magister officiorum* ezt követően kivételesen a tanács keretében érvényesíthette bírói hatalmát abban az esetben, ha az érintett hivatalnokok a *consistorium* megbízásából teljesítettek feladatokat a provinciákban és e tevékenységük körében jogsértést követtek el.⁸⁸ Ilyen jogsértésnek minősülhetett például a haza- és felségárulás, amely cselekmények elkövetése vagy annak gyanúja esetén a *magister officiorum* érvényesíthette bírói hatalmát.⁸⁹ A gyakorlatban ez az eset nagy jelentőséggel bírhatott, tekintettel arra, hogy a római állam és a császár elárulásának minősülő cselekedetek köre folyamatosan bővült a posztklasszikus korban.⁹⁰

7. Összegzés

Tanulmányom összegzéseként megállapítható, hogy a *magister officiorum* készítette elő a tanács (*sacrum consistorium*) üléseit, a császári audienciákat, részt vett a rendelettervezetek megvitatásában, tolmácsok útján biztosította a diplomáciai levelezést, fogadta a külföldi államok követeit és a birodalmi megbízottakat, illetve időnként ő maga is követként képviselte a birodalom érdekeit. A tanács működését és a *magister officiorum* munkáját a *consistorium* üléseit előkészítő *officium admissionum*, a császári kancellária részét képező *scrinium dispositionum*, a jegyzők testülete (*schola notariorum*) és egyéb támogató szervek segítették. A jegyzők előmenetele kapcsán láthattuk, hogy a szabályozás kiemelten foglalkozik a *suffragium* kérdésével. A *suffragium* intézménye a nyugati birodalomrész hanyatlásának egyik meghatározó oka volt. A kérdés a szakértelem szükségessége miatt egyáltalán nem volt elhanyagolható, hiszen számos esetben a jegyzők kötelékében szolgáló tisztviselőket az uralkodók *magister officiorum*-má nevezték ki. A keleti birodalom esetében az ügyvédi tevékenységet folytató személyek jegyzővé való kinevezése tekinthető a szakértelem hiányát ellensúlyozni kívánó intézkedésnek. A többi udvari főméltósággal való kapcsolat körében megállapítható, hogy a *magister officiorum* és a

⁸⁷ PÓKECZ Kovács A.: *Pénzügyi igazgatás a dominátus korában*. i.m. 112-114.

⁸⁸ CTh 6, 30, 1; CTh 6, 30, 4.

⁸⁹ DELMAIRE, R.: i. m. 93.

⁹⁰ FÖLDI A. – HAMZA G.: *A római jog története és intéstitúciói*. Budapest: Novissima Kiadó, 2023, 575-581.

quaestor sacri palatii között, a császári jogalkotás kapcsán felmerülő hatásköri összeütközések tényleges jogi szabályozása és feloldása csak a keleti birodalomrészben, fokozatosan következett be az 5. század során. A Nyugatrómai-birodalomban a *magister officiorum* és a *quaestor sacri palatii* együtt járt el a *scrinium memoriae* és a többi kancelláriai ügyosztály hivatalnokai által elküvetett jogsértések ügyében, amely hatásköri összeütközésekhez vezethetett. A *magister officiorum* érvényesíthette politikai befolyását a császári rendelettervezetekhez fűzött javaslatok útján, amennyiben a *quaestor sacri palatii* által szerkesztett tervezet megtárgyalására került sor a *consistorium* keretein belül. Keleten a *magister officiorum* 443-tól kezdve felelt a határmenti csapatok és katonai létesítmények megszervezéséért, erről pedig évente jelentést tett a *consistoriumban*. A feladat végrehajtása feltételezte a *magister officiorum* és a *magister militum* együttműködését, egyúttal az erről szóló császári rendelkezés a katonai főparancsnok hatásköreibe való beavatkozásnak tekinthető, amely ellentmondott a késő római igazgatás rendszerében érvényesülő általános gyakorlatnak. A *magister officiorum* a nyugati birodalomrészben nem gyakorolta ezt a jogkört, valószínűleg a katonai főparancsnokok kivételes befolyása miatt. A *magister officiorum* feladata volt egy lista összeállítása a követeknek szánt ajándékokról, amelyet a császár jóváhagyását követően átadott a *comes sacrarum largitionum*nak, aki az ajándékokat előkészítette. A *magister officiorum* írásos utasítása alapján a *comes rerum privatarum* kötelezettsége a megfelelő berendezéssel ellátott lakhelyek előkészítése és anyagi finanszírozása volt a követek és megbízottak vonatkozásában. A *magister officiorum* a *comes sacrarum largitionum* és a *comes rerum privatarum* alá tartozó hivatalnokok (*palatinus*) felett a 4. század közepétől kezdődően csak abban az esetben gyakorolhatott bírói jogköröket, ha azok a tanács felhatalmazása alapján a provinciákban teljesítettek megbízásokat és e tevékenységük körében jogsértéseket követtek el.

Irodalomjegyzék

BENEDEK Ferenc – PÓKECZ KOVÁCS Attila: *Római magánjog*. Budapest: Ludovika Egyetemi Kiadó, 2023.

BLUME, Fred H. – FRIER, Bruce W.: *The Codex Of Justinian. A New Annotated Translation With Parallel Latin And Greek Text*. Cambridge: Cambridge University Press, 2016.

BOAK, Arthur Edward Romilly: *The Master of the Offices in the later Roman and Byzantine Empires*. In: BOAK, Arthur Edward Romilly – DUNLAP, James Eugene: *Two studies in later Roman and Byzantine Administration*. New York: The Macmillan Company, 1924, 1-160.

BURY, John Bagnell: *History of the later Roman Empire. From the death of Theodosius II. to the death of Justinian*. Volume I., New York: Dover Publications Inc., 1958.

BURY, John Bagnell: *The Imperial Administrative System in the Ninth Century; with a revised text of the Kletorologion of Philotheos*. London: Pub. for the British Academy by H. Frowde, 2011.

CICOGNA, Giovanni: *Consilium principis – Consistorium. Ricerche de diritto romano pubblico e di diritto privato*. Turin, 1902.

CLAUSS, Manfred: *Der magister officiorum in der Spätantike (4.–6. Jahrhundert). Das Amt und sein Einfluß auf die kaiserliche Politik*. München: C. H. Beck, 1980.

CROOK, John: *Consilium Principis. Imperial Councils and Counsellors from Augustus to Diocletian*. Cambridge: Cambridge University Press, 1955.

DELMARE, Roland: *Les institutions du Bas-Empire romain de Constantin à Justinien. I. Les institutions civiles palatines*. Paris: CERF, 1995.

DEMANDT, Alexander: *Die Spätantike. Römische Geschichte von Diocletian bis Justinian 284-565*. München: C. H. Beck, 2007.

ELTON, Hugh: *The Roman Empire in Late Antiquity, A Political and Military History*. Cambridge: Cambridge University Press, 2018.
<https://doi.org/10.1017/9781139030236>

FÖLDI András – HAMZA Gábor: *A római jog története és intézményei*. Budapest: Novissima Kiadó, 2023.

HARRIES, Jill: *The Roman Imperial Quaestor from Constantine to Theodosius II*. The Journal of Roman Studies 1988/78. sz., 148-172.

JONES, Arnold Hugh Martin: *The later Roman Empire 284-602. A social economic and administrative survey*. Volume I., Oxford: Basil Blackwell, 1964.

KELLY, Christopher: *Bureaucracy and Government*. In: LENSKI, Noel Emmanuel: *The Cambridge Companion to the Age of Constantine*. Cambridge: Cambridge University Press, 2005, 183-204. <https://doi.org/10.1017/CCOL0521818389>

KELEMEN Miklós: *A Birodalom kormányzása. A Késő-római Birodalom közszolgálati – jogi források alapján*. Budapest: ELTE Állam- és Jogtudományi Kar, 2007.

KELEMEN Miklós: *Az igazgatás szolgálata. Hivatalviselésben korlátozott tisztviselők a Római Birodalomban*. Budapest: Menedzser Praxis, 2022.

KRAUSE, Jens-Uwe: *Die Spätantike (284 bis 565 n. Chr.)*. In: GEHRKE, Hans-Joachim; SCHNEIDER, Helmuth: *Geschichte der Antike. Ein Studienbuch*. Berlin: J. B. Metzler, 2018, 429–499. <https://doi.org/10.1007/978-3-476-04761-8>

KRAUSE, Jens-Uwe: *Spätantike Patronatsformen im Westen der Römischen Reiches*. München: C. H. Beck, 1987.

LONDON, John E.: *Empire of Honour. The Art of Government in the Roman World*. Oxford: Oxford University Press, 2005.

LIEBS, Detlef: *Ämterkauf und Ämterpatronage in der Spätantike – Propaganda und Sachzwang bei Julian dem Abtrünnigen*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, 1978, 158-186.

MOLNÁR Imre – JAKAB Éva: *Római jog*. Szeged: Leges Bt., Diligens Bt., 2015.

PHARR, Clyde – DAVIDSON, Theresa Sherrer – PHARR, Mary Brown: *The Theodosian Code and Novels and the Sirmondian Constitutions*. Princeton: Princeton University Press, 1952.

POTTER, David S.: *The Roman Empire at Bay AD 180-395*. London and New York: Routledge, 2004.

PÓKECZ KOVÁCS Attila: *A magister officiorum*. Scriptura, 2016/I. sz. 138-156.

PÓKECZ KOVÁCS Attila: *A principátus kormányzása és igazgatása Augustus uralmának idején (kr. e. 27 - kr. u. 14)*. Glossa Iuridica 9:3-4, 2022, 75-89. <https://doi.org/10.55194/GI.2022.3-4.4>

PÓKECZ KOVÁCS Attila: *A principátus közjoga*. Budapest-Pécs: Dialóg Campus Kiadó, 2016.

PÓKECZ KOVÁCS Attila: *A quaestor sacri palatii tisztsége a késő római császárság korában*. In: BÉLI Gábor – KORSÓSNÉ DELACASSE Krisztina - HERGER Csabáné (szerk.): *Ut Juris Ordo Exigit: Ünnepi tanulmányok Kajtár István 65. születésnapja tiszteletére*. Pécs: Publikon Kiadó, 2016, 237-244.

PÓKECZ KOVÁCS Attila: *Pénzügyi igazgatás a dominátus korában*. JURA 22:1, 2016, 108-119.

PÓKECZ KOVÁCS Attila: *The development of state structure in the principatus from Tiberius to Diocletianus (AD 14-284)*. In: SZÓKE Gergely László – BENKE József et al. (szerk.): *Essays of Faculty of Law University of Pécs Yearbook 2015*. Pécs: Pécsi Tudományegyetem – Állam- és Jogtudományi Kar, 2016, 151-166.

SÁRY Pál: *Titkos ügynökök a császárkori Rómában*. Debreceni Szemle 10:4, 2002, 528-536.

SÁRY Pál: *Előadások a római büntetőjog köréből*. Miskolc: Miskolci Egyetemi Kiadó, 2011.

SCHULLER, Wolfgang: *Ämterkauf im Römischen Reich*. Der Staat 19:1, 1980, 57-71.

SINNIGEN, William G.: *Two branches of the Late Roman Secret Service*. The American Journal of Philology 80:3, The Johns Hopkins University Press, 1959, 238-254.
<https://doi.org/10.2307/291793>

STEIN, Ernst: *Geschichte des spätrömischen Reiches. Band I. Vom römischen zum byzantinischen Staate (284-476 n. Chr.)*. Wien: L. W. Seidel & Sohn, 1928.

BALLA BULCSÚ*

Criminal law aspects of risk caused by the victim

Absztrakt

A sértett-elkövető páros tagjai közül úgy a jogtudomány, mint a szélesebb körű publicum hajlamos elsősorban az elkövető cselekményére vagy mulasztására összpontosítani. Ennek oka, hogy a sértett általában a bűncselekményt elszenvedő félként jelenik meg. Bizonyos esetekben azonban, a sértett szerepe akarva vagy akaratlanul túllépik az egyszerű szenvedő személyén és aktívan bekapcsolódik a bűncselekmény eredményének formálásba. Ezen aspektus vizsgálata pedig kiemelkedő jelentőségűvé válik az elkövető büntetőjogi felelősségének vizsgálata során.

Kulcsszavak: sértetti közrehatás, előreláthatóság, arányosság, veszély, felelősség

Abstract

Among the victim-offender pair, both legal doctrine and the broader public tend to focus primarily on the actions or omissions of the offender. This is because the victim is generally perceived as the passive sufferer of the crime. However, in certain cases, the victim's role, whether intentionally or unintentionally, extends beyond mere passivity, actively influencing the outcome of the crime. Examining this aspect becomes particularly significant in assessing the offender's criminal liability.

Keywords: contribution, foreseeability, proportionality, risk, liability

1. Introduction

Criminal law is traditionally focused on the act of the offender when considering liability for a crime. In determining the criminal liability of the offender, the legislator and the law enforcer analyze first and foremost whether the act has achieved the criminal elements of the offence as defined by law and whether the offender is guilty. However, the complexity of human interactions means that we cannot ignore the fact that in some cases the victim himself may contribute to the development or progression of a crime. The victim is not only a passive sufferer, but also a factor that can influence the behavior of the perpetrator, the outcome of the offence and the legal assessment of it.

Although these cases may seem unusual at first glance, a closer look at everyday conflicts reveals that dangerous situations generated by victims are not uncommon. From traffic accidents to fights, there are many situations in which the victim's behavior, whether intentional or negligent, contributes to the occurrence of crimes. These cases raise questions about the proportionality and fairness of criminal

* Balla Bulcsú, Miskolci Egyetem, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, <https://orcid.org/0009-0002-2546-0938>, témavezető: Csemáné Dr. Váradi Erika egyetemi docens

liability, as there can be a significant difference between an offense committed against a completely innocent person and one when the victim has - to some extent - created the risk that led to the harm. This problem is a concern for all legal systems, since justice requires that the legal assessment of criminal offences should not be rigid and disregard individual circumstances. Some legal systems explicitly recognize the relevance of the victim's contributory conduct in the assessment of criminal offences, while others are more cautious in this respect. However, despite the different approaches, the question remains the same: to what extent and in what cases is it appropriate to take the extent of risk caused by the victim's involvement into account in determining criminal liability and the severity of criminal sanctions?

The aim of this paper is to examine in detail the criminal law relevance of the risk created by the victim, to analyze its theoretical and practical implications and to highlight the problems that may arise related to it. This issue may be particularly important for the fair application of the law, since if it ignores the victim's involvement, the perpetrator's responsibility may become disproportionate.

2. Contributory behavior in criminal and civil law

By contributory actions, criminal law understands conduct on the passive side of the offence that contributes to the occurrence or aggravation of the result. In its Resolution No 56, the Criminal Chamber of the Curia of Hungary¹ stated that the “imputable contribution of the victim” must be considered as a mitigating circumstance. As it has been pointed out in the literature, the finding of contributory involvement can only lead to a reduction in the penalty and cannot exclude criminal liability.² The Resolution also contains a list of examples of contributory actions, such as rude, violent, defiant or seriously offensive behavior on the part of the victim, unlawful conduct, and, in the case of traffic offences, the victim's infringement of the rules, which is a concurrent cause. Therefore, imputable contribution can be established for both intentional and negligent conducts. It is important to note, however, that the resolution of the Criminal Chamber of the Curia characterizes this contributive behavior as a mitigating circumstance, but in my opinion, it may be of much greater importance in certain cases, since the victim's conduct may also influence the classification of the offence. A case in point would be when the victim refuses what is surely a life-saving intervention and loses his life as a result of injuries inflicted by the offender. The wording of the Curia opinion suggests that, victim behavior affecting the outcome should be approached from the perspective of imputability, as indicated by the use of the word “imputable”.

¹ <https://kuria-birosag.hu/hu/kollvel/56-bkv> (2025.02.28)

² BÉRCES V.: *A sértett magatartásának büntetőjogi relevanciájáról: beleegyezés, közrebatás, utólagos hozzájárulás.* Büntetőjogi szemle, VI, nr. 2017/2., 52.

However, in my opinion, this is only the first step in the assessment of the victim's contribution, which is to establish whether he could foresee its possible consequences; in other words, whether the victim influenced the outcome by an act which could be objectively imputed to him. When it can be established that the victim had an influence on the outcome of the offence which was attributable to him, the extent of that influence can be determined rather by the causal link test. Since the Hungarian Criminal Code does not impose a duty of care on the victim similar to that in civil law, the standard of reasonable conduct cannot be applied in the same way. Thus, among the subjects of a criminal offence, their participation in causing the result must be judged according to the extent to which their conduct is causally linked to the result. This requires, in the first place, the establishment of a complete causal chain leading to the result. However, since causation in a broad sense encompasses all the circumstances that contribute to the course of a given outcome in a given way, it is the task of the various theories to examine the causes that may be relevant to criminal law within the framework of "legal causation".³ For this purpose, cause-selecting theories have been developed to identify the causes relevant to determining the punishment.⁴ In the causal chain of causes thus selected, it is then necessary to distinguish between those causes which are attributable to the offender and those over which he had no control. Contributory behavior will therefore include the causes by which the victim becomes involved in the causal chain, diverting it towards a different result. The test is to determine the proportion of the causes leading to the outcome that can be attributed to the victim. As these are beyond the control of the offender, and are also generally neither intended nor foreseeable, the limit of his responsibility in imposing a penalty must be determined only as a result of the risk which he caused, foresaw or should have foreseen when he committed the act. The reason for limiting the offender's liability is that the victim's "intervention" may in certain cases alter the result of the offence so markedly that it may lead to a more severe harm and, thus to harsher penalty. The nature of the risk caused by the victim must therefore be examined not only when the sentence is imposed, but also at the moment the offence is qualified, since the offender's responsibility extends only to the danger he has caused, and its consequences. I agree with the view expressed in Romanian doctrine according to which, if the danger caused by the victim has such a significant influence on the offence that it directs it towards a more serious one, the offender should be held liable only for the offence corresponding to the danger he initially created.

³ KOMPORDAY-OROSZ N.: Okozatosság a büntetőjogban és a magánjogban in Nagy M. - Fazekas M.: *Jogi tanulmányok. Jogtudományi Előadások az Eötvös Lóránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskolájának Konferenciáján*. Budapest: ELTE Állam- és Jogtudományi Kar, 2022, 151. DOI: 10.56966/2022.10.Korompay

⁴ BALOGH Á. - TÓTH M. (ed): *Magyar büntetőjog. Általános rész*. Budapest, Osiris Kiadó, 2015, 106-107.

Consequently, if the offender's conduct causes injuries that endangers life, but the victim's death results from the refusal of an intervention that would certainly have saved his life, the offender's liability must be assessed up to the moment of the refusal of that intervention, taking into account the victim's involvement.⁵ The point of intervention must therefore be drawn up to the point of refusal, since up to that point we can speak of a chain of causation based solely on the legal causes linked to the perpetrator's act, in which the victim's contributory conduct is then involved, changing the final outcome.

According to civil law doctrine if the victim's conduct deviates so significantly from what is considered typical behavior that it becomes culpable, the act in question cannot remain without consequences.⁶ In cases where culpable contributory negligence by the victim is established, civil law applies the special "more or less" principle within the framework of damage apportionment.⁷ The legitimacy of this view is based on the acceptance of the *casus nocet domino* principle, which holds that damage that cannot be transferred to the tortfeasor must be borne by the affected owner.⁸ The application of this principle becomes even more essential when the owner has contributed to the damage by culpably breaching the duty of prevention imposed on them by law.⁹ Consequently both criminal and civil law attach legal consequences to contributory conduct that affects the outcome. The most striking similarity between the two legal instruments can be found in the way they cover both intentional and negligent conducts. A further similarity between criminal contributory involvement and civil damage apportionment is that neither of them is aimed at excluding liability, but rather at determining the penalty and the amount of damages to be recovered. As such, neither victim contribution nor the conduct of the other party, which constitutes the basis for the apportionment of damages, is capable of excluding liability altogether, but only of reducing it. On the other hand, the most striking difference is the nature of the consequence of the conduct which may be imputed. While in civil law the victim is held liable for failing to comply with one of the obligations imposed on him by the law - and as such civil law provides for the application of damage apportionment as a kind of sanction against a victim who fails to show the care required of him - in the field of criminal law, no similar obligation can be found regarding the victim, so that a lighter sentence of the perpetrator can hardly be interpreted as a sanction imposed on the

⁵ CURT I.: *Contribuția victimei la producerea rezultatului în dreptul penal*. Bukarest: Hamangiu, 2021, 199.

⁶ JOBBÁGYI G.: *Kötelmi jog I. A kötelmek közös szabályai*. Budapest: Apostoli Szentszék Könyvkiadója, 2014, 172.

⁷ FUGILINSZKY Á.: Felróható károsulti közrehatás és kárenyhítési kötelezettség a magyar polgári jogban in Vékás L. (ed.): *Polgári jogi kodifikáció*, X., nr. 2008 / 4., 3.

⁸ LÁBADY T.: *A magánjog általános tana*. Budapest: Az Apostoli Szentszék Könyvkiadója, 2018, 219.

⁹ CSEHI Z. (ed.): *2013. évi V. törvény a Polgári Törvénykönyvről kommentárja*. Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2021, 2253.

victim. The acceptance of damage apportionment as a specific form of joint tort in civil law would seem to confirm this view.¹⁰ A further difference is the scale used to measure the impact. The difference is mainly due to the fact that while the Hungarian Civil Code specifically regulates the victim's contribution, the Criminal Code does not make any specific reference to the victim's contribution, but we find a reference to it in the Curia Resolution No. 56. Accordingly, the victim's imputable contribution must be considered as a mitigating circumstance, but the Resolution does not specify the yardstick for reducing the penalty on this basis. On the other hand, the Civil Code specifically provides that the measure of apportionment of damages is to be based on the degree of fault, or, if this cannot be established, on causation, and finally, if neither of these two can be established, the victim and the tortfeasor are to bear the damage equally.¹¹ In criminal law, however, since we cannot even seem to speak of the joint responsibility of the victim and the perpetrator (as in civil law, opinions have been expressed that the victim's contribution may be regarded as a special form of joint tort¹²), the measure of the reduction of the penalty should, in my view, be the proportion of the subjects' contribution to the result. To determine this proportion, we need to consider the extent to which the victim's conduct can be regarded as the cause of the result, and how decisive it is in bringing it about. The closer the link between the victim's conduct and the occurrence of the result, the greater the reduction should be in the offender's sentence. In criminal law, therefore, unlike in civil law, the primary role is that of causation, and the test of imputability is merely a preliminary to the test contributory involvement, which helps courts to decide whether there is conduct on the part of the victim which should be examined in terms of its influence on the outcome. As a final aspect, the distinction between the more lenient forms of liability in relation to contributory conduct should be highlighted. As pointed out earlier, damage apportionment may be used in the context of establishing civil liability, which may entail pecuniary sanctions. In contrast, however, contributory victim involvement plays a role in determining the level of the criminal sanction, which is more likely to restrict the offender's freedom. Therefore, victim involvement requires more scrutiny, emphasis and assessment in criminal law, since criminal sanctions are clearly more severe.

3. Possible forms of risk caused by the victim

Risk caused by the victim can manifest in multiple forms, reflecting a spectrum of involvement in the outcome of a criminal event. While it is generally rooted in

¹⁰ CSEHI Z.: *ibid.*, 2253.

¹¹ CZINE A.: *Okoztatosság a kártérítési jogban*, Themis, nr. 2017/2., 6.

¹² CSEHI Z.: *ibid.*, 2253.

negligence, it is essential to acknowledge that there are instances when the victim deliberately endangers their own physical integrity or life. Both negligently or intentionally committed contributory actions lead to two potential consequences: contributory participation or crime induced solely by the victim's actions. The fundamental distinction between these two lies in their impact on the offender's liability. In cases where the victim's actions are the sole cause of the harmful outcome, the "perpetrator" cannot be held liable, as there is no causal link between their conduct and the result. On the other hand, contributory participation implies a partial but relevant connection between the offender's actions and the final consequence.

Contributory participation occurs when the victim's actions play a role in facilitating the criminal outcome. This scenario requires an assessment of causation to determine whether the victim's conduct significantly influenced the severity of the harm suffered. A key factor in distinguishing contributory participation is that the offender's initial actions create the setting in which the victim's behavior contributes to the result. Consequently, liability is "shared" to some extent, although the degree of responsibility varies depending on the foreseeability and proportionality of the victim's reaction. Sole victim-induced causation, by contrast, completely excludes the offender's liability. This situation arises when the victim independently creates the risk leading to their harm, without any causal contribution from the perpetrator. Accordingly, the absence of a direct causal link between an offender's actions and the harm excludes criminal liability.

However, the question arises whether there could exist possibilities in which the perpetrator can be held responsible for a danger created by the victim? This question has been the subject of legal debates and jurisprudential analysis across various jurisdictions. While the general principle holds that individuals are responsible for the risks they create, exceptions arise when the victim's contributory actions are coerced by the offender. In such cases, legal systems may recognize the perpetrator's liability, even if the immediate danger originates from the victim's conduct.

4. The international jurisprudential landscape of risk caused by the victim

In a Spanish case¹³ the perpetrator was driving his truck when he spotted the 18 years old, single victim. He stopped the vehicle and invited her to get into the truck, which she did, placing herself in the seat intended for the driver's companion. Between the two a conversation began, in the course of which the defendant told the passenger, who was wearing shorts and carrying a bag on her legs, to leave it on the ground because it was going to be hot, ending up proposing to make love to him, insisting on it several times despite her repeated refusals. The victim demanded

¹³ STS, 8 de Noviembre de 1991, <https://vlex.es/vid/53581080> (2025.02.28)

that he stop the truck, going so far as to express that she would throw herself out of the moving vehicle. As the driver didn't stop and kept making sexual comments, the victim opened the door on her side, and threw herself out of the truck. When she fell to the ground her left lower limb was crushed by the rear wheels of the vehicle. The truck was speeding 40 kilometers per hour, according to the statement of its driver, who once this event occurred stopped his vehicle, closed the door that had been left open and continued his journey. As a result of this accident, the victim suffered the amputation of the left lower limb to mid-thigh, having to use a prosthesis. The first instance court convicted the perpetrator. In his appeal the defendant claimed his conviction to be unlawful because there was no causal link between his behavior and the result, as it was due exclusively to the conduct of the victim of voluntarily throwing herself out from the truck.

The Spanish Supreme Court in its ruling declared that there was a first aspect in the perpetrator's conduct which must necessarily be assessed, in itself, as having no legal significance, which includes the action relating to his initial conversation with the young woman, including his proposal to make love. Despite this the Court also stated that, when he became insistent in the face of the victim's repeated refusal, it meant a double attack on the victim's freedom: first on her freedom of movement, because she was forced to remain involuntarily in the truck, as the driver did not stop the vehicle so that she could get out, and secondly, against her sexual freedom, since she was forced to put up with insistent proposals that were unpleasant to her, and evidently induced in her a fear of being sexually assaulted by the driver. It was highlighted that the recklessness that undoubtedly existed had special characteristics, since, it had no relation to the lack of diligence in the handling of the vehicle as it was usual in similar cases. The Court considered that the reckless conduct of the defendant took form, not in the mere proposal to make love, but in the impertinent insistence on that proposal as the only possibility of getting rid of the aggression to which she was being subjected, the victim threw herself out of the vehicle. Taking into consideration that the defendant, at that time, was the master of the situation and was able to prevent the victim from carrying out such a dangerous action, simply by ceasing his dishonest proposals or stopping the vehicle for the victim to get out, the Court declared that what lacks justification is that he continued in that same aggressive style even after the victim repeatedly asked him to stop, ultimately putting forward that she would throw herself out of the moving truck otherwise. Consequently, according to the Court the action of the victim of throwing herself from the truck was fully legitimate, as it was the only solution in such circumstances that she was able to get out of that situation. Upon evaluating this reasoning, it becomes clear that the sole cause of the victim's injuries lies in the perpetrator's reprehensible behavior, since his unlawful act of aggression against the victim led to her legitimate action of throwing herself from the moving truck. Thus, the driver of the vehicle with his behavior created a risk, and within the scope of that risk the

“voluntary” act of the victim occurred. Such act, having been carried by the victim within the scope of risk created by the offender, did not interrupt the causal link between the initial conduct of the perpetrator and the subsequent injuries suffered by the victim, which, therefore, were objectively attributable to the perpetrator.¹⁴ Accordingly the Supreme Court declared that there was reckless imprudence producing serious injuries, without attributable interference on the victim’s side on the events.

On the other hand, in another similar Spanish case¹⁵, known as the “Vehicle Jump Case”¹⁶, the Supreme Court took a different stance, further detailing the issue of properly assessing the risk caused by the victim. The victim was hitchhiking in the city of Trebujena when the accused driving his vehicle, stopped offering to take him. Once the victim entered the vehicle, the accused began to ask him for money. The victim told him that he did not have any, but later the defendant asked him to show him the watch he was wearing, telling him to give it to him. When the victim refused, the perpetrator insisted on his claims by telling him that he had a knife. The victim, frightened, asked the defendant to stop the vehicle to get out, which he refused, despite the repeated request of the victim, who nervously insisted that he would throw himself out of the vehicle. As the driver refused to stop the vehicle, the victim jumped out of it. As a result of the fall, he suffered injuries which took 45 days to heal, 30 of them requiring medical treatment. Regarding the victim’s action the Court held that there are specific conditions under which the result must be attributed to the responsibility of the perpetrator or the victim. In particular, in the aforementioned case, it is a question of whether the injuries caused by the self-defensive behavior of the victim of a robbery can be attributed to the perpetrator. The Court declared that the result must be imputed to the perpetrator as long as it is the consequence of a danger, created by his action. As it was pointed out, in this case the question raised by the Court was not whether the perpetrator acted with malice with respect to the result, but whether such injuries could be objectively imputed to him.

As the Court pointed out in cases as the presented one, the danger created by the victim is of decisive importance. For this reason, the Court considered that not all self-defensive actions, consisting of throwing oneself from a moving vehicle to avoid harm, should have the same significance. Undoubtedly, in all of them it is necessary to affirm causality in the sense of the *conditio sine qua non*, because if the victim had not been in the situation created by the offender, he would not have

¹⁴ STS, 8 de Noviembre de 1991, <https://vlex.es/vid/53581080> (2025.02.28)

¹⁵ STS 270/2000, 26 de Febrero de 2000, <https://vlex.es/vid/intentado-intimidacion-autoproteccion-17726101> (2025.02.28)

¹⁶ Also see MANUEL C. M.: *Victims and Self-Liability in Criminal Law: Beyond Contributive Negligence and Foreseeability (Without Blaming the Victim)*, 28 Pace L. Rev. 739 (2008), 744.

DOI: <https://doi.org/10.58948/2331-3528.1108744>

thrown himself out of the car. However not all causality is relevant. In cases in which the victim chooses to create with his action a danger much greater than that actually generated by the perpetrator, without a special justification as in the case presented earlier, the consequences arising from the introduction of this new, more serious danger should not be attributed to the perpetrator. According to this criterion, the Supreme Court declared that it is true that the perpetrator said he had a knife and was willing to use it, but it is not known if such a knife really existed, as it had not been used when the victim threw himself out of the car. Consequently, the result of the injuries should not have been attributed to the perpetrator's action, since in order to protect his watch the victim assumed, by his own decision, an extraordinarily greater danger than that to which he was actually subjected.¹⁷

These two court rulings clearly illustrate the importance of thoroughly examining the risk caused by the victim. Following the reasoning of the Spanish Supreme Court, it can also be established that this examination must be conducted on a case-by-case basis, taking into full account the specific circumstances of each case. Based on the judgments rendered in these two cases, we can conclude that the legal effect of the danger caused by the victim must be assessed in relation to how its extent compares to the danger originally created by the perpetrator. Consequently, two distinct tendencies can be identified. The first is when the danger caused by the victim is deemed “justifiable.” This requires that the new or subsequent danger is not unreasonably more severe than what the victim would have had to endure if they had refrained from creating a risk for themselves. In this sense, the victim’s reaction must be considered reasonable in light of the circumstances. An example of this can be found in the first case discussed, in which the court’s reasoning appears well-founded in determining that the victim’s act of jumping out of the truck was considered “reasonable.” This is because, in comparison to the initial risk of sexual assault, the danger created by the victim—resulting in a bodily injury leading to limb loss—was not disproportionately greater than the potential consequences of the avoided situation, namely the violation of the victim’s sexual freedom. Conversely, the reasoning in the second case illustrates the second possible scenario, in which the victim’s actions lead to an unreasonably high-risk situation compared to the perpetrator’s initial act. In this instance, there is no proportionality between the potential loss of a property item and suffering injuries requiring 30 days of medical treatment, making the victim’s reaction objectively unreasonable.

Thus, for the danger caused by the victim under coercion to uphold the perpetrator’s liability – ensuring that the causal link remains unbroken – two conditions must be met. First, the victim must have been subjected to a compelling

¹⁷ STS 270/2000, 26 de Febrero de 2000, <https://vlex.es/vid/intentado-intimidacion-autoproteccion-17726101> (2025.02.28)

force. Second, the resulting harm from the victim's actions must remain not only proportionate but also reasonable in relation to the negative consequence they would have suffered had they not intervened with their own actions. If these two conditions are met simultaneously, the danger caused by the victim—due to its coerced nature—remains without legal consequences and does not affect the extent of the perpetrator's criminal liability. This is because the causal chain is initiated by the perpetrator's initial act, which exerts pressure on the victim through the potential harm it may cause. As a result, the victim is compelled to take action, and the consequences of their reaction can be considered reasonable in comparison to the original danger created by the perpetrator.

However, if either of these conditions is not met—meaning that the coercion resulting from the perpetrator's act cannot be considered irresistibly compelling, or that the danger created by the victim to avoid harm results in significantly more severe consequences than those they would have faced had they not acted—then the causal link between the perpetrator's act and the final outcome is interrupted. Consequently, the difference in results between the original danger and the one created by the victim cannot be attributed to the perpetrator.

In a German¹⁸ case the defendant was driving his van at a minimum speed of 65 km/h on a road with a 50 km/h speed limit, approaching a traffic-light-controlled intersection. Simultaneously, another vehicle was approaching the same intersection from the left at about 30 km/h. Both drivers intended to proceed straight through the intersection. The defendant observed the other vehicle and assumed it would stop at the intersection. However, both vehicles entered the intersection almost simultaneously. The accused noticed the vehicle again only when both were in the intersection, at which point he attempted to brake but could not prevent the collision. His van struck the right side of the victim's car with significant force. As a result of the collision, the passenger of the vehicle, sustained severe injuries and died, while the driver suffered injuries to the chest and neck, requiring brief medical treatment.

The Regional Court stated that the defendant's speeding was causally linked to the accident, as adhering to the speed limit could have allowed him to avoid the collision. However, the court could not conclusively determine which driver had committed a red-light violation. In favor of the defendant, the court assumed that, the other vehicle had run a red light but still held the him responsible due to his speeding. Upon appeal, the Higher Regional Court of Hamm found that the Regional Court had not adequately considered whether the potential red-light violation, especially if committed intentionally and after the light had been red for more than one second (a qualified red-light violation), could constitute behavior so

¹⁸ 5 RVs 102/15,
https://nrwe.justiz.nrw.de/olgs/hamm/j2015/5_RVs_102_15_Beschluss_20150820.html (2025.02.28)

unreasonable that it would render the accident unforeseeable for the defendant. The Higher Regional Court emphasized that the victim's misconduct could only negate the foreseeability of an accident for the defendant if it involved entirely irrational or unforeseeable behavior.

The court's reasoning highlights that not every risk caused by the victim is sufficient to exonerate the perpetrator. The victim's conduct must meet the threshold of unreasonable behavior in order to exclude liability. Consequently, a mere mistake made by the victim does not automatically eliminate the foreseeability of an accident or other harmful event. However, when the victim's actions can be considered highly reckless—in case of intentional conduct— or committed on basis of gross negligence, this shifts the responsibility. In such cases, the victim's conduct not only increases the risk of a harmful outcome but fundamentally alters the reality expected by the perpetrator. For this reason, the distinction between reasonable and unreasonable victim behavior is crucial in determining whether criminal liability can be mitigated or excluded. If a victim disregards fundamental rules in a manner that no reasonable person would expect, the perpetrator's ability to foresee and avoid the harm is severely diminished. Thus, perpetrators while potentially acting negligently, are faced with an unexpected risk created by the victim, that goes beyond their own negligence. For this reason a perpetrator's liability may be limited or negated when the victim's conduct creates an unforeseeable and unreasonable risk. In such instances, the legal system must recognize that liability cannot be imposed blindly but must take into account whether the victim's actions were so unreasonable that they effectively broke, altered, or in some cases induced the chain of causation leading to the result.

Ultimately, in the Bridge Case (Supreme Court of Peru)¹⁹, the defendant organized a concert next to a river, and he also constructed a homemade bridge, from ropes and wooden planks, over it. Prior to the event, the organizer obtained official authorization for the party, also obtaining on-site police support. The party took place without incident throughout the day. However, in the evening, a group of intoxicated individuals, began dancing on the bridge made by the defendant. The structure collapsed under their weight, causing all of them to fall into the river. As a result, two people drowned, while other thirty-eight sustained injuries. The first instance court found the event organizer guilty of negligent homicide, ruling that he had failed to take the necessary precautions to prevent the accident. However, the Supreme Court overturned the conviction, acquitting the defendant. The Court reasoned that the bridge was intended as a pedestrian crossing, not a dance platform, and that the victims, by choosing to dance on it in an unsafe manner, had assumed the risk of their actions and were solely responsible for the consequences.

¹⁹ MANIEL C. M.: *ibid.*, 745. DOI: <https://doi.org/10.58948/2331-3528.1108>

This case exemplifies a fundamental principle of criminal liability according to which an individual can only be held responsible for harm if their actions have contributed to the result. When the victim alone generates the risk that leads to harm, the accused cannot be held liable - merely because harm occurred - as there is no risk-creating conduct on their part.

5. Conclusion

The legal implications of risk caused by the victim in criminal law are profound, requiring a nuanced approach that balances fairness, and legal consistency. As the presented jurisprudence proves it, the role of the victim in certain cases cannot be overlooked. The complex interactions between offender and victim in criminal cases necessitate a careful assessment of various circumstances in determining criminal liability and sentencing.

The examination of comparative case law, highlights the diversity of perspectives in evaluating risk caused by the victim. The rulings of the Spanish Supreme Court illustrate the importance of assessing the proportionality of the victim's reaction to the initial danger posed by the perpetrator. These cases underscore that the key legal question is not merely whether the victim contributed to the risk, but whether their actions were reasonable and proportionate in relation to the initial threat. Similarly, the German case highlights the role of judicial interpretation in assessing foreseeability. Ultimately the decision of the Supreme Court of Peru emphasizes that holding someone liable requires establishing a causal connection between the perpetrator's action or omission and the result.

From a theoretical standpoint, the discussion of risk caused by the victim in criminal law suggests that it should not automatically exonerate the offender, but should serve as a factor influencing liability and sentencing. The Hungarian Curia's Resolution No. 56 acknowledges the imputable contribution of the victim as a mitigating factor, yet it does not offer explicit guidelines on how it should affect the classification of offenses. This indicates a gap in legal frameworks that could benefit from more structured criteria for assessing contributory actions on the victim's side.

The analysis further distinguishes between two key forms of risk caused by the victim: contributory participation, where the victim plays a role in facilitating the crime, and victim-initiated risk, when the victim's actions are the sole cause of the harm. The former does not absolve the perpetrator of liability but may serve as a mitigating factor, whereas the latter could potentially exclude criminal liability if the offender had no role in the final result. However, an additional layer of complexity arises when the offender, through coercion or manipulation, forces the victim into a position of creating risk against himself. In such cases, the law tends to attribute liability to the offender, recognizing that the victim's choices were made under coercion.

Moreover, the distinction between criminal and civil law in handling risk caused by the victim is significant. While civil law explicitly acknowledges contributory negligence as a basis for damage apportionment, criminal law remains more cautious in integrating such considerations. The lack of a clear statutory criminal framework in many jurisdictions leaves room for judicial discretion, potentially leading to inconsistent applications of the law. In criminal law, the threshold for considering victim involvement is higher due to the fundamental principles of culpability and proportionality in sentencing. Unlike civil law, which primarily deals with financial compensation, criminal law directly impacts an individual's liberty, making it imperative that any assessment of risk caused by the victim is conducted with rigorous legal scrutiny.

Ultimately, criminal law must adopt a balanced approach that neither dismisses the risk caused by the victim nor exaggerates its impact in exonerating offenders. A crucial factor in assessing risk caused by the victim has to be the proportionality of the victim's actions in response to the offender's behavior. If the victim's reaction is grossly disproportionate to the initial threat, it may be considered an unreasonable assumption of risk rather than a justifiable action. Establishing clearer legal criteria for assessing victim involvement could enhance consistency and fairness in judicial decision-making. While it is essential to hold perpetrators accountable for their actions, it is equally important to recognize when a victim's behavior significantly influences the outcome of an offense. Thus, the need for a fair and nuanced legal framework that appropriately considers these factors remains an ongoing challenge.

References

- BALOGH Á. - TÓTH M. (ed): *Magyar büntetőjog. Általános rész*. Budapest, Osiris Kiadó, 2015.
- BÉRCES V.: *A sértett magatartásának büntetőjogi relevanciájáról: beleegyezés, közrehatás, utólagos hozzájárulás*. Büntetőjogi szemle, VI, nr. 2017/2.
- CSEHI Z. (ed.): *2013. évi V. törvény a Polgári Törvénykönyvről kommentárja*. Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2021.
- CURT I.: *Contribuția victimei la producerea rezultatului în dreptul penal*. Bukarest: Hamangiu, 2021.
- CZINE A.: *Okozatosság a kártérítési jogban*, Themis, nr. 2017/2.
- FUGILINSZKY Á.: Felróható károsult közrehatás és kárenyhítési kötelezettség a magyar polgári jogban in VÉKÁS L. (ed.): *Polgári jogi kodifikáció*, X., nr. 2008/4.
- JOBBÁGYI G.: *Kötelmi jog I. A kötelmek közös szabályai*. Budapest: Apostoli Szentszék Könyvkiadója, 2014.
- KOMPORDAY-OROSZ N.: Okozatosság a büntetőjogban és a magánjogban in NAGY M. - FAZEKAS M.: *Jogi tanulmányok. Jogtudományi Előadások az Eötvös Lóránd*

Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskolájának Konferenciáján. Budapest: ELTE Állam- és Jogtudományi Kar, 2022. DOI: 10.56966/2022.10.Korompay
LÁBADY T: *A magánjog általános tana.* Budapest: Az Apostoli Szentszék Könyvkiadója, 2018.

MANIEL C. M.: *Victims and Self-Liability in Criminal Law: Beyond Contributive Negligence and Foreseeability (Without Blaming the Victim)*, 28 Pace L. Rev. 739 (2008), DOI: <https://doi.org/10.58948/2331-3528.1108744>

DAJKA-CZIFRA BEÁTA*

Munkavédelmi kihívások megjelenése az atipikus munkavégzések tekintetében

Absztrakt: A munka jövőjét három szorosan összefüggő tényező befolyásolja: a munkaerő, a munkavégzés tartalma és annak helyszíne. Mindhárom területen jelentős átalakulások zajlanak, amelyek már a pandémia előtt is formálták a munka világát, azonban az elmúlt évek drasztikusan felgyorsították ezt a folyamatot. A munka világa folyamatos átalakuláson megy keresztül, amelynek egyik meghatározó tényezője az atipikus munkavégzés térnyerése. Az atipikus foglalkoztatási formák – például a távmunka, az otthoni munkavégzés, a részmunkaidős foglalkoztatás vagy az önfoglalkoztatás – egyre elterjedtebbé válnak a gazdasági és technológiai fejlődés hatására. Ezek az új munkavégzési formák azonban számos munkavédelmi kihívást is felvetnek, amelyek kezelése mind a munkáltatók, mind a munkavállalók számára kiemelt fontosságú.

Kulcsszavak: munkakörnyezet, munkavédelem, home office, pszichoszomatikus tényező

Abstract: The future of work is influenced by three closely related factors: the workforce, the content of work and its location. All three areas are undergoing significant transformations that were already shaping the world of work before the pandemic, but recent years have drastically accelerated this process. The world of work is undergoing continuous transformation, one of the determining factors of which is the rise of atypical work. Atypical forms of employment – such as teleworking, working from home, part-time employment or self-employment – are becoming increasingly widespread due to economic and technological developments. However, these new forms of work also raise a number of occupational safety and health challenges, the management of which is of paramount importance for both employers and employees.

Keywords: work environment, occupational safety, home office, psychosomatic factors

* Dajka-Czifra Beáta PhD hallgató, Miskolci Egyetem, Állam- és Jogtudományi Kar Doktori Iskola. Témavezető: Dr. Mélypataki Gábor, egyetemi docens

1. Bevezetés

Ma már a munka megléte sokkal nagyobb szerepet kap az emberek életében, mint korábban. Nemcsak anyagi biztonságot nyújt, hanem az önértékelés, a társadalmi megbecsülés, és az identitás szempontjából is alapvető jelentőségű. A stabil munkahely hozzájárul az élet kiszámíthatóságához, ami különösen fontos a gyorsan változó világban. A munka tehát nemcsak a megélhetés eszköze, hanem egy olyan alap, amely biztonságot, önbizalmat és irányt ad az emberek életének.

A technikai fejlődéssel, az információs társadalom kialakulásával a munka világa radikálisan átalakul. A munka „természete” változóban, a munka térbeli és időbeli egysége felbomlóban van, alkalmazkodni kell a „valós idejű” gazdasághoz. A hagyományos munkahelyek száma csökken, a foglalkoztatás újabb és újabb, s olcsóbb megoldásait keresik a munkaadók, hogy a világméretű versenyben megőrizzék, vagy erősítsék pozíciójukat.¹ A munkavédelem kiemelt jelentőséggel bír a modern munkakörnyezetben, hiszen célja a munkavállalók egészségének és biztonságának védelme. A folyamatosan változó gazdasági és technológiai környezet új kihívásokat teremt a munkáltatók és a munkavállalók számára, amelyekhez a munkavédelmi előírásoknak is alkalmazkodniuk kell.

Az utóbbi években egyre nagyobb teret hódítanak az atipikus munkavégzési formák, amelyek eltérnek a hagyományos, teljes munkaidős és helyhez kötött foglalkoztatástól. Ilyen például a távmunka, a részmunkaidős foglalkoztatás, a projektalapú munkavégzés vagy a rugalmas munkaidő. Az atipikus munkavégzés elterjedése új lehetőségeket és kihívásokat teremt mind a munkavállalók, mind a munkáltatók számára, különösen a munkavédelmi szempontok érvényesítése terén. A téma aktualitását az adja, hogy a digitalizáció, a globalizáció és a pandémia hatására a munkavégzési szokások jelentős átalakuláson mennek keresztül. Az új munkavégzési formák elterjedésével egyre nagyobb szükség van a munkavédelmi szabályok korszerűsítésére és a munkavállalók védelmének biztosítására, akár irodai, akár otthoni vagy más alternatív környezetben végzik feladataikat.

2. A munka jövője-a munkaerő, a munkavégzés tartalma és helyszíne közötti dinamikus kapcsolatok

A munkaerő szerkezete az elmúlt évtizedekben jelentősen átalakult. Az automatizáció és a mesterséges intelligencia fejlődése miatt a hagyományos fizikai munkák egy részét gépek váltják fel, miközben a tudásalapú és kreatív munkák felértékelődnek. A munkavállalók részéről egyre nagyobb az igény az élethosszig

¹ MATISCSÁKNÉ LIZÁK, M. (szerk.): Emberi erőforrás gazdálkodás. *Wolters Kluwer Kft.*, 2016. DOI: doi.org/10.55413/9789632956176 (letöltés dátuma: 2025. 01.25.)

tartó tanulásra, mivel a gyorsan változó munkaerőpiacon való boldoguláshoz folyamatosan új készségek elsajátítása szükséges. Mivel az egyén életének a munkahely az egyik alapvető színtere, az egész életen át tartó tanulás stratégiáiban is mind fontosabbá válik a tanulás elérhetőbbé tétele minél több munkahelyen, illetve a munkahelyi (és munka melletti) tanulás megkönnyítése.² A munkakörök dinamikusan változnak, és egyre többször előfordul, hogy a munkavállalóknak teljesen új készségeket kell elsajátítaniuk pályafutásuk során. Az élethosszig tartó tanulás és az átképzések szerepe így kulcsfontosságúvá válik.

A demográfiai változások szintén hatással vannak a munkaerőpiacra. Az előregedő társadalmakban a nyugdíjkorhatár kitolódása és a rugalmas foglalkoztatási formák elterjedése egyre gyakoribb jelenség. Emellett a digitalizáció révén a munkaerő egyre mobilisabbá válik, lehetőséget biztosítva a globális munkaerőpiac kihasználására. A munkavégzés tartalma is jelentősen átalakult az elmúlt években. A rutinszerű, ismétlődő feladatokat egyre inkább automatizált rendszerek végzik el, miközben a munkaerő számára a kreativitást, problémamegoldást és emberi kapcsolatteremtést igénylő feladatok kerülnek előtérbe. A vállalatok egyre nagyobb hangsúlyt fektetnek a munkavállalói készségek fejlesztésére, különös tekintettel a digitális kompetenciákra, a csapatmunkára és az innovációra. Az úgynevezett gig economy (projektalapú munkavégzés) térnyerése is megfigyelhető, amelyben a hagyományos, hosszú távú munkaviszonyok helyett egyre többen választják a szabadúszói, rövid távú szerződéses munkalehetőségeket. Ez a változás új kihívások elé állítja mind a munkavállalókat, mind a munkáltatókat, mivel a stabilitás és a biztonság kérdései kiemelten fontossá válnak.

A technológia fejlődése és a digitalizáció lehetővé tették, hogy a munkavégzés helye egyre kevésbé legyen kötött egy adott fizikai térhez. Az otthoni munkavégzés (home office) és a hibrid munkamodellek elterjedése jelentős változást hozott, különösen a pandémia hatására, amely során a vállalatok tömegesen álltak át távoli munkavégzésre. 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.³ Az irodai jelenlét csökkenése új munkakultúrát eredményezett, amelyben a rugalmasság és az önállóság nagyobb szerepet kap. Ugyanakkor ez új kihívásokat is jelent, például a csapatkohézió fenntartását és a munkavállalói elkötelezettség biztosítását. A vállalatoknak ezért olyan megoldásokat kell találniuk, amelyek egyensúlyt teremtenek a rugalmasság és a hatékonyság között. Az információs gazdaság és az információs társadalom jobban képzett, motiváltabb,

² KUN A.: Az egész életen át tartó tanulás (lifelong learning) jogi keretei a munka világában, különös tekintettel a munkaviszonyra. *Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum* XIX., 2017. 19 o.

³ MÉLYPATAKI G.: Az Ipar 4.0. és a jog kapcsolata – Problémafelvetések a foglalkoztatás és szociális biztonság témaköre kapcsán. *Jogelméleti Szemle*, 2023/1. DOI: doi.org/10.59558/jesz.2023.1.61 (letöltés dátuma: 2025.02.01.)

rugalmasabb munkaerőt igényel, amely megköveteli az emberektől, hogy állandóan készek legyenek a feladatok elvállalására, munka- és lakóhelyük gyakori változtatására. Ugyanakkor a gyors technológiai változások új munkakapcsolatokat igényelnek, melynek során a munka társadalma átalakul a tevékenységek társadalmává. Jellemzővé válnak a rövidebb időtávok és a rugalmas munkaidőrendszerek, az újszerű foglalkoztatási formák, a többszörös munkaviszonyok.⁴ A rugalmas munkamodellek, az élethosszig tartó tanulás és az új készségek elsajátítása kulcsszerepet játszanak abban, hogy a munka jövőjét sikeresen alakíthassuk. Azok a szervezetek és egyének, akik képesek alkalmazkodni ezekhez a változásokhoz, előnyre tehetnek szert a folyamatosan fejlődő munkaerőpiacon.

A technológia fejlődése további változásokat hoz magával, különösen az automatizáció terjedésével és a mesterséges intelligencia egyre szélesebb körű felhasználásával. A munkaerőpiac minden szereplőjének – legyenek azok munkáltatók vagy munkavállalók – folyamatosan tanulnia és alkalmazkodnia kell, hogy megfeleljenek az új kihívásoknak.

3. Az atipikus munkavégzés különböző formái

Az atipikus munkavégzés olyan foglalkoztatási formákat foglal magában, amelyek eltérnek a hagyományos, teljes munkaidős, határozatlan idejű munkaviszonytól. Az ilyen típusú munkák általában rugalmasabb feltételeket biztosítanak mind a munkavállalók, mind a munkáltatók számára. A leggyakoribb atipikus munkavégzési formák a következők:

- Részmunkaidős foglalkoztatás, a munkavállalók heti óraszámja kevesebb a szokásos teljes munkaidőnél. Ez lehetőséget ad arra, hogy a dolgozók munka és magánélet között könnyebben egyensúlyozzanak.
- Határozott idejű munkaszerződések, a munkaviszony egy meghatározott időtartamra szól, ami gyakori például szezoni munkák esetében vagy projektekhez kötődő feladatok ellátásánál.
- Távmunka és otthoni munkavégzés, az alkalmazottak fizikailag távol dolgoznak a munkahelytől, gyakran online kommunikációval és technológiával. A távmunkában dolgozók jellemzően rugalmasabb munkaidő-beosztással is rendelkeznek.
- Rugalmas munkaidő, a munkavállalók szabadabban oszthatják be a munkaidő kezdetét és végét, ami segíti az egyéni igényekhez való igazítást.
- Megbízási szerződéssel végzett munka, a munkavégzés nem munkaviszonyon, hanem polgári jogi szerződésen alapul. Ilyen esetekben a

⁴ MATISCSÁKNÉ LIZÁK M.: A felelős foglalkoztatás és a HR-Szakember mint a „szervezetbe engedő” ember a „kapuőr”.

https://publikacio.unieszterhazy.hu/5442/1/153_166_Matiscs%C3%A1kn%C3%A9.pdf

(letöltés dátuma: 2025.02.05.)

munkavállaló egy meghatározott feladat vagy projekt elvégzésére kap megbízást, nem állandó jellegű foglalkoztatásra.

- Munkakörmegosztás (job sharing), két vagy több alkalmazott osztozik egy teljes munkaidős álláson, és megosztva látják el a feladatokat.

- Kölcsönzött munkaeerő, a munkavállalók nem közvetlenül egy adott cégnél dolgoznak, hanem egy munkaeerő-kölcsönző cégen keresztül, és az adott céghez ideiglenes jelleggel kerülnek. Az atipikus munkavégzés formái nagyobb rugalmasságot biztosítanak, és a modern munkaeerőpiac igényeihez igazodnak.

A távmunka egy atipikus foglalkoztatási forma, melyet jogi keretek szabályoznak. Az Mt. megfogalmazása szerint a „távmunkavégzés a munkáltató telephelyétől elkülönült helyen rendszeresen folytatott olyan tevékenység, amelyet számítástechnikai eszközzel végeznek és eredményét elektronikusan továbbítják.⁵ Feleknek a munkaszerződésbe foglalva kell megállapodniuk a munkavállaló távmunkában való foglalkoztatásáról.⁶ A Mt. 2012. évi I. törvény (a továbbiakban: Mt.) meghatározása szerint a távmunkavégzésnek két típusát különíthetjük el; az egyik az ún. hibrid forma, amikor a munkáltató telephelyétől elkülönült helyen való munkavégzésre csak a munkaidő egy részében kerül sor, a másik forma pedig az, amikor a munkaidő teljes tartama alatt eltérő helyen dolgozik a munkavállaló.⁷

A távmunkavégzés – vagy home office – egyre elterjedtebb munkavégzési forma, amely lehetővé teszi, hogy az alkalmazottak otthonról vagy egyéb távoli helyszínekről dolgozzanak. Azonban a távmunkavégzés szabályozása fontos, hogy mind a munkáltató, mind a munkavállaló érdekei érvényesüljenek, és a munkahelyi teljesítmény, valamint a munka-magánélet egyensúlya megfelelő legyen. Magyarországon a távmunkavégzés szabályait a Munka Törvénykönyve és különböző munkavédelmi előírások is szabályozzák.

A távmunka a munkavégzés azon formája, amikor a munkavállaló rendszeresen nem az irodában, hanem egy távoli helyről dolgozik. Ez a hely lehet az otthona, de akár egy kávézó, coworking iroda vagy bármely más hely, amely alkalmas a munkavégzésre. A távmunka kifejezés jellemzően arra utal, hogy a munkavégzés nem helyhez kötött, és a technológia révén rugalmasan elvégezhető.

Az utóbbi időszakban kezdett terjedni a távmunkához részben kapcsolódva a home office kifejezés. A home office-t a távmunkavégzés szinonimájaként használják. A két jogintézmény azonban nem azonos. A különbség lényege a funkcióban van. A távmunkavégzés egy atipikus munkavégzési forma, mely feltételezi a számítástechnológiai és IKT-eszközök aktív használatát.⁸ A home office esetében a munkavégzés függő és kevésbé önálló, amelyet a munkáltató egyoldalúan

⁵ Mt. 196.§ (1) bekezdés

⁶ Mt. 196.§ (2) bekezdés

⁷ Mt. 196.§ (1) bekezdés

⁸ MÉLYPATAKI G. –MÁTÉ DÁVID A. –RÁCZ Z.: Az otthon mint munkahely?. *Publicationes Universitatis Miskolciensissectio Juridica et Politica Tomus XXXVIII/2*(2020) Miskolc 2021 214 o.

elrendelhet. Ezzel szemben a távmunka szintén függő jogviszonyt jelent, azonban nagyobb önállósággal jár, és kizárólag távmunkaszerződés alapján végezhető.

A távmunkának két fő alakzata alakult ki; az egyik amikor a munkavállaló munkája egy részét a munkahelyén, másik részét pedig a saját lakásán végzi. A távmunka másik alakzata a kizárólagosan otthon végzett képernyős feldolgozó, vagy egyéb ilyen jellegű tevékenység. Előre kell bocsátani, hogy a magyar szabályozás ez utóbbit veszi alapul.⁹ A munkáltató biztosítja az egészséget nem veszélyeztető és biztonságos munkavégzés követelményeit. Jogszabályban meghatározott esetben, illetve, ha a munkáltató elrendeli, a munkába lépést megelőzően és a munkaviszony fennállása alatt rendszeres időközönként a munkáltató ingyenesen köteles biztosítani a munkavállaló munkaköri alkalmassági vizsgálatát.¹⁰

Fontos megemlíteni, hogy a munkavédelem feladata a dolgozók testi-lelki és szociális jó közérzete legmagasabb szintjének elősegítése és megtartása minden foglalkozásban, a dolgozók körében a munkakörülményekből származó egészségi károsodások megelőzése, a dolgozók védelme az egészségük ellen ható veszélyektől, olyan munkakörnyezet biztosítása és fenntartása, amely a dolgozók fiziológiai és pszichológiai adottságához alkalmazkodik.¹¹ 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 pszichoszociális kockázatok okozta igénybevétel elkerülésére.¹² Pál Lajos álláspontja szerint távmunkavégzés esetén a munkáltató felelős a munkavédelmi szabályok betartásáért. Home office esetében, mivel a teljesítési hely meghatározása a munkavállalóra hárul, a munkáltató köteles biztosítani a munkavégzés feltételeit. Ezzel szemben, ha a munkáltató és a munkavállaló közösen állapodnak meg a munkavégzés helyéről (ún. szerződéses munkahely), akkor a megállapodás

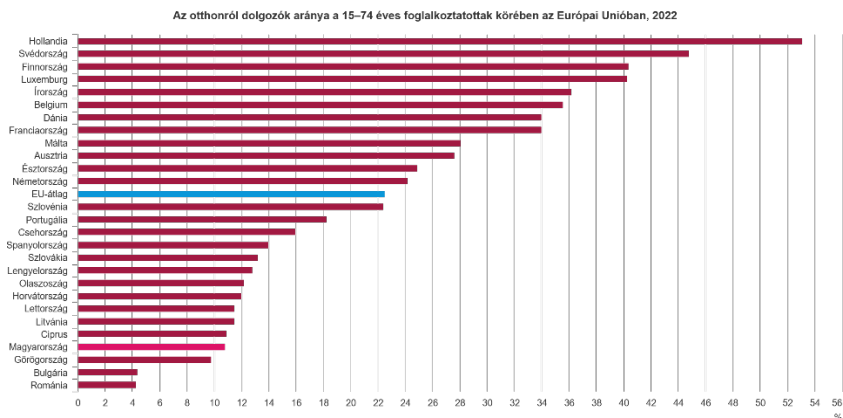
⁹ PRUGBERGER T. – KENDERES Gy.: Az atipikus munkaviszonyok a munkaerő-kölcsönzés és a távmunkavégzés tükrében, *MJSZ* 4. évfolyam 2009. 2. szám 49.

¹⁰ Mt. 51. § (4) bekezdés

¹¹ JURÁNYI R.–GUBICZA S.: Munka- és tűzvédelem. Budapest, 2020., *Akadémiai Kiadó*. DOI:doi.org/10.1556/9789634545125 (letöltés dátuma: 2025.02.07.)

¹² 1993. évi XCIII. törvény a munkavédelemről 54. § (1) (d) bekezdés

határozza meg, hogy melyik fél felelős a szükséges feltételek biztosításáért.¹³ A hazai modellben a munkavédelmi jog célja az egészséget nem veszélyeztető és biztonságos munkavégzés személyi, tárgyi és szervezeti feltételeinek biztosítása. A munkavédelmi szabályok alapján a munkavédelmi szabályt szegő munkáltató bírsággal sújtható, amely alkalmas lehet a megelőzés, illetve a "büntetés" céljának előmozdítására.¹⁴



1. ábra¹⁵ A távmunkában, home office-ban foglalkoztatottak aránya. KSH (2022).

A távmunka Magyarországon különösen a COVID-19 járvány hatására terjedt el. Míg 2019-ben a munkavállalók csupán 4,6%-a dolgozott otthonról, ez az arány 2020-ra 11%-ra, 2021-re pedig 13,3%-ra emelkedett. A járvány lecsengésével azonban csökkenés figyelhető meg: 2022-ben a Home Office aránya 10,6%-ra mérséklődött, mivel sok vállalat fokozatosan visszatért a hagyományos irodai munkavégzéshez.

¹³ PÁL L.: A szerződéses munkahely meghatározása – a „home office” és a távmunka. *Munkajog*, 2018/2., 56–59.

¹⁴ TRENYISÁN M.: A munkáltatói kárfelelősség célja és szabályozási modelljei. *Munkajog*, Budapest, 2024/4, sz. 1-10.

¹⁵A távmunkában, home office-ban foglalkoztatottak aránya. KSH (2022). <https://ksh.hu/s/kiadvanyok/fenntarthato-fejlodes-indikatorai-2022/2-7-sdg-5#2-abra> (letöltés dátuma: 2025.02.09.)

4. Munkahelyi ergonómia és fizikai környezet

A távmunka elterjedése egyre nagyobb figyelmet irányít a munkahelyi környezet fizikai és ergonómiai kockázataira. Az informatikai eszközök használatával járó lehetséges fizikai hatásainak listája igen hosszú. A három legnagyobb kockázati tényező a rossz testtartás, a nem megfelelő használati technika és a túlzott igénybevétel (Pascarelli–Quilter, 1994).¹⁶

A munkahelyváltás során egyre nagyobb szerepet kapnak az ergonómiai szempontok, hiszen a munkavállalók számára kiemelten fontos a megfelelő munkakörnyezet. Az otthoni munkavégzés számos előnnyel járhat, azonban komoly veszélyeket is rejlhet magában, ha a munkakörnyezet nincs megfelelően kialakítva. Igen látványos a számítógépes ülő munkahelyek számának robbanásszerű megszaporodása az utóbbi évtizedekben.

Az ülő munkahelyek:

- ipari jellegű tevékenységekhez (ezen belül szalagmunkához is)
- irodai jellegű tevékenységhez,
- járművezetéshez kapcsolódnak.¹⁷

Az alábbiakban bemutatom a leggyakoribb kockázatokat a nem megfelelő munkaállomást, a mozgásszegény életmódot, valamint a baleseti kockázatokat.

A munkával foglalkozó különböző tudományterületek alakultak ki, s fontosságuk számottevően megnőtt. Ennek egyik példája a 20. században „született” ergonómia. Közismert, hogy a munka szerepe és fejlődése az ember evolúciójához kapcsolódik.¹⁸ Az egyik legnagyobb munkavédelmi kihívás az ergonómikus munkakörnyezet biztosítása. Az irodákban a munkáltatók felelősek a megfelelő munkaállomások kialakításáért, otthoni munkavégzés esetén azonban ez a feladat a munkavállalókra hárul. Az otthoni munkavégzés egyik legnagyobb kockázata a helytelenül kialakított munkaállomás. Az otthoni munkavégzés előnyei nem mindenki számára egyformán elérhetők. Azok, akik nem rendelkeznek megfelelő technológiai eszközökkel vagy stabil internetkapcsolattal, hátrányba kerülhetnek. Sokan nem rendelkeznek ergonómikus bútorokkal, így egy konyhaasztalnál vagy egy kanapén dolgoznak, ami hosszútávon komoly mozgásszervi problémákhoz vezethet. A nem megfelelő szék, az alacsony vagy túl magas asztal, valamint a rosszul beállított monitor okozhatja a gerincferdülést, a nyaki- és hátfájdalmakat, valamint a csukló- és könyökfájdalmakat. Az ergonómiai szempontok figyelembevétele nélküli munkakörnyezet hosszútávon csökkentheti a munkavállalók termelékenységét és ezzel párhuzamosan növelheti az egészségügyi

¹⁶ HAMPEL Gy.: A képernyős eszközök káros hatásai, a káros hatások megelőzésének módjai. *Jelenkori társadalmi és gazdasági folyamatok*, 2023/XVIII. évfolyam, Különszám, 183 – 197.

¹⁷ UNGVÁRY Gy.: Munkaegészségtan. *Medicina Kiadó Rt.*, Budapest, 2000. 623

¹⁸ SIMAI M.: A munka jövője, a tudomány és a tanulás a 21. század világában. *Magyar Tudomány* 179 (2018)1, 3–13 DOI: 10.1556/2065.179. 2018.1.1

problémák kialakulásának esélyét. Az ergonómiaifő célja, 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.¹⁹

A munkavédelem és az ergonómia fogalma – különösen szellemi munkavégzés esetén – szorosan összekapcsolódik az irodai környezetben. Azokon a munkahelyeken, ahol figyelmet fordítanak az ergonómiai szempontokra, a dolgozók közérzete javul, elkötelezettebbé és motiváltabbá válnak. Ennek eredményeként csökken a betegszabadságok száma is, különösen, ha a számítógépes ergonómia megfelelően érvényesül. Emellett az ergonómiai tényezők egyre nagyobb szerepet kapnak a munkahelyválasztás során, hiszen a munkavállalók számára kiemelten fontos a megfelelő munkakörnyezet.

A távmunkával gyakran jár a mozgásszegény életmód, hiszen a munkavállalók jelentős része napjának nagy részét egyhelyben, ülésben tölti. A folyamatos egyhelyben maradás csökkenti a vérkeringést, elősegíti az elhízást, valamint növeli a szív- és érrendszeri megbetegedések kockázatát. Emellett a fizikai aktivitás hiánya miatt az izmok és ízületek merevebbé válhatnak, ami további mozgásszervi problémákat okozhat. A probléma megelőzése érdekében fontos, hogy a munkavállalók rendszeresen végezzenek nyújtógyakorlatokat, tartsanak szüneteket, és lehetőség szerint iktassanak be rövid sétákat vagy testmozgást a nap folyamán. Az állítható magasságú asztalok használata is segíthet abban, hogy a dolgozók váltogathassák az ülést és az állást.

A hagyományos irodahelyiségekben a munkakörnyezetet gyakran ergonómiai és biztonsági szempontok szerint alakítják ki, azonban az otthoni munkavégzés során ezek az előírások nem mindig teljesülnek. Az előre nem látható baleseti kockázatok, mint a nem megfelelő kábelezés miatti botlásveszély, a rossz megvilágítás okozta szemfáradtság vagy az elektromos berendezések meghibásából eredő tüzesetek komoly veszélyt jelenthetnek. A balesetek megelőzése érdekében fontos, hogy a munkavállalók megfelelő elővigyázatossággal alakítsák ki munkakörnyezetüket. A vezetékek elrendezése, a megfelelő vízszintes és csúszásmentes padlózat biztosítása, valamint a megfelelő világítás kiemelten fontos. Emellett érdemes ellenőrizni az elektromos berendezések állapotát, hogy elkerülhető legyen az esetleges áramütés vagy tüzeset. Az otthoni munkavégzés során a munkavédelmi szabályok ellenőrzése és betartatása nehezebbé válik. A munkáltatónak kevesebb rálátása van az otthoni munkakörnyezetre, így kisebb a kontrollja a munkabiztonságot illetően. A számítógépes munkavégzésre kialakított munkahelyeknek meg kell felelniük az ergonómiai elvárásoknak, függetlenül attól, hogy a dolgozók mennyi időt töltenek ott. Felmerül a kérdés, hogy a korábban beszerzett bútorok, munkaszékek és világítási rendszerek megfelelnek-e a legújabb követelményeknek. A

¹⁹ UNGVÁRY Gy.: Munkaegészségtan. *Medicina kiadó Rt.* Budapest, 2000. 619

munkaállomások cseréje vagy korszerűsítése jelentős anyagi ráfordítást igényel a cégektől, ugyanakkor, ha a munkavállalók nem tudják megfelelően használni munkahelyüket és eszközeiket, az csökkenti hatékonyságukat. Ennek következtében nő a betegállományban töltött idő, ami további költségeket eredményez. Ezért érdemes mérlegelni, hogy egy egyszeri beruházás kisebb kiadást jelent-e hosszú távon, mint a termelékenység csökkenéséből adódó folyamatos bevételkiesés. Bár a távmunka sokak számára elősegíti a hatékonyabb munkavégzést, mások számára a családi, háztartási kötelezettségek, illetve a kevésbé szabályozott munkakörnyezet kihívást jelenthet a hatékonyság fenntartásában. A vezetői visszajelzések és a folyamatos támogatás hiánya is megnehezítheti a munkavállalók számára a teljesítmény követését.

5. Munkahelyi pszichoszociális kockázatok

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.²⁰

A munka és a magánélet dinamikája az elmúlt évtizedekben jelentős változásokon ment keresztül, amelyek új pszichoszociális kockázatokat hoztak magukkal. Ezek a kockázatok jelentős hatást gyakorolhatnak az egyének mentális és fizikai jólétére, valamint a társadalmi kapcsolatok minőségére. A legfontosabb tényezők közé tartozik a magány és az elszigeteltség, a kiégés és a mentális terhelés, valamint a munka és a magánélet közötti határvonal elmosódása. A modern munkahelyi környezetben, különösen a távmunka elterjedésével, egyre több munkavállaló tapasztalja meg a magány és az elszigeteltség érzését. Azok, akik otthonról dolgoznak, gyakran kevesebb személyes kapcsolatot ápolnak kollégáikkal, ami csökkenti a társas támogatás lehetőségét. A munkahelyi közösség hiánya hosszú távon negatív hatással lehet a munkavállalók mentális egészségére, növelve a depresszió és a szorongás kockázatát. A megfelelő szociális kapcsolatok kialakítása és fenntartása kulcsfontosságú a magány ellensúlyozásában, amelyben a munkáltatóknak is szerepet kell vállalniuk.

A folyamatos teljesítménykényszer és a túlzott munkaterhelés növeli a kiégés kockázatát. A kiégés szindróma egyre elterjedtebb jelenség, amely a munkahelyi stressz tartós fennállásából fakad. A kiégés tünetei közé tartozik a fizikai és érzelmi kimerültség, a motiváció elvesztése és az alacsony önértékelés. A munkavállalók mentális egészségének védelme érdekében a munkáltatóknak olyan intézkedéseket kell bevezetniük, amelyek elősegítik a munkahelyi stressz csökkentését, például rugalmas munkaidő, mentálhigiénés támogatás és pihenőidők biztosítása révén. A

²⁰ 1993. évi XCIII. törvény a munkavédelemről 87. § (1/H.) bekezdés

munkáltatóknak és munkavállalóknak egyaránt törekedniük kell a munkaidő világos meghatározására és betartására.

A digitális technológiák fejlődésével a munka és a magánélet közötti határ egyre inkább elmosódik. Az e-mailek és a munkahelyi üzenetek folyamatos elérhetőséget követelnek meg, ami megnehezíti a valódi kikapcsolódást és a munkahelyi feszültségek levezetését. Ez hosszú távon növelheti a stresszt és a szorongást, valamint csökkentheti a családdal és barátokkal töltött minőségi időt. A munka-magánélet egyensúly fenntartása érdekében elengedhetetlen a tudatos határmeghúzás, például a munkaidő világos meghatározása és a munkahelyi elvárások kezelése. A munka és a magánélet közötti egyensúly a szakmai és a magánélet közötti megfelelő egyensúly megteremtését jelenti. Bár ez mindenki esetében máshogy nyilvánulhat meg, egy dolog biztos: ez az egyensúly nemcsak a fizikai és a mentális jóllét szempontjából fontos, mivel időt és teret biztosít a saját érdeklődési körbe tartozó egyéb tevékenységek végzésére és a személyes kapcsolatok ápolására, hanem a termelékenység szempontjából is lényeges, mivel jobb eredményekhez és a munkával való nagyobb fokú elégedettséghez vezet.²¹ A Randstad új globális kutatásából kiderül, hogy a munka és a magánélet egyensúlya tűnik a munkavállalói fluktuáció legfőbb katalizátorának, megelőzve az olyan okokat, mint a megélhetési költségek emelkedése miatt "alacsony fizetés", valamint a "karrierlehetőségek hiánya".²²

A távmunkát végzők és a digitális platformokon dolgozók gyakran szembesülnek a társas kapcsolatok hiányával. A munkatársakkal és a vezetőkkel való közvetlen interakció elmaradása fokozhatja a magányosság és az elszigeteltség érzését, ami hosszú távon csökkentheti a motivációt és a teljesítményt.

A pszichoszociális kockázatok kezelése során minden érintett tartsa szem előtt a stressz elmélet megalapítója – Selye János – napjainkban is érvényes megállapítását: A munka az ember alapvető szükséglete. Nem az a kérdés, hogy dolgozunk-e, hanem az, hogy milyen munka a megfelelőbb számunkra. Igaz, hogy minden munka stresszel jár, de nem igaz, hogy distresszel is jár.²³

Fontos megemlíteni a kockázateértékelést, mely a megelőzés egyik legmodernebb eszköze, amely a munkahely és a munkakörnyezet aktuális állapotát veszi alapul. Célja, hogy feltárja és meghatározza azokat a lehetséges egészségkárosító hatásokat

²¹ A munka és a magánélet közötti megfelelő egyensúly megteremtése.

https://eures.europa.eu/striking-right-balance-between-work-and-personal-time-2024-04-05_hu
(letöltés dátuma: 2025.02.10.)

²² Hogyan tarthatja meg legjobb dolgozóit? a kulcs a munka-magánélet egyensúlya.

<https://www.randstad.hu/workforce-insights/employer-branding/hogyan-tarthatja-meg-legjobb-dolgozoit-a-kulcs-a-munka/> (letöltés dátuma: 2025.02.12.)

²³ A munkahelyi pszichoszociális kockázatok kezelése

<https://www.nincsbaletset.hu/dokumentumok/23-a-munkahelyi-pszichoszocialis-kockazatok-kezelese>
(letöltés dátuma: 2025.02.13.)

és veszélyforrásokat, amelyek a munkavállalókra kockázatot jelenthetnek vagy egészségkárosodást okozhatnak. 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.²⁴ Pál Lajos álláspontja szerint távmunkavégzés esetén a munkáltató felelős a munkavédelmi szabályok betartásáért. Home office esetében, mivel a teljesítési hely meghatározása a munkavállalóra hárul, a munkáltató köteles biztosítani a munkavégzés feltételeit. Ezzel szemben, ha a munkáltató és a munkavállaló közösen állapodnak meg a munkavégzés helyéről (ún. szerződéses munkahely), akkor a megállapodás határozza meg, hogy melyik fél felelős a szükséges feltételek biztosításáért.²⁵ A hazai modellben a munkavédelmi jog célja az egészséget nem veszélyeztető és biztonságos munkavégzés személyi, tárgyi és szervezeti feltételeinek biztosítása. A munkavédelmi szabályok alapján a munkavédelmi szabályt szegő munkáltató bírsággal sújtható, amely alkalmas lehet a megelőzés, illetve a "büntetés" céljának előmozdítására.²⁶

6. Összegzés

A munka jövőjét befolyásoló három fő tényező – a munkaerő jellege, a munkavégzés tartalma és annak helyszíne – szoros összefüggésben áll egymással, és együtt alakítják a munka világát. Az új technológiák, a gazdasági változások és a társadalmi elvárások együttesen formálják a munkakörnyezetet, amelyre a munkavállalóknak és a munkáltatóknak egyaránt rugalmasan kell reagálniuk. Azok a szervezetek és egyének, akik képesek alkalmazkodni ezekhez a változásokhoz, versenyelőnyre tehetnek szert a folyamatosan átalakuló munkaerőpiacon.

Az atipikus munkavégzés egyre nagyobb szerepet tölt be a modern munkaerőpiacon, de ezzel párhuzamosan új munkavédelmi kihívásokat is felvet. Az ergonómiai, pszichoszociális, felelősségi és adatbiztonsági kockázatok kezelése érdekében mind a munkáltatóknak, mind a munkavállalóknak aktívan részt kell venniük a biztonságos és egészséges munkakörnyezet kialakításában. Az innovatív szabályozási és technológiai megoldások alkalmazása hozzájárulhat az atipikus munkavégzés előnyeinek kihasználásához, miközben minimalizálja annak veszélyeit.

A munkavédelmi szabályozások átalakítása, a megfelelő képzések és iránymutatások biztosítása, valamint az új technológiák kihasználása kulcsfontosságú a biztonságos munkakörnyezet fenntartásában. Összességében az

²⁴ MÉLYPATAKI G.: A veszélyes anyagokkal foglalkozó üzemek létesítésével és működtetésével összefüggő munkajogi és társadalombiztosítási felelősségi kérdések. *Publicationes Universitatis Miskolcensis Series Juridica et Politica* 2017/XXXV. 366-380.

²⁵ PÁL L.: A szerződéses munkahely meghatározása – a „home office” és a távmunka. *Munkajog* 2018/2., 56–59.

²⁶ TRENYISÁN M.: A munkáltatói kárfelelősség célja és szabályozási modelljei. *Munkajog*, 2024/4., 1-10.

atipikus munkavégzési formákhoz rugalmasabb és innovatívabb munkavédelmi megoldásokra van szükség.

A távmunka esetén a munkáltató felelőssége nehezen meghatározható, hiszen az otthoni munkavégzés körülményei eltérnek a hagyományos irodai környezettől. A munkavédelmi szabályozások átalakítása, a megfelelő képzések és iránymutatások biztosítása, valamint az új technológiák kihasználása kulcsfontosságú a biztonságos munkakörnyezet fenntartásában.

A munkáltatóknak és a munkavállalóknak egyaránt fontos szerepük van abban, hogy a távmunka ne csak hatékony, hanem biztonságos és egészségkímélő is legyen.

A távmunka és a home office terjedésével a munkahelyek a dolgozók otthonába kerülnek át, ahol a munkáltatók nehezebben tudják ellenőrizni a munkakörnyezet biztonságát és ergonómiáját. Megoldásként a munkáltatóknak lehetőségük van tájékoztatással és rendszeres online ellenőrzéssel biztosítani, hogy a munkavállalók otthoni munkakörnyezete megfelel a munkavédelmi szabályoknak.

Felhasznált irodalom

MATISCSÁKNÉ LIZÁK M.: (szerk.): Emberi erőforrás gazdálkodás. *Wolters Kluwer Kft.* Budapest, DOI: doi.org/10.55413/9789632956176 (letöltés dátuma: 2025. 01.25.)

KUN A.: Az egész életen át tartó tanulás (lifelong learning) jogi keretei a munka világában, különös tekintettel a munkaviszonyra. *Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum*, XIX. Budapest, 2017.

MÉLYPATAKI G.: Az Ipar 4.0. és a jog kapcsolata – Problémafelvetések a foglalkoztatás és szociális biztonság témaköre kapcsán. *Jogelméleti Szemle*, 2023/1. DOI: doi.org/10.59558/jesz.2023.1.61 (letöltés dátuma: 2025.02.01.)

MÉLYPATAKI G. –MÁTÉ DÁVID A. –RÁCZ Z.: Az otthon mint munkahely?. *Publicationes Universitatis Miskolcinenensis sectio Juridica et Politica Tomus XXXVIII/2021/2.*

PRUGBERGER T. – KENDERES Gy.: Az atipikus munkaviszonyok a munkaerő-kölcsönzés és a távmunkavégzés tükrében. *Miskolci Jogi Szemle*, 2009/4.

JURÁNYI R.–GUBICZA S.: Munka- és tűzvédelem. *Akadémiai Kiadó*. Budapest, 2020. DOI:doi.org/10.1556/9789634545125 (letöltés dátuma: 2025.02.07.)

PÁL L.: A szerződéses munkahely meghatározása – a „home office” és a távmunka. *Munkajog*, 2018/2., 56–59.

TRENYISÁN M.: A munkáltatói kárfelelősség célja és szabályozási modelljei.
Munkajog, 2024/4.

HAMPEL Gy.: A képernyős eszközök káros hatásai, a káros hatások megelőzésének módjai. *Jelenkori társadalmi és gazdasági folyamatok*, (2023) XVIII. évfolyam, Különszám, 183 – 197.

UNGVÁRY Gy.: Munkaegészségtan. *Medicina kiadó Rt. Budapest*, 2000.

SIMAI M.: A munka jövője, a tudomány és a tanulás a 21. század világában. *Magyar Tudomány*, 2018/1., 3–13 DOI: 10.1556/2065.179. 2018.1.1

MÉLYPATAKI G.: A veszélyes anyagokkal foglalkozó üzemek létesítésével és működtetésével összefüggő munkajogi és társadalombiztosítási felelősségi kérdések. *Publicationes Universitatis Miskolcensis Series Juridica et Politica*, 2017: XXXV., 366–380.

PÁL L.: A szerződéses munkahely meghatározása – a „home office” és a távmunka. *Munkajog*, 2018/2., 56–59.

TRENYISÁN M.: A munkáltatói kárfelelősség célja és szabályozási modelljei.
Munkajog, 2024/4., 1-10.

Felhasznált internetes források

MATISCSÁKNÉ LIZÁK M.: A felelős foglalkoztatás és a HR-Szakember mint a „szervezetbe engedő” ember a „kapuőr”. https://publikacio.uni-eszterhazy.hu/5442/1/153_166_Matiscs%C3%A1kn%C3%A9.pdf (letöltés dátuma: 2025.02.05.)

A távmunkában, home office-ban foglalkoztatottak aránya. KSH (2022).
<https://ksh.hu/s/kiadvanyok/fenntarthato-fejlodes-indikatorai-2022/2-7-sdg-5#2-abra>
(letöltés dátuma: 2025.02.09.)

A munka és a magánélet közötti megfelelő egyensúly megteremtése.
https://eures.europa.eu/striking-right-balance-between-work-and-personal-time-2024-04-05_hu (letöltés dátuma: 2025.02.10.)

Hogyan tarthatja meg legjobb dolgozóit? a kulcs a munka-magánélet egyensúlya.
<https://www.randstad.hu/workforce-insights/employer-branding/hogyan-tarthatja-meg-legjobb-dolgozoit-a-kulcs-a-munka/> (letöltés dátuma: 2025.02.12.)

A munkahelyi pszichoszociális kockázatok kezelése
<https://www.nincsbaleset.hu/dokumentumok/23-a-munkahelyi-pszichoszocialis-kockazatok-kezelese> (letöltés dátuma: 2025.02.13.)

Felhasznált jogforrások jegyzéke

Mt. 196.§ (1) bekezdés

Mt. 196.§ (2) bekezdés

Mt. 51. § (4) bekezdés

1993. évi XCIII. törvény a munkavédelemről 54. § (1) (d) bekezdés

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

MGR. DOMINIK DRDUL*

The role of National Council of the Slovak Republic in the EU

Abstract: The main aim of the paper is to describe the role of National Council of the Slovak Republic in the law-making process of the EU and a role of this institution in other areas of the political and legal life of the European Union based on legal documents which define relations between national parliaments of member states and other institutions of the EU including practical examples

Key words: National parliaments, proportionality, subsidiarity, role, treaty, European Union

1. Slovak Republic in the European Union

In the very beginning of my paper, I find it useful to write a few general comments on our story of accession to the European Union and to make a little more detailed timeline of our way to full feature membership in the European Union. Ideas heading towards better international cooperation on European level, has been present in our politics on national level since early eighties, just a few months after fall of communism, when Slovak republic was part of the Czechoslovak Federative republic, literally just a few months before the split of this federative state, on a background of talks which had been heading towards its split in the end of year 1992. The fact of division of the federation and ongoing political and legal processes necessary for overall stabilization of newly created successor states slowed these processes and the idea of accession down and postponed it for a few years.

The independent Slovak republic has been established since January the 1st 1993. Ideas heading towards our accession to the European Union could be resumed and got certain contours which were embodied into talks and led to signing an association treaty between European Union and Slovak republic. In constitutional conditions of Slovak republic these talks were led by prime minister Vladimír Mečiar. Association treaty itself has been signed on October the fourth in Luxembourg, the same year.

* Mgr. Dominik Drdul, PhD Candidate, Faculty of Law, Trnava University in Trnava, Department of Criminal Law, Slovak Republic. Member of the Constitutional Committee of the National Council of the Slovak Republic (2020–2023).

Ratification of this treaty by European parliament followed on the 27th of the same month of 1993. The National council of Slovak republic takes the floor on December 15, 1993 by ratifying Association treaty with European Union. This was for the first time when National Council of Slovak republic took part in association process in quite an important way, because without its consent this treaty would be only a priceless piece of paper. On May the ninth 1994 the Slovak republic became Associated EU partner state. In the second half of the year 1994 (30th September and 1st October 1994) the first parliamentary election took place in Slovakia, won by Vladimír Mečiar and its movement.

For next few years, mostly due to political reasons, accession of Slovak republic to the European Union has been slowed down, for not matching political criteria requested from candidate country by European Commission. As a sign of concern over the actions of governing coalition during the first and the second plenary session of newly elected National council Slovak republic received demarche of the EU calling Slovak republic a "Black hole of Europe." Despite the demarche, Association treaty between Slovak republic and the European union has come into force on February the first 1995. On the June 27th 1995 official application for the membership of Slovak republic in the EU has been submitted in Cannes, France by Vladimír Mečiar. On October 25th 1995 representatives of the European Union have visited Slovak republic once again, giving its prime minister another demarche, expressing again concerns on political course of Slovak republic and on politics performed by government. Prime minister by mouth of his speaker called this demarche "*communiqué*."

In November 1995 Slovak republic received from European Commission document called *White book*. European Commission issues this kind of publication as a sort of a guidelines for member states on certain occasions regarding various topics. In this case, white book contained specific recommendations to follow in order to integrate "separated national market" into common European market with free movement of personnel, goods and services. Based on this White Book the government of Slovak republic established twenty-three expert groups to implement the most crucial elements of secondary law of the European Union to legal order of Slovak republic and to comply legal system of Slovak republic with legal system of the EU. This process could not be successfully finished without significant share of national council in this approximation process, as many of laws had to be changed.¹

A year 1997 brought the first bolder steps in our Association process, when Council of European Union passed European Union extension conception and agreed on the first group of countries to undergo intensive talks on the Accession

¹ "Udalosť po udalosti, ako Slovensko vstupovalo do EÚ." Article (Published 2013, June 9). Available here: <https://www.teraz.sk/import/chronologia-pristup-proces-slovensko-eu/48622-clanok.html>.

to the EU, on its summit held on December 1997. This group included following countries: Czech Republic, Hungary, Poland, Slovenia, Estonia and Cyprus. Slovak republic was listed in the second group of countries which should just undergo a preparatory talks on Accession together with other countries such as Latvia, Lithuania, Bulgaria and Romania, mostly for not complying with political European Union membership criteria.

Months before this summit (on July the 16th 1997) European Commission announced that Slovak republic could not be enlisted into the list of countries most prepared for accession talks for not matching above mentioned political criteria of membership in the European Union. Despite all problems, Slovak republic consequently showed its wish to be full-featured member state in the EU either on legal or on political field. As it is clear sign of the wish to be part of the European union, we cannot ignore Resolution of National council of Slovak republic No. 763 from 10.10. 1997 (passed even before the summit in December 1997), in which National council expressed some disappointment from postponing our accession on one hand but declared our full feature membership in the European union as our strategic national interest on the other. Beside this statements, Slovak republic admitted existence of some unsolved problems of our society, but expressed beliefs that these are temporary and can be overcome by political means. The National Council of Slovak republic has appealed in the point C of this declaration on European Parliament to pass recommendation on beginning of the accession talks with all associative countries including Slovak republic and asked to give a chance in an accession process even to countries not recommended for such a procedure.²

If we should talk about the role of National Council of Slovak republic in the EU, beside expressing political gestures, broad approximation of our national laws has been necessary. As you may see, Slovak republic had to meet certain criteria (e.g. Copenhagen Criteria) to be found eligible for full scale membership in the European Union. This required passing numerous amendments of existing laws, derogating those contrary to EU law and creating new ones too as Slovak republic is a parliamentary republic. We shall write more on the role of National council of Slovak republic during and after accession of Slovak republic to the European Union in next parts of our article.

On March 30th 1998 Slovak republic was allowed to join process aimed to the extension of the European union by 11 countries. Representatives of Slovak republic has received on this day two documents of significant importance: *National strategy for Acquis Communautaire adoption in Slovak republic* and *Partnership for*

² Text of the declaration is available here:
<https://www.nrsr.sk/web/default.aspx?sid=nrsr/dokumenty/vyhlasenia>

accession. These two documents included sum of specific criteria (either legal or political) which should candidate country meet in order to become full feature member of the European union. *In concreto* we may mention institutional stability of democracy keeping institutions, criteria regarding rule of law, ability of Slovak republic to take on commitments of our future membership in the European union including the fulfillment of political, economic and monetary goals.

December of 1998 brought next progress on our way to the European union, as the European Parliament has adopted a resolution on candidacy of Slovak republic for membership in the European union recommending to Wiena Summit “flexible approach” towards Slovak republic. European parliament also recommended to reconsider political situation in Slovak republic after parliamentary election, which brought a victory of a new pro-european establishment of Mikuláš Dzurinda which replaced “old establishment” of Vladimir Mečiar. By this resolution European parliament imposed on the European Commission a task of making up a new report on readiness of Slovak republic for full feature membership in the European Union.

Preliminary state of our accession to the European Commission we may find finished by December 1999, when Slovak republic received (together with five other candidate countries) an invitation for actual accession talks. From that date on, Slovak republic (together with other candidate countries) was under even closer watch regarding the way it was able to meet specific milestones on our way to the European Union by European Commission and European Parliament.

On February 15th 2000 Accession Conference regarding Slovak republic’s accession took place in Brussels. At the end of the year European Commission has declared Slovak republic to be a “functioning open-market economy” in its report, what meant reaching one of membership economic criteria. Nearly a year later, the European Parliament passed a declaration welcoming a progress Slovak republic had reached in preparation for European union’ full scale membership on one hand but bringing up lasting issues in financing control, environmental area, in some topics regarding rule of law, internal affairs or justice.

Beside a few resolutions, mostly of political importance, following period did not bring any remarkable progress until December 2002. In December 2002, leaders of member states of the European Union declared reaching the final agreement on finishing accession talks with 10 new member states, including Slovak republic, which should join 15 member states of the European Union. This agreement got final contours to the greatest enlargement of the European Union in its history.

On April 9th 2003 the European parliament has approved accession of Slovak republic and nine other countries to the European Union. 521 deputies of European parliament voted for the entry of the Slovak Republic, 21 voted against it and 25 abstained from vote. Just a few days. Nothing stood from this moment

(from international perspective) in the way of Slovak republic to becoming a full feature member state of the European Union.³

Five days later Council of the European Union in Luxembourg lit a final green light to the accession of Slovak republic to the European Union, when ministries of foreign affairs have approved accession of Slovak republic and other nine countries to the European union. Two days later prime minister of the Slovak republic, Mikuláš Dzurinda and president of the Slovak republic have signed in Athens, Greece, Treaty on the Accession to the European Union.

Citizens of Slovak republic expressed their wish to access European union in the only referendum successful so far in our history, when 92, 46 percents of those who voted answered YES to the question whether they agree with the accession of Slovak republic to the EU. Referendum took place in May 16-17th 2003 and turn out in a vote reached 52,15 percents of entitled voters. Constitution of Slovak republic requires in its article 98, par. 1, turn out of 50 percents of entitled voters for results to be valid.

On July the first 2003 National Council agreed with the ratification process of the Treaty on the Accession to the European Union⁴. 140 members of National council of Slovak republic took part in a vote, 129 members of parliament voted for the Treaty, 10 members of parliament voted against the Treaty and 1 member of parliament did not vote. As it was declared to be a treaty with a priority to acts according to article 7 paragraph 5 of a constitutional act No. 460 from 1992 (Constitution of the Slovak republic), it was published in official law publication instrument of Slovak republic, within the notification of the Ministry of Foreign Affairs No. 185/2004⁵

Signing of a ratification document to the Treaty by president of Slovak republic Rudolf Šuster on August 26th 2003 and approval of Jan Figel's nomination to the position of a European Commissioner by government of Slovak republic on January 28th 2004 completed process of the Accession to the

³ "Udalost' po udalosti, ako Slovensko vstupovalo do EÚ." (2013, June 9). Retrieved from <https://www.teraz.sk/import/chronologia-pristup-proces-slovensko-eu/48622-clanok.html>

⁴ Whole name *Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union*

⁵ "Udalost' po udalosti, ako Slovensko vstupovalo do EÚ." (2013, June 9). Retrieved from <https://www.teraz.sk/import/chronologia-pristup-proces-slovensko-eu/48622-clanok.html>

European Union and made Slovak republic a full feature member of the European Union. Slovak republic became full feature member of the European union on May the 1st 2004. More than ten years long process of accession to the European Union was successfully completed.

2. Constitutional act No. 90/ 2001

Process of accession of Slovak republic to the European Union required as it was mentioned above, wide approximation of our legal order to legal order of European Union including amendment of Constitution of the Slovak republic. In a following text I would like to have a closer look to this constitutional amendment, which is with no doubt worth at least some attention, despite the fact that this is not the main point of interest in our paper. Some relevant constitutional lawyers and an active authors of that time thought, that Constitutional amendment was necessary for our integration to the European union. ⁶Constitutional amendment made by constitutional act No. 90/2001 became one of the greatest amendments of Constitution of Slovak republic in our constitutional history. This amendment has changed more than 40 percents of original text of a Constitution of the Slovak republic. ⁷

The interesting thing about this amendment is that the second article of a draft contains mandate for the president of the National council of Slovak republic to send this amendment, just after it is passed in National Council, for publication together as a whole, with two previous constitutional act amending Constitution of the Slovak republic. These three amendments were published as a “The full text of the Constitution of the Slovak Republic”

From a systematic point of a view, we can divide the constitutional amendment and changes which came into force by this amendment, into a few groups. The main reason for realization of this amendment was in open questions regarding certain relations between national legal order and international law mostly regarding international treaties. The first group of changes is dealing with topics regarding international law our membership in EU and NATO. New text was supposed to create a constitutional framework for a relations in-between legal order of the European Union, other international law and national legal order.

Amendment made by a constitutional act No 90/2001 should also bring up a new procedure for the accession and membership of Slovak republic in an organization like the European union or NATO because existing constitutional

⁶ M. Jánošíková.: ÚSTAVA SLOVENSKEJ REPUBLIKY A ČLENSTVO SLOVENSKEJ REPUBLIKY V EURÓPSKEJ ÚNII. 2013 *Článok*. ACTA UNIVERSITATIS CAROLINAE – IURIDICA 4., s 249- 264

⁷ OROSZ, L. *Dvadsať rokov Ústavy Slovenskej republiky. Článok*, 2012. Available here: <https://cejsh.icm.edu.pl>

text in that time either did not contain such a provisions, or existing provisions were not as precise as necessary for fluent application in daily life. As an important point of amendment, we may highlight a clause establishing application priority of secondary law of European union to domestic law (not to constitution).

One of a most important intentions of a legislator was to clarify preconditions and parameters of international treaties' priority to acts⁸. Amendment has also created an option and a procedure of transferring certain national competences and powers to interntional bodies, such as European union. One of the objectives of the legislator was to improve the possibilities of review of constitutionality of international treaties by Constitutional Court of Slovak republic.

Original text of a constitutional act no. 460 /1992 contained article 11 which set up a position of international treaties in constitutional system of Slovak public and sketched up basic proportions of priority of international system treaties on human rights to acts based on rather dualistic approach. On the one hand, according to this article, Slovak republic fully respects all its obligations under international law and gives international treaties its priority, on the other the priority applies only under one condition –it is given only if the provisions of this treaties secure greater standard of human rights protection, than domestic law. This approach is called alternative priority of law principle. Wording of this article was not perfect to as it was leaving to much space for interpretation⁹ This article has been removed from the Constitution of the Slovak republic and its content has been replaced by article 154c.

Another group of changes is dealing with powers of constitutional court. The amendment widened possibilities of using already created institute described in new wording of an article 127. According to this article, (after the amendment), the Constitutional court decides on complaints of natural and legal persons objecting to violation of their basic rights and freedoms, or the basic rights and freedoms ensuing from an international treaty ratified by the Slovak Republic and promulgated in a manner laid down by law, unless other court makes decision on the protection of such rights and freedoms.¹⁰

Beside the option to file the constitutional complaint to a Constitutional Court by natural and legal persons, this amendment brought up completely new Article 127a regarding complaints filed by the bodies of the territorial self-administration against an unconstitutional or unlawful decision or other unconstitutional or

⁸ Same source

⁹ Balog, B. (2009). "MEDZINÁRODNÉ ZMLUVY V ÚSTAVNOM SYSTÉME SLOVENSKEJ REPUBLIKY." In Dny práva – 2009 – Days of Law: the Conference Proceedings (1st ed.). Brno: Masaryk University. ISBN 978-80-210-4990-1 Available here: <https://www.law.muni.cz>

¹⁰ Compare to Article 127 of the Constitution of the Slovak republic,
English version available here: <https://www.nrsr.sk/web/static/en-us/nrsr/dokumenty/constitution.doc>

unlawful intervention in the matters of the territorial self-administration. This complaint can be filed only when no other court has the power to decide on that matter.

This amendment made changes in a numerous area of the Constitution of the Slovak republic such as an increased number of judges of Constitutional Court from ten to thirteen or prolonging their functional period from ten seven to twelve years. A procedure of appointing and recalling of a judge has changed (president appoints and recalls a judge). A judge's position has been made more stable as he may be recalled by president just on grounds set by Constitution. Another group of changes dealt with judicial matters, created a Judicial Council, as a body of judicial self-administration, which takes part on organization and management of system of courts. Amendment improved a structure of already known division of a state power into three groups: Legislative, Exexecutive and Judicial power.¹¹

By newly added article 151a, this amendment created an independent body of the Slovak Republic which, within the scope and as laid down by law, protects basic rights and freedoms of natural and legal persons in proceedings before public administration bodies and other bodies of public authority, if their conduct, decision-making, or inaction, is contrary to the legal order - Public Protector of a Rights. According to an article 152 par. 2 The Public Protector of Rights may file a motion with the Constitutional Court of the Slovak Republic to initiate a proceeding pursuant to Article 125, if a generally binding regulation is violating a basic human right or freedom. He is elected and recalled by National Council of Slovak republic.

As the last, but not the least, I would like to mention group of changes in the Fourth Chapter of Constitution of Slovak republic called "Teritorial Self-administration" The option of the bodies of territorial self-administration to fil constitutional complaint under article 127a were not the last changes regarding territorial self-administration made by this amendment. Constitutional act No. 90/2001 has created constitutional foundations for complex reform of territorial administration and strengthen its legal position. This amendment legally defined, on constitutional level, second instance bodies of territorial self-administration altogether with constitutional definition of their competences.¹²

3. National Council of the Slovak Republic in the EU

In the next few pages, I would like to write about the most important topic of my paper, the role of National council of Slovak republic in the European Union. The range of an article for sure is not sufficient for such a complicated and broad

¹¹ OROSZ, L. *Dvadsať rokov Ústavy Slovenskej republiky. article*, 2012

¹² Same source

topic, but I will try to at least get the point of an issue. Before we proceed to foreign affairs and European matters, I find useful to write a few sentences on the National Council of the Slovak republic from a general point of view. National Council of the Slovak republic is the only legislative and constitutional body of Slovak republic, which is seated in Bratislava, the capital city of the Slovak republic.

The National Council of the Slovak republic is created by 150 members of parliament who are elected for four years election period. Members of parliament are elected in one constituency, which includes whole area of a Slovak republic, by secret ballot in general, equal, and direct elections. President of a National council is one of a members of parliament elected during the first plenary session of an election period in a secret vote. He is second most important representative (from a constitutional point of view) of a Slovak republic, just after its president.

In constitutional system of Slovak republic, as it is a parliamentary democracy, the National council of the Slovak republic is one of the most powerful institutions superior even to the Government of the Slovak republic, which is responsible to the National Council in a bunch of matters including European affairs and membership of the Slovak republic in the European Union. I shall discuss the mutual relationship of a National council of a Slovak republic with a Government of the Slovak republic in the matters of the European Union later in the text, as there is a separate constitutional regulation which is necessary to notice.

National council is given a separate Chapter in the Constitution of the Slovak republic called *Legislative power*. This chapter begins from an article 72 reaching to an article 100. In these articles, there are competences and powers of members of parliament set, altogether with competences of the National council of the Slovak republic as a whole. The last seven articles of this chapter are devoted to constitutional regulation of a referendum. The details of the procedure of a National council of Slovak republic are regulated by an act No. 350/1996 *On a rules of procedure of a National Council*.

From the point of a view of our paper, I find relevant to stress out that according to Article 86 letter d) National council is entitled as we mentioned before, to express consent, prior to ratification, with the international treaties on human rights and fundamental freedoms, international political treaties, international treaties of military nature, international treaties establishing membership of the Slovak Republic in international organizations, international economic treaties of a general nature, international treaties whose execution requires the enactment of a law, as well as with international treaties that directly establish rights or obligations of natural persons or legal persons, and at the same time making determination if these are international treaties stipulated in Article 7,

paragraph 5¹³ as the Treaty on the accession to the European union has been declared such a treaty in July 2003.

As we have already mentioned, not all regulation passed by European Union and its institutions are directly executable. As it is a widely known, we distinguish in very general view, primary and secondary law of the European union. Primary law consists of Founding Treaties signed by future member states and the Secondary law of the European Union is created by its institutions, within their competence given by Primary law. Under this notion, we may subsume Directives and Regulations of the European Parliament and European Commission.¹⁴ Directives are executable with no need of approximation, but the national parliament plays the most visible role in the European union when it timely and correctly approximates European Union law to national legal order by transposing regulations of the European Parliament and Council of the European Union to the acts approved by National council of the Slovak republic

National council of the Slovak republic is not only legislative and constitutional body, but it is a controlling body too with bunch of institution responsible for their functioning to it. For the purposes of control of the subordinate bodies, National council of Slovak republic creates Committees of National Council composed from the members of parliament. Every member of the parliament may be in maximal number of 3 committees. There are nineteen committees, which powers and tasks are set by an act No. 350/1996 *On a rules of a procedure of a National Council* from §45 to §63. Provisions of the abovementioned paragraphs set a duties of a chairman of a committee and regulate the first session of the committee in an election period.

Every committee may set its own rule of procedure, within the competences given to a certain committee by the Rules of procedure of National Council of the Slovak republic. Within these competences, they cooperate with members of government and other public bodies and central state administration authorities. National council may create any committee, either temporary, or permanent. The sessions of the committees of the National Council of the Slovak republic are open to public. Public may watch the sessions either by online streaming or in person. Any person, present to the session may even be given a floor in the session if the majority of the committee members agree.¹⁵

¹³ Compare to art 86, d) in Constitution of the Slovak republic,

Available here: <https://www.nrsr.sk/web/static/en-us/nrsr/dokumenty/constitution.doc>

¹⁴ Jánosiková, M. (2013). "Ústava Slovenskej republiky a členstvo Slovenskej republiky v Európskej Únii." ACTA UNIVERSITATIS CAROLINAE – IURIDICA, 4, 249–264.

¹⁵ Compare to § 46, section 1, of the Rules of procedure of the National Council of the Slovak republic,

Available here: https://www.nrsr.sk/web/Static/en-US/NRSR/rules_of_procedure_20230101.pdf

Every chairman of any committee is entitled to establish supportive commissions of a committee, to support fulfillment of competences of the superior committee. The committees of the National Council of the Slovak republic mostly discuss material brought to discussion by National council, President of the National council of the Slovak republic or members of a committee. They may discuss whatever issue they can agree to discuss within area of their competence. The committees are entitled to send their suggestions, stimuli and findings to the relevant member of the government (or other central administration institution) with a deadline (30 days or any other) for reply, which asked body is obliged to keep. If this is ignored, the committee shall turn to national council with such a file (§ 47).

Since 2004 National Council creates Committee of the National council of the Slovak republic for European Affairs. Its importance is evident as the regulation of its competences in Rules of procedure of the National council of the Slovak republic is quite wide. From the point of a view of our paper, this committee is the most relevant to write about. The source of its importance lays upon the fact that National Council of the Slovak republic transfers its powers in relation to the European Union, and the membership of the Slovak republic in the European Union, to the Committee of the National council of the Slovak republic for the European Affairs as its specifically laid down by constitutional act, on which we will write later on.¹⁶

Beside the specific controlling committees of the National Council of the Slovak republic in relation to security departments such as civil and military intelligence service, the Committee for European Affairs has the principles of its composition set directly by the Rules of procedure of the National council of the Slovak republic. Its structure should exactly reflect actual political composition of the National Council of the Slovak republic (§ 58a par. 1, par 2).

Every member of the committee is substitutable by one substitute member elected in the same way as the member of a committee. A substitute member is entitled to represent the member he is elected to substitute, but only if this substitution in a session is reported to a committee chair. A reported substitute can vote and is included in the quorum so the session of a committee could take place. If there is a substitute for a committee chair present instead of the Committee chair himself, the substitute is in a position of a committee member. In other words, he cannot perform a powers of the chairman of the Committee of National Council for European Affairs. (§58 par. 2)

¹⁶ Constitutional act No. 397/2004 On cooperation of the National Council of the Slovak republic and the Government in the matters of the European Union

Competences of the Committee of the National Council of the Slovak republic for European Affairs are set in § 58a and following provisions of the Rules of procedure of the National Council of the Slovak republic. By the time, the importance of the Committee of the National Council of the Slovak republic grew, mainly after the passing of Treaty of Lisbon which Amended original “Founding Treaties” of the European union after the failure of the European Constitutional treaty project. Passing Treaty of Lisbon has given national parliaments in all member states of the European union more power as its provisions include them directly in decision making process, and fortified position of a citizens of member states in the European union as a whole as we shall prove later in the text.

In reaction to passing a Lisbon Treaty, The Rules of procedure of the National Council of the Slovak republic has been amended. The provisions of the paragraph 58a have received their present shape mostly by the amendment No. 187/2011 of the Rules of procedure of the National Council of the Slovak republic. As it is laid down in the reasoning of this amendment, the Committee of the National Council of the Slovak republic for European Affairs is given competences needed for sufficient fulfillment of their new role of the “watchdog over the legislative acts of the European Union.”¹⁷

This amendment has brought the two types of competences, the first we could call “soft competences” (to ask for information, to discuss legally binding acts...) and the other group we can call “hard” (discuss action draft proposals on the grounds of infringement upon the principle of subsidiarity by a legislative act of the European Union). Both groups of powers brought to the Committee for European Affairs bolden and strengthen its position either to the European union, or to the government or its member. It all depends on political and human factors of their application. In the following pages, I would like to have a closer look for these powers.

According to a provision of the §58a, paragraph 3, the Committee for European Affairs is above all entitled to:

- A) discuss drafts of legally binding legal documents of European Union and other political acts of the European union
- B) approve the opinions of the Slovak Republic on the proposals under subsection a), which are to be discussed by the relevant institutions of the European Union, made by authorised department.
- C) assess the compliance of draft legislative acts of the European Union with the principle of subsidiarity, including the approval of reasoned positions,

¹⁷ Reasoning of an amendment No. 187/2011 Z. z. to an Act No. 350/1996 Z.z.

Available here: <https://www.najpravo.sk/dovodove-spravy/rok-2011/187-2011-z-z.html>

D) discuss action draft proposals on the grounds of infringement upon the principle of subsidiarity by a legislative act of the European Union,

E) discuss reports and information submitted to the National Council by the Government and members of the Government, and acts submitted to the National Council by the EU institutions.

F) request, in its discretion, position of other committees of the National Council on proposals under a) and b) of this section,

G) submit activity reports to the National Council under subsections a) through f) of this section.

The National council may “take the transferred powers back” and reserve the right to decide on matters under section abovementioned subsection a) - c). The expression of subordination of the government we may see in paragraph 6 of §58a which lays, that an authorized member of the Government shall attend the meetings of the Committee for European Affairs and inform the Committee of the drafts of legally binding acts and other acts of the European Communities and the European Union under paragraph (3) subsection a) and provide information on the results of the discussions of those bodies of which he is a member (§ 58a par. 4).

Following provisions of the §58a are giving to the Committee for EU affairs other powers in relation to members of the government so it can sufficiently perform competences laid by § 58a par. 3, letter a) - g). As an example we use the right of Members of the European parliament to get a floor in the Committee session to provide more information regarding material brought to discussion (§58a par. 7), or an obligation of the government to submit to the Committee for European Affairs without delay the drafts of legally binding acts and other acts of the European Communities and the European Union under paragraph (3) subsection a), which are to be discussed by the representatives of governments of European Union member states laid by paragraph 8. In this situation the Committee act on behalf of the National council

The other part of this paragraph lays down a duty of a government or its member to send a preliminary opinion of the government or authorized member of a government on the draft mentioned in previous sentence, not longer then 3 weeks after receiving it. This opinion should include brief information on the content and objectives of the draft, the type and time schedule of the decision-making procedure in the European Communities and European Union, on the compliance of the draft with the principle of subsidiarity, and an evaluation of the impact of the draft on the Slovak Republic with respect to political, legislative, economic, social and environmental aspects. A commission for european Affairs either approves it, or denies it. This position is binding for the member of

government in the bodies and institutions of the European Union as as official position of the Slovak republic.¹⁸

National Council of the Slovak republic is according to the §58a paragraph 9 entitled to ask an the Government or an authorized member of the Government shall, sufficiently in advance, submit to the Committee for European Affairs the proposed opinion of the Slovak Republic on the proposals under paragraph 3) subsection a). Once it is passed in the Committee for the European union Affairs, this may be changed only with justification of the National Council of the Slovak republic.

The last competence of the Committee for the European Affairs according to the §58a I would like to talk about is the competence to discuss the report on matters related to the membership of the Slovak Republic in the European Union. The Act No. 350/1996 says in §58 paragraph 12, that by the end of March of each year the Government shall submit to the National Council a report on matters related to the membership of the Slovak Republic in the European Union for the preceding calendar year. The Committee for European Affairs may at any time request that the Government or an authorized member of the Government submit reports, information, justifications or explanations of any matters related to the membership of the Slovak Republic in the European Union.

Probably the strongest instrument the National Council of the Slovak republic has, is the competence given to National council formulated (on international level) in the article 263 of the Treaty on the Functioning of the European Union within the period according to the last paragraph of this article. This competence of the member state, to object a breach of the principle of the subsidiarity, is one of the results of passing a Treaty of Lisbon and brings better position for national parliaments in the European union.¹⁹ In the legal order of the Slovak republic, this competence is set by Rules of procedure of the National Council of the Slovak republic in the provisions of §58 b.

According to the first section of this provision, 30 members of parliament or a Committee for European affairs may in a writing submit a draft of a resolution of the National council on Subsidiarity Principle Infringement Action by a legislative act of the European Union to President of the National Council. The action draft shall contain the exact wording of the respective action subject to the resolution of the National Council. The law sets a deadline in which the action draft proposal is submitted to the Chairman of the National Council. This period cannot be shorter than fifteen days prior to the action submission deadline.

The president of the National Council shall incorporate the action draft into the program of the next session of the National Council or a special hearing. The

¹⁸ Compare to §58a par. 8 of the Rule of procedure of the Natioonal Council of the Slovak republic, Available here: https://www.nrsr.sk/web/Static/en-US/NRSR/rules_of_procedure_20230101.pdf

¹⁹ *Lisbon Treaty* (Article) Available here :<https://www.europaskaunia.sk/lisabonska-zmluva>

President of the National council shall convene such session or hearing to allow for the timely discussion of the action draft. The members of the parliament have to receive the action draft at least 72 hours before the discussion upon it. Should the National Council approve the action draft, the National Council shall entrust a Member or another appropriate person by representing a NC in a Court of Justice of the European Union.

If a representative in a court is a member of parliament, his mandate is not linked to the duration of the mandate of a member of parliament. According to § 58b, paragraph 5, the authorized representative is bound by the text of the Action and is not entitled to rescind the Action. The Government, Members of Government, Heads of other central state-administration authorities and public administration authorities shall cooperate and provide the necessary support and information to the representative, within the range of his mandate, in a proceedings before the Court of Justice of the European Union.

President of the National Council shall right after passing the Action in a National Council forward the resolution of the National Council containing complete and exact wording of an Action to the Government. The government is bound by the resolution of the National Council and the text version of the Action. The government shall immediately present the Action to the Court of Justice of the European Union.²⁰

The Committee for the European Union Affairs has a right to be informed about the proceedings in a Court of Justice of the European Union by the authorized representative in a time and manner designated by the Committee for the European Union. The status of the National Council as a participant in proceedings before the Court of Justice of the European union is not affected by the end of the parliamentary term of the National Council or by the dissolution of the National Council.²¹ If a EU law allows it, National Council may change a wording or given authorization for a representative in a Court.

4. Constitutional Act No. 397/2004 On cooperation of the National Council and the Government in the matters of the European Union:

The topic of interinstitutional relations in the Slovak republic in the matters of the EU is in the legal order of the Slovak republic regulated in multiple places. The

²⁰ Compare to : § 58b par. 7 of the Rules of procedure of the Natioonal Council of the Slovak republic, Available here: https://www.nrsr.sk/web/Static/en-US/NRSR/rules_of_procedure_20230101.pdf

²¹ Compare to : § 58b par. 9, 10 of the Rules of procedure of the Natioonal Council of the Slovak republic, Available here: https://www.nrsr.sk/web/Static/enUS/NRSR/rules_of_procedure_20230101.pdf

basic framework or this relation is set by Constitution of the Slovak republic and internal treaties, which foreseen an existence of this relations. On the level of the acts, these relations are set by The Rules of procedure of the National Council of the Slovak Republic. However, not all relations were regulated by any of them. The Legislator decided “to patch” this gap on the constitutional level, as it regulates fundamental relations between National Council of the Slovak republic and the Government of the Slovak republic, by the draft of constitutional act. In the following few paragraphs I would like to write in brief a few comments on this law.

Despite the superiority of the National Council of the Slovak republic to the Government of Slovak republic, in constitutional system of the Slovak republic, in relation to the European Union, the whole picture may seem different. The members of Government participate in a session of the Council of the European Union, prime minister takes part in European Council and they pass various decisions, seemingly with no control. The truth is, that in both cases, they are just filling their mandate, which has been approved by National Council (Committee of the National Council of the Slovak republic for the European Union Affairs) and present position of the Slovak republic, which has been approved by National Council too. Therefore, constitutional law on the cooperation of the National Council and the government in matters of the European Union deals with the processes that precede the approval of the conclusions of the Council of the European Union. Actually, this constitutional act is a quite short document, with simple structure as it is composed of four articles, composed of sections and subsections.

The First article sets a duty of the government (or its authorized member) to forward draft legislative acts to the National council and an obligation to bring to the discussion position of the Slovak republic to this drafted law to the National Council of the Slovak republic too. The actual body who is discussing this drafts and position is the Committee of the National Council of the Slovak republic for the European Union Affairs. This body has this competence in accordance with article 2 paragraph 2, according to which The National Council may entrust by the law its committee to discuss and pass both draft legislative acts and positions of Slovak republic to them. National Council may even pass the position of the Slovak republic to other matters regarding European union, when asked by 30 members of parliament or the Government of the Slovak republic (article 2 par. 3),

If the national council passes the draft of the position of the Slovak republic, the member of the government is bound by this position in the bodies of the European Union. If the National Council does not approve the position of the Slovak republic to the draft legislative, or does not pass its own position in two week after it was forwarded to the National council, the original position the of Slovak republic to this draft legislative act (or to any other material) is binding for

member of the Government, as the official position of the Slovak republic in the Council of the European Union. This procedure laid down in the article 2, paragraph 4 of the constitutional act is called Silent procedure.

The wording of the constitutional act allows in the article 5 an exception from the mandate given to the member of the Government of the Slovak republic by passing a position of the Slovak republic to certain issue. The member of the government may deviate from passed position of the Slovak republic only if necessary and this deviation is within the interest of the Slovak republic. In such a case he informs the National Council of the Slovak republic with no delay on such a matter. The member of government is obliged to justify this deviation from passed position. He may ask the National council for the change of the position of the Slovak republic. The National Council does not need to accept this request.

From my point of view, The main problem of this constitutional regulation lays within the fact, that the breach of such a regulation have neither direct legal consequences nor any factual inevitable consequences. That basically means that the strength and sufficiency of this regulation is directly dependent on the non-legal, rather social of political factors (such as trust, political agreements etc.). Practically, the only consequence which is possible if the member of government deviates voluntarily from the position of the Slovak republic which have its ground in the law, is the dismissal from his function, but such a consequence was never applied.

5. Other means and tools of action for National Council of the Slovak Republic in the European Union:

5.1. Protocols of the Treaty on the European Union:

As we have already stated in our paper, Treaty of Lisbon meant significant step forward in numerous areas of either legal, or political significance. The area of progress which is the most important to our topic is the role of national parliament of the Slovak republic in the European Union. The most significant and prominent manifestation of the improvement of the position of the national parliaments in the European union is the fact that amended article 12 of The Treaty on the European Union²² contains *expressis verbis* enumerations of tasks and powers of parliaments of the member states. I shall take closer look specifically for its first two letters.

²² The whole Treaty on the EU is available here: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html - new-2-51>

According to Article 12 of the Treaty on the European Union, National Parliaments contribute actively to the good functioning of the Union mainly:

- through being informed by the institutions of the Union and having draft
- a) legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
 - b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

The first two competences are most relevant to us, because they bring real participation for the National Council in the decision-making process of the European Union. According to article 12 letter a) and b) national parliaments have in advance legislative drafts sent. European union has the duty to send them in advance, so the national parliaments have a real occasion to have a better look on them to analyze their content with regard to criteria of proportionality and subsidiarity. To make this treaty functioning and executable, including this sections of the article 12, member states attached to the treaty thirty seven protocols, setting up various procedures, among others specification of the procedure mentioned under the Article 12 letter a) and letter b) of the Treaty on the EU so either EU or National parliaments have bigger deal of the legal certainty on their competence. In the next few sentences, I would like to pay more attention to these two protocols.

Protocol No. 1: On the Role of National Parliaments in the European Union

From systematic point of a view this document is divided into three elements: Preamble and two Titles whereas each of the Titles is divided to Articles. Preamble includes very general constataions. The first Title called Information for National Parliaments has eight articles. Articles include definitions of the notions included in the Protocole and exact instructions about forwarding documents together with the commitment to forward, in certain deadline drafts to their final destinations. The document sets (when appropriate) minimal time which must be left for forwarded institution to assess the documents within legislative process.

The second chapter includes another two articles. Article nine lays down mutual commitments of National Parliaments and European Parliament to determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union. Article ten gives Conference of Parliamentary Committees for Union Affairs a space to submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. It sets and confirm its goals and benefits for the European union highlighting further opportunities for its initiatives. It reassures member states,

that contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.²³

Protocol No. 2: On the Application of the Principles of Subsidiarity and Proportionality

The second protocol is longer than the first one but has simple structure of preamble and 9 articles. The preamble contains the expression of the purpose of this protocol - to formalize a procedure of forwarding draft legislative acts, to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union, and to establish a system for monitoring the application of those principles,²⁴

Article 1 includes general commitment of the European Union to ensure respect to the principles of subsidiarity and proportionality. The second article includes an obligation to perform consultations before drafting a legislative act. Article 3 includes definitions (for the purposes of this Protocol) of the „draft legislative act“. Article 4 regulates institutional rules of forwarding of the drafts.

Drafts have to be justified with focus on reasoning of the subsidiarity and proportionality principles respect in every justified draft as it is set by Article 5 or the Protocol. This article sets standards for such a justification. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality and some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. This article also binds european institutions to focus on lowering of the potential financial, administrative or material burdens for member states and their bodies as low as possible.

Article 6 gives any national Parliament or any chamber of a national Parliament a right to send to the President of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity together with modification of the procedure for sending such a reasoned opinion if a drafts' author differs. This article sets a deadline for sending such an opinion.

Article 7 stipulates an obligation of the authorized european institution to take a regard of reasoned opinion. It also sets up division of votes, each parliamentary has and states conditions under which the draft must be reviewed or withdrawn.

²³ Protocole No. 1, Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/PRO/01>

²⁴ Protocole No. 2, Available here: <https://eur-lex.europa.eu/legal-content/SK-EN/TXT/?from=SK&uri=CELEX%3A12016M%2FPRO%2F02>

Following subsection of the article sets a various option, which proposing institution has, once the review is over. A draft after review may be maintained as it is, amended or withdrawn. Any of the procedures must be justified.

Article 8 establishes jurisdiction of the The Court of Justice of the European Union in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union²⁵ and a right of a member state (on behalf of their national Parliament or a chamber) to file such Actions. the Committee of the Regions has such a right too.

Article 9 contains another element of check and balances system to European Union's power in relation to national parliaments as it binds European Commission to submit each year to the European Council, the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and to national Parliaments a report on the application of Article 5 of the Treaty on European Union.

6. Conference of Parliamentary Committees for Union Affairs (COSAC)

Interparliamentary cooperation is quite important manifestation of an activity of any national parliament of the European union. The ability to cooperate and to create networks and coalitions is the source of the political activity and a very important precondition of political power. This cooperation is held on various platforms (e.g. ICM – Interparliamentary Committees Meetings, other interparliamentary groups and delegations).

As an example of the institutionalized platform, with a goal of better interparliamentary cooperation we may use The Conference of Parliamentary Committees for Union Affairs (COSAC). This permanent interparliamentary conference brings together the EU affairs committees of national Parliaments. At these meetings, each Parliament is represented by six Members. Each plenary meeting is prepared for by holding a meeting of the EU Affairs Committee Chairpersons.

The European Parliament delegation to COSAC is co-chaired by one of the Vice-Presidents responsible for Relations with national Parliaments and the Chair of the EP Committee on Constitutional Affairs (AFCO). The national Parliaments of the EU candidate countries are also invited to participate with three observers each. COSAC meetings usually take place in the capital of the country holding the Presidency of the Council of the European Union.

COSAC was formally and legally recognized by the Treaty of Amsterdam, entering into force on 1 January 1999, in the Protocol on the Role of National

²⁵ Whole Treaty on the functioning of the European Union Available here: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html?new-2-51>

Parliaments in the EU. The Conference of Parliamentary Committees for Union Affairs plenary meetings take place twice a year. The first COSAC meeting took place on 16-17 November 1989 in Paris. The 56th plenary COSAC meeting, commenced on 13-15 of November 2016 in Bratislava. The last meeting of the COSAC chairperson meeting was hosted by the Spanish Senate in Madrid and took place on 18 September 2023.

Programs of the COSAC meetings reflect the most relevant topics of the day, which influence daily life of the European Union, such as Ukraine conflict, migration, green politics regarding topics or the climate change.²⁶

Other remarkable organizations and platforms

The last topic I am going to write about in this paper is the topic which is mostly beyond the legal framework and is far more connected to spreading information within the relevant entities, as the information exchange is the most elementary, but the most important tool of any cooperation, including political cooperation. European union as the organization gathering 27 member states is vitally dependent on functioning information exchange within its institutional framework. The platform which is from my point of a view of a significant importance is an IPEX (interparliamentary platform for exchange).

IPEX is the platform of the European Union for information exchange between the national parliaments in the European Union and the European Parliament. IPEX consists of a database containing documents from the European Union institutions and parliamentary documents uploaded by the national parliaments themselves. It also provides a calendar of interparliamentary conferences and meetings, as well as information about national parliaments in the European Union and the European Parliament. Furthermore, IPEX hosts the websites of a number of interparliamentary conferences that are arranged on a regular basis²⁷.

The other organization which is worth mentioning ECPRD – European Centre for Parliamentary research and Documentation serves as an information channel whenever European Parliament needs to know more information on the procedures and policies in other countries of the European Union. The Statutes of the ECPRD were adopted by the ECPRD Secretaries General meeting at the Conference of Speakers in Budapest on 7 June 1996 and subsequently amended in Tallinn on 31 May 2006 and in Strasbourg on 21 September 2012 and 25 October 2019²⁸. Both of this organizations play undeniable role in the functioning of the

²⁶ Taken from: <https://www.europarl.europa.eu/relnatparl/en/institutional-bodies/cosac>

²⁷ Taken from : <https://secure.ipex.eu/IPEXL-WEB/about>

²⁸ Taken from: <https://ecprd.secure.europarl.europa.eu/ecprd/public/page/about>

daily life of the European union and help national parliaments to participate in its daily life in even more effective way.

7. Conclusion

As a young lawyer and a person who has personal experience with both, parliamentary work as a member of parliament on national level and for a short period of time as an assistant of the Member of the European parliament in our paper the author wanted to describe in general terms the role of the National council of the Slovak republic in the European Union and based on the abovementioned sources and his personal experience he wanted to provide a little assessment of powers and the legal, political and administrative instruments the national parliament has in relation to the European Union legislative acts adoption together with general overview of the accession's process milestones.

According to our opinion and the personal experience too, from the legal point of view as we have shown in our paper there are basically two sources of powers and competences of national parliaments regarding its role in the EU. The first source we find in the international law, mostly in Lisbon Treaty and its protocols No. 1 and No. 2 and the other on national level, in the laws, constitutional laws and Constitution of a Slovak republic, which constitutes both position and powers of National Council of the Slovak republic in national legal order and its relation to the European union including its powers regarding legislative acts.

While describing and concluding on the role of the national parliament in the political and legal life of the European Union, we find important to stress out once again how important role played National council of the Slovak republic in the process of accession of the Slovak republic to the EU and still plays until this day. As we have proved, one of the boldest ways through which we can perceive the role of The National Council of the Slovak republic in the European union is by performing its legislative power. By performing transpositions of the directives into our legal order it makes our legal orders compatible and makes possible for the citizens of the Slovak republic to use all the rights and benefits which legal order of the EU provides to them and to fulfill all the necessary duties in the right way. Beside this legal level in a political level of the role of the National Council of the Slovak republic, reflected in numerous declarations and resolutions adopted which reflect positions and opinions of the actual majority which has passed them towards various topics and events taking place in the European space.

As the time shows the role of the national parliaments in the European Union from the perspective of both, international and national levels of legal order has been changing as the European Union as the whole has been changing too. In general we may say that it has been strengthening as the time was passing to the

present state when national parliaments may achieve (in cooperation with other parliaments) review or even withdrawal of the legislative act of the European union from the legislation process or initiate a proceeding in the Court of Justice of the European Union on the grounds of breach of the principles of subsidiarity and proportionality by legislative act of the EU. The biggest milestone in reference to the power of the national parliament to influence the legislative processes of the legislative acts of the European union from the international point of view presents Lisbon's Treaty adoption in 2007 and the adoption of its protocols No. 1 (*Protocol on the role of national parliaments in the European Union*) and No. 2 (*Protocol on the application of the principles of subsidiarity and proportionality*).

The importance of this adoption lies within the fact, that Lisbon Treaty as the first revision of the founding treaties of the European Union together with their protocols recognized and defined *expressis verbis* the place and role of the national parliaments of the member states in the legislative procedure of the European Union and created the obligation of the European Union's institutions to inform national parliaments during the legislation process about upcoming legislative acts and forwarding draft legislative acts of the Union to them and also the obligation to take into account reasoned opinions of the national parliaments regarding draft legislative acts.

The main instrument or power given to the national parliaments by this amendment is the right to evaluate and assess these legislative acts with regard to the principles of subsidiarity and proportionality. This happens through reasoned opinions made by National parliaments or its committees for European affairs. These are important because based on the number of these statements objecting the breach of the subsidiarity or proportionality principle, the draft legislative act may be reviewed or even withdrawn from the discussion.

The Lisbon Treaty has also given the national parliaments the possibility to take part in the process of amending of the founding treaties in both, long and shortened procedure according to Article 248 and 249 of the EU. This option assures even greater contribution of the national parliaments to the final "image" of the European union and on the way it works and respects member states.

From our point of view, the most powerful tool the National council of the Slovak republic has is the right to file a lawsuit on the grounds of the breach of the principles of proportionality and subsidiarity to the Court of Justice of the European Union. We find this instrument the strongest, because it is the direct way how to potentially get to the point when the act is declared to be void. It is the Rules of procedure of the National Council, where we find exact rules which must be obeyed to file the lawsuit, to select a proper representant of the National council in the court, to bring it to the discussion in the plenary session of the National council and to successfully send it to the Court of Justice of the

European Union to initiate the judicial review of the legislative act. The entitlement for such possibility in international law we find in the Article 263 of the Treaty on the functioning of the European union. In addition we have to once again highlight the fact, that the National Council of the Slovak republic in practical life delegates the vast majority of its powers on its European Affairs' Committee what makes it one of the most important bodies of the Slovak republic taking part in the functioning of the EU.

Beside this direct role of the National council of the Slovak republic in the European Union there is also kind of its indirect role through the power of the National council of the Slovak republic to set binding positions of the Slovak republic on various matters discussed in the Council of the European union according to the provisions of the Constitutional Act No. 397/2004 which may be absolutely different from the original governmental position sent in advance to the National council for consideration . However we do not find this instrument very strong in a practical way. The reasons are very simple. The power of this law and the quality of its implementation vitally depends on the level of political culture and on the personal courtesy of the ministers bound by the certain position. It is so, because on the one hand Constitutional act is clear about the binding character of the position to the member of government but on the other hand it constitutes no sanctions applicable to the member of government if he decides to deviate from the position approved on the National level. The only possible sanction according to the other laws of the Slovak republic is a dismissal of the member of parliament, but this is only theoretical sanction, not directly bound to such a deviation.

As we are discussing the role of the political bodies as the parliaments with no doubts are, we cannot miss out the opportunity to conclude a little on a role of political platforms as a COSAC platform. COSAC is an important political instrument gathering twice a year to discuss amidst Member States's European Affairs committees members the most important and the hottest topics of certain period which have quite strong influence on political and common life in European Union and in the world. As the politics is the instrument of creation and change and last but not the least of an application of law, we cannot underestimate the influence of this meetings as they may become a place of important discussions to influence the general image of the European Union and its law. European Union also creates a tools and platforms for national parliaments to share and find useful information in their agenda. As an example of such a platform we may use *IPEX - European centre for interparliamentary exchange* what basically is an exchange platform for member states parliaments including various documents of EU institutions. European Union also created a various think- tanks and research centers. As an example we may use *European Centre for Parliamentary research and Documentation* which serves as an information channel

usable whenever certain parliament needs to know more about procedures and policies in other EU countries as we have already mentioned.

In the end I just would like to conclude, that role of the National council in the European Union and its functioning is of an unmissable importance but more direct competences influencing in the more direct way the final form of the European law are given to the Government of the Slovak republic which is under control of the National council and is directly responsible to her so, what matter most is the quality of political culture, cooperation in the governing majority amidst institutions which it controls and the way National council fulfills the powers given to her in this area. Direct parliamentary role of the National council in the European Union in legal terms we do not assess as extraordinarily strong so it depends on the quality of work of the certain political representation how much influence it gets.

Bibliography

Books

Bröstl, A., & kolektív. (2015). "Ústavné právo Slovenskej republiky" (3rd revised ed.). Plzeň. ISBN 978-80-7380-580-7.

Drgonec, J. (2019). "Ústava Slovenskej republiky (Veľké komentáre)" (2nd ed.). Bratislava: CHBeck.

Jánošíková, M. (2013). "Repetitórium práva Európskej únie." Bratislava: Iuris Libri. ISBN 978-80-89635-04-7.

Legal Documents

Treaty on the European Union

Available here: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html> - new-2-51

Treaty on the Functioning of the European Union

Available here: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html> - new-2-52

Protocols to the Treaty of Lisbon (No.1 & No. 2)

Available here: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html> - new-2-52

The Constitution of the Slovak republic

Available here: <https://www.nrsr.sk/web/default.aspx?SectionId=124>

Constitutional Act No. 397/2004

Available here : <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/397/>

The Rules of procedure of the National Council of the Slovak republic.

Available here: https://www.nrsr.sk/web/Static/en-US/NRSR/rules_of_procedure_20230101.pdf

Reasoning of an amendment No. 187/2011 Z.z. to an Act No. 350/1996 Z.z.

Available here: <https://www.najpravo.sk/dovodove-spravy/rok-2011/187-2011-z-z.html>

Online articles

OROSZ, L. *Dvadsať rokov Ústavy Slovenskej republiky. Článok*, 2012.

Available here: <https://cejsh.icm.edu.pl>

BALOG, B. (2009). "MEDZINÁRODNÉ ZMLUVY V ÚSTAVNOM SYSTÉME SLOVENSKEJ REPUBLIKY." In Dny práva – 2009 – Days of Law: the Conference Proceedings (1st ed.). Brno: Masaryk University. ISBN 978-80-210-4990-1

Available here: <https://www.law.muni.cz>

Lisbon Treaty (Article)

Available here : <https://www.europskaunia.sk/lisabonska-zmluva>

ZSÓFIA FARKAS*

The role of international payment systems, with particular regard to SWIFT and SEPA schemes

Abstract: This study explores the evolution and current state of international payment systems, with a focus on two major systems: SWIFT and SEPA. Despite its prevalence, SWIFT faces significant challenges, including high costs, slow processing times, and vulnerability to political manipulation. In contrast, SEPA offers a more efficient and cost-effective solution for cross-border payments within Europe, processing transactions within a single day. The study delves into the legal complexities associated with these systems, particularly data privacy and regulatory compliance for SWIFT, and harmonizing regulations across countries for SEPA. It also addresses broader issues such as the SWIFT ban on Russian banks and the risks of money laundering in correspondent banking. Emerging alternatives to SWIFT, such as Russia's System for Transfer of Financial Messages and China's Cross-Border Interbank Payment System, are examined for their potential to provide faster, cheaper, and more secure international transactions. This analysis underscores the dynamic nature of international payment systems and the ongoing efforts to address its inherent challenges.

Keywords: international payment systems, SWIFT, SEPA, alternatives to international payments, SWIFT ban against Russian banks

1. Introductory thoughts

International payments, also known as cross-border payments or global payments, involve transactions that extend beyond traditional banking institutions, linking companies, individuals, banks, and settlement entities across at least two different countries with various currencies, necessitating payment.

The need to transfer funds between distant locations emerged with industrialization. In the late 19th century, Western Union, originally a telegraph company, began facilitating money transfers through "wiring" to other locations. A sender would deposit money at one office for the operator to send a message and "wire" the money to be collected by the recipient at another office. Shortly after, banks adopted the wire method to telegraphically transfer funds from one location to another, leading to the development of EFT (Electronic Funds Transfer), which is still utilized today in banking applications for local money transfers.¹

* Farkas Zsófia, Miskolci Egyetem, Deák Ferenc Állam-és Jogtudományi Doktori Iskola. Témavezető: Prof. Dr. Nagy Zoltán egyetemi tanár

¹SPENCER, T.: *Wire Transfers: A Guide to What Banks Charge*. NerdWallet. March 25 2016.

Subsequently, banks adopted the SWIFT (Society for Worldwide Interbank Financial Telecommunication) network for relaying international payments securely. One notable characteristic of these modes of money transfer up to this point is the time it takes for the recipient to receive funds, which can span days or even weeks.²

Looking into the future of international payment systems, it is highly probable that ongoing payment and messaging initiatives will continue to impact financial institutions, from the largest global banks to the smallest credit unions. Moreover, these initiatives will affect stakeholders across various banking sectors involved in payment and messaging processing. Looking ahead, the pace of change is expected to accelerate with the introduction of innovative technologies.

In this study, two major cross-border payment systems, SWIFT and SEPA, will be discussed. My aim is to highlight the differences between these two systems, as well as their respective pros and cons. Such an overview is essential to understand the current challenges faced by international payment systems. When considering the legal challenges associated with the SWIFT and SEPA payment schemes, a couple of issues emerge. As for the SWIFT scheme, one major legal concern is related to data privacy and compliance with international regulations. On the other hand, SEPA faces different legal challenges primarily rooted in harmonizing regulations across multiple countries.

Additionally, my aim is to outline the characteristics of European and American payment systems. The disputes between states over payment systems are also a very intriguing, so this paper will briefly address this topic as well. Furthermore, the study focuses on the SWIFT ban against Russian banks and the money laundering issues that arise in illegal but existing payment systems. Correspondent banking is especially vulnerable, involving cross-border payments where the payer and payee may not be known to all parties in the payment chain. The misuse of financial intermediation can have repercussions beyond individual transactions, as it jeopardizes the stability of the institutions involved and potentially the entire financial system. This underscores the necessity for preventive measures against money laundering, in addition to its prosecution as a criminal offense. Finally, the possible alternatives to international payment systems will be discussed.

²ALAM, S.M. I.: *What is SWIFT in International Banking?* January 2022.

2. Overview of the major international payment systems used in the United States of America and in Europe

2.1. The payment system in the United States of America

The evolution of the U.S. payment system has been influenced by several key factors. First of all, the diversity of financial intermediaries offering payment, clearing, and settlement services is significant. In the United States of America over 20,000 institutions provide various services. On one hand, the system includes a range of private payment networks. These private payment networks can vary from local interbank associations and ATM/POS networks to national credit and debit card networks to a major "large-value" electronic funds transfer system. On the other hand, the central bank also plays a vital role by offering a wide array of interbank payment services.³

Another key factor which influences the payment system is the legal and regulatory framework which governs payment activities and financial institutions. Offering payment services in the United States is quite complex and intricate. The system looks as follows: financial institutions in the U.S. can be chartered at either the state or federal level and are regulated by multiple agencies, depending on their charter. The legal principles that apply generally depend on whether the payment method is paper-based or electronic, and on the status of the parties involved, such as consumers, merchants, or financial institutions.⁴

Thirdly, a wide variety of payment instruments and settlement mechanisms exist to meet the needs of financial institutions and their customers. These instruments vary in terms of cost, technology, convenience, funds availability, finality, and whether they are intended for consumer, commercial, or interbank transactions. Although large-value electronic funds transfer mechanisms handle most of the dollar value of payments in the U.S., retail transactions are predominantly settled using paper-based instruments, especially cash and cheques. However, the use of electronic payment mechanisms like the Automated Clearing House (ACH) and ATM/POS networks has been rapidly increasing.⁵

The size and complexity of financial markets in the United States have led to significant payment and settlement interdependencies involving the banking

³Board of Governors of the Federal Reserve System: *Federal Reserve Payments Study (FRFS): 2022 Triennial Initial Data Release*, July 27, 2023.

⁴CHENG, J. – TORREGROSSA, J.: *A Lawyer's Perspective on U.S. Payment System Evolution and Money in the Digital Age*. FEDS Notes. Washington: Board of Governors of the Federal Reserve System, February 04 2022.

⁵KAIMAN, M.: *Payment Systems Evolution: How Does Money Move from a Buyer to Seller?* Page One Economics, January 2024.

system, money and capital markets, and associated derivative markets. Market participants and the Federal Reserve have long pursued measures to strengthen major US payment mechanisms, enhance processing efficiency, and reduce payment system risks.⁶

As for the general legal framework in the United States, the payment system is governed by a combination of state and federal statutes, regulations, and case law. The legal principles that apply generally depend on the method of payment, whether it is paper-based or electronic. Moreover, in some cases, the status of the parties involved, such as consumers, merchants, or financial institutions.

At the state level, the Uniform Commercial Code (UCC) plays a crucial role. The UCC provides model statutes governing various commercial and financial activities, including specific articles related to payment and settlement activities:

- Article 3 (negotiable instruments)⁷: covers the use of negotiable instruments like checks and promissory notes.
- Article 4 (bank deposits and collections)⁸: governs the relationship between banks and their customers concerning deposits and collections.
- Article 4A (funds transfers)⁹: pertains to wholesale credit transfers, including Automated Clearing House (ACH) transfers.
- Article 8 (investment securities)¹⁰: deals with the transfer of investment securities.

Each of these articles above has been incorporated into the laws of all states, sometimes with local variations, to ensure a uniform approach to commercial transactions across the United States.

Private clearing and settlement arrangements also have their own rules and membership agreements, creating a contractual framework within the governing law. The Federal Reserve, which plays a critical role in the payment system, provides a wide range of interbank payment services. Federal Reserve regulations and operating circulars define the terms and conditions for these services, ensuring consistency and reliability across the payment infrastructure.¹¹ This multi-layered legal and regulatory framework ensures the robustness and reliability of the U.S.

⁶CHENG, J. – TORREGROSSA, J.: *A Lawyer's Perspective on U.S. Payment System Evolution and Money in the Digital Age*. FEDS Notes. Washington: Board of Governors of the Federal Reserve System, February 04 2022.

⁷U.C.C. § 3-104 (2002).

⁸U.C.C. § 4-104 (2002).

⁹U.C.C. § 4A-104 (2002).

¹⁰U.C.C. § 8-104 (2002).

¹¹Board of Governors of the Federal Reserve System: *Annual Report of the Board of Governors of the Federal Reserve System*, 2021,

payment system while allowing for innovation and adaptability to new technologies and payment methods.

2.2. Payment systems in Europe

Generally speaking, payments are made via two different systems in Europe: the SWIFT and the SEPA. SWIFT is the world's oldest international financial transfer system, dating back to the 1970s. Today, it is used by over 11,000 institutions in 200 countries. To illustrate the situation, nearly half (40%) of international transfers use the SWIFT system.¹² On the other hand, SEPA (Single Euro Payment Area) is a European payment network. The SEPA system, fully introduced in 2014, is currently used by 38 European countries, including several that are not part of the eurozone or the European Union, such as Iceland, Switzerland, and the United Kingdom. However, a pertinent question arises: what delineates these systems in terms of their *modus operandi* for executing international bank transfers?

2.2.1. SWIFT scheme

For better understanding the difference between the SWIFT and the SEPA scheme, it is essential to first have a look at the SWIFT scheme. SWIFT is a cooperative society headquartered in Belgium, and it is not owned by any single country. Governed by a board of directors consisting of representatives from its members, SWIFT was established in 1973 under Belgian law. Its primary objective was to create a secure and efficient messaging system for banks and financial institutions to communicate and conduct transactions globally. Today, SWIFT counts over 11,000 members across more than 200 countries and territories worldwide.¹³

Although SWIFT is not owned by any country, it operates within the legal frameworks of the countries in which it functions. Additionally, it is subject to the regulations and oversight of various regulatory authorities, including central banks and financial supervisory bodies. SWIFT offers a range of compliance solutions and services to assist its members in adhering to anti-money laundering (AML) and counter-terrorism financing (CTF) regulations. These solutions encompass

¹²GÓRKA, J. – VAN HOVE, L. – LEINONEN, H. – KRUEGER, M. – SEITZ, F. – HARASIM, J. – JONKER, N. – BARTZSCH, N. – BOTT, J. – MILKAU, U.: *Transforming Payment Systems in Europe*. Palgrave Macmillan, 2016.

¹³KÖPPEL, J.: *Annex 1: The History and Detailed Functioning of SWIFT*. In: *The SWIFT Affair*. Graduate Institute Publications. 6 September 2011;

tools for screening transactions and customers, as well as services for sharing and exchanging Know Your Customer (KYC) information.¹⁴

As a pivotal component of the global financial system, the SWIFT network plays a crucial role in combating financial crime. It has developed an array of tools and services to help its members detect and prevent financial crimes, including transaction monitoring, sanctions screening, and fraud detection. Despite its strengths, SWIFT has faced criticism regarding its transparency and accountability. Critics argue that the organization can be opaque and challenging to hold accountable.¹⁵ Concerns have also been raised about its governance structure, which is controlled by its member banks. In response, SWIFT has increased its transparency and accountability by establishing a new oversight body, the SWIFT Board¹⁶, to set strategic direction and oversee management. Efforts have also been made to engage more with stakeholders and improve communication and reporting.

SWIFT faces competition from emerging technologies like blockchain and distributed ledger technology, which offer new and potentially disruptive methods for facilitating cross-border payments. In response, SWIFT has explored these technologies and developed new services, such as SWIFT GPI, which aim to enable faster and more transparent cross-border payments.¹⁷ While the SWIFT payment system is widely recognized for facilitating international financial transactions across different currencies, it is essential to also consider the SEPA system for several key reasons.

2.2.2. SEPA scheme

The Single Euro Payments Area (SEPA) was introduced to enhance the efficiency of small-value payments within the EU by establishing a unified legal framework, common standards, and a shared infrastructure. Despite the introduction of the euro, which many expected to unify clearing and settlement flows, the diverse national payment regulations led to fragmented markets. SEPA aims to address this by creating a seamless payments area across Europe.¹⁸

¹⁴CIPRIANI, M. – GOLDBERG, L. – LA SPADA, G.: Financial Sanctions, SWIFT, and the Architecture of the International Payment System. *Journal of Economic Perspectives*. 2023/37. 31-52.

¹⁵REUTERSKIÖLD, C.: *SWIFT*. Stockholm: March 2006.

¹⁶SCOTT, S. V. – ZACHARIADIS, M.: *Origins and development of SWIFT, 1973-2009*. Business History, 2012/54(3), 462-482.

¹⁷Bank for International Settlements: *SWIFT gpi data indicate drivers of fast cross-border payments*. Committee on Payments and Market Infrastructures, 8 February 2022;

¹⁸BOLT, W. – HUMPHREY, D.: Reducing payment processing costs: Scale economies and SEPA, *Journal of Payment Strategy and Systems*, 2008.

Since the early 2000s, the European Commission and the European Central Bank (ECB) have spearheaded the SEPA initiative, with significant contributions from the European Payments Council (EPC). The EPC, formed by the EU banking community, has played a crucial role in developing the SEPA project and a comprehensive pan-European payment toolkit. The development of this toolkit considered the general EU-wide framework for payment services, notably the Payment Services Directive issued in 2007 and its revised version (PSD2) issued in 2015. These directives established common standards and procedures for payment models, making their application mandatory for payment service providers connected to these models.¹⁹

Regulation (EU) No 260/2012²⁰ mandated the transition to SEPA credit transfer and SEPA direct debit payment methods by February 1, 2014, for euro area countries, and by October 31, 2016, for non-euro area member states. Consequently, countries like Hungary must apply SEPA standards for all euro transactions.²¹ Additionally, common rules for instant payments have been established, although their provision to customers is not yet mandatory. The ECB strongly encourages the adoption of SEPA instant credit transfers to enhance service availability.

Payments and related services across EU member states are governed by different legal frameworks. SEPA, as an integrated payments market, necessitates a common legal basis provided by the Payment Services Directive. This directive not only facilitates the operational implementation of SEPA instruments but also harmonizes the legal framework, aiding their adoption by the banking industry and end-users. The Payment Services Directive's scope extends beyond euro transactions, covering payments in any currency, with all EU member states required to transpose it into national law by November 1, 2009.²²

As for the member states, currently, SEPA counts 36 countries, including 27 EU member states, as well as Iceland, Liechtenstein, Norway, Switzerland, the United Kingdom, and smaller nations like Andorra, San Marino, Vatican City, and Monaco.²³ This initiative ensures that both domestic and cross-border payments within these countries follow a unified set of payment instruments, eliminating distinctions between national and cross-border transactions.

¹⁹SILVA, V. – ARRANHADO, E. – VIEIRA, C.: The impact of SEPA in credit transfer payments: Evidence from the euro area. *Research in International Business and Finance*. 2016/38.

²⁰Regulation (EU) No. 260/212.

²¹Magyar Nemzeti Bank: *SEPA, The Single Euro Payments Area*.

²²Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC..

²³European Central Bank: *Single Euro Payments Area (SEPA)*.

Domestic banks facilitate SEPA credit transfers, accessible via mobile and web banking applications under cross-border or foreign currency transfers. While most banks charge similar fees for SEPA and domestic transfers, some banks in non-euro countries may impose additional charges for SEPA transfers. For instance, Hungarian banks might offer free SEPA transfers within the EEA but charge a fee for transfers outside the EEA.²⁴

2.2.3. Differences between SWIFT and SEPA schemes

The differences between SWIFT and SEPA payment schemes are significant in terms of cost, speed, and geographical scope, impacting their suitability for various types of transactions. Firstly, SWIFT transfers typically take 2-5 working days to process. The time frame can be influenced by factors such as anti-fraud and anti-money laundering procedures, intermediary bank involvement, and banking holidays or specific processes in different countries. These transfers often incur costs ranging from €15 to €50, and currency conversion fees can add an additional 3-5% of the transfer amount. SWIFT is a global network used in over 200 countries and supports transactions in multiple currencies.²⁵

On the other hand, SEPA is designed for euro-denominated transfers within 36 European countries, as mentioned above. SEPA transfers are generally faster, with standard transfers taking up to one working day and instant transfers being processed within seconds, even on holidays and weekends. SEPA transactions are also more cost-effective, often free or with minimal fees, and are not subject to currency conversion charges as they only involve euro accounts.

A key advantage of SEPA is its simplicity. Only an IBAN (International Bank Account Number) is required to initiate a transfer, unlike SWIFT which requires detailed recipient information including SWIFT/BIC codes.²⁶ SEPA is also preferred for its reliability and lower costs for intra-European transactions, while SWIFT remains essential for international transfers outside the SEPA zone.

In summary, while SEPA is ideal for fast, low-cost euro transfers within Europe, SWIFT is better suited for global transactions involving different currencies despite being slower and potentially more costly. The choice between the two depends on the specific needs of the transaction, such as the destination, currency, and urgency.

²⁴Magyar Nemzeti Bank: *SEPA, The Single Euro Payments Area*.

²⁵REUTERSKIÖLD, C.: *SWIFT*. Stockholm: March 2006.

²⁶BERGMAN, M. – GUIBOURG, G. – SEGENDORF, B.: *The Costs of Paying - Private and Social Costs of Cash and Card Payments*. Sveriges Riksbank Working Paper No. 212, 2017.

2.2.4. Legal challenges the SWIFT and the SEPA schemes are facing

When considering the legal challenges associated with the SWIFT and SEPA payment schemes, a couple of issues emerge.

As for the SWIFT scheme, one major legal concern is related to data privacy and compliance with international regulations. Given SWIFT's global reach, it must adhere to diverse and often conflicting regulations from different jurisdictions. For instance, data protection laws like the European Union's General Data Protection Regulation (GDPR) impose strict requirements on how personal data is handled, potentially clashing with regulations from other countries that may demand access to such data for security or tax purposes. Furthermore, SWIFT's role in sanction enforcement creates legal challenges, as the network must navigate the complex terrain of international sanctions, ensuring compliance without violating the laws of other jurisdictions.²⁷

On the other hand, SEPA faces different legal challenges primarily rooted in harmonizing regulations across multiple countries. The SEPA initiative aims to unify euro-denominated payments across Europe, but this unification requires consistent regulatory standards across all member states, which can be difficult to achieve. The Payment Services Directive (PSD) and its revised version, PSD2, are critical in establishing this common framework, yet their implementation varies by country, leading to potential inconsistencies and legal uncertainties. Additionally, SEPA must ensure compliance with Regulation (EU) No 260/2012, which sets technical and business requirements for credit transfers and direct debits, presenting challenges in maintaining uniformity and addressing the specific legal landscapes of non-euro countries participating in SEPA.²⁸

Overall, both SWIFT and SEPA must navigate complex regulatory environments, balancing the need for security, data protection, and regulatory compliance across multiple jurisdictions, which can lead to significant legal challenges.

3. Challenges the international payments system is facing

The current international payments system has been essentially unchanged for decades, with a structure characterised by correspondent banking networks and a dominant interbank messaging system. In addition to the still high costs and time requirements of international payments, the use of the payment system as a political instrument and the gradual shift of economic power towards Asia point

²⁷SWIFT, SEPA and Faster Payments: *What's the difference?* February 12, 2024.

²⁸European Payments Council: *SEPA political, legal and regulatory framework*.[_](#)

to a possible future renewal of the international payment system. The multilateralisation of national digital central bank currencies and their interconnection could become a channel for future international payments.²⁹

For both international and domestic payments, the final settlement between banks is typically in the form of central bank money, as this is the only truly risk-free instrument. These settlements take place in large-value payment systems (LVPS, such as VIBER, operated by the Hungarian National Bank) operated by local central banks, which are typically able to settle incoming transactions instantaneously during opening hours (real time gross settlement, RTGS). However, the different national LVPS systems are islands, linked mainly by a network of correspondent banks, formed by international financial institutions, through which the transaction is routed. If the sending and/or receiving parties are located in smaller countries and do not have strong international connections, this chain may involve up to 5 or 6 banks, which can significantly increase both the associated costs and the processing time.³⁰

3.1. State-to-state dispute over payment systems

Legal disputes between states on international payments often revolve around issues such as currency manipulation, economic sanctions, and compliance with international financial regulations. These disputes can be brought before various international bodies, including the International Court of Justice (ICJ) and arbitration tribunals.

One notable example of such a dispute is the "Lockerbie Case"³¹ (*Libya v. United Kingdom* and *Libya v. United States*), which involved accusations of state-sponsored terrorism and the imposition of economic sanctions by the UK and the US against Libya. Libya brought the case to the ICJ, arguing that the sanctions were unlawful under international law. The ICJ's involvement highlighted the complexities of balancing state sovereignty with international legal obligations regarding financial sanctions.³²

²⁹BORSÁNYI, S. – VARGA, L.: *Recseg-rópog a nemzetközi fizetések fél évszázados rendszere (A digitális jegybankpénzek geopolitikai vetülete 1. rész)*. Magyar Nemzeti Bank. June 7 2023.

³⁰Bank for International Settlements. *The role of central bank money in payment systems*. Committee on Payment and Settlement Systems, August 2003;

³¹International Court of Justice (ICJ): Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*). Judgement of 27 February 1998. International Court. <https://www.icj-cij.org/sites/default/files/case-related/89/089-19980227-JUD-01-00-EN.pdf>.

³²GOWLLAND-DEBBAS, V.: The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case. *American Journal of International Law*. 1994/88(4), 643-677; <https://doi.org/10.2307/2204134>.

Another example is the dispute between India and Pakistan over the Indus Waters Treaty³³, which involved arbitration to resolve disagreements on water-sharing rights that had significant economic implications. The case was brought to the Permanent Court of Arbitration, demonstrating how economic and financial disputes can also intersect with broader resource management issues.

Furthermore, disputes over international payments can also arise in the context of alleged currency manipulation. For instance, countries may bring cases to the World Trade Organization (WTO) if they believe another state is manipulating its currency to gain an unfair trade advantage.³⁴ Such disputes require detailed analysis and adjudication based on complex financial data and international trade laws.

These examples illustrate the range of legal mechanisms available for resolving disputes over international payments, from the ICJ to arbitration and the WTO. Each case typically involves intricate legal arguments and requires states to navigate the interplay between domestic interests and international legal frameworks.

3.2.SWIFT ban against Russian banks

SWIFT is used by thousands of financial institutions in more than 200 countries, previously including Russia, and provides a secure messaging system to facilitate cross-border money transfers.³⁵ According to the Russian National SWIFT Association, around 300 banks use SWIFT in Russia, with more than half of Russian credit institutions represented in SWIFT. Russia has the second highest userbase after the United States of America.³⁶

In 2022, pursuant to international and multilateral action to intensify financial sanctions against Russia, specialised financial messaging providers, such as SWIFT, were prohibited from providing services to designated entities under EU Council Regulation (EU) 833/2014.³⁷ As SWIFT is incorporated under Belgian law and must comply with EU regulation, SWIFT disconnected all designated Russian entities (and their designated Russia-based subsidiaries) from its network. Additionally, in compliance with EU Council Regulation (EU) 765/2006³⁸

³³The Indus Waters Treaty (1960) between India, Pakistan and the International Bank for Reconstruction and Development.

³⁴STANFORD, J.E.: *Currency Manipulation: The IMF and WTO*. Congressional Research Service, January 28 2011.

³⁵CBC News: *How expelling Russia from SWIFT could impact the country. And why there's reluctance to do so*. February 26 2022.

³⁶GOLLOM, M.: *How expelling Russia from SWIFT could impact the country. And why there's reluctance to do so*. CBC News. February 22, 2022. <https://www.cbc.ca/news/world/russia-swift-ukraine-1.6363611>.

³⁷Regulation (EU) No. 833/2014.

³⁸Regulation (EU) No. 765/2006.

containing similar prohibition, SWIFT also disconnected designated Belarusian entities (and their designated Belarus-based subsidiaries).

However, this was not the first time that SWIFT has disconnected banks for sanctions purposes. In 2012, pursuant to international and multilateral action to intensify financial sanctions against Iran, EU Regulation 267/2012³⁹ was passed. The Regulation prohibits specialised financial messaging providers, such as Swift, from providing services to EU-sanctioned Iranian banks. Swift is incorporated under Belgian law and has to comply with this decision as confirmed by its home country government. Swift implemented the regulatory obligation by disconnecting the related EU-sanctioned banks.

The recent SWIFT sanctions against Russia, implemented in response to its invasion of Ukraine, mark a significant regulatory and legal maneuver in the global financial system. These sanctions involve excluding several major Russian banks from the SWIFT network, which effectively cuts them off from the international banking system, complicating cross-border transactions and financial communications.

From a legal regulatory perspective, the sanctions were coordinated primarily by the United States, the European Union, and their allies. The legal framework for these sanctions falls under various national and international laws designed to enforce economic measures against entities that pose a threat to international security and stability. In particular, the EU's legal actions are grounded in Council Regulation (EU) No 269/2014⁴⁰ concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine. The U.S. sanctions are enforced under the International Emergency Economic Powers Act⁴¹ (IEEPA), which grants the President authority to regulate commerce in response to a national emergency that threatens the United States.

The impact of these sanctions is multifaceted. Legally, they aim to cripple Russia's financial infrastructure by restricting access to the global financial messaging system that underpins international banking transactions. Economically, they seek to exert pressure on the Russian economy by isolating it from the global financial system, thereby making it more difficult for Russian banks to process international payments and for businesses to conduct international trade.

Moreover, the sanctions have prompted Russia to seek alternative methods for international transactions, including the development of its own financial

³⁹Regulation (EU) No. 267/2012.

⁴⁰Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine..

⁴¹International Emergency Economic Powers Act, United States Congress, Senate Report No. 110-82.

messaging system, the System for Transfer of Financial Messages (SPFS), and increased use of China's Cross-Border Interbank Payment System (CIPS) (CSIS). However, these alternatives are not yet as widely adopted or as effective as SWIFT, leading to significant logistical and financial challenges for Russian entities.⁴²

Overall, the SWIFT sanctions against Russia underscore the power of financial networks in international regulatory enforcement and highlight the interconnectedness of global banking systems. These measures are part of broader efforts to impose economic costs on Russia for its actions in Ukraine and demonstrate the strategic use of financial tools in geopolitical conflicts.

3.3. Money laundering issues, non-legal but existing payment systems

Banks are particularly vulnerable to being exploited for money laundering purposes. Private banking or asset management services may be utilized for "layering" or "integration" of illicit funds, while credit card or automated teller machine (ATM) services can be utilized for the "placement" of illegal funds.⁴³

International payment services enable money launderers to transfer funds globally, creating layers that obscure the origins of the funds. Correspondent banking is especially vulnerable, involving cross-border payments where the payer and payee may not be known to all parties in the payment chain. Similarly, cryptoassets pose similar risks.

The misuse of financial intermediation can have repercussions beyond individual transactions, as it jeopardizes the stability of the institutions involved and potentially the entire financial system. This underscores the necessity for preventive measures against money laundering, in addition to its prosecution as a criminal offense.

4. Alternatives to international payments

The challenges within the realm of international payments have sparked interest in alternative solutions from a variety of stakeholders. For instance, due to SWIFT's dominant market position, the Federal Reserve established Fedwire⁴⁴ to handle domestic transfers in the US, while the ECB, in order to ensure independence from the messaging service provider, connected to the SIA-Colt

⁴²CIPRIANI, M. – GOLDBERG, L. – LA SPADA, G.: Financial Sanctions, SWIFT, and the Architecture of the International Payment System. *Journal of Economic Perspectives*. 2023/37. 31-52.

⁴³MATEJIC, I. – ČURČIĆ, M.: *The role of electronic payments in money laundering*. 2022.

⁴⁴ARMANTIER, O. – MCANDREWS, J. – Arnold, J.: Changes in the Timing Distribution of Fedwire Funds Transfers. *Economic Policy Review*, 2008/14(2); <http://dx.doi.org/10.2139/ssrn.1141334>.

group messaging system alongside SWIFT. However, these efforts primarily aim to break SWIFT's domestic monopoly rather than altering the landscape of international or non-EU transactions.⁴⁵

Two notable implementations addressing the latter concern are the Russian-developed SPFS⁴⁶ (System for Transfer of Financial Messages) and the Chinese CIPS⁴⁷ (Cross-Border Interbank Payment System). SPFS was launched in 2014 as a response to Russia's consideration of disconnecting from SWIFT. Similar to SWIFT, SPFS serves as a messaging system connecting banks, albeit with a significantly smaller maximum file size. Initially, 331 institutions were connected to the system, including Russian banks, some Belarusian, Kyrgyz, Kazakh, Armenian, Tajik, and Cuban institutions, as well as a German and a Swiss bank. Though the Central Bank of Russia has ceased publishing the list of participants, the latest announcement indicates that the number of members exceeds 400. While SPFS facilitates domestic payments within Russia, international transactions are limited to a small number of countries, and there is no indication of this changing in the near future. While the system can send messages, it does not replace correspondent banking chains. Nevertheless, it can replace SWIFT dependency for domestic payments and payments involving countries with affiliated foreign banks.⁴⁸

CIPS, developed by the Chinese central bank, has been operational since 2015. Unlike SWIFT and SPFS, CIPS is not a messaging system; rather, it is utilized to settle domestic and foreign renminbi transactions in central bank money. The Chinese central bank aims to increase the international use of the renminbi with this system. Although a significant number of European and American entities have joined the system, it still handles only a small proportion of global cash flows. Its expansion is hindered by the limited international use of the renminbi outside the East Asian region and concerns regarding the management of the Chinese central bank, seen as a major risk by Western entities.⁴⁹

There were reports in 2019 and 2022 suggesting that Russia and China are working towards linking the two systems. However, detailed information is lacking, and the technical feasibility of such a solution is questionable. Even in the event of successful interconnection, only a fraction of global cash flows would be settled within these systems, as settlements would be limited to ruble or yuan

⁴⁵*Ibid.*

⁴⁶Bank of Russia: *Financial Messaging System of the Bank of Russia – SPFS*. National Payment System Department, 2024.

⁴⁷Cross-Border Interbank Payment System: Introduction to CIPS and Its Role in International Banking.

⁴⁸Bank of Russia: *Financial messaging system of the Bank of Russia (SPFS)*. 2022. http://www.cbr.ru/eng/Psystem/fin_msg_transfer_system/.

⁴⁹CIPS: *Cross-Border Interbank Payment System. Wherever There Is RMB, There Is CIPService*. 2022.

transactions, which currently constitute a negligible share of the total according to SWIFT data (less than 0.2 percent for ruble and 2.2 percent for yuan). While a linkage would facilitate the increased use of ruble and yuan, this process would likely take time, making a rapid market shift away from the dollar unlikely, albeit not impossible with significant political backing.⁵⁰

In theory, crypto-assets could serve as an alternative to the current correspondent banking system. However, existing networks' capacity to handle large transaction volumes is limited, and the necessary migration of banking systems poses a short-term obstacle. Additionally, the volatility of crypto-asset prices appears to be a deterrent, although stablecoins could potentially address this issue. Moreover, converting crypto-assets, particularly in large quantities, into traditional central bank or commercial bank money could be problematic due to liquidity issues and the often uncertain status and ownership of crypto exchanges.⁵¹

Of the potential future alternatives to the current international payment system, two options seem particularly viable. The first involves interconnecting instant payment systems for different currencies, a concept already under discussion. The second option involves the emergence and interconnection of digital central bank money issued by various central banks. While the adoption of private digital currencies requires a high level of investor confidence, digital currencies issued by central banks offer security. Developed with a focus on inter-bank use, digital central bank money could effectively manage cross-border cash flows, offering an alternative to the entire financial infrastructure for international payments, including communication platforms and correspondent banks.⁵²

5. Concluding thoughts

The current international payment system, dominated by SWIFT, has remained essentially unchanged for decades, characterized by correspondent banking networks and a dominant interbank messaging system. Despite its widespread use, this system has several drawbacks, including high costs, time requirements, and the use of the payment system for political purposes.

In response to these challenges, several alternative systems have emerged. The Single Euro Payments Area (SEPA) has proven to be a faster and more cost-effective scheme for handling international transfers, particularly within

⁵⁰AGGARWAL, P.: *How U.S. Sanctions are Fostering Innovative Strategies for Resiliency in Russia*. The Fletcher School, Tufts University, October 2018.

⁵¹Bank for International Settlements: *The Future Monetary System*. Annual Report, 2022.

⁵²SWIFT Accenture: *Exploring central bank digital currencies: How they could work for international payments*.

participating countries. SEPA offers cross-border transfers that can be processed within one working day, and even faster with instant credit transfers.

Another alternative to SWIFT is the development of new messaging systems, such as the Russian-developed System for Transfer of Financial Messages (SPFS) and the Chinese Cross-Border Interbank Payment System (CIPS). These systems aim to provide more efficient and cost-effective alternatives to SWIFT, particularly for domestic payments and transactions with affiliated foreign banks.

Looking ahead, the future of the international payment system may involve the interconnection of instant payment systems for different currencies and the emergence of digital central bank money issued by central banks. These developments could offer more secure and efficient alternatives to the current financial infrastructure for international payments, reducing costs and processing times while increasing transparency and traceability.

Bibliography

Legal sources

Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02014R0269-20240314>.

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02015L2366-20240408>.

International Court of Justice (ICJ): Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*). Judgement of 27 February 1998. International Court. <https://www.icj-cij.org/sites/default/files/case-related/89/089-19980227-JUD-01-00-EN.pdf>.

International Emergency Economic Powers Act, United States Congress, Senate Report No. 110-82. <https://www.congress.gov/congressional-report/110th-congress/senate-report/82/1?outputFormat=pdf>

Regulation (EU) No. 260/2012. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R0260>.

Regulation (EU) No. 267/2012. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0267>.
Regulation (EU) No. 765/2006. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R0765>.
Regulation (EU) No. 833/2014. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0833>.
The Indus Waters Treaty (1960) between India, Pakistan and the International Bank for Reconstruction and Development. <https://treaties.un.org/doc/Publication/UNTs/Volume%20419/volume-419-I-6032-English.pdf>.
U.C.C. § 3-104 (2002).
U.C.C. § 4-104 (2002).
U.C.C. § 4A-104 (2002).
U.C.C. § 8-104 (2002).

Books and monographies

AGGARWAL, P.: *How U.S. Sanctions are Fostering Innovative Strategies for Resiliency in Russia*. The Fletcher School, Tufts University, October 2018.
GÓRKA, J.–VAN HOVE, L.–LEINONEN, H.–KRUEGER, M.–SEITZ, F.–HARASIM, J.–JONKER, N.–BARTZSCH, N.–BOTT, J. –MILKAU, U.: *Transforming Payment Systems in Europe*. Palgrave Macmillan, 2016. <https://doi.org/10.1057/9781137541215>
KÖPPEL, J.: *Annex 1: The History and Detailed Functioning of SWIFT*. In: *The SWIFT Affair*. Graduate Institute Publications. 6 September 2011; <https://doi.org/10.4000/books.iheid.323>.
REUTERSKIÖLD, C.: *SWIFT*. Stockholm: March 2006.
SCOTT, S.V. – ZACHARIADIS, M: *The Society for Worldwide Interbank Financial Telecommunication (SWIFT): Cooperative governance for network innovation, standards and community*. Routledge. October 30, 2013. <https://doi.org/10.4324/9781315849324>.
SCOTT, S. V. – ZACHARIADIS, M.: *Origins and development of SWIFT, 1973-2009*. Business History, 2012/54(3), 462-482. <http://doi.org/10.1080/00076791.2011.638502>.

Journals

ARMANTIER, O.–MCANDREWS, J.– Arnold, J.: *Changes in the Timing Distribution of Fedwire Funds Transfers*. *Economic Policy Review*, 2008/14(2); <http://dx.doi.org/10.2139/ssrn.1141334>.

BOLT, W. – HUMPHREY, D.: Reducing payment processing costs: Scale economies and SEPA, *Journal of Payment Strategy and Systems*, 2008. <https://doi.org/10.69554/UQNL1912>.

CIPRIANI, M.–GOLDBERG, L.–LA SPADA, G.: Financial Sanctions, SWIFT, and the Architecture of the International Payment System. *Journal of Economic Perspectives*. 2023/37. 31-52. <https://doi.org/10.1257/jep.37.1.31>.

GOWLLAND-DEBBAS, V.: The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case. *American Journal of International Law*. 1994/88(4), 643-677; <https://doi.org/10.2307/2204134>.

SILVA, V.–ARRANHADO, E.–VIEIRA, C.: The impact of SEPA in credit transfer payments: Evidence from the euro area. *Research in International Business and Finance*. 2016/38. <https://doi.org/10.1016/j.ribaf.2016.04.013>.

Online articles and other sources

ALAM, S.M. I.: *What is SWIFT in International Banking?* January 2022; <http://doi.org/10.13140/RG.2.2.23667.60961>.

CBC News: *How expelling Russia from SWIFT could impact the country. And why there's reluctance to do so.* February 26 2022.

CIPS: Cross-Border Interbank Payment System. *Wherever There Is RMB, There Is CIPS.* Service. 2022. <https://www.cips.com.cn/en/index/index.html>.

Cross-Border Interbank Payment System: Introduction to CIPS and Its Role in International

Banking. https://www.cips.com.cn/en/about_us/about_cips/introduction/index.html.

European Central Bank: *Single Euro Payments Area (SEPA)*. <https://www.ecb.europa.eu/paym/integration/retail/sepa/html/index.en.html>.

European Payments Council: *SEPA political, legal and regulatory framework*. <https://www.europeanpaymentscouncil.eu/about-sepa/sepa-political-legal-and-regulatory-framework>.

GOLLOM, M.: *How expelling Russia from SWIFT could impact the country. And why there's reluctance to do so.* CBC News. February 22, 2022. <https://www.cbc.ca/news/world/russia-swift-ukraine-1.6363611>.

KAIMAN, M.: *Payment Systems Evolution: How Does Money Move from a Buyer to Seller?* Page One Economics, January

2024. <https://research.stlouisfed.org/publications/page1-econ/2024/01/02/payment-systems-evolution-how-does-money-move-from-a-buyer-to-seller>.

SPENCER, T.: *Wire Transfers: A Guide to What Banks Charge*. NerdWallet. March 25 2016. <https://www.nerdwallet.com/article/banking/wire-transfers-what-banks-charge>.

SWIFT Accenture: *Exploring central bank digital currencies: How they could work for international payments*. https://www.swift.com/sites/default/files/files/swift-paper-cbdc_0.pdf#:~:text=URI%3A%20https%3A%2F%2Fwww.swift.com%2Fsites%2Fdefault%2Ffiles%2Ffiles%2Fswift.

SWIFT, SEPA and Faster Payments: *What's the difference?* February 12, 2024. <https://blog.payop.com/payments/swift-sepa-and-faster-payments-whats-the-difference/>.

Reuters: *Iran, Russia link banking systems amid Western sanction*. 30 January 2023. <https://www.reuters.com/business/finance/iran-russia-link-banking-systems-amid-western-sanction-2023-01-30/>.

Reports:

Bank for International Settlements: *SWIFT gpi data indicate drivers of fast cross-border payments*. Committee on Payments and Market Infrastructures, 8 February 2022; https://www.bis.org/cpmi/publ/swift_gpi.pdf.

Bank for International Settlements: *The Future Monetary System*. Annual Report, 2022.

Bank for International Settlements. *The role of central bank money in payment systems*. Committee on Payment and Settlement Systems, August 2003; <https://www.bis.org/cpmi/publ/d55.pdf>.

Bank of Russia: *Financial messaging system of the Bank of Russia (SPFS)*. 2022. http://www.cbr.ru/eng/psystem/fin_msg_transfer_system/.

Bank of Russia: *Financial Messaging System of the Bank of Russia – SPFS*. National Payment System Department, 2024. https://www.cbr.ru/Content/Document/File/72210/SPFS_25082022_e.pdf.

BERGMAN, M. – GUIBOURG, G. – SEGENDORF, B.: *The Costs of Paying - Private and Social Costs of Cash and Card Payments*. Sveriges Riksbank Working Paper No. 212, 2017. <https://doi.org/10.2139/ssrn.1022266>.

Board of Governors of the Federal Reserve System: *Federal Reserve Payments Study (FRFS): 2022 Triennial Initial Data Release*. July 27, 2023; <https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm>.

Board of Governors of the Federal Reserve System: *Annual Report of the Board of Governors of the Federal Reserve System*, 2021, <https://www.federalreserve.gov/publications/files/2021-annual-report.pdf>.

BORSÁNYI, S. – VARGA, L.: *Recseg-ropog a nemzetközi fizetések fél éves adatai rendszerére (A digitális jegybankpénzek geopolitikai vetülete 1. rész)*. Magyar Nemzeti Bank. June 7 2023.

CHENG, J. –TORREGROSSA, J.: *A Lawyer's Perspective on U.S. Payment System Evolution and Money in the Digital Age*. FEDS Notes. Washington: Board of Governors of the Federal Reserve System, February 04 2022, <https://doi.org/10.17016/2380-7172.2964>.

Magyar Nemzeti Bank: *SEPA, The Single Euro Payments Area*. <https://www.mnb.hu/en/payments/the-euro/sepa>.

MATEJIC, I.–ĆURČIĆ, M.: *The role of electronic payments in money laundering*, 2022.

STANFORD, J.E.: *Currency Manipulation: The IMF and WTO*. Congressional Research Service, January 282011. <https://sgp.fas.org/crs/misc/RS22658.pdf>.

HANIN GHANEM*

The Conceptual Framework for the Public Administration Contract

Abstract: This paper explores the conceptual framework of administrative contracts, focusing on their distinct features and legal significance within the broader field of public administration. Administrative contracts differ from private contracts in key aspects such as their function in serving the public interest, the role of public entities, and their legal enforceability. By examining existing literature and case law, this study aims to clarify the legal principles and theoretical underpinnings of these contracts.

Keywords: Administrative contracts, public administration, civil contracts, public interest.

1. Introduction:

Administrative contracts are universally recognized as pivotal instruments in modern public administration. Defined by their unique attributes, diverse forms, and critical significance, these contracts play a central role in enhancing the efficiency and effectiveness of governance within the legal frameworks of democratic nations. By enabling public administration bodies to enter into binding agreements aimed at serving the broader interests of the state, administrative contracts have become indispensable tools for institutional governance and economic development.

At their essence, administrative contracts represent a sophisticated legal mechanism that bridges the domains of public governance and private-sector collaboration. They have evolved into essential instruments for implementing and legally formalizing economic development initiatives at both national and international levels. The intricate fusion of administrative, economic, and legal principles highlights the multifaceted nature of these contracts, underscoring their significance in achieving public objectives. Unlike civil contracts, where parties operate on an equal footing, administrative contracts inherently involve an asymmetry of power. Public authorities, acting as custodians of the public interest, hold a privileged position that allows them to impose specific obligations or exercise unilateral rights to ensure the continuity and efficiency of public services. This

* Hanin Ghanem, PhD student, Deák Ferenc Doctoral School of Law, University of Miskolc, Supervisors: Dr. Zsolt Czékman, Associate Professor, Dr. Réka Pusztahelyi, Associate Professor.

inherent imbalance is not a flaw but a feature, reflecting the prioritization of public welfare over individual autonomy.

The conceptual framework of administrative contracts is fundamental to understanding the mechanisms through which governments establish legal agreements with private entities or individuals. These contracts enable the delivery of services, execution of public projects, and fulfillment of administrative objectives, all while striking a balance between the rights of the contracting parties and obligations toward the public interest. Unlike private law agreements, administrative contracts frequently incorporate extraordinary provisions—such as Clauses exorbitant—that grant public authorities unique privileges to safeguard public services and ensure their uninterrupted operation.

This study explores the conceptual framework of administrative contracts through a comparative lens, focusing on Syrian and European legislations. Syrian administrative law, influenced by the French legal tradition due to historical and legal ties, incorporates many foundational principles of French public law. It emphasizes the authority of administrative entities, the primacy of public interest, and a centralized approach to governance. In contrast, European legal systems, particularly in France and Germany, have further refined their administrative frameworks by integrating principles of transparency, accountability, and competitive practices. These advancements are often guided by European Union directives on public procurement, which aim to harmonize administrative practices across member states, promote fairness, and combat corruption.

By comparing the Syrian and European approaches to administrative contracts, this study seeks to identify areas of convergence and divergence, shedding light on the legal, institutional, and cultural factors shaping these frameworks.

2. The emergence of the theory of administrative contracts

The institution of administrative contracts holds great significance within administrative law, particularly in regulating public administrative activities. Historically, these contracts trace their origins to the civil laws of the late 19th and early 20th centuries, with France serving as a pioneer in their development. French administrative law, with its foundational theories and essential elements, has profoundly influenced the evolution of administrative contracts, leaving a lasting impact on the legal systems of numerous countries¹. In contemporary democratic systems, administrative contracts are firmly established, especially within continental European legal traditions that have adopted or adapted principles derived from French law. Many foundational terms and concepts in administrative law can be

¹ EGZON, D.: Legal Changes about Administrative Contracts in Republic of Kosovo, *Acta Universitatis Danubius. Juridica*, 2018/1, 125-138.

traced back to French jurisprudence, underscoring the enduring influence of its legal tradition.

The historical development of administrative contracts highlights their longstanding importance in public law. Initially, these contracts were relatively straightforward, explicitly outlining the rights and obligations of the contracting parties. The state administration's primary role was enforcing the contract, while the other party was responsible for delivering the agreed-upon goods or services. Through these contracts, governments can achieve ambitious goals while fostering economic growth and infrastructural development. Today, the evolution of administrative contracts reflects the increasing complexity of public administration, affirming their indispensable role in modern governance.²

The French State Council has been instrumental in defining the theory of administrative contracts, creating a specialized legal framework tailored to the needs of public administration while safeguarding the public interest. Since its establishment in 1799, the state Conseil has championed the development of an autonomous administrative legal system, distinct from private law.³ This separation was firmly anchored in the landmark Blanco Case (1873), which articulated that issues involving public services fall under the jurisdiction of administrative law⁴. Although the case did not directly address contracts, it provided the philosophical and legal foundation for a distinctive approach to public contracts, emphasizing the centrality of public interest.

A key feature of administrative contracts is their close association with public service, first articulated in the Thérond Case (1910). Here, the state Conseil determined that contracts conferring public service responsibilities—such as waste collection—should be classified as administrative contracts. This decision established public service as a cornerstone of administrative contracts, highlighting their alignment with objectives beyond mere private interests⁵. The state Conseil further enriched the theory in the Vosges Porphyroïde Granite Company Case (1912) by introducing the concept of “expensive clauses of common law.” These contractual provisions grant public authorities extraordinary powers or impose

² AHMET, I. - MIRLINDA, B.: The role of administrative contracts in the field of public administration. *Access to Justice in Eastern Europe*, ISSN 2663-0583.

³ GABRIELA-AURA F. - ELENA-MIHAELA F.: Public law and private law within administrative law. *Editura Universității Petru Maior*, 2013/1, 78-86.

⁴ Tribunal des Conflits, 8 February 1873, Blanco, Rec. Lebon 61. Available at: <https://www.conseil-etat.fr/decisions-de-justice/jurisprudence/les-grandes-decisions-depuis-1873/tribunal-des-conflits-8-fevrier-1873-blanco> (Accessed: 23 November 2024).

⁵ Conseil d'État, 4 March 1910, Thérond, Rec. Lebon 193. Available at: <https://www.doc-du-juriste.com/blog/conseils-juridiques/commentaire-arret-therond-conseil-etat-4-mars-1910-06-06-2018.html> (Accessed: 20 November 2024).

unique obligations, emphasizing the specialized nature of administrative law. Such clauses enable public authorities to adapt to changing societal needs and prioritize the public interest, thereby demarcating a clear boundary from private contractual norms.⁶

Another defining aspect of administrative contracts is their acknowledgment of inherent power asymmetry. The State Conseil justified this imbalance as essential to maintaining the continuity, adaptability, and efficiency of public services. Public authorities are vested with prerogatives such as unilateral modification or termination of contracts in the public interest, ensuring that administrative agreements remain flexible and relevant in evolving contexts. To formalize the identification of administrative contracts, the State Conseil established several key criteria: the contract must serve a public interest, include extraordinary legal provisions that set it apart from private law, and involve at least one public authority acting in its administrative capacity. These principles were later codified in legislative texts like the General Orders Law, yet the jurisprudence of the State Conseil remains dynamic. Its decisions continue to refine administrative contract theory, shaping public procurement practices and influencing legal systems worldwide.⁷

By embedding principles such as unilateral modification, termination for public interest, and the use of extraordinary clauses, the State Conseil has provided a robust doctrinal foundation for administrative contracts. It has ensured that these contracts serve the dual objectives of meeting administrative needs and safeguarding public welfare, cementing their role as a cornerstone of modern administrative law.

3. Legislative development of administrative contracts

The development of administrative contracts in European Union legislation reflects a progressive and systematic effort to harmonize procurement practices across member states, ensuring transparency, competition, and alignment with the principles of the internal market. This evolution can be categorized into distinct stages:⁸

The journey began with initial efforts at coordination in the late 1960s and early 1970s, exemplified by Directive 70/32/EEC (1969), which sought to align national rules without fully addressing inequalities or incorporating the core principles of the

⁶ Conseil d'État, 31 July 1912, Société des Granits Porphyroïdes des Vosges, Rec. Lebon 909. Available at: <https://jurisprudentiel.fr/fiche-arret-societe-des-granits-porphyroïdes-des-vosges> (Accessed: 10 November 2024).

⁷ AHMET, I. – MIRLINDA, B.: The role of administrative contracts in the field of public administration, *Access to Justice in Eastern Europe*, ISSN 2663-0583.

⁸ CATALIN-SILVIU, S.: Administrative Contracts in the European Union Law. *Book: Contemporary Challenges in the Business Law*, 2017, 33-42. Available at: <https://www.cceol.com/search/chapter-detail?id=478619>.

common market. This was followed by Directive 71/305/EEC (1971), which introduced competitive practices for awarding public works contracts.

Subsequent enhancements in the late 1970s and early 1990s aimed to expand the scope and improve procedural transparency. For instance, Directive 77/62/EEC (1976) mandated the publication of contract notices in official journals, while Directives 92/50/EEC (1992) and 90/531/EEC (1990) extended coverage to public service contracts and sectors such as water, energy, and telecommunications.⁹

A significant milestone came in 1993 with the adoption of three core directives (93/36/EEC, 93/37/EEC, and 93/38/EEC) that established a comprehensive framework for public supply, works, and service contracts. This marked a turning point in harmonizing procurement practices and reinforcing the principles of fair competition.

In 2004, EU legislation underwent modernization and simplification with Directives 2004/18/EC and 2004/17/EC. These directives consolidated earlier regulations into a unified framework, introduced electronic procurement, and streamlined rules for supplies, services, and works, reflecting a commitment to adapting to contemporary technological and administrative demands.¹⁰

The most recent phase of development, occurring in 2014, saw the introduction of Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU. These directives redefined procurement practices by enhancing flexibility, encouraging sustainable procurement, and modernizing communication methods. For the first time, they also established principles governing the awarding, performance, and termination of concession contracts.¹¹

The EU's sustained efforts continue to address the tension between national sovereignty and the overarching principles of the Union. Legal frameworks, such as Directive 89/665/EEC, ensure that procurement decisions remain contestable, fostering an environment of accountability. Overall, the evolution of administrative contracts in EU law underscores a commitment to creating a competitive, unified, and transparent procurement system that balances national interests with the collective goals of the European Union.

The legislative development of administrative contracts in Syria reflects multiple stages aimed at regulating contractual relationships between public entities and other parties to achieve public interest and enhance transparency and efficiency. This journey began during the pre-independence era when Ottoman laws and regulations derived from French law were applied, but these were not specifically

⁹ Published in the Official Journal of the European Communities, series L, no. 76 of 23 March 1992 with subsequent amendments.

¹⁰ Published in J.O. L 134 of 30 April 2004.

¹¹ Published in the Official Journal of the European Union L 94 of 28.3.2014.

tailored to administrative contracts, leading to reliance on general rules and non-standard systems.

In Syria, after gaining independence in 1946, efforts were initiated to build an independent legal system. The Civil Code of 1949 served as a cornerstone, regulating contracts in general, but it did not dedicate a specific chapter to administrative contracts, prompting the issuance of regulatory decrees to address the needs of public entities¹². As the state's role in the economy grew during the 1960s and 1970s¹³, the need for clear legislation to regulate administrative contracts became more evident. This led to the issuance of the 1974 Contracts Law, which established fundamental principles for tenders, auctions, and negotiated contracts. The law contributed to ensuring transparency and equality among contractors while setting standards for contractor selection in line with national development goals.¹⁴

Between 1980 and 2000, significant developments in administrative contract legislation emerged to meet the growing needs of major public-sector projects. New laws and decrees focused on regulating tenders and auctions, combating corruption, and safeguarding public funds. Amendments were also made to allow for contract adjustments in light of changing economic conditions.¹⁵ With the dawn of the new millennium, efforts shifted towards modernizing legislation to align with international standards. The 2004 Law No. 51 was a pivotal regulation that reorganized the foundations of tenders and auctions, emphasizing competitiveness and public announcements of contracts to ensure transparency and the selection of the best bids.

In a move to modernize administrative contracts and align with contemporary practices, Law No. 12 of 2016 introduced the concept of Public-Private Partnerships (PPP). This law opened the door for collaboration with the private sector to execute major projects that contribute to economic development. It adopted modern principles emphasizing flexibility and defining the responsibilities of both parties within a framework that ensures public interest.

Administrative contracts in Syria are governed by core principles, including the pursuit of public interest as the ultimate goal, competitiveness and transparency through public tenders and auctions, and flexibility to allow contract adjustments in case of emergencies. Disputes related to administrative contracts are subject to judicial oversight, primarily through the Administrative Judiciary and the Council of State.

¹² Syrian Civil Code issued by Legislative Decree No. 84 of 1949.

¹³ Syrian Decree No. 228 of 1969 containing the Contracts System for Public Bodies of an Administrative Nature.

¹⁴ Syrian Decree No. 195 of 1974 containing the Contracts System for Public Institutions, Companies and Establishments.

¹⁵ Syrian Decree No. 339 of 1982 containing the system of contracts for public construction companies.

Despite challenges facing administrative contracts in Syria, such as bureaucracy and the effects of the Syrian crisis, the future holds promising prospects for improving the legislative environment. These include digitizing contracts, enhancing partnerships with the private sector, and attracting investments through clearer and more flexible laws. The legislative evolution of administrative contracts in Syria - from the 1949 Civil Code, through the 1974 Contracts Law, the 2004 Law No. 51, the Decree No. 450 of 2004, and up to the 2016 Law No. 12- reflects the state's commitment to developing a legal framework that aligns with modern standards and meets the needs of national development.

From the above, it is clear to us that both systems underscore the importance of administrative contract legislation as a tool for promoting the public interest, but the EU's success in achieving harmonized procurement practices through clear, enforceable directives highlights the benefits of regional cooperation and shared governance. For Syria, the experience of the EU offers valuable insights into the potential of well-structured legal frameworks to attract investments, foster accountability, and support economic development. However, Syria must address its unique challenges, such as rebuilding institutional capacity and integrating technology, to fully realize these benefits.

4. Definitions of the administrative contract in comparative perspective

Administrative contracts are a cornerstone of public administration, serving as instruments to balance the imperatives of public interest with contractual obligations. While they share basic elements with civil contracts—such as mutual consent and adherence to conditions of validity—they diverge in their objectives, parties involved, and the inclusion of exceptional terms that prioritize public welfare. This analysis explores the conceptualization of administrative contracts in Syrian, and EU legislation, focusing on their defining features and regulatory approaches.

Syrian law recognizes and regulates administrative contracts without providing a specific statutory definition. Instead, their characteristics have been articulated through judicial interpretations and administrative practice. Therefore, the Syrian Administrative Court defined it as a contract concluded by a public legal entity to manage or operate a public facility, and that its intention in this contract is to follow the method of public law and its provisions, such that the contract includes exceptional conditions that are not common in private law contracts¹⁶. The Syrian approach underscores the primacy of public interest, enabling the administration to

¹⁶ Ruling of the Supreme Administrative Court of Syria, No.43, 1963.

craft contractual terms that ensure the effective management of public resources and services.

French law offers a more structured approach, rooted in statutory provisions and reinforced by the jurisprudence of the State Council (Conseil d'État).¹⁷ where established specific criteria for a contract to be classified as administrative. Two primary conditions must be met: the presence of exorbitant terms in the tender book and the involvement of an administrative authority. Exorbitant terms refer to unusual provisions that deviate from standard private law contracts, granting public authorities unique privileges or imposing special obligations for the public interest. Additionally, at least one party to the contract must be a recognized administrative entity, such as a state body, territorial authority, or public institution.¹⁸

Contracts between a public authority and a private party in France are considered administrative if they include terms from common law or are explicitly intended to provide a public service. Such contracts reflect the unique needs and objectives of public administration, ensuring that public services are effectively managed in alignment with broader societal interests.

On the other hand, contracts between two natural persons are typically governed by private law. However, two notable exceptions allow for their classification as administrative contracts. The first exception applies to state infrastructure works, where a contract is deemed administrative if one party acts on behalf of the state. For example, a concessionaire responsible for constructing and operating a highway could meet this criterion. The second exception arises when evidence shows that one party is acting on behalf of a public authority or territorial community, such as a concession organization tasked with landscaping and designing a tourist resort under the directive of a local government.¹⁹

German law, by contrast, provides an explicit statutory framework for administrative contracts under the Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*). Section 54 of the Act defines administrative contracts as agreements under public law designed to regulate public law relationships between a public authority and another party. This statutory clarity ensures a systematic and consistent approach to regulating administrative contracts, emphasizing their alignment with public law principles and their role in advancing public objectives.

¹⁷ MARIE GRACE SEIF: The administrative contract. Available at: <https://www.tamimi.com/law-update-articles/the-administrative-contract/>. (Accessed: 10 October 2024).

¹⁸ LIANA-TEODORA, P.: Some ideas for a comparative analysis of the administrative contracts. *European Journal of Law and Public Administration*, 2016. Available at: <https://www.cceol.com/search/article-detail?id=426564>.

¹⁹ ELENA, D. - ANA, P. - DANEVA.: Financial equilibrium for the administrative contracts. *Economic Development*, 2013, 89-102. Available at: <https://www.cceol.com/search/article-detail?id=219060>.

Under EU legislation, public contracts are defined as agreements for pecuniary interest concluded between a contracting authority and an economic operator (e.g., a private company or individual) to procure works, supplies, or services that serve public needs. The focus in EU law is on the public interest purpose of the contract and its compliance with established procurement principles, rather than requiring a direct link to a public facility.

Despite variations in legal frameworks, the core principles underlying administrative contracts are similar across these systems. Administrative contracts universally involve public authorities acting in their administrative capacity, include exceptional terms tailored to public service objectives, and aim to prioritize public welfare over individual interests. The French and German systems stand out for their codified and jurisprudential precision, offering clear criteria and definitions for administrative contracts. In comparison, the Syrian system relies on judicial interpretation and administrative practice, which, while flexible, may benefit from greater statutory clarity.

Administrative contracts represent a vital intersection between law and governance, where public administration principles guide contractual obligations. While Syrian law regulates these contracts effectively, the absence of a formal statutory definition contrasts with the more structured approaches seen in French and German systems. The German framework provides statutory precision, ensuring consistency and legal certainty, while the French model combines statutory and jurisprudential insights to adapt to evolving public needs.

In my opinion, Syrian law would benefit from codifying a clear definition of administrative contracts to enhance legal certainty and consistency in their application. The German approach, with its systematic statutory framework, provides a valuable model, while the flexibility of the French system offers lessons in adaptability. A hybrid approach that incorporates both statutory clarity and adaptability could strengthen the regulation of administrative contracts in Syria, ensuring their alignment with public interest and governance objectives. Ultimately, the effectiveness of administrative contracts lies in their capacity to balance public welfare with accountability and fairness.

5. Characteristics of the administrative contract

5.1. The administration is a party to the contract

Administrative contracts are defined by specific legal principles, primarily the requirement that one contracting party is a public legal entity. According to Article 54 of the Syrian Civil Code, such entities include the state, municipalities, public

institutions, and administrative bodies.²⁰ Professional bodies like lawyers' and engineers' unions are treated differently; in France, they are considered public legal entities eligible to enter administrative contracts, but in Syria, they are classified as private legal entities, and their contracts are governed by private law.

Private institutions serving public benefit may conclude administrative contracts if granted public authority privileges. For example, Article 43 of the Private Associations and Institutions Law states that the public benefit association enjoys the powers of public authority, such as the inadmissibility of seizing its funds and the permissibility of the competent administrative body expropriating the property for the public benefit carried out by the association...etc.²¹ These privileges are limited by way of example and not limited to, and therefore it is permissible to use them as an analogy, it is permissible for it to conclude administrative contracts if it includes exceptional and unusual conditions.

Contracts between private legal persons are usually considered ordinary unless one party acts on behalf of or for the benefit of a public legal entity. In such cases, administrative judiciary systems, as in France, may classify these as administrative contracts. Similarly, under German law, administrative contracts are referred to as "öffentlich-rechtliche Verträge" (public law contracts). These agreements are explicitly addressed in the Administrative Procedure Act, particularly in Sections 54–62. A contract is classified as administrative if it involves at least one public legal entity acting within its administrative capacity and serving a public interest.²²

German law, like French and Syrian law, emphasizes the role of public legal entities in administrative contracts. While professional bodies such as lawyers' and engineers' unions are not explicitly addressed in Syrian law, German law considers such entities eligible to enter administrative contracts if they perform public functions. Furthermore, contracts between private parties in Germany are governed by private law unless one party acts under the authority or on behalf of a public legal entity. These contracts are adjudicated by administrative courts (Verwaltungsgerichte) if they serve a public law purpose.

Under EU law, contracting authorities eligible to conclude administrative contracts include the state, regional and local authorities, and bodies governed by public law, such as public universities and hospitals. These bodies must serve general interest needs, not of an industrial or commercial nature, and be financed, supervised, or controlled by public authorities. Other entities include public undertakings influenced by public authorities, associations formed by public bodies for shared projects, and utilities in regulated sectors like water, energy, and transport.

²⁰ Syrian Civil Code issued by Legislative Decree No. 84 of 1949.

²¹ Syrian Law No. 384 of 1956, amended by Legislative Decree No. 224 of 1969, published in Issue No. 13 of the Official Gazette of 1969.

²² Germany: Administrative Procedure Act [Verwaltungsverfahrensgesetz (VwVfG)]. Available at: <https://www.refworld.org/legal/legislation/natlegbod/1976/en/63421>.

Contracts must involve a contracting authority, fulfill public interest needs, and may include public law provisions like unilateral modifications, ensuring compliance with EU standards for transparency and competition.²³

In its judgments, the Court of Justice of the European Union has made it clear that entities operating under normal market conditions, with the aim of making a profit, and bearing their own commercial risks, are generally not considered to be public law entities. This is because the activities of such entities are considered to be of an industrial or commercial nature, even if they serve a public interest. For instance, entities like utilities or transportation providers, if run under competitive conditions without significant public control or funding, are excluded from the definition. The Court has emphasized that needs in the general interest must be distinct from industrial or commercial objectives, which typically focus on profit generation and self-sustenance in market environments.²⁴

The Court of Justice of the European Union has addressed the concept of “public law entities” in several landmark judgments, including Case C-18/01 – *Korhonen and Others v. Finland*, where the Court ruled that if an entity operates in normal market conditions, aims to make a profit, and bears the risks of its operations, it cannot be classified as a “public law entity”. Even if such an entity fulfils needs in the public interest, its operations must be of a non-commercial nature in order to be classified.

Administrative contracts in Syria are characterized by the involvement of public legal entities and exceptional public law conditions. While Syria’s framework aligns in some areas with international practices like those in EU law, its interpretation of professional bodies and public benefit institutions differs, highlighting opportunities for further legal refinement. Incorporating more flexible interpretations, could enhance public-private collaboration and broaden the applicability of administrative contracts. Ultimately, the comparison reveals that while the foundational principles remain consistent, the practical implementation and judicial interpretations reflect the distinct priorities and legal traditions of each system.

5.2. The contract must be related to a public facility

For a contract to be classified as administrative, it must involve a public legal entity and be linked to a public facility. A public facility refers to an activity

²³ Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on Public Procurement.

²⁴ GUNILLA, E. - MARTIN, T. - ROBERTO, C.: *EU Public Contract Law: Public Procurement and Beyond. Primento, 2013*, ISBN 2802741675, 9782802741671.

conducted by the administration or under its supervision to meet a general public need. The link between the contract and the public facility can take various forms, depending on the facility's activity, as recognized by the Syrian administrative judiciary:

1. Establishing or Renewing a Public Facility: This includes contracts such as public works agreements for constructing or renovating facilities.
2. Organizing, Exploiting, and Managing a Public Facility: An example is a concession contract for the operation of a public utility.
3. Managing Public Facility Operations: This covers contracts for supplies or service provision essential to the facility's functioning.

The nature of the facility whether a traditional public facility (e.g., defense, police, education) or a modern economic utility (e.g., electricity, water, transportation) does not affect the requirement of linkage to a public facility. However, contracts concluded by industrial or commercial facilities with their service beneficiaries are not considered administrative. Such agreements pertain to product marketing rather than the organization or management of the public facility itself.

For instance, a contract by a public university to renovate a college qualifies as administrative because it involves a public legal entity (the university) and pertains to the continuous management of an educational public facility. This distinction ensures that administrative contracts focus on facilitating public service delivery, not on purely commercial transactions.

While under French law, administrative contracts are closely tied to public service, a core principle of the administrative framework. The Thérond Case (1910) established that contracts involving public services, such as waste collection, qualify as administrative²⁵. The Vosges Porphyroïde Granite Company Case (1912) introduced the concept of exceptional clauses (clauses exorbitantes), granting public authorities powers beyond those in private contracts²⁶. While public service is central, French law allows flexibility, not strictly limiting administrative contracts to public facilities but emphasizing public interest objectives.

In German law, though not explicitly requiring a link to public facilities, contracts related to infrastructure often qualify due to their public service orientation. The material criterion whether a contract serves public objectives is key to classification.

²⁵ Conseil d'État, 4 March 1910, Thérond, Rec. Lebon 193. Available at: <https://www.doc-duc-juriste.com/blog/conseils-juridiques/commentaire-arret-therond-conseil-etat-4-mars-1910-06-06-2018.html> (Accessed: 20 November 2024).

²⁶ Conseil d'État, 31 July 1912, Société des Granits Porphyroïdes des Vosges, Rec. Lebon 909. Available at: <https://jurisprudenciel.fr/fiche-arret-societe-des-granits-porphyroïdes-des-vosges> (Accessed: 10 November 2024).

German law also includes special provisions like unilateral modifications but balances them with safeguards to ensure proportionality and contractor rights.²⁷

In contrast, EU law does not include a specific requirement for contracts to be linked to a public facility to qualify as public or administrative. Instead, contracts are classified based on: their public interest purpose, which can include a wide range of objectives, from delivering essential services to constructing or maintaining infrastructure. Their execution by or through contracting authorities, which are entities defined by EU directives. For example: a public works contract to construct a road or school would be classified as a public contract because it serves a public purpose, regardless of whether it is directly tied to the operation or management of a public facility.²⁸

Similarly, a contract for the procurement of office supplies for a government agency qualifies as a public contract because it involves a contracting authority and meets public needs, even if it is unrelated to a specific public facility. The absence of a strict public facility requirement allows EU law to apply more flexibly to a wide range of procurement scenarios, accommodating modern governance structures and market conditions.

In summary, Syrian law adopts a facility-specific framework, emphasizing the direct link between administrative contracts and public facilities. In contrast, French and German systems prioritize public service and public law objectives, which often align with facility management but are not strictly dependent on it. The EU's broader framework reflects contemporary governance structures and market-oriented practices, ensuring administrative contracts remain adaptable and effective across diverse procurement scenarios. Despite their differences, all systems share the goal of ensuring that public contracts serve the general interest effectively and lawfully, balancing flexibility with accountability.

5.3. The contract includes exceptional terms that are not common in private law contracts

The treatment of exceptional conditions in administrative contracts reflects distinct approaches in Syrian and European Union legislation, shaped by differing legal traditions and governance priorities. While Syrian law considers exceptional conditions a mandatory feature for classifying contracts as administrative, EU law treats them as optional provisions that must comply with transparency and

²⁷ Germany: Administrative Procedure Act [Verwaltungsverfahrensgesetz (VwVfG)]. Available at: <https://www.refworld.org/legal/legislation/natlegbod/1976/en/63421>

²⁸ GUNILLA, E.-MARTIN, T.-ROBERTO, C.: EU Public Contract Law: Public Procurement and Beyond. *Primento, 2013*, ISBN 2802741675, 9782802741671.

proportionality principles. Similarly, French and German legal systems incorporate exceptional conditions in varying degrees, balancing public interest with fairness and accountability.

Under Syrian law, exceptional conditions are a defining characteristic of administrative contracts, reflecting the administration's privileged position and its duty to safeguard the public interest. These terms grant public authorities unilateral powers, such as the ability to modify or terminate contracts to adapt to evolving circumstances or public needs. Examples of such conditions include:

- Unilateral Modification: The administration can alter contractual terms to ensure public service continuity, provided the contractor is compensated for resulting losses.²⁹
- Termination for Public Interest: Contracts can be prematurely ended if deemed necessary to align with public goals or changing priorities.³⁰
- Supervision and Control: The administration retains oversight powers to ensure compliance with contractual obligations and public service standards.³¹

These exceptional conditions are codified in laws such as the Syrian Civil Code and Public Contracts Law No. 51 of 2004, making them essential for a contract to be classified as administrative. They highlight the state's focus on ensuring flexibility and control over contracts related to public facilities and services. Without these terms, a contract involving public legal entities would typically fall under private law.

In contrast, European Union law does not require the inclusion of exceptional conditions to classify a contract as administrative or public. Instead, EU legislation, particularly Directive 2014/24/EU on Public Procurement, focuses on defining public contracts based on their subject matter, purpose, and compliance with procurement principles such as transparency, proportionality, and non-discrimination.

Exceptional conditions in EU contracts are optional and permissible only when necessary to serve public interest objectives. Examples include:

- Contract Modifications: Allowed under Article 72 of Directive 2014/24/EU, modifications must be justified, clearly defined in the contract, and meet conditions such as unforeseen circumstances or minor scope changes.³²
- Termination for Public Interest: EU law permits termination clauses if explicitly stated in the contract and justified by overriding public needs.³³
- Risk-Sharing Mechanisms: Special provisions may allocate risks in ways atypical for private contracts, especially in long-term or complex projects.

²⁹ Articles (9 - 32 - 34) of Syrian Legislative Decree No. 450 of 2004. And Article No. 62 of Syrian Law No. 51 of 2004.

³⁰ Article No. 60 of Syrian Law No. 51 of 2004.

³¹ Articles (10, 26) of Syrian Legislative Decree No. 450 of 2004.

³² Article 72 of Directive 2014/24/EU.

³³ Article 73 of Directive 2014/24/EU.

The permissibility of these terms is tightly regulated by Court of Justice of the European Union (CJEU) rulings, which emphasize compliance with EU principles. For instance, in *Presstext Nachrichtenagentur GmbH v. Republic of Austria* (Case C-454/06), the CJEU ruled that contract modifications must not alter the fundamental nature of the agreement unless predefined or justified by exceptional circumstances.

While exceptional conditions are integral to administrative contracts, French law maintains some flexibility. For example, contracts involving public service may not strictly require explicit exceptional terms if the broader objectives of the contract align with public interest. This approach balances administrative authority with legal accountability.

German administrative contracts similarly incorporate exceptional conditions to serve public law purposes. These contracts, include provisions that reflect the unique requirements of public administration:

- **Unilateral Powers:** Public authorities may modify or terminate contracts to fulfill public objectives, particularly in infrastructure projects or public utilities.³⁴
- **Proportionality and Contractor Rights:** Unlike Syrian law, German law imposes safeguards to ensure that exceptional conditions are applied proportionately, protecting contractor rights while prioritizing public interest.³⁵

The material criterion whether the contract serves public objective plays a key role in the classification of contracts. While exceptional conditions are not mandatory, they are often implicit in contracts serving public needs.

The comparison reveals fundamental differences in how Syrian and EU legislation approach exceptional conditions in administrative contracts. Syrian law, rooted in traditional administrative principles, views exceptional conditions as mandatory to ensure public interest and administrative control. In contrast, EU law as well as France and Germany, guided by procurement directives and market-driven principles, treats exceptional conditions as optional and subject to stringent regulatory oversight to protect competition and fairness. These differences reflect broader legal and institutional priorities: Syria emphasizes state authority and public service delivery, while the EU focuses on harmonizing procurement practices, fostering competition, and safeguarding contractor rights. Both approaches underscore the importance of exceptional conditions but balance flexibility and accountability in markedly different ways.

6. Distinctions Between Administrative Contracts and Private Law Contracts

³⁴ Articles (59, 60) of Germany: Administrative Procedure Act.

³⁵ Articles (54, 58) of Germany: Administrative Procedure Act.

Administrative contracts and private law contracts are fundamentally distinct in their purposes, legal frameworks, and the roles they assign to the contracting parties. Administrative contracts are designed to serve the public interest, reflecting the administration's responsibility to safeguard societal needs, while private law contracts prioritize the mutual interests of the parties involved, focusing on commercial or personal benefits. This distinction influences not only the rights and obligations of the parties but also the procedures for forming, managing, and enforcing these contracts.

The purpose of administrative contracts is inherently tied to public services and facilities. They are used to manage, maintain, or develop infrastructure such as roads, schools, and utilities, aiming to fulfill societal needs. The administration, acting as a representative of the state, prioritizes public objectives over private benefits. In contrast, private law contracts are grounded in the mutual consent of equal parties, governed by principles of autonomy and equality, and aim to achieve private or commercial goals without broader societal implications.³⁶

One of the key distinctions lies in the powers and obligations conferred under these contracts. Administrative contracts impose additional obligations on contractors under public law. For example, contractors may be required to perform extra work or adapt their methods to meet evolving public needs. Public authorities are granted exceptional powers, such as the right to unilaterally modify contract terms, terminate the agreement if it no longer serves the public interest, or supervise the contractor's performance to ensure alignment with public service objectives. These powers are statutory and rooted in public law, transcending the explicit terms of the contract itself. For instance, in the case of *Ministre de la Guerre v. Association Coopérative des Ouvriers Paveurs*, the administration issued directives regarding construction methods that were not specified in the contract, and the contractor was held liable for failing to comply.³⁷ This highlights the administration's inherent authority to regulate contracts in the public interest.

Private law contracts, on the other hand, operate under the principle of contractual autonomy, where the rights and obligations of the parties are confined to the agreed terms. Any modifications or additional requirements must be mutually consented to, as neither party has unilateral authority over the other. This predictability is one of the hallmarks of private law contracts, distinguishing them from the flexibility inherent in administrative agreements.

The judicial oversight for these contracts also varies significantly. Administrative contracts fall under the jurisdiction of administrative courts, such as the Council of State in many jurisdictions, which prioritize the public interest when resolving

³⁶ MUHAMMAD, A. - AMOURI.: Administrative Contracts. *Publications of the Syrian Virtual University*, 2018.

³⁷ ALAN W. MEWETT.: The theory of government contracts. *McGill Law Journal*, 1959/ 5(4), 222-246.

disputes. In Syrian law, for example, disputes are adjudicated under Public Contracts Law No. 51 of 2004, which emphasizes the administration's regulatory powers. Conversely, private law contracts are adjudicated by civil or commercial courts, which focus solely on the contractual relationship without considering broader public interest implications.³⁸

Another key distinction is the link to public facilities and services. Administrative contracts are often directly connected to the operation or management of public facilities, such as hospitals, schools, or utilities, making this linkage a key feature of their classification. In Syrian law, the material criterion -whether a contract serves a public interest or is tied to a public facility- plays a significant role in distinguishing administrative contracts from private ones. Private law contracts lack this connection, focusing instead on personal or commercial objectives, such as the sale of goods or property leases.³⁹

The procedures for forming these contracts further highlight their differences. Administrative contracts involve rigorous public procurement rules, including public tenders, transparent evaluation of bids, and the selection of contractors based on their ability to serve public needs. These measures ensure accountability and fairness in the use of public resources. In contrast, private law contracts are simpler and governed by mutual agreement, without the formalities required for public contracts.

To determine whether a contract is administrative or private, two key criteria are applied: the organic criterion, which considers whether a public legal entity is a party to the contract, and the material criterion, which examines whether the contract serves the public interest. However, if a public entity acts in a commercial capacity without prioritizing public objectives, the contract may be classified as private, even if one party is a public body.⁴⁰

In conclusion, administrative contracts and private law contracts reflect fundamentally different legal philosophies and objectives. Administrative contracts are governed by public law, prioritizing societal needs and granting public authorities exceptional powers to modify, terminate, and oversee contracts in the public interest. Private law contracts, on the other hand, emphasize equality, mutual consent, and private benefits, focusing on the explicit terms agreed upon by the parties. These distinctions underscore the broader role of the state in managing public resources and services while maintaining accountability and fairness in both public and private contractual relationships. Understanding these differences is

³⁸ Article No. 66 of Syrian Law No. 51 of 2004.

³⁹ MUHAMMAD, A. - AMOURI.: *Administrative Contracts. Publications of the Syrian Virtual University*, 2018.

⁴⁰ AHMET, I. – MIRLINDA, B.: The role of administrative contracts in the field of public administration. *Access to Justice in Eastern Europe*, 2024/ 7(3), ISSN 2663-0583.

essential for navigating the complexities of contractual obligations and legal oversight in the public and private spheres.

7. Conclusion

The comparative study of administrative contracts reveals both similarities and differences in their conceptualization and implementation across various legislative frameworks, including Syrian law, European Union law, French law, and German law. These contracts are essential tools for public authorities to achieve societal objectives, balancing the public interest with legal obligations. However, the underlying principles, procedures, and powers granted to public authorities vary significantly across these systems.

Similarities include the central role of public interest, the special legal frameworks governing administrative contracts, and the supervisory authority of public entities. In all systems, administrative contracts prioritize the delivery of public services, infrastructure development, and resource management. They are governed by public law, granting public authorities oversight powers to ensure contractors meet contractual obligations and public welfare goals.

Differences are particularly notable in the treatment of exceptional powers. Syrian law mandates unilateral powers, such as modification, early termination for public interest, and supervisory authority, as essential features of administrative contracts. This reflects a centralized approach, emphasizing administrative control. Similarly, French law incorporates exceptional clauses granting public authorities powers beyond those in private law but emphasizing public service objectives. French administrative contracts are strongly tied to public service, with flexibility in their application when the public interest is evident.

In contrast, EU law treats exceptional powers as optional provisions, subject to strict regulatory oversight to ensure transparency, proportionality, and competition. Likewise, German law incorporates exceptional conditions, such as unilateral modification or termination, but balances these with safeguards to protect contractor rights, ensuring that proportionality principles are upheld. While Syrian and French laws emphasize the administration's unilateral authority, EU and German laws reflect modern governance practices, balancing administrative powers with contractor protections.

Another distinction is the link to public facilities. Syrian law often ties administrative contracts directly to the operation or management of public infrastructure, maintaining a traditional approach. French law also emphasizes public facilities but ties this to broader public service objectives, allowing greater flexibility. German law adopts a public law purpose criterion, focusing on whether the contract serves a public interest, without explicitly requiring a direct link to a

facility. EU law, in comparison, adopts the broadest approach, focusing on procurement objectives that may include, but are not limited to, public facilities.

The formation and dispute resolution of administrative contracts also vary. Syrian law emphasizes rigid public procurement rules designed to safeguard the public interest and resolve disputes in specialized administrative courts, such as the Council of State. French law follows a similar tradition, with the State Conseil playing a pivotal role in resolving disputes. In the EU, procurement directives harmonize rules across member states, while disputes are resolved within national jurisdictions and influenced by the Court of Justice of the European Union (CJEU). German law provides a structured framework through the (VwVfG), with administrative courts ensuring that exceptional powers are proportionate and legally justified.

In conclusion, administrative contracts across Syrian, EU, French, and German legal systems reflect a shared commitment to serving public needs while differing in their legal philosophy and implementation. Syrian law adopts a traditional approach, emphasizing state authority and direct linkage to public facilities, while French law integrates flexibility within a public service framework. EU and German laws align with modern governance practices, focusing on competition, harmonization, proportionality, and procedural fairness. These distinctions highlight the adaptability of administrative contracts to diverse legal and institutional contexts, ensuring they remain effective tools for achieving public objectives while balancing public interest and accountability.

Bibliography

AHMET, I. – MIRLINDA, B.: The role of administrative contracts in the field of public administration. *Access to Justice in Eastern Europe*, 2024/7(3), ISSN 2663-0583.

ALAN W. MEWETT.: The theory of government contracts. *McGill Law Journal*, 1959/5(4).

CATALIN-SILVIU, S.: Administrative Contracts in the European Union Law. *Book: Contemporary Challenges in the Business Law*, 2017.

Conseil d'État, 31 July 1912, Société des Granits Porphyroïdes des Vosges, Rec. Lebon 909. Available at: <https://jurisprudentiel.fr/fiche-arret-societe-des-granits-porphyroïdes-des-vosges> (Accessed: 10 November 2024).

Conseil d'État, 31 July 1912, Société des Granits Porphyroïdes des Vosges, Rec. Lebon 909. Available at: <https://jurisprudentiel.fr/fiche-arret-societe-des-granits-porphyroïdes-des-vosges> (Accessed: 10 November 2024).

Conseil d'État, 4 March 1910, Thérond, Rec. Lebon 193. Available at: <https://www.doc-du-juriste.com/blog/conseils-juridiques/commentaire-arret-therond-conseil-etat-4-mars-1910-06-06-2018.html> (Accessed: 20 November 2024).

Directive 2014/24/EU Of The European Parliament And Of The Council Of 26 February 2014 On Public Procurement.

EGZON, D.: Legal Changes about Administrative Contracts in Republic of Kosovo, *Acta Universitatis Danubius. Juridica*, 2018/1.

ELENA, D. - ANA, P. - DANEVA.: Financial equilibrium for the administrative contracts. *Economic Development*, 2013. Available at: <https://www.cceol.com/search/article-detail?id=219060>.

GABRIELA-AURA F. -ELENA-MIHAELA F.: Public law and private law within administrative law. *Editura Universității Petru Maior*, 2013/1.

Germany: Administrative Procedure Act [Verwaltungsverfahrensgesetz (VwVfG)]. Available at: <https://www.refworld.org/legal/legislation/natlegbod/1976/en/63421>

GUNILLA, E. - MARTIN, T. - ROBERTO, C.: EU Public Contract Law: Public Procurement and Beyond. *Primento*, 2013, ISBN 2802741675, 9782802741671.

LIANA-TEODORA, P.: Some ideas for a comparative analysis of the administrative contracts. *European Journal of Law and Public Administration*, 2016. Available at: <https://www.cceol.com/search/article-detail?id=426564>.

MARIE GRACE SEIF: The administrative contract. Available at: <https://www.tamimi.com/law-update-articles/the-administrative-contract/> (Accessed: 10 October 2024).

MUHAMMAD, A. - AMOURI.: Administrative Contracts. *Publications of the Syrian Virtual University*, 2018.

Ruling of the Supreme Administrative Court of Syria, No.43, 1963.

Syrian Civil Code issued by Legislative Decree No. 84 of 1949.

Syrian Law No. 51 of 2004.

Syrian Law No. 384 of 1956, amended by Legislative Decree No. 224 of 1969, published in Issue No. 13 of the Official Gazette of 1969.

Syrian Legislative Decree No. 450 of 2004.

Syrian Decree No. 195 of 1974 containing the Contracts System for Public Institutions, Companies and Establishments.

Syrian Decree No. 228 of 1969 containing the Contracts System for Public Bodies of an Administrative Nature.

Syrian Decree No. 339 of 1982 containing the system of contracts for public construction companies.

Tribunal des Conflits, 8 February 1873, Blanco, Rec. Lebon 61. Available at: <https://www.conseil-etat.fr/decisions-de-justice/jurisprudence/les-grandes-decisions-depuis-1873/tribunal-des-conflits-8-fevrier-1873-blanco> (Accessed: 23 November 2024).

HOJNYÁK DÁVID*

Carl Schmitt szuverenitás-elméletének vázlatja

Absztrakt: *Carl Schmitt* német jog-, és politikafilozófus személyének, munkásságának megítélése a mai napig heves viták tárgyát képezi. Kétségtelen, hogy Schmitt munkássága nagy hatást gyakorolt a 20. századi és a jelenkori állam-, politika-, és jogelméleti gondolkodására. Jelen munka célja, hogy felvázolja a schmitti szuverenitás-elmélet megalkotásának körülményeit, ismertesse annak főbb jellemvonásait, valamint, hogy reflektáljon a Schmitt koncepciója kapcsán, a koronavírus-járvánnyal összefüggésben felmerült kérdésekre.

Kulcsszavak: Carl Schmitt, szuverenitás, szuverenitás-elmélet, jogelmélet, államelmélet

Abstract: The assessment of the personality and work of German legal and political philosopher *Carl Schmitt* remains a subject of heated debate to this day. There is no doubt that Schmitt's work had a major impact on 20th-century and contemporary thinking on state, political, and legal theory. The aim of this study is to outline the circumstances surrounding the creation of Schmitt's theory of sovereignty, to describe its main features, and to reflect on the questions that have arisen in connection with Schmitt's concept in the context of the coronavirus pandemic.

Keywords: Carl Schmitt, sovereignty, theory of sovereignty, legal theory, political theory

1. Bevezetés

Carl Schmitt (1888–1985) német jog-, és politikafilozófus személyének, munkásságának megítélése a mai napig heves viták tárgyát képezi. Kétségtelen, hogy Schmitt munkássága nagy hatást gyakorolt a 20. századi és a jelenkori állam-, politika-, és jogelméleti gondolkodására, ugyanakkor Hitler 1933-as hatalomra

* dr. Hojnyák Dávid, abszolvált PhD-hallgató, Miskolci Egyetem, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, Civilisztikai Tudományok Intézete, Agrár- és Munkajogi Tanszék. Témavezető: Prof. Dr. Szilágyi János Ede intézeti tanszékvezető egyetemi tanár. Tanársegéd, Miskolci Egyetem, Állam- és Jogtudományi Kar, Jogtörténeti és Jogelméleti Intézet, Jogelméleti és Jogszociológiai Tanszék.

kerülését követően, a náci párt, az NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) tagjaként fontos szerepet vállalt a náci rezsim kiépítésében és megszilárdításában. A náci „koronajogászként” aktívan közreműködött a jogfosztást-jogkorlátozást elősegítő törvényalkotásban, valamint az autoriter hitleri rezsim ideológiai alapjainak megteremtésében, megszilárdításában, ugyanakkor később opportunizmussal vádolták és a nemzetiszocialista rendszer hátralevő részében kegyvesztetté vált a közéletben.¹

Schmitt célja és ideája egy konzervatív, autoriter állam volt, ezzel együtt munkáiban a pluralizmus-ellenesség, az állami egység és az állam védelme központi elemként jelenik meg. Ezek alapján azt mondhatjuk, hogy Schmitt tanai a konzervatív, etatista politikai filozófia jegyeit hordozza magán. E jellemvonások erőteljesen megjelennek Schmitt szuverenitás-elméletében is, amely egyértelműen szembelyezkedik a 20. század másik nagy koncepciójával, *Hans Kelsen* szuverenitás-elméletével, ugyanakkor számos elemében a *Jean Bodin* és *Thomas Hobbes*-féle szuverenitás-tanok jegyeit hordozza magán.

Jelen munka által tárgyalt téma ugyanakkor a közelmúltban rendkívül aktuális volt, hiszen a koronavírus-járvány okozta egészségügyi válsághelyzetre válaszul Európa és a világ országai szinte kivétel nélkül különleges jogrendet vezettek be, számos esetben pedig a koronavírus-járvány miatt bevezetett különleges jogrendet tévesen a schmitti szuverenitás-elmélettel és kivételes állapot fogalmával azonosították. Jelen munka célja, hogy felvázolja a schmitti szuverenitás-elmélet megalkotásának körülményeit, ismertesse annak főbb jellemvonásait, valamint, hogy reflektáljon a Schmitt koncepciója kapcsán, a koronavírus-járvánnyal összefüggésben felmerülő kérdésekre.

2. Carl Schmitt szuverenitás-elmélete

Schmitt állam-, és politikaelméletének középpontjában az alábbi fogalmak állnak: (a) a „politikai” fogalma; (b) az állam; (c) a szuverenitás; (d) a döntés, valamint (e) a norma és a kivétel, illetve a normál-, és kivételes állapot.² Habár az egyes fogalmak egymással szoros kapcsolatban állnak és összefüggő rendszert alkotnak, ugyanakkor a dolgozat tárgya szempontjából a szuverenitás fogalmának vizsgálata mellett a döntés fogalma, valamint a normál-, és kivételes állapot fogalom pára bír relevanciával, ezért részletesebben e fogalmak elemzésére kerül sor.

¹ Schmitt és a náci kapcsolatáról lásd bővebben: TECHET P.: Carl Schmitt és a nemzetiszocializmus. *Politikatudományi Szemle*, 21 (2012) 1, 133–152.

² A téma kapcsán lásd bővebben: KÖRÖSÉNYI A.: Carl Schmitt állam és politikaelméleti alapfogalmai. *Politikatudományi Szemle*, 9 (2000) 3-4, 5–24.

2.1. A schmitti szuverenitás-elmélet megszületésének körülményei

Schmitt szuverenitás-felfogása elsősorban *A diktatúra*³ (1921), valamint a *Politikai teológia*⁴ (1922) című munkáiban került kifejtésre, ezért szuverenitás-elméletének rekonstruálására e munkák alapján kerül sor. Elmondható, hogy mindkét munka Schmitt pályájának második nagyobb korszakában⁵ született, amely történetileg az első világháborút lezáró Párizs környéki békeszerződések, valamint a békeszerződések következtében Németországban kialakult weimari demokrácia időszakára esett. E körülmények – de különösen a weimari köztársaság államberendezkedése – meghatározó élményt jelentett Schmitt számára, mindez pedig jelentős hatást gyakorolt szuverenitás-elméletének kidolgozására és annak tartalmára. Ez okból kifolyólag szükséges röviden kitérni Schmittnek a világháború, valamint az azt követő németországi forradalom⁶ következtében kialakult alkotmányos struktúráról alkotott véleményére.

Schmitt a weimari demokrácia kritikusa volt: meglátása szerint a jogállamiság eszméje – amely a weimari alkotmány és a jogrendszer egészét áthatotta – egy „némettelen rendtelenség”, ami a szuverén megosztására és visszaszorítására törekszik, mindez pedig rossz példát szolgáltat. Az alkotmányos szabályozás problémájának tekintette, hogy az nem egy egységes döntéshozó szuverént, hanem több, egymással versengő szuverént határozott meg. A weimari alkotmány négy ilyen döntéshozó pozícióban lévő szuverént határozott meg. (a) Az *első szuverén* az egyszerű (51%-os) parlamenti többséghez kapcsolódik, amely a legtöbb esetben

³ SCHMITT, C.: *Die Diktatur*. Munich–Leipzig, Duncker & Humblot, 1921.

⁴ SCHMITT, C.: *Politikai teológia* (ford.: Paczoly Péter). Budapest, ELTE ÁJK, 1992. Az eredeti mű: SCHMITT, C.: *Politische Theologie*. Munich–Leipzig, Duncker & Humblot, 1922. Jelen munkában a Politikai teológia magyar nyelvű fordítása került felhasználásra.

⁵ Schmitt munkássága alapvetően négy korszakra tagolódik. Az első korszakban (1910–1918) főleg jogdogmatikai kérdésekkel foglalkozott. Munkásságának második, fentebb már hivatkozott korszaka (1919–1932) a weimari köztársaság időszakára tehető, ekkor elsősorban állam-, és politikaelméleti kérdésekkel foglalkozott munkáiban. A harmadik korszak (1933–1938) a hatalomra kerülő náci rezsim uralmának első szakaszát öleli fel. Ekkor főként jogelméleti és alkotmánytani munkái születtek, amelyek több esetben is az autoriter náci rezsim diktatórikus működésének igazolására szolgáltak. A negyedik korszak (1939–1985) a náci rezsim regnálásának második szakaszát, valamint bukását és az azt követő négy évtizedet öleli fel. Schmitt érdeklődése ekkor a nemzetközi jog felé fordult, ezért munkásságának utolsó – egyben leghosszabb – korszakában a nemzetközi jog aktuális kérdéseivel foglalkozott. Schmitt munkásságának korszakai kapcsán lásd bővebben: KÖRÖSÉNYI A.: i.m. 6–7.

⁶ Németországban az első világháborús vereséget követően 1918 novemberében forradalom tört ki. A forradalom végét a weimari alkotmány 1919. augusztus 11-i aláírása jelentette, amely Németország államformáját alkotmányos monarchiáról (az egykori Német Császárság) köztársasággá változtatta. Ez alapján beszélhetünk 1919 és 1933 között, Hitler hatalomra jutásáig a weimari köztársaságról.

önállóan járt el és tudott döntést hozni a törvényhozás folyamatában.⁷ (b) Az alkotmány meghatározott ugyanakkor olyan törvényeket is, amelyeknek az elfogadásához nem elégséges az egyszerű parlamenti többség, hanem minősített (2/3-os) többség szükséges. Schmitt ehhez köti a *második szuverén* kategóriáját.⁸ (c) A *harmadik szuverén* a közvetlen demokrácia egyik jogintézményében, a népszavazásban,⁹ míg a (d) *negyedik szuverén* az államfő, tehát a birodalmi elnök¹⁰ személyében jelölte meg. Schmitt szerint a weimari alkotmány azon megoldása, hogy nem egy szuverént, hanem négy, egymással konkuráló szuverént határozott meg és helyezett ezáltal döntéshozói pozícióba, hosszú távon nem fenntartható, és az legfeljebb egy tisztázatlan átmeneti helyzet során szükségmegoldásként alkalmazható.¹¹ Schmitt amiatt is bírálta a weimari demokráciát – és ezáltal a jogállamiság eszméjét, valamint a parlamentáris demokráciát –, hogy az a pluralista erők, a szuverének széthúzása következtében nem képes megteremteni a politikai egységet, amely meglátása szerint az államélet alapját képezi.¹²

2.2. Schmitt szuverenitás-elméletének főbb jellemzői

Schmitt *A diktatúra* című munkájában a modernkori szuverenitásgondolat történetének vázlatát adja – amint erre a munka alcíme is utal: *Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* – és abban még kevésbé jelenik meg tisztán saját szuverenitás koncepciója. E munkájában Schmitt a szuverént még a diktátorral azonosítja, de már itt megjelenik a kivételes állapot kategória. A szerző a diktatúrát egy speciális kivételes állapotnak, vagyis a jogrend felfüggesztésének egyik esetkörének tekinti. A szuverén itt abból a célból függeszt(het)i fel az érvényes jogrendet, hogy egy új alkotmányos struktúrát hozzon létre. A szuverén diktátornak tehát nem az a célja, hogy megóvja és egy későbbi időpontban újra hatályba helyezze a korábban felfüggesztett jogrendet, hanem, hogy egy új alkotmányt és jogrendet teremtsen. A szuverén diktatúrája ez esetben tehát az alkotmányozó hatalmat, annak megszerzését jelenti, amely új normák megalkotását teszi lehetővé a számára. A diktatúra bevezetésének

⁷ Weimari alkotmány 32. cikk.

⁸ Weimari alkotmány 74. és 76. cikk.

⁹ Weimari alkotmány 43., valamint 73–76. cikkek.

¹⁰ Weimari alkotmány 48. cikk. A birodalmi elnök által különleges jogrend idején gyakorolt kivételes hatalom gyakorlati megvalósulása kapcsán lásd: SZABÓ I.: Különleges jogrend a weimari alkotmányban. *Iustum Aequum Salutare*, 13 (2017) 4, 127–141. Mindez szorosan kapcsolódik Schmitt szuverenitás-elméletéhez.

¹¹ KARÁCSONY A.: Carl Schmitt a szuverénról. *Kommentár*, 14 (2019) 1, 70–71.

¹² A pluralista államelmélet schmitti kritikájának rövid összegzése kapcsán lásd: KÖRÖSÉNYI: i.m. 17–18. A téma kapcsán lásd különösen Schmitt alábbi munkáit: *A parlamentarizmus és a modern tömegdemokrácia ellentéte* (1926) [ford.: Cs. Kiss Lajos]. In: *Carl Schmitt: A politikai fogalma. Válogatott politika- és államelméleti tanulmányok*. Budapest, Osiris–Pallas Stúdió–Attraktor, 2002, 191–204., valamint *Legalitás és legitimitás* (1932), Máriabesnyő–Gödöllő, Attraktor Kft., 2006.

szükségessége, és ezáltal a diktátor, mint szuverén fellépése a barát/ellenség megkülönböztetésén, tehát mindig egy ellenséggépen alapul. A diktatúra bevezetése ez alapján két esetben válhat szükségessé: (a) ha vannak, akik nem tartják be a politikai közösség által elfogadott normákat, vagy pedig (b) kívülről jelentenek veszélyt a politikai közösség létére.¹³ A diktatúrában foglaltakhoz képest az egy évvel később, 1922-ben megjelenő *Politikai teológia* című munkájában Schmitt egy több elemében módosított szuverenitás-elméletet vázol fel.

„Szuverén az, aki a kivételes állapotról dönt”¹⁴ – szól a *Politikai teológia* híres tételmondata, amely kihangsúlyozza a szuverén – kivételes állapot (*Ausnahmezustand*) – döntés fogalmak kiemelt jelentőségét és egymással való szoros kapcsolatát a schmitti szuverenitás-elméletben. Már e tételmondatból kitűnik, hogy Schmitt nem a szuverenítésra, hanem magára a szuverénre helyezi a hangsúlyt. Az első kérdés, hogy mikor beszélhetünk kivételes állapotról, mikor állnak fenn a bevezetésének feltételei? Schmitt abból indult ki, hogy amennyiben egy súlyos politikai vagy gazdasági válság az állam létét fenyegeti, szükségessége válhat a hagyományos jog(rend) felfüggesztése. A jogrend felfüggesztése pedig egyet jelent a kivételes állapottal.¹⁵ Mindezt Schmitt a következőképpen fogalmazta meg: „A kivételes állapot idején az állam az önfenntartáshoz való jog alapján, ahogy mondani szokás felfüggeszti a jogrendet. A jogrend két eleme – fogalmi önállóságuk bizonyítékaként – szembekerül egymással. Ahogy rendes körülmények között a döntés autonóm mozzanata a minimumra szorítható vissza, úgy semmisül meg a norma a kivételes állapot idején. Ennek ellenére a kivételes állapot fogalma még mindig megközelíthető a jog oldaláról, mivel mindkét eleme, a norma és a döntés egyaránt, a jog keretein belül marad.”¹⁶ Megjegyzendő továbbá, hogy Schmitt szerint a jogtudomány a kivételes állapot kategóriával, mint normafeletti nem foglalkozik, mivel azt nem tudja értelmezni, számára csak a normál állapot értelmezhető. Ellentétben ezzel a felfogással, Schmitt maga úgy gondolta, hogy „a kivételes érdekesebb, mint a mindennapi esetek. A normális semmit, míg a kivétel mindent bizonyít.”¹⁷ Mivel pedig a kivételes állapot és az arról való döntés a jog számára ismeretlen, ezért az egy politikai természetű kérdés lesz.¹⁸

A fentiek alapján tehát a szuverén jogosult döntetni a kivételes állapotról, vagyis az alkotmányos rend felfüggesztéséről, ugyanakkor e döntési jogköre nem közvetlenül jogi normából ered, hiszen „a döntés megszabadul minden normatív

¹³ PETHŐ S.: *Norma és kivétel. Carl Schmitt útja a totális állam felé*. Budapest, MTA Filozófiai Intézet, 1993, 137–143.

¹⁴ SCHMITT, C.: i.m. 1992, 1.

¹⁵ PACZOLAY P.: Bevezetés. In: *Politikai teológia*. Budapest, ELTE ÁJK, 1992.

¹⁶ SCHMITT, C.: i.m. 1992, 5.

¹⁷ SCHMITT, C.: i.m. 1992, 6–7.

¹⁸ MÉSZÁROS G.: Uralhatja-e a jog a kivételes állapotot? *Iustum Aequum Salutare*, 13 (2017) 4, 33–34.

köteléktől, és a szó tényleges értelmében abszolúttá válik.”¹⁹ Schmittnél a kivételes állapotról való döntés jogilag nincs szabályozva, tehát nem egy jogi normából levezethető döntésről, hanem egy politikai-hatalmi jellegű problémáról és ezáltal egy politikai jellegű döntésről van szó. Másképpen fogalmazva: a kivételes állapot kérdése arra utal, hogy hol húzódik meg a politikai²⁰ és a jogi közötti határ. Schmitt pedig ezt egy tisztán politikai kérdésnek tekintette, amelyet nem lehet jogi eszközökkel kezelni.²¹ A kivételes állapotról való döntés így nem a normatartalomból következik, mivel a szuverén a norma – jelen esetben az alkotmány – csak felhatalmazza a politikai döntés meghozatalára, ilyen formán a döntés elválik a jogi normától.²² Schmitt továbbá amellet érvel, hogy szükségtelen a kivételes állapot alkotmányos szinten történő szabályozása, „*a kivételes állapot esetére szolgáló jogosítványok körülírása*”, mivel ezáltal a szuverenitás kérdésének vizsgálata a létjogosultságát vesztené. A kivételes állapot szabályainak alkotmányos szinten történő rögzítése azt eredményezné, hogy nem lenne olyan, aki a normál állapot és a jogrend helyreállításáról döntene. A szuverén lesz ugyanis az, aki e kérdésben dönthet, ezáltal is egyértelművé téve a döntés és a jog különvadását.²³

A szuverén hatalma nem származtatott és nem levezetett valamilyen normából, a szuverén hatalma önmagából fakad. A szuverén ebből kifolyólag önmagában áll, ezért döntése a semmihez kötött.²⁴ De kit tekint Schmitt szuverénnek, azaz a szuverenitás szubjektumának? Habár egyértelműen soha nem jelölte meg ezt a személyt vagy személyi kört, ugyanakkor Schmitt a weimari alkotmány szerinti birodalmi elnököt tekintette a szuverénnek, szemben egy évvel korábban publikált munkájával, ahol a szuverént még a diktátorral azonosította.²⁵ A szuverén helyzete ugyanakkor paradox. Schmitt e kapcsán a következőképpen fogalmaz: „*A szuverén kívül áll az általánosan érvényes jogrenden, ám mégis hozzá tartozik, mert ő illetékes az alkotmány teljes körű felfüggesztése kérdésében dönteni.*”²⁶ A szuverén egyfelől tehát kívül áll a jogrenden, mivel a kivételes állapotról való döntési jogosultság forrása az alkotmányon kívülről származik, másfelől viszont a jogrendhez tartozik, mivel döntési kompetenciája van a jogrend, az alkotmány felfüggesztésére. A kivételes állapot ugyanakkor nem azonosítható az anarchiával vagy a káosszal, hiszen az nem egy minden rendet nélkülöző állapotként, hanem egy jogrend nélküli állapotként fogható fel. Erre Schmitt maga is rámutat, amikor rögzíti, hogy „*sokékal*

¹⁹ SCHMITT, C.: i.m. 1992, 5.

²⁰ A *politikai*, mint alapfogalom kapcsán lásd SCHMITT, C.: *Dér Begriff des Politischen*. Berlin, Duncker & Humblot, 1932.

²¹ LÁNCZI A.: Politikai teológia: állam, szuverenitás, kivételes állapot. *Jogtörténeti Szemle*, 2005/3, 13–14.

²² SZIGETI P.: A decizionizmus két terepe Carl Schmittnél: a szuverenitás makro- és a bírói ítélet mikroszintjén. *Világosság*, 44 (2003) 7–8, 104.

²³ SCHMITT, C.: i.m. 1992, 4.

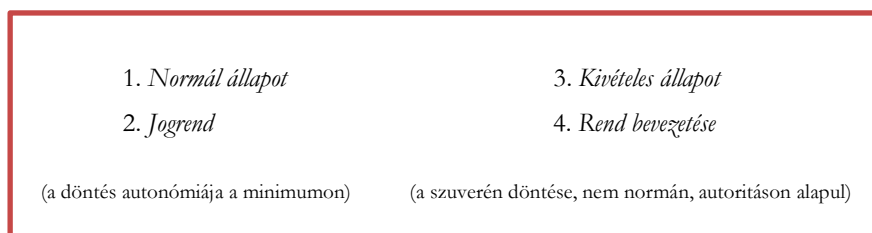
²⁴ KARÁCSONY A.: i.m. 70.

²⁵ MÉSZÁROS G.: i.m. 38.

²⁶ SCHMITT, C.: i.m. 1992, 2.

*inkább jellemzi a kivételes állapotot a korlátlan felhatalmazás, azaz az egész fennálló rend felfüggesztése. Ebben a helyzetben világossá válik, hogy az állam a jog eltűnésekor is fennmarad. Mivel azonban a kivételes állapot mást jelent, mint anarchiát vagy káoszt, még ilyenkor is beszélhetünk valamilyen jogi értelemben vett rendről, ha nem is mindjárt a megszokott jogrendről. Az állam léte ebben az esetben minden kétséget kizáró bizonyítéka annak, hogy a jogi normák érvényessége fölött fölényben van.”*²⁷ E megállapításban egyúttal benne rejlik az is, hogy Schmitt szerint az állam a jog létezése nélkül vagy annak felfüggesztésekor is tud funkcionálni – ellentétben a Kelsen által a *Tiszta jogtanban* kifejtett elképzeléssel.²⁸

A fenti elemzés alapján megállapíthatjuk, hogy Schmittnél a szuverén a kivételes állapotban korlátlan politikai hatalomra tehet szert. E korlátlan politikai hatalom ugyanakkor nem öncélú, az nem egy autoriter és diktatórikus rendszer kiépítését célozza, hanem a rend helyreállítását, amely pedig a jogrend helyreállításának a feltétele. Mint írja, „*normális állapotot kell teremteni, és az a szuverén, aki megállapítja, valóban normális állapot uralkodik-e.*”²⁹ A szuverén tehát nem csak a kivételes állapotról dönt, hanem a normál állapot helyreállításáról is. Mindezek alapján azt mondhatjuk, hogy a szuverén számára a kivételes állapot eszközül szolgál, hogy megteremtse vagy visszaállítsa a normál állapotot. Ilyen formán a normál állapot és a kivételes állapot viszonyát cél-eszköz viszonyként határozhatjuk meg.³⁰ A normál állapot *normatív rendjét*, valamint a kivételes állapot *nem-normatív rendjét* a következő ábra kifejezően szemlélteti:



1. ábra³¹

Az állam két, egymást feltételező állapota, a normál állapot (1), valamint a kivételes állapot (3) egymás ellentétei. A normál állapotnak van jogrendje (2), míg a kivételes állapotnak nincs, hiszen ekkor a jogrend, pontosabban az alkotmányos

²⁷ SCHMITT, C.: i.m. 1992, 5.

²⁸ UHEL P.: A szuverenitás képlékenysége a feloldódás korában. *Kommentár*, 14 (2019) 1, 58.

²⁹ SCHMITT, C.: i.m. 1992, 5.

³⁰ KÖRÖSÉNYI A.: i.m. 12–13.

³¹ Az ábra forrása: SZIGETI P.: i.m. 107.

rend felfüggesztésre kerül. A normál állapot és jogrendjének felbomlása – amelyet tehát egy, az állam létét fenyegető súlyos politikai vagy gazdasági válság előz meg – vezet el a kivételes állapothoz, aminek a bevezetéséről a szuverénnek van autoritáson alapuló felhatalmazása dönteni. A kivételes állapot során a norma megsemmisül, a döntés megszabadul normatív kötelekeitől és abszolúttá válik, a jog a szuverént nem köti. A szuverén ekkor korlátlan politikai hatalomhoz jut, mely hatalmat arra kell felhasználnia, hogy visszaállítsa vagy helyreállítsa a rendet (4). A kivételes állapot ugyanakkor nem egy anarchikus helyzetet vagy káoszt jelent, illetve a kivételes állapotnak és ezáltal a korlátlan politikai hatalomnak nem is a diktatúra kialakítása a célja. E folyamat végén, a rend helyreállításával (4) a normál állapot (1) és a jogrend (2) visszatér. Mindezek alapján azt mondhatjuk, hogy Schmitt szuverenitás-elmélete a konzervatív, etatista politikai filozófia jegyeit hordozza magán.³² Míg belpolitikai értelemben a szuverenitás a kivételes állapotról, vagyis a jogrend felfüggesztéséről való döntésben nyilvánul meg, addig külpolitikai (vagy nemzetközi jogi)³³ értelemben ez a háború indításának jogában (*ius belli*) realizálódik. Belpolitikai síkon a normál állapot tehát a jogrend érvényességét, a kivételes állapot pedig a jogrend felfüggesztését, míg külpolitikai (nemzetközi jogi) dimenzióban a normál állapot a békét, míg a kivételes állapot a háborút jelenti Schmitt szuverenitás-felfogásában.³⁴

2.3. Különbségek Carl Schmitt és Hans Kelsen szuverenitás-elmélete, valamint a kivételes állapot és a kivételes jogrend kategóriái között

Kétségtelen, hogy a 20. század két legfontosabb szuverenitás-elmélete Carl Schmitt és Hans Kelsen nevéhez köthető, éppen ezért szükséges röviden kitérni a két jogtudós szuverenitás koncepciójának eltérő vonásaira. A két, egymással szemben álló elképzelést leegyszerűsítve úgy jellemezhetjük, hogy míg Schmitt szerint a szuverenitás egy ténytyszerűségi, addig Kelsen szerint az egy tisztán jogi kérdés. Láthattuk, hogy Schmitt a szuverenitás kapcsán a kivételes állapottal, mint határhelyzettel, valamint a jogon túli döntés kérdésével foglalkozott, ehhez képest Kelsen a normál állapotot, a jogrend normál helyzetét, a jogállamot vizsgálta. A jogpozitívista Kelsen szakított a Jean Bodin óta tartó, államra vagy nemzetre alapozott szuverenitás-értelmezéssel, amikor megfogalmazta, hogy az egyén szuverén és csak a normáknak van alávetve. Kelsennél nem az állam a szuverenitás alanya. Az állami szuverenitás tagadása Kelsennél azzal áll összefüggésben, hogy számára az egységes jogrendszer legmagasabb szintje, egyúttal maga a szuverén a

³² KÖRÖSÉNYI A.: i.m. 7.

³³ Habár Schmitt szuverenitás-elmélete ilyen formán kapcsolódik a nemzetközi joghoz is, e munkának nem célja Schmitt nemzetközi jogi vonatkozású munkásságának az ismertetése. A téma kapcsán lásd: KARDOS G.: Carl Schmitt nemzetközi jogi felfogásának jellemzői. *Világosság*, 2003/7–8, 53–56.

³⁴ KÖRÖSÉNYI A.: i.m. 10.

nemzetközi jog, amely az államok joghatóságának egyetlen korlátja. Kelsen végül odáig jut, hogy a szuverenitásra nincs is szükség, mert az feloldható és feloldandó. E koncepcióban tehát a szuverenitás normatív meghatározása rajzolódik ki, amely kizárólag a jogi szabályozásra koncentrál.³⁵ A szuverenitás külső (külpolitikai–nemzetközi jogi) oldala tekintetében is ellentét mutatkozik Schmitt és Kelsen elméletében. Míg Schmitt egy „*sein*” alapú, a tényleges hatalmi viszonyokra koncentráló, deskriptív, realista elképzelést vallott, addig Kelsen egy „*sollen*” alapú, a jogelvek fontosságát hangsúlyozó, normatív, idealista megközelítés híve volt.³⁶ Schmitt tehát a döntést és az államot helyezte középpontba, és ilyen formán kapcsolódott Bodin és Hobbes materiális szuverenitás-értelmezéséhez, mondhatni azt fejlesztette tovább. Kelsen ehhez képest a szuverenitás normatív–formális értelmezését határozta meg, amelynek középpontjában a norma és a nemzetközi jog áll.

Mindezek után fontos különbséget tenni a Schmitt által meghatározott kivételes állapot, valamint a kivételes jogrend – a magyar alkotmányjogi terminológiát használva: különleges jogrend – kategóriái között. Az alapvető különbség abban rejlik, hogy a különleges jogrend (mint például a szükségállapot, a hadiállapot, a veszélyhelyzet stb.) esetében jogilag (általában alkotmányos szinten, ritkább esetben törvény által) szabályozott módon kerül sor az érvényes jog időleges felfüggesztésére. Tehát a különleges jogrend során egyes törvények felfüggesztésére, speciális törvények hatályba léptetésére, a rendeleti kormányzás bevezetésére, az alapjogok korlátozására a jogi normák által szabályozott módon és ideig kerül(het) sor. Schmittnél pedig azt látjuk, hogy a kivételes állapot bevezetésére, tehát az alkotmányos rend felfüggesztésére vonatkozó döntés a jogi normából nem levezethető döntésként jelenik meg.

E kérdés ugyanakkor rendkívül aktuális, hiszen a koronavírus-járvány okozta egészségügyi válsághelyzetre válaszul Európa és a világ országai szinte kivétel nélkül különleges jogrendet vezettek be. Számos esetben a koronavírus-járvány miatt bevezetett különleges jogrendet tévesen a schmitti szuverenitás-elmélettel és kivételes állapot fogalmával azonosítják, éppen ezért lényeges a különbségtétel. Fontos rögzíteni, hogy az egyes országokban a különleges jogrend bevezetésére azoknak a jogszabályoknak az alkalmazásával került sor, amelyeket az adott nemzeti jogrendszer a rendkívüli helyzetekre tart fenn.³⁷ Ezekben az esetekben a

³⁵ DETRE L.: A jogrendszer teljessége, vagy tények realitása? Hans Kelsen és Carl Schmitt szuverenitás felfogásának összevetése. *Jogi tanulmányok – az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskolájának III. konferenciája*. Budapest, ELTE ÁJK, 2012, 177–180.

³⁶ BAUDET, T.: *A batárok jelentősége*. Budapest, Századvég Kiadó, 2015, 105–107.

³⁷ Lásd például a magyar kormány koronavírus-járványra adott választ. Magyarországon a koronavírus-járvány 2020 március elején való megjelenésére reagálva a kormány március 11-i rendeletével [40/2020. (III. 11.) Kormányrendelet a veszélyhelyzet kihirdetéséről] az ország egész

cél tehát nem az volt, hogy korlátlan politikai hatalomra tegyen szert az annak bevezetésére felhatalmazott személy vagy szerv. A párhuzam tehát nem állja meg a helyét, mivel a koronavírus-járvány, mint egészségügyi válsághelyzet kapcsán nem is lehet olyan jellegű rendkívüli helyzetről vagy válságról beszélni, amire a *Politikai teológiában* Schmitt utalt. Jelenleg ugyanis nincs olyan személy vagy személyi kör (szuverén), amely az érvényes és hatályos jogon túlmutató olyan döntést sürgetne, amelyre nincs felhatalmazása.

3. Konklúziók és összegzés

Schmitt elméletének az áttekintését követően érdemes az általa megalkotott szuverenitás fogalmat elhelyezni a többi, schmitti alapfogalom között. Schmitt a *politikai* fogalmából indult ki, amely egy ellenségképen, pontosabban a barát/ellenség megkülönböztetésen alapul, e megkülönböztetés pedig alkalmas arra, hogy a politikait elhatárolja más szféráktól. A második kulcsfogalom az *állam* fogalma, amely az alapvető politikai egységet jelöli Schmittnél. E politikai egység legfontosabb jellemvonása pedig a *szuverenitás*, amely annak a *szuverénnek* a döntéseiben nyilvánul meg, akinek a hatalma önmagából fakad. A szuverén legfontosabb döntése a *normál és kivételes állapot*ról való döntés, amely viszont nem a normatartalomból következik, hanem az mindig egy politikai döntés – ilyen formán tehát a döntés elválik a jogi normától. A szuverén e *döntési kompetenciája* azt teszi lehetővé a számára, hogy a normál állapot helyreállítása érdekében az érvényes jogrendet – pontosabban az alkotmányos rendet – felfüggeszse. A kivételes állapot ugyanakkor egy olyan korlátlan politikai hatalmat feltételez, amely független a jogrendtől, illetve azon felül is áll. Ez az állapot ugyanakkor nem azonosítható az anarchiával vagy a káosszal, hiszen az nem egy minden rendet nélkülöző állapotként, hanem egy jogrend nélküli állapotként fogható fel. Schmitt tehát a saját szuverenitás fogalmát a normál állapottal szemben ragadta meg. A kivételes állapot végső célja pedig nem a diktatúra kialakítása, hanem a rend helyreállítása, ami pedig előfeltétele a normál állapot és ezáltal a jogrend

területére veszélyhelyzetet hirdetett. A veszélyhelyzet – amely egyike az Alaptörvény által meghatározott és szabályozott hat különleges jogrendi esetkörnek – élet- és vagyonbiztonságot veszélyeztető elemi csapás vagy ipari szerencsétlenség esetén, valamint ezek következményeinek az elhárítása érdekében hirdethető ki. A különleges jogrend bevezetésére, valamint a korlátozó intézkedések elrendelésére tehát jogilag szabályozott módon került sor. A téma kapcsán lásd bővebben: HOJNYÁK Dávid–UNGVÁRI Álmos: Az Európai Unió egyes tagállamainak koronavírus-járványra adott válasza, különös tekintettel a vizsgált államok által bevezetett különleges jogrendi szabályozásra. *Miskolci Jogi Szemle*, 15 (2020) 1, 122–138., valamint HOJNYÁK, D.–HORVÁTH, A.–NAGY, Z.—UNGVÁRI, Á.: Summary: Pondering about emergency powers during COVID-19. In: Horváth, A.–Nagy, Z. (eds.): *Emergency powers in Central and Eastern Europe*. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing, 2022, 343–367.

visszaállításának. Ezzel visszatértünk a politikai fogalmához, vagyis a schmitti alapfogalmak egymással összefüggő rendszere bezárult.

Felhasznált szakirodalom:

BAUDET, Thierry: *A határok jelentősége*. Budapest, Századvég Kiadó, 2015.

DETRE László: A jogrendszer teljessége, vagy tények realitása? Hans Kelsen és Carl Schmitt szuverenitás felfogásának összevetése. *Jogi tanulmányok – az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskolájának III. konferenciája*, Budapest, ELTE ÁJK, 2012, 169–182.

HOJNYÁK Dávid–UNGVÁRI Álmos: Az Európai Unió egyes tagállamainak koronavírus-járványra adott válasza, különös tekintettel a vizsgált államok által bevezetett különleges jogrendi szabályozásra. *Miskolci Jogi Szemle*, 15 (2020) 1, 122–138.

HOJNYÁK Dávid–HORVÁTH Attila–NAGY Zoltán–UNGVÁRI Álmos: Summary: Pondering about emergency powers during COVID-19. In: Horváth Attila–Nagy Zoltán (eds.): *Emergency powers in Central and Eastern Europe*. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing, 2022, 343–367. DOI: [10.47079/2022.znah.epicaee.1](https://doi.org/10.47079/2022.znah.epicaee.1) 13

KARÁCSONY András: Carl Schmitt a szuverénről. *Kommentár*, 14 (2019) 1, 69–73.

KARDOS Gábor: Carl Schmitt nemzetközi jogi felfogásának jellemzői. *Világosság*, 2003/7–8, 53–56.

KÖRÖSÉNYI András: Carl Schmitt állam és politikaelméleti alapfogalmai. *Politikatudományi Szemle*, 9 (2000) 3–4., 5–24.

LÁNCZI András: Politikai teológia: állam, szuverenitás, kivételes állapot. *Jogtörténeti Szemle*, 2005/3, 9–17.

MÉSZÁROS Gábor: Uralhatja-e a jog a kivételes állapotot? *Iustum Aequum Salutare*, 13 (2017) 4, 31–41.

PETHŐ Sándor: *Norma és kivétel. Carl Schmitt útja a totális állam felé.* Budapest, MTA Filozófiai Intézet, 1993.

SCHMITT, Carl: *Die Diktatur.* Munich–Leipzig, Duncker & Humblot, 1921.

SCHMITT, Carl: *Politikai teológia* (ford.: Paczolay Péter). Budapest, ELTE ÁJK, 1992.

SZABÓ István: Különleges jogrend a weimari alkotmányban. *Iustum Aequum Salutare*, 13 (2017) 4, 127–141.

SZIGETI Péter: A decizionizmus két terepe Carl Schmittnél: a szuverenitás makro- és a bírói ítélet mikroszintjén. *Világosság*, 44 (2003) 7–8, 103–118.

TECHET Péter: Carl Schmitt és a nemzetiszocializmus. *Politikatudományi Szemle*, 21 (2012) 1, 133–152.

UHEL Péter: A szuverenitás képlékenysége a feloldódás korában. *Kommentár*, 14 (2019) 1, 54–61.

Felhasznált jogszabály:

A weimari köztársaság alkotmánya

HORVÁTH FÁBIÁN LÁSZLÓ*

***A közigazgatás „megtisztításának” eszköztára a II. világháború után.
Jogi eljárások a 1945–50 között*****

Absztrakt: Jelen tanulmány célja bemutatni azokat a *jogi eljárásokat*, melyek a közigazgatási apparátus lecseréléséhez, az 1945-ös hatalomváltást megelőző rendszer képviselőinek elcheteletlenítéséhez vezettek. A közigazgatásban kialakult funkcionális válság megoldására tett első kísérletektől, a nemzeti bizottságok politikai tevékenységétől indulva egészen a koalíciós évek végéig mutatom be a népbíróági, igazolási, valamint B-lista eljárások dinamikáját, illetve kísérletet teszek a döntések mögött álló politikai szándék kifejtésére is.

Kulcsszavak: közigazgatás, jogi eljárások, hatalomváltás, kommunizmus, koncepciók per

Abstract: This paper aims to describe the legal procedures that led to the replacement of the administrative apparatus and the removal of representatives from the regime that preceded the 1945 change of power. I will outline the dynamics of the procedures of the People's Court, the 'verification process', and the B-list, from the initial attempts to resolve the functional crisis in administration—beginning with the political activities of the national committees—through to the end of the coalition years. Additionally, I will attempt to explain the political intentions behind these decisions.

Keywords: public administration, legal procedures, regime change, communism, show trial

1. Bevezetés

Az 1944-es esztendő köztudottan Magyarország huszadik századi történetének talán egyik legnagyobb fordulópontja. A pusztító háborús helyzetet követő, hónapokig tartó közjogi interregnum állapotának decemberben sikerült véget vetnie a Szövetségi Ellenőrző Bizottság engedélyével és hathatós szovjet segítséggel megalakult Ideiglenes Nemzetgyűlésnek. A Nemzetgyűlés által megválasztott Ideiglenes Nemzeti Kormány egyik legsürgetőbb feladata volt a háború által megtépázott országban az akkor szinte működésképtelen közigazgatást olyan helyzetbe hozni, mely nemcsak az alapvető közszükségleteket és közszolgáltatásokat tudja minél hamarabb szakszerűen biztosítani, hanem személyi és politikai összetételében megfelel a – a Magyar Kommunista Párt

* dr. Horváth Fábián László, II. évfolyamos PhD hallgató, Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Doktori Iskola. Témavezető: Dr. Völgyesi Levente dékánhelyettes, egyetemi docens.

** A tanulmány a Kulturális és Innovációs Minisztérium EKÖP-24-3-I kódszámú Egyetemi Kutatói Ösztöndíj Programjának a Nemzeti Kutatási, Fejlesztési és Innovációs Alapból finanszírozott szakmai támogatásával készült.

1944 november 30-i akcióprogramjával szinte megegyező– Magyar Nemzeti Függetlenségi Front Programjában¹ foglalt elveknek is.

Rövidesen megalakultak a települési és vármegyei önkormányzatok, s átvették a nemzeti bizottságoktól a közigazgatási feladatokat. Szem előtt tartva az előzőekben felvetetteket, a baloldali sajtó egyre élénkebben cikkezett a közigazgatás megtisztításának szükségességéről, azért, hogy „kiirtsák a magyar állami és közigazgatási gépezetből a hivatalnoki karból a nép ellenségeit, azokat, akikre egy nép államának a közigazgatását nem lehet rábízni.”² Megindultak először az igazolási eljárások, majd azok kudarcnak titulált működését követően – illetve azzal párhuzamosan – jelentősen megnőtt a népbíróságok elé kerülő korábbi köztisztviselők száma. A folyamatot végül az utólag statisztikai szempontból szintén sikertelennek tekinthető B- listázás zárta. Inkább módszernek, mint eljárásnak mondható a megbízhatatlan közszolgákkal szemben alkalmazott internálás, rendőri felügyelet alá helyezés, továbbá a lejáratusukra alkalmazott sajtóhadjárat, melyek egészen a tanácsrendszer kialakulásáig jelentős volt. Az állambiztonsági megfigyelést vagy hasonló eszközöket pedig sokszor egészen a reakciónak bélyegezett egykori tisztviselők nyugdíjba vonulásáig alkalmazta az államszocialista rendszer.

Tanulmányom célja bemutatni azokat a *jogi eljárásokat*, melyek a közigazgatási apparátus lecseréléséhez, az előző rendszer képviselőinek ellehetetlenítéséhez vezettek. A nem jogi módszerek részletes bemutatása – terjedelmi okokból – egy következő munkában lesz lehetséges. A történetek mélyebb megértéséhez kísérletet teszek a döntések mögött álló politikai szándék kifejtésére is.

Munkámban használt köztisztviselő, tisztviselő, közszolga kifejezéseket csak a vármegyei, városi és községi igazgatás szolgálatában állt tisztviselőkre használok szinonimaként, nem vizsgálom sem a közigazgatási segédszemélyzet, sem a központi igazgatás tisztviselőinek sorsát.

2. A közigazgatás állapota a háború végén

1944 végére- 1945 elejére a helyi közigazgatás működése egyrészt a háború pusztításai következtében beálló anyagi károk következtében, másrészt a kiűritési rendeletnek eleget tevő, Dunántúlra vagy Németországba menekülő jelentős számú, hiányzó tisztviselői létszám miatt az ország legtöbb településén megbénult. Hiányoztak a legfontosabb közellátási cikkek, a háborús károk miatt leállt a közlekedés, a

¹ Lásd: Magyarország demokratikus újjáépítésének és felemelkedésének útja. A Magyar Nemzeti Függetlenségi Front programja. *Délmagyarország*. 1944. december 3., 3.

² Ahol a munkásosztály egységes, ott a demokrácia ügye győzedelmeskedik — mondta Révay József nemzetgyűlési képviselő a Magyar Kommunista Párt kecskeméti nagygyűlésén. *Kecskeméti Lapok*. 1945. március 15., 2.

közüzemek, rengeteg lakóház lakhatatlanná vált. A sokszor egyéni kezdeményezésekre meginduló romeltakarítás és a robbanóanyagok eltávolítása életveszélyes volt a szakemberek és a hatékony munkaszervezés hiánya következtében. Megszűnt a közbiztonság, járványok ütötték fel a fejüket.³ Ezen problémák megoldása a front által a megalakult kormánytól elzárt településeken is halaszthatatlanná vált, így különféle szerkezetben és elnevezéssel (kis- és nagytanács, törvényhatósági bizottság, intézőbizottság), civilekből és párttagokból álló, később nemzeti bizottságokká alakult szervek öntevékenyen vették kézbe a közügyek intézését.⁴

Megállapítható ugyanakkor az is, hogy a közigazgatási feladatok ellátása ezekben az időkben leginkább az ország keleti részén okoz gondot, hiszen onnan menekültek el nagyobb számban a helyi hatalom képviselői és a szakszemélyzet tagjai, míg Zala vármegyében például minden közalkalmazott (tehát nem csupán a közigazgatásban dolgozók) mindösszesen 11%-a távozott el.⁵

3. Eltérő politikai szándékok a közigazgatással kapcsolatban 1944-45-ben

A helyi közigazgatás személyi összetételét vizsgálva megállapítható, hogy az 1944-ben hivatalukba visszatért, vagy helyükön maradt közigazgatási tisztviselők között túlnyomó többségben a középrétegek képviseltették magukat. Matheovits Ferenc képviselő felszólalása szerint 1930-ban például a teljes közalkalmazotti kar csupán 47%-a sorolható a nem középosztálybeli származásúak közé.⁶ A közigazgatási *tisztviselők* számára vonatkozóan adattal nem rendelkezünk, ugyanakkor a magasabb képzettséget (jogtudományi, államtudományi végzettséget vagy közigazgatási tanfolyam elvégzését) igénylő munkakörökben elenyésző lehetett a középrétegen kívüli társadalmi rétegek aránya.

Az Ideglenes Nemzetgyűlés megalakulását követően rövid ideig minden politikai szereplő negatívan vélekedett az említett társadalmi csoportról, nem egy megszólalás arról árulkodik, hogy nélkülük akarták létrehozni az új, demokratikus közigazgatást. Érthető volt a kezdeti ellenérzés, hiszen a nyilas kormányzat személycserék útján átvett szinte minden vezető közigazgatási pozíciót, illetve az alacsonyabb pozíciókba is sokszor pártfunkcionáriusokat helyezett (Kivétel volt a szakigazgatási személyzet és a kisebb községek előjárósága)⁷. Eltérő indokolással, de egységesen követelték tehát a politikai pártok a „népet szolgáló demokratikus közigazgatás” megteremtését.

³ DEGRÉ A.: A közigazgatás megindulása Zala megyében a felszabadulás után. *Levéltári Közlemények*, 1960/1., 5.

⁴ CSIZMADIA A.: *A magyar közigazgatás fejlődése a XVIII. századtól a tanácsrendszer létrejöttéig*. Budapest, Akadémiai Kiadó, 1976, 517.

⁵ DEGRÉ A.: i.m. 4.

⁶ N. SZABÓ J.: A diktatúra kiépülése és a közigazgatás (1946 ősze – 1948). *Hitel*, 2019/4., 101.

⁷ CSIZMADIA A.: i. m. 7.

Míg a jobboldali pártok jobbra a fenti érvek alapján értettek egyet a közigazgatás ’megtisztításával’, a munkaspártok drasztikusabb nézeteket vallottak. A kommunisták automatikusan nyilasbarátnak, fasisztának nevezték azokat, akik szolgálati helyükről elmenekültek, ugyanakkor egyes marxista jogtörténeti művekben – és később látható, a kommunista pártvéleményben is – a helyükön maradó tisztviselőket is bűnösnek bélyegezték, mondván, ez a réteg „többségében, ha nem is állott a fasizmus oldalára, sőt embertelenségeinek ellenzője volt, ezt az ellenzést azonban aktív harccal nem nyilvánította.”⁸

A hivatalnoki osztály, bár jelentősen átpolitizált volt, nem csak értékrendi, világnézeti okokból kötődött a Horthy-rendszerhez. A szoros kötődés oka jobbra finánciális jellegű volt: a világháború kitörését követő szűkebb évek időszakát követően tízezrek juthattak tisztos megélhetéshez, biztosnak tűnő álláshoz a közigazgatásban.⁹

4. Nemzeti bizottságok – korai kísérlet a közigazgatás átalakítására

Gyarmati György tanulmányában »a közigazgatás reformtervezet nélküli „demokratizálásának”«¹⁰ nevezi az 1945-46 közötti másfél éves periódusban lejátszódó folyamatokat. A magyar politikai pártok egyetértettek abban, hogy a fennálló önkormányzati rendszer a személyi összetételével még a törvényhatóságok újbóli összehívása esetén is alkalmatlan, a Horthy-rendszer bukásával hitelét veszítette, s nem csak személyi, hanem szervezeti reformokat is sürgettek. A ’demokratizálás’ végül csupán személycserékhez vezetett, strukturális változásokra a tanácstörvény hatályba lépéséig kellett várni.

A háború utolsó pár hónapjáig a helyi közigazgatási hatáskört is a Magyar Nemzeti Függetlenségi Front helyi szervezetei, a nemzeti bizottságok gyakorolták, egészen január elejéig, amikor is az Ideiglenes Kormány ezen hatáskörük megszüntetéséről döntött, illetve felszólította őket a helyi önkormányzati szervek megalakítására.¹¹ Ezzel a baloldali erők elképzelései maradéktalanul nem érvényesültek (csehszlovák mintára a pártok által delegált tagokból álló nemzeti bizottságok vették volna át a helyi hatalmi és igazgatási tevékenységet az állami szervezetrendszerbe ágyazódva), ugyanakkor a helyi önkormányzatok megalakításánál, hatalmas befolyásuk volt a személyi összetétel megállapítására.¹² Pest-Pilis-Solt-Kiskun vármegye Nemzeti Bizottsága például még az 1945.március 19-én kiadott rendeletében is úgy rendelkezett, hogy a vármegyei törvényhatóság megalakulásáig az „*alispáni, főszolgabírói, polgármesteri, adott esetben a községi vezetőjegyzői állásokat arra érdemes és rátermett, egyébként az előírt képesítéssel nem rendelkező*

⁸ CSIZMADIA A., i.m. 531.

⁹ KOVÁCS M. M.: Közalkalmazottak 1938-1949. Létszám, összetétel, politika. *Válóság*, 1982/9., 44.

¹⁰ GYARMATI GY.: Három koncepció és ami azután következik... Közigazgatási reformtörökvések és kudarcaik sorozata Magyarországon 1945-1948. *Tér és Társadalom*, 1989/4., 4.

¹¹ 14/1945. ME rendelet a közigazgatás ideiglenes rendezéséről.

¹² CSIZMADIA A.: i.m. 524.

egyénekekkel is betölti, illetőleg kicserélheti (!)¹³ Ezt a példát követve kormányrendeletben is rögzítésre került, hogy a miniszternek jogában áll olyan személyt is tisztviseelőnek kinevezni, akinek nincs megfelelő képzettsége.¹⁴

A nemzeti bizottságok állandó szervvé, befolyásos politikai erővé tétele volt a 'demokratizálás' első lépése. Fontos szerep jutott még a nemzeti bizottságoknak a közigazgatási szervezetrendszerből való kirekesztésük után többek között az igazolási eljárás, valamint a népbírósi eljárás során is.

5. Jogi jellegű eljárások

A közigazgatás megtisztításának eszköztára jogi, adminisztratív eljárások és egyéb módszerek főkategóriákba sorolható. A megkülönböztetés szempontja a jogi eljárások esetén két feltételből áll: 1) a jogkövetkezmények politikai- büntetőjogi felelősség megállapítását követően voltak alkalmazhatóak 2) mindhárom eljárás részletesen lefektetett eljárási (és anyagi) szabályok szerint zajlott le. Az adminisztratív módszer, az internálás esetében kevésbé voltak meghatározottak a processzuális szabályok, illetve a jogkövetkezmények nem feltétlenül a politikai- büntetőjogi felelősség megállapítását követően, hanem 'prevenációs céllal' kerültek alkalmazásra (hivatalosan a közrend és a közbiztonság vagy más fontos állami érdek védelme, gazdasági károk megelőzése céljából). Az egyéb módszerek nem illeszthetők az említett két kategóriába, hiszen az állambiztonsági módszerekkel a gyanúsnak vélt személyeket igyekeztek ártalmatlanná tenni, a sajtóhadjárat pedig az említett személyekkel kapcsolatos bizalom megtörését és a társadalmi csoport teljes lejáratását szolgálták.

5.1. Igazolási eljárás

Felismerve azt a körülményt, hogy a meglévő közigazgatási apparátus nélkül, csupán a nemzeti bizottságokra nem lehet támaszkodni, az Ideiglenes Nemzeti Kormány a közigazgatás mielőbbi megindítása céljából – az igazolási rendelettel egyidejűleg – előírta a köztisztviselők azonnali jelentkezési kötelezettségét, mely az igazolási rendelettel egyidejűleg, január 1-én lépett hatályba. A jelentkezéssel egyidőben a köztisztviselő köteles volt előterjeszteni a hivatali főnökének az igazolónyilatkozatot. Állásról lemondottnak kellett tekinteni azt, aki a felhívásnak nem tett eleget.¹⁵

A közalkalmazottak 1939. szeptember 1-jét követő időszakban kifejtett hivatali tevékenységének vizsgálatára, kiindulva a közigazgatás demokratizálására vonatkozó, minden politikai párt által támogatott elvárásra, az Ideiglenes Nemzeti Kormány 1945. januárjában megalkotta a 15/1945. ME. sz. rendeletet. A kormányrendelet

¹³ Pest-Pilis-Solt-Kiskun vármegye Nemzeti Bizottsága március 19-én megalakult. *Cegléd*, 1945. április 22., 4.

¹⁴ 1150/1945. M. E. számú rendelet a közszolgálati alkalmazáshoz előírt képesítési kellékekről.

¹⁵ 16/1945. ME rendelet a közalkalmazottak szolgálatátelre való jelentkezési kötelezettségéről.

preambulumában előrevetíti, hogy az igazolási eljárás a népbíróági eljárás komplementere lesz, a kibocsátásához az a fontos közérdek vezetett, hogy a népbíróági rendelet – bár előkészítése már folyamatban volt – még nem jelent meg, arra egészen január 25-ig várni kellett. Szükségszerűséből, addig is „amíg a felállítandó népbíróóságok minden népellenes cselekmény elkövetőjét és a háborús bűnösöket felelősségre vonják”¹⁶

Központi gondolatként a jogszabály egésze azt vizsgálta, hogy az igazolandó személy (legyen az tényleges szolgálatban álló vagy tényleges szolgálat teljesítése végett visszarendelt nyugállományú közalkalmazott) 1939. évi szeptember hó 1. napját követőleg tanúsított magatartása *sértette-e a magyar nép érdekeit*. Ezt három szempont szerint elemezték: első és legfontosabb volt az, hogy a vizsgálandó személy a „népellenes törvények és rendeletek” végrehajtása során miként végezte munkaköri feladatait. A másik körülmény az volt, ha és amennyiben a közalkalmazott elhagyta a szolgálati helyét a Vörös Hadsereg bevonulása előtt, azt milyen okból tette (ennek keretében az eltávozás idején végzett tevékenységét, magatartását is ellenőrizték). Külön kiemelendő, hogy nem szolgálhatott az igazolás megtagadásának alapjául, ha az igazolandó a Vörös Hadsereg bevonulása előtt félelemből és aggodalomból (de nem politikai okból) elmenekült. Ez ugyanakkor terhelő tényezőként sok igazolási- és népbíróági eljárásban előkerült.¹⁷

Önigazoló nyilatkozat kitöltésével és munkahelyi előljáró részére történő benyújtásával kezdődött a procedura. A tulajdonképpeni eljárás során a politikai pártok (5), valamint a munkahely által delegált (1) tagokból és egy jogvégzett, jogszerűséget felügyelő tagból álló bizottság zárt ülésen vagy nem nyilvános tárgyaláson döntött. Zárt ülést kezdetben csak a helyükön maradó közalkalmazottak esetén tartottak, (nem nyilvános) tárgyaláson az elmenekültek kérdésével foglalkoztak, illetve abban az esetben, ha egy tag tárgyaláson való elbírálást kívánta. A tárgyalás az igazolandó távolléte esetén is lefolytatható volt. A bizottsági által hozott döntés alapja főként az igazoló nyilatkozatban foglaltak voltak, de jelentőséget tanúsítottak a bejelentéseknek, tanúk vallomásainak is.¹⁸

Alkalmazható jogkövetkezmény az igazoltnak tekintés, megfeddés, áthelyezésre ítéles, vezető állásra alkalmatlanság kimondása, előléptetésből 1-5 évre kizárás volt. A legsúlyosabb esetben a bizottság az érintettet határozatával népbíróóság elé utalhatta, mindamellett állásában felfüggeszthette. Fellebbezni csupán az áthelyezést elrendelő vagy előléptetést kizáró határozat ellen lehetett az illetékes miniszterhez címezve.¹⁹

¹⁶ Az Ideiglenes Nemzeti Kormány 15/1945. ME rendelete a közalkalmazottak igazolásáról preambuluma. *Magyarországi Rendeletek Tára*, Budapest, Magyar Belügyminisztérium, 1945, 79. évf., 5.

¹⁷ SCHÖNWALD P: Igazoló eljárások, 1945-1948. In: *A Magyar Munkásmozgalmi Múzeum Évkönyve*, Budapest, 1969, 252-253.

¹⁸ 15/1945. ME rendelet, 12-13. §.

¹⁹ 15/1945. ME rendelet 19-20. §.

Két lényeges újítást vezetett be az a 77/1945. M.E. számú rendelet: Egyrészt bevezette az ún. *feltételes* és a *balaszthatatlan szolgálati érdekből történő* igazolást. Feltételesen lehetett igazolni azt a személyt, aki a nem az Ideiglenes Nemzeti Kormány joghatósági területéről érkezett és itteni előjárója nem volt; őket az illetékes miniszter feltételesen igazolhatta. Mindkét csoporttól egy olyan nyilatkozat megtételét várták el a szolgálat megkezdéséhez, mely szerint alávetik magukat a későbbi igazolási eljárásnak (ez a feltételesen igazolt esetében a nyilatkozat megtételét követő három éven belül gyanú esetén bármikor megtörténhetett).²⁰

1945 áprilisában teljesen új igazolási rendelet alkottak, hatályon kívül helyezve az előbbieket. Kis különbséggel a népbíróági rendelet tényállásai alapján meghatározták a magyar nép érdekeit sértő magatartásokat. Kiegészült a kényszerítő okból Szálásra tett esküvel azon körülmények sora, mely miatt az érintett igazolását nem lehet megtagadni. Az igazoló bizottságok létrehozása a nemzeti bizottságok feladata lett, a bizottság a szakszervezetek képviselőivel együtt már nyolc tagúvá vált. Fontos változást jelentett a nyilvánosság elvének kimondása az eljárás során. Szigorodtak a szankciók, illetve a bizottság indokolt esetben internálási javaslattal élhetett a rendőrhatalóság felé, valamint az iratok áttételével megkereshette a népügyészséget is. Kidolgozták a fellebbezésre vonatkozó részletes szabályokat: egyfokú eljárásban, a népbírósághoz lehetett fellebbezni állásvesztés és nyugdíjigény elvesztését kiszabó határozat, valamint anyagi és eljárásjogi szabálysértés okán.²¹

Rendeződtek a Nyugatra eltávozott közalkalmazottak igazolási kérdései. Mentessült a hátrányos jogkövetkezmények alól az, aki katonai vagy munkaszolgálatos zárt kötelékben hagyta el az országot, valamint azok is, akik hitelt érdemlően igazolták, hogy a külföldre hurcolt állami vagyon gondozásánál jelentős érdemeket szereztek.²²

Az igazolási eljárásokat kezdettől fogva számos kritika érte. A munkáspártok úgy vélték, hogy a reakció az elvesztett közigazgatási pozíciókat az igazolási eljárás kijátszásával igyekszik megszerezni, egyrészt a múlt rendszer tisztviselőit olyan eljárásokba helyezte át, ahol az érintettek a tevékenységüket nem ismerték, Dunántúlon pedig az eljárások lassításával igyekeznek 'machinálni'.²³ További problémának tűnt az, hogy a kitöltött igazoló nyilatkozatok valóságtartalma nem ellenőrizhető, valamint az eljárások során elkövetett visszaélések miatt egyre kevesebben mentek el a tárgyalásokra tanúskodni. Nem elhanyagolható az sem, hogy a hivatalnoki kar esetében nagy volt az összetartás, emiatt sokszor a munkatársak, ismerősök 'egymást igazolták'.²⁴ Egyes

²⁰ 77/1945. ME rendelet a 15/1945. és 16/1945. ME rendeletek kiegészítése tárgyában, 4-5. §

²¹ SCHÖNWALD P.: i.m. 260-262.

²² 3300/1945. ME; 11400/1945. (XII. 1.) ME rendeletek.

²³ ZÖLD S.: Tisztogatás és leépítés a közigazgatásban. *Társadalmi Szemle*, 1946/8-9., 615.

²⁴ PAPP Gy.: Az igazoló eljárások és a háborús bűnök megtorlása 1945 után Magyarországon *Aetas*, 2009/2., 172.

vélemények szerint azzal, hogy nagyjából 2-5 % lehetett a nem igazolt személy „bürokrácia régi emberei fokozatosan visszatértek a közigazgatásba”²⁵.

Az igazságügyminiszter az Ideiglenes Nemzeti Kormány felkérésére a közigazgatás demokratikus átszervezése tárgyában készített beszámolójában megállapította, hogy az igazolóbizottságok nem oldották meg maradéktalanul a rájuk bízott feladatot. Hibának róta fel, hogy azért is vannak még ’antidemokratikus elemek’ hivatalban, ugyanis a már lezárt ügyek tárgyalása során nem derült ki a népellenes magatartásuk. Külön megemlíti azokat a tisztviselőket, akiknek az igazolásuk megtörténtét követően hivatali működése az ország demokratikus szellemű újjáépítése szempontjából károsná vált, valamint az ország nehéz helyzetéből adódó feladatok ellátására szakértelmük vagy szorgalmuk hiánya miatt alkalmatlanok.²⁶ Az utóbbi körülmény megállapításával lényegében hivatalosan is megteremtették az elméleti alapot a későbbi B-lista rendelet megalkotására.

5.2. A népbíróságok szerepe a közigazgatás megtisztításában

Dálnoki Miklós Béla vezérezredes Ideiglenes Nemzeti Kormányának megalakulásának napján, 1944. december 22-én, a Magyar Nemzeti Függetlenségi Front programjának megfelelően nyilatkozatban vállalta, hogy a háborús és népellenes bűnösöket bíróság elé állítja, illetve szükség esetén más országoknak kiadja.²⁷

A nyilatkozatot megelőzően a Szegedi Nemzeti Bizottság a MNFF programjára hivatkozva 1944. december 13-án a „népakaratnak is eleget téve” elsőként kimondta a népbíróságok felállítását. A felállítandó öt fős tanácsok határozatlan idejű internálást, börtönt, fegyház- vagy halálbüntetést szabhattak volna ki azzal, hogy az ítélet ellen nincs helye fellebbezésnek, csupán a halálbüntetés esetén lehetett kegyelmi kérvényt felterjeszteni a nemzeti bizottsághoz. Bár működését ténylegesen nem kezdte meg, ez a kezdeményezés a baloldali sajtóban megjelenő követelések, valamint a későbbi moszkvai fegyverszüneti egyezményben vállalt nemzetközi jogi kötelezettség mellett sürgette a kormányt egy népbírószági jogszabály megalkotása tárgyában.²⁸

Az 1945. február 5-én hatályba lépett 81/1945 M.E. rendelet két csoportba sorolta a *háborús és népellenes* büntetteket, ezeken belül pedig az elkövetési magatartás alapján súlyosabb és enyhébb kategóriákat alakított ki. A legsúlyosabb háborús büntettek (11.§) büntetése a legnagyobb mértékű (halálbüntetés, életfogytig tartó kényszermunka) illetve e § alapján az elítélt egyáltalán nem élhetett fellebbezéssel. A dolgozat témája szempontjából kiemelendő ezen § elkövetési magatartásai közül az 1. bekezdés, mely

²⁵ SCHÖNWALD P.: i.m. 270.

²⁶ IM Irattár. T. 2.250/1945.1945. november 25, Idézi: SCHÖNWALD P.: i.m. 271-272.

²⁷ PAPP A: Néptörvényszék, Népbíróság és népbírószági jog Magyarországon. *E-tudomány* 2011/4., 10.

²⁸ „A Magyar Nemzeti Függetlenségi Front Szegedi Nemzeti Bizottsága. RENDELET” (1945. január 9.) *Néplap*, 3.

azt a személyt büntette, aki vezető állásban kifejtett tevékenységével, magatartásával Magyarországnak a háborúba mind fokozottabb mértékben történt belesodródását elősegítette, vagy azt megakadályozni nem törekedett, bár arra módja lett volna *készívatati állásánál*, politikai, közgazdasági, közéleti szerepénél fogva. A népellenes büntettek (15.§ és 17.§ foglaltak) a magyar nép vagy egyes csoportjai ellen irányuló olyan deliktumok voltak, melyeket leginkább politikusok, köztisztviselők követhettek el. Említést érdemel a közigazgatási tisztviselőkkel szemben igen kreatívan alkalmazott 15. § 3) bekezdés szerinti népellenes büntett, mely azt a joghatósággal bíró közalkalmazottat büntette, aki következetesen népellenes, fasisztabarát működést fejtett ki. E bekezdés alapján 5 évtől 10 évig terjedő kényszermunka, fegyház, kivételes esetben börtön volt kiszabható. (Az általam vizsgált eljárások során ugyanakkor a legtöbb esetben az akkor hatályos Btk. 92. § alkalmazásával az enyhítő körülmények túlsúlyára tekintettel szállították le a büntetési tételt.) Ez a 'gumitényállás' is lehetővé tette, hogy a népbírószági jogot a közigazgatás megtisztítására pallosként alkalmazhassa a kiépülő kommunista kormányzat.²⁹

A jogszabály pontatlanságán túl a népbírószágok jogszerű működését egyes népbírák képzetlensége, a pártutasítások, sajtóból és a néptől eredő politikai nyomás egyaránt befolyásolta. Ehhez járulhatott – főként a köztisztviselők esetén – az eljárásokban résztvevő tanúk és feljelentők bosszúvágya is. A tárgyalásokról elmondható, hogy azok a védelem jogosítványainak súlyos korlátozásával, nem ritkán megsértésével, a vádat alátámasztó vallomások erősebb értékelésével folytak le. Az ítéletekben csak a rendkívüli enyhítő körülményeket vették számottevően figyelembe. A Bp. szabályait sértő eljárási szabálysértések is a bizonyítási eljárás során fordultak elő.

Dacára a szakképzett tanácsvezető bírák közreműködésének, nemcsak az egyes népbírószágok, hanem azok tanácsai között is nagy különbség volt a bűnösség megállapítása és a büntetés mértéke között.

Azon közigazgatási tisztviselők, akik az igazolási eljárást lefolytatása után állásukban maradhattak, maguk is számíthattak arra, hogy hamarosan egy feljelentés hatására internálótáborban sínylődnék s a népbírószág elé kerülnek.³⁰

5.3. B- Lista: az államháztartás egyensúlyának helyreállítása?

A munkáspártok részéről a kudarcos igazolási eljárást követően újra felmerült a közigazgatás 'reformtervezet nélküli reformjaként' az álláshelyek bizonyos számának

²⁹ RIES I.: *A Népbíráskodásról szóló 81/1945. M.E. számú és az ezt kiegészítő 1440/1945. M.E. számú rendelet szövege és magyarázata*. Budapest, Politzer Zsigmond és fia, 1945. 25–26.

³⁰ HORVÁTH F. L.: „(...) nem lenne illő, hogy a demokráciában ilyen szellemű emberek helyt kapjanak.” A magyar népbírószágok ítélkezési gyakorlata egyes közigazgatási tisztviselők pereiben 1945-50. In: KURUNCZI G.; POGÁCSÁS A.; VARGA Á. (szerk.) *'A puro pura defluit aqua': Válogatott tanulmányok joghallgatók tollából*. Budapest, Pázmány Press, 2023, 293-294.

leépítése: „azoktól a reakciósoktól, akik az igazolások ellenére ott maradtak”, meg kell szabadulni a közigazgatásban – írta Vásárhelyi Miklós.³¹ Révai József a köztisztviselői kar 30%-ának leépítésével példálózott, először *gazdasági indokokra* hivatkozva. A politikusok túloztak is ugyan, hogy nézeteiket alátámasszák, ugyanakkor valóban nem indokolt a trianoni Magyarországon ennyi közszolgát alkalmazni. A másik – igazából elsődleges – a *politikai indok*: a ’reakciós’ közigazgatást felváltsa a ’demokratikusabb’. 1945-ben még elég nagy számban szolgált a „régí garnitúra”. Révai ezt az arányt 98%-ra, Erdei Ferenc 81%-ra becsüli. A kommunisták által fontosnak tartott harmadik okot Révai így fogalmazta meg: „a demokráciának kötelessége és érdeke szabaddá tenni az utat a nép fiai számára a közigazgatásban.” Volt még egy rejtett ok, amit Szélig Imre, az SZDP közigazgatási osztályának vezetője említ, mely szerint a kommunisták célja nem egy demokratikus, hanem a kommunisták által irányított közigazgatás létrehozása.³²

A „leépítve megtisztításra” már 1945 novemberében készített egy tervezetet az MKP Központi Vezetőség Közigazgatási Osztálya, kormányrendelet elkészítésére tettek javaslatot, ugyanakkor a végrehajtás előkészítéséhez is nekiláttak.³³ A Belügyminisztérium főmegbízottjai a helyi nemzeti bizottságok és hivatalfőnökök közreműködésével felmérték a leépítendőek számát, adatgyűjtést végeztek. Az április közepén elkészült első javaslat a baloldali vélemény szerint kibúvókat tartalmazott a ’demokrácia ellenségei’ számára, mert nem kapott volna számottevő szerepet a lebonyolításban a Szaktanács, sem a nemzeti bizottságok. A Kormány végül az Igazságügyi Minisztérium javaslatát fogadta el, a rendelet és a végrehajtási rendelet 1946 május végén lépett hatályba.³⁴

A jogszabály címéből (az államháztartás egyensúlyának helyreállítása érdekében szükséges egyes rendelkezések tárgyában) arra következtethetünk, hogy ez egy koalíciós megállapodás eredménye, a kiscgazda álláspont a rendelet elnevezésében és egyes rendelkezéseiben, a kommunista pedig a tartalmában és valós következményeiben realizálódik. Az MKP szándékai olyannyira nyíltak voltak, hogy Zöld Sándor 1946-ban megjelent munkájában a B-lista bizottságokat nyíltan és következetesen *’tisztogató-bizottságoknak’* nevezi. Leírja továbbá, hogy „(...) az akciónak a gazdasági jelentősége, ha nem is törpül el a politikai jelentősége mögött, mégis inkább másodlagos és az előkészítő munkálatoknál is már a politikai tisztogatás szempontjait érvényesítették. Elsősorban nem azt tették elbírálás tárgyává, hogy a stabilizáció költségvetése hány közalkalmazottat bír el, hanem arra az álláspontra helyezkedtek, hogy a demokrácia ellenségei minél nagyobb számban kerüljenek ki a közigazgatásból.”³⁵

³¹ GYARMATI GY: Harc a közigazgatás birtoklásáért. A koalíción belüli pártküzdelmek az 1946. évi hatalmi dualizmus időszakában. *Századok*. 1996/3, 512.

³² VARGA L.: A közigazgatás „racionalizálása” Pest megyében /Az 1946. évi B-listázás lefolyása és revíziója. In: HALÁSZ Cs.; TÓTH J. (szerk.) *Tanulmányok Pest megye múltjából*. Budapest, Pest Megyei Levéltár, 2006, 221.

³³ VARGA L.: i.m. 222.

³⁴ ZÖLD S.: Tisztogatás és leépítés a közigazgatásban. *Társadalmi Szemle*, 1946/8-9., 617.

³⁵ ZÖLD S.: i.m. 618.

Két szempont szerint írta elő a rendelet tehát a tényleges szolgálatból elbocsátandók körét. Egyrészt el kellett bocsátani azokat, akiknek hivatali működése az ország demokratikus szellemű újjáalakítását tevélegesen nem szolgálja (elsődleges, politikai indok); valamint a hivatalukkal járó feladatok kifogástalan elvégzéséhez szükséges rátermettség vagy szorgalom hiánya miatt szolgálatukat megkívánt mértékben el nem látó köztisztviselőket. A leépítéseket 1946 július- augusztus végéig úgy kellett végrehajtani, hogy az egyes minisztériumok feladatkörének ellátását végző alkalmazottak száma ne haladja meg az 1937/38-as költségvetési évben alkalmazottak számának 90%-át. Amennyiben ez a szám a fenti két szempont alapján nem teljesült, el kellett bocsátani a nélkülözhető munkacserőt is.³⁶ A jogszabályhoz tartozó végrehajtási utasítás szerint a hivatali főnök az elbocsátandó személyről, a terhére rótt tényekről felterjesztést ír a miniszterhez és háromtagú bizottság dönt abban, hogy az alkalmazott megfelel-e a rendeletben foglalt követelményeknek.³⁷

Azzal, hogy a B-lista eljárás során nem kellett 'perrendszerű bizonyítékokkal' alátámasztani a közalkalmazott demokratikus szellemiségét, valamint állására alkalmasságát, az igazolási eljárásokkal szemben a kommunisták pozícióharcában hatékonyabb fegyvert jelentett.³⁸

A B-listázás következtében nagyjából 22000 főt bocsátottak el az önkormányzatoktól, az ottani közalkalmazottak csaknem egynegyede vált állástalanná. A közigazgatás minden területén komoly problémák jelentkeztek. Az FKGP, az SZDP és az NPP erőteljes tiltakozása hatására végül 6668 közalkalmazottat, köztük 1800 főt önkormányzati alkalmazottat vettek vissza állásába. A csekély korrekció ellenére kijelenthetjük, hogy ez az akció az MKP számára sikerrel zárult.³⁹

6. Összegzés – siker vagy kudarc?

A köz szolgálatából ténylegesen eltávolított tisztviselők száma valóban nem tűnik olyan drasztikusnak, ugyanakkor az említett eljárások mellett alkalmazott internálás, rendőri felügyelet alá helyezés és lejárata hatására a tanácsrendszer kialakulásáig rengeteg tehetséges, szakértelemmel rendelkező és kivételes munkabírásu köztisztviselő veszítette el állását, vagy kényszerült alacsonyabb pozíciókba. A diktatúra enyhülésével sokak szaktudását ismét igénybe vették, de karrierjük így is derékba tört. A hatalomváltással a kiszámítható életpályának mondható közigazgatási munkakörök illúzióvá váltak, bizonytalanságot okozva a társadalom egészében.

³⁶ 5.000/1946. M. E. számú rendelet az államháztartás egyensúlyának helyreállítása érdekében szükséges egyes rendelkezések tárgyában. *Magyar Közlöny*, 1946/113. 1., 2. §.

³⁷ 5000/1946. ME rendelet az államháztartás egyensúlyának helyreállítása érdekében szükséges egyes rendelkezések tárgyában. *Magyar Közlöny*, 1946/119. 1. 4. §.

³⁸ SCHÖNWALD P.: i.m. 271-272.

³⁹ VARGA L.: i.m. 224-225.

A tanulmányban említett eljárások sikerességét vagy kudarcát a kommunista párt nézőpontjából szemlélve sem állapíthatjuk meg egyértelműen. A valóban népellenesnek tekinthető személyek, nyilas vezetők, kegyetlenkedő háborús bűnösök, vezető politikusok nagy része Nyugatra menekült, sokak felelősségre vonása soha nem történt meg. Egyenesen az internálótáborból, igazolási eljárás kezdeményezése nélkül kerültek népbírószám elé azok, akikről megfelelő számú terhelő bizonyíték állt rendelkezésre. Az ellehetetlenített, elbocsátott köztisztviselők tanulmányomban érintett, legnagyobb része valóban ’bűnös’ volt abban a sokat hangoztatott vádban – már, ha a közhivatal mindenkori kormányzattól független, fennálló jogszabályoknak megfelelő ellátását bűnnek tekintjük –, hogy a Horthy-korszakban, túlnyomórészt közeposztálybeli származásúként hivatalt viselt, a települések, járások igazgatásában szaktudásával részt vett. Nem elhanyagolva azt a körülményt, hogy voltak közöttük olyanok, akiknek vállalkozatlan világnézete, akár felderítetlen vagy felderített cselekedetei nem voltak összeegyeztethetőek a háború pusztításaiból éledező ország demokráciakísérletével, a közigazgatás megtisztítására tett erőteljes kísérlet-sorozat inkább ártott, mint használt egy legyőzött ország újjáépítésének, a társadalom igazságérzetének.

Az igazolási, B-lista eljárás és ezekhez szorosan kapcsolódó népbírószági eljárás igen gazdag volt bizonytalan, szabadon értelmezhető tényállásokkal, mely a különleges politikai környezetben igen sok visszaélésre adott lehetőséget. A demokrata vagy népellenes világnézet, mint dichotóma alkalmazása egy köztisztviselő sorsának eldöntésénél, a fogalmak, szigorú törvényi kritériumok meghatározása nélkül – mai szempontok szerint – minden körülmények között súlyosan sérti a jogállamiság, a legalitás és a normavilágosság alapelvét.

Annai bizonyos, hogy a ’reformtervezet nélküli közigazgatási reform’, a közigazgatás demokratizálása politikai-hatalmi hátsó szándékok nélkül, világos normák megalkotásával s a jog uralmára támaszkodva kisebb leépítéssel járt volna, ugyanakkor fényesebb jövőt vetített volna előre Magyarországnak.

Felhasznált irodalom

CSIZMADIA A.: *A magyar közigazgatás fejlődése a XVIII. századtól a tanácsrendszer létrejöttéig*. Budapest, Akadémiai Kiadó, 1976. DEGRÉ A.: A közigazgatás megindulása Zala megyében a felszabadulás után. *Levéltári Közlemények*, 1960/1., 3–21.

GYARMATI GY.: *Harc a közigazgatás birtoklásáért. A koalíció belüli pártküzdelmek az 1946. évi hatalmi dualizmus időszakában. Századok*. 1996/3.

GYARMATI GY.: Három koncepció és ami azután következik... Közigazgatási reformtörekvések és kudarcai sorozata Magyarországon 1945-1948. *Tér és Társadalom*, 1989/4., 3-16.

HORVÁTH F. L.: „(...) nem lenne illő, hogy a demokráciában ilyen szellemű emberek helyt kapjanak.” A magyar népbíróságok ítélkezési gyakorlata egyes közigazgatási tisztviselők pereiben 1945-50. In: KURUNCZI G.; POGÁCSÁS A.; VARGA Á. (szerk.) *‘A puro puro defluit aqua’: Válogatott tanulmányok joghallgatók tollából.* Budapest, Pázmány Press, 2023 277-294.

KOVÁCS M. M.: Közalkalmazottak 1938-1949. Létszám, összetétel, politika. *Valóság*, 1982/9. 41-53.

Magyarországi Rendeletek Tára, Budapest, Magyar Belügyminisztérium, 1945, 79. évf
N. SZABÓ J: A diktatúra kiépülése és a közigazgatás (1946 ősze – 1948). *Hitel*, 2019/4., 91–104.

PAPP A: Néptörvényszék, Népbíróság és népbíróági jog Magyarországon. *E-tudomány* 2011/4. PAPP Gy.: Az igazoló eljárások és a háborús bűnök megtorlása 1945 után Magyarországon *Aetas*, 2009/2., 162-179.

SCHÖNWALD P: Igazoló eljárások, 1945-1948. In: *A Magyar Munkásmozgalmi Múzeum Évkönyve*, Budapest, 1969, 249-274.

VARGA L.: A közigazgatás „racionalizálása” Pest megyében /Az 1946. évi B-listázás lefolyása és revíziója. In: HALÁSZ Cs.; TÓTH J. (szerk.) *Tanulmányok Pest megye múltjából.* Budapest, Pest Megyei Levéltár, 2006, 221-248.

ZÖLD S.: Tisztogatás és leépítés a közigazgatásban. *Társadalmi Szemle*, 1946/8-9., 615-621.

Jogszámbélyeg:

1150/1945. M. E. számú rendelet a közszolgálati alkalmazáshoz előírt képzési kellékekről

14/1945. ME rendelete a közigazgatás ideiglenes rendezéséről.

16/1945. ME rendelet a közalkalmazottak szolgálatátételre való jelentkezési kötelezettségéről

77/1945. ME rendelet a 15/1945. és 16/1945. ME rendeletek kiegészítése tárgyában
5.000/1946. M. E. számú rendelet az államháztartás egyensúlyának helyreállítása
érdekében szükséges egyes rendelkezések tárgyában

Sajtó

Pest-Pilis-Solt-Kiskun vármegye Nemzeti Bizottsága március 19-én megalakult. *Cegléd*,
1945.április 22., 4.

„A Magyar Nemzeti Függetlenségi Front Szegedi Nemzeti Bizottsága. RENDELET”
(1945. január 9.) *Néplap*, 3.

Ahol a munkásosztály egységes, ott a demokrácia ügye győzedelmeskedik — mondotta
Révay József nemzetgyűlési képviselő a Magyar Kommunista Párt kecskeméti
nagygyűlésén. *Kecskeméti Lapok*. 1945. március 15., 2.

KISSZÖLLŐSI-SZÁNTHÓ BALÁZS*

On Constitutional Complaints Submitted in Foreign Currency Loan Cases

Abstract: The foreign currency loan crisis in Hungary resulted in a significant number of financial institutions and private individuals seeking alternative legal remedies that examined the legislation underlying foreign currency loan cases from a constitutional perspective. These proceedings were primarily constitutional in nature. Within the broader scope of constitutional procedures, this study aims to focus on constitutional complaints submitted in foreign currency loan cases. In foreign currency loan cases, hundreds of private individuals and financial institutions initiated proceedings based on constitutional complaints. The purpose of this study is to present these cases.

Key words: constitutional complaint, foreign currency loan contracts, invalidity, right to property and right to fair trial, retroactive legislation, discrimination

1. Introduction

The first constitutional procedure was initiated by the Hungarian government in 2013, requesting the Constitutional Court to examine whether consumer protection provisions were unconstitutional, particularly regarding potential abuse of dominance.¹ However, the first constitutional decision regarding constitutional complaints in the topic of foreign currency loan cases has been made in 2015.

To begin with, in order to provide a detailed overview of the proceedings initiated by individual constitutional complaints, it is essential to briefly outline the essence of a constitutional complaint.

The source of law of the constitutional complaint is the Fundamental Law, Act CLI of 2011 on the Constitutional Court (CC) (Abtv.) and Resolution 1001/2013 (II. 27.) CC on the Rules of Procedure of the Constitutional Court.

Mainly, there are three types of constitutional complaints based on Article 26-27 of Abtv.

The complainers may challenge a judicial decision,

- That is contrary to the Fundamental Law, if the decision on the merits of the case, or any other decision concluding the judicial proceedings, infringes the complainer's rights guaranteed by the Fundamental Law;

* dr. Kisszöllősi-Szánthó Balázs PhD hallgató, Miskolci Egyetem, Állam-és Jogtudományi Kar, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, Európai és Nemzetközi Jogi Intézet, Polgári Eljárásjogi Tanszék, Témavezető: Turkovicsné Dr. Nagy Adrienn, PhD.

¹<https://www.alkotmanybirosag.hu/sajtojegijelenes/devizahiteles-ugyek-eddig-harom-jelentos-dontes-es-tobb-szaz-folyamatban-levo-ugy-az-alkotmanybirosagon/>

- The conformity of a legal regulation applied in an individual case with the Fundamental Law if, in the judicial proceedings, the application of a regulation contrary to the Fundamental Law resulted in the infringement of the complainant's right guaranteed by the Fundamental Law;
- A legal regulation or a provision thereof if the infringement of their rights occurred directly, without a judicial decision, as a result of its application or enforcement, and there is no remedy procedure available to address the infringement, or if they have already exhausted all available remedies.

2. Individual constitutional complaints

2.1. 3048/2015 (III.2.) CC decision²

In this case there were submitted more, than 380 constitutional complaints with the same content. Therefore, the Constitutional Court has unified these cases to the main case.

Basically, the complainants based their complaint on the following grounds:

- Civil rights and obligations arising from consumer loan contracts are amended
- Parliament has no constitutional authority to intervene in civil law disputes
- They cause a conflict between the Hungarian legal system and Hungary's international legal commitments

In its decision the Constitutional Court essentially stated, that the complainants did not justify the essence of the violation of the right guaranteed by the Fundamental Law. In view of this, all complaints were rejected.

2.2. 7/2015. (III. 19.) CC decision³

The complaints were submitted by 3 financial institutions and 1 consumer in this case. The complaint challenged basically Section 1, paragraph (6)-(7) and Section 3 of Act XXXVIII of 2014 on the Settlement of Certain Issues Related to the Curia's Uniformity Decision Concerning Consumer Loan Contracts of Financial Institutions Act (hereinafter referred to as 'Act I') and point 3 of 2/2014 Civil law unity decision (hereinafter referred to as "*Unity Decision*").

²<https://alkotmanybirosag.hu/ugyadatlap/?id=C107E02BD91E6502C1257DD9005DA2ED?OpenDocument>

³<https://alkotmanybirosag.hu/ugyadatlap/?id=CB87090BD63CD003C1257D6B0032088F?OpenDocument>

The complainants stated that the above provisions violate Article B, paragraph (1) of the Fundamental Law⁴, Article M paragraph (2) of the Fundamental Law⁵, right to property, prohibition of discrimination, it qualifies as retroactive legislation, and it also conflicts with the constitutional provision of fair economic complaint.

To have a better understanding we must have a look at the challenged provisions.

Section 1, Paragraph (6)-(7) of Act I:

(“6) The provisions of Act IV of 1959 on the Civil Code regarding the statute of limitations shall be interpreted, in the case of claims arising from consumer loan contracts, such that these claims do not expire during the term of the loan contract; the limitation period begins upon the termination of the contract.

(7) The limitation period for the claims referred to in subsection (6) is suspended from the date of this Act's entry into force until the date specified in the separate law as per Section 3(5) and Section 4(3). (Section 1 of the Act)”

The fundamental objection about the above legislation was that the above provision means that expired partial claims can be asserted again, however they were not burdened, when the law entered into force. It also means retroactive legislation; it's adversely altered the complainer's contractual rights and the resulting acquired rights.

Point 3 of the Unity Decision:

“The use of the financial institution's buying rate at the time of disbursement and the selling rate at the time of repayments (differential exchange rates) is unfair, as the consumer does not receive any direct service in return for these charges, thus incurring an unwarranted cost. These provisions are also unfair because the economic rationale behind their application is unclear, incomprehensible, and non-transparent to the consumer. Instead of the buying and selling exchange rates specified in foreign currency-based consumer loan contracts, the official exchange rate of the Hungarian National Bank becomes part of the contract, in light of the non-mandatory statutory provision under Section 231(2) of the Civil Code, until a binding statutory provision replaces it.”

The financial institutions stated that the exchange rate gap is not unfair and there is no reason to change the law. In the case of foreign currency-based loans, there is a currency conversion, which results in an exchange rate difference, which someone has to bear.

Section 3 of Act I:

“In consumer loan agreements, with the exception of individually negotiated terms, any provision is null and void if it stipulates that the financial institution shall apply the buying rate for

⁴(1) Hungary is an independent, democratic state governed by the rule of law.

⁵(2) Hungary ensures the conditions for fair economic competition. Hungary takes action against the abuse of dominant position and protects the rights of consumers.

disbursement of the financing amount for the purchase of the loan or leasing object, and the selling rate, or any exchange rate other than the one determined at the time of disbursement, for repayment of the debt.(2) In place of the invalid provision specified in subsection (1)—with the exception outlined in subsection (3)—the official foreign exchange rate of the Hungarian National Bank shall apply to both disbursement and repayment (including the payment of instalments and any costs, fees, or commissions calculated in foreign currency”.

The financial institutions said that they were required to conduct actual foreign currency acquisitions for the disbursement of foreign currency loans. The complainer secured real foreign currency funding by entering into a refinancing loan agreement with its parent company, thereby establishing a “genuine currency exchange service behind the loans granted”. They argued that in its uniformity decision, the Curia reasoned that the exchange rate spread was unfair, because no currency exchange activity existed behind the dual exchange rates. However, the complainer claimed they could prove otherwise, yet the legislator did not incorporate the possibility for counterevidence into the law. Instead, the exchange rate spread was pre-emptively deemed unfair, which, in their view, contradicts the requirement of legal certainty.

The financial institutions also stated that the income from the exchange rate gap is the subject of property, which is a right of property value. Based on their view, Act I take it away from the financial institutions and hands it over to the debtor without any kind of compensation.

The financial institutions have also referred to the prohibition of discrimination. A financial enterprise authorized to engage in lending activities is not permitted to set its own exchange rate. For its lending operation, it primarily secures funds from its own available forint recourses or through market loans obtained under existing credit facility agreements with other financial institutions. If the complainer requires foreign currency, it can acquire it at the purchasing exchange rate of the financial institution with which it has a contract. Similarly, when it has a foreign currency repayment obligation, it must conduct the conversion at the same financial institution’s selling exchange rate. Therefore, the lending financial institution also applies an exchange rate spread against it, resulting in discriminatory treatment, as the regulation treats legal entities in similar situations differently.

The private person has challenged the provision due to the fact, that since the use of foreign currency buying and selling exchange rate is considered unfair, it is therefore null and void. Consequently, the legislature should not mandate the application of the official foreign exchange rate of the Hungarian National Bank, as a replacement.

The decision of the Constitutional Court basically stated regarding the Unity Decision, that laws and other legal instruments that, by their nature, cannot take direct effect (such as a unity decision) cannot be the subject of direct concern and therefore cannot be adjudicated. These are only binding on court. Based on that, the Constitutional Court refused this objection.

Concerning Article M paragraph (2) of the Fundamental Law, the Constitutional Court stated, that this Article of the Fundamental Law does not qualify as a right guaranteed by the Fundamental Law. The referenced constitutional section does not address the complainer as their address and do not grant the any rights. Therefore, a constitutional complaint cannot be directly based on these provision (abuse of power, consumer protection, fairness of economic complaint). The result was also a refusal of this objection.

In relation to limitation period the Constitutional Court referred to its previous decision (34/2014. (XI. 14.) CC decision). The decision contained the followings: *“The limitation period begins only when the contractual relationship ends according to the terms of the contract. In other words, as long as the debtor’s obligation toward the financial institution (and the institution’s claim against the debtor) exists, the limitation period for individual payments and claims cannot commence separately. Consequently, claims related to payments made by the debtor cannot expire independently.”*

It was the concept of the so called “Uniform Contractual Relationships”. The Constitutional Court said that this is constitutionally acceptable, which is why it is a “*res indicata*” case and it has refused the objection.

In view of the exchange rate gap the Constitutional Court established, that there was no actual service provided by the financial institutions. It was also not clear, comprehensible or transparent for the consumer. The Cura said, that it was “*ex lege*” unfair, based on which the Constitutional Court has also refused this objection.

With respect to the retroactive legislation the Constitutional Court said that the financial institution should have known at the time of entering into the contract, that it was demanding compensation for a service, that it would not actually or genuinely provide the debtor. Citing the prohibition on retroactive legislation cannot serve as a basis to render untouchable the contractual clauses that were widely created in the past and deemed unfair – and therefore void. The decision was a refusal of the objection.

As for the right to property the Constitutional Court pointed out that the contractual clauses establishing the exchange rate margin were inherently unfair at the time of their conclusion. This is not a matter of ownership over a “*previously acquired*” sum of money by the financial institution and its repayment to the consumer (i. e. the property infringement claimed by the complainer), but rather the application of the legal consequence of nullity and the restoration of the factual situation in line with this legal status. A contract clause that was inherently unfair excludes the protection of property rights. In this regard, even an expectation of ownership cannot be interpreted. Considering that, the objection was rejected.

Pertaining to prescription of the Hungarian National Bank’s currency exchange rate by law the Constitutional Court explained that this section created the basis of the settlement. The different currencies must be settled. some exchange rate must

be available at which the foreign currency must be converted into forints and the repaid forints must be converted back into foreign currency. This calculation is not done on two separate exchange rates, but on 1 exchange rate, so there is not actual exchange rate gap. Taking that into account, the objection was rejected.

Regarding discrimination the Constitutional Court pointed out the difference between financial institution and a consumer. These agreements were consumer loan agreements. The challenged statutory provision does not contain any provision regarding the relationship between the financial institution and the financial enterprise or the contract concluded between them. A financial enterprise may bring a lawsuit against the financial institution with which, it has a contract on grounds of the unfairness of the exchange rate margin. In light of that, the objection was refused.

It should be specifically emphasized that there were two dissenting opinions against the decision of the Constitutional Court.

One was the dissenting opinion of Dr. Czine Ágnes constitutional judge, who pointed out, that a Unity Decision necessarily affects the parties through judicial application. By means of a judgement based on the mandatory interpretation of the law, she said that the scope directly affecting legal proceedings. She also said that it established nullity, so no further judicial decision is required. So, it means, that it is directly applicable. She finally drew the conclusion that the constitutional complaint should have been investigated on its merits.

The other dissenting opinion was made by Dr. Kiss László constitutional judge, who stated that Section 3 of Act I contravenes the prohibition of prohibited retroactive effect. The provision subsequently established heavier obligation, than before for some of the recipients of the norm, i. e. the legal entities providing loans. In his view the legislation should have been struck down.

He also set out that the Constitutional Court failed to apply the property protection test. These contractual clauses were deemed unfair only through retroactive legislation without sufficient constitutional justification. Therefore, the property protection test should have been substantively applied to limit the enforceability of these existing contractual claims, as – just as the majority opinion points out – all rights of economic value, including property and contractual claims, fall under the constitutional property protection clause.

He declared that the problem of freedom of contract should have been investigated. The law classified a contractual content as unfair retroactively. This is unconstitutional and this legislation should have been struck down.

Dr. Lévay Miklós constitutional judge has joined this dissenting opinion.

2.3. 3057/2015. (III. 31.) CC decision

In this case 80 constitutional complaints with essentially the same content were submitted.

The complaints challenged Section 16 of Act I⁶. This provision was about the automatic suspension of the ongoing litigation procedures in foreign currency loan cases without providing any remedy against it.

The complaints said that it is the right of the court to suspend the proceedings *ex officio*. Furthermore, the law excluded the possibility of an appeal against the court order that ordered the suspension. This means that the possibility of completing their trial within a reasonable time has ceased (unreasonable delay). The complainants stated that it violates Article XXVIII paragraph (1)-(7) of the Fundamental Law.⁷ They also said that they are obliged to pay the increased instalments during the period of the suspension.

The complaints also challenged Section 38 paragraph 2 of Act XL of 2014 on the rules of settlement and certain other provisions laid down in Act XXXVIII of 2014 on the settlement of certain issues related to the unified decision of the Curia

⁶ (1) The court shall, *ex officio*, suspend the litigation proceedings—except for lawsuits initiated by a public interest claim under Section 6 (2) and lawsuits regulated in Subtitle 6—until the measure specified in a separate law is taken, but no later than December 31, 2014, if the subject of the litigation is, in whole or in part, a contractual clause as defined in Section 3 (1) or Section 4 (1), or if the lawsuit has been initiated by the financial institution against the consumer to enforce a claim based on such a contractual clause. The court may decide on the suspension without holding a hearing. The provisions of Section 155 of the Code of Civil Procedure shall apply accordingly to the suspension, with the exception that no appeal may be lodged against the court's decision ordering the suspension.

(2) The court shall, *ex officio*, suspend the litigation proceedings—except for lawsuits initiated by a public interest claim under Section 6 (2) and lawsuits regulated in Subtitle 6—until the measure specified in a separate law is taken, but no later than December 31, 2015, if the subject of the litigation is, in whole or in part, a contractual clause as defined in Section 4 (1), or if the lawsuit has been initiated by the financial institution against the consumer to enforce a claim based on such a contractual clause, provided that the contractual clause under Section 4 (1) appears in a consumer loan agreement as defined in Section 1 (1a). The rules set out in paragraph (1) shall apply to the suspension.

⁷ (1) Everyone has the right to have any charges brought against them or any disputes concerning their rights and obligations adjudicated by a court that is established by law, independent, and impartial, in a fair and public hearing, within a reasonable time.

(2) No one shall be considered guilty until their criminal liability has been established by a final decision of the court.

(3) A person subject to criminal proceedings has the right to a defense at every stage of the proceedings. A defense counsel shall not be held liable for opinions expressed in the course of providing legal defense.

(4) No one shall be declared guilty or subjected to punishment for an act that did not constitute a criminal offense under Hungarian law or—within the scope defined by an international treaty or a legal act of the European Union—the law of another state at the time it was committed.

(5) Paragraph (4) does not preclude the prosecution and conviction of a person for an act that, at the time of its commission, was considered a crime under the generally recognized rules of international law.

(6) Except in extraordinary cases defined by law, no one shall be subjected to criminal proceedings or convicted for a criminal offense for which they have already been acquitted or convicted by a final judgment in Hungary or—within the scope defined by an international treaty or a legal act of the European Union—another state in accordance with the law.

(7) Everyone has the right to seek legal remedy against judicial, administrative, or other governmental decisions that violate their rights or lawful interests.

on consumer loan agreements of financial institutions (Settlement Act)⁸. This section has regulation about the further suspension of the ongoing procedures, if they cannot be continued till the settlement of the parties.

The complaints has disputed the provisions with the same reasoning: “already suspended procedures should be suspended again ex officio”. They said, that during the period of suspension the procedures could legally be terminated by then.

The first question was that, if only final decisions of the court can be a subject to a constitutional court and these cases are still ongoing cases, then is there any option for the Constitutional Court to make a decision on the merits of these complaints.

The Constitutional Court has given the explanation in its decision, that the main rule is that only final decisions or final orders can be subject to constitutional complaint, however, constitutional complaints may challenge decisions that are not considered final in terms of civil procedural law, provided that the violation of a right guaranteed by the Fundamental Law occurs explicitly before the substantive decision is made, and cannot be remedied by the substantive decision. The Constitutional Court declared that a decision on suspension is not a final decision, but it raises the suspicion of a fundamental rights violation.

The Constitutional Court also declared that with the referred the provisions the procedure is extended by a minimum of 7-9 months. Based on this data the Court drew the conclusion that having information on the available statistic, the mandatory delay of at least 7-9 months in the adjudication of ongoing cases appears to be significant. However, these data are not conclusive, they represent only one aspect of the investigation.

The Constitutional Court also stated that through this norm prescribing the suspension the legislator directly intervenes in the activities of another branch of power, the judiciary. *“This provision halts the course of ongoing lawsuits on generally mandatory procedural rules retroactively. It is not a matter of supplementing the general cases of suspension of proceedings with a new one, but of ordering the suspension of specific ongoing procedures. The court does not have the possibility to assess whether the suspension is inherently necessary based on the facts of the case, nor whether its continuation is justified. Furthermore, the complainants do not have the right to challenge the suspension or to submit a request for the continuation of the proceedings. The legislator has excluded the possibility of legal remedy through Section 16 (1) of the Act (the “opt-out” option from the mandatory accounting system is not provided). The Constitutional Court finds that the mandatory suspension of proceedings significantly delays the substantive adjudication of cases — the judicial decision on the claims brought by the parties to the lawsuit and not yet decided by the legislator. The legislator has restricted the complainants’ right to*

⁸ (2) After this provision enters into force, Section 16 (1) of Act XXXVIII of 2014 shall be applied with the exception that the court shall suspend the proceedings ex officio until the measure specified in a separate law is taken, but in any event no later than December 31, 2015.

have their cases concluded within a reasonable time, as guaranteed under Article XXVIII(1) of the Fundamental Law, which ensures the right to a fair trial”.

Based on that the Constitutional has taken a necessity-proportionality test. During the test it was declared that the decision of ongoing lawsuits is influenced by the content of the legislation, but it will only become clear later in what form and to what extent. However, the Constitutional Court also stated, that if the legal procedures and the settlements between the financial institutions and the private persons are going in the same time it would lead to reopen already closed cases. “*The parallelism of the volume of proceedings would lead to serious legal uncertainty*”. Due to this fact the Constitutional Court said that the protection of legal certainty underpins the need for suspension.

The goal was to phase out foreign currency-based consumer loan agreements from the Hungarian financial system and thereby prevent a serious social catastrophe. By suspending the procedure until the settlement is completed, the parties’ right to have the procedure concluded within a reasonable time is only affected to the extent necessary to achieve the constitutionally justifiable goal of the restriction.

Based on the above, the Constitutional Court has confirmed that the suspension was necessary and proportionate and refused the complaint.

With respect to the lack of legal remedy the Constitutional Court declared that the correction is still possible, because it is not a final decision and it can be challenged by the legal remedy of the final decision, which is why the Constitutional Court has refused this complaint as well.

The dissenting opinion of Dr. Czine Ágnes constitutional judge however contains that reasonable time cannot be subject to investigation. She said that the legislator considered the harm resulting from the violation of the requirement for a timely adjudication to be primarily compensable within the framework of private law, through the instruments of personality protection. This was contained in the old code of civil law procedure (Section 2 paragraph 2 – General Damages).

The dissenting opinion of Dr. Kiss László constitutional judge on the other hand says that in this case “*the judge is just the mouth of the law (la bouche de la loi)*”. There is no basic right of a legal and impartial judge provided for the consumer and this right becomes vacant. The legislator does not provide for a maximum period of suspension (uncertain situation). It significantly delays the merits of the case, restricts fundamental rights. He said that the necessity-proportionality test stated that parallel cases would lead to legal uncertainty, but he thinks it should have been left to the ordinary courts. “*Ex lege*” suspension was not inevitable; suspension is not the least restrictive tool in the hand of the legislator.

He also said that this is an “*idem per idem*” reasoning error. In relation to the right of remedy and that correction is possible he asked the question whether the

consumer will submit a lawsuit against the court because of violating his or her rights and after that a court of ordinary jurisdiction will hold the legislator liable for imposing an “*ex lege*” suspension on it under the legal basis of harm caused by legislation?

2.4. Other, not investigated and refused complaints

3183/2015. (V. 8.) CC decision also referred to violating reasonable time and right to remedy, so it was refused on the basis of “*res indicata*”.

In the case of 3084/2015 (V. 8.) CC order the complainant has submitted its complaints based on that the legislation violates Article M (2) of the Fundamental Law over 180 days, which means it is a late submission and that this Article does not qualify as a right guaranteed by the Fundamental Law.

In the case of 3087/2015 (V. 19.) CC decision more, than 160 complaints were submitted, however they were refused on the basis of “lack of involvement”, formal conditions are missing, “*res indicata*”, legal unity decision.

The complainants have challenged the legislation referring to the violation of Article B paragraph (1), Article M paragraph (2) and that it violates the right to self-determination derived from human dignity, because it prevents consumers from invoking the unfairness of the exchange rate margin to request the annulment of the entire contract.

The Constitutional Court explained the followings: “*In connection with initiating legal proceeding, the constitutionally protected right to self-determination, according to the practice of the Constitutional Court, essentially means that an individual has the right to decide whether or not they wish to enforce their subjective rights in court. Within the framework of the law, they can also decide what legal consequences they request the court to establish*”. The Constitutional Court declared that this complaint does not affect constitutional issues, so it has refused the complaint.

2.5. 3121/2015 (VII. 9.) CC decision

In this case more financial institutions challenged the whole Act I, the Settlement Act and the whole Unity Decision.

The challenge of the Unity decision was rejected on the reason that it does not contain the essence of infringement of the secured right, it was already a “*res indicata*” case and the complaint was submitted without reference.

The complaint however referred to a conflict with an international law treaty based on Article E⁹ and Q¹⁰ of the Fundamental Law. The Constitutional Court in this topic stated that it examines these reasons only at the initiative of a specific group of complainers.

The Constitutional Court also determined that claims aimed at determining violations of state objectives or other provisions of the Fundamental Law cannot be adjudicated in the context of a constitutional complaint. Such claims included elements of complaints seeking to establish violations of the principle of separation of powers [Article C¹¹], the freedom of enterprise [Article M], the requirement for

⁹ (1) In order to enhance the freedom, well-being, and security of European peoples, Hungary participates in the creation of European unity.

(2) For Hungary's participation as a Member State of the European Union, based on an international treaty—and to the extent necessary for exercising the rights and fulfilling the obligations arising from the founding treaties—it may exercise certain powers derived from the Fundamental Law jointly with other Member States through the institutions of the European Union. The exercise of powers under this paragraph must be in accordance with the fundamental rights and freedoms enshrined in the Fundamental Law and must not limit Hungary's inalienable right to dispose of its territorial integrity, population, form of government, and state structure.

(3) Within the framework of paragraph (2), the law of the European Union may establish generally binding rules of conduct.

(4) The recognition of the binding force of the international treaty referred to in paragraph (2) requires a two-thirds majority vote of the Members of Parliament.

¹⁰ (1) Hungary seeks cooperation with all peoples and countries of the world to establish and preserve peace and security, as well as to ensure the sustainable development of humanity.

(2) In order to fulfill its international legal obligations, Hungary ensures the harmony between international law and Hungarian law.

(3) Hungary accepts the generally recognized rules of international law. Other sources of international law become part of the Hungarian legal system upon their promulgation in legislation.

¹¹ (1) The operation of the Hungarian state is based on the principle of the separation of powers.

(2) No one may engage in activities aimed at the violent acquisition, exercise, or exclusive possession of power. Everyone has the right and duty to take lawful action against such attempts.

(3) The state has the authority to apply coercive measures to enforce the Fundamental Law and legal regulations.

consistency between laws and the Fundamental Law [Article T¹²], as well as violations of judicial independence [Article 26.]¹³

The financial institutions also said in their complaint that the challenged provisions practically created a statutory procedure in the absence of a special legal order. The Constitutional Court however said that it does not deal with special legal orders in relation with complaints.

The complaints also criticized the Acts that it is not possible to know exactly who qualifies as a consumer. The answer was clear based on the Acts, because the material and personal scope of the law gave the answer (consumer loan agreements).

The reason of the challenge referred to that retrial is excluded of these cases, which violates the right to fair trial. Answering this challenge the Constitutional Court stated that none of them are related to any fundamental right, and therefore, according to the Constitutional Court's above findings, they do not violate the prohibition of discrimination as defined in Article XV of the Fundamental Law¹⁴.

The complaint was also submitted on the ground of violation of the right to business. The financial institutions said that the law deems as unlawful a legal practice permitted by the regulatory environment in effect at the time of contract conclusion, thereby restricting the financial institution's licensed financial service

¹² (1) A generally binding rule of conduct may be established by the Fundamental Law and by legislation enacted by a body vested with legislative authority as designated in the Fundamental Law, and promulgated in the official gazette. A cardinal act may also establish different rules regarding municipal decrees, as well as the promulgation of legislation enacted under a special legal order following the Government's initiation of a state of war or state of emergency.

(2) Legislation includes acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the head of an autonomous regulatory body, and municipal decrees.

(3) Legislation may not be contrary to the Fundamental Law.

(4) A cardinal act is an act that requires the votes of two-thirds of the Members of Parliament present for its adoption and amendment.

¹³ (1) Judges are independent and subject only to the law; they may not be instructed in their judicial activities. Judges may be removed from office only for reasons and through procedures specified in a cardinal act. Judges may not be members of political parties and may not engage in political activities.

(2) Professional judges are appointed by the President of the Republic in accordance with the provisions of a cardinal act. Only persons who have reached the age of thirty may be appointed as judges. Except for the President of the Curia and the President of the National Office for the Judiciary, a judge's service relationship may remain in effect until they reach the general retirement age.

¹⁴ (1) Everyone is equal before the law. Every person has legal capacity.

(2) Hungary ensures fundamental rights for everyone without discrimination, in particular on the grounds of race, color, sex, disability, language, religion, political or other opinion, national or social origin, property, birth, or any other status.

(3) Women and men have equal rights.

(4) * Hungary supports the implementation of equal opportunities and social inclusion through specific measures.

(5) * Hungary protects families, children, women, the elderly, and persons with disabilities through specific measures.

activities and its fundamental right to conduct business. The Constitutional Court explained the right to enterprise, however, primarily means guaranteeing the opportunity to enter an economic framework established by the state for businesses – in other words, ensuring the possibility of becoming an entrepreneur, albeit sometimes subject to conditions motivated by professional standards or restrictions. The right to enterprise is neither absolute nor unlimited: no one has an inherent right to engage in a particular business or to operate within a specific legal form of business. The right to enterprise essentially entails – at a minimum, as a constitutional requirement – that the state should not prevent or render impossible the ability to become an entrepreneur. This means, that the business environment can be modified, it does not hinder or make the business impossible.

The financial institutions also referred to the violation of right to good reputation. They said, that in the Acts the unfair practices of the financial institutions were recorded without the possibility of a real defence. The Constitutional Court's answer was that the authentic interpretation of law by the legislator (in this case by the parliament) filtered from the practice of law (judicial practice) enforcement formed case by case, did not create new substantive legal conditions.

Based on the above the complaints were rejected.

Dr. Salamon László constitutional judge had a parallel opinion in which he said that in his opinion, the development of a regulatory framework aimed at effectively resolving the large-scale social problems arising from past improper practices in foreign currency lending, as well as addressing the related legal issues, justifies the inclusion of the challenged provisions—despite their divergence from general or other comparable rules—within the legislative structure chosen by the lawmaker. These provisions cannot be considered either unnecessary or arbitrary. He therefore supported the substantive rejection of the complaint elements seeking to establish a violation of the prohibition against discrimination based on this reasoning effect.

On the other hand, the dissenting opinion of Dr. Czinege Ágnes constitutional judge stated the retroactive legislation must be investigated in a way that it must also be applied to legal relationships established before the entry into force of the legislation. Resulting from this it caused a change in legal relationships (limitation period), so it should have been examined in substance whether retroactive legislation is permissible.

2.6. 3143/2015. (VII. 24.) CC decision

In this case the complainer was also a financial institution. It submitted its complaint on the grounds that the legislator failed to consult the European Central Bank (ECB); there was a lack of preparation time; it conflicted with international agreements; the violation of protection of property (protection of acquired rights);

it has established extremely short procedural deadlines for legal enforcement, the opportunities to present evidences were limited; it has significantly narrowed the scope of legal interpretation; and it violated clarity norms.

The complainer primarily contested the interpretation of law by the courts, which, according to the established practice of the Constitutional Court, falls outside its jurisdiction, as it pertains strictly to matters of legality review.

Due to the violation of the requirement of clarity norms, the complainer may not invoke Article B) paragraph (1) of the Fundamental Law as a constitutionally protected right in the constitutional procedure.

Regarding lack of preparation of time it can be determined that it was already a “*res indicata*” question, as 34/2014 CC decision already made a decision in this part of the complaint. It said that 30 days cannot be considered as a serious threat to legal certainty, the legislator did not make it impossible to adapt to the legal provisions from the outset.

As for failing to consult with the ECB it was also a “*res indicata*” case, as the current rules on the competence of the Constitutional Court does not provide an opportunity for the Constitutional Court to examine the issue of whether a piece of legislation has been brought into line with the law of the European Union in terms of form or content for acceptance.

In connection with violating the right to property it was also already a “*res indicata*” decision, because there is no direct substantive relationship between the legislation and the right to property that could result in a violation of fundamental right.

With regard to unreasonable short deadlines (the lawsuit must arrive between the 5th January and 12th January 2015) the Constitutional Court stated the it does not conflict with fair court proceedings, proportionality, it just places the receipt of the claim in a specific time frame in connection with purely foreign currency contracts. The Constitutional Court particularly highlighted that “*when the law was promulgated, it became clear by what deadline they had to start the lawsuit to overturn the unfairness of the clauses, at the same time it was clear what the main issue of the civil litigation would be*”.

2.7. 3147/2015. (VII. 24.) CC decision

In this case almost 100 complaints were submitted and united with the same content. The complaints challenged basically Section 2 paragraph (1) point f)¹⁵

¹⁵ f) original initial interest rate:

fa) the interest rate applicable at the due date of the first installment of the contract, except as provided in point fb),

fb) if the financial institution granted an interest rate discount for a predetermined period of the contract, then the first interest rate that became part of the contract after the expiry of the discount period.

(original starting interest) and Section 10 point a) and b)¹⁶ (HUF conversion) of Act LXXVII of 2014 on the Settlement of Issues related to the Change in Currency of Certain Consumer Loan Agreements and Interest Rate Regulations (Act II)

The complaints challenged this Act on the following grounds. It violates the right to go to court and withdraws judicial authority, which violates Article 25 of the Fundamental Law. The Act also compensates for the lack of an interest clause existing on the basis of nullity by legal means without judicial consideration. It – independently of the will of the litigants – decides on the amount of consideration charged to the debtor in the loan agreement. They also said that the retroactive settlement through statutory means, - excluding judicial review – results in the legal dispute becoming moot in the absence of a judicial decision. Consequently, the court, within its jurisdiction, cannot rule on the issue of nullity, which undermines legal certainty. The complaints also contained that Section regarding the HUF conversion allows for an unjustified distinction (discrimination) between those who opted for early repayment and those subjected to mandatory currency conversion, specifically regarding the applicable foreign exchange rate for conversion to HUF-denominated claims and its temporal effect.

The decision of the Constitutional Court said first of all that Article 25¹⁷ of the Fundamental Law is not a fundamental right, but a rule establishing the duties and jurisdiction of the courts, which cannot be validly invoked as grounds in a constitutional complaint.

¹⁶ a) the average of the foreign exchange rates officially quoted by the MNB between June 16, 2014, and November 7, 2014, or

b) the foreign exchange rate officially quoted by the MNB on November 7, 2014.

¹⁷ (1) * Courts perform judicial activities. The highest judicial body is the Curia.

(2) * The court rules on criminal matters, civil disputes, the legality of administrative decisions, the conflict and annulment of municipal decrees with other legal provisions, the determination of the failure to fulfill legislative obligations based on law by local governments, and other matters specified by law.

(3) * In addition to what is specified in paragraph (2), the Curia ensures the unity of judicial application, issuing binding uniformity decisions for the courts.

(4) * The judicial organization is multi-level.

(5) * The central tasks of the administration of courts are carried out by the President of the National Office for the Judiciary. The National Judicial Council oversees the central administration of the courts. The National self-government bodies cooperate in the administration of the courts.

(6) * The President of the National Office for the Judiciary is elected by the Parliament for a nine-year term, based on the proposal of the President of the Republic. The election of the President of the National Office for the Judiciary requires the votes of two-thirds of the Members of Parliament. The President of the Curia is a member of the National Judicial Council, and other members are elected by the judges in accordance with the provisions of a cardinal act.

(7) * The law may also allow other bodies to act in certain legal disputes.

(8) * The detailed rules governing the organization, administration, and central supervision of the courts, the legal status of judges, as well as the remuneration of judges, are defined by cardinal acts.

The Constitutional Court also said that state intervention is not constitutionally excluded: a law may exceptionally alter the content of contracts concluded before its entry into force based on the principle of *clausula rebus sic stantibus*.

Regarding the original starting interest (interpretative provision) the Constitutional Court explained: “From this definition alone, it does not follow that the specific rate of the initial interest set by any existing contract subject to the Act can be determined or modified retroactively. Therefore, the contested provision of the Act cannot be attributed with the statutory content referred to by the complainers.” (...), *The Constitutional Court examines the contract modification through legislative action, as a norm, not in connection with the right to turn to the court as guaranteed in Article XXVIII(1) of the Fundamental Law, but primarily in terms of its compliance with Article B(1) and Article II of the Fundamental Law.*”

As for discrimination it was stated that the discounted final payment was an “*ex gratia benefit*”, which was only an entitlement provided by law. The Constitutional Court acknowledged, that the regulation was obviously disadvantages for those affected by forint conversion. However, the two groups of people are not the same. The legislator decided so based on consideration and fairness (not a homogenous group). The legislator is not obliged to ensure the same rights for those affected by the forint conversion as for those affected by the final repayment.

2.8. 3168/2015. (VII. 24.) CC decision

In this case Section 10 of Act LXXVII of 2014¹⁸ has been challenged by the complainer, which is basically the main rule of HUF conversion on the grounds that it violates human dignity and that the rate of the debt in forints also significantly exceeds the amount originally determined as the subject of the contract. It was also challenged by the reason that the consumer must bear the costs due to the entire exchange rate conversion. They also said that it makes an asymmetry between the parties. The complainer explained that based on this Act the consumers cannot maintain living conditions worthy of a human being. They said that the Act legitimized the exchange rate risk and limited the freedom of action of the consumers. They also referred to the violation of fair trial and last, but not least that the financial institutions did not comply with the obligation to provide information.

¹⁸ In the case of a foreign currency or foreign currency-based consumer mortgage loan agreement, the authorized financial institution is required to convert the total debt arising from or existing under the foreign currency or foreign currency-based consumer mortgage loan agreement – including the interest, fees, commissions, and costs charged in foreign currency – into a forint claim, at the more favorable exchange rate for the consumer, based on the calculation provided under the settlement law, no later than the deadline for fulfilling the settlement obligation under the settlement law. The exchange rate shall be based on:

- a) the average of the foreign exchange rates officially quoted by the MNB between June 16, 2014, and November 7, 2014, or
 - b) the foreign exchange rate officially quoted by the MNB on November 7, 2014.
- (from here on referred to as: conversion to forints).

The Constitutional Court basically determined that the referred Section of the Act by the complainant only states that from the given time on the financial institution records the debt is recorded in forints and the debtor is obliged to pay the debt in forint currency, however it does not refer to those reasons, which has been stated by the complainant. The legislator's intention was clearly to remedy the situation for consumer protection. None of the provisions of the Fundamental Law result in the legislator's obligation to enact rules aimed at classifying exchange rate risk as illegal.

The Constitutional Court highlighted that the complaint is directed at an omission committed by the legislator, but the complainant is not entitled to submit such a complaint.

The Constitutional Court also stated that there is no substantive connection between the forint conversion requirement and the right to fair court proceedings, so the complaint was rejected.

2.9. 3203/2015. (X. 14.) CC decision and 3216/2015. (XI. 10.) CC decision

In these two cases the complaint challenged Article 3, 4 and 5 of the Settlement Act based on that it violates Article M, R, T and 20 of the Fundamental Law and that the legislator did not take sufficient action against the illegal behaviour of the financial institutions.

The Constitutional Court in its decision again explained that the indicated provisions cannot be considered as a right guaranteed by the Fundamental Law, so the complainant does not have the opportunity to submit a constitutional complaint based on them.

2.10. 3202/2015. (X.14.) CC decision

This complaint has challenged Section 3 paragraph (2)¹⁹ and Section 5 paragraph (3)²⁰ of the Settlement Act on the basis that distinction between those paying in full and those obliged to convert to forints constitutes a discrimination.

¹⁹ (2) The financial institution must convert the amount of the loan it disbursed, and then – with the exception specified in paragraph (3) – the amount of the installments, based on the official exchange rate published by the Hungarian National Bank on the actual settlement date of the payment. If the financial institution specifies a specific date for the conversion in its terms and conditions or contracts, the conversion must be carried out based on the official exchange rate published by the Hungarian National Bank on the conversion date.

²⁰ (3) The consumer's claim – with the exception of paragraph (4) – must primarily be settled in accordance with the general rules of civil law, first for the costs, then for the interest, and finally for the principal debt. If the consumer's claim exceeds the overdue and matured debt owed to the financial institution, it must be accounted for as an early repayment in the manner and at the time specified in the regulation of the Hungarian National Bank (MNB).

In this case the complaint did not meet the legal requirements, so it was also refused.

2.11. 3215/2015. (XI. 10.) CC decision

The complaints challenged Section 1 of the Settlement Act²¹.

The complainer said that the Act excludes entrepreneurs and other actors other than consumers in a way that financial institutions does not have an obligation to make settlement for them, and it violates fair complaints conditions and Article M of the Fundamental Law.

The decision of the Constitutional Court stated the complaint did not provide justification and that the establishment of a legislative omission cannot be requested, which resulted to a refusal.

2.12. 3223/2015. (XI. 10.) CC decision

This complaint has challenged Curia unity decision No. 6/2013 PJE, Curia unity decision No. 2/2014 PJE, as well as the laws concerning the conversion into Hungarian forints and the settlement of foreign currency-based loan agreements on the grounds that these are violating the Fundamental Law and the Parliament must enact a new law that settles the actually loaned forint amounts with the credit institutions at their nominal value.

In view of the complaint did not meet the legal requirements the Constitutional Court refused this complaint.

2.13. 3224/2015. (XI. 10.) CC decision

In this case Section 3, 4, and 5 of the Settlement Act has been challenged on the basis that the contested legal provisions enabled the violation of debtors' rights regarding unfairly charged amounts, thereby infringing upon their right to property as set out in Article XIII (1) of the Fundamental Law²².

The decision contained that this complaint neither did not meet the legal requirements and it was also refused.

2.14. 33/2015. (XII. 3.) CC decision

In this case more, than 800 complaints arrived.

²¹ This law applies to consumer loan agreements that fall under the scope of the 2014 Act XXXVIII on the settlement of certain issues related to the uniformity decision of the Curia regarding consumer loan agreements of financial institutions (hereinafter referred to as the 2014 Act XXXVIII).

²² (1) Everyone has the right to property and inheritance. Property entails social responsibility.

The basis of the complaints was the objection of Section 10 and 15 of Act LXXVII of 2014.

The main question was the following: are the challenged legal provisions, or Section 523, paragraph (1) of the (old) Civil Code²³ does serve the interests of the debtor based on the principle of good faith and honesty, taking into account the prohibition of abuse of rights. According to the complainers' point of view, if the challenged legal provision remains in force, it will result in an increase in the share capital in connection with the loan agreement in question to such an extent that it violates the complainers' fundamental rights referred to in the complaint.

The Constitutional Court first of all stated that the complainers did not present an explanation regarding the unconstitutionality of the contested provisions.

Regarding discrimination the decision declared "*res indicata*".

In regard to the breach of fundamental rights the Constitutional Court stated that it cannot be based on the freedom of contract, however it can be referred to. It is not a fundamental right, but a constitutional right, which can be judged by applying the reasonableness test.

The Constitutional Court also explained that the primary goal of the conversion to Hungarian forint was to eliminate for the future the exchange rate risk borne by consumers, as debtors, which has been an unpredictable and heavy burden on them. The forint change was made to protect the debtors, the legislator did not resolve legal disputes with this. If the debtors said that they don't want this legal protection, then it was not obligatory. The legislator ensured the possibility of opting out of the forint conversion (opt-out clause).

The Constitutional Court determined that the legislator decided to convert the debts affected by the law into Hungarian forints going forward due to significant and legitimate changes in circumstances that occurred after the contracts were conducted, which resulted in substantial harm to the public interest.

Based on the following the Constitutional Court declared that the law meets the requirement of reasonableness.

Besides that, in this case the Constitutional Court stated that the challenged provision and the right to human dignity does not have any connections.

Furthermore, the Constitutional Court also said that there is no substantial constitutional connection between the challenged provisions and the right to fair court proceedings.

In his parallel decision, Dr. Pokol Béla constitutional judge said, that the Constitutional Court "*has come to the conclusion that freedom of contract is derived not only from the constitutional value of entrepreneurial freedom enshrined in Article M) of the Fundamental Law, but also from the right to property, declared as a fundamental right in Article*

²³ (1) Under a loan agreement, the financial institution or other lender is obliged to make a specified amount of money available to the borrower, and the borrower is obliged to repay the loan amount according to the terms of the contract.

XIII, specifically through owner's right of disposition. With this understanding, the the decision elevated the constitutional value of freedom of contract to the level of fundamental rights protection. Due to this change, the previous position that freedom of contract 'does not qualify as a fundamental right' can no longer be maintained'.

Finally, in summary he said, that financial stability is the reason for the restrictions.

2.15. 6/2019. (III. 20.) CC decision

In its complaint the complainer requested the determination of unconstitutionality and annulment of Section 37 of Settlement Act²⁴ and Order No. 57.Pkf.638.942/2016/3 of the Budapest-Capital Regional Court acting as the court of second instance, because they are violating paragraph (1), Article XXVIII., paragraph (1) Article B, paragraph (2) of Article M and paragraph (1) of Article VX of the Fundamental Law; it also infringes the right to a reasoned judicial decision, guaranteed as a component of the right to a fair trial; retroactive legislation with disadvantageous content [which violates paragraph (1), Article B of the Fundamental Law]; and disadvantageous and unjustified discrimination [paragraph (1) Article XV of the Fundamental Law].

Hereby is a short summary of the facts of the claim and dismissal of the original case.

The claim was submitted in order to declare the annulment of the loan agreement. The claimant got a requirement to remedy deficiencies based on Section 37 of Settlement Act.

After that a dismissal has arrived by the court, which has been affirmed on appeal. The reason of the dismissal was that the claimant must submit a precise request specifying the calculation of claims between the parties, including exact amounts, attaching the bank's calculation and indicating how much the defendant might still claim from them is insufficient. Based on the accounting rules, the claimant must submit a detailed calculation and a precise claim, however the claimant did not specify with what content they sought validation.

Based on the above the complainer referred to violation of fundamental rights. The complainer said that the obligation lacked a legal basis. The claimant's arguments were not considered, and it is unclear which deficiency notice the

²⁴ Paragraph (1)Section 37 of Settlement Act „For contracts falling under the scope of this Act, a party may request the court to declare the invalidity of the contract or the invalidity of specific provisions of the contract (hereinafter: partial invalidity) — regardless of the grounds for invalidity — only if the request also extends to the application of the legal consequences of invalidity, such as declaring the contract valid or effective up until the time of judgment. In the absence of such a request, the statement of claim or the action itself cannot be substantively adjudicated following an unsuccessful request for correction of deficiencies. If a party requests the application of legal consequences for the invalidity or partial invalidity, they must also specify the particular legal consequence they wish the court to apply. Regarding the application of legal consequences, the party must submit a definitive request, which includes an itemized and detailed accounting of the settlement between the parties.”

claimant allegedly failed to address. The obligation lies with the banks, a specific claim was submitted and submitting a calculation cannot reasonably be expected of the consumer, as this is the obligation of the banks.

The complainer specially highlighted that the rules in effect at the time of submitting the lawsuit allowed the claimant to request the court to declare the invalidity of the contract (annulment), or the invalidity of specific provisions of the contract (partial invalidity), without simultaneously requesting the application of legal consequences for the invalidity. However, the Settlement Act eliminated this possibility, while the lawsuit was pending.

The complainer also referred to discrimination, as for contract falling under the scope of Act2, firstly, the consumer may not request a declaration of the invalidity of the contract without also requesting the application of the legal consequences of invalidity. Secondly, the consumer cannot request restoration to the original state as one of the legal consequences of invalidity. Thirdly, an additional condition applies to the adjudication of the consumer's claim for the declaration of the contract's invalidity: the submission of a specific request that includes a detailed, itemized calculation of the settlement between the parties, involving a "mathematically highly complex settlement."

In its decision the Constitutional Court stated the followings:

It cannot be considered a right guaranteed by the Fundamental Law under Article M (2) of the Fundamental Law and does not constitute a right protected by the Fundamental Law. Therefore, it cannot serve as a basis for a constitutional complaint (abuse of power, consumer protection, fairness of economic complaint).

Regarding legal certainty the Constitutional Court said that in itself it is not a right guaranteed by the Fundamental Law, and therefore a constitutional complaint based on a violation of Article B (1) may only be filed in exceptional cases, specifically in instances of retroactive legislation or lack of sufficient preparation time. The contested legal provision in the present case did not enter into force retroactively, therefore the only thing that can be raised is that it causes a change in legal relationships that arose before its entry into force.

Regarding the main reason of the complaint the Constitutional Court said: *"The fact that the legislator has excluded the initiation of a declaratory action and now only allows the submission of another type of action that also includes the determination of invalidity in the case of contracts falling under the scope of DH2 Act (giving the possibility to modify the action in ongoing lawsuits) does not mean a change in terms of the legal relationships established on the basis of the substantive law. Neither this provision nor the requirement to adjust the amount of the claim taking into account the settlement affects the legal relationships established between the parties, the substantive legal basis for the enforcement of the claim. There is no mention of a circumstance preventing the initiation of a lawsuit, nor of a change resulting in the loss of rights. [2/2009 (I.23.) CC decision]. The enforcement of substantive law before the court remains unchanged after the entry into force of the DH2 Act."*

The Constitutional Court also declared that the contested legislation does not attach any new legal consequences to the event, fact or situation prior its entry into force, nor does it create any legal consequence that is different from the previously effective rule, that did not exist before, or that differs from the old one.

The Constitutional Court explained that there is no hierarchy between the possible consequences provided by the Civil code, restoration to the original state however is not the primary consequence. The Court also highlighted that point 4 of Unity Decision 6/2013 PJE prefers to declare contracts valid. Besides that, the Court stated that the civil court may rule on the legal consequences of invalidity in a manner different from the party's request.

To sum up with the Constitutional Court said, that however the legislator ceased a potential legal consequence, but the complainer does not have a constitutional right for exactly that consequence. The complainer should have counted even at the original submission of the lawsuit that the court can decide differently, then the request in the lawsuit.

Regarding discrimination the Constitutional Court acknowledged, that distinction has actually been implemented between entities in a comparable situation, which is why a reasonable test must be carried out.

The Constitutional Court has established first of all, that the reason of the legislation is to finally complete the ongoing procedures. The exclusion of the declaratory claim is helping the final completion of these cases. Besides that, during the suspension of these cases, the settlement between the consumers and the financial institutions has been done. This means, that the issue has been solved between the parties in a legal way and in a financial way as well. Based on that, a declaratory lawsuit cannot be submitted, and specification of the required amount therefore is a reasonable additional requirement.

In view of the above the Constitutional Court stated that the Settlement Act meets the requirement of reasonableness.

Dr. Szívós Mária constitutional judge in its parallel opinion said, that the reasoning of the decision aligns with the Constitutional Court's practice. However, the balance of power between the parties is unbalanced. A request for a complex accounting threatens to terminate the case, placing consumers in a significantly more challenging position. It requires knowledge of economics or mathematics, which cannot be expected from everyone and is much more a matter of experts. This imposes an additional burden on consumers, making compliance almost bound to fail. The consumer bears the burden of any inaccuracies.

2.16. 3133/2020. (V.150.) CC decision

In this case the complainer stated that the reasoning recorded in the first instance judgment confused the conclusion of the contract with its entry to force, which violated the right to a fair trial.

The Constitutional Court explained in this case, that it does not examine the courts' compliance with their obligation to provide reasons from the perspective of their suitability for review, and refrains from taking a position on the appropriateness or legality of questions related to legal dogma, or solely on problems of statutory interpretation. "*Establishing facts, evaluating and weighing the evidence is a task reserved for the courts in procedural law rules*".

2.17. 3550/2023. (XII. 21.) CC decision

The complaint challenged the judgement No. Gfv.VI.30.462/2022/8. of the Curia, because in the view of the complainer the judgement of the Curia was contrary to certain sentences of the National Creed of the Fundamental Law, paragraph (2), Article M, paragraphs (1)-(3) of Article R²⁵; Article XXIV²⁶; Paragraphs (1) and (7) of Article XXVIII, paragraph (1)-(3) and Article 28 of the Fundamental Law.

The constitutional Court stated that the complaint did not meet the requirements for admission, therefore it was rejected.

2. 18. IV/3027/2024 CC decision

In their constitutional complaint, submitted with reference to the violation of Article XIII. Paragraph (1)²⁷, Article XV. Paragraph (1), and Article XXVIII. Paragraphs (1) and (7) of the Fundamental Law, they requested the declaration of the unconstitutionality and annulment of the Curia's judgment No. Gfv.VI.30.382/2023/3.

However, the complaint did not contain any grounds that would raise a question of fundamental constitutional importance and therefore did not meet the admissibility criteria.

²⁵ (1) The Fundamental Law is the foundation of Hungary's legal system.

(2) The Fundamental Law and the laws are binding on everyone.

(3) The provisions of the Fundamental Law must be interpreted in accordance with its purpose, the National Creed contained therein, and the achievements of our historical constitution.

(4) * The protection of Hungary's constitutional self-identity and Christian culture is the duty of every organ of the state. In order to protect constitutional self-identity, an independent body has been established by a cardinal law.

²⁶ (1) Everyone has the right to have their affairs handled by authorities in an impartial, fair manner and within a reasonable time frame. Authorities are required to provide reasoning for their decisions as prescribed by law.

(2) Everyone has the right, as defined by law, to compensation for any damage unlawfully caused to them by authorities during the performance of their duties.

²⁷ (1) All are equal before the law. Every person is capable of having rights.

2.19. 3055/2025. (II. 14.) CC decision

According to the petitioner, in the final judgment, the court only partially adjudicated the defendant's appeal; the judgment lacks the specifics of the case and contains only general statements; all of this violates the right to a fair trial under Article XXVIII. (1) of the Fundamental Law. The petitioner complained that in the litigation, the subject of which was a foreign currency-based loan agreement, the plaintiff did not settle his claim in foreign currency, the foreign currency amount was not even indicated; and the amount of the forint-denominated claim was not settled in a verifiable manner.

The constitutional Court stated that the complaint did not meet the requirements for admission, therefore it was rejected.

2.20. 3056/2025. (II. 14.) CC decision

In this case, according to the complainer, the right to a fair trial was violated by the aggrieved court decisions, as the court ignored the practice of the Constitutional Court.

The constitutional Court stated that the complaint did not meet the requirements for admission, therefore it was rejected.

3. Closing words

This thesis is the basis for the legal history and constitutional law examination of my PhD research topic on the litigation procedure of foreign currency loan agreements. It is very important to see what constitutional law problems the legal regulation raised and what answers the Constitutional Court gave to them. The conclusions drawn from these will be provided by the future continuation of my research.

List of legislation

Fundamental Law

Act CLI of 2011 on the Constitutional Court (CC) (Abtv.)

Resolution 1001/2013 (II. 27.) CC on the Rules of Procedure of the Constitutional Court

Act XXXVIII of 2014 on the Settlement of Certain Issues Related to the Curia's Uniformity Decision Concerning Consumer Loan Contracts of Financial Institutions Act

Act XL of 2014 on the settlement rules and certain other provisions set out in Act XXXVIII of 2014 on the settlement of certain issues related to the Curia's decision on legal uniformity regarding consumer loan contracts of financial institutions

Bibliography

<https://alkotmanybirosag.hu/devizahiteles-ugyek/>

KOC SIS MELINDA*

Third-Country Workers in The European Union

Abstract: Third-country workers play a crucial role in the European economy and society, helping to meet the changing needs of the labour market and, where necessary, to overcome labour and skills shortages. The European Union is not just aiming for a sustainable labour market, but also for decent work. Decent work is work that provides people with a decent income, safe working conditions and equal opportunities in conditions of freedom, fairness, security and dignity. The objective of decent work also applies to third-country workers.

Key words: Third Country Nationals, migration, European Union, integration

Absztrakt: Harmadik országbeli munkavállalók kulcsfontosságú szerepet játszanak az európai gazdaságban és társadalomban, segítve a munkaerőpiac változó igényeinek kielégítését, és szükség esetén a munkaerő- és készséghiány leküzdését. Az Európai Unió nemcsak a fenntartható munkaerőpiacra, hanem a tisztességes munkára is törekszik. A tisztességes munka olyan munka, amely az embereknek tisztességes jövedelmet, biztonságos munkakörülményeket és egyenlő esélyeket biztosít a szabadság, a méltányosság, a biztonság és a méltóság feltételei között. A tisztességes munka célkitűzése a harmadik országbeli munkavállalókra is vonatkozik.

Kulcsszavak: harmadik országbeli állampolgárok, migráció, Európai Unió, integráció

1. Introduction

The European Union has long been a centre for labour migration, with workers from non-EU countries contributing significantly to the economic and social structure of the region. These workers, known as third-country nationals, represent a critical segment of the EU labour force, filling gaps in various industries, particularly in sectors like agriculture, construction, healthcare, and hospitality. While third-country nationals play an essential role in the EU's economy, their rights as employees have been a subject of ongoing legal development. This article explores the fundamental employment rights of third-country workers in the EU, focusing on the legal frameworks, protections, and challenges they face in the employment process and the workplace.

In the context of labour migration, there are varieties of labour challenges that parties have to face on a daily basis. Even before the employment relationship is

* dr. Kocsis Melinda, III. éves PhD hallgató, Miskolci Egyetem, Deák Ferenc Állam-és Jogtudományi Doktori Iskola, Agrár- és Munkajogi Tanszék, 3515 Miskolc-Egyetemváros, témavezetők: Prof. Dr. Jakab Nóra, egyetemi tanár és Dr. Tóth Hilda, Phd., egyetemi docens.

established, there are challenges specific to the prospective employment of a migrant worker, both for the prospective employer and the prospective worker. Such challenges include, but are not limited to the establishment of a legal employment relationship, poor working conditions, low wages, informal and unregulated working agreements, possible harassment of women workers, discrimination, occupational health risks issues, inadequate trade union representation and challenges to the right to freedom of association, difficulties in integrating migrant workers, procedural and de facto difficulties in access to justice¹.

A complex approach is needed to properly address these challenges, not only from a legal but also from a social perspective. In my view, not only legal actors such as the EU, public administrations, the legislature, the state, the courts, but society as a whole - companies, employers, employees, NGOs and other social groups - must work together.

In this study, first I will generally examine the fundamental rights of migrant workers as outlined in key international agreements, focusing on the protection of their human rights, labour rights, and access to justice. Then issues are examined at EU level, and finally I turn to the issue of corporate social responsibility. Given the complexity of the system, it is impossible to cover all the relevant provisions in full, and the legal documents included in this study are therefore only a selection of the complex system.

2. The rights of migrant workers in international documents

Despite their invaluable contributions, migrant workers often face vulnerabilities related to exploitation, discrimination, and a lack of protection in their working conditions. To address these issues, various international agreements and conventions have been established to safeguard the fundamental rights of migrant workers. These agreements set forth standards that ensure migrant workers are treated with dignity and equality, irrespective of their nationality or legal status.

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, provides the foundation for the protection of human rights worldwide, including for migrant workers. The UDHR has been widely accepted as a normative standard for human rights protection. Key articles² relevant to migrant workers include: *“Everyone has the right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment”*³. This guarantees the right to work and equitable treatment for all individuals,

¹ Fudge, Judy; McCann, Deirdre: Unacceptable forms of work: A global and comparative study / Judy Fudge and Deirdre McCann; International Labour Office – Geneva: ILO, 2015 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ilo.org/sites/default/files/wcmsp5/gro ups/public/@ed_protect/documents/publication/wcms_436165.pdf (2025.01.12.)

² Article 23 and Article 25 of UDHR

³ Article 23 1. of UDHR

including migrant workers, ensuring that they have access to fair working conditions. Moreover, UDHR declares, *“Everyone, without any discrimination, has the right to equal pay for equal work⁴.”* This guarantees equal remuneration for migrant workers in comparison to nationals, promoting fairness in employment. Moreover, *“everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests.”⁵* Article 25 of UDHR states, *“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”* This provision ensures that migrant workers and their families are not denied basic social services and are entitled to an adequate standard of living.

While the UDHR provides broad principles of equality and fairness, specific international agreements have been developed to provide more detailed and actionable protections for migrant workers.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations in 1966, is a key international treaty that outlines the economic, social, and cultural rights of individuals, including migrant workers. Article 2 of the ICESCR emphasizes the principle of non-discrimination, ensuring that all individuals, including migrants, are entitled to the same rights and protections as nationals. The ICESCR declares the right to work, this provision guarantees the right of everyone, including migrant workers, to the opportunity to earn a living through freely chosen work. It includes the right to enjoy just and favourable conditions of work⁶. Article 7 of the ICESCR ensures the right to fair wages, equal pay for equal work, and the right to just and favourable working conditions. For migrant workers, this provision is particularly important in safeguarding against wage disparities and exploitation in the labour market. Article 9 provides the right to social security, including access to benefits and protections such as unemployment benefits, health insurance, and pensions, is guaranteed under this article. Migrant workers are entitled to equal treatment regarding social security rights and benefits. Article 10 guarantees protection for workers, including migrant workers, from exploitation, including ensuring that they have access to adequate protection in their working and living conditions, particularly in relation to family and maternity leave.

⁴ Article 23 2. of UDHR

⁵ Article 23 3.-4. of UDHR

⁶ Article 6 of the ICESCR

The ICESCR plays a significant role in setting international standards for the protection of migrant workers' economic and social rights, emphasizing equality and non-discrimination.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), adopted by the United Nations in 1990, is the most comprehensive and binding international treaty specifically focused on the rights of migrant workers and their families. The Convention aims to protect the rights of migrant workers across the full spectrum of their migration journey—during entry, employment, and in cases of return to their home country. Article 7 of the ICMW guarantees that migrant workers shall enjoy equal rights and treatment as nationals of the host state. This includes equal access to employment, social services, healthcare, and housing⁷. Article 18 of the ICMW provides that migrant workers shall have the right to seek legal redress and protections under the law, ensuring they are not subjected to arbitrary detention or unfair treatment due to their migration status⁸. The ICMW guarantees that migrant workers have access to judicial and administrative remedies in case their rights are violated. This includes the right to legal representation and the ability to challenge abusive employers or exploitative working conditions⁹. According to ICMW, migrant workers are entitled to participate in social security systems, including health insurance, pensions, and unemployment benefits, on the same terms as nationals of the host country. The Convention prohibits the use of migrant workers for forced labour or human trafficking and mandates the provision of safe and decent working conditions. It also emphasizes the protection of workers from arbitrary expulsion or deportation by the host state¹⁰.

Although the ICMW has been ratified by many countries, some key migrant destination countries, such as the United States and several European states, have yet to ratify it, limiting its global applicability.

The Global Compact for Safe, Orderly, and Regular Migration adopted by the United Nations in 2018, is a non-legally binding agreement designed to facilitate international cooperation on migration management. While it is not a treaty, it includes a commitment to uphold migrant workers' rights by protecting migrant workers from exploitation. States commit to protecting migrants from abuse, including human trafficking and forced labour, and providing decent work and fair treatment. The Compact emphasizes the need to ensure decent working conditions for all migrants, including equitable treatment with nationals regarding employment rights and social protections.

⁷ i.e. non-discrimination provision

⁸ Right to equality before the law

⁹ Access to justice

¹⁰ Article 32 of ICMW

The International Labour Organization (ILO) has developed several key conventions that specifically address the protection of migrant workers' rights, aiming to promote fair labour practices and decent working conditions.

ILO Convention No. 97 Migration for Employment (Revised), 1949, provides fundamental protections for migrant workers, emphasizing the need for equal treatment with nationals in terms of employment conditions and social security. According to the Convention, migrant workers must be afforded the same rights as nationals in terms of wages, working hours, health and safety, and social security¹¹. Moreover, the migrant workers have the right to participate in and benefit from social security systems, such as unemployment benefits, pensions, and healthcare¹². The Convention also states that migrant workers should not be discriminated against based on nationality, race, or religion in employment or social security.

ILO Convention No. 143 Migrant Workers (Supplementary Provisions), 1975, supplements ILO Convention No. 97, specifically focusing on improving the treatment of migrant workers in irregular situations. It addresses the equality of treatment in terms of wages, working conditions, and social benefits¹³, and migrant workers should not be subjected to forced labour, and their working and living conditions must meet minimum standards¹⁴.

ILO Convention No. 181 Private Employment Agencies, 1997, seeks to regulate the role of private employment agencies, which are frequently involved in the recruitment of migrant workers. It ensures that these agencies comply with ethical standards to prevent exploitation and abuse.

International agreements provide a robust framework for safeguarding the fundamental rights of migrant workers. The Universal Declaration of Human Rights, the ICESCR, and the ICMW emphasize the right to fair and just working conditions, equal treatment, social security, and legal protection for migrant workers. Furthermore, the ILO Conventions and the Global Compact for Migration reinforce these protections, ensuring that migrant workers are not subjected to exploitation, discrimination, or abuse.

However, despite these international legal instruments, challenges remain in ensuring full implementation and enforcement of these rights. The lack of universal ratification of key agreements such as the ICMW, and inconsistent implementation of standards across countries, continue to pose significant obstacles to the protection of migrant workers. Moving forward, it is critical for states to not only ratify but also effectively enforce international agreements that protect migrant workers, ensuring their dignity, security, and well-being in the global labour market.

¹¹ Articles 1 and 2 of the Convention No.97

¹² Article 6 of the Convention No.97

¹³ Article 10 of the Convention 143

¹⁴ Articles 5 and 6 of the Convention 143

3. The rights of third-country workers in the EU

The fundamental rights of third-country nationals working in the EU are governed by a combination of EU directives, regulations, and national laws. The primary source of protection is EU law, particularly the Treaty on the Functioning of the European Union (TFEU), which outlines the principles of free movement and non-discrimination. Additionally, several key directives and regulations explicitly address the employment rights of third-country nationals.

One of the central principles of EU law is the right to equal treatment for third-country nationals once they are legally employed in an EU Member State. Directive 2024/1233/EU¹⁵ establishes that third-country nationals legally residing and working in the EU should have the same rights as nationals with respect to employment conditions, social security and social benefits and trade union membership and collective rights. Employment conditions include equal pay for equal work, non-discrimination in job opportunities, working hours, and other employment terms. Regarding to social security and social benefits, third-country nationals are entitled to access social security benefits, including healthcare, unemployment insurance, and pensions, on equal terms with nationals of the host country. As far as trade membership and collective rights, third country workers also have the right to join trade unions, participate in collective bargaining, and be represented in employment-related matters. Although, these principles of equal treatment are reinforced by national laws that must comply with EU directives, though implementation may vary across different Member States.

Third-country nationals in the EU are protected by comprehensive anti-discrimination laws that prohibit discrimination based on nationality, race, religion, or ethnicity. Directive 2000/43/EC¹⁶, known as the Racial Equality Directive, aims to combat discrimination in employment and occupation, ensuring that third-country nationals are treated equally in the workplace. If third-country nationals face discrimination in employment, they have the right to challenge this through legal means, including lodging complaints with labour authorities or pursuing legal action in national courts.

A key legal protection for third-country nationals in the EU is the right to equal access to social security systems. Regulation (EC) No 883/2004¹⁷ ensures that third-

¹⁵ Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast)

¹⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

¹⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

country nationals who work legally in the EU have access to the same social security benefits as nationals, regardless of whether they move between different EU Member States during their employment. This regulation is particularly important for ensuring the portability of social benefits, meaning that workers can accumulate and transfer social security contributions across different Member States. For example, a third-country national who moves from one EU country to another can still access their pension, unemployment benefits, or health insurance contributions, thus ensuring their rights are not lost when moving within the EU.

Third-country workers are also entitled to the same health and safety protections as EU nationals in the workplace. Directive 89/391/EEC¹⁸, which establishes the framework for improving health and safety at work in the EU, applies to all workers, including third-country nationals. The directive requires employers to provide a safe working environment, implement risk assessments, and take appropriate measures to prevent workplace accidents and occupational diseases. Third-country nationals working in hazardous conditions are entitled to the same protective measures as EU nationals, including the provision of personal protective equipment, adequate training on health and safety, and access to healthcare services in case of workplace accidents.

The Charter of Fundamental Rights of the European Union (CFR) provides a comprehensive set of rights intended to protect all individuals within the EU, regardless of their nationality or legal status. For third-country nationals who work in the EU, the CFR is a crucial tool for safeguarding their rights in the context of employment. It ensures that third-country workers are treated with dignity, equality, and fairness in the workplace. The Charter of Fundamental Rights of the European Union was proclaimed in 2000 and became legally binding in 2009 with the adoption of the Treaty of Lisbon. The CFR consolidates and affirms rights that are drawn from EU treaties, the European Convention on Human Rights, and other international instruments. It applies to EU institutions and member states when they implement EU law, and importantly, it has a direct impact on individuals within the EU, including third-country nationals working in the EU labour market. The CFR guarantees a wide range of rights that intersect with the employment conditions of third-country workers. These rights include non-discrimination, the right to fair and just working conditions, protection against exploitation, and the right to join trade unions, among others.

The provisions of CFR guarantee the fundamental right to human dignity and the prohibition of discrimination. For third-country workers, this means they are entitled to the same dignity and respect as nationals within the EU. The non-

¹⁸ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work

discrimination principle is particularly relevant in employment settings, ensuring that third-country workers are not discriminated against based on their nationality, race, or ethnicity. This has been a pivotal principle in ensuring that third-country nationals enjoy equal access to employment opportunities, fair wages, and equal working conditions as their EU counterparts. For example, TCNs must not be paid less or subjected to worse working conditions solely because of their status as non-EU nationals.

Article 15 of the CFR guarantees the right to work and choose one's occupation, an essential right for third-country nationals seeking employment in the EU. This provision, although primarily aimed at EU citizens, underpins the broader legal context for third-country nationals' right to access the labour market in the EU member states where they have lawful residence.

Article 31 is of particular importance to third-country workers as it mandates fair and just working conditions, emphasizing the need to respect workers' health, safety, and dignity. This includes protection against unsafe working environments and ensuring that workers are not exploited or forced into unfair labour conditions. Article 32 focuses on prohibiting child labour and safeguarding young workers. This provision applies equally to third-country workers, ensuring that even the youngest migrant workers are protected from exploitation. Right to collective bargain and action guarantees that workers—including third-country nationals—can freely form or join trade unions and participate in collective bargaining. As many third-country nationals in the EU are employed in sectors like agriculture, construction, and hospitality, where union membership can be crucial in ensuring labour rights, this provision is vital. It provides a legal basis for third-country workers to demand better working conditions, higher wages, and the protection of their rights through organized collective action. In addition, the protection against unjustified dismissal¹⁹ is an important safeguard for third-country workers, who may be at a higher risk of exploitation or arbitrary dismissal due to their vulnerable legal status. This provision ensures that workers cannot be fired without a valid reason, and it reinforces the importance of just cause in employment termination. Moreover, Article 31 emphasizes the need for fair and just working conditions, ensuring that all workers—including third-country nationals—are entitled to a work environment that respects their basic rights, including the right to a safe workplace, reasonable working hours, and fair remuneration.

Third-country nationals working in the EU are often in precarious employment situations, making access to social security and social assistance vital. The provision²⁰ of the Charter reaffirms the EU's commitment to combating social exclusion and poverty by ensuring that workers, regardless of their nationality, can access social security benefits in cases of illness, unemployment, or other social

¹⁹ Article 30 of CFR

²⁰ Article 34 of CFR

hardships. In practice, this means that EU member states should extend social security protections to third-country workers who contribute to the national economy.

4. The rights of third-country workers in the light of the case law of the European Court of Justice

The legal framework governing third-country workers in the European Union is shaped not only by EU legislation and directives but also by the interpretive role of the European Court of Justice (ECJ). The case law developed by the ECJ has been crucial in determining the extent of rights and protections afforded to third-country nationals, especially in the context of employment, residence, and access to social benefits. The ECJ has issued several landmark rulings that have shaped the legal status and employment rights of third-country workers in the EU. These rulings address various issues, including equal treatment, access to social benefits, family reunification, and the scope of worker protections.

Though the Case C-313/04²¹ is not a case involving third-country nationals directly, this case is significant because it clarified the concept of "workers" under EU law, which later impacted the understanding of the rights of third-country workers in the EU. The ECJ held that the concept of a "worker" under EU law applies to all individuals who are engaged in an activity that is remunerated. This ruling extended the protections of EU labour law to workers from third countries who meet the definition of a worker under EU law. The decision was groundbreaking because it ensured that third-country nationals, when legally employed in the EU, are entitled to similar protections as EU citizens in relation to employment, working conditions, and non-discrimination.

In Case C-192/05²², a third-country national was involved who was granted a residence permit for employment purposes in the Netherlands. The applicant was seeking to obtain social assistance benefits, but the Dutch authorities denied him access to these benefits, arguing that he did not meet the residence requirements for entitlement to such benefits. The ECJ ruled that third-country nationals who are lawfully residing in an EU member state and working there are entitled to the same social security benefits as nationals of that member state. The court emphasized that the right to equal treatment under EU law applies to workers regardless of their nationality, provided they are lawfully resident and employed in the host country. The decision reinforced the principle of equal treatment for third-country nationals in terms of social security and benefits.

²¹ Case C-313/04 Walrave and Koch (1974)

²² Case C-192/05 Kaba v. Minister voor Vreemdelingenzaken en Integratie (2006)

In Case C-333/13²³, the applicant was a Romanian national who had moved to Germany and applied for social assistance benefits. The German authorities denied her request, asserting that she did not meet the criteria for residence and work under German national law. In this case, the ECJ ruled that EU law, specifically the Regulation on the coordination of social security systems, permits Member States to restrict access to social benefits for economically inactive EU citizens, but the ruling had important implications for third-country nationals as well. It clarified that the principle of equal treatment under the TFEU does not grant a third-country national access to social assistance benefits unless they are economically active (i.e., employed or self-employed) or satisfy specific residence conditions. Though this case primarily involved an EU citizen, it reinforced the importance of employment status in determining access to benefits for third-country nationals under similar EU principles.

In Case C-43/95²⁴ the ECJ examined the interpretation of the rights of third-country nationals employed under a long-term visa arrangement. The case concerned a migrant worker employed in the Netherlands and whether he could claim benefits based on his employment status. The ECJ ruled that long-term migrant workers should not be discriminated against in terms of employment and social security rights, particularly once they have established stable and regular employment. This reinforced the idea that employment and social security rights should not be contingent on a worker's nationality or short-term visa status.

The ECJ also examined social security and family reunification rights for third-country nationals. In Case C-257/03²⁵ involved a Chinese national who entered the UK as the dependent child of a third-country national. The case centered on whether she had the right to reside and work in the UK under the EU rules on family reunification. In this case, the ECJ ruled that third-country nationals who are family members of an EU citizen - in this case, the mother of the child - are entitled to residence and work rights within the EU member state. This ruling was significant because it extended certain family reunification rights to non-EU nationals, reinforcing the rights of families to live together within the EU and ensuring that third-country workers' families could join them under specific conditions.

In Case C-68/89²⁶, a third-country worker residing legally in the Netherlands challenged the refusal to allow family members to join him, arguing that the refusal violated the principle of non-discrimination. The ECJ ruled that family members of third-country nationals who are legally employed within the EU should be granted the same right to family reunification as EU nationals. The ruling affirmed the

²³ Case C-333/1323 *Dano v. Jobcenter Leipzig* (2014)

²⁴ Case C-43/95 *Christos S. J. Kaba* (1996)

²⁵ Case C-257/0325 *Zhu and Chen* (2004)

²⁶ Case C-68/89 *Ten Oever* (1990)

importance of family life and the need for EU member states to respect the family reunification rights of third-country workers, regardless of their nationality.

The ECJ plays a central role in interpreting the CFS's provisions in relation to third-country workers, as well. For example, in Case C-528/13²⁷, the ECJ ruled that third-country nationals who are primary carers of EU citizens cannot be denied the right to reside and work within the EU, as this would violate the right to family life and the right to work of the third-country worker. The ECJ has also dealt with cases regarding the equal treatment of third-country nationals in employment and social security contexts under the CFR. In Case C-67/14²⁸, the Court clarified that third-country nationals legally residing and working in the EU are entitled to access to social benefits on an equal footing with nationals, rejecting restrictions based solely on nationality.

The body of case law developed by the ECJ has been crucial in advancing the rights of third-country workers in the EU. These rulings have reinforced the principle of equal treatment, ensuring that third-country nationals who are legally employed in the EU enjoy the same rights as EU nationals in areas such as employment conditions, social security, and family reunification. Cornerstones derived from ECJ case law include the declaration of third-country workers are entitled to the same treatment as EU nationals in relation to wages, working conditions, and access to social benefits, as long as they are lawfully employed in an EU member state. Moreover, third-country nationals employed in the EU are entitled to participate in the social security systems of their host country, receiving the same benefits and protections as nationals. Additionally, the rights of third-country nationals to family reunification are increasingly recognized by the ECJ, ensuring that migrant workers can live with their families within the EU.

In summary, the case law of the European Court of Justice has played an essential role in shaping the legal rights of third-country workers within the EU. Through its rulings, the ECJ has expanded the scope of protections available to migrant workers, particularly in relation to equal treatment, social security, family reunification, and access to justice. These decisions are crucial for ensuring that third-country nationals are not subjected to discrimination or exploitation while contributing to the EU labour market. As the EU continues to grapple with migration challenges, the case law of the ECJ will remain central in upholding the fundamental rights of third-country workers in the Union.

²⁷ Case C-528/13 *Zambrano* (2011)

²⁸ Case C-67/14²⁸, *Koua Poirrez* (2015)

5. Social responsibility- Employers' social responsibility – Corporate Social Responsibility

In the context of companies as employers - but also as responsible businesses - , it is essential to mention the Corporate Social Responsibility²⁹. In an increasingly globalized world, corporations play a pivotal role not only in economic development but also in shaping social and environmental practices across borders. With migrant workers forming a significant part of the global labour force, their rights and well-being have become a focal point for discussions on Corporate Social Responsibility (CSR). CSR refers to the ethical obligation of businesses to contribute positively to society, beyond profit maximization, by ensuring fair labour practices, environmental sustainability, and respect for human rights. This can include employment conditions and labour standards, freedom of association, well-being at work, non-discrimination and gender balance, stakeholder engagement, human rights, preventing environmental harm, including reducing emissions and pollution, and eliminating bribery and corruption³⁰. Nowadays, many companies are increasingly focusing on the supply chain as a strategic factor that can make a positive difference to the business and to society as a whole. While governments and international organizations play a crucial role in regulating labour migration and protecting migrant workers' rights, corporations also bear significant responsibility for ensuring the welfare of their workers. Under CSR, businesses are encouraged to take proactive measures that go beyond legal compliance to safeguard the rights and dignity of migrant workers throughout their supply chains.

Moreover, the content and naming of Corporate Social Responsibility is also beginning to be replaced by “Responsible Business Conduct” and/or “Business and Human Rights”, in which a legal orientation is now clearly recognisable worldwide³¹. The demand for positive change and how to achieve it also applies, of course, to the issue of migrant workers.

This is supported by the fact that one of the most important document on which the voluntary Corporate Social Responsibility is based, the Ten Principles of the United Nations Global Compact³², is derived from the following fundamental

²⁹ The UN Global Compact is the world's largest voluntary corporate responsibility initiative, setting out corporate principles based on categories such as human rights, labour, the environment and the fight against corruption.

³⁰ https://eur-lex.europa.eu/legal-content/HUEN/TXT/?from=HU&uri=LEGISSUM%3Acorporate_social_responsibility (2025.01.16.)

³¹ Kun Attila: A migráns munkavállalók alapvető emberi jogai és a vállalati szféra felelőssége a transznacionális munkajog újabb fejleményei tükrében, KISS GYÖRGY- BERKE GYULA -BANKÓ ZOLTÁN (szerk.):TANULMÁNYOK A SZEMÉLYEK HATÁROKON ÁTNYÚLÓ MUNKAVÉGZÉSÉNEK MUNKAERŐPIACI, FOGLALKOZTATÁSPOLITIKAI ÉS MUNKAJOGI KIHÍVÁSAI KUTATÁSBÓL 2020, ISBN 978-963-429-645-4

³² The Ten Principles of the UN Global Compact, 2012

human rights documents: the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

The first six principles are relevant to my research topic. According to the first six principle, businesses should support and respect the protection of internationally proclaimed human rights; ensuring that they are not complicit in human rights abuses. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation³³.

One of the key areas of CSR with respect to migrant workers is the guarantee of fair wages and safe working conditions. Many migrant workers, especially in low-wage sectors such as agriculture and construction, often face exploitation, receiving below-market wages, being subjected to unsafe working environments, and lacking access to necessary protective equipment. This can result in workplace accidents, health hazards, and other violations of their dignity and rights. A CSR strategy that addresses these issues would involve companies committing to paying fair and equitable wages in line with local standards or above, particularly for sectors that employ migrant workers, providing safe working conditions, ensuring that workplaces meet safety standards to protect workers from hazards and accidents, and preventing exploitation by instituting policies to prevent forced labour, human trafficking, and other exploitative practices.

In practice, this means companies should adopt transparent wage policies and be vigilant about the conditions under which their migrant workforce is employed. Migrant workers often lack access to adequate social protections, including health insurance, unemployment benefits, and workers' compensation. A robust CSR policy would include providing migrant workers with the same access to benefits as national workers, ensuring that they are not excluded from essential services. Corporations should ensure that migrant workers have access to affordable healthcare, particularly in industries where workers are exposed to health risks, and migrant workers should be eligible for social security benefits such as pensions, unemployment insurance, and accident coverage, which can help reduce vulnerability during times of crisis or injury. Another essential component of CSR is ensuring that migrant workers have the right to organize and join trade unions or workers' associations. In many countries, migrant workers face significant barriers to unionization and collective bargaining. Corporations can play a key role in

³³ Principle 1-6 of The Ten Principles of the UN Global Compact

promoting freedom of association by ensuring that migrant workers are not discouraged or penalized for joining unions or collective bargaining activities, and by encouraging dialogue between workers (including migrants) and management through regular consultations and grievance mechanisms. Human trafficking and forced labour are significant issues affecting migrant workers, particularly in high-risk sectors. Companies should take proactive measures to prevent human trafficking in their supply chains and workplaces. This can be achieved through regular audits of contractors, subcontractors and subcontractors' subcontractors and suppliers to ensure they are not engaging in exploitative practices, including forced labour or trafficking. Moreover, companies should provide training to both employees and suppliers on how to recognize and report trafficking or forced labour, and should adopt a zero-tolerance policy towards human trafficking and forced labour. It is essential in ensuring that businesses do not benefit from exploitative practices in their supply chains. Migrant workers often face discrimination based on their nationality, ethnicity, or immigration status. CSR initiatives should prioritize diversity and inclusion, ensuring that migrant workers are treated equally in the workplace and have access to the same opportunities for advancement as national workers. This includes implementing clear policies to combat discrimination and harassment based on race, nationality, or legal status, and offering training programs for employees to promote understanding and integration of migrant workers into the workforce.

While there is significant recognition of the importance of CSR in protecting migrant workers, challenges remain in ensuring that businesses uphold their responsibilities. Key challenges are ensuring that CSR policies are effectively implemented and monitored across supply chains, particularly when operating in countries with weak labour laws or enforcement mechanisms. Migrant workers are often employed through subcontractors or subcontractors of subcontractor or labour agencies, making it difficult for corporations to monitor and enforce fair treatment. However, these challenges also present opportunities for businesses to lead the way in promoting ethical labour practices. By implementing comprehensive CSR strategies, companies can enhance their reputation and create a sustainable business model. Businesses that treat migrant workers fairly and promote ethical practices are likely to attract consumers who value social responsibility. Moreover, ethical treatment of migrant workers contributes to a more stable and motivated workforce, leading to long-term productivity and reduced turnover rates.

6. Conclusion

Despite these protections, third-country nationals continue to face significant challenges in the EU labour market. Many workers are employed in low-wage, precarious jobs with limited access to social benefits and protections. This is especially true for those employed in informal sectors or under exploitative working

conditions, such as migrant workers in agriculture, domestic work, and construction.

In some Member States, the implementation of EU laws and directives regarding the rights of third-country nationals may be inconsistent or insufficient, leading to discrepancies in how these workers are treated. Additionally, language barriers, lack of awareness of their rights, and fear of deportation can prevent third-country nationals from seeking legal redress in cases of exploitation or unfair treatment.

The legal framework protecting third-country nationals' employment rights in the EU has evolved significantly, offering a range of safeguards to ensure fair treatment in the workplace. Key EU directives, such as those on equal treatment, social security, health and safety, and family reunification, provide a robust foundation for the protection of migrant workers. However, challenges remain in ensuring that these rights are effectively implemented and that all third-country nationals, particularly those in vulnerable sectors, are fully protected against exploitation and discrimination. Continued efforts at both the EU and national levels are essential to address these challenges and ensure that third-country nationals can fully enjoy their fundamental employment rights within the EU.

Corporate Social Responsibility is an essential mechanism through which businesses can address the exploitation and mistreatment of migrant workers. By adopting comprehensive CSR strategies that promote fair wages, safe working conditions, access to social security, freedom of association, and the prevention of forced labour, corporations can not only improve the lives of migrant workers but also contribute to a more ethical and sustainable global economy. As consumer demand for ethically responsible businesses continues to rise, it is in the best interest of corporations to embrace their role in protecting the rights of migrant workers and ensuring their fair treatment within the global supply chain.

References:

FUDGE, J., McCann, D.: *Unacceptable forms of work: A global and comparative study* / Judy Fudge and Deirdre McCann; International Labour Office – Geneva: ILO, 2015
chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_protect/documents/publication/wcms_436165.pdf (2025.01.12.)

KUN A: *A migráns munkavállalók alapvető emberi jogai és a vállalati szféra felelőssége a transznacionális munkajog újabb fejleményei tükrében*, KISS GY- BERKE GY -BANKÓ Z.

(szerk.): *Tanulmányok a személyek határokon átnyúló munkavégzésének munkaerőpiaci, foglalkoztatáspolitikai és munkajogi kihívásai kutatásból* 2020, ISBN 978-963-429-645-4

SZEGEDI K. – KERÉKES K. N.: *Challenges of Responsible Supply Chain Management*, Club of Economics in Miskolc, TMP Vol. 8., Nr. 2., pp. 68-75. 2012

DR. LANG-FUKSA DOROTTYA *

Svéd út a fenntartható közlekedéshez

Absztrakt: A közlekedésbiztonság kulcsfontosságú tényező a társadalom fejlődése és a gazdaság fenntarthatósága szempontjából. Az elmúlt években jelentős technológiai és szabályozási újítások születtek annak érdekében, hogy csökkentsék a közlekedési balesetek számát és annak súlyosságát. Jelen tanulmány a svéd közlekedési kultúrát kívánja bemutatni, valamint arra tér ki, hogy hogyan is lehetne ezzel javítani más országok közlekedési kultúráját, köztük Magyarországét is. Svédország közlekedése világszinten kiemelkedőnek mondható, amely elsősorban a biztonságra, fenntarthatóságra és hatékonyságra épül. Az elmúlt évtizedben a svédek tudatosan fejlesztik az úthálózatot és a tömegközlekedést. A svédek elsőként vezették be a Vision Zero koncepciót, amelynek célja a közlekedési halálesetek teljes megszüntetése. Az utak kialakítását és a forgalomirányítást úgy tervezték meg, hogy minimalizálják a veszélyforrásokat, például sebességkorlátozásokkal, biztonságos gyalogátkelőhelyekkel és külön kerékpársávokkal. A tömegközlekedés gyors, megbízható és jól szervezett. A városokban a metró, villamosok, buszok és vonatok pontosan közlekednek. A járműpark modern. Az ország nagy hangsúlyt fektet a fenntartható közlekedésre is, ezért az elektromos autók elterjedését kedvezményekkel ösztönzik, és egyre több töltőállomást építenek. A biciklis közlekedés szintén fontos szerepet játszik, a városokban külön kerékpárutak és tárolók biztosítják a kényelmes és biztonságos haladást. A technológiai innováció is nagy szerepet játszik a közlekedési rendszer hatékonyságában. Intelligens forgalomirányítási rendszerek, modern közlekedési alkalmazások és digitális jegyrendszerek segítik az utasokat abban, hogy gyorsan és egyszerűen elérjék úti céljukat. Svédország közlekedési stratégiája a jövőbe mutat, hiszen nemcsak a balesetek számának csökkentésére törekszik, hanem arra is, hogy a közlekedés minél fenntarthatóbb és környezetbarátabb legyen.

Kulcsszavak: közlekedésbiztonság, jármű, baleset, Svédország, közlekedéskultúra

1. Bevezetés

Az ember és az autó mára szorosan összetartozik. Elképzeltetlenné tartjuk azt, hogy az autót száműzzük a mindennapi életünkől. A felgyorsult, modern világunk egyik legnépszerűbb közlekedési eszköze a gépjármű lett. A 21. századi ember el sem tudja már azt képzelni, hogy ha valahová menni szeretne, hogy azt ne gépjárművel tegye meg. Elmondhatjuk azt is, hogy a modern világ egyik legnagyobb kockázattal járó, komoly veszélyforrást jelentő területe lett a közlekedés. A Földön

* dr. Lang-Fuksa Dorottya, PhD hallgató, Pécsi Tudományegyetem, Állam- és Jogtudományi Doktori Iskola

1,47 milliárd gépjárművet regisztráltak a hatóságok.¹ A népesség számának a növekedésével még több gépjármű kerülhet forgalomba, mely a közlekedési balesetek számát jelentősen növelheti. Csak Magyarországon a 2023-as évben 18.176 db közúti baleset történt, ebből 423 db halálos kimenetelű.² A közlekedésbiztonság kiemelt fontosságú társadalmi kérdés, amely mindannyiunk életére hatással van. Az utakon bekövetkező balesetek száma és súlyossága számos tényezőtől függ, beleértve a közlekedési infrastruktúrát, a járművek műszaki állapotát, a vezetők felelősségteljes magatartását és a forgalomszabályozás hatékonyságát. A tanulmányom célja, hogy bemutassam egy olyan európai ország közlekedését, ahol mondhatni minden tökéletes működik, és a halálos közúti balesetek száma elenyészőnek mondható.

2. A közlekedésbiztonság jelentősége

Miért is fontos a közlekedésbiztonság? A közlekedésbiztonság jelentősége abban rejlik, hogy közvetlen hatással van az emberi élet védelmére és a társadalom jólétére.³ Magyarországon 2023-ban a közúti közlekedésbiztonság helyzete mondhatni igen kedvezően alakult; a személysérüléses közúti balesetek, a közúti halálozások, a súlyos és könnyű sérülések, valamint az ittasan okozott balesetek számában egyaránt pozitív változások történtek. Tavaly – a modern hazai baleseti statisztika történetében immár második alkalommal – 500 fő alá, 472 főre csökkent a közlekedési balesetekben meghalt személyek száma.⁴ Ami az uniót illeti, az Európai Unió tagállamaiban évente közel 20.000 halálos kimenetelű baleset történik.⁵ Ennél alacsonyabb értéket csupán a pandémia évében regisztráltak.

Vannak azonban olyan országok, ahol nem születtek szép eredmények a statisztikai számokat illetően. „*A közlekedésbiztonság Bulgáriában, Horvátországban, Lengyelországban és Romániában rosszabb, mint az EU átlagában.*”⁶ Ez több tényezőre is alapszik. Ezek a tényezők az infrastruktúrától, a közlekedési kultúrától és a szabályozások betartásától/be nem tartásától kezdve a gazdasági és társadalmi tényezőkhöz terjednek.⁷ Az útinfrastuktúra hiányosságai elsőként érvényesülnek ezekben az országokban. Az elavult utak és alacsony minőségű úthálózatok (szűk sávok, földes utak), hiányzó autópályák, nem megfelelő útjelzések miatt több baleset

¹ <https://www.vezess.hu/magazin/2023/10/20/hany-auto-van-a-foldon-hedges-company-kutatas-2023/> (2024.12.29.)

² Központi Statisztikai Hivatal <https://www.ksh.hu/?lang=hu> (2024.12.13.)

³ MAJOR RÓBERT: A közlekedési balesetek megelőzése, különös tekintettel a rendőrség lehetőségeire és korlátaira. PhD. értekezés. Pécs. 2009. 25.o.

⁴ <https://www.autoklub.hu/klub/hirek/baleseti-statisztikak/> (2024.12.29.)

⁵ <https://www.europarl.europa.eu/topics/hu/article/20190410STO36615/halalozas-kozuti-balesetek-az-eu-ban> (2025.02. 28.)

⁶ <https://hu.euronews.com/utazas/2024/12/13/romania-es-bulgaria-januartol-csatlakozik-a-schengeni-ovezethez-mi-valtozik-az-utazok-szam> (2025.02.28.)

⁷ <https://kronikaonline.ro/belfold/romaniaban-es-bulgariaban-halnak-meg-lakossagaranyosan-a-legtobben-kozuti-balesetben-az-eu-ban> (2025.02. 28.)

következik be. A közlekedési kultúra hánya és a járművezetők magatartás is közrejátszik. A gyorsajtás, alkoholos befolyásoltság, figyelmetlenség és a közlekedési szabályok figyelmen kívül hagyása ezekben az országokban szinte mindennaposak. Kiemelném még, hogy ezekben az országokban igen gyenge vagy egyáltalán nincs rendőri ellenőrzés. A büntetések is enyhének számítanak más országokhoz képest, és a korrupció is kiemelendő. Ami a gazdasági tényezőket illeti leginkább a járművek életkorán és állapotán mutatkozik meg. A társadalmi problémákat illetően a megfelelő oktatás hiánya, valamint a felelősségtudat hiánya is kulcsszerepet játszik. Ezen tényezők együttesen arra vezetnek, hogy magasabb baleseti statisztikákat, súlyosabb sérüléseket és magasabb haláleseteket eredményeznek. Vannak azonban olyan uniós tagállamok, ahol igen kedvezően alakultak a statisztikai adatok. Ezen országok Svédország, Dánia, Hollandia és Finnország. Az uniós legbiztonságosabb országai közé tartoznak közlekedésbiztonsági szempontból.

3. A svéd közlekedési kultúra

Svédország közlekedési rendszere elismert a biztonság, a fenntarthatóság és az innováció terén. Az országban az utak minősége, a tömegközlekedés hatékonysága és a forgalomirányítás tudatos tervezése mind ahhoz, hogy a közlekedés gördülékenyebb és biztonságosabb legyen, mint sok más országban. A svédek közlekedési kultúráját a hosszú távú fejlődés jellemzi, az egyik legfontosabb mérföldköve a Vision Zero program bevezetése volt. A fenntarthatóság kiemelt szerepet kap a közlekedéspolitikában. *„A svéd közlekedési rendszer sikere nemcsak az infrastruktúrán múlik, hanem azon a tudatos szemléleten is, amely az egész társadalmat áthatja. A közlekedés nemcsak egy eszköz a célba éréshez, hanem egy olyan rendszer, minden eleme az emberek jólétére, biztonságára és a környezet védelmére épül. Ez a komplex és előrelátó megközelítés teszi Svédországot a világ egyik legjobban működő közlekedési rendszerével rendelkező országgá, ahol az emberek biztonságosan, kényelmesen és fenntartható módon a legjobban juthatnak el céljukhoz, akkor a környezet védelmét is szem előtt tartja.”*⁸ Svédország közlekedési rendszere egyszerre ötvözi a biztonságot, a fenntarthatóságot és technológiai innovációt. *„Az ország közlekedési politikájának hosszú távú tervezése és folyamatos fejlesztése célja nem csupán a gyors és kényelmes közlekedés biztosítása, hanem a balesetek minimalizálása és a környezeti terhelés csökkentése is.”*⁹ A közlekedési infrastruktúra kialakítása során nagy hangsúlyt kap a felhasználói élmény, ami azt jelenti, hogy az utak, a tömegközlekedési hálózat és az alternatív közlekedési formák az emberek igényeihez igazodnak.

⁸ ELVIK RUNE, VADEBY ANNA, HELS TOVE VAN SCHAGEN: A svéd közlekedésbiztonsági kutatás költségei és előnyei Svédország számára. Balesetek elemzése és megelőzése. 42. kötet. 4. szám. Elsevier Ltd. 2010. 1266-1270. o.

⁹ <https://www.consilium.europa.eu/hu/policies/clean-and-sustainable-mobility/> (2025.02.28.)

A Vision Zero stratégia Svédországban került legelsőként bevezetésre.¹⁰ A program célja az, hogy 2050-re a nullára csökkentése a közúti közlekedési balesetek számát.¹¹ *"A Vision Zero program alapja az a szemlélet, hogy az emberi hibák elkerülhetetlenek, de a közlekedési rendszernek képesnek kell lennie arra, hogy kompenzálja ezeket a hibákat."*¹² A program egyik legfontosabb eleme, hogy a közlekedési infrastruktúra kialakítása során figyelembe veszik az emberek viselkedését, és ennek megfelelően tervezik az utakat, például elválasztott sávokkal a különböző közlekedési módok számára.

Svédországban a közlekedési rendszerek megtervezésekor figyelembe vettek egy igen általánosnak mondható dolgot, ami nem más, mint az, hogy az emberek hibáznak. A közlekedési balesetek nagy százalékát az emberi hiba okozta balesetek teszik ki (90%). Ezért a svédek az infrastruktúrájukat úgy alakították ki, hogy képesnek kell lennie minimalizálni a hibák következményeit. A közlekedésbiztonsági fejlesztések mellett az infrastruktúra folyamatos modernizálása is nagy szerepet kap. A svéd közúti hálózat kiemelkedően jó állapotban van, mivel az utak karbantartását és fejlesztését hosszú távú tervek alapján végzik. Az intelligens forgalomirányítási rendszerek alkalmazása és a korszerű közlekedési lámpák biztosítják a gördülékeny forgalmat.¹³ Az önvezető járművek tesztelése is zajlik az országban, ezért a svéd kormány támogatja azokat az innovációkat, amelyek a közlekedés automatizálásának irányába mutatnak.¹⁴ A folyamatosan fejlődő digitális infrastruktúra lehetővé teszi az egyéni közlekedési adatok elemzését, ami segíti a közlekedésszervezők munkáját a még hatékonyabb várostervezés érdekében. Az intelligens forgalomirányítás különböző érzékelők és prediktív algoritmusok segítségével biztosítja a hatékony forgalomszabályozást, amely csökkenti a torlódásokat és optimalizálja a forgalmi áramlást.

Az ittas vezetés, gyorshajtas és más szabálysértések ellen nagyon szigorú szabályok vannak érvényben, mely cselekmények igen jelentős büntetésekkel is járnak. *„A forgalomcsillapított övezetek, a biztonságos gyalogátkelőhelyek és a modern forgalomtechnikai eszközök mind hozzájárulnak ahhoz, hogy az utak kevésbé veszélyesek legyenek. Egyes városi övezetekben a sebességkorlátozásokat 30 km/h-ra csökkentették, ami jelentősen reduktálta a halálos balesetek arányát.”*¹⁵

¹⁰ <https://kozlekedesbiztonsag.kti.hu/bezzeg-a-svedek/> (2025.02.28.)

¹¹ <https://visionzeronet.org/about/what-is-vision-zero/> (2025.02.2.)

¹² <https://bransch.trafikverket.se/en/startpage/operations/Operations-road/vision-zero-academy/Publications-related-to-Vision-Zero/> (2025.02.28.)

¹³ <https://www.phoenixcontact.com/hu-hu/iparagak/alkalmazasok/intelligens-forgalomiranyitas> (2025.02.28.)

¹⁴ https://www.rohde-schwarz.com/hu/solutions/automotive-testing/automotive-connectivity-and-infotainment/5g-in-automotive/5g-in-automotive_255295.html?mid=10884&midx=5g-automotive_aut-connectivity-generic_search_text-ad_r-eu_&kw=intelligent%20transport%20systems (2025. február 28.)

¹⁵ <https://www.cestec.hu/celallomas/svedorszag/szallitas> (2025.02.28.)

Az erős, azaz állandó rendőri jelenlétnek köszönhetően a közúti szabályok betartását hatékonyan ellenőrzik, és az elkövetett szabálysértéseket szigorúan szankcionálják. Megjegyezném a magas szintű közlekedési kultúrát is, mely más országokhoz képest (Németország, Hollandia) is kiemelkedő. A felelősségtudatot már igen korán megtanítták a gyerekekkel, mely tudatot az oktatás teljes egésze alatt végig megtartják. Ennek köszönhetően a gyalogosok és a kerékpározók felelősségteljesen viselkednek és figyelmesek végig a közlekedésük során. Az oktatás során az iskolákban és a gépjárművezetői képzés során nagy hangsúlyt fektetnek magára a közlekedésbiztonság oktatására. Kiemelném, hogy az itt élő emberek megengedhetik maguknak, hogy új gépjárműveket vásároljanak, ezért az utakon a legmodernebb járművek közlekednek. Mivel igen magas az új, biztonságos járművek aránya, mely járművek fejlett biztonsági rendszerekkel (ABS, automata vészfékrendszerek stb.) vannak felszerelve, így növelve a közlekedésbiztonságot. Az adatalapú döntéshozatal is jellemző. „*A baleseteket és a közlekedési események adatait folyamatosan szakemberek elemzik, és ezek alapján alakítanak ki új szabályokat, intézkedéseket.*”¹⁶ Kiemelendő még, hogy ezen szabályok megalkotására nem éveket kell várni, hanem igen gyorsan döntenek arról, hogy a jogszabály része legyen. Fontosnak tartom megemlíteni a korrupciót is, mely igen alacsonynak mondható Svédországban. Melynek a hatása az, hogy a rendőrök nehezebben lesznek lefizethetőek, megvesztegethetőek.

A tömegközlekedés hatékonysága szintén kulcsfontosságú az országban. A nagyobb városokban, így különösen Stockholmban, a metró, a buszok és a villamosok pontos menetrend szerint közlekednek, ami lehetővé teszi a gyors és kényelmes utazást. A digitalizáció előrehaladtával az utasok valós időben követhetik a járatok érkezését mobilalkalmazások segítségével, ami nagymértékben hozzájárul a közlekedés hatékonyságához. A közlekedési rendszer környezettudatos működését az is segíti, hogy egyre több elektromos busz és hibrid jármű jelenik meg a flottában, csökkentve a szén-dioxid kibocsátást. „*A stockholmi tömegközlekedési rendszer világszinten is példaértékű, hiszen fenntartható, pontos és jól szervezett szolgáltatásokat nyújt az utasok számára.*”¹⁷

A fenntarthatóság a közlekedéspolitikai minden területén meghatározó szerepet játszik. Svédország az elektromos autók egyik vezető piacává vált, ahol az állam jelentős támogatásokkal ösztönzi a fosszilis energiát nem használó járművek elterjedését.¹⁸ A töltőhálózat folyamatos bővítése lehetővé teszi, hogy az elektromos autók tulajdonosai kényelmesen és gyorsan tölthessék járműveiket, ami hozzájárul

¹⁶ MÉSZÁROS GÁBOR: A közlekedési balesetmegelőzés rendszerének információs folyamatai. 2.o. <https://www.pecshor.hu/periodika/XVII/meszaros.pdf> (2025. február 28.)

¹⁷ <https://www.oliverwymanforum.com/mobility/urban-mobility-readiness-index/stockholm.html> (2025.02.28.)

¹⁸ <https://www.honda.hu/cars/blog/article/brand/which-european-country-is-most-interested-in-electric-vehicles-a.html> (2025.02.28.)

az elektromobilitás további fejlődéséhez. Az állam emellett adókedvezményekkel és különböző ösztönzőkkel segíti az embereket abban, hogy környezetbarát közlekedési módot válasszanak. Svédország célja, hogy 2030-ra teljesen fosszilis üzemanyagoktól mentes közlekedési rendszert alakítson ki.

A közlekedési infrastruktúra fejlődése Svédországban szorosan összefonódik az ország társadalmi és gazdasági fejlődésével. A közlekedési beruházások hosszú távon hozzájárulnak a gazdaság dinamizmusához, hiszen az infrastruktúra fejlesztése munkahelyeket teremt, ösztönzi a belső piacot, és elősegíti a fenntartható urbanizációt. Az elkövetkező években az új technológiák, például az 5G-alapú forgalomirányítás és a teljesen elektromos tömegközlekedési hálózatok még inkább hozzájárulnak a svéd közlekedési rendszer hatékonyságához. A svéd kormány hosszú távú célja, hogy az országa közlekedése példát mutasson a világ számára a fenntarthatóság, a biztonság és az innováció területén. Az intelligens várostervezés, az energiahatékony közlekedési eszközök és a folyamatos fejlesztések biztosítják, hogy Svédország továbbra is a világ egyik legélhetőbb országai közé tartozzon.

Összességében elmondható, hogy Svédországban a közlekedésbiztonság tervezése integrált rendszerként működik, amely az emberi életet helyezi a középpontba. Az infrastruktúra fejlettsége, a szigorú szabályozás, a társadalmi tudatosság és a modern technológiák együttesen jelentősen csökkentették a halálos esetek számát és a súlyos sérülések számát.

4. Hogyan is tudná átvenni Magyarország és más ország a svéd közlekedési rendszert?

A svéd közlekedési rendszer hosszú évek alatt vált a világ egyik legbiztonságosabbá és leghatékonyabb rendszerévé. *„Ennek alapját a Vision Zero elnevezésű stratégia képezi, amelynek célja, hogy teljesen megszüntesse a közlekedési balesetekből eredő haláleseteket és súlyos sérüléseket.”*¹⁹ Svédország közlekedéspolitikája egy olyan holisztikus szemléleten alapul, amely az infrastruktúra fejlesztését, a közlekedési szabályok szigorítását, valamint a társadalmi szemléletformálást egyaránt magában foglalja. Magyarország és más országok számára a svéd modell adaptálása rendkívül előnyös lehet, azonban számos kihívással is járhat.

A Vision Zero elvet szem előtt tartva a svéd infrastruktúra kialakítása során már eleve figyelembe veszi az emberi hibázás lehetőségét, és úgy tervezik meg az utakat, hogy azok csökkentsék a balesetek súlyosságát. Ennek egyik legfontosabb példája az ún. 2+1 sávú utak alkalmazása, ahol az előzési lehetőség ciklikusan változik az egyes irányok között, ezáltal minimalizálva a frontális ütközések kockázatát. A körforgalmak használata szintén jelentős szerepet játszik a balesetek számának csökkentésében, hiszen ezek lassítják a forgalmat. A gyalogos és kerékpáros közlekedés védelmében különálló kerékpárutak és biztonságos gyalogátkelőhelyek

¹⁹ JOHANSSON R: *Vision Zero – Implementing a policy for traffic safety*. Safety Science. 2009. 826-831. o.

kiépítésére helyeznek hangsúlyt, ezzel is biztosítva, hogy a közlekedés minden résztvevője megfelelő védelmet élvezzen.

A technológiai fejlesztések szintén nagy hangsúlyt kapnak a svéd közlekedésbiztonságban. Az intelligens sebességhatároló rendszerek, amelyek automatikusan figyelmeztetik a sofőröket a megengedett sebesség túllépésére, egyre szélesebb körben elterjedtek, egyre több gépjárműbe kerül beépítésre. A digitális forgalomfigyelő rendszerek és a sebességmérő kamerák hatékonyan járulnak hozzá a szabályok betartásához. A forgalomirányító lámpák intelligens működésének köszönhetően a járművek mozgását dinamikusan tudják szabályozni, ami nemcsak a torlódásokat csökkenti, hanem a környezeti terhelést is mérsékli.

A közlekedésbiztonság fejlesztése köztudottan nem kizárólag az infrastruktúrán és a technológiai innováción múlik, hanem jelentős szerepe van a társadalmi szemléletformálásnak és az oktatásnak is. Svédországban kiemelt figyelmet kap, hogy már kisgyermekkorban elkezdjék a közlekedési ismeretek oktatását, így a fiatalok már az iskolában megtanulják a biztonságos közlekedés alapelveit. Az állami és civil szervezetek közlekedésbiztonsági kampányokat folytatnak. Ezek a kampányok hatékonyan segítik a társadalmi normák megváltozását, hiszen tudatosítják az emberekben, hogy a közlekedés biztonságáért minden résztvevőnek együttesen kell felelősséget vállalnia.

Álláspontom szerint Magyarország számára a svéd modell átvétele fokozatosan, lépésről lépésre történhetne. Elsődlegesen a közlekedéspolitikai szemléletmódját kellene teljes egészében megváltoztatni oly módon, hogy a közlekedésbiztonság minden fejlesztési és tervezési döntés középpontjába kerüljön. A sebességhatárolások szigorítása és a közlekedési szabályok következetesebb betartatása azonnali hatással lehetne a balesetek számának csökkentésére. A 2+1 sávú utak bevezetése és a körforgalmak szélesebb körű alkalmazása az úthálózat biztonságának javításához járulhatna hozzá. Az olyan technológiai fejlesztések, mint az intelligens sebességhatároló rendszerek és a digitális forgalomfigyelés, Magyarországon is kiegészíthetnék a hagyományos rendőrségi ellenőrzéseket. A svéd példa követésére azonban más országok is törekedhetnek, de ennek sikeressége az adott ország sajátos közlekedési szokásaitól és infrastruktúrájától függ. Vegyük példának Bulgáriát. A közlekedési kultúra igen elmaradt ebben az országban. Kérdésként merül fel bennem, hogy egy ilyen jellemzőkkel rendelkező ország hogyan is tudná integrálni a svéd rendszert. Az egyik legnagyobb probléma az infrastruktúra fejletlensége. Bulgária úthálózata jelentős fejlesztésre szorul, mivel sok helyen elavult, rossz állapotúak az utak. Míg Svédországban a 2+1 sávú utak, az intelligens közlekedési rendszerek és a modern körforgalmak elterjedtek, addig Bulgáriában a hasonló beruházások elmaradnak a finanszírozási nehézségek miatt. Az útfelújítások lassúsága és a korszerű közlekedési infrastruktúra hiánya ellehetetleníti a svéd modell egyik alapvető pillérének bevezetését. Ezen kívül a közlekedési szabályok betartatása és a jogi környezet sem megfelelő. Svédországban

szigorú szabályozás érvényesül, amelyet hatékony ellenőrzési rendszer támogat. A közlekedési kihágásokat gyorsan és következetesen szankcionálják, ami jelentős visszatartó erővel bír. Ezzel szemben Bulgáriában a közlekedési szabályok gyakran nincsenek betartatva, és a korrupció jelenléte gyengíti a hatóságok ellenőrzési képességét. A sebességmérő kamerák és az automatikus forgalomfigyelő rendszerek csak korlátozottan működnek. A közlekedési kultúra is jelentős különbséget mutat a két ország közt. Míg Svédországban a közlekedés résztvevői nagyfokú felelősségtudattal és szabálykövető magatartással közlekednek, addig Bulgáriában gyakoriak a szabályszegések, a gyorshajtás és az agresszív vezetési stílus. Az ittas vezetés aránya is magasabb (a többi országhoz képest is magasabbnak mondható), ami tovább növeli a baleseti kockázatot. A közlekedési normák betartásának hiánya miatt egy olyan modell, amely erősen épít a felelősségteljes vezetési kultúrára, nehezen lenne átültethető Bulgáriában.

A gazdasági tényezők is akadályozzák a svéd modell bevezetését Bulgáriában. Egy ilyen átfogó közlekedésbiztonsági reform komoly pénzügyi forrásokat igényelne, amelyek jelenleg nem állnak rendelkezésre az országban. A gazdasági fejlettség és az állami költségvetési források hiánya korlátozza a közlekedési infrastruktúra fejlesztésére fordítható összegeket, így a svéd modell egyik legfontosabb elemének – a biztonságos és korszerű úthálózatnak – a megvalósítása is kétséggé válik.

Látható, hogy Bulgária esetében a svéd közlekedési rendszer átvétele számos akadályba ütközne. Az infrastruktúra hiányosságai, a jogi környezet és a szabályozás hiányosságai, a közlekedési kultúra eltérései és a gazdasági korlátok egyaránt hozzájárulnak ahhoz, hogy a Vision Zero elveit csak korlátozott mértékben lehetne bevezetni. Bár bizonyos elemek, például a körforgalmak vagy a sebességkorlátozások szigorítása alkalmazhatók lennének, az egész rendszer sikeres átvétele hosszú távú, átfogó reformokat igényelne. Ennek első lépése a közlekedési kultúra fejlesztése és a jogi környezet megerősítése lenne, mielőtt az infrastruktúra és a technológiai fejlesztések terén komolyabb előrelépés történhetne.

A fejlettebb nyugat-európai államok, mint például Németország vagy Ausztria, már rendelkeznek olyan közlekedési kultúrával, amely megkönnyíti a Vision Zero elveinek beépítését. Ezzel szemben Kelet-Európa országaiban, ahol a közlekedési fegyelem alacsonyabb, nagyobb hangsúlyt kell fektetni az oktatásra és a szemléletformálásra, hogy a svéd modell valóban hatékonyan működhessen.

Elmondható összességében, hogy a svéd közlekedési rendszer számos olyan elemet tartalmaz, amely Magyarország és más országok számára is követendő példa lehet. Az infrastruktúra fejlesztése, a közlekedési szabályok szigorítása, a technológiai újítások bevezetése és a társadalmi szemléletformálás együttesen járulhatnak hozzá egy biztonságosabb és hatékonyabb közlekedési rendszer kialakításához. A sikeres adaptáció azonban nem pusztán technikai kérdés, hanem hosszú távú társadalmi és politikai elköteleződést igényel, amelynek célja egy olyan

közlekedési kultúra megteremtése, ahol az emberi élet védelme az elsődleges szempont.

5. Összegzés

Svédország közlekedésbiztonsági rendszere a világ egyik legfejlettebb és leghatékonyabb modelljének tekinthető jelenleg. Az országban alkalmazott közlekedéspolitikai intézkedések eredményeként a balesetek száma jelentősen csökkent, így a svéd utak az egyik legbiztonságosabbak Európában. A siker hátterében több tényező áll, köztük az infrastrukturális fejlesztések, szigorú jogi szabályozás, az innovatív technológiai megoldások és a közlekedési kultúra magas szintje.

A svéd közlekedéspolitika egyik alapelve a folyamatos infrastruktúra-fejlesztés.²⁰ Az ország úthálózata modern, jól karbantartott és biztonsági szempontokat előtérbe helyező megoldásokat alkalmaz. Az utak kialakítása csökkenti a frontális ütközések kockázatát, a körforgalmak pedig lassítják a forgalmat és csökkentik az ütközések erejét. A kerékpáros és gyalogos közlekedés védelme érdekében az utak jól elkülönített kerékpársávokkal és gyalogátkelőhelyekkel vannak ellátva, amelyek tovább növelik a közlekedés biztonságát.

A jogi szabályozás szigorúsága és annak következetes betartatása szintén kulcsfontosságú szerepet játszik a biztonságban. Svédországban a közlekedési törvények rendkívül szigorúak, és a szabálysértéseket gyorsan, azonnal és hatékonyan szankcionálják. A sebességhatárolások betartását széles körben alkalmazott sebességmérő kamerákkal ellenőrzik. Az ittas vezetés elleni fellépés is kiemelt jelentőségű, így a megengedett véralkoholszint rendkívül alacsony, és a rendőrség rendszeres ellenőrzéseket tart az utak biztonságának fenntartása érdekében.

A technológiai innovációk jelentős szerephez jutnak a közlekedésbiztonság javításában. Az intelligens közlekedési lámpák és a forgalomfüggő irányítás csökkenti a torlódásokat és növeli a közlekedés hatékonyságát. Az önvezető és félautomata járművek elterjedése szintén hozzájárul a balesetek megelőzéséhez, mivel ezek a rendszerek minimalizálják az emberi hibákból eredő kockázatokat. Emellett Svédország az intelligens úthálózat fejlesztésére is nagy hangsúlyt fektet, amely lehetővé teszi a járművek és az infrastruktúra közötti kommunikációt, tovább csökkentve a baleseti kockázatokat.

Az igen magasnak mondható közlekedési kultúra fejlettsége is hozzájárul a biztonságos közlekedéshez. Svédországban a lakosság nagyfokú szabálykövetéssel és felelősségtudattal rendelkezik. Az állami és civil szervezetek folyamatosan

²⁰ chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.eca.europa.eu/lists/ecadocuments/sr20_10/sr_transport_flagship_infrastructures_hu.pdf (2025.02.28.)

kampányokat folytatnak annak érdekében, hogy a lakosság tisztában legyen a közlekedésbiztonsági előírásokkal és azok jelentőségével.

Gazdasági és politikai tényezők szintén szerephez jutnak a közlekedésbiztonság sikerességében. Svédország kormánya elkötelezett a közlekedésbiztonsági célok iránt, és jelentős anyagi forrásokat biztosít az infrastruktúra és a technológiai fejlesztések támogatására. Az állami és magánszektor együttműködésével folyamatosan új megoldásokat dolgoznak ki a közlekedésbiztonság javítására, ami hozzájárul a hosszú távú fenntarthatósághoz és hatékonysághoz.

Svédország példája jól mutatja, hogy megfelelő szabályozással, infrastruktúrával és társadalmi szemléletformálással a közlekedési balesetek jelentős mértékben csökkenthetők, ami egy biztonságosabb és fenntarthatóbb közlekedési környezetet eredményez.

Felhasznált irodalom:

ELVIK RUNE, VADEBY ANNA, HELS TOVE VAN SCHAGEN: A svéd közlekedésbiztonsági kutatás költségei és előnyei Svédország számára. Balesetek elemzése és megelőzése. 42. kötet. 4. szám. Elsevier Ltd. 2010. 1266-1270. o.

MAJOR RÓBERT: A közlekedési balesetek megelőzése, különös tekintettel a rendőrség lehetőségeire és korlátaira. PhD. értekezés. Pécs. 2009. 25.o.

MÉSZÁROS GÁBOR: A közlekedési balesetmegelőzés rendszerének információs folyamatai. 2.o. <https://www.pecshor.hu/periodika/XVII/meszaros.pdf> (2025. február 28.)

JOHANSSON R: Vision Zero – Implementing a policy for traffic safety. Safety Science. 2009. 826-831. o.

Felhasznált internetes források:

<https://www.vezess.hu/magazin/2023/10/20/hany-auto-van-a-foldon-hedges-company-kutatas-2023/> (2024.12.29.)

Központi Statisztikai Hivatal <https://www.ksh.hu/?lang=hu> (2024.12.13.)

<https://www.autoklub.hu/klub/hirek/baleseti-statisztikak/> (2024.12.29.)

<https://www.europarl.europa.eu/topics/hu/article/20190410STO36615/halalos-kozuti-balesetek-az-eu-ban> (2025.02. 28.)

<https://hu.euronews.com/utazas/2024/12/13/romania-es-bulgaria-januartol-csatlakozik-a-schengeni-ovezethez-mi-valtozik-az-utazok-szam> (2025.02.28.)

<https://kronikaonline.ro/belfold/romaniaban-es-bulgariaban-halnak-meg-lakossagaranyosan-a-legtobben-kozuti-balesetben-az-eu-ban> (2025.02. 28.)

<https://www.consilium.europa.eu/hu/policies/clean-and-sustainable-mobility/> (2025.02.28.)

<https://kozlekedesbiztonsag.kti.hu/bezzeg-a-svedek/> (2025.02. 28.)

<https://visionzeronetwork.org/about/what-is-vision-zero/> (2025.02.2.)

<https://bransch.trafikverket.se/en/startpage/operations/Operations-road/vision-zero-academy/Publications-related-to-Vision-Zero/> (2025.02. 28.)

<https://www.phoenixcontact.com/hu-hu/iparagak/alkalmazasok/intelligens-forgalomiranyitas> (2025.02.28.)

https://www.rohde-schwarz.com/hu/solutions/automotive-testing/automotive-connectivity-and-infotainment/5g-in-automotive/5g-in-automotive_255295.html?mid=10884&midx=5g-automotive_aut-connectivity-generic_search_text-ad_r-eu_&kw=intelligent%20transport%20systems (2025. február 28.)

<https://www.cestec.hu/celallomas/svedorszag/szallitas> (2025.02.28.)

<https://www.oliverwymanforum.com/mobility/urban-mobility-readiness-index/stockholm.html> (2025.02.28.)

chrome-

extension://efaidnbmnnnibpcajpcgltclfindmkaj/https://www.eca.europa.eu/lists/ecadocuments/sr20_10/sr_transport_flagship_infrastructures_hu.pdf (2025.02.28.)

<https://www.honda.hu/cars/blog/article/brand/which-european-country-is-most-interested-in-electric-vehicles-a.html> (2025.02.28.)

MARIA MASŁOWIEC*

Private Law Aspects of Protecting a Child's Right to Identity in the Context of Adoption in the Domestic Legal Regulations of Poland

Abstract: This article is part of ongoing doctoral research on adoption and the child's right to identity, focusing on private law aspects within Poland's legal framework. The right to identity, safeguarded by international human rights law, includes birth registration, a name, nationality, and access to origins. The analysis explores Poland's adoption regulations, balancing a child's right to know their origins with integration into the adoptive family. Key issues include name changes, access to birth records, and the rights of biological and adoptive parents.

Keywords: Adoption, Identity, Civil Status, Confidential Adoption, Poland

1. Introduction

This article is part of ongoing doctoral research on adoption and the child's right to identity. It focuses on the private law aspects of protecting a child's right to identity within the context of adoption in Poland's domestic legal framework. The concept of identity is multifaceted, encompassing philosophical, psychological, sociological, and legal dimensions. The right to identity, recognized under international human rights law, safeguards an individual's personal attributes, social relationships, and access to their origins. The UN Convention on the Rights of the Child [hereinafter: CRC]¹ provides a crucial framework for this protection, particularly through Articles 7 and 8, which establish the child's right to birth registration, a name, nationality, and the preservation of identity. Additionally, Article 20 para. 3 emphasizes the importance of continuity of upbringing in alternative care while respecting the child's original identity. This article examines Poland's regulatory approach to adoption and civil status, highlighting how the legal system navigates the often-competing interests of the child, biological parents, and adoptive families. The analysis focuses on birth registration, name changes, and access to original birth records. Special attention is

* University of Miskolc; Ferenc Deák Doctoral School of Law; ORCID: 0000-0003-0870-6051, Supervisor: Prof. Dr. Tímea Barzó, Co-supervisor: Dr. Katarzyna Zombory, PhD.

¹ United Nations Convention on the Rights of the Child signed at New York on 20 November 1989, UNTS, vol. 1577, p. 3; published in Poland in Dz.U. 1991 nr 120 poz. 526.

given to balancing the protection of a child's origins with ensuring their seamless integration into the adoptive family.

2. Adoption in the Polish Law

The protection of identity, which can be challenged by adoption, is examined within the framework of children's rights. They are protected at national level by the Constitution of the Republic of Poland of 2 April 1997.² The most relevant in this respect is the Article 72.³ It guarantees the subjectivity and dignity of a child (para. 1).⁴ It also emphasizes the necessity for public authorities to provide support to a child lacking parental care and the responsibility of public authorities and those caring for the child to listen to and, where feasible, consider the child's opinions on matters that directly or indirectly affect them (paras. 2 and 3). As indicated by Elżbieta Holewińska-Łapińska: 'The right to be brought up in one's own family - in the first instance by the parents from whom the child is born - is a consequence of the natural, biologically determined order of things and has a moral dimension.'⁵

Adoption, however, is intended to provide a family environment for a child when they are deprived of the care of natural parents.⁶ The aim of adoption is to welcome the child into the family and to create the conditions for his or her proper development, both physically and spiritually (psychologically).⁷ Adoption can also have a family unifying function, for example when a parent has remarried.⁸ Although the notion of adoption (in Polish *przysposobienie*, while *adopcja*

² The Constitution of the Republic of Poland of 2 April 1997 (Dz.U. 1997 nr 78 poz. 483), translation from the website of the Polish Sejm. Available at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (date of download 13/09/2024).

³ Art. 72. 1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. 4. The competence and procedure for appointment of the Commissioner for Children's Rights shall be specified by statute.

⁴ ANDRZEJEWSKI, M.: Legal Protection of the Family: Essential Polish Provisions Regarding International Legal Standards and Social Change. In T. Barzó - B. Lenkovicz (Eds.), *Family Protection From a Legal Perspective. Budapest-Miskolc, Ferenc Mádln Institute of Comparative Law—Central European Academic Publishing*, 2021, 180. Available at: <https://doi.org/10.54237/profnet.2021.tbblfl.5>.

⁵ HOLEWIŃSKA-ŁAPIŃSKA, E.: *Przysposobienie*. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12. Wyd. 2, Warszawa, 2011*, 497.

⁶ *Ibid.*

⁷ See e.g. Resolution of the Supreme Court of the Republic of Poland of 25 October 1983, sig. III CRN 234/83.

⁸ WYBRAŃCZYK, D.: *Przysposobienie, a prawo o aktach stanu cywilnego – omówienie instytucji, postulaty zmian. Metryka*, 2017/2, 92.

is used mostly colloquially) occurs in numerous Polish normative acts, it is not defined by the legislator.⁹ The primary source of law for adoption in Poland is the Family and Guardianship Code from 25 February 1964 [hereinafter: FGC].¹⁰ The opening provision of its chapter on adoption emphasizes the role of the best interests of the child in adoption (Article 114. § 1 FGC). Undefined best interests of the child, as a guiding principle in family and guardianship law, is determined based on the specific circumstances of each case.¹¹

The institution of adoption was already known to Roman law.¹² Its principles, objectives and legal forms have developed differently over the centuries.¹³ The year 1918 and the regaining of independence, which involved inheriting non-uniform regulations from the partitioning states, is significant in the history of Polish law.¹⁴ A common feature of the various (Austrian, German, Russian and French-modelled) statutory solutions was the treatment of adoption as an option for individuals without 'legitimate' children and who were unlikely to have any in the future, permitting only 'simple' adoption.¹⁵ Both children and adults could be adopted, and it was also possible to adopt one's own extramarital child to enhance the child's legal status.¹⁶ Consent from specific individuals, especially the adoptee's parents (even for adults), was required.¹⁷ However, the purpose of adoption was usually to guarantee the continuity of the family's property interests.¹⁸ As with other family law issues, the regulation of the relationship between parents and children including adoption was not unified in the inter-war period, despite the drafts of the Codification Commission from 1934 and 1938.¹⁹ Some provisions of the 1938 draft provided a model for post-war regulations.²⁰

⁹ Ibid., p. 91.

¹⁰ Family and Guardianship Code of 25 February 1964 (Ustawa z dnia 25 lutego 1964 r. - Kodeks rodzinny i opiekuńczy, Dz.U. 1964 Nr 9, poz. 59, t.j. Dz.U. z 2023 r. poz. 2809).

¹¹ WYBRĄNCZYK, D.: Przysposobienie, a prawo o aktach stanu cywilnego – omówienie instytucji, postulaty zmian. *Metryka*, 2017/2, 95; HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (498–753)*. Wyd. 2, Warszawa, 2011, 586–592.

¹² BROSAN, J. F.: The Law of Adoption. *Columbia Law Review*, 1922/22(4), 332.

¹³ FIEDORCZYK, P.: Kilka uwag o genezie ustawy z dnia 13 lipca 1939 r. o ułatwieniu przysposobienia małoletnich. *Studia Iuridica Lublinensia*, 2016/25(3), 301.

¹⁴ DZIADZIO, A.: Powszechna historia prawa. *Wydawnictwo Naukowe PWN*, 2021, 255–260.

¹⁵ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12. Wyd. 2, Warszawa, 2011*, 501.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ STELMACHOWSKI, A.: Przysposobienie w polskim prawie rodzinnym. *Warszawa, 1957*, 77.

¹⁹ LECIAK, I.: Polemika wokół kodyfikacji prawa rodzinnego i opiekuńczego w II Rzeczypospolitej. *Studia Iuridica Toruniensia*, 2014(13), 81–108. Available at: <https://doi.org/10.12775/STI.2013.018>.

²⁰ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego, Tom 12. Wyd. 2, Warszawa, 2011*, 504.

However, it is worth noting that shortly before the Second World War, on 13 July 1939, the Polish Parliament enacted the Act on Facilitating the Adoption of Minors.²¹ The Act aimed to address the issue of child abandonment while simultaneously responding to the desires of childless couples who wished to care for a child and fully integrate them into their family.²² Interestingly, during the drafting of the law, considerations were given to issues related to the child's identity, such as the appropriateness of not disclosing the child's illegitimate origin in official documents, as well as matters concerning the religion of both the adoptee and the adoptive parents.²³ Although limited in scope compared to the drafters' original intentions, the Act introduced innovative measures for the welfare of minors, including provisions for the full adoption of abandoned children, renaming of the child, and judicial oversight of the adoption process.²⁴ The Act of 13 July 1939 on Facilitating the Adoption of Minors contributed to the provision of care for war orphans during the Second World War.²⁵

Family law, including adoption, was unified by the Decree of 22 January 1946 on Family Law, continuing the facilitation of minors' adoptions.²⁶ The Decree was replaced by the Family Code from 27 June 1950.²⁷ This regulation is called innovative for the time, introducing standards comparable to those imposed by the European Convention on the Adoption of Children from 1967.²⁸ As mentioned above, the current (as amended) Family and Guardianship Code dates from 1964. Among the decrees on civil law enacted between 1945 and 1946 was a Decree of 25 September 1945 on Civil Registry Records respectively.²⁹ This

²¹ Act on Facilitating the Adoption of Minors (Ustawa z dnia 13 lipca 1939 r. o ułatwieniu przysposobienia małoletnich, Dz.U. 1939 nr 63 poz. 416). The Act primarily addressed the situation of children up to the age of 7.

²² FIEDORCZYK, P.: Kilka uwag o genezie ustawy z dnia 13 lipca 1939 r. o ułatwieniu przysposobienia małoletnich. *Studia Iuridica Lublinensia*, 2016/25(3), 304.

²³ Ibid., p. 308-310, analyzing the draft and *travaux préparatoires*.

²⁴ Ibid., p. 311.

²⁵ STELMACHOWSKI, A.: Przysposobienie w polskim prawie rodzinnym. *Warszawa*, 1957, 81.

²⁶ Decree of 22 January 1946 on Family Law (Dekret z dnia 22 stycznia 1946 r. - Prawo rodzinne, Dz.U. 1946 nr 6 poz. 52).

²⁷ Family Code of 27 June 1950 (Ustawa z dnia 27 czerwca 1950 r. Kodeks rodzinny, Dz.U. 1950 nr 34 poz. 308).

²⁸ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. *Smyczyński* (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego, Tom 12. Wyd. 2, Warszawa*, 2011, 507; European Convention on the Adoption of Children signed at Strasbourg on 24 April 1967, ETS 58, published in Poland in Dz.U. 1999 nr 99 poz. 1157.

²⁹ Decree of 25 September 1945 on Civil Registry Records (Dekret z 25 września 1945 r. Prawo o aktach stanu cywilnego, Dz.U. 1945 nr 48 poz. 272). See: PAPIŚ, A.: Profesor Józef Litwin - przypomnienie sylwetki twórcy nowoczesnej rejestracji stanu cywilnego w prawie polskim. *Technika i USC*, 2006/1(46), 5.

is currently regulated by the Act of 28 November 2014 on Civil Registry Records [hereinafter: ACRR].³⁰

Under the Polish law currently in force, adoption can only apply to minors and for the sole purpose of their good. According to the Family and Guardianship Code, the adoptive parent must be significantly older than the adopted child and possess the personal qualities necessary to handle the responsibilities of raising a child (Article 114¹ FGC). The Act of 9 June 2011 on Supporting the Family and the Foster Care System governs the functioning of adoption centres carrying out the qualification procedure.³¹ Only spouses can jointly adopt a child (Article 115 FGC). Adoption is granted by a court upon the adopter's request (Article 117 FGC).³² As a general rule, consent of the adoptee is required if they are over 13,³³ while younger children should be heard by the court, if capable of understanding adoption (Article 118 FGC). As noted by Marek Andrzejewski: 'A child is qualified for adoption if his or her parents fail to exercise parental authority over him/her because they are dead, unknown, have been relieved of their parental authority or have consented to the adoption of their child'.³⁴

3. Types of Adoption under Polish Law

Adoption always gives rise to such rights and obligations for the parties to it as exist between the parents and the child (Article 121. § 1 FGC). Additionally, the effects of adoption shall also always extend to the adopted person's descendants (Article 121 § 4 and Article 124 § 1 *in fine* FGC). However, on the basis of the FGC, three types of adoption may be distinguished.³⁵

³⁰ Act of 28 November 2014 on Civil Registry Records (Ustawa z dnia 28 listopada 2014 r. Prawo o aktach stanu cywilnego, Dz.U. z 2014 r. poz. 1741, t.j. Dz.U. z 2023 r. poz. 1378).

³¹ Act of 9 June 2011 on Supporting the Family and the Foster Care System (Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej, Dz.U. 2011 nr 149 poz. 887, t.j. Dz.U. z 2024 r. poz. 177).

³² Art. 585 of the Code of Civil Procedure of 17 November 1964 (Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego, Dz.U. 1964 Nr 43, poz. 296, t.j. Dz.U. z 2023 r. poz. 1550).

³³ This is the boundary of limited legal capacity, see Art. 12 of Civil Code of 23 April 1964 (Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny; Dz. U. 1964 Nr 16 poz. 93; t.j. Dz. U. z 2024 r. poz. 1061, 1237).

³⁴ ANDRZEJEWSKI, M.: Legal Protection of the Family: Essential Polish Provisions Regarding International Legal Standards and Social Change. In T. Barzó - B. Lenkovic (Eds.), *Family Protection From a Legal Perspective. Budapest-Miskolc, Ferenc Mád Institute of Comparative Law—Central European Academic Publishing, 2021*, 182. Available at: <https://doi.org/10.54237/profnct.2021.tbblfl.5>.

³⁵ In detail about the types of adoption in: HOLEWIŃSKA-LAPIŃSKA, E.: *Przysposobienie*. In T. Smyczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12. Wyd. 2, Warszawa, 2011*, 648-672.

The first of them is full adoption (*adoptio plena*) which is to be considered the primary type of adoption in the Family and Guardianship Code.³⁶ As a result of adoption, the adoptive parent(s) acquires full parental authority.³⁷ This means they raise the child and care for them (Article 96 FGC), manage the child's property (Article 101 FGC), and act as their legal representative (Article 98 FGC). It is clear that the reciprocal rights and obligations of adoptive parents and the child also concern providing maintenance and statutory inheritance rights.³⁸ At the same time, as a consequence of *adoptio plena*, the reciprocal rights and obligations of the adoptee cease in relation to their relatives (Article 121 § 3 FGC). As a result of adoption the adoptee and their descendants are treated as relatives of the adopter(s). Importantly, legal family relations, including those related to maintenance and inheritance, are also established between the adopted child and the relatives of the adoptive parent(s) (Article 121 § 2 FGC). However, *adoptio plena* may be dissolved for important reasons, at the request of the adopted child or the adoptive parent, and within the best interests of the child (Article 125 § 1 FGC).

Contrary to 'blanket' adoption (*adoptio plenissima*), which is full and cannot be dissolved (Article 125 § 1 FGC). It is granted in cases where the parents have passed away or have given consent for the child's adoption without specifying an adopter ('blanket' authorization). This type of adoption leads to an irreversible break in the existing family bond.³⁹

The third type is simple adoption (*adoptio minus plena*), in which no rights and obligations arise between the adoptee and their descendants, and the adopter's relatives (Article 124 § 1 FGC).⁴⁰ Therefore, no rights and obligations arise between the adopted child and the relatives of the adoptive parent(s) in matters of maintenance (Article 131 FGC) or statutory inheritance (Article 937 Civil Code). This type of adoption is an exception in Polish law.⁴¹

³⁶ Ibid, p. 648.

³⁷ ANDRZEJEWSKI, M.: Poland: Parental Authority. In P. Sobczyk (Ed.), *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates*, Miskolc–Budapest, Central European Academic Publishing, 2022, 147–185. Available at: <https://doi.org/10.54237/profnet.2022.pscrp>; PIETRZYKOWSKI, K. (Ed.): Kodeks rodzinny i opiekuńczy. *Komentarz*. Wyd. 8, Warszawa, *Komentarz do Art. 92*, 2023.

³⁸ Art. 128-129; 133 FGC (on maintenance); Art. 936 Civil Code (on inheritance). See also: FRAS, M. - HABDAS, M. (Eds.): Kodeks rodzinny i opiekuńczy. *Komentarz*. Warszawa, *Komentarz do Art. 121*, 2023.

³⁹ WOJEWODA, M.: Skutki przysposobienia w kontekście rejestracji stanu cywilnego w Polsce. *Monitor Prawniczy*, 2022/8, 420.

⁴⁰ See also, e.g., Resolution of the Supreme Court of the Republic of Poland of 23 June 2016, sig. V CSK 619/15.

⁴¹ OSAJDA, K. (Series Ed.) - DOMAŃSKI, M. - SŁYK, J. (Vol. Eds.): Kodeks rodzinny i opiekuńczy. *Komentarz*. Wyd. 11, Warszawa, *Komentarz do Art. 124*, 2024.

The distinction between these three types is relevant to matters of civil status, because the type specified in the adoption order determines whether a new birth certificate will be issued.⁴²

The Polish family and guardianship law also provides for subsidiary intercountry adoption (Article 114² FGC). Poland is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.⁴³ However, the following comments will primarily disregard the cross-border aspects of adoption,⁴⁴ concentrating instead on the key issues related to protecting the child's identity in domestic adoption. Furthermore, greater emphasis will be placed on the establishment of the adoption relationship rather than on its termination in exceptional circumstances.

4. Safeguarding Child's Right to Birth Registration and the Right to a Name

As indicated above, adoption of each of the three aforementioned types invariably establishes the same rights and responsibilities between adoptive parents and the adopted child as those between biological parents and their child. This section will address the implications of adoption related to the child's civil status. Its proper safeguarding is fundamental to the protection of the individual.⁴⁵ Thus, also the child's right to identity. The establishment of an adoption relationship is an event that results in a change in the child's civil status.⁴⁶ The issue of their registration is particularly important because of the role of civil status records as exclusive evidence of the events stated therein (Article 3 ACRR).⁴⁷ In the case

⁴² WYBRĄNCZYK, D.: Przysposobienie, a prawo o aktach stanu cywilnego – omówienie instytucji, postulaty zmian. *Metryka*, 2017/2, 91-98, 92-93.

⁴³ Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, UNTS, vol. 1870, p. 167, see status table at the webpage of the Hague Conference on Private International Law (date of download 29/11/2024); published in Poland in Dz.U. 2000 nr 39 poz. 448. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

⁴⁴ Particularly, intercountry adoption, including the operation of the Hague Convention in Polish legal order; recognition of foreign adoption decisions and subsequent actions by the civil status registrars. See: BAGAN-KURLUTA, K.: Przysposobienie zagraniczne: krok w przód krok w tył. In R. Łukasiewicz - J. M. Łukasiewicz (Eds.), *Pieczą zastępczą i przysposobienie w polskim systemie prawa*, 2019; WYSOCKA-BAR, A.: Umowy międzynarodowe dotyczące przysposobienia dzieci. *Metryka*, 2018/1, 71–89 and 2018/2, 65–77; WOJEWODA, M.: Nawiązanie lub rozwiązanie przysposobienia w sprawach z elementem obcym a wpisy w polskim rejestrze stanu cywilnego. *Kwartalnik Prawa Prywatnego*, 2018/3, 723–755.

⁴⁵ HRYNICKI, W. M.: Organizacja rejestracji stanu cywilnego w Polsce w ujęciu historycznym. *Ius Norum*, 2016/4, 371. From a different angle, issues of civil status are elements of identity.

⁴⁶ WOJEWODA, M.: Czynności rejestracyjne kierownika USC w przypadku nawiązania lub rozwiązania stosunku przysposobienia. *Metryka*, 2018/1, 53; WOJEWODA, M.: Skutki przysposobienia w kontekście rejestracji stanu cywilnego w Polsce. *Monitor Prawniczy*, 2022/8, 419.

⁴⁷ WOJEWODA, M.: Czynności rejestracyjne kierownika USC w przypadku nawiązania lub rozwiązania stosunku przysposobienia. *Metryka*, 2018/1, 54.

of a birth certificate, this includes the child's descent from specific parents and name, and surname of the parents.⁴⁸

The first issue to be addressed is whether a new birth certificate is drawn up for the child as a result of the adoption. Another area worth examining is the issue of the child's given name and surname, specifically the question of their alteration following adoption. The effects on civil status (and civil status records) and name are sometimes mentioned by commentators first among the civil rights effects of adoption.⁴⁹

In the case of *adoptio plena*, according to Article 72 § 1 of ACRR, as a general rule, a new birth certificate is not issued, instead the fact of adoption shall be recorded as a notice in the existing certificate. Adoption can potentially be dissolved; therefore, there is a need to protect the child's natural civil status.⁵⁰ However, a new birth certificate, indicating the adoptive parent (s) as child's parent(s), is issued when ordered by the court (Article 72 § 2 of ACRR). A request from the adoptive parent and the consent of the adopted child, if they are over 13 years old, or a request from the adopted child and the consent of the adoptive parent, is required. The rules on hearing a child also applies.

In the case of *adoptio minus plena*, under Article 75 § 1 of ACRR,⁵¹ a mention regarding the adoption is added to the child's birth certificate, and a new birth certificate is not issued. According to Article 75 § 2 of ACRR, at the request of the adopter and with the consent of the persons whose consent to the adoption is needed, the court may exclude the possibility of indicating the adopter(s) as the child's parent(s) in the abridged copies of the birth certificate. In this particular situation, only a full copy reveals the adoption.⁵² The abridged copies, on the other hand, list only the biological parents and omit information on the legal bond established with the adopter(s). In deciding the case in this respect, the court should have the best interests of the adopted child as its primary consideration.⁵³

The situation is completely different for *adoptio plenissima*.⁵⁴ Under Article 71 ACRR, always, a new birth certificate with the data of adoptive parent(s) is drawn

⁴⁸ Resolution of the Supreme Court of the Republic of Poland 11 December 2002, sig. I CK 348/02.

⁴⁹ PIETRZYKOWSKI, K. (Ed.): Kodeks rodzinny i opiekuńczy. Komentarz. Wyd. 8, Warszawa, Komentarz do Art. 114. *Pietrzykowski*, 2023.

⁵⁰ FRAS, M. - HABDAS, M. (Eds.): Kodeks rodzinny i opiekuńczy. Komentarz. Warszawa, Komentarz do Art. 121, 2023.

⁵¹ See Art. 75 ACRR.

⁵² WOJEWODA, M.: Skutki przysposobienia w kontekście rejestracji stanu cywilnego w Polsce. *Monitor Prawniczy*, 2022/8, 420.

⁵³ OSAJDA, K. (Series Ed.) - DOMAŃSKI, M. - SLYK, J. (Vol. Eds.): Prawo o aktach stanu cywilnego. Komentarz. Warszawa, Komentarz do Art. 75, 2024.

⁵⁴ See Art. 71.

up.⁵⁵ The effect of *adoptio plenissima* is that the adoptee loses his or her natural civil status, which was represented through the existing birth certificate.⁵⁶ The acquisition by the adoptee of the civil status following adoption results in the need for a new birth certificate.⁵⁷ If a new birth certificate is issued as a result of the adoption, a notice on the establishment of the new birth certificate shall be attached to the existing birth certificate of the adopted person, and shall not, as a rule, be disclosed (Article 73 § 1 and 2 ACRR). As a result, all copies of the birth certificate issued from the register (abridged and complete) will only show the adopters.⁵⁸

Adoption also affects the child's surname.⁵⁹ This is because a surname is the outward expression of family belonging.⁶⁰ The rule is to take the adopter's surname or, in the case of joint adoption, of the children born or to be born of the adopters' marriage (Article 122 § 1 FGC). In cases where a new birth certificate is not issued,⁶¹ the guardianship court may, upon the request of the adopted person and with the consent of the adopter, order that the adopted person bear a surname combining their current surname with that of the adopter (Article 122 § 2 FGC).⁶² As noted by Aleksandra Graffke and Mirosława Graffke: 'Such regulation of the surname issue in the case of child adoption is based on the assumption that adoption creates a relationship between the adopter and the adoptee similar to that between parents and children. Therefore, the Family and Guardianship Code does not provide for any other way to regulate the child's surname in the case of adoption (except as outlined in Art. 122 § 1 and § 2 of the FGC), nor does it allow for the possibility of restoring the child's original surname while the adoption relationship is still in effect.'⁶³

In addition, Elżbieta Holewińska-Łapińska explains that: 'A hyphenated surname distinguishes the adopted child from their new "adoptive family", particularly from other children of the adoptive parents, and reveals their

⁵⁵ *Ex officio*, see, CZAJKOWSKA, A. (Ed.) - BASIOR, I. - SORBIAN, D.: Prawo o aktach stanu cywilnego z komentarzem. Przepisy wykonawcze i związkowe oraz wzory dokumentów. *Warszawa, 2015*, 140.

⁵⁶ OSAJDA, K. (Series Ed.) - DOMAŃSKI, M. - SLYK, J.: Prawo o aktach stanu cywilnego. Komentarz. *Warszawa, Komentarz do Art.71, 2024*.

⁵⁷ *Ibid*.

⁵⁸ WOJEWODA, M.: Skutki przysposobienia w kontekście rejestracji stanu cywilnego w Polsce. *Monitor Prawniczy, 2022/8*, 421.

⁵⁹ WOJEWODA, M.: Czynności rejestracyjne kierownika USC w przypadku nawiązania lub rozwiązania stosunku przysposobienia. *Metryka, 2018/1*, 61.

⁶⁰ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12. Wyd. 2, Warszawa, 2011*, 649.

⁶¹ I.e. *adoptio minus plena* or in some cases *adoptio plena*.

⁶² If either party has a multi-part surname, the court will determine which elements will be included in the adopted person's new surname.

⁶³ GRAFFKE, A. - GRAFFKE, M.: Vademecum kierownika urzędu stanu cywilnego. *Wyd. 2, Warszawa, 2021*, 216.

connection to the “family of origin”, hindering full integration into the new family (...). While it is not possible for the adopted person to fully retain their original surname, a hyphenated surname may hold significant importance, especially if the adoptee has consciously used it for an extended period due to their age (...).⁶⁴

Another issue is changing a child's given name. This matter is governed by Article 122 § 2 FGC. As a rule, it remains unchanged. It can only be modified by the court at the request of the adopters. Elżbieta Holewińska-Łapińska further notes: ‘At the request of the adoptive parent, the court may change the first name or names of the adopted child in the adoption ruling. The child's consent is required if they are 13 years old or older (younger children should be heard on this matter). It is particularly worth noting that, unlike decisions regarding a hyphenated surname, the court is not bound by the request concerning the child's name change. It seems that such a request, especially if the child is no longer an infant, should be considered with great caution and care. A child's identification with a specific name occurs much earlier than with a surname, and none of the arguments justifying a surname change can be applied to the change of the first name.’⁶⁵

It is worth examining the issues discussed above from the point of view of the child's identity. Adoption significantly impacts the personal status of the adoptee, altering their civil status and affecting various personal rights, such as the right to a specific name or surname.⁶⁶ Interestingly, commentators suggest that aligning the adopted child's surname with that of the adoptive family is part of the broader process of establishing a new identity for the adoptee through adoption, and may even serve as a way of obscuring the child's natural origins.⁶⁷ In a way, therefore, the child loses its previous identity and gains a new one, or maybe rather gains new elements of their single identity. In any case, the changes result from the need for integration within the family that has taken on the care of the child and are intended to serve the integration purposes.⁶⁸ It is worth noting that the inability to ‘fully integrate’ was a problem in the past, when *adoptio plena* did not yet exist in the Polish system.⁶⁹

However, in view of the existence of a certain tension between the child's ‘original identity’ and the ‘new identity’ resulting from being part of an adoptive

⁶⁴ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smyczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12. Wyd. 2, Warszawa, 2011*, 650.

⁶⁵ Ibid., p. 651.

⁶⁶ Ibid., p. 567.

⁶⁷ ZAŁUCKI, M. (Ed.): *Kodeks rodzinny i opiekuńczy. Komentarz. Warszawa, Komentarz do Art. 122 and quoted sources, 2023*.

⁶⁸ As pointed out, for instance, by the aforementioned Aleksandra Graffke and Mirosława Graffke or Elżbieta Holewińska-Łapińska on the example of the surname.

⁶⁹ FIEDORCZYK, P.: Kilka uwag o genezie ustawy z dnia 13 lipca 1939 r. o ułatwieniu przysposobienia małoletnich. *Studia Iuridica Lublinensia*, 2016/25(3), 301–312, 305.

family, it is worth highlighting several issues. Firstly, it is important to remember the primacy of the premise of the child's best interests in the permissibility of adoption, as well as its role in family law in general.⁷⁰ Elements of the adoption judgment, such as the question of drawing up a new birth certificate⁷¹ or changing the child's name,⁷² are therefore subject to this premise. The realisation of the child's best interests is required not only when it is used *expressis verbis* in the wording of the provision concerned.⁷³ Secondly, the issue of the participation of the child (the consent of at least 13 years old and the hearing of younger ones) is relevant both to the issue of the admissibility of adoption and to partial decisions within it, such as those on new birth certificate in *adoptio plena*, hyphenated surnames or first name changes. Although, as a rule, the consent of a 13-year-old child is required for an adoption to be granted, an exception exists to protect the child's identity when it is likely that the child believes they are biologically related to their prospective adoptive parents.⁷⁴ In every case, however, the issue of the child's consent or being heard is ultimately guided by the child's best interests (Article 118 § 3 FGC).

Despite the important role of this principle within adoption, situations might occur, where the best interests of the child has not sufficiently been taken into account by the Polish legislator, especially in the context of the child's identity. An example of such situation is the impossibility of remaining with one's own surname in any situation, or the lack of precise regulation regarding the child's consent to a given name change in case of children younger than 13 years old.⁷⁵ In the case of infants (e.g. six weeks old, when the biological parents' consent to adoption can be given at the earliest, see Art. 119² FGC), a first name change can be motivated by the adopters' need to attach themselves to their 'own' child from now on.⁷⁶ However, as for the later age, e.g., later than 3, advocates of amendments in this regard argue that where adopters are decided to adopt and

⁷⁰ PIETRZYKOWSKI, K. (Ed.): Kodeks rodzinny i opiekuńczy. *Komentarz*. Wyd. 8, Warszawa, *Komentarz do Art.114*, 2023.

⁷¹ WOJEWODA, M.: Skutki przysposobienia w kontekście rejestracji stanu cywilnego w Polsce. *Monitor Prawniczy*, 2022/8, 421.

⁷² HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), Prawo rodzinne i opiekuńcze. *System Prawa Prywatnego. Tom 12 (498–753)*. Wyd. 2, Warszawa, 2011, 650, stating that the court should inform the child about the automatic name change due to adoption and consider the child's strong opposition as a factor in assessing the adoption's alignment with the child's best interests.

⁷³ ŁUKASIEWICZ, R.: Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia. *Warszawa*, 2019, 74.

⁷⁴ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), Prawo rodzinne i opiekuńcze. *System Prawa Prywatnego. Tom 12*. Wyd. 2, Warszawa, 2011, 566-570.

⁷⁵ Ibid., p. 148-149.

⁷⁶ Ibid.

are guided by the best interests of the child, the need to remain with the minor's existing first name should not discourage them.⁷⁷

One should also note that changes to a child's civil status can only occur within the limits prescribed by law, meaning there is no possibility of altering details such as the date or place of birth in the birth certificate.⁷⁸

5. Protecting Child's Cultural, Ethnic or Religious Identity (Continuity of Upbringing)

Article 20 para. 3 of the CRC imposes on the state authorities the obligation to respect cultural, ethnic or religious identity of a child undergoing adoption. Poland was the initiator of the Convention and is a party to it from 7 July 1991.⁷⁹ The Convention is directly applicable in Poland.⁸⁰ Article 20 para. 3 of the CRC refers to 'alternative care,'⁸¹ which includes not only adoption but also all forms of child care, such as foster care and institutionalized care, which are regulated separately from adoption in Poland.⁸² In relation to foster care, the required continuity in the child's upbringing is interpreted as preserving the positive aspects of the child's previous upbringing by their former parents, along with maintaining the child's ethnic, religious, cultural, and linguistic identity.⁸³

In the context of adoption, these issues are primarily addressed in case law⁸⁴ and literature⁸⁵ concerning the adoption of a child from Poland to a foreign country (intercountry adoption). As to adoption in Poland, evaluating a prospective adoptive parent's capacity to maintain the child's identity is crucial in adoption cases involving a minor from abroad or a child from an ethnic or

⁷⁷ Ibid.

⁷⁸ Resolution of the Supreme Court of the Republic of Poland of 6 December 2007, sig. IV CSK 274/07.

⁷⁹ ZAJĄCZKOWSKA-BURTOWY, J.-BURTOWY, M.: Tożsamość dziecka w pieczy zastępczej. Po 30 latach od uchwalenia Konwencji o prawach dziecka. *Prokuratura i Prawo*, 2020/1, 101.

⁸⁰ Ibid. See also: Resolution of the Supreme Court of the Republic of Poland of 12 June 1992, sig. III CZP 48/92.

⁸¹ ANDRZEJEWSKI, M.: Piecza zastępcza. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (389–482). Wyd. 2, Warszawa*, 389. Andrzejewski, 2011.

⁸² In the Family and Guardianship Code and the Act on Supporting the Family and the Foster Care System.

⁸³ ZAJĄCZKOWSKA-BURTOWY, J.-BURTOWY, M.: Tożsamość dziecka w pieczy zastępczej. Po 30 latach od uchwalenia Konwencji o prawach dziecka. *Prokuratura i Prawo*, 2020/1, 102.

⁸⁴ Resolution of the Supreme Court of the Republic of Poland of 12 June 1992, sig. III CZP 48/92.

⁸⁵ HOLEWIŃSKA-ŁAPIŃSKA, E. (2011): Przysposobienie. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (498–753). Wyd. 2, Warszawa*, 646–647.

national minority in Poland,⁸⁶ the latter enjoying protection guaranteed to national and ethnic minorities by the Polish Constitution.⁸⁷

There are several potential conflicts of interest that might arise in this area. First, the Polish Constitution guarantees the right of parents to raise their children in line with their own beliefs, including providing moral and religious education,⁸⁸ on the other hand, the child's identity is protected by the aforementioned constitutional and convention-based guarantees concerning children's rights, taking into account the child's identity. Additionally, considering the safeguards stemming from Article 53 para. 7 of the Constitution, the adoption proceedings must ensure that prospective parents only voluntarily disclose their religious and philosophical convictions.⁸⁹ However, it is important to remember that the adoptive family should be chosen based on the child's needs.⁹⁰ The fundamental aim underlying all child care is to provide conditions for the full and harmonious development of the child.⁹¹ In a given situation, the question may arise as to whether the child's best interest may suggest that an adopted child should not retain their previous ethnic and cultural identity. This issue can be particularly significant, especially in the case of older children.⁹² However, at least

⁸⁶ Ibid., p. 538.

⁸⁷ Art. 35: 1. The Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture. 2. National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity.

Cf. KORHECZ, T.: National Minorities – Constitutional Status, Rights and Protection. In L. Csink - L. Trócsányi (Eds.), *Comparative Constitutionalism in Central Europe: Analysis on Certain Central and Eastern European Countries. Legal Studies of Central Europe* (3). Central European Academic Publishing, Miskolc-Budapest, 2022. Available at: <https://doi.org/10.54171/2022.lcslt.ccice>. See also: CZAPLIŃSKI, W.: Protection of National and Ethnic Minorities in Poland: A European Dimension. *Europa Ethnica: Vierteljahresschrift Für Nationalitätenfragen*, 2020/77, 42–49. Available at: <https://doi.org/10.24989/0014-2492-2020-12-42>; GDULEWICZ, E.-POPLAWSKA, E.: National and Ethnic Minorities in Poland—the Legal Problem of Definition. *Acta Iuridica Hungarica*, 2004/45, Nos. 3–4, 281–300.

⁸⁸ Art. 48, para. 1: Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions.

⁸⁹ Art. 53, para. 7: No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief.

⁹⁰ HOLEWIŃSKA-LAPIŃSKA, E.: Przysposobienie. In T. Smyczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12. Wyd. 2, Warszawa*, 2011, 589.

⁹¹ See Preamble of the CRC. See also: Resolution of the Supreme Court of the Republic of Poland of 24 November 2016, sig. II CA 1/16.

⁹² KUŹNICKA, D.: Prawo do tożsamości jako prawo dziecka – wybrane zagadnienia. *Folia Iuridica Universitatis Wratislaviensis*, 2016/5(2), 195.

in previous decades, adoption in Poland primarily involved young children who do not differ racially from their adoptive parents.⁹³

6. Child's Right to Know Their Origins (Parentage)

The child's right to know their origin is one of the most topical issues pertaining to the child's identity in adoption. Adoptive parents have no connection to the child's biological parentage, making the question of the child's right to know their origin crucial. However, among Polish legal scholars there have been voices questioning the implementation of the right to know one's own origins separately from the pursuit of civil status rights, which are specifically focused on establishing biological status.⁹⁴

In this context, one should analyze the issue of the confidentiality (secrecy) of adoption, which means concealing the child's biological origins. This notion is not present *expressis verbis* in any of the Polish legal acts.⁹⁵ Nevertheless, it is considered as a principle of adoption.⁹⁶ Some authors regard this principle, alongside the judicial oversight of adoption and the limited dissolvability of adoption, as supplementary to the main principles of adoption, which are its non-financial nature, the best interests of the child, and the equal treatment of adoption with the natural parent-child relationship.⁹⁷ The issue of the secrecy of adoption was so important that Poland made reservations to the Convention on the Rights of the Child in connection with Article 7 para 1 *in fine*, guaranteeing to the child the right to know their parents⁹⁸: 'With respect to Article 7 of the Convention, the Republic of Poland stipulates that the right of an adopted child to know its natural parents shall be subject to the limitations imposed by binding legal arrangements that enable adoptive parents to maintain the confidentiality of the child's origin'.⁹⁹

⁹³ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12. Wyd. 2, Warszawa, 2011*, 672.

⁹⁴ GAJDA, J.: Tajemnica przysposobienia i jej ochrona w polskim prawie cywilnym. *Wyzsza Szkoła Prawa i Administracji, Przemysł-Rzeszów*, 2012, 278.

⁹⁵ ŁUKASIEWICZ, R.: Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia. *Warszawa, 2019*, 152.

⁹⁶ PIETRZYKOWSKI, K. (Ed.): *Kodeks rodzinny i opiekuńczy. Komentarz. Wyd. 8, Warszawa, Komentarz do Art. 114, 2023*.

⁹⁷ IGNATOWICZ, J.: Przysposobienie. In J. Piątkowski, *System prawa rodzinnego i opiekuńczego. Ossolineum, 1985*, 922-924.

⁹⁸ Art. 7, para. 1 CRC: 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

⁹⁹ See, reservation made by the Republic of Poland available at the United Nations Treaty Collection website. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-11&chapter=4&clang=en (date of download 25/11/2024).

At that time, the Act of 29 September 1986 on Civil Registry Records¹⁰⁰ was in force in Poland, which did not allow under any circumstances for the access to the original birth certificate when a new one was drawn up for an adopted child. Regardless of the fact that Poland withdrew its reservation to the CRC in 2013,¹⁰¹ the way it was formulated is worth attention. The emphasis was on adoptive parents and their ability under the law to maintain the confidentiality of the child's origin. It may be connected with the need to prevent the stress that an adopted person might experience upon discovering, after many years, that the adoptive parents are not their biological parents.¹⁰² It also aimed at preventing biological parents from disturbing the adoptive family, and to provide adoptive parents with the satisfaction of being recognized as the sole parents of the adopted child.¹⁰³

The confidentiality of adoption is considered in both internal contexts, i.e. between adoptive parents and children, as well as external ones, with relation to third parties, regardless of the relationship between parents and children.¹⁰⁴ Adoptive parents decide on the timing and manner of disclosing the fact of adoption to third parties or choosing not to disclose it.¹⁰⁵ They also influence how state authorities should handle the disclosure of this information.¹⁰⁶ The relationships between parents and children in this regard are not regulated by Polish law.¹⁰⁷ Nevertheless, here, important issues of protecting the child's right to identity become apparent.¹⁰⁸ It seems important for children, in a manner and at a time appropriate for their best interests, to learn about the fact of their adoption.¹⁰⁹ However, on the other hand, a broad protection of the secrecy of

¹⁰⁰ Act of 29 September 1986 on Civil Registry Records (Ustawa z dnia 29 września 1986 r. Prawo o aktach stanu cywilnego, Dz.U. 1986 poz. 180).

¹⁰¹ Oświadczenie Rządowe z dnia 27 marca 2013 r. w sprawie zmiany zakresu obowiązywania Konwencji o prawach dziecka, przyjętej dnia 20 listopada 1989 r. w Nowym Jorku (Dz.U. z 2013 r. poz. 677).

¹⁰² PIETRZYKOWSKI, K. (Ed.): Kodeks rodzinny i opiekuńczy. Komentarz. Wyd. 8, Warszawa, Komentarz do Art. 121, 2023.

¹⁰³ Ibid.

¹⁰⁴ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (498–753). Wyd. 2, Warszawa, 2011, 672.

¹⁰⁵ GAJDA, J. (2012): Tajemnica przysposobienia i jej ochrona w polskim prawie cywilnym. Wyższa Szkoła Prawa i Administracji, Przemyśl-Rzeszów, 27.

¹⁰⁶ Ibid.

¹⁰⁷ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (498–753). Wyd. 2, Warszawa, 2011, 673.

¹⁰⁸ FRAS, M. - HABDAS, M. (Eds.): Kodeks rodzinny i opiekuńczy. Komentarz. Warszawa, Komentarz do Art. 121, 2023.

¹⁰⁹ HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (498–753). Wyd. 2, Warszawa, 2011, 570; ANDRZEJEWSKI, M.: Przysposobienie – podstawowe informacje i najważniejsze płaszczyzny sporów prawnych. In M. Andrzejewski - M. Łączkowska (Eds.), Prawne i pozaprawne aspekty adopcji: materiały z konferencji zorganizowanej

adoption can be justified primarily with the reasons connected to maintaining the stability of the family created by adoption.¹¹⁰

The confidentiality of adoption is most strongly protected in the case of *adoptio plenissima*, where a new birth certificate for the child is always issued and the existing file shall not be disclosed (Article 73 ACRR). However, the confidentiality of adoption is not absolute.¹¹¹ As mentioned above, Poland has withdrawn its reservations to the CRC. Previously, changes were made to the Act of 29 September 1986 on Civil Registry Records.¹¹² The protection of the child's right to identity, even in the case of *adoptio plenissima*, is to be ensured by the possibility for an adult adoptee to apply for access to the original birth certificate.¹¹³ However, there are voices, from the point of view of the child's right to identity, that such a construction insufficiently protects them.¹¹⁴ The child still has no guarantee that the adoptive parents will inform them of the adoption, and therefore whether the adoptee, once they have reached the age of majority, will be able to consult the original birth certificate.¹¹⁵

The functioning of 'baby boxes' in Poland raises other issues related to the protection of child's identity. These are the places in which parent(s) can leave their child, who will receive immediate care.¹¹⁶ In Poland they are known under the name of 'windows of life'.¹¹⁷ The situation of children left in 'baby boxes' is not directly regulated by Polish law, for example in terms of special adoption procedures.¹¹⁸ Additionally, UN Committee on the Rights of the Child¹¹⁹ raised

przez Wyższą Szkołę Nauk Humanistycznych i Dziennikarstwa w Poznaniu oraz Centrum Prawa Rodzinnego i Praw Dziecka Instytutu Nauk Prawnych Polskiej Akademii Nauk, Poznań, 2008, 22-23. See also: Resolution of the Supreme Court of the Republic of Poland of 6 December 2007, sig. IV CSK 274/07.

¹¹⁰ GAJDA, J.: Tajemnica przysposobienia i jej ochrona w polskim prawie rodzinnym. In M. Andrzejewski - M. Łączkowska (Eds.), *Prawne i pozaprawne aspekty adopcji: materiały z konferencji zorganizowanej przez Wyższą Szkołę Nauk Humanistycznych i Dziennikarstwa w Poznaniu oraz Centrum Prawa Rodzinnego i Praw Dziecka Instytutu Nauk Prawnych Polskiej Akademii Nauk, Poznań, 2008*, 272-275.

¹¹¹ Resolution of the Supreme Court of the Republic of Poland of 6 December 2007, sig. IV CSK 274/07.

¹¹² Amendment of 26 May 1995 (Ustawa o zmianie ustawy kodeks rodzinny i opiekuńczy i niektórych innych ustaw z dnia 26 maja 1995 r., Dz.U. Nr 83, poz. 417). See more: HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smyczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (498–753). Wyd. 2, Warszawa, 2011*, 692.

¹¹³ Art. 73 of the Act of 28 November 2014 on Civil Registry Records, currently in force).

¹¹⁴ MICHAŁKIEWICZ-KADZIĘŁA, E.: Prawo do tożsamości człowieka w prawie polskim i międzynarodowym. C.H. Beck, Warszawa, 2020, 197-199.

¹¹⁵ Ibid.

¹¹⁶ CZAPLIICKI, P.-KROCZEK-SAWICKA, Z.: Legal Aspects of the "Windows of Life". *Białostockie Studia Prawnicze*, 2017/2(22), 33-42. Available at: <https://doi.org/10.15290/bsp.2017.22.02.en.02>.

¹¹⁷ Ibid.

¹¹⁸ See about the steps taken by the state authorities towards the found child. Available at: <https://www.prawo.pl/zdrowie/okno-zycia-jak-wplywa-na-adopcje-dziecka.519053.html> (date of download 25/11/2024). See also: Art. 62 ACRR.

numerous concerns about their functioning from the perspective of child's identity, both in the case of Poland¹²⁰ and other countries.¹²¹ There is also an argument for their operation. Insofar as they do indeed directly protect children's lives, without it there is no question of the need to protect identity.¹²²

Important issues related to the identity of the child and the issue of the secrecy of adoption are also those related to the right to privacy. The privacy of the adoptive family against the unauthorised disclosure of the data of the family member (adopted child) to third parties is undoubtedly subject to protection in the context of adoption secrecy.¹²³ This is particularly relevant in view of the doubts about the legitimacy of treating adoption secrecy as such as falling within the category of personal rights.¹²⁴

The question of respecting the privacy of the parents¹²⁵ of origin is also very relevant.

There may be a tension (or even a collision) between the child's right to know their origins and the privacy of the biological parents. The Polish law on an adult adoptee's access to the first birth certificate does not address this problem in any way. As Rafał Łukasiewicz points out: 'There is no doubt that an adopted person should have the right to know certain information about his or her biological origin, in such a extent that the legitimate interests of others are also taken into account. It would appear that the key to achieving the necessary compromise would have to be a remodelling of the procedure for obtaining data on the biological parents. In particular, such a procedure could concern cases of *adoptio plenissima* (...). Separating thereof is due to the fact that blanket consent externalizes the will to absolutely sever any ties with the adoptee'.¹²⁶

Polish law does not distinguish between data identifying the biological parents (enabling them to be traced) and data not identifying them (general information

¹¹⁹ The group of eighteen impartial specialists that oversees the States party to the Convention on the Rights of the Child's implementation. Available at: <https://www.ohchr.org/en/treaty-bodies/crc> (date of download 25/11/2024).

¹²⁰ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Poland, 30 October 2015, CRC/C/POL/CO/3-4.

¹²¹ See, e.g., Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Czech Republic, 4 August 2011, CRC/C/CZE/3-4.

¹²² MICHALKIEWICZ-KADZIĘŁA, E.: Prawo do tożsamości człowieka w prawie polskim i międzynarodowym. *C.H. Beck, Warszawa, 2020*, 160.

¹²³ Resolution of the Supreme Court of the Republic of Poland of 6 February 2018, sig. IV CSK 60/17.

¹²⁴ Ibid.

¹²⁵ Polish law does not generally distinguish between the position of the natural mother and the natural father strictly in the context of the secrecy of adoption. Some practical differences may arise from the very construction of motherhood in Polish law (*mater semper certa est*) and technical matters. See, Art. 61 ACRR.

¹²⁶ ŁUKASIEWICZ, R.: Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia. *Warszawa, 2019*, 158-159.

not allowing the parents' identity to be established, e.g., nationality, occupation, state of health).¹²⁷ Furthermore, the possibility of disclosing the original birth certificate and thus knowing the name of the parents (mother) is not dependent on the consent of the natural parents, either at the time of placing the child for adoption or later when the certificate is to be disclosed.¹²⁸

Solutions regarding non-identifying data and the issue of natural parents' consent to disclosure of identifiers are known to the law of some other countries.¹²⁹ One of these states is Hungary.

7. Conclusion

Polish law aims to balance the interests of the child, adoptive parents, and biological parents in the context of adoption. However, it appears to prioritize the stability and integration of the adoptive family, sometimes at the expense of the child's right to know their origins and the privacy of biological parents. This is particularly significant for a child with a unique history, whose sense of identity may be shaped by both biological and adoptive connections. The legal framework could better reconcile these competing interests by ensuring greater transparency for adoptees while safeguarding the confidentiality of biological families. A more nuanced approach, considering the evolving understanding of identity and children's rights, would enhance the protection of all parties involved, with the best interests of the child remaining the guiding principle.

Bibliography

ANDRZEJEWSKI, M.: Poland: Parental Authority. In P. Sobczyk (Ed.), Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates (147–185). *Miskolc–Budapest, Central European Academic Publishing*, 2022. Available at: <https://doi.org/10.54237/profnct.2022.pscrpr>.

ANDRZEJEWSKI, M.: Legal Protection of the Family: Essential Polish Provisions Regarding International Legal Standards and Social Change. In T. Barzó - B. Lenkovics (Eds.), *Family Protection From a Legal Perspective. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing*, 2021, 180. Available at: https://doi.org/10.54237/profnct.2021.tbblfl_5.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid, p. 162.

ANDRZEJEWSKI, M.: Piecza zastępcza. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (389–482)*. Wyd. 2, Warszawa, 2011.

ANDRZEJEWSKI, M.: Przysposobienie – podstawowe informacje i najważniejsze płaszczyzny sporów prawnych. In M. Andrzejewski - M. Łączkowska (Eds.), *Prawne i pozaprawne aspekty adopcji: materiały z konferencji zorganizowanej przez Wyższą Szkołę Nauk Humanistycznych i Dziennikarstwa w Poznaniu oraz Centrum Prawa Rodzinnego i Praw Dziecka Instytutu Nauk Prawnych Polskiej Akademii Nauk, Poznań, 2008*.

BAGAN-KURLUTA, K.: Przysposobienie zagraniczne : krok w przód krok w tył. In R. Łukasiewicz - J. M. Łukasiewicz (Eds.), *Pieczka zastępcza i przysposobienie w polskim systemie prawa*, 2019. Toruń, Wydawnictwo Adam Marszałek.

BROSAN, J. F.: The Law of Adoption. *Columbia Law Review*, 1922/22(4).

CZAJKOWSKA, A. (Ed.) - BASIOR, I. - SORBIAN, D.: Prawo o aktach stanu cywilnego z komentarzem. Przepisy wykonawcze i związkowe oraz wzory dokumentów. *Warszawa, 2015*.

CZAPLICKI, P.-KROCZEK-SAWICKA, Z.: Legal Aspects of the “Windows of Life”. *Białostockie Studia Prawnicze*, 2017/2(22). Available at: <https://doi.org/10.15290/bsp.2017.22.02.en.02>.

CZAPLIŃSKI, W.: Protection of National and Ethnic Minorities in Poland: A European Dimension. *Europa Ethnica: Vierteljahresschrift Für Nationalitätenfragen*, 2020/77. Available at: <https://doi.org/10.24989/0014-2492-2020-12-42>.

DZIADZIO, A.: Powszechna historia prawa. *Wydawnictwo Naukowe PWN, 2021*.

FIEDORCZYK, P.: Kilka uwag o genezie ustawy z dnia 13 lipca 1939 r. o ułatwieniu przysposobienia małoletnich. *Studia Iuridica Lublinensia*, 2016/25(3).

FRAS, M. - HABDAS, M. (Eds.) (2023): Kodeks rodzinny i opiekuńczy. Komentarz. Warszawa.

GAJDA, J.: Tajemnica przysposobienia i jej ochrona w polskim prawie rodzinnym. In M. Andrzejewski - M. Łączkowska (Eds.), *Prawne i pozaprawne aspekty adopcji: materiały z konferencji zorganizowanej przez Wyższą Szkołę Nauk Humanistycznych i Dziennikarstwa w Poznaniu oraz Centrum Prawa Rodzinnego i Praw Dziecka Instytutu Nauk Prawnych Polskiej Akademii Nauk, Poznań, 2008*.

GAJDA, J.: Tajemnica przysposobienia i jej ochrona w polskim prawie cywilnym. *Wyższa Szkoła Prawa i Administracji, Przemysł-Rzeszów*, 2012.

GDULEWICZ, E. - POPŁAWSKA, E.: National and Ethnic Minorities in Poland—the Legal Problem of Definition. *Acta Iuridica Hungarica*, 2004/45, Nos. 3-4.

GRAFFKE, A. - GRAFFKE, M.: Vademecum kierownika urzędu stanu cywilnego. *Wyd. 2, Warszawa*, 2021.

HOLEWIŃSKA-ŁAPIŃSKA, E.: Przysposobienie. In T. Smoczyński (Ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 12 (498–753)*. *Wyd. 2, Warszawa*, 2011.

HRYNICKI, W. M.: Organizacja rejestracji stanu cywilnego w Polsce w ujęciu historycznym. *Ius Novum*, 2016/4, 358–374.

IGNATOWICZ, J.: Przysposobienie. In J. Piątkowski, *System prawa rodzinnego i opiekuńczego. Ossolineum*, 1985.

KORHECZ, T.: National Minorities – Constitutional Status, Rights and Protection. In L. Csink - L. Trócsányi (Eds.), *Comparative Constitutionalism in Central Europe: Analysis on Certain Central and Eastern European Countries. Legal Studies of Central Europe (3)*. *Central European Academic Publishing, Miskolc–Budapest*, 2022. Available at: <https://doi.org/10.54171/2022.lcslt.ccice>.

KUŹNICKA, D.: Prawo do tożsamości jako prawo dziecka – wybrane zagadnienia. *Folia Iuridica Universitatis Wratislaviensis*, 2016/5(2).

LECIAK, I.: Polemika wokół kodyfikacji prawa rodzinnego i opiekuńczego w II Rzeczypospolitej. *Studia Iuridica Toruniensia*, 2014/13. Available at: <https://doi.org/10.12775/SIT.2013.018>.

ŁUKASIEWICZ, R.: Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia. *Warszawa*, 2019.

MICHAŁKIEWICZ-KĄDZIELA, E.: Prawo do tożsamości człowieka w prawie polskim i międzynarodowym. *C.H. Beck, Warszawa*, 2020.

OSAJDA, K. (Series Ed.) - DOMAŃSKI, M. - SŁYK, J. (Vol. Eds.): Kodeks rodzinny i opiekuńczy. *Komentarz. Wyd. 11, Warszawa*, 2024.

OSAJDA, K. (Series Ed.) - DOMAŃSKI, M. - SŁYK, J. (Vol. Eds.) (2024): Prawo o aktach stanu cywilnego. *Komentarz. Warszawa, 2024.*

PAPIS, A.: Profesor Józef Litwin - przypomnienie sylwetki twórcy nowoczesnej rejestracji stanu cywilnego w prawie polskim. *Technika i USC, 2006/1(46).*

PIETRZYKOWSKI, K. (Ed.): Kodeks rodzinny i opiekuńczy. Komentarz. *Wyd. 8, Warszawa, 2023.*

STELMACHOWSKI, A.: Przysposobienie w polskim prawie rodzinnym. *Warszawa, 1957.*

WOJEWODA, M.: Skutki przysposobienia w kontekście rejestracji stanu cywilnego w Polsce. *Monitor Prawniczy, 2022/8.*

WOJEWODA, M.: Nawiązanie lub rozwiązanie przysposobienia w sprawach z elementem obcym a wpisy w polskim rejestrze stanu cywilnego. *Kwartalnik Prawa Prywatnego, 2018(3).*

WOJEWODA, M.: Czynności rejestracyjne kierownika USC w przypadku nawiązania lub rozwiązania stosunku przysposobienia. *Metryka, 2018/1.*

WYBRAŃCZYK, D.: Przysposobienie, a prawo o aktach stanu cywilnego – omówienie instytucji, postulaty zmian. *Metryka, 2017/2.*

WYSOCKA-BAR, A.: Umowy międzynarodowe dotyczące przysposobienia dzieci. *Metryka, 2018/1 and 2018/2.*

ZAJĄCZKOWSKA - BURTOWY, J. - BURTOWY, M.: Tożsamość dziecka w pieczy zastępczej. Po 30 latach od uchwalenia Konwencji o prawach dziecka. *Prokuratura i Prawo, 2020/1.*

ZAŁUCKI, M. (Ed.): Kodeks rodzinny i opiekuńczy. Komentarz. *Warszawa, 2023.*

Maria Maslowiec

Private Law Aspects of Protecting a Child's Right to Identity in the Context of Adoption in the Domestic Legal Regulations of Poland

NYIKES ZITA *

On What Ground the Legal Entity Has the Right to Protect Its Reputation?

Abstract: This paper is dealing with the development of the way how the protection of the reputation of the legal entity gained importance in cases of the international courts such as Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECHR). The reputation of the legal persons in the Hungarian legislation is regulated by many legislatives i.e. the civil law, the competition law, the criminal law. On the other hand, the practice in other countries differs to the Hungarian solution. In the Member States of the European Union or on the international level the protection of the legal persons is dissimilar. Implicitly, the protection of the natural persons's rights is evident. On the other hand, the protection of the reputation of the legal persons is rather unique. The research is dealing with CJEU and ECHR court cases related to reputation of the legal person. It also examines what is behind the court cases and what were the bases of the disagreement between the parties. During the different court cases of the CJEU and the ECHR we can come to the conclusion that there had been made several steps of the development of protecting the legal persons, similar to the natural persons, in terms of the reputation. Gradually, the legal persons have been gaining the right to protection of the reputation. This paper has set the goal of studying the reputation of the legal persons throughout the court cases and the decisions published and available.

Keywords: legal persons, legal entity, legal body, public and private interest, reputation, ECHR, CJEU, digital media, right to freedom of opinion and expression, respect for your private and family life, comments

1. The Jurisprudence of the CJEU

The protection of good reputation is the task of national rights. In the absence of authoritative EU rules, cases related to the violation of reputation therefore appear before the CJEU as a matter of jurisdiction, especially when several Member States are involved in the violation. In one of the cases described later, the CJEU nevertheless dealt with the issue of the good reputation of the legal entity outside of its jurisdiction, which was due to the fact that the protection of the legal entity in this direction is not regulated in one of the affected Member States.

* Nyikes Zita, University of Miskolc, Ferenc Deak Doctoral School in Law and Political Sciences

1.1. It's a matter of jurisdiction

In *Shevill v. In the case of Press Alliance SA*¹, the damage to the reputation is related to publication in the print media. British citizen Fiona Shevill filed a defamation lawsuit in the United Kingdom against the French Press Alliance SA, because the publisher falsely claimed in an article in its *France Soir* that Fiona Shevill was involved in the operation of an international drug network. The case is worth mentioning from the point of view of damage to the reputation of legal entities because it clarifies jurisdictional issues. The Court found that in the case of a violation of reputation through a press article published in several contracting states, the victim may file an action for damages against the publisher: or before the court of the state where the publisher that published content that damages the reputation is established - which court is to order compensation for the full damage resulting from the violation of reputation has jurisdiction - or before the court of any member state where the publication took place and where the victim's reputation was allegedly damaged - which court has jurisdiction exclusively to assess the damage caused in this state (mosaic rule).

The next important stage, which can still be linked to the good reputation of the natural person, but is a step forward from the point of view that the violation is already taking place on a digital platform, is a decision made during the merger of two cases. One is the *eDate Advertising et al. case (C-509/90)*, which is based on the fact that the internet portal of the Austrian *eDate Advertising GmbH*, primarily aimed at a homosexual audience, continuously provided information about a German citizen who was sentenced to life imprisonment for the murder of a well-known German actor. The plaintiff, who felt wronged and was released on parole in 2008, appealed to a German court, requesting that it prohibit the Austrian portal in question from distributing information about him throughout Germany and oblige him to compensate his non-pecuniary damage. In the other case (*Case C 161/10*) before the *tribunal de grande instance de Paris*, the French actor *Olivier Martinez* and his father, *Robert Martinez*, are seeking their right to respect for their private lives and the right to respect for *Olivier Martinez's* reputation. They cited a violation of his rights. The offense was published in the UK-edited website in an English-language article. The plaintiffs therefore started the lawsuit in their country of citizenship, the main reason for which was that the article was also published in French. The action was initiated against the *MGN* company, which is governed by English law and is the editor of the website of the British newspaper, due to a violation of the French Civil Code. However, this company invoked the lack of jurisdiction of the French court.

¹ Case C-68/93

In relation to the two cases, the CJEU made a number of forward-looking findings:

The jurisdictional findings made in the Shevill case are also valid for other mass communication and telecommunications devices. The publication of this content on an internet website differs from the geographically limited publication of the printed press, as it is generally aimed at making said content available everywhere. This content can be instantly downloaded by an indeterminate number of Internet users around the world, regardless of whether the publisher intended it to be downloaded outside the Member State of its establishment, and downloads are outside its scope. The Internet reduces 'where published' the usefulness of the criterion, since the content published on the Internet is, as a general rule, accessible anywhere. Furthermore, in relation to a specific Member State, it is not always technically possible to quantify this distribution with complete certainty and credibility, and therefore it is not always possible to assess the damage caused exclusively in this Member State, where the center of the interests of the alleged victim is located. This usually corresponds to his habitual residence, but it can also be in a Member State where this person does not have a habitual residence, if other factual circumstances, such as the exercise of a professional activity, may indicate a particularly close relationship with this state. In summary, it shall be interpreted as the alleged violation of personal rights by the content of an Internet website case, the injured person has the option to file a claim for the establishment of liability in order to compensate for the total damage caused: either to the court of the Member State where the publisher of this content is established, or to the court of the Member State where the center of interests of the injured person is located. In addition, a person may file a claim with the court of any member state in whose territory the content published on the Internet is or was accessible. These courts only have jurisdiction to assess damage caused in the territory of their member state.²

1.2. The good reputation of the legal entity through the northern lights

The Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB³ case was a breakthrough in the field of defamation committed against a legal entity, which took place on the Internet. The judgment itself only deals with jurisdictional issues, but the comments attached to the decision affect the legal entity's personal rights and the protection of its reputation. Bolagsupplysningen OÜ (plaintiff) is a company based in Tallinn, Estonia, which apparently carries out most of its

² Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters, Article 5, Point 3.

³ Case C-194/16

economic activities in Sweden. I. Ilsjan is an employee of the plaintiff. The Swedish trade association Svensk Handel AB (defendant) blacklisted the plaintiff on its website with the entry that the plaintiff is a fraud. In response to the blacklisting, nearly 1,000 comments were received on the website's discussion forum, including direct calls for violence against the plaintiff and his employees. The Estonian company filed a lawsuit against the Swedish association in court, claiming that its reputation was damaged due to the published information. It asked the Swedish federation to correct the allegations and delete the comments. It also claimed that he had suffered damage due to the comments and allegations, for which he demanded compensation. The plaintiff and I. Ilsjan claimed that as a result of the defendant's conduct, he suffered damage, because the plaintiff's economic activity in Sweden was paralyzed due to the publication of the untrue statements.

The question arose as to whether the Estonian courts could establish their jurisdiction based on the 'center of interests' of the plaintiff, which is a special reason for jurisdiction that the CJEU has already applied to natural persons, but not to legal persons. With regard to the request for a preliminary ruling submitted by the Estonian Supreme Court, the motion of Chief Counsel Michal Bobek raised new aspects. He proposed a fresh and perhaps more critical review of the previous jurisprudence of the European Court of Justice, referring to the fact that in this case a legal entity requests the correction and removal of statements primarily made available on the Internet. He questioned whether talking about personal rights shall we make a distinction between natural persons and legal entities.⁴ Michal Bobek focuses also draws attention to the fact that in the case in question, the question of whether the protection of personality rights as fundamental rights can be extended to legal entities and whether legal entities have personality rights is undoubtedly the subject of extensive debate. Advocate General Michal Bobek explained that the good reputation of legal entities is protected in the law of many Member States as part of their statutory rights.⁵

Advocate General Michal Bobek briefly reviewed how the ECHR gradually extended the protection of fundamental rights to legal entities. For example, in terms of freedom of expression, the right to respect for housing and correspondence, and the right to a fair hearing. Michal Bobek saw that within the system of EU law, the CJEU also confirmed that legal persons enjoy rights such as the right to property, the freedom of enterprise, the right to an effective remedy, the right to be free of costs, the presumption of innocence and, in particular, the right to defence. In summary, he pointed out that the extension of fundamental rights to legal entities in the application of the law of both the ECHR and the CJEU happened gradually and naturally. According to Michal Bobek, personality

4 Michal Bobek General Advocate Opinion Point 35.

5 Michal Bobek General Advocate Opinion 40.

rights can also be seen as a tool for the effective protection of other fundamental rights, rather than for its own sake. The protection of the personal rights of legal persons also leads to other rights, such as the right to property or the freedom of entrepreneurship. Following this logic, damage to a company's reputation directly results in damage to the company's economic rights. In order to effectively protect economic rights, their rights must also be protected.⁶

In terms of jurisdiction, the center of interests must be examined from the point of view of the legal entity. It must be determined based on the place where the majority of its economic activity is carried out. The center of interests of a legal entity may also be the same as its registered office according to its founding document, if it carries out all or the majority of its activities here, and if the reputation it enjoys there is consequently more significant than in any other member state. The legal entity whose rights have been violated by the correction of allegations for the obligation to remove the comments and for the compensation of the financial damage caused by the publication of untrue statements on the Internet.

1.3. Competition infringement vs reputational infringement?

The protection of the good reputation of legal entities is basically the task of national rights, so we cannot find adequate EU rules. For this reason, the following case⁷ was interesting, in which a company involved in a cartel case fought so that its name and the parts referring to it would not appear in the widely published decision establishing a violation of competition law, after the proceedings against it were terminated. In the absence of EU regulation, the protection of the reputation was on the one hand indirect and only appeared as one of the company's arguments, on the other hand it is exciting what approach the EUB adopted in response to this.

In the case of *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. the Commission of the European Communities*, which ended with a verdict in 2007, the plaintiff requested the deletion of data relating to him from a decision establishing a competition violation, citing that, among other things, they could damage his reputation. The Court held that if the Commission's findings regarding a legal violation committed by a company may violate the application of the principle of the presumption of innocence, they should, as a general rule, be considered confidential with regard to the public and, consequently, by their nature, fall within the scope of official secrecy. This principle results, among other things, from the need for the good reputation and dignity of the person concerned to be

6 Michal Bobek General Advocate Opinion Points 47-49.

7 Case T-474/04

respected as long as they have not been legally convicted. Therefore, it should be considered that the disputed references are, by their very nature, classified as information within the scope of official secrecy. It must be stated that, in such circumstances, the public interest related to the publication of the disputed references prior to the plaintiff's legitimate interest is absent. The Court therefore ruled in favor of the plaintiff and, in order to protect his reputation, included the relevant parts of the decision in the scope of professional secrecy, declaring that in this case there is no public interest that would justify the publication of the disputed parts.

2. Decisions of the ECHR

The good reputation of the legal entity was raised in cases brought before the ECHR due to violations of Article 8 and Article 10 of the European Convention on Human Rights. In the majority of cases, the perpetrators of the violation appealed to the ECHR citing Article 10 Freedom of expression, because the national courts convicted them against the legal entity. A rare exception is one case in which the legal entity itself requested legal aid from the ECHR for damage to its reputation, citing Article 8.

2.1. The bad wine does not need the bush, either?

The applicant a journalist published an article in the 'Opinion' section of a national daily newspaper. The subject of the article was the quality of the product of a well-known Hungarian wine variety, T. Zrt. – a state-owned business company – which product, according to the applicant, is bad, he also expressed it vulgarly, and its popularity among Hungarian consumers is unjustified. The T. Zrt. he did not enforce his claim through private law, but filed a criminal complaint against the applicant. The Hungarian courts convicted the applicant for defamation, finding that the criticism expressed in the applicant's article went beyond the limits of journalistic opinion and was considered a factual statement capable of damaging the reputation of the producer of the wine variety in question. The applicant applied to the ECHR for a violation of Article 10 as it follows: -

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the

interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Court examined whether the interference with the applicant's Article 10 rights was 'prescribed by law', served a legitimate aim or aims and was 'necessary in a democratic society' to achieve those aims. The Court accepted that the interference served a legitimate purpose, namely the protection of the reputation or rights of others. The Court observed that the impugned criminal charges were brought by a business entity that arguably had the right to defend itself against defamatory claims, there was an interest linked to the protection of the commercial success and viability of economic companies, which also serves the benefit of shareholders, employees and the wider economy, competing with freedom of expression. However, there is a difference between the interest of an economic company in the commercial reputation and the reputation of an individual, which concerns social status. While the latter may have implications for dignity, for the Court the interest in commercial goodwill lacks this moral dimension. The reputational interest at stake in this application is the interest of a state-owned business company. In this way it is a commercial interest that has no relevance in terms of moral character.

However, the subject of the case is not a defamatory statement of fact, but a value judgment or opinion. The publication in question carried out a satirical denunciation of the company in the context of government economic policies and consumer attitudes. Taking into account the above facts, the Court found that the applicant's primary goal was to call attention to the disadvantages of state ownership, and not to create a bad reputation for the quality of the products produced by the company in the minds of the readers. The opinion was expressed with reference to government policies related to the protection of national values and private enterprises and foreign investments. In this way, it was related to a matter of public interest. The Court believes that the domestic courts did not take into account the fact that the press is expected to communicate information and ideas related to matters of public interest, to use a certain degree of exaggeration or even provocation, or to make somewhat excessive statements can also apply. The Court notes that the use of vulgar expressions in itself is not conclusive when judging an offensive expression, as it can also serve purely stylistic purposes. For the Court, style as a form of expression forms part of communication, and as such is protected together with the content of the expression. The Court found that the

domestic authorities did not convincingly establish the need for intervention, and Article 10 of the Convention was violated.⁸

2.2. Making truthful statements in public

In the case based on the request submitted by Sandor Csanics, the president of the Valuable Transport and Security Protection Workers Union, against Hungary.⁹ The applicant, who is a trade union leader, claimed that the decisions of the domestic authorities violated his right to freedom of expression under Article 10 of the Convention when he was required to correct statements he made in an interview related to a demonstration organized by the trade union. The applicant claimed that the Hungarian courts violated his right to freedom of expression according to Article 10 of the Convention. The Court found that the intervention, i.e. the restriction of the expression of opinion, took place for a reason defined by the Hungarian Civil Code, the complained of measure served the legal purpose of protecting the rights of others. However, he objected to the fact that, according to the Hungarian courts, the relevant statements of the applicant are both statements of fact. According to the Court, a distinction must be made between factual statements and value judgments in that while the existence of facts can be proven, the reality of value judgments cannot be proven.

According to the Court, the Csanics v. Hungary case involves two interrelated claims. Regarding the rights of the employees were trampled on due to the inhumane behavior of the management, the Court believes that the applicant generally evaluated the behavior of the G. company, and his statement is considered a value judgment. The Court, like the Hungarian courts, considered the other claim, namely, according to the applicant, company G called him and his colleagues criminals, factual. The Court held that such statements are, at least in part, probative. Consequently, the Court considered that the domestic courts should have allowed the applicant to support his statements. In principle, it should be possible to make truthful statements in public, regardless of their tone or negative consequences for those involved. The Court noted that the applicant made the objectionable statements in a dispute related to issues of public interest, namely during a collective labor dispute. The Court is aware that the tone of such disputes is often heated because of the stakes. The Court considered that these disputes require a high level of protection under Article 10 as they affect the most important interests of workers. The Court ruled that the applicant, who is a trade union leader, formulated his statements in the usual way in labor disputes. In conclusion, he found that the domestic courts did not find the right balance between the need to

⁸ Application nr. 23954/10.

⁹ Application nr. 12188/06.

protect the applicant's freedom of expression and the need to protect the plaintiff's rights and reputation. Consequently, there has been a violation of Article 10 of the Convention.

2.3. Expression of opinion in the light of defamation

In the following case¹⁰, the applicant is the Hungarian Content Association (hereinafter: MTE) and Index.hu Zrt. At the time of the facts, both applicants allowed reader comments to appear on their news portals. The MTE published an opinion entitled 'Another unethical business behavior on the Internet' about two real estate websites operated by the same company. According to the opinion, the two websites originally provided users with a free advertising service for thirty days. After the thirty-day free period expired, the service became chargeable, but users were not notified beforehand. This was possible because when registering on the website, users accepted the terms of use, according to which the service provider could unilaterally modify the terms of use. The opinion stated that the service provider only removed outdated advertisements and personal data from the website when the due fees were paid. The opinion established that the service provider's behavior was unethical and misleading. The opinion was also responded to in pseudonymous user comments, which also contained common expressions.

Index consumer protection blog also wrote about the opinion, publishing the full text of the opinion. The Index also published the comments of users reacting under a pseudonym. The company operating the affected websites filed a claim for defamation. Upon learning of the court action, the applicants removed the controversial comments. The Hungarian courts reprimanded the applicants and established their liability arguing that the applicants were merely intermediary service providers for publishing offensive opinions and comments that were capable of harming the plaintiff's reputation. The applicants filed a constitutional complaint, essentially disputing the court's decision, which made them responsible for the content of the comments, thus unfoundedly limiting their freedom of expression. The Constitutional Court dismissed the complaint 19/2014. (V.30) AB rejected it in its decision. The applicants initiated the procedure due to a violation of the freedom of expression stipulated in Article 10 of the Convention, during which the ECHR also discussed the legal responsibility of the operators of Internet news portals for the published opinions and comments.¹¹

¹⁰ Application nr. 22947/13.

¹¹ Andras Koltay deals with these issues of responsibility in details in his study 'Internet gatekeepers and Article 10 of the European Convention on Human Rights: new subjects of press freedom'. Allam-és Jogtudomány, Year 2017. Volume 4. pp. 129–140., <https://jog.tk.hu/uploads/files/2017-04-AJT-teljes.pdf>

The Court emphasized that the right to protection of reputation is protected by right to privacy Article 8 of the Convention, as part of the right to respect for private and family life as it follows: -

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court found that the underlying article referred to the business practices of two large real estate websites – deemed misleading and harmful to their customers – and therefore the public interest justified the decision to allow the discussion of a public matter affecting many consumers and internet users, ensuring the exchange of information. According to the judgment of the Court, in this case the comments are value judgments or opinions. They were actually condemning a business practice, and they were partly influenced by the commenters' personal frustration at being duped by the company in question. The terms used in the comments were offensive, one was downright vulgar. However, the use of ordinary expressions alone is not decisive in the evaluation of an offensive expression of opinion. According to the Court's understanding, style as a form of expression is part of communication and as such is protected along with the content of the expression. According to the Court's view, although the expressions used in the comments belong to a low level of style, they occur frequently in the communication on Internet portals, a consideration that may reduce the effect attributed to such expressions.

The implications of the comments should also be considered. At the time of the publication of the article and the controversial comments, investigations were already underway regarding the plaintiff company's business conduct. In light of this, the Court is not convinced that the comments in question could have had any further significant impact on the attitudes of the consumers concerned. The Hungarian courts did not evaluate whether the comments reached a sufficient level of seriousness and whether they were published in a way that could actually damage the professional reputation of a legal entity. The Court found a violation of Article 10 of the Convention.

2.4. Debating the importance of public interest

In the case of *Firma EDV v. Germany*¹² the applicant company was a software company that provided software and customer service for databases widely used by German doctors. The Medical Tribune, a trade journal for medical professionals, published an article warning of the possibility of a technical security breach and exposing Firma EDV as 'Christ's Company', closely associated with the religious community called Universelles Leben. They claimed that although Universelles Leben did not officially control Firma EDV, it did so through informal means, as all employees, as well as management, were affiliated with Universelles Leben according to their religious beliefs. The representative of the Evangelical Lutheran Church in Bavaria issued a press release stating that there is a security gap in the software of medical practices and the patients' data is available to the Universal Life psycho-sect. The statement warned that there was a 'conceivable risk' that the company could abuse access to patient data and use it for the purposes of the religious community.

Firma EDV submitted the case to the ECHR, referring to Articles 8 of the ECHR, objecting that the revelation of the religious affiliation of its employees and management had called its reliability into question, and for these reasons the Bavarian Protestant-Evangelical Church had damaged its reputation and destroyed its economic activity. The main question was whether Article 8 could be applied in the 'private life' part to a legal entity, such as Firma EDV, which complained of a violation of its right to good reputation.

The Court considered that the question of whether the good reputation of a legal person falls within the concept of privacy according to Article 8 (1) can be left open for the purposes of this action. In view of the already previous judgments, it can be said that Article 8 is applicable. The Court therefore had to examine whether an appropriate balance had been struck between the company's right to respect for private life and the Bavarian Evangelical Lutheran Church's freedom of expression. According to the Court, the objectionable statement of the representative of the church contributed to a debate of public interest, namely about data security in the sensitive area of health data protection. As regards the description of the applicant company as a 'dubious organisation', this negative value judgment had sufficient factual basis as it indicated that the company was de facto under the control of another religious community and was not offensive. And the fact that the company had to cease its business activities was essentially a consequence of the public debate initiated by others. The German courts thus took all factors into account

¹² Application nr. 32783/08.

and did not exceed their Article 8 discretion. The Court therefore found the request to be clearly unfounded.¹³

2.5. Beyond sensitivity and understanding

In the case of *Kulis and Rozycki v. Poland*¹⁴, in an advertising campaign by the food company Star Foods Company, a popular cartoon character – a puppy named Reksio – was placed on the packaging of the crisps they produced, which was called a killer according to the inscription next to it. In response to this, the owner-editor-in-chief of the Polish magazine *Angora* and its children's supplement, *Angorka*, published an article in *Angorka*, which referred to the advertising campaign for potato crisps produced by a company called Star Foods. On the front page of the magazine, a cartoon boy held a packet of Star Foods potato crisps and said to Reksio the dog (a popular children's cartoon character): 'Don't worry! It would turn me into a murderer if I ate this crap!' The drawing in question had this headline: 'Polish children were shocked by the potato crisps ad: Reksio is a killer.' The article beginning on the next page reported that parents and children were outraged and horrified by the aforementioned potato crisps slogan. The company sued the publisher of the weekly newspaper and the editor-in-chief of the magazine for defamation. The Polish courts found the defamation. According to the justification, the strongly pejorative words used in the article – which conveyed disgust and revulsion – were suitable for discrediting the company's products, which violated the company's privacy rights. The applicants claimed a violation of Article 10. The Court found that the company has a right to good reputation.

The applicants argued that the publication contributed to public debate about the company's ill-advised and harmful advertising campaign. According to the Court, the domestic courts did not sufficiently take into account the applicants' argument that the satirical caricature retaliated against what they considered to be an unacceptable advertising campaign and was aimed at young children. The subject of the case is not a non-defamatory factual statement, but a value judgment. According to the Court, the publication constituted a satirical stigmatization of the company and the advertising campaign in the form of a caricature. The Court held that the applicants' primary objective was not to denigrate the quality of the product, but to draw attention to the type of passwords used by the company and the unacceptability of such methods in order to increase sales. According to the

¹³ This case was also mentioned by Sandor Koczian in his paper about Judgments of the ECHR related to freedom of expression, pp. 263-265., https://nmhh.hu/dokumentum/192028/Az_EJEB_szolasszabadsaggal_kapcsolatos_iteletei_AF.pdf. More: <https://inform.org/2014/10/09/case-law-strasbourg-firma-edv-fur-sie-v-germany-article-8-companies-and-the-right-to-reputation-hugh-tomlinson-qc/>

¹⁴ Application no. 27209/03.

Court, the domestic courts did not take into account the fact that the press's task is to communicate information and ideas in matters of public interest. And in doing so it has the opportunity to resort to a certain degree of exaggeration or even provocation, in other words, it can make somewhat excessive statements. Although the wording used by the applicants was excessive, they were reacting to the slogans used in the plaintiff's advertising campaign, which showed neither sensitivity nor understanding of the age and vulnerability of the target consumers, i.e. children. Based on all this, the Court found a violation of Article 10 of the Convention.¹⁵

2.6. Good reputation vs. rights to information related to public interest

The protection of the reputation of businesses was a central issue in the case of *OOO Regnum v. Russia* case¹⁶. The electronic news portal *OOO Regnum* published information distributed by the local police and the state consumer protection office about mercury poisoning after consuming a branded fruit juice-based drink. The drinks sold under the brand name in question were produced by at least two legal entities, one of which initiated defamation proceedings against *OOO Regnum* in the commercial court. The commercial court of Russia ruled against the company *OOO Regnum*, found that three news items published on a website owned by the plaintiff company damaged the business reputation of a private trading company, and ordered the company *OOO Regnum* to pay a significant amount of compensation to the producing private trading company. *OOO Regnum* claimed a violation of its right to freedom of expression. The Court examined whether the interference with the applicant company's right to freedom of expression was 'necessary in a democratic society'. Also, it examined whether the intervention was in question proportionate to the legitimate aim to be achieved, it did create a fair balance between a commercial company's right to a good reputation and an electronic medium's right to freedom of expression. Although the right to the protection of reputation is guaranteed by Article 8 as part of the right to respect for private life, the concept of 'private life' is a broad concept that includes the physical and mental integrity of the individual. However, an attack on a person's reputation must reach a certain level of severity. When a conflict between two equally protected rights has to be decided based on the ECHR, the Court of Justice considers the competing interests, in relation to which the Court considered

¹⁵ More on this topic by Dominika Bychawska-Siniarska in the study of 'Protection of freedom of expression based on the European Convention on Human Rights'. Council of Europe, November 2018. pp. 175-176.

<https://rm.coe.int/protecting-the-right-to-freedom-of-expression-under-the-european-convention/168092f25a>

¹⁶ Application nr. 22649/08.

as relevant principles. E.g. whether the publication contributed to the debate in the public interest, what is the level of the knowledge of the person concerned, what the previous behavior of the person concerned, what was the content, form and consequences of the publication. As the plaintiff is a trading company, the Court notes that it has previously accepted that a private company's interest in protecting its reputation may be matched by a broader economic interest. According to the Court, the state considers what means it provides in national law so that a company can question the truth of claims that threaten its reputation. At the same time, the Court emphasizes that there is a difference between the interests of a legal person's reputation and the reputation of an individual as a member of society. According to the Court's position, when the media's right to freedom of expression has to be weighed against a commercial company's right to a good reputation, the relevant criterion is whether the objectionable publications affected a matter of public interest, and what the content, form and consequences of the publications were. National courts must convincingly demonstrate the existence of a pressing social need when weighing up the general interests in protecting public health and providing information on potential health risks, the interests and duty of the media to report on such risks, and the interests in the reputation of a commercial company. According to the Court, the Russian District Court did not present any arguments as to why it gave greater importance to the reputational interests of a commercial company than the public's interest in being informed about such a serious matter as mercury poisoning caused by commercial food. The Court found that the Russian court did not provide 'relevant and sufficient grounds' to award damages for the alleged damage to the reputation of a commercial company.

2.7. Different levels of protection of the legal person

The Freitas Rangel v. Portugal case can be considered an important stage in terms of assessing the reputation of legal entities.¹⁷ Freitas Rangel was convicted of defamation of a legal person because he made statements about the professional association of judges and prosecutors in a hearing before the Parliamentary Ethics, Social and Cultural Committee, which affected freedom of expression and the Portuguese media. The plaintiff made objectionable statements about freedom of expression and the media and how they are affected by politics and the economy. He alleged that the federations shared confidential information with journalists to further their political agenda. These issues were matters of general interest to the community and their discussion before Parliament was part of the political debate, an area where freedom of expression is generally highly protected and the authorities thus have a narrow discretion. Furthermore, since the parliamentary

¹⁷ Application nr. 78873/13.

session was open to the public and journalists were present, it is not surprising that in the days following his speech, his statements were widely circulated online. He was also interviewed immediately after the meeting by a journalist who was present at his speech, and he gave another interview the next day in which he reiterated his position.

Reputable and well-known professional bodies, professional associations of judges and prosecutors were often invited to present their position to the Parliament regarding legal proposals related to the functioning of the judiciary. The domestic courts assumed that the plaintiff only made factual statements that he knew to be false and defamatory to the said bodies. However, most of his claims consisted of his personal opinion, the reality of which could not be proven. The only disputed factual claim was his claim about the sharing of confidential information, which could be seen as speaking more generally about the sharing of information. Although probably an overstatement and therefore unfortunate, his comments can be read as an illustration of a wider social critique of the judiciary's improper interference in politics and the media. The Court held that the protection of the reputation of a legal entity did not have the same force as the protection of the reputation or rights of individuals. The Court also noted that the journalist applicant, as an invited expert, expressed his views before a parliamentary committee, but his speech should have received a higher level of protection, similar to parliamentary and political speech. Regardless, the Lisbon Court of Appeal based its decision solely on the right to reputation and reputation of the bodies, without properly considering or examining in detail the criteria of the ECHR's jurisprudence. In summary, it can be said that, according to the ECHR, the Portuguese courts did not provide relevant and sufficient reasons to justify the interference with the plaintiff's freedom of expression and exceeded their discretionary power to limit public interest disputes. Furthermore, there was no reasonable relationship of proportionality between the limitation of the applicant's right and the legitimate goal to be achieved. However, it was an important point to note that the protection of the reputation of a legal entity does not have the same force as the protection of the reputation or rights of individuals.

2.8. Public interest has greater priority

The fresh case¹⁸ relates to a complaint under the Article 10 of the Convention. The applicant was ordered to pay compensation for an violation of the personality rights of a Hungarian municipality sharing a third party's post on one of the social media platforms.

¹⁸ Application no. 15076/17.

The facts are that a third person, who was not involved in the case, published a post on the page of one of the social media platforms calling on the municipality to demonstrate against an assumed unlawful business transaction between the municipality and a local businessman. The reason of the call was that the Hungarian municipality had sold a heritage building owned by the municipally cheaper than the price on the market to a local businessman. Later, the building was rented back to the municipality much more expensive than the market price. The person posting also encouraged the others sharing the call. The applicant shared the post on her social media platform, and she added a comment regarding another topic in which she questioned another business transaction by the Hungarian municipality. The Hungarian municipality and the municipal office started a lawsuit against the applicant. They were claiming that their reputation was violated. They were claiming compensation for non-pecuniary damage for the infringement of the right to reputation of the municipality. Also, they asked the Hungarian court to require the applicant to terminate her wrongful conduct and order the applicant not to get involved in illegal action in the future again. What is more, the Hungarian municipality published a press release in which they are stating that they had started a criminal procedure against the person of the original post. Also, the municipality said that they had sued every person who had shared the original post because they had been disseminating untrue information.

The Hungarian High Court found for the plaintiff in the infringement of the reputation and ordered the applicant to place a post on her social media page an apology. Also, ordered the applicant to place a notice on her social media that the allegation of the municipality sold the property cheaper than the market price was false. Finally, the Court made the applicant pay the compensation for non-pecuniary damage to the municipality and municipality office. The High Court was not concerned by the state institutions' fundamental rights. It stated that the topic of the case was not about the exercise of public power, but the exercise of property rights. Thus, the plaintiff was entitled to protect its reputation. The Court expressed the necessity of the restriction of the applicant's right to freedom of expression. It added that the municipality has the right to protect public trust in state institutions. The applicant assumed untrue statement and false facts were not validated and sharing information on the social media platform was significant and major enough to complainant the reputation of the plaintiff.

The applicant appealed against that judgment. The Court of Appeal upheld the first-instance judgment. The applicant appealed against that judgment, but it was upheld by the Supreme Court. The applicant then lodged a constitutional complaint, which was declared inadmissible. The Constitutional Court found that her complaint had not challenged the constitutionality of the court judgments but rather the establishment of facts, in that she had argued that the statements shared by her had not constituted facts but value judgments.

In the case of *Maria Somogyi v. Hungary* the applicant argued that the Hungarian courts' decision had violated her right to freedom of expression Article 10 of the Convention. She also argued that did not dispute that a legal entity exercising public, 'political authority' might have a legitimate interest in the protection of its reputation. However, her intention was of a public nature. She also mentioned that the institutions of the political power and governmental authority had to protect their institutional reputation by political activities, open engagements and public democracy. What is more, legal entities exercising public and political authority are allowed to respond publicly regarding their performance. A municipality could not have a private life and had no right to the protection of its reputation under Article 8 of the Convention.

The applicant came up with the reason that the use of social media platforms might be the only way for the average citizen to actively take part to discuss public matters of general interest of a local community in Hungary.

On the other hand, the Hungarian government argued that the content of the post shared by the applicant had been partly false, it reached out many citizens and affected the reputation of the municipality. The Hungarian government argued that the municipality is a legal person and thus, it has fundamental rights. As for a business company, the reputation is one of the main values when acting in business life. In terms of the municipality, the interest is to maintain public's trust in order to be creditable in the eyes of the public.

The Court protects the right to protection of reputation as part of the right to respect for private life. The concept of 'private life' includes both physical and mental integrity of a person. The phrase 'protection of the reputation of others' in Article 10 is not limited to natural persons, despite the difference between the reputational interests of a legal person and the reputation of an individual. The Court also recognized that there is a legitimate interest in protecting the reputation of the companies for the benefit of shareholders and employees and for the wider economic good. On the other hand, public bodies along with local authorities, state-owned enterprises and political parties cannot sue for defamation. In their cases it is in the public interest to have a democratically elected open to public criticism.

The Court held that executive bodies with state powers are fundamentally different from legal entities. In cases of state-owned companies engaging in competitive activities in the marketplace, they rely on their reputation to attract customers and to serve the public as they are funded by taxpayers. In a democratic society, the interests of the executive power body endowed with state power in preserving the good reputation were fundamentally different from both the right to the good reputation of natural persons and the interests of the good reputation of private or public legal entities that competed in the market. The Court states that the right to protect reputation proceedings initiated by the Hungarian municipality

against the Hungarian citizen applicant did not pursue any of the legitimate goals listed in Article 10 of the Convention. The Court holds that there has been a violation of Article 10 of the Convention.

3. Conclusion

The jurisprudence of the CJEU is primarily forward-looking in the matter of the applicable jurisdiction in case of damage to the good reputation of a legal person, the basis of which is provided by decisions already made in similar cases of natural persons. On the one hand, the developed jurisprudence can also be applied in the case of legal entities, on the other hand, what we mean by the center of the legal entity's interests has been defined. In addition to all of this, the right to a good reputation that also belongs to a legal person has been recognized.

Regarding the cases brought before the ECHR, it can be seen that they are initiated mainly with reference to the violation of Article 10 of the ECHR. The ECHR later included Article 8 in the investigation, and reputation was weighed directly against the freedom of expression. Regarding the comparison, the ECHR provided a number of criteria. The ECHR also carefully examined whether the alleged damage to reputation was done by stating a fact or expressing an opinion, and found a violation of Article 10 of the Convention if the court of the given state did not distinguish between these two types of communication. In relation to the jurisprudence of the ECHR and the relationship between legal entities, it can be established that the ECHR accepted that Article 8 of the ECHR also protects the good reputation of legal entities. In almost all cases involving legal entities, the statement considered offensive was classified as an expression of opinion, a value judgment, and without exception, it found that the statements in question were of public interest and served to inform the public. The ECHR has stated in several cases that a certain degree of exaggeration is permissible when communicating information on matters of public interest, and that the use of vulgar expressions is not decisive in itself when judging an offensive expression, as it can also serve purely stylistic purposes. The ECHR expressed that there is a difference between the interest of an economic company in the commercial reputation and the reputation of an individual, which affects social status. While the latter may affect dignity, the interest in commercial reputation lacks this moral dimension. As can be seen from the above, this led to the ECHR discussing opinions concerning legal entities with greater tolerance towards perceived violations. At the same time, the 2024 legal case draws attention to the fact that those legal entities whose basic task is to ensure publicity, and which are democratic public institutions, are obliged to tolerate opinions arising from publicity related to their operation.

Bibliography

Case C-68/93

Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters, Article 5, Point 3.

Case C-194/16

Michal Bobek General Advocate Opinion Point 35.

Michal Bobek General Advocate Opinion 40.

Michal Bobek General Advocate Opinion Points 47-49.

Case T 474/04

Application nr. 23954/10.

Application nr. 12188/06.

Application nr. 22947/13.

Andras Koltay deals with these issues of responsibility in details in his study 'Internet gatekeepers and Article 10 of the European Convention on Human Rights: new subjects of press freedom'. *Allam-és Jogtudomány*, Year 2017. Volume 4. pp. 129–140., <https://jog.tk.hu/uploads/files/2017-04-AJT-teljes.pdf>

Application nr. 32783/08.

This case was also mentioned by Sandor Koczian in his paper about Judgments of the ECHR related to freedom of expression, pp. 263-265., https://nmhh.hu/dokumentum/192028/Az_EJEB_szolasszabadsaggal_kapcsolatos_iteletei_AE.pdf.

More: <https://inform.org/2014/10/09/case-law-strasbourg-firma-edv-fursie-v-germany-article-8-companies-and-the-right-to-reputation-hugh-tomlinson-qc/>

Application no. 27209/03.

More on this topic by Dominika Bychawska-Siniarska in the study of 'Protection of freedom of expression based on the European Convention on Human Rights'. Council of Europe, November 2018. pp. 175-176.

<https://rm.coe.int/protecting-the-right-to-freedom-of-expression-under-the-european-conve/168092f25a>

Application nr. 22649/08.

Application nr. 78873/13.

Application no. 15076/17.

NSHIMIYIMANA FRANCOIS REGIS*

*Cybercrime and legal framework of the Council of Europe: A focus on the
Budapest Convention and its protocols*

Abstract: This paper examines the legal framework of the Council of Europe, focusing on the Budapest Convention and its protocols as pivotal tools in combating cybercrime. It explores how these instruments foster international collaboration, harmonize national laws, and address jurisdictional challenges posed by cybercriminals operating across borders. The study highlights the Convention's role in ensuring electronic evidence's effective collection and admissibility while analyzing its adaptability to evolving cyber threats and emerging technologies.

Keywords: Cybercrime, Budapest Convention, Council of Europe, Electronic Evidence, International Cooperation.

1. Introduction

The rapid advancement of digital technologies has brought transformative changes to modern society, enhancing communication, commerce, and public services.¹ However, these advancements have also created new vulnerabilities, enabling the rise of cybercrime as a global threat to security, economic stability, and individual privacy. Cybercriminals exploit the borderless nature of cyberspace, challenging traditional legal and regulatory frameworks that struggle to keep pace with sophisticated cyber threats.²

The Budapest Convention on Cybercrime, adopted by the Council of Europe in 2001, represents a landmark effort to establish an international legal framework to combat cybercrime. As the first and only binding multilateral treaty on the subject, it serves as a cornerstone for global cooperation, fostering the harmonization of national laws and promoting procedural tools to address the unique challenges posed by

* Nshimiyimana Francois Regis, PhD hallgató Károli Gáspár Református Egyetem Jog- és Államtudományi Doktori Iskola. Témavezetők: Prof. Dr. Domokos Andrea egyetemi tanár, Dr. Ambrus István egyetemi docens.

¹ADMASS et al. "Cyber Security: State of the Art, Challenges, and Future Directions." *Cyber Security and Applications* 2 (2024): Article 100031.
<https://www.sciencedirect.com/science/article/pii/S2772918423000188>. (Date of download: 10/01/2025).

² Ibid.

cybercriminal activities.³ Its additional protocols further enhance mechanisms for cross-border collaboration and provide guidelines for the effective handling and admissibility of electronic evidence, which is critical for ensuring justice in the digital era.⁴

This paper examines the legal framework established by the Budapest Convention and its Protocols, emphasizing their role in shaping international efforts to combat cybercrime. It explores how these instruments promote global collaboration and harmonization of domestic legislation while addressing key issues such as jurisdictional challenges, data sharing, and the protection of fundamental rights in the context of cybersecurity. By critically analyzing these legal tools, the study aims to contribute to the broader discourse on strengthening global cybercrime governance and ensuring the adaptability of existing frameworks to emerging technological advancements.

2. The Budapest Convention: A Landmark in international Cybercrime legislation

Cybercrime refers to criminal activities that involve the use of the Internet, computers, or digital devices.⁵ These offenses range from simple fraud schemes to highly sophisticated attacks targeting critical infrastructure, posing a significant threat to the security and stability of societies globally.⁶ In 1997, recognizing the growing challenges posed by cybercrime, the Council of Europe (CoE) decided to initiate negotiations for a binding international treaty. This led to the creation of the Convention on Cybercrime, which was formally opened for signature on 23 November 2001 in Budapest. The treaty aims to harmonize national laws, enhance international cooperation, and establish legal frameworks for prosecuting and investigating cybercrimes. The Council of Europe is a global organization dedicated to advancing human rights, democracy, and the rule of law across its 46 member states. These countries encompass EU member states and non-EU nations such as the United Kingdom, Turkey, and Norway. Through its commitment to fostering legal frameworks that address emerging criminal threats like cybercrime, the CoE plays a pivotal role in shaping international efforts to combat digital offenses. The Budapest Convention, formally known as the *Convention on Cybercrime*, represents a significant milestone in evolving international legal frameworks for fighting cybercrime.⁷ The Budapest

³Council of Europe. *Budapest Convention on Cybercrime 2001: Joining the Convention on Cybercrime: Benefits*. The Convention on Cybercrime, Version 5 July 2024. <https://rm.coe.int/cyber-buda-benefits-2024-july-2789-5929-5498-v-1/1680b0d659>. (Date of download: 08.01.2025).

⁴ Ibid.

⁵ GONI, OSMAN, et al.: "The Basic Concept of Cyber Crime: *Journal of Technology Innovations and Energy* 1, no. 2 (2022): 16-24. <https://ijemt.com/wp-content/uploads/2023/01/GSV-August-04-IJEMT.pdf>. (Date of download: 09/01/2025).

⁶ Ibid.

⁷ Council of Europe. 2001. *Op-cit.* 6.

Convention was the first international treaty to address the growing threat of cybercrime in a globalized digital environment.⁸ It established a comprehensive framework for harmonizing laws related to cybercrime, the procedural powers necessary for investigating and prosecuting cybercrime, and the international cooperation required to address transnational cyber threats effectively. This convention is particularly notable for its focus on providing countries with the legal tools to tackle a wide array of cybercrime offenses, such as illegal access, data breaches, and content-related crimes while balancing the need for privacy protection and human rights.⁹ Over the years, the Budapest Convention has been ratified by numerous countries worldwide, making it a cornerstone of international cybercrime legislation. Its impact continues to shape the ongoing dialogue on cybercrime law and policy, especially in the face of emerging technologies and new forms of criminal activities in cyberspace. This paper examines the importance of the Budapest Convention in shaping global cybercrime legislation, highlighting its key provisions, challenges, and role in fostering international cooperation in the fight against cybercrime.

2.1. The role of international legal frameworks in combating cybercrime

International legal frameworks are crucial in tackling cybercrime by establishing common standards and procedures that facilitate cooperation among nations. Cybercrime has emerged as a significant global threat, affecting individuals, organizations, and governments.¹⁰ The rapid evolution of technology and the internet has facilitated the rise of various forms of cybercrime, including hacking, identity theft, online fraud, and cyberbullying. These crimes often transcend national borders, making it imperative for countries to collaborate effectively to combat them.¹¹ However, the lack of harmonized laws and legal frameworks across jurisdictions poses substantial challenges in addressing cybercrime.¹² One of the primary functions of international legal frameworks is to promote harmonizing national cybercrime laws.¹³ This involves aligning definitions of cyber offenses and establishing consistent penalties. Harmonized laws reduce the risk of creating “safe havens” where cybercriminals can operate without

⁸ Ibid.

⁹ Council of Europe. 2001. *Convention on Cybercrime (ETS No.185), Explanatory Report*. https://www.oas.org/juridico/english/cyb_pry_explanatory.pdf. (Date of download: 10/01/2025).

¹⁰ BUÇAJ, E., and K. IDRIZAJ: "The Need for Cybercrime Regulation on a Global Scale by International Law and Cyber Convention." *Multidisciplinary Reviews* 8, no.1 (2024):2025024. <https://www.malque.pub/ojs/index.php/mr/article/view/5348>. (Date of download: 08/01/2025).

¹¹ Ibid.

¹² African Union: *Harmonizing Cyberlaws and Regulations: The Experience of the East African Community*. New York and Geneva, 2012. <https://au.int/sites/default/files/newsevents/workingdocuments/27223-wd-harmonizing-cyberlaws-regulations-the-experience-of-eac1.pdf>. (Date of download: 08/01/2025).

¹³ Ibid.

fear of prosecution.¹⁴ Many international treaties incorporate the principle of dual criminality, which requires that an act must be considered a crime in both the requesting and requested states for mutual legal assistance to be granted.¹⁵ This principle ensures that countries only cooperate on matters that are recognized as criminal under their respective laws. Various treaties exist at different levels, such as bilateral agreements between two countries, regional agreements among neighboring states, and multilateral treaties involving multiple nations.¹⁶ For instance, the Council of Europe's Convention on Cybercrime (2001) is a foundational multilateral treaty to foster international cooperation in combating cybercrime. The Ibero-American Cooperation Agreement on Research, Assurance, and Evidence on Cybercrime Issues emphasizes collaboration among Latin American countries. The Commonwealth of Independent States' Agreement on Cooperation in Combating Offences related to Computer Information (2001) outlines specific cooperation mechanisms among member states.¹⁷

International legal frameworks also emphasize respecting human rights when addressing cybercrime.¹⁸ Requests for international cooperation may be denied if they would result in violations of human rights obligations by the responding state. Furthermore, many international frameworks include provisions for technical assistance to help countries develop their capabilities in investigating and prosecuting cybercrimes effectively. This support can take various forms, including training law enforcement personnel or providing resources for cybersecurity infrastructure. Some treaties allow for expedited preservation requests concerning stored data relevant to investigations before formal requests for mutual assistance are made. This is crucial given the transient nature of digital evidence.¹⁹ Effective international legal frameworks often include mechanisms for monitoring compliance with treaty obligations, ensuring that states adhere to their commitments regarding cooperation against cybercrime.

¹⁴ Onomrerhinor, Flora Alohan: "Universal Jurisdiction for Transnational Cybercrimes?" *UCC Law Journal* 3, no. 1 (July 2023): 119-151. <https://doi.org/10.47963/ucclj.v3i1.1253>.

¹⁵ United Nations Office on Drugs and Crime (UNODC): "E4J University Module Series: Cybercrime, Module 3: Legal Frameworks and Human Rights." First published February 2019. <https://www.unodc.org/e4j/en/cybercrime/module-3/possible-class-structure.html>. (Date of download: 07/01/2025).

¹⁶ United Nations: *List of Multilateral Treaties Deposited with the Secretary-General*. New York: United Nations, 2016. Available at: https://treaties.un.org/doc/source/events/2016/Treaties/list_english.pdf. (Accessed on 08/01/2025).

¹⁷ United Nations Office on Drugs and Crime (UNODC): *Op-cit*. 27.

¹⁸ Ibid.

¹⁹ United Nations Office on Drugs and Crime (UNODC): *Model Law on Mutual Assistance in Criminal Matters (2007), as Amended with Provisions on Electronic Evidence and the Use of Special Investigative Techniques (2022)*. Commission on Crime Prevention and Criminal Justice, Thirty-first session, Vienna, 16–20 May 2022, Item 5 of the provisional agenda. https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_31/CRP/E_CN15_2022_CRP6_e_V2202980.pdf. (Date of download: 08.01.2025).

In summary, international legal frameworks are essential tools in the fight against cybercrime because they can foster cooperation among nations through harmonized laws, mutual legal assistance provisions, respect for human rights, technical support initiatives, and compliance monitoring mechanisms. As cyber threats evolve rapidly alongside technological advancements, these frameworks will remain vital in effectively ensuring a coordinated global response to combatting cybercriminal activities.

2.2 The impact of the Budapest Convention on member and non-member countries

The Budapest Convention on Cybercrime, adopted in 2001 by the Council of Europe, remains a pivotal international legal instrument addressing cybercrime and electronic evidence.²⁰ Its influence extends beyond its 67 member states, shaping domestic and global responses to the growing threat of cybercrime in both signatory and non-signatory countries.²¹ For member countries, the Convention has served as a blueprint for enacting robust cybercrime legislation. Its harmonized legal framework facilitates cross-border cooperation, ensuring that substantive and procedural laws align to address crimes committed in the digital space.²² By mandating mechanisms such as expedited data preservation, mutual legal assistance, and international cooperation protocols, the Convention strengthens the ability of states to investigate and prosecute cybercriminals effectively. Furthermore, ongoing updates, such as the *Second Additional Protocol* adopted in 2021, enhance the Convention's relevance by addressing new technological challenges, including direct cooperation with service providers and using cloud-based evidence.²³

Member states also benefit from capacity-building initiatives provided by the Council of Europe, including training for law enforcement and judiciary on handling electronic evidence and combating cybercrime.²⁴ These efforts improve technical expertise and foster trust and collaboration among countries, which is essential for addressing crimes that transcend borders.

²⁰ BUČAJ, E., and K. IDRIZAJ: *Op-cit.* 22.

²¹United Nations Office on Drugs and Crime. (2024): *Five reasons why the new Cybercrime Convention matters*. <https://www.unodc.org/unodc/frontpage/2024/December/five-reasons-why-the-new-cybercrime-convention-matters.html>. (Date of download: 09/01/2025).

²² Ibid.

²³Aguinaldo, M. A. L., & de Hert, P. (2025): Moving in the right direction for transborder access to digital evidence in criminal matters? The Council of Europe and the Second Additional Protocol introducing direct cooperation mechanisms. In M. Kaiafa-Gbandi, N. Latif, & C. Zimmermann (Eds.), *The Cambridge Handbook of Digital Evidence in Criminal Investigations* (pp.200–218). Cambridge University Press. DOI: <https://doi.org/10.1017/9781009049771.010>.

²⁴Juszczak, A., & Sason, E. (2023): The use of electronic evidence in the European Area of Freedom, Security, and Justice: An introduction to the new EU package on e-evidence. *EUCRIM*, 2(2023), 182–200. DOI: <https://doi.org/10.30709/eucrim-2023-014>.

For non-member countries, the Budapest Convention's influence is not limited to its signatories. Many non-member states, particularly in Africa, Asia, and Latin America, have adopted its principles as a model for their domestic legislation.²⁵ The Convention's universal appeal lies in its comprehensive approach to defining offenses, procedural powers, and cooperation mechanisms.²⁶ Countries like India and Brazil, while not formal parties to the treaty, have developed legal frameworks inspired by its provisions, recognizing the necessity of aligning with international standards to participate effectively in global cybercrime investigations.²⁷ Moreover, the Convention's role in fostering international cooperation extends to non-member states through partnerships and observer status in the Council of Europe's Cybercrime Convention Committee (T-CY). These arrangements enable non-member countries to collaborate with signatories, share expertise, and access resources to enhance their cybercrime capabilities.

Although the Budapest Convention has had an influence, it has also had some challenges and criticisms. Despite its success, the Convention faces criticism for its perceived Eurocentric approach and lack of inclusivity in its drafting process.²⁸ Some non-member states, particularly those in the Global South, argue that the treaty does not sufficiently address their unique legal, technological, and capacity-related challenges.²⁹ Additionally, concerns about sovereignty and potential conflicts with domestic privacy laws have led some countries, such as China and Russia, to oppose the Convention and advocate for alternative frameworks under the United Nations.³⁰ In summary, even if the Budapest Convention has significantly influenced the global fight against cybercrime by providing a standardized framework for legal and operational measures. While its impact on member states is most pronounced, its principles have also shaped the cybercrime strategies of non-member countries, underscoring its status as a cornerstone of international cybercrime law. Moving forward, greater inclusivity and responsiveness to diverse legal systems will be essential to ensure its continued relevance and effectiveness in combating cybercrime globally.

²⁵Cybercrime Convention Committee (T-CY). (2020). *The Budapest Convention on Cybercrime: Benefits and impact in practice*. Strasbourg: Council of Europe. <https://rm.coe.int/t-cy-2020-16-bc-benefits-rep-provisional/16809ef6ac>. (Date of download: 09/01/2025).

²⁶ Ibid.

²⁷Council of Europe. (2018). Brazil: Status regarding Budapest Convention. *Cybercrime policies/strategies*. <https://www.coe.int/en/web/octopus/-/brazil>. (Date of download: 09/01/2025).

²⁸BLACK HAT MIDDLE EAST AND AFRICA. (2025). Part 1: Strengths and weaknesses of the new UN cybercrime convention. <https://insights.blackhatmea.com/part-1-strengths-and-weaknesses-of-the-new-un-cybercrime-convention/>. (Accessed on 09/01/2025).

²⁹ Ibid.

³⁰Human Rights Watch. (2017). *The costs of international advocacy: China's interference in United Nations human rights mechanisms*. <https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights>. (Date of download: 09/01/2025).

3. Key provisions of the Budapest Convention in combating cybercrime

The Budapest Convention on Cybercrime is a landmark international treaty designed to address the challenges posed by cybercrime in the modern digital age. Its comprehensive framework provides a cohesive approach to harmonizing criminal legislation, procedural tools, and international cooperation, making it a global cornerstone in the fight against cybercrime.³¹

3.1 Substantive criminal law provisions

The Budapest Convention outlines a standardized set of cyber-related offenses to promote consistency across legal systems. These provisions create a foundational framework for criminalizing critical cyber activities, facilitating uniform enforcement, and minimizing jurisdictions that could serve as safe havens for cybercriminals. These offenses include:

- Illegal access (Article 2): Unauthorized access to computer systems or networks.
- Data interference (Article 4): Unauthorized alteration, deletion, or suppression of data.
- System interference (Article 5): Disruption of computer system functionality, including through cyberattacks such as Distributed Denial of Service (DDoS).
- Misuse of devices (Article 6): Possession, distribution, or use of tools intended to commit cyber offenses.
- Computer-related forgery and fraud (Articles 7 and 8): Acts such as creating fake electronic data or committing fraud through digital means.
- Content-related offenses (Article 9): Criminalizing illegal online content, such as child exploitation material.

3.2. Procedural law provisions

The Convention introduces innovative procedural mechanisms to empower law enforcement in addressing cybercrime while balancing fundamental rights:

- Expedited preservation of stored computer data (Article 16): Requiring Internet service providers or entities to retain specific data for investigative purposes.
- Production orders (Article 18): Enabling authorities to compel individuals or entities to provide data, such as subscriber or traffic information.

³¹ Council of Europe. 2001: *Op-cit.* 6.

- Search and seizure of stored computer data (Article 19): Allowing law enforcement to access and secure evidence stored in digital systems.
- Real-time collection of traffic data (Article 20): Facilitating surveillance of data in transit, such as during live communications.
- Interception of content data (Article 21): Enabling the capture of the substance of communications where lawful interception is authorized.

These provisions address the volatile nature of digital evidence, which is often time-sensitive and susceptible to alteration or deletion.

3.3. International cooperation mechanisms

Given cybercrime's inherently transnational nature, the Convention emphasizes international collaboration. These mechanisms enhance states' ability to respond rapidly and effectively to cyber threats that span multiple jurisdictions.

- Mutual legal assistance (Article 25): A framework for efficient cross-border information sharing and evidence gathering.
- Extradition (Articles 24 and 27): Simplified procedures for extraditing individuals accused of cybercrime offenses.
- 24/7 network of contact points (Article 35): A network of national contact points available around the clock to assist in urgent cases requiring international cooperation.

3.4. Capacity-building and adaptability

The Convention promotes capacity-building initiatives to strengthen national legal and technical systems, particularly in developing countries.³² Furthermore, adopting the Second Additional Protocol (2021) illustrates its adaptability to emerging cybercrime challenges, addressing issues such as direct cooperation with service providers and using cloud-based evidence.

In a few words, The Budapest Convention's key provisions offer a robust legal and procedural foundation for combating cybercrime. The Convention has set a global standard in addressing cyber threats by harmonizing laws, empowering law enforcement with advanced procedural tools, and fostering international cooperation. Its enduring relevance lies in its ability to evolve in response to technological advancements and the increasingly complex nature of cybercrime.

³²United Nations Framework Convention on Climate Change (UNFCCC). (2024). *Implementation of the framework for capacity-building in developing countries: Synthesis report by the secretariat*. Subsidiary Body for Implementation, Sixtieth Session, Bonn, 3–13 June 2024. https://unfccc.int/sites/default/files/resource/sbi2024_02E.pdf. (Date of download: 09/01/2025).

4. Protocols to the Budapest Convention: Enhancing legal mechanisms

The Budapest Convention, established in 2001 under the Council of Europe, serves as a key international legal framework for addressing cybercrime.³³ It aims to foster global cooperation by harmonizing national laws, enhancing investigative techniques, and facilitating mutual assistance. The Convention covers various offenses, including illegal access to computer systems, data interference, and content-related crimes like child pornography³⁴.

As cybercrime evolves alongside advancements in technology, the original provisions of the Convention may no longer be sufficient to address emerging threats such as artificial intelligence, blockchain, and cryptocurrencies. To address these challenges, various protocols have been introduced to update the legal framework.³⁵ Notable protocols include the 2003 Additional Protocol on Xenophobia and Racism, which criminalizes online hate crimes (Additional Protocol, 2003)³⁶, and the 2022 Protocol on Enhanced Cooperation, which strengthens collaboration between law enforcement agencies (Protocol on Enhanced Cooperation, 2022).³⁷ Discussions continue creating further protocols to address issues such as data protection in investigations, privacy concerns, and digital evidence collection (ongoing talks, 2025).

These protocols enhance legal mechanisms by standardizing laws across member states, improving international cooperation, ensuring adaptability to technological changes, and safeguarding human rights. They facilitate smoother extradition processes, foster effective cross-border collaboration, and ensure that legal frameworks remain relevant as technology progresses.³⁸ In conclusion, the protocols of the Budapest Convention are vital in enhancing legal mechanisms to combat cybercrime effectively.

³³ Council of Europe. 2001: *Op-cit.* 6.

³⁴ Ibid.

³⁵ African Journal of Biomedical Research. (2024): The role of legal frameworks in combating cybercrime: Global perspectives and local implications. *African Journal of Biomedical Research*, 27(5S), 186–195. https://www.researchgate.net/publication/387546329_The_Role_of_Legal_Frameworks_in_Combating_Cybercrime_Global_Perspectives_and_Local_Implications. (Date of download: 09/01/2025).

³⁶ Council of Europe. (2003). *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*. European Treaty Series - No. 189, Strasbourg, 28 January 2003. <https://rm.coe.int/168008160f>. (Accessed on 09/01/2025).

³⁷ Council of Europe. (2022). *Second Additional Protocol to the Cybercrime Convention on enhanced co-operation and disclosure of electronic evidence (CETS No. 224)*. https://www.coe.int/en/web/cybercrime/second-additional-protocol/-/asset_publisher/isHU0Xq21lhu/content/opening-coecyber2ap. (Date of download: 09/01/2025).

³⁸ CELIS, M. (2024): Transforming legal borders: International judicial cooperation and technology in private international law – Part II. *Conflict of Laws.net*. <https://conflictoflaws.net/2024/transforming-legal-borders-international-judicial-cooperation-and-technology-in-private-international-law-part-ii/>. (Date of download: 09/01/2025).

They promote international cooperation, standardize laws, adapt to technological advancements, and protect individual rights, contributing to a safer global cyberspace.

4.1. Specific offenses introduced by protocol 1.

The Budapest Convention, initially adopted in 2001, addressed cybercrime broadly but did not specifically tackle hate speech or racially and ethnically motivated crimes in cyberspace. As online platforms grew in popularity, the rise of racist, xenophobic, and hate-driven content necessitated the expansion of the Convention's scope.³⁹ Protocol 1 was introduced and enacted on March 1, 2006, to provide legal mechanisms to counteract such content globally in response to the increasing spread of hate speech online.⁴⁰

The growing concern about online hate speech, especially in the early 2000s, prompted international pressure for a unified legal framework to address the misuse of digital spaces for propagating hate. The original Budapest Convention's limitations were evident, as national laws often did not address the cross-border nature of online hate speech. Protocol 1 sought to close this gap by criminalizing various forms of hate speech and racially motivated acts in cyberspace. Article 3 of Protocol 1 requires signatories to criminalize the distribution or sharing of racist and xenophobic material online. An example of this can be seen in the 2022 case in Germany, where courts ruled against a right-wing website hosting hate-filled, racist content. The ruling emphasized the criminality of distributing xenophobic content online, even when the material was hosted internationally.⁴¹ Article 4 establishes criminal liability for publicly insulting individuals or groups based on race, ethnicity, or religion. In a 2023 case in France, a user was convicted for posting racist insults on Twitter directed at a specific ethnic group. This case reinforced Protocol 1's stance on racially motivated public insults, underlining the obligation for signatories to uphold this provision under national law.⁴²

Article 6 criminalizes the denial, gross minimization, or justification of genocide and crimes against humanity when spread online. This provision aims to combat content that fuels hate and violence, such as Holocaust denial. In a 2021 case in Austria, a user

³⁹ NAVE, E., LANE, L. (2023). Countering online hate speech: How does human rights due diligence impact terms of service? *Computer Law & Security Review*, 51, 105884.

<https://doi.org/10.1016/j.clsr.2023.105884>.

⁴⁰ Ibid.

⁴¹ Euractiv. "Top German Court Strikes Down Facebook Rules on Hate Speech." *Euractiv*, July 30, 2021. <https://www.euractiv.com/section/tech/news/top-german-court-strikes-down-facebook-rules-on-hate-speech/>. (Accessed on 09/01/2025).

⁴² BAGHDASARYAN, M. (2023, August 4). Sanchez v. France: Are the expanded liability rules foreseeable for social media users? *Strasbourg Observers*. <https://strasbourgobservers.com/2023/08/04/sanchez-v-france-are-the-expanded-liability-rules-foreseeable-for-social-media-users/>. (Date of download: 09/01/2025).

was charged for repeatedly denying the Holocaust on social media.⁴³ The Austrian courts upheld the provisions of Protocol 1, classifying Holocaust denial as a form of hate speech, falling under genocidal justification and thus subject to legal action. Through these provisions, Protocol 1 significantly expanded the Budapest Convention's ability to address online hate speech, reinforcing the international community's commitment to combating racism, xenophobia, and the glorification of crimes against humanity in the digital age.

4.2. Additional Protocol 2: Enhancing International Cooperation

The Second Additional Protocol to the Budapest Convention on Cybercrime opened for signature on November 12, 2021. It was introduced to address emerging challenges in international cooperation for transborder access to electronic evidence in criminal investigations. While the original Budapest Convention and its First Protocol laid a foundation for combating cybercrime, the rapid advancement of technology and the rise in transnational offenses highlighted significant gaps in evidence collection across borders.⁴⁴ The Second Protocol aims to bridge these gaps by strengthening mechanisms for cooperation among law enforcement agencies while ensuring a balance between evidence accessibility, data privacy, and human rights protections. The key provisions of the protocol include:

- **Mutual Assistance in Emergency Situations (Article 6):** This article facilitates expedited data sharing in emergencies, enabling authorities to act swiftly when critical evidence is at risk. This provision ensures timely responses to incidents where delays could compromise investigations.
- **Direct Cooperation with service providers (Article 7):** Article 7 empowers law enforcement agencies to request electronic evidence directly from service providers in other countries. By streamlining procedures, this provision reduces bureaucratic delays and enhances the efficiency of international evidence collection.
- **Expedited disclosure of stored computer data across Jurisdictions (Article 8):** Under Article 8, procedures are established to efficiently preserve and disclose electronic evidence stored in multiple jurisdictions. This mechanism helps prevent the loss of vital evidence crucial to cybercrime investigations.
- **24/7 Network Cooperation (Article 9):** Article 9 enhances collaboration among national contact points by establishing a 24/7 support network. This

⁴³NPR. (2006, February 21): Austrian court jails historian who denied Holocaust. *World*. <https://www.npr.org/transcripts/5226811>. (Date of download: 09/01/2025).

⁴⁴Council of Europe. 2001: *Op-cit.* 6.

provision ensures real-time communication and rapid response capabilities, significantly improving the effectiveness of cross-border investigations.

By incorporating these measures, the Second Protocol strengthens international cybercrime investigations, allowing countries to work more effectively across borders. At the same time, it upholds essential legal safeguards to protect data privacy and civil liberties, addressing law enforcement's needs and individuals' rights.

5. The role of the Council of Europe in promoting Cybersecurity

The Council of Europe (CoE) has played a pivotal role in promoting cybersecurity and addressing the challenges posed by cybercrime.⁴⁵ As technological advancements continue to shape the global landscape, cyber threats have become more pervasive, targeting individuals, organizations, and governments. Cybercrime, which encompasses offenses such as hacking, identity theft, fraud, and child exploitation, poses significant risks to public safety, economic stability, and national security. To combat these challenges effectively, international collaboration is indispensable, and the CoE has emerged as a leader in developing legal frameworks and fostering cooperation among its member states.⁴⁶ One of the Council's most notable contributions to cybersecurity is the Budapest Convention on Cybercrime, adopted in 2001. As the first and only binding international treaty on cybercrime, the Budapest Convention provides a comprehensive legal framework for harmonizing national laws, improving investigative techniques, and facilitating international cooperation. Its provisions address various issues, from illegal access to computer systems to using electronic evidence in criminal proceedings. The convention also promotes the establishment of 24/7 contact points to enhance cross-border collaboration in combating cyber threats.⁴⁷

Beyond the Budapest Convention, the Council of Europe has continuously adapted its strategies to tackle evolving challenges in cybersecurity. Adopting the Second Additional Protocol to the Budapest Convention in 2021 marked a significant step in addressing transborder access to electronic evidence. This protocol enhances international cooperation mechanisms, such as mutual legal assistance and direct collaboration with service providers, while ensuring safeguards for data privacy and human rights. The CoE has also been instrumental in building the capacity of member states to address cyber threats. Through training programs, workshops, and technical assistance, the Council supports national authorities in improving their legislative,

⁴⁵CSONKA, P. (2006): *The Council of Europe's Convention on Cyber-Crime and Other European Initiatives*. *Revue Internationale de Droit Pénal*, 2006(3), 473–501. <https://shs.cairn.info/revue-internationale-de-droit-penal-2006-3-page-473?lang=fr>. (Date of download: 10/01/2025).

⁴⁶Ibid.

⁴⁷Council of Europe. (2024). *2024 Meeting of the 24/7 Network of Contact Points of the Budapest Convention on Cybercrime: Summary Report*. The Hague, The Netherlands. <https://rm.coe.int/coe-24-7-annual-meeting-summary-report-2024-v4/1680b2bcc>. (Date of download: 09/01/2025).

technical, and operational capabilities to combat cybercrime. Its partnerships with global organizations and private sector stakeholders reinforce the collective effort to establish a secure and resilient cyberspace.⁴⁸ By fostering international collaboration, establishing robust legal frameworks, and promoting the protection of fundamental rights, the Council of Europe continues to be a driving force in promoting cybersecurity. Its efforts underscore the importance of a coordinated global response to address cybercrime's complex and dynamic nature in the digital age.

6. Challenges in the implementation of the Budapest Convention

The Budapest Convention on Cybercrime aims to facilitate international cooperation in combating cybercrime. However, its implementation faces several challenges, categorized as legal, technical, and political barriers. Understanding these challenges is crucial for enhancing the convention's effectiveness and ensuring a coordinated global response to cyber threats.⁴⁹

6.1. Legal barriers

The primary legal challenge in implementing the Budapest Convention is the divergence in national laws among member countries. Each country has its own legal framework governing cybercrime, which can lead to inconsistencies in how offenses are defined and prosecuted. For instance, while some countries may have robust laws against data breaches or unauthorized access to computer systems, others may lack comprehensive legislation or have outdated laws that do not adequately address modern cyber threats. A notable example is Estonia, which has made significant strides in digital governance but still faces challenges due to varying interpretations of what constitutes a cybercrime in different jurisdictions.⁵⁰ This inconsistency can hinder cross-border investigations and prosecutions, as law enforcement agencies may struggle to obtain evidence or cooperate effectively with their counterparts in other nations. Additionally, issues related to privacy laws can complicate matters further. Europe's General Data Protection Regulation (GDPR) imposes strict data handling and processing rules. While

⁴⁸Council of Europe. (2024). *Cybercrime@COE Update: January - March 2024*. Retrieved from <https://rm.coe.int/cybercrime-coe-update-q1-2024/1680af746e>. (Date of download: 10/01/2025).

⁴⁹ SINGH, T., et al. (2024). *Cybercrime and International Law: Jurisdictional Challenges and Enforcement Mechanisms*. African Journal of Biomedical Research, 27(3s), 697–708. <https://africanjournalofbiomedicalresearch.com/index.php/AJBR/article/view/2101>. (Date of download: 10/01/2025).

⁵⁰ JONATHAN CLOUGH, "A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation," *Monash University Law Review* 40, no. 3 (2014): 698–736, Monash University Faculty of Law Legal Studies Research Paper No. 2015/06, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615789. (Date of download: 10/01/2025).

it aims to protect individuals' privacy rights, it can create obstacles for law enforcement agencies seeking access to data during investigations.⁵¹ For example, when investigating cybercrimes involving social media platforms based in different jurisdictions (like Facebook), authorities may face delays or refusals due to conflicting privacy regulations.

6.2. Technical barriers

Technical challenges also significantly hinder the effective implementation of the Budapest Convention. The rapid evolution of technology means that law enforcement agencies often struggle to keep pace with new tools used by cybercriminals. Many member states lack sufficient technical expertise and resources necessary for investigating complex cybercrimes.⁵² For instance, Greece has faced difficulties due to limited technical capabilities within its law enforcement agencies. Despite being a signatory to the convention, Greece has encountered issues training personnel on advanced cybersecurity techniques and tools to effectively investigate and prosecute cyber offenses.⁵³ This gap affects domestic capabilities and hampers international collaboration since effective communication between countries requires a shared understanding of technical standards. Moreover, many countries lack adequate infrastructure for secure information sharing among law enforcement agencies. Collaboration becomes challenging without secure channels for exchanging sensitive information about ongoing investigations or intelligence on emerging threats. A case study highlights this issue in South Africa, where, despite having ratified the convention, significant gaps in cybersecurity infrastructure impede timely information sharing between local police forces and international partners.⁵⁴

6.3. Political Barriers

Political will is another critical factor influencing the successful implementation of the Budapest Convention.⁵⁵ In some cases, governments may prioritize other issues

⁵¹Council of the EU. "Data Protection: Council Agrees Position on GDPR Enforcement Rules." Press release, June 13, 2024. <https://www.consilium.europa.eu/en/press/press-releases/2024/06/13/data-protection-council-agrees-position-on-gdpr-enforcement-rules/>. (Date of download: 10/01/2025).

⁵² United Nations Office on Drugs and Crime (UNODC): Op-cit. 27.

⁵³Octopus Cybercrime Community, "Status Regarding Budapest Convention. <https://www.coe.int/en/web/octopus/-/greece>. (Date of download: 10/01/2025).

⁵⁴Timcke, Scott, et al. "The Centrality of Cybersecurity to Socioeconomic Development Policy: A Case Study of Cyber-Vulnerability at South Africa's Transnet." *The African Journal of Information and Communication* 32 (2023). <https://doi.org/10.23962/ajic.132.16949>.

⁵⁵ Roberto Martínez B. Kukutschka, *Building Political Will: Topic Guide*, compiled by the Anti-Corruption Helpdesk, Transparency International, reviewed by Marie Chêne, Finn Heinrich, PhD, and Carmen Malena, CIVICUS, October 31, 2014,

over cybersecurity or not fully understand the importance of international cooperation against cybercrime. This lack of prioritization can lead to insufficient funding for necessary initiatives to strengthen legal frameworks or enhance technical capabilities. For example, Turkey has been criticized for its internet freedom and cybersecurity legislation approach. While Turkey is a party to the Budapest Convention, political considerations often overshadow commitments made under international agreements.⁵⁶ The government's focus on controlling online content rather than fostering an environment conducive to cooperation against cybercrime illustrates how political agendas can obstruct effective implementation. Furthermore, geopolitical tensions can complicate collaborative efforts among member states. Countries may be reluctant to share intelligence or cooperate on investigations if they perceive potential risks related to national security or diplomatic relations with other nations involved.

In summary, while the Budapest Convention represents a significant step forward in addressing global cybercrime through international cooperation, various legal, technical, and political barriers challenge its effective implementation across member countries. Addressing these barriers requires concerted efforts from all stakeholders involved. Governments must harmonize their legal frameworks; investment must be made in building technical capacities; and political will must be fostered through awareness campaigns emphasizing the importance of cybersecurity collaboration.

7. Strengthening the Budapest Convention for the digital age

The Budapest Convention on Cybercrime has served as a foundational legal framework for international cooperation in combating cybercrime. However, since its inception, the digital landscape has undergone profound transformations. The rapid evolution of technology, coupled with increasingly sophisticated cyber threats such as ransomware attacks, data breaches, and state-sponsored cyber espionage, necessitates a comprehensive reassessment and update of the Convention.⁵⁷ One significant area requiring attention is the definition and scope of cybercrime itself. Criminal activities are becoming more complex and varied as new technologies emerge, such as artificial

https://knowledgehub.transparency.org/assets/uploads/kproducts/Topic_Guide- Political Will.pdf. (Date of download: 09/01/2025).

⁵⁶ Octopus Cybercrime Community, "Status Regarding Budapest Convention. <https://www.coc.int/en/web/octopus/-/turkey>. (Date of download: 09/01/2025).

⁵⁷ WILL DIE, *A Comprehensive Analysis of High-Impact Cybersecurity Incidents: Case Studies and Implications* (Master's thesis, Babeş-Bolyai University, October 29, 2023), https://www.researchgate.net/publication/375062115_A_Comprehensive_Analysis_of_High-Impact_Cybersecurity_Incidents_Case_Studies_and_Implications/citation/download. (Date of download: 10/01/2025).

intelligence (AI), blockchain, and the Internet of Things (IoT).⁵⁸ For instance, AI can be exploited for automated phishing attacks or deepfake technology used in fraud. The current definitions within the Budapest Convention may not adequately encompass these modern threats. Therefore, updating these definitions to include emerging forms of cybercrime is essential to ensure law enforcement agencies can effectively address them. Moreover, the convention's provisions regarding international cooperation need enhancement.⁵⁹ In an era where cybercriminals often operate across borders with relative anonymity, member states must streamline their processes for mutual legal assistance (MLA) and expedite requests related to electronic evidence. This could involve establishing more precise protocols for real-time data sharing during investigations or creating a centralized platform for reporting incidents that require cross-border collaboration.

7.1. Possible amendments or new protocols for future challenges in cybersecurity

To address the evolving challenges in cybersecurity effectively, this research proposes several amendments or new protocols that could be considered:

- *Incorporation of new technologies:* A protocol specifically addressing crimes involving AI and machine learning could be developed. This would include guidelines on investigating offenses facilitated by these technologies and establishing liability frameworks for developers whose products are misused.
- *Enhanced data protection measures:* As privacy concerns grow alongside cybersecurity threats, updates should consider balancing law enforcement needs with individual privacy rights. This could involve creating standards for data retention policies that respect user privacy while allowing law enforcement access when necessary.
- *Strengthening capacity building:* A new protocol focused on capacity building among member states could be established to ensure all countries can effectively access training resources and technical assistance in combating cybercrime. This would help level the playing field between nations with varying levels of technological advancement.
- *Public-private partnerships:* Since many critical infrastructures are owned by private entities, fostering partnerships between governments and private sectors is vital. A protocol encouraging collaboration between law

⁵⁸Irshaad Jada and Thembekile O. Mayayise, "The Impact of Artificial Intelligence on Organisational Cybersecurity: An Outcome of a Systematic Literature Review," *Data and Information Management* 8, no. 2 (June 2024): 100063, <https://www.sciencedirect.com/science/article/pii/S2543925123000372>. (Date of download: 10/10/2025).

⁵⁹Ibid.

enforcement agencies and tech companies could facilitate quicker responses to incidents while ensuring that security measures are robustly implemented.

- *Cybersecurity incident reporting framework*: Establishing a standardized framework for reporting cybersecurity incidents across borders would enhance transparency and allow countries to learn from each other's experiences in dealing with specific threats.
- *Focus on cyber resilience*: Finally, any future amendments should emphasize not just prevention but also resilience against cyberattacks. This includes developing strategies that allow public and private organizations to recover quickly from incidents while minimizing damage.

In summary, strengthening the Budapest Convention requires a multifaceted approach that acknowledges current realities and anticipates future challenges in cybersecurity. By updating definitions, enhancing international cooperation mechanisms, incorporating new technologies into legal frameworks, promoting capacity-building initiatives, fostering public-private partnerships, establishing incident reporting standards, and focusing on resilience strategies, we can create a more robust legal framework capable of addressing the complexities of modern cyber threats.

8. Conclusion

The Budapest Convention remains a cornerstone in the global fight against cybercrime, offering a robust and adaptable legal framework that facilitates international cooperation and harmonization of national laws. Its comprehensive approach has enabled member states to establish common standards for investigating and prosecuting cybercrime, significantly improving cross-border collaboration. The Convention's key provisions, particularly those addressing the collection and admissibility of electronic evidence, provide essential tools for overcoming the challenges posed by the borderless nature of cybercrime. By enabling the effective gathering of digital evidence and its use in criminal proceedings, the Convention strengthens the ability of law enforcement agencies to tackle cybercriminal activity.

Moreover, the additional protocols to the Convention have enhanced its legal mechanisms, addressing the rapidly changing dynamics of cybercrime. These protocols are instrumental in adapting the Convention to emerging cyber threats and technological advancements, reinforcing its relevance in the face of new challenges. However, as the digital landscape continues to evolve, the Budapest Convention must remain responsive to these developments. The emergence of artificial intelligence, blockchain technologies, and sophisticated cyberattack techniques demands an ongoing assessment of the Convention's provisions to ensure its effectiveness in combating future threats. The challenges in implementing the Budapest Convention, including varying national legal systems and resource constraints, underscore the need for

continued international dialogue and support. The Council of Europe's role in promoting cybersecurity through legal instruments and fostering a culture of collaboration among member states is essential to creating a unified front against cybercrime. Strengthening the Budapest Convention for the digital age is crucial for enhancing legal mechanisms and ensuring states can effectively respond to the evolving landscape of cybercrime.

Ultimately, the Convention's enduring success lies in adapting to emerging threats while maintaining its foundational principles of international cooperation and respect for human rights. The Council of Europe's ongoing commitment to strengthening the global legal framework for cybersecurity will be instrumental in securing a safer digital environment for individuals, businesses, and governments worldwide. By continuing to evolve and respond to the challenges posed by the digital age, the Budapest Convention can remain an indispensable tool in the fight against cybercrime and a key instrument for advancing global cybersecurity.

Bibliography

AGUINALDO, M. A. L., & DE HERT, P. (2025): *Moving in the right direction for transborder access to digital evidence in criminal matters? The Council of Europe and the Second Additional Protocol introducing direct cooperation mechanisms*. In M. Kaiafa-Gbandi, N. Latif, & C. Zimmermann (Eds.), *The Cambridge Handbook of Digital Evidence in Criminal Investigations* (pp.200–218). Cambridge University Press. DOI: <https://doi.org/10.1017/9781009049771.010>.

African Union. (2012): *Harmonizing Cyberlaws and Regulations: The Experience of the East African Community*. New York and Geneva. https://au.int/sites/default/files/newsevents/workingdocuments/27223-wd-harmonizing_cyberlaws_regulations_the_experience_of_eac1.pdf. (Date of download: 08/01/2025).

African Journal of Biomedical Research. (2024): *The role of legal frameworks in combating cybercrime: Global perspectives and local implications*. African Journal of Biomedical Research, 27(5S), 186–195. https://www.researchgate.net/publication/387546329_The_Role_of_Legal_Frameworks_in_Combating_Cybercrime_Global_Perspectives_and_Local_Implications. (Date of download: 09/01/2025).

ADMAS et al. (2024): *Cyber Security: State of the Art, Challenges, and Future Directions*. Cyber Security and Applications, 2, Article 100031.

<https://www.sciencedirect.com/science/article/pii/S2772918423000188>. (Date of download: 10/01/2025).

BAGHDASARYAN, M. (2023, August 4): *Sanchez v. France: Are the expanded liability rules foreseeable for social media users?* Strasbourg Observers. <https://strasbourgobservers.com/2023/08/04/sanchez-v-france-are-the-expanded-liability-rules-foreseeable-for-social-media-users/>. (Date of download: 09/01/2025).

BELLIA, FRANCESCO. (2019): *Cybercrime and Human Rights: Striking the Balance*. Journal of Law and Technology, 31(4), 128–145.

Black Hat Middle East and Africa. (2025): *Part 1: Strengths and weaknesses of the new UN cybercrime convention*. <https://insights.blackhatmea.com/part-1-strengths-and-weaknesses-of-the-new-un-cybercrime-convention/>. (Date of download: 09/01/2025).

BUÇAJ, E., & IDRIZAJ, K. (2024): *The Need for Cybercrime Regulation on a Global Scale by International Law and Cyber Convention*. Multidisciplinary Reviews, 8(1), 2025024. <https://doi.org/10.31893/multirev.2025024>.

CELIS, M. (2024): *Transforming legal borders: International judicial cooperation and technology in private international law – Part II*. Conflict of Laws.net. <https://conflictoflaws.net/2024/transforming-legal-borders-international-judicial-cooperation-and-technology-in-private-international-law-part-ii/>. (Date of download: 09/01/2025).

CLOUGH, JONATHAN. (2014): *A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation*. Monash University Law Review, 40(3), 698–736, Monash University Faculty of Law Legal Studies Research Paper No. 2015/06. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615789. (Date of download: 10/01/2025).

Council of Europe. (2001): *Convention on Cybercrime* (ETS No. 185), Explanatory Report. https://www.oas.org/juridico/english/cyb_pry_explanatory.pdf. (Date of download: 09/01/2025).

Council of Europe. (2001): *Convention on Cybercrime* (ETS No. 185). <https://www.coe.int/en/web/cybercrime/the-budapest-convention>. (Date of download: 8/01/2025).

Council of Europe. (2003): *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*. European Treaty Series - No. 189, Strasbourg, 28 January 2003. <https://rm.coe.int/168008160f>. (Date of download: 09/01/2025).

Council of Europe. (2017): *General Report on Mapping the Current Strengths, Weaknesses, Opportunities and Risks of Public/Private Cooperation on Cybercrime in the Eastern Partnership*. Updated version, December 2017. <https://rm.coe.int/general-report-on-mapping-the-current-strengths-weaknesses-opportuniti/16808f1e1b>. (Date of download: 08/01/2025).

Council of Europe. (2018): *Brazil: Status regarding Budapest Convention*. Cybercrimepolicies/strategies. <https://www.coe.int/en/web/octopus/-/brazil>. (Date of download: 09/01/2025).

Council of Europe. (2022). *Second Additional Protocol to the Cybercrime Convention on enhanced co-operation and disclosure of electronic evidence* (CETS No. 224). https://www.coe.int/en/web/cybercrime/second-additional-protocol/-/asset_publisher/isHU0Xq21lhu/content/opening-coecyber2ap. (Date of download: 09/01/2025).

Council of Europe. (2024): *Cybercrime@COE Update: January - March 2024*. <https://rm.coe.int/cybercrime-coe-update-q1-2024/1680af746e>. (Date of download: 10/01/2025).

Council of Europe. (2024): *2024 Meeting of the 24/7 Network of Contact Points of the Budapest Convention on Cybercrime: Summary Report*. The Hague, The Netherlands. <https://rm.coe.int/coe-24-7-annual-meting-summary-report-2024-v4/1680b2bccc>. (Date of download: 09/01/2025).

GONI, OSMAN, et al. (2022): *The Basic Concept of Cyber Crime: Journal of Technology Innovations and Energy*, 1(2), 16–24. <https://ijemt.com/wp-content/uploads/2023/01/GSV-August-04-IJEMT.pdf>. (Date of download: 08/01/2025).

Global Privacy Assembly. (2017): *Global Cross Border Enforcement Cooperation Arrangement*. Version 17. <https://globalprivacyassembly.org/wp-content/uploads/2019/11/Version-17-GCBECA-2017-ICDPPC.pdf>. (Date of download: 8/01/2025).

IRSHAD, LI ADIK ALEKSANDROVICH. (2024):*Cyber Law: Addressing Legal Challenges in the Digital Age*. Uzbek Journal of Law and Digital Policy, 1(3). Tashkent State University of Law.
https://www.researchgate.net/publication/382847682_Cyber_Law_Addressing_Legal_Challenges_in_the_Digital_Age. (Date of download: 08/01/2025).

JUSZCZAK, A., & SASON, E. (2023):*The use of electronic evidence in the European Area of Freedom, Security, and Justice: An introduction to the new EU package on e-evidence*. EUCRIM, 2(2023), 182–200. DOI: <https://doi.org/10.30709/eucrim-2023-014>.

KUNER, C. (2018):*The EU and International Data Protection Law: The Budapest Convention and Beyond*. International Data Privacy Law, 8(2), 98–111.

LEGGAT, HELAINE. (2024):*A New Look at the Budapest Convention on Cybercrime in Cyber Security*. ICTLC Australia. <https://www.ictlc.com/a-new-look-at-the-budapest-convention-on-cybercrime/?lang=en>. (Date of download: 08/01/2025).

NAVE, E., & LANE, L. (2023):*Countering online hate speech: How do human rights due diligence impact terms of service?* Computer Law & Security Review, 51, 105884. <https://doi.org/10.1016/j.clsr.2023.105884>.

ONOMRERHINOR, FLORA ALOHAN. (2023):*Universal Jurisdiction for Transnational Cybercrimes?* UCC Law Journal, 3(1), 119–151. <https://doi.org/10.47963/ucclj.v3i1.1253>.

SABRY, F., et al. (2020):*Cryptocurrencies and Artificial Intelligence: Challenges and Opportunities*. IEEE Access, 8, 175840–175858. https://www.researchgate.net/publication/344460243_Cryptocurrencies_and_Artificial_Intelligence_Challenges_and_Opportunities. (Date of download: 08/01/2025).

SINGH, T., et al. (2024):*Cybercrime and International Law: Jurisdictional Challenges and Enforcement Mechanisms*. African Journal of Biomedical Research, 27(3s), 697–708. <https://africanjournalofbiomedicalresearch.com/index.php/AJBR/article/view/2101>. (Date of download: 14/01/2025).

NAGY CSILLA*

Szomszédkonfliktusok az irodalomban: Kisvárosi szomszédkonfliktusok és lehetséges megoldásaik Stephen King: Hasznos Holmik c. művén keresztül

Absztrakt: Jelenlegi tanulmányban a tipikus kisvárosi szomszédkonfliktusokat, az együttélésből eredő zavaró hatásokat jelenítjük meg Stephen King: Hasznos Holmik (Needful Things, 1991) c. művén keresztül. Arra keressük a válasz, hogyan lehet hivatali úton, közigazgatási eljárás során, jegyző előtti birtokvédelmi eljárás során, birtokperben ill. mediáció segítségével rendezni a vitás helyzeteket, mielőtt a kapcsolatok végképp és visszavonhatatlanul tönkremennének.

Kulcsszavak: King, szomszédok, kapcsolatok, mediáció, birtokvédelem

1. Előszó

„Koccanunk mindannyian, aztán megbéküliünk.”¹

Ma ünnepli 77. születésnapját Stephen King, a horrorok királya. Az első írása 1967-ben jelent meg *The Glass Floor* címmel, mára pedig a világ minden pontján a horrorok koronázatlan királyaként ismerik az író. Negyvennél is több nyelvre lefordított művei több mint 400 millió példányban keltek el, több műve megfilmesítésre került. Jelenleg is aktív alkotó, történetei pedig napjainkban is aktuálisak, keresettek, mozivászonra kíváncsoznak.

1991-ben jelent meg King *Hasznos Holmik* (*Needful Things*) c. könyve. A könyv 1993-ban került megfilmesítésre és ugyanebben az évben jelent meg a magyar fordítása. Jómagam a Hasznos holmikkal először gyermekkoromban találkoztam, akkoriban faltam King meséit, főleg a történetiségük miatt. Később már rácsodálkoztam az író humorára, a műveiben áttejő humánumára, ahogy újabb és újabb könyve jelent meg.

King írt, én felnőttem és tíz éve egy kisváros polgármesteri hivatalában helyezkedtem el, mint igazgatási előadó. Azóta foglalkozom a helyiek állatvédelmi ügyeivel, birtokvédelmi vitáival, szomszédkonfliktusokkal. Megismertem az ottlakók életét, szokásait, mindennapjait. Ahogyan Leland Gaunt látja Castle Rockot, úgy látom én ezt a kisvárost, az emberek közötti kapcsolatrendszer

* Nagy Csilla, PhD hallgató, Miskolci Egyetem, Deák Ferenc Állam- és Jogtudományi Doktori Iskola.

¹ KING, S.: *Hasznos holmik*, Budapest, Európa, 2005., ford.: Bartos Tibor, 11.

szövevényességét, a ki nem mondott szavakat és feszültségeket. Hamarosan aktív szerepet vállaltam a más települések közigazgatási szakemberei munkájának koordinálásában, és a szenvedélyemmé vált a közigazgatás. Mára már napi szinten kerülnek eléem szomszédkonfliktusos ügyek az ország minden pontjából. Egy éve ezen a vonalon kezdtem foglalkozni a mediáció intézményével, mint jogon kívüli alternatív vitarendezési megoldással.

Jelenlegi kutatásom középpontjában az a kérdés áll, hogyan lehet hivatali úton, közigazgatási eljárás során, jegyző előtti birtokvédelmi eljárás során, birtokperben, illetve mediáció segítségével rendezni a személyközi konfliktusokat. Ezek a vitás helyzetek semmiben sem különböznek Castle Rock mindennapjaitól. Pontosan azért érezzük közel magunkhoz a Hasznos Holmikot, mert a történetben megjelenő élethelyzetekkel mi is napi szinten találkozunk.² Leland Gaunt megjelenéséig Castle Rock ugyanazt az életet éli, mint bármely más kisváros. Akkor fordulnak át a mindennapi semmiségek horrorba, amikor a titokzatos kereskedő megnyitja Hasznos Holmik elnevezésű boltját. Az üzlet már a nyitás előtt felkelti az ottélők figyelmét, akik nyitás után először félénken majd egyre elszántabban látogatják a boltot. Ott egyfajta hipnotikus állapotba kerülnek, amikor meglátni vélik azt a „hasznos holmit”, amire már régóta vágnak. Gaunt a tárgyak ellenértékét összetett módon határozza meg: a vevő fizet pénzben egy összeget, amely jóval alacsonyabb, mint az áru piaci értéke, és tesz egy szívességet a kereskedőnek. Ez a szívesség nem más, mint a Gaunt által meghatározott célszemély megrtéfálása. Az elkövetés áldozatát, jellegét, időpontját, mennyiségét Gaunt határozza meg.

A „*hajmeresztően meredek móka*”³ abban áll, hogy a csínyet egyik lakos sem a saját haragosa ellen követi el, és az elkövetők bár sejtik, de (talán tudatosan is) nem tudatosítják magukban, hogy miközben a tréfával egy lakost felbosszantanak, egy másikat gyanúba kevernek. Miután az elkövetéseknek nincs tanúja, és az elkövetőnek olyan üzenetet kell hagynia a károsultnál, amit maga ugyan nem ért, de ami alapján a károsult az elkövető személyét a haragosával azonosítja, a lakosok egymás ellen fordulnak. Leland Gaunt kisméretű irkájába eközben elegáns betűkkel jegyzi fel áldozatainak nevét. A vásárolt áruk később hipnotizáló erejüket elvesztik, és sokan rájönnek a csalásra, de addigra már eladták a lelküket.

Jelen tanulmányban górcső alá vesszük Castle Rock jellemző konfliktusos helyzeteit, ezeket a tipikus kisvárosi szomszédkonfliktusokat, az együtélésből eredő zavaró hatásokat és arra keressük a választ, hogyan lehet hivatali úton, közigazgatási eljárás során, jegyző előtti birtokvédelmi eljárás során, birtokperben,

² az író maga is megerősíti, hogy Castle Rock egy átlagos kiváros életét éli: „*Ilyen az élet a kisvárosban, ha Castle Rock-nak nevezik, ha másnak.*” Stephen King: i. m. 9. o.

³ KING, S.: i. m. 111.

illetve mediáció segítségével rendezni a vitás helyzeteket, mielőtt az emberek közti kapcsolatok végképp és visszavonhatatlanul tönkremennek.

2. A mediációs eljárás

„Tétlenség az ördög párnája.”⁴

A mediáció latin eredetű szó, a jelentése közvetítés. Olyan speciális konfliktuskezelési módszer, amelynek során a felek egy közvetítő személy útján veszik fel egymással a kapcsolatot. A mediációnak nem a jogszolgáltatás, a jognak való megfelelés a célja, hanem az, hogy olyan helyzet jöjjön létre – win-win helyzet – amellyel mindkét fél elégedett.

A mediációs eljárás rövid idő alatt hosszútávú megoldást hozhat: a megállapodás aláírásának napjával, vagy azon a napon, amelyen az egyik fél közli a másik féllel és a közvetítővel, hogy a közvetítői eljárást befejezettnek tekinti, vagy azon a napon, amelyen a felek egybehangozva kijelentik a közvetítő előtt, hogy kéri a közvetítői eljárás befejezését, vagy a felek eltérő megállapodása hiányában a nyilatkozat aláírásának napjától számított négy hónap elteltével fejeződik be.⁵ Ez azt jelenti, hogy a panaszos fél akkor is csak négy hónapot „veszít”, ha nem sikerül a megállapodás. Amennyiben viszont sikerül megegyezni, olyan helyzet jön létre, amellyel mindegyik fél elégedett lesz. a megszületett megállapodás jogon kívüli egyezség, amely nem végrehajtható, és nem is kikényszeríthető – viszont mindegyik fél érdeke a megállapodás betartása.

Az eljárás kerékkötője lehet a kevés vagy félrevezető információ, a panaszosok konfliktuskereső vagy épp „kivárá” magatartása, a bizalom hiánya⁶. Közkeletű tévedés, hogy a konfliktusok idővel megoldódnak maguktól, és elég egyszerűen csak nem tudomást venni a problémákról, mert minden ilyen félresöpört, ki nem mondott, meg nem beszélt helyzet egy puskaporos hordóba kerül, míg végül a legapróbb viták is túlnőnek magukon és robbanásközel állapotok állnak be. Amikor bepillantást nyerünk Castle Rock hordójába, a kisváros lakói úgy élnek egymás mellett, mint biztosítékok: „csak össze kell kötni egyiket a másikával”⁷. Gaunt pedig, az emberi lélek villanyszerelője, nem tesz mást, mint zárlatot okoz, pl. Wilma Jerzyck zárlatát Nettie Cobb-bal két másik biztosítékból átvezetett árammal idézi elő.

⁴ KING, S: i. m. 371.

⁵ a közvetítői tevékenységről szóló 2002. évi LV. törvény 35. § (1) bek. alapján.

⁶ FERENCZI A.: A konfliktus, ami összeköt, A mediáció mint a bizalomépítés eszköze, <https://pea.lib.pte.hu/bitstream/handle/pea/15365/ferenczi-andrea-tezis-hun-2011.pdf?sequence=1> (letöltés dátuma: 2024.09.27.)

⁷ KING, S: i. m. 333.

Ki tudja, ha nem Gaunt, hanem egy mediátor érkezne – vagy Gaunt preferenciái mások lennének – feltehetően hosszútávon és békés úton lehetne rendezni a vitás helyzeteket.⁸

3. A kisvárosi szomszédkonfliktusok megoldási lehetőségei birtokvédelem útján

A Polgári Törvénykönyvről szóló 2013. évi V. törvény (a továbbiakban: Ptk.) 5:5. § (1) bekezdése alapján „a birtokost birtokvédelem illeti meg, ha birtokától jogalap nélkül megfosztják vagy birtoklásában jogalap nélkül háborítják (a továbbiakban: tilos önhatalom).”

„Tilos önhatalommal megvalósuló birtokháborításnak minősül általánosságban minden olyan önkényes – vagyis a birtokos hozzájárulását nélkülöző – cselekmény, amely valamegy birtoklási helyzetbe beavatkozik.”⁹

A Ptk.-ban foglalt birtokvédelemnek három útja van:

1. az önhatalom,
2. a jegyző előtti birtokvédelmi eljárás,
3. és a birtokper.

Az önhatalom azt jelenti, hogy „a tilos önhatalom ellen a birtokos – a birtok megvédéséhez szükséges mértékben – önhatalommal is felléphet.”¹⁰ Az önhatalom nem jelent magánbosszút, miután időben és jellegében is korlátozott. Castle Rock „megtréfált” lakosai csak az elkövetést követően fedezik fel a kárukra elkövetett jogsértést, szándékaikat sem az önhatalom vezérli, amikor megkeresik az általuk gyanúsított haragosukat, hanem egyértelműen a bosszú.

A birtokukban megsértett lakosoknak egy év áll rendelkezésükre, hogy a jegyzőtől birtokvédelmet kérjenek.¹¹ A jegyző előtti birtokvédelmi eljárás kizárólag akkor indul meg, ha a kérdés birtokvédelmi hatáskörbe tartozik, és a kérelmező meg tudja jelölni kérelmezettét és annak címét (székhelyét), továbbá a kérelem további kötelező elemeit. Az eljárás határideje 15 nap,¹² de legkevesebb 10 nap.¹³

⁸ A mediátori vitarendezés ugyanakkor nem zárja ki a feleknek azt a jogát, hogy a vitás ügyben igényüket bírósági vagy választottbírói eljárás keretében érvényesítsék a közvetítői tevékenységről szóló 2002. évi LV. törvény 36. § (1) bek. alapján.

⁹ SERÁK I.: *Magyarúrat a szomszédjogokról* Budapest, Wolters Kluwer Hungary, 2020., 141.

¹⁰ a Ptk. 5:6. § (1) bek. alapján.

¹¹ a Ptk. 5:8. § (1) bek. alapján.

¹² 30 nap, ha tolmács igénybevétele szükséges), mely eljárási határidő a benyújtott kérelem jegyzőhöz történő megérkezését követő napon kezdődik. Az eljárási határidőbe nem számít bele a kérelem és az eljárás megindításáról szóló jegyzői megkeresés hivatalos iratként való postára adásának napjától annak kézbesítéséig vagy a megkeresés jegyzőhöz történő visszaérkezéséig terjedő időtartam, a jegyzői megkeresés kézbesítésétől az ellenérdekű fél nyilatkozatának megtételéig vagy az ellenérdekű fél írásbeli nyilatkozatának jegyzőhöz történő megérkezéséig terjedő legfeljebb nyolc napos időtartam. Ha a határidő utolsó napja olyan nap, amelyen a jegyző által vezetett polgármesteri hivatalnál vagy közös

Ennyi idő áll a kérelmező rendelkezésére, hogy bizonyítsa a birtokháborítás megtörténtét anélkül, hogy a jegyző ehhez bármilyen hatósági lépést tenne. A birtokvédelmi eljárásban ugyanis a jegyző kvázi „bírói szerepben jár el”¹⁴ és nem léphet fel a hagyományos értelemben vett közigazgatási hatóságként, nem terheli tényállásbiztosítási kötelezettség, minden bizonyítás a kérelmezőre hárul. Amennyiben a bizonyítás alapján a kérelemnek helytadó határozat születik, „a jegyző elrendeli az eredeti birtokállapot helyreállítását és a birtoksértőt a birtoksértő magatartástól eltiltja; kivéve, ha nyilváníti, hogy az, aki birtokvédelmet kért, nem jogosult a birtoklásra vagy birtoklásának megszüntetésére volt köteles. A jegyző – kérelemre – jogosult a hasznok, a károk és a költségek kérdésében is határozni”.¹⁵ A 10-15 napos eljárást esetlegesen követő végrehajtás ideje is rövid: a jegyző határozatát a kérelmezettnek a meghozatalától számított három napon belül végre kell hajtania.¹⁶

A jegyző előtti birtokvédelmi eljárás és a birtokper akár párhuzamosan is megindítható, az is lehetséges, hogy a panaszos nem fordul a jegyzőhöz, hanem kizárólag birtokpert indít. A birtokper indításának tehát nem feltétele a jegyző előtti birtokvédelmi eljárás, viszont amennyiben valamelyik fél nem elégedett a jegyző döntésével, a bíróság elé viheti azt.¹⁷ A jegyző döntése kizárólag a birtoklás tényén alapulhat, tehát a jegyző azt vizsgálja, hogy a dolog a birtokos birtokában van (volt) és a birtokost a birtoklásban tilos önhatalommal megzavarták – ez az ún. possessorius eljárás –, a bíróság ezzel szemben a jogcímet is vizsgálja az ún. petitorius eljárás keretében.¹⁸ Így lehetséges, hogy a bíróság a jegyző döntését jogszerűnek minősíti, a perben megválaszolt jogkérdések alapján mégis megváltoztatja.

önkormányzati hivatalnál a munka szünetel, a határidő a következő munkanapon jár le a jegyző hatáskörébe tartozó birtokvédelmi eljárásról szóló 17/2015. (II. 16.) Korm. rendelet 8. § alapján.

¹³ miután „a jegyző a tényállás tisztázásához szükséges bizonyítékokat az eljárási határidő lejártát megelőző ötödik napig fogadja be, ezt követően a bizonyítási eljárást befejezi, és a rendelkezésre álló bizonyítékok alapján meghozza a határozatát” a jegyző hatáskörébe tartozó birtokvédelmi eljárásról szóló 17/2015. (II. 16.) Korm. rendelet 5. § alapján.

¹⁴ MÉHES T.: Közjog a magánjogban, birtokvédelem jegyzői szemmel, in *Opuscula Civilia 2016-2017.* (szerk.: Auer Adám - Dul János) https://antk.uni-nke.hu/document/akk-uni-nke-hu/Opuscula_Civilia_2016_2017.pdf#page=15, (letöltés dátuma: 2024.09.17.)

¹⁵ a Ptk. 5:8. § (2) bek. alapján.

¹⁶ a Ptk. 5:8. § (4) bek. alapján.

¹⁷ A Ptk. 5:8. § (3) bek. alapján: „a jegyző határozata ellen közigazgatási úton jogorvoslatnak helye nincs. Az a fél, aki a jegyző birtokvédelem kérdésében hozott határozatát sérelmesnek tartja, a határozat kézbesítésétől számított tizenöt napon belül a bíróságtól a másik féllel szemben indított perben kérheti a határozat megváltoztatását”.

¹⁸ A jegyző előtt indított birtokvédelmi ügyek bírósági gyakorlata tárgykörre felállított joggyakorlat-elemző csoport 2017.El.II.JGY.P.2. sz. összefoglaló vélemény, https://kuria-birosag.hu/sites/default/files/joggyak/joggyak_osszefoglalo_2018_dr_orosz_arpad.pdf, (letöltés dátuma: 2024. 09. 14.)

A jegyző előtti birtokvédelmi eljáráshoz kapcsolódó kérelemnek és a keresetlevélnek is van egy kötelező minimális adattartalma és kötelező melléklete,¹⁹ de mindkettőben meg kell jelölni az ellenérdeklő fél (alperes) lakóhelyét.

Amennyiben valamely fél bírósági úton megtámadja a jegyző határozatát, perben a bíróság nem a jegyző által lefolytatott eljárás jogszerűségét vizsgálja, hanem tulajdonképpen birtokper indul.

A birtokvédelem olyan speciális jogterület, amely számos más jogterülettel határos, és nem lehet éles határvonalat húzni, így a bíróság nemcsak birtokvédelmet nyújthat, de kártérítést, sérelemdíjat is megállapíthat. A sérelemdíj és a kártérítés a személyiségi jogok megsértése esetén követelhető.²⁰

4. Kisvárosi szomszédkonfliktusok

„Valami bűzlik Castle Rock-ban. És ami bűzlik, az robbanással is fenyeget.”²¹

4.1. A zavaró parkolások kérdésének bemutatása Alan Pangborn és Danforth Keaton (Rosszcsont) konfliktusán keresztül

Alan Pangborn, Castle Rock járás seriffje és Danforth Keaton, Castle Rock első tanácsnoka - akit a báta mögött Rosszcsontnak neveznek - között állandosuló feszültséghelyzetet az váltja ki, hogy Keaton rendszeresen a seriff bejárata elé parkol. Pangborn ilyenkor a munkatársát, Norris Ridgwick-et kéri meg a büntetőcédula elhelyezésére.

A bejárat elé parkolás olyan helyzet, ami kimeríti a közúti közlekedés szabályairól szóló 1/1975. (II. 5.) KPM–BM együttes rendelet (KRESZ) 40. § (2) bekezdés c) és d) pontjában foglalt, tilalmazott „várakozás” tevékenységet. Az ilyen módon várakozó gépjármű vezetője szabálysértést követ el, amely alapján a rendőr és a közterület-felügyelő is szabhat ki helyszíni bírságot.²² Az eljárás hátránya, hogy fennáll az esély, hogy mire a hatóság kikerkezik, a gépjárművel már továbbáll a szabálysértő személy, valamint időről időre kérni kell az intézkedést, és ha minden nap ismétlődik a jogsértés – pl. mert az iskolás, óvodás gyerekek szülei minden reggel odaállnak a kapuba – ez rendkívül megterhelő tud lenni.

A szabálysértési eljárás megindítása, helyszíni bírság kiszabása mellett helye lehet birtokvédelmi eljárásnak is, hiszen a kapubeállóba álló gépjármű a birtoklásban való zavarást eredményez, melynek során a birtokháborító személy ugyan nem vonja el a dolog feletti hatalmat a birtokostól, de akadályozza a birtokost a dolog feletti hatalom zavartalan gyakorlásában. A bejárat elé parkolással

¹⁹ A Birtokvédelmi rendelet 2. § és a Pp. 170. § alapján.

²⁰ A Ptk. 2:52. §, 2:53. § alapján.

²¹ KING, S: i. m. 373. o.

²² A szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről szóló 2012. évi II. törvény 224. § (2) bek. alapján.

kapcsolatosan a bíróság még abban az esetben is megállapította a birtoksértést, amikor birtokos nem is tartózkodott az ingatlanon, nem mindig gépkocsi beállítására használta a garázst, illetve a gépkocsi beállót. Ezen körülmények a bíróság álláspontja szerint önmagában azt a tényt, hogy a birtoksértő fél gépkocsijával az birtokost birtoklásukban megzavarta, nem teszik vitathatóvá.²³

A kapubeállóba való leparkolás mellett gyakran érkezik a hatósághoz azzal kapcsolatosan is panasz, hogy valaki a panaszos háza – de nem a bejáró – elé teszi le az autóját. Ebben a tekintetben is felmerülhet a birtoksértés, ugyanakkor nincs egyértelmű iránymutatás vagy gyakorlat abban a kérdésben, hogy a folyamatos parkolás kimeríti-e a szükségtelen zavarás fogalmát. Önmagában a zavarás ténye még nem jelent jogszerűtlen tevékenységet, szükséges ehhez az is, hogy a zavarás szükségtelen legyen. „A zavarás szükségtelennek akkor minősülhet, ha sajátos jellege, intenzitása, jelentkezésének gyakorisága vagy időtartama alapján olyan mértékű negatív hatásokat idéz elő, aminek az eltűrése a szomszédoknak általában nem kívánható.”²⁴ A zavarás szükséges, illetve szükségtelen jellegét a jegyző és a bíróság tehát esetről esetre döntik el. Az eljárás megindítását ugyanakkor gyakorlatilag el lehetetleníteni az, ha a kérelmező nem ismeri a leálló gépjármű üzemtartóóját, tulajdonosát – amennyiben pl. az adott ingatlan olyan helyen van, ahol nagy az átmenő forgalom és ismeretlenek parkolnak le –, ilyen esetben ugyanis az ellenérdekű fél megjelölése lehetetlen. Ugyanebből az okból kifolyólag nem jöhet létre mediáció sem.

A parkolással kapcsolatos zavarással kapcsolatosan van még egy panasztípus, ami gyakran beérkezik a hatóságokhoz. Ebben a panaszos azt kifogásolja, hogy valamely lakos a ház elé köveket, egyéb akadályokat tett le, hogy megakadályozza mások leparkolását. Amennyiben a ház előtti terület magánterület, nincs akadálya annak, hogy oda tárgyakat helyezzen el a terület tulajdonosa. Amennyiben az érintett terület viszont közterület, kizárólag közterület-használati engedély birtokában lehet ott elhelyezni bármit is.

Az ingatlantulajdonosok nehezen fogadják el, hogy miközben ezzel a területtel nem rendelkezhetnek szabadon, jogszabály szerint mégis ők kötelesek gondoskodni az ingatlan előtti járdaszakasz (járda hiányában egy méter széles területsáv, illetőleg ha a járda mellett zöldsáv is van, az úttestig terjedő teljes terület), a járdaszakasz melletti nyílt árok és ennek műtárgyai, továbbá tömbtelken a külön tulajdonban álló egyes épületek gyalogos megközelítésére és körüljárására szolgáló terület tisztán tartásáról, a csapadékvíz zavartalan lefolyását akadályozó anyagok és más hulladékok eltávolításáról.²⁵

²³ A Fővárosi Ítéltábla Pf.21426/2010/4 sz. ügyben meghozott ítélete.

²⁴ SERÁK I: A szükségtelen zavarás néhány fogalmi kérdése, *Magyar Jog*, 2009/10.

²⁵ a köztisztasággal és a települési szilárd hulladékkal összefüggő tevékenységekről szóló 1/1986. (II. 21.) ÉVM–EüM együttes rendelet 6. § (1) bek. alapján és a köztisztasággal és a települési szilárd hulladékkal összefüggő tevékenységekről szóló 1/1986. (II. 21.) ÉVM–EüM együttes rendelet 6. § (1) bek. alapján.

Munkám során találkoztam olyan esettel is, hogy a szomszéd előtt található zöldsávra leparkolni kívánó lakos azért tett bejelentést a szomszéd ellen, mert az virágot ültetett erre a területre. Az egyébként példásan rendbentartott zöldsávra ültetett virágokkal kapcsolatosan nem állapítható meg közterülethasználat, illetve jogszabálysértés, ugyanakkor mégis megakadályozza a zavaró parkolást – amennyiben a gépjármű vezetője nem hajt rájuk barbár módon.

Az ingatlan elé elhelyezett tárgyakkal kapcsolatosan is elképzelhető birtokvédelmi eljárás lefolytatása, ugyanazzal a kitételrel, esetről esetre történő megítéléssel, ahogyan arról a fentiekben szó volt. Ezekben az esetekben van mód a kérelmezett személyének és lakcímének megállapítására és a birtokvédelmi kérelemben, illetve keresetlevélben történő megjelölésére a tulajdoni lap TAKARNET rendszerből történő lekérésével.

Ha tehát ismert a birtoksértő fél – a Hasznos Holmikban Danforth Keaton rendszeresen parkol a seriff bejárata elé –, nincs akadálya a birtokvédelmi eljárás megindításának, és a szükségtelen zavarás megállapítása esetén a kérelemnek helyt adó határozat meghozatalának, vagyis a birtoksértéstől történő eltiltásnak sem.

Azokban az esetekben, amikor a felek nem ismerik egymást, az ingatlantulajdonosok és a gépjármű vezetők konfliktusát egyes önkormányzatok helyi rendeletalkotással oldják fel. Budaörs Város Önkormányzata Képviselő-testületének Budaörs város zöldfelületeinek és zöldterületeinek megóvásáról, használatáról, fenntartásáról és fejlesztéséről szóló 29/2004. (V. 25.) önkormányzati rendelete pl. tilalmazza a járművel a zöldterületen történő közlekedést, parkolást.

	Szabálysértési eljárás	Birtokvédelmi eljárás, birtokper	Mediáció	Önkormányzati rendelet
Kapubeálló elé parkolás	inkább rövid úton megoldás	akkor jelenthet csak megoldást, ha ismert az ellenérdekű fél és szükségtelen a zavarás	akkor jelenthet csak megoldást, ha ismert az ellenérdekű fél	nem szabályozhatja
Ház elé parkolás	nem szabálysértés			hosszútávon is megoldást jelenthet
Parkolás megakadályozása kihelyezett tárgyakkal	inkább rövid úton megoldás			

4.2. A kutyaugatással kapcsolatos zavarások és megoldási lehetőségek Wilma Jerzyck és Nettie Cobb konfliktusán keresztül

Nettie Cobb a Hasznos Holmik nyitása idején munkaterápiásként dolgozik Pangborn seriff párjánál, akitől tavasszal egy kiskutyát kap ajándékba. A tőle nem messze, a férjével élő Wilma Jerzyck életének savát-borsát a villongások jelentik, hadvezéreként éli meg ezeket, a csatáira játékszabályokat is állít fel.²⁶

Amikor Nettie tavasszal magához veszi a kutyáját, Fogdmeget, Wilma „hadba vonul”. Az ugatás ugyan nem okoz senkinek sem kellemetlenséget, a Jerzyck családnak sem, de Wilmának jó indok egy újabb „háború” kirobbantására. Meg sem próbálja békés úton jelezni, hogy zavarja az ugatás, és egészen addig nem is szól, ameddig az ugatás ki nem kezd az idegeit. Akkor egy éjjel rátelefonál Nettie-re, hogy „ha nem bírja a kutyáját elhallgattatni, hát eméssze el”. Miután egy héttel később sem javul a helyzet, rendőrséggel fenyegetőzik, majd valóban ki is hívja a rendőröket. Talán egy héttel később Nettie megjelenik Wilma munkahelyén, a helyi ABC-ben, de akkor sem jutnak dűlőre. A kutya ezek után elcsendesedik, Wilma nagy csalódására. Aztán egy május estén megint ugatni kezd Fogdmeget, és Wilma siet a telefonhoz felhívni Nettie-t²⁷, nehogy az ugatás azelőtt végetérjen, mielőtt társázza a szót, felhívja Nettie-t és megfenyegeti: „Ha el nem hallgattatja azt a kutyát, majd én hallgattatom el”, „ha a kutya legközelebb ricsajt csap, nem szaladok a rendőrségre, hanem átmegyek, és elmeszem a torkát.”²⁸ aztán elégedetten leteszi a telefont.

A kutya azóta meg se nyikkan, de ha megnyikkan, Wilma, aki már egyébként már új célpontot talált magának Castle View kozmetikusnőjének személyében, nem is hallja, és Nettie-ről meg a Fogdmegetről el is feledkezik.

A kutyaugatással kapcsolatos bejelentések nálunk is minden településen mindennaposak, akár városról, akár kisebb településről van szó, családi házas övezetekben éppúgy, mint társasházakban. A történetben vázolt konfliktust „megspékeli” Wilma összeférhetetlen természete. Elmeállapotával kapcsolatosan felvethető az ún. perlekedési (kverulátoros) téboly, magában hordozza az ilyen betegségben szenvedő egyének egy-egy jellemzőjét, minthogy pl. csak barát-ellenség kategóriában képes gondolkodni, élvezi, tudat alatt kívánja ezeket a konfliktusokat (a kutyaugatás nem volt zavaró, de mégis kikezdi az idegeit), de „csatáit” maga vívja meg, mindössze egy alkalommal tett feljelentést a kutyaugatás miatt.²⁹ Ugyanakkor a férje Pete, időről időre nyugtatót ad be neki, nem kizárt, hogy ez fogta vissza attól, hogy több feljelentést tegyen.

²⁶ pl. „Az efféle összecsapások (rokonokkal, szomszédokkal, hitvesekkel) legfőbb szabálya, hogy az utolsó szó a támadóé legyen.” KING, S: i. m. 142.

²⁷ „Meg is jelölte számát a telefonkönyvben, hogy a drága időt berdálnia ne kelljen.” Stephen King: i. m. 142.

²⁸ KING, S: i. m. 142.

²⁹ „A perlekedési (kverulátoros) téboly a paranoid pszichotikus zavar (paranoia) egyik típusa. A perlekedési tébolyban szenvedő beteg fő ismérve, hogy rélt vagy valós sérelme miatt számtalan eljárást kezdeményez, amelyek sikertelensége újabb eljárásokat generál és mindezek során széleskörű, elmélyült jogi ismeretekre tesz szert, amelyet beadványaival és

A kutyaugatás okozta konfliktus megoldására többféle lehetőség áll előttünk. A jegyző előtti állatvédelmi eljárásban kivizsgálhatja, hogy az ugatás nem vezethető vissza valamilyen állattartási problémára, állatvédelmi jogszabálysértésre. Több olyan esettel is találkoztam már, amikor az ebtartó család elköltözött, és az ebet az udvaron magára hagyta. A szomszédnak az tűnt fel, hogy a kutya szokatlanul hosszan ugat. Egy ilyen esetben a közigazgatási állatvédelmi eljárás rendezi az eb helyzetét és ezzel a zavarás is megszűnik.

Amikor állatvédelmi eljárás keretében nem orvosolható a probléma, a birtokvédelmi eljárás, a birtokper és a mediáció közül választhat a panaszos. Az eljárások előnyei és hátrányai *A kutyaugatás okozta konfliktus megoldási lehetőségei a jegyző előtti, a mediációs és a bírósági eljárásban*³⁰ tanulmányban³⁰ részletesen bemutatásra kerültek, és azt a következtetést vontuk le, hogy ilyen esetekben a felek közötti mediációs eljárás a leghatékonyabb, hosszútávon is működő konfliktuskezelési mód:

	A mediációs eljárás	A jegyző előtti birtokvédelmi eljárás	Az állatvédelmi eljárás	A bírósági eljárás
előnyök	win – win helyzetre törekszik, biztosan úgy oldódik meg a konfliktus, hogy mindkét fél elégedetten távozik az eljárás végére a felek eltérő megállapodása hiányában négy hónapig tart ³¹ A közvetítői eljárásban	amennyiben a bizonyítás sikeres, megoldódhat az ugatással kapcsolatos konfliktus rövid eljárási határidő nap: 15 nap az eljárásnak nincsenek költségei	amennyiben az ugatás tartási problémára vezethető vissza, a tartási körülmények változtatásával megszűnhet a kutyaugatás indirekt következmény, hogy javulhat egy állat életminősége (állatvédelmi pozitív hatás)	kikényszeríthető, végrehajtható döntés

nyilatkozataival igazolni is kíván.” MAZZAG JUDIT: A perlekedési téboly anyagi és eljárási kérdése, https://birosag.hu/sites/default/files/2024-08/mailath_2023_nyertes_dolgozatok.pdf#page=36 (letöltés dátuma: 2024. 09. 21.)

³⁰ NAGY CSILLA: A kutyaugatás okozta konfliktus megoldási lehetőségei a jegyző előtti, a mediációs és a bírósági eljárásban <https://www.jogiforum.hu/publikacio/2024/04/18/a-zavaro-kutyaugat-as-okozta-konfliktus-megoldasi-lehetosegei/> (letöltés dátuma: 2024. 09. 21.)

³¹ a Közvetítői törvény 35. § (1) bek. d) pontja alapján.

	létrejött megállapodás nem érinti a feleknek azt a jogát, hogy a vitás ügyben igényüket bírósági vagy választottbírói eljárás keretében érvényesítsék.³² kreatív, jogon túli megállapodások is létrejöhetnek videokonferencia alkalmazásával is lefolytatható³³ A közvetítő a felek egyetértésével szakértőt vehet igénybe.³⁴ Az eljárás során javulhat (megjavulhat) a felek kapcsolata		nagyjából kalkulálható határidő a hatóság széleskörű eszköztárral rendelkezik a tényállás tisztázása során a hatóság széleskörű döntési lehetőséggel rendelkezik végrehajtható döntés születik, amellyel szemben kizárólag bírósági jogorvoslattal lehet fellépni és kizárólag az ügyfél lehetősége ez. A kutyaugatás miatt kezdeményezett állatvédelmi eljárásban az ügyfél leginkább csak az állattartó	
hátrányok	a felek közös megegyezése szükséges az eljárás megindításához,	bizonyítási nehézségek minden bizonyítás a	amennyiben az ugatás tartási problémára vezethető vissza, akkor	időigényes költségekkel jár a felek kapcsolatában

³² a közvetítői tevékenységről szóló 2002. évi I.V. törvény 36. § (1) bek. alapján.

³³ a közvetítői tevékenységről szóló 2002. évi I.V. törvény 35. § (5) bek. alapján.

³⁴ a közvetítői tevékenységről szóló 2002. évi I.V. törvény 33. § (1) bek. alapján.

	minél jobban elmérgesedik a kapcsolat, annál kevésbé valószínű, hogy túl tudnak lépni a felek saját sérelmeiken, szóba állnak egymással és nyitnak a mediáció felé nem végrehajtható, nem kikényszeríthető a döntés	kérelmezőre hárul, a jegyző az eljárásnak mintegy „passzív szemlélője” pontosan meg kell jelölni az állattartó kérelmezett személyét és címét egy éven túli birtoksérelem esetén nem alkalmazható kizárt bármiféle kompromisszum, vagy helytadó vagy elutasító határozat születik. bírósági úton megtámadható a határozat, így az eljárás éveket is elhúzódhat	sem garantált, hogy a tartási körülmények változtatásával megszűnhet a kutyaugatás amennyiben az ugatás nem tartási problémára vezethető vissza, nem biztosan nem oldódik meg kutyaugatás problémája az eljárásban nem kap a bejelentő pontos tájékoztatást sem az eljárásról, sem a döntésről	nem hoz változás, sőt még jobban elmérgesítheti azt

Wilma Jerzyk és Nettie Cobb konfliktusában ugyanakkor a mediáció lehetőségét teljes mértékben kizárja Wilma összeférhetetlen természete.

4.3. Birtokvédelmi felvetések a más otthonába való behatolással kapcsolatosan Brian Rusk Wilma Jerzyk ellen megvalósított első csínye és Nettie Cobb Danforth Keaton (Rosszcsont) ellen elkövetett csínye alapján

A Hasznos Holmik első vásárlója Brian Rusk, tizenegy éves kisiskolás fiú, aki egy ritkaságszámba menő baseball kártyát lát meg a boltban. Gaunt elbűvöli a fiút, akivel megegyeznek a pénzbeli árban és egy csínyben. Hamarosan a fiú átkerekedik a Jerzyk család kertjébe, ahova Wilma kitérgette a nagymosását, mielőtt elment volna otthonról. A fiú a sáros földdel összemocskolja a frissen mosott lepedőket. Miután Wilma megtalálja a lepedőket, azonnal Nettie Cobb-ot gyanúsítja meg, akit nyomban meg is fenyeget telefonon.

Eközben Nettie Cobb Danforth Keaton (Rosszcsont) és felesége otthonába tör be – a „csínyért” egy számára kedves, régen elveszett lámpaernyőt kap Gaunt-tól – ahol a ház különböző pontjaira cetlre írt üzeneteket elhelyeznie, mint pl.

„KÖZFORGALMI KIHÁGÁS

Csupán FIGYELMEZTETÉS – szívlelje meg mégis!

Megfigyeléseink szerint egyszer vagy többször is megszegte a forgalmi szabályokat. Ügyeletes megbízottunk úgy döntött, hogy „utolsó figyelmeztetésben” részesíti, azonban följárta kocsijának gyártmányát, típusát és rendszámát, és hasonló esetben bírságotlani fogja. Ne feledje, hogy a forgalom szabályai MINDENKIT köteleznek! Körültekintően vezessen!

Hazavárják! Figyelmét köszöni a Helyi Rendőrség.”

„A lelkiförcös alatt üres rovatok, GYÁRTMÁNY, TÍPUS és RENDSZÁM részére. Az első két rovatba már bevezették a Cadillacet meg a Seville-t, s a RENDSZÁM rovatba is akkurátusan, nyomtatott betűkkel:

ROSSZCSONT 1.

Ezután következett a kihágások garmadája, fordulási szándékjelzésének elbanyagolása, áthajtás pirosan, parkolás tilosban, majd a cédula alján még két rovat az EGYÉB KIHÁGÁSOK-nak, és ebbe takarosan nyomtatott betűkkel beírták:

A LEGNAGYOBB SZEMÉTLÁDA CASTLE ROCKBAN.

A cédula alján a SERIFF MEGBÍZOTTJÁ-nak helyén Norris Ridgwick bélyegzős névalírása.

A dolgozószobaiak voltak a legtárgyilagosabbak:

SIKKASZTÁS

LOPÁS

CSALÁS

KÖZPÉNZEK ELTULAJDONÍTÁSA

HÜTTLEN KEZELÉS

CSALÁRDSÁG

De a térszű volt a legborzasztóbb:

SIKKASZTÁS”³⁵

A cédulák alapján Keaton az őt megbírságoló Norris Ridgwick-re gyanakszik, akivel korábban össze is verekedett. Hamarosan mindenféle kérdés nélkül rajta áll a bosszút a cetlikért.

Brian és Nettie birtokháborítást követnek el, amikor engedély nélkül hatolnak be mások otthonába. A birtoksértéssel párhuzamosan felmerül a magánlakáshoz való jog sérelme is. A bírósági gyakorlat szerint „a magánlakás sértetlenségéhez fűződő jog sérelmét jelenti (..) az, ha a lakó vagy a lakással rendelkező személy akarata ellenére valaki bemegy a lakásba.”³⁶

³⁵ KING, S.: im. 278. o., 285. o.

³⁶ továbbá: „a magánlakáshoz való jog a dologi jogi birtokvédelemmel párhuzamos, sajátos személyiségi jogi oltalom. Az embereknek társadalmi rendeltetésük betöltéséhez, a társadalom számára hasznos tevékenységeik kifejtésére

2022-ben került előm egy olyan eset, hogy a két szomszédos ingatlanban egy kétfélegenerációs család élt, az egyik ingatlanban a szülők, a másik ingatlanban a már felnőtt gyerekek. A két porta közötti kerítésre egy kertkapu volt szerelve, amin keresztül a családtagok kölcsönös beleegyezéssel jártak át egymáshoz és használták egymás ingatlanját. Amikor az egyik szülő elhunyt, a gyerekek magukhoz vették az özvegyet, és az idősök ingatlanját eladták. Az ingatlant megvásárló új tulajdonosok később azért fordultak a jegyzőhöz, mert az özvegy a kertkapun keresztül továbbra is átvitt az ingatlanra, csak körülnézni, megszokásból. Figyelemmel arra, hogy meg tudták jelölni a birtoksértő fél nevét és címét, valamint egy éven belül fordultak a jegyzőhöz, a birtokvédelmi eljárást a jegyző megindította. Az eljárásban megállapításra került a zavarás szükségtelen volta, az özvegy pedig el lett tiltva a további szükségtelen zavarástól.

A 2022-es esettől eltérően Danforth Keaton számára csak közvetett bizonyíték áll rendelkezésre az elkövető személyéről. Izgalmas eljárástani a gondolattal, ha Keaton megindítaná a jegyző előtti birtokvédelmi eljárást, mennyiben adna helyt a jegyző a kérelemnek a cetlik alapján, miközben a cédulák alapján gyanúsítható személy tagadja az elkövetést. Ebben a képzeletbeli eljárásban Keaton egyetlen bizonyítékai az üzenetek és a jegyző nem rendelheti el írásszakértő igénybevételét. Keaton fordulhat szakértőhöz, ez esetben a szakértő csak azt állapíthatja meg, hogy nem Ridgewick írásával írták az üzeneteket, és Ridgewick tanúkkal is bizonyíthatja hollétét a betörés időpontjában.

Később Pangborn seriff rájön, hogy Brian volt a Jerzyk család hívatlan látogatója. Ezzel kapcsolatosan fontos felhívni a figyelmet arra, hogy amennyiben valamely hatóság birtoksértés elkövetését észleli, erről tájékoztathatja a jegyzőt, de a jegyző hivatalból nem indíthat birtokvédelmi eljárást.

4.4. Kiskorú vétőképeségének, valamint birtokháborításért való felelősségének vizsgálata Brian Rusk Wilma Jerzyk ellen elkövetett második csínye tükrében

*Wilma telefonos fenyegetését követően Gaunt újabb csínnyel bízza meg a Briant. A fiú a fűzetlapjaiba csomagol köveket, a lapokra pedig ráírja.*³⁷

másokétól határozottan elkülönülő, háborítatlan térre is szükségük van. Ennek zavartalan használatát kívánja oltalmazni a Ptk. azgal, hogy a személyiségi jogok megsértése esetére megállapított szankciókat a szóban forgó jogot sértő magatartásokra is kiterjeszteni rendeli. Magánlakás minden olyan helyiség, amely a magánszemély életvitelét biztosító tartózkodási helyül szolgál, tekintet nélkül a használat jogcímére és a lakás céljára szolgáló helyiség jellegére.” Pécsi Törvényszék 18.P.20.362/2020/33/I. sz. ügyben hozott ítélete.

³⁷ KING, S.: i.m. 142. o., 258. o., 282. o.

MEGMONDTAM, HAGYJON BÉKEM!
UTOLSÓ FIGYELMEZTETÉS.

majd ezekkel az üzenetekbe csomagolt kövekkel töri be Jerzykéé ablakait, a benti tvkészüléket, a mikrosütőt, a kerti virágokat és más dolgokat. Az elkövetésnek nincs tanúja, Brian már Jerzykéé behajtóján kerekedik, amikor Jerzykéé tőzsomszédja, Mrs. Mislaburski kinyitotta házuk bejárati ajtaját, meglátja a fiút és beszédbe elegyedik vele.

Nem kérdés, hogy a fiú rongálást követ el,³⁸ ugyanakkor gyermekora kizárja büntethetőségét.³⁹ Jerzyk-éknek kártérítési igénye is keletkezik: a Ptk. 6:519. § első fordulata alapján „*aki másnak jogellenesen kárt okoz, köteles azt megtéríteni*”.

A 18 év alatti kiskorú személyek károkozása tekintetében a Ptk. eltérően szabályozza az ún. vétőképtelen és a vétőképés kiskorúak károkozását.⁴⁰ A bíróságok esetről esetre vizsgálják a vétőképesség fennállását. Figyelembe veszik „*a károkozó életkorát, szellemi állapotát, értelmi képességeit, tulajdonságait, valamint a konkrét károkozási helyzetet, a jogellenes magatartást és a károkozás egyéb körülményeit*”.⁴¹ Így pl. nem állapította meg a bíróság annak a tíz és fél éves kiskorúnak a vétőképességét, aki egy be nem kerített ingatlanra a testvérével és a barátaival bejutva a kerti szalonnasütőben tüzet rakott, majd egy füstölgő bottal masírozva katonásdit játszott, miközben a botról lehulló parázsdarab meggyújtotta a nádtetőt és a házban tűz ütött ki, miután nem várható el egy 10-12 éves gyermektől, hogy felismerje, hogy a füstölgő, de nem égő nád, illetve fadarab miatt tűz keletkezhet.⁴²

Megállapította viszont a bíróság annak a tízéves kiskorúnak a vétőképességét, akit az úttesten futva áthaladva egy személygépkocsi elütött. A bíróság figyelembe vette, hogy a kiskorú felperes már a baleset előtti 2-2,5 évben önállóan közlekedett,

³⁸ a Btk. 371. § (1) bek. szerint „*aki idegen vagyontárgy megsemmisítésével vagy megrongálásával kárt okoz, rongálást követ el*”.

³⁹ a Btk. 15. § a) pontja és 16. § alapján.

⁴⁰ A Ptk. 6:544. § alapján:

„(1) *Akinek belátási képessége oly mértékben korlátozott, hogy a károkozással kapcsolatos magatartása következményeit nem képes felmérni, nem felel az általa okozott kárért.*

(2) *A vétőképtelen behyett az felel, aki jogszabály alapján a vétőképtelen gondozójának minősül. Gondozó az is, aki a vétőképtelen személy felügyeletét a károkozásakor ellátta.*

(3) *Mentesül a gondozó a felelősség alól, ha bizonyítja, hogy a nevelés és a felügyelet ellátásával kapcsolatban felröbátóság nem terbeli.*

(4) *Több gondozó felelősségére a többek közös károkozására vonatkozó szabályokat kell alkalmazni.*”

A Ptk. 6:547. § alapján: „*ha a kárt olyan vétőképés kiskorú okozta, akinek van felügyeletre köteles gondozója, és a károsult bizonyítja, hogy a gondozó kötelességét felröbátóan megszegte, a gondozó az okozott kárért a károkozóval egyetemlegesen felelős.*”

⁴¹ VARGA N.: A vétőképtelen személy károkozásáért való felelősség, Debreceni Jogi Műhely, 2015/3-4.

⁴² a Györi Ítélotábla Pf. 20.453/2009/5. sz. ügyben meghozott ítélete.

azt az utat, amelyen a baleset bekövetkezett, sokszor megtette, jól ismerte, az édesanyja is úgy ítélte meg, hogy a felperes biztonságosan közlekedik, nem kell tartani baleset bekövetkezésétől.⁴³

Míg károkozás tekintetében a jogszabály tehát differenciál életkor szerint, a birtokvédelem jogi szabályozása nem veszi figyelembe az életkort. A Ptk. a birtokos személyét helyezi fókuszba, a birtokos jogi lehetőségeit részletezi, a birtoksértő félről nem rendelkezik úgy, mint pl. a károkozás tekintetében. A birtoksértésnél való felelősségnél így nem hivatkozhatja be a Ptk. vétőképeséget és nem hivatkozható be a cselekvőképeség sem. A jegyző előtti birtokvédelmi eljárásban a jegyző Briant eltilthatná a birtoksértő magatartástól, és kötelezhetné az eredeti birtokállapot helyreállítására.⁴⁴ Az eljárásban, valamint a végrehajtás során – pl. az ablakok beüvegeztetése tekintetében – Briant, mint cselekvőképtelen kiskorút,⁴⁵ a szülei képviselnék.

4.5. Az állatkínzók főbb jellemzőinek bemutatása a Castle Rock-ban elkövetett állatkínzások esetein keresztül

Gaunt három vásárlója követ el állatkínzást: Hugh Priest, ötvenegy éves, fehérférfi, alkoholista, Frank Jewett, az iskolaigazgató, aki titokban gyerekpornót néz és fiatalokkal folytatott orgián vesz részt, továbbá Cora Rusk, Brian Rusk édesanyja. Mindhármukat elbűvöli az általuk megvásárolt „hasznos holmi”.

Hugh Priest róka farkát vesz Gaunt hasznos holmijai közül, de ez a róka farka különleges darab, mert a gyerekkorába viszi vissza az öregedő alkoholistát – és Gaunt utasításait közvetíti Priest felé. Az árúért cserébe Priest betör Nettie Cobb lakásába, amikor a nő távol van, és brutálisan kivégzi Nettie kutyáját, Fogdmeget: „egyik kezével megkereste a kutya mellkasának jobb felén azt a kényes helyet, amelyik valahogyan a hátsó jobb lábával van kapcsolatban (...) cédulát húzott elő az inge zsebéből. Hugh mindjárt ébredése után nekiült a konyhasztalnál reggel, és iskolás macskakaparásával ráírta az utolsó szöveg, amit a róka farka mondott.”⁴⁶

*Az én tiszta lepedőimet senki
bűntetlen össze nem jeni!
Megfizetsz érte, megmondtam!*

⁴³ a Fővárosi Ítéltábla a Pf. 21.748/2012/4. sz. ügyben meghozott ítélete.

⁴⁴ Miután a kódolás ill. a lepedők összeszározása egyszeri alkalmakat jelentett, nem egy hosszantartó zavarást, a zavarás megszüntetésére való kötelezés lehetősége itt most tárgyaltan.

⁴⁵ a Ptk. 2:13. § alapján „cselekvőképtelen az a kiskorú, aki a tizennegyedik életévét nem töltötte be.”

⁴⁶ KING, S: i. m. 281.

Kinyitotta a svájci bicska dugóhúzóját, és a cédulát rátűzte, majd rázárta a markát a bicska nyelére úgy, hogy a dugóhúzó a mutatóujja meg a középső ujj közül állt ki (...) azonnal lesújtott a jobb kezével. Birizgáló bal keze lefogta a kutyát addig, amíg a dugóhúzón hármát csavarintott. A fröcskölő meleg vér beborította mind a két kezét. A kutya megvonaglott, és elnyúlt a padlón. Egyetlen szigorú vakkantás sem telt már tőle.”

Frank Jewett, az iskolaigazgató, aki titokban gyerekpornót néz, és részt is vesz fiatalokkal folytatott orgián, szintén felnőtt férfiként követ el állatkínzást. Abban a hitben, hogy párja, George T. Nelson zsaroló levelet hagyott neki – a levelet egyébként Sally Ratcliffe, Brian Rusk beszédjavító tanára hagyta neki Nelson aláírásával „csínyből” – betör hozzá, felfordítja a lakását, kifordul önmagából és Nelson papagáját a kalickán keresztül késsel döfködi, majd a szerencsétlen madarat a kés hegyére tűzi.

Cora Ruska a barátnőjéhez tör be delíriumos állapotban, ahol meglátja és agyonlövi barátnője és ellenfele, Myra Evans agóramacsáját, Garfield-ot.

Nem kérdés, hogy mindhárom személy állatkínzás bűncselekményét követi el. Az állatkínzás minősített esetének fennállása⁴⁷ is felmerülhet: a madarat az elkövető késsel döfközte, majd kés hegyére tűzte, Garfield-ról csak annyit tudunk, hogy a lövés után „a macska véres gombolyagja félrehengeredett”⁴⁸ Fogdmeg ugyanakkor a szúrás pillanatában azonnal elpusztult a seriff által beszerzett szakvélemény szerint „mivel a dugóhúzó a kutya szívébe hatolt, s meg is döglött nyomban, kimúlását záros időhatáron belül teheti.”⁴⁹

A tanulmány megírásakor Dr. Deim Zoltán PhD. igazságügyi szakértő szakvéleményét kértem azzal kapcsolatosan, hogy Fogdmeg esetében megállapítható-e az állatkínzás minősített esete. A szakértő megerősítette, hogy a dugóhúzóval okozott szúrás következtében kialakuló szívtamponád gyorsan bekövetkező halált eredményezett, amelyhez az eszméletvesztés is viszonylag gyorsan társult, ⁵⁰ ugyanakkor az állat a halála előtt jelentős szenvedést élt át.⁵¹ Az

⁴⁷ A Btk. 244. § (1) bek. a) pontja alapján „aki gerinces állatot indokolatlanul oly módon bántalmaz, vagy gerinces állattal szemben indokolatlanul olyan bánásmódot alkalmaz, amely alkalmas arra, hogy annak maradandó egészségkárosodását vagy pusztulását okozza, vétség miatt két évig terjedő szabadságvesztéssel büntetendő.” A (2) bek. a) pontja szerint „a büntetés büntett miatt három évig terjedő szabadságvesztés, ha az állatkínzást az állat különös szenvedését okozza, követik el.”

⁴⁸ KING, S.: i. m. 640.

⁴⁹ KING, S.: i. m. 425.

⁵⁰ A szívtamponád során a perikardiális térben felgyülemelő vér növekvő nyomást gyakorol a szívre, ami meggátolja a szív megfelelő működését, és drámai mértékben csökkenti a keringés hatékonyságát. Ez az oxigénhiányhoz vezet a szervezetben, különösen az agyban, ami az eszméletvesztés gyors bekövetkezését eredményezi. A szívtamponád kialakulása után az agy oxigénellátása rendkívül gyorsan csökken, mivel a vérnyomás hirtelen zuhan le, és az agy nem kap elegendő vért és oxigént. Az agy hypoxiás (oxigénhiányos) állapota miatt az állat rövid időn belül elveszíti az eszméletét. Ez a folyamat néhány másodperctől akár egy percre is tarthat, attól függően, hogy mennyi ideig képes a szervezet kompenzálni a keringési elégtelenséget. Az eszméletvesztés azonban nem akadályozza meg a fájdalom és a szenvedés rövid ideig történő átélését, hiszen az oxigénhiányt megelőzően az állat hirtelen gyengeséget, erős fájdalmat és légszomjat érezhetett.

állat különös szenvedéséről akkor beszélhetnénk, ha az állat hosszabb ideig agonizált volna vagy öntudatánál maradt volna, mielőtt a halál bekövetkezik. Ez abban az esetben történhetett volna meg, ha a dugóhúzó nem közvetlenül a szívet érte volna, hanem más szerveket, például a tüdőt, és ennek következtében légmell (pneumothorax) alakult volna ki.⁵² Fogdmeg esetében az eszméletvesztés gyors bekövetkezése miatt az adott esetben a különös szenvedés mértéke csökkent.

Hugh Priest ötvenegy éves fehér férfi, alkoholista, rossz körülmények között él. Neme, kora, életvitele, életkörülményei szerint pontosan besorolható abba a társadalmi kategóriába, amelyhez hazánkban az állatkínzás elkövetése leginkább kötődik. Magyarországon az állatkínzók főként felnőtt férfiak, akik az elmaradottabb, jelentős anyagi, szociális problémákkal küzdő térségekből kerülnek ki. Ezeken a területeken pedig az állatkínzás mellett a más erőszakos bűncselekmények elkövetése is markánsan jelen van. Egy a Bűnügyi Statisztikai Rendszer (BSR) 2022. szeptember 26-án elérhető, 2018 második félévétől kezdődően az egy ügyszámon belül indított összes nyomozás esetszámát tartalmazó, állatkínzással kapcsolatos statisztikai adatai alapján végzett kutatás szerint hazánkban 1571 regisztrált állatkínzásos eset történt, amelyekből 1175-öt – a bűncselekmények 74,8 százalékát – férfiak követték el. 75,3%-uk felnőtt korban (25 és 59 év között) vált elkövetővé. Az elkövetések 40,3 százaléka Borsod-Abaúj-Zemplén (15,6%) és Szabolcs-Szatmár-Bereg (24,7%) megyére koncentrálódik. Az ország legszegényebb megyéiről van szó, ahol a nem kielégítő gazdasági helyzet, oktatási színvonal, munkanélküliségi arány okozta frusztráció esetükben ösztönzőleg hat a bűnelkövetésre.⁵³

Hugh Priest esetében fontos kiemelni, hogy míg a többi vásárló birtokháborítást, illetve vagyon elleni bűncselekményt követ el, és ennek során jutnak el az állat életének kioltásához, és ha nem is sokáig, de érezhető a hezitálásuk, Hugh pontosan az állat életének kioltásának szándékával jelenik meg

⁵¹ A perikardiális térben történő vérzés miatt a szív keringési funkciója fokozatosan romlik, ami oxigénhiányt és keringési sokkot okoz. A kutya ebben az állapotban hirtelen gyengeséget, légszomjat, valamint szélsőséges fájdalmat érezhetett, amint a szív teljesítménye csökkent. Az ilyen sérülések gyakran okoznak agóniát, ami hirtelen görcsokban, remegésben és heves légzésben nyilvánul meg, mielőtt a halál bekövetkezik.

⁵² A pneumothorax akkor következik be, amikor a tüdőt levegő vagy vér tölti meg a mellhártya és a tüdő közötti térben, ami gátolja a tüdő megfelelő működését, és súlyos légszomjat okoz. Ez esetben a tüdő részleges vagy teljes összeesése miatt az állat légzése fokozatosan nehézkessé válik, és súlyos oxigénhiány lép fel, ami jelentős fizikai kényelmetlenséget és szenvedést okoz. Az oxigénhiányos állapot hosszabb ideig fennmaradhat, amíg a keringési rendszer össze nem omlik. Ilyen esetben az állat agóniája tovább tarthat, és a halál bekövetkezte előtt hosszabb ideig tudatánál maradhat, ami fokozott fájdalommal és szenvedéssel járna.

⁵³ MÉSZÁROS LILLA: Az állatkínzás és a személy elleni erőszakos bűncselekmények elkövetésének kriminológiai összefüggései <https://ugyeszeklapja.hu/?p=4153> (letöltés dátuma: 2024. 09. 21.)

Nettie Cobb házánál. Akkor sincs benne hezitálás, amikor később kioltja Henry Beaufort kocsmáros életét.

Frank Jewett, az iskolaigazgató életkörülményei, megbecsültsége jóval kedvezőbb, mint Priest-té, azonban itt is tettenérhető, ahogyan az állatkínzás más devianciával párosul, figyelemmel a gyerekek iránti szexuális vonzalmára.

Cora Rusk nemcsak azért tűnik ki a két férfi közül, mert ő az egyetlen nő a sorban, hanem mert az életében nincsenek sötét titkok, egy jólszituált családanya, aki folyamatosan verseng barátnőjével, Myra Evans-szel.

Az elkövetők büntethetőségét, illetve a cselekmény büntetendőségét kizárja vagy korlátozza a kóros elmeállapot. Jelenthet-e kóros elmeállapotot az, hogy a Gaunt-tól vásárolt tárgyak megbűvölték az elkövetőket?⁵⁴ Álláspontom szerint nem, figyelemmel arra, hogy Hugh Priest pontosan azzal a szándékkal jelenik meg Nettie-nél, hogy a kutyát kivégezze, Frank Jewett-et és Cora Rusk-ot a bosszú hajtja, és ennek része az állat megölése. Hogy egyébként más okból hivatkozható-e a kóros elmeállapot, nos ez a kérdés megválaszolása már szakértő bevonását igényli. Az eredményre megállapítható, hogy Hugh Priest hidegvérrel végzi ki a kutyát, Frank Jewett és Cora Rusk pedig felindult állapotban követik el tettüket.

Bár Hugh Priest az állatkínzók típusalakjának megtestesítője, az állatkínzás elkövetésével mindhárman átlépik azt a határt, amely mérőföldő az életellenes bűncselekmények felé vezető úton, és végül mindhárman gyilkossá válnak: így teljesül a szakirodalom azon alapvetése is, hogy az állat és az ember elleni erőszak összekapcsolódik.⁵⁵

5. Zárszó

Caveat emptor.

Akik nem ismerik Stephen King írásait, vagy csak a megfilmesített történeteit látták, hajlamosak azt gondolni, hogy történetei öncélú vérengzések. Hatalmas tévedés ez a részükről. Egyrészt King nemcsak a horror műfajában alkotott nagyot, másrészt minden egyes történetében, a horrorokban is tettenérhető humánuma és állatszeretete. Egy állat elpusztítása minden könyvében sokkoló esemény, drámai határátlépés az emberek elleni erőszakhoz, az emberi élet kioltásához vezető úton. Hugh Priest alakja megfelel az állatkínzást elkövető személyek profiljának, Castle Rock lakóit ugyanazok a vágyak, motivációk vezetik,

⁵⁴ A Btk. 15. § b) pontja alapján „az elkövető büntethetőségét, illetve a cselekmény büntetendőségét kizárja vagy korlátozza a kóros elmeállapot.” A Btk. 17. § (1) bek. szerint „nem büntethető, aki a büntetendő cselekményt az elmeműködés olyan kóros állapotában követi el, amely képtelenné teszi cselekménye következményeinek a felismerésére, vagy arra, hogy a felismerésnek megfelelően cselekedjen.” A (2) bek. szerint „a büntetés korlátlanul enyhíthető, ha az elmeműködés kóros állapota az elkövetőt korlátozza a bűncselekmény következményeinek a felismerésében, vagy abban, hogy a felismerésnek megfelelően cselekedjen.”

⁵⁵ VETTER SZ.: Állatvédelmi jog, Budapest, L'Harmattan, 2024. 175.

mint körülöttünk mindenkit, vitáik, konfliktusai ugyanazon az élethelyzetek, amelyekkel a jegyző, mint birtokvédelmi egyben állatvédelmi hatóság, illetve a polgármesteri hivatalban dolgozó szakemberek napi rendszerességgel találkoznak.

A kérdés tehát nem az, hogy van-e valóságalapja a tanulmány tárgyát képező, az együttéléssel együttjáró feszültségeknek, a jogsértésekbe fulladó konfliktusos helyzeteknek, hanem az, hogy mit tehetünk annak érdekében, hogy ezen helyzeteket hatékonyan kezeljük és ne üljünk puskaporos hordón. Nap mint nap találkozom azzal az attitűddel a lakosok részéről, hogy szívesen fordulnak ügyes-bajos dolgaikkal a „Tanácshoz”, és határozottan érezhető a részükről az elvárás, hogy a hivatalnokok oldják meg a gondjaikat és szolgáltatassanak igazságot nekik. Ez az elvárás sokszor túllépi a hatáskörök által meghatározott lehetőségeket és az ügyfél csalódottan távozik, a konfliktusai pedig külső segítség nélkül elmérgesednek. Fontos, hogy a hivatalban dolgozó szakember ismerje az egyes konfliktusok lehetséges megoldási módjait és megfelelő módon tájékoztassa erről a panaszost. Fontos, hogy a társadalom tagjai ne viseljenek szemellenzőt és nyitottak és bátrak legyenek szembenézni a konfliktushelyzetekkel.

Felhasznált irodalom:

KING, S.: *Hasznos holmik*, Budapest, Európa, 2005., ford.: Bartos Tibor

A jegyző előtt indított birtokvédelmi ügyek bírósági gyakorlata tárgykörre felállított joggyakorlat-elemző csoport 2017.El.II.JGY.P.2. sz. összefoglaló vélemény, https://kuria-birosag.hu/sites/default/files/joggyak/joggyak_osszefoglalo_2018_dr._orosz_arpad.pdf, (letöltés dátuma: 2024. 09. 14.)

FERENCZI A. : A konfliktus, ami összeköt, A mediáció mint a bizalomépítés eszköze, <https://pea.lib.pte.hu/bitstream/handle/pea/15365/ferenczi-andrea-terezis-hun-2011.pdf?sequence> (letöltés dátuma: 2024.09.27.)

MAZZAG J.: *A perlekedési téboly anyagi és eljárási kérdése*, https://birosag.hu/sites/default/files/2024-08/mailath_2023_nyertes_dolgozatok.pdf#page=36 (letöltés dátuma: 2024. 09. 21.)

MÉHES T.: Közjog a magánjogban, birtokvédelem jegyzői szemmel, in *Opuscula Civilia 2016-2017.* (szerk.: Auer Á. – Dul J.) https://antk.uni-nke.hu/document/akk-uni-nke-hu/Opuscula_Civilia_2016_2017.pdf#page=15, letöltés ideje: 2024. 09. 17.

MÉSZÁROS L.: *Az állatkínzás és a személy elleni erőszakos bűncselekmények elkövetésének kriminológiai összefüggései* <https://ugyeszeklapja.hu/?p=4153> (letöltés dátuma: 2024. 09. 21.)

NAGY CS.: *A kutyaugatás okozta konfliktus megoldási lehetőségei a jegyző előtti, a mediációs és a bírósági eljárásban* <https://www.jogiforum.hu/publikacio/2024/04/18/a-zavaro-kutyaugatas-okozta-konfliktus-megoldasi-lehetosegei/> (letöltés dátuma: 2024. 09. 21.)

SERÁK I.: A szükségtelen zavarás néhány fogalmi kérdése, *Magyar Jog*, 2009/10.

SERÁK I.: *Magyarázat a szomszédjogokról* (Budapest, Wolters Kluwer Hungary, 2020.)

VARGA N.: *A vétőképtelen személy károkozásáért való felelősség*, *Debreceni Jogi Műhely*, 2015/3-4.

VETTER SZ.: *Állatvédelmi jog*, Budapest, L'Harmattan., 2024.

Nagy Csilla

Szomszédkonfliktusok az irodalomban: Kisvárosi szomszédkonfliktusok és lehetséges megoldásaik
Stephen King: Hasznos Holmik c. művén keresztül

OSHAN BAYAN**Features of Constitutional Court of Turkey*

Abstract: This article examines the role of the Constitutional Court of Turkey in safeguarding fundamental rights and freedoms, focusing on its interpretations of secularism, political party restrictions, and gender equality. It analyzes key decisions, including the headscarf ban, party dissolutions, and human rights limitations. The study also explores the Court's evolving stance in response to political pressures and international legal obligations, highlighting its complex position between state authority and individual rights.

Keywords: Constitutional Court of Turkey, secularism, political parties, human rights, gender equality, judicial independence.

1. Introduction

The issue of protecting fundamental rights and freedoms is a key element of the constitutional structure of a modern state. The Constitutional Court of Turkey plays a central role in interpreting and applying the norms regulating human rights, especially in the context of the country's integration into the international human rights system. The formation of the modern concept of rights and freedoms in Turkey has been a difficult path, reflecting the peculiarities of the political and legal evolution of the country. After the military coup of 1960, the Constitution of 1961¹ for the first time enshrined a wide range of rights and freedoms, proclaiming Turkey a republic based on the principles of the rule of law and the protection of human rights. However, two decades later, as a result of a new coup in 1980, the Constitution of 1982² was adopted, which changed the balance between individual rights and the authority of the state. The new constitutional order prioritized the preservation of state integrity and stability, which was expressed in strengthening the role of the executive branch and limiting some rights and freedoms. Although the 1982 Constitution also declared Turkey a state that respects human rights, it set a stricter framework for their implementation,

* Bayan Oshan, PhD student, Karoli Gaspar Reformed University, Faculty of Law, supervisor: Prof. Dr. habil. Tóth J. Zoltán.

¹ TURKISH CONSTITUTION (1961): The 1961 Constitution of Turkey provided a more expansive recognition of rights and freedoms than previous versions. It identified Turkey as a Republic 'based on human rights' (Article 2), but also contained strict political and ideological limitations, particularly on political parties and unions

² TURKISH CONSTITUTION (1982): The 1982 Constitution, adopted after the military coup, shifted the emphasis towards state authority rather than individual freedoms, introducing broader restrictions on rights while maintaining formal democratic principles

defining them not only as privileges but also as a set of duties of the citizen to the state.

Fundamental rights and freedoms, according to the 1982 Constitution, are grouped into three main categories: individual rights and duties, social and economic rights, and political rights. This approach reflects the traditional division of rights into negative (civil and political), active (participation in government) and positive (social guarantees). However, even with this distinction, some rights, such as freedom of association or the right to work, are placed in a different context than in Western liberal democracies, which gives rise to certain legal conflicts.

Despite the formal proclamation of rights and freedoms, the 1982 Constitution simultaneously established a number of significant restrictions on their implementation. In particular, it provides for the possibility of limiting rights both by direct constitutional provisions and by laws adopted in accordance with constitutional principles. In this sense, the Turkish Constitutional Court has been given broad powers to interpret the scope of permissible restrictions, which has led to the need to take into account not only domestic legislation but also Turkey's international human rights obligations.

The influence of international law, especially the European Convention on Human Rights (ECHR) and the decisions of the European Court of Human Rights (ECtHR), has become an important factor in the work of the Turkish Constitutional Court. Although Turkey has been a party to the ECHR since 1954, the implementation of international standards in the national legal system has been gradual. An important step was the amendment of Article 90 of the Constitution in 2004, according to which international treaties on human rights were given priority over national legislation. However, this did not mean full acceptance of the principles of the European Court, since the Turkish Constitutional Court retained the right to independently interpret constitutional norms.³

This article examines the constitutional and legal framework for the protection of fundamental rights and freedoms in Turkey, as well as the evolution of the approaches of the Constitutional Court in this area. Particular attention is paid to the analysis of the court's decisions on the most controversial issues, such as gender equality, freedom of political parties, social rights and restrictions under the state of emergency. The influence of international legal standards on national legislation and judicial practice is considered, and existing contradictions between constitutional norms and Turkey's international obligations are identified.

The 1982 Constitution of Turkey enshrined a broad range of fundamental rights and freedoms, while significantly changing their content and protection mechanism compared to the 1961 Constitution. The main emphasis in the new

³ ÖZBUDUN, E.: Democratization Reforms in Turkey, 1993–2004. *Turkish Studies*, 2007, 8(2): 179–196

constitutional system was not on the unconditional provision of human rights, but on their correlation with the principle of state integrity and the supremacy of power. As a result, constitutional guarantees were limited by a system of broad exceptions and conditions within which the state can narrow the scope of rights and freedoms based on considerations of security, public order and national unity.⁴

The 1982 Constitution classifies rights and freedoms into three main categories:

- Individual rights and obligations – classic civil rights, including the right to life (Article 17), the right to personal liberty and security (Article 19), the inviolability of the home (Article 21), freedom of expression (Article 26), etc.
- Social and economic rights and obligations – the right to work (Article 49), the right to social security (Article 60), the right to health care (Article 56), etc.
- Political rights and obligations – the right to participate in government (Article 67), freedom of association (Article 33), freedom of political parties (Article 68), etc.

However, the constitutional formulations of rights and freedoms are accompanied by a number of reservations and restrictive mechanisms. The central element of the restrictions is Article 13, which establishes the principles of permissible state interference in the implementation of human rights.

The original wording of Article 13 of the 1982 Constitution provided that all rights and freedoms could be restricted in order to protect:⁵

- the integrity of the state with its territory and nation;
- national sovereignty;
- the Republic and its democratic foundations;
- national security, public order and interests;
- public health and morals.

Thus, restrictions on human rights were allowed in any potential conflict with state interests. In 2001, Article 13 was revised as part of the reforms related to Turkey's European integration. The new version stipulates that restrictions must:

- have a legal basis (only by law);
- not affect the essence of the right;

⁴ GÖNENÇ, L.: The 2001 amendments to the 1982 constitution of Turkey. *Ankara Law Review*, 2004, 1(1): 89–109

⁵ Article 13 (as amended in 2001) – Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the Constitution, without infringing upon their essence. *TURKISH CONSTITUTION*, 1982

- be proportionate;
- meet the requirements of a democratic society.

Nevertheless, even after this reform, the Turkish Constitutional Court continues to interpret the concept of "democratic order" through the prism of national characteristics, rather than the standards of the European Court of Human Rights (ECtHR).

Restrictions in a State of Emergency: Article 15

Article 15 of the Turkish Constitution provides for the possibility of suspension or complete restriction of fundamental rights and freedoms in times of war, mobilization, martial law or a state of emergency. In such situations, it is permissible to introduce norms that deviate from constitutional guarantees, provided that three conditions are met:

- Compliance with Turkey's international obligations. This is especially important since Turkey is a party to the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).
- The principle of necessity - the measures must be necessary and proportionate to the situation.
- The presence of an "inviolable core of rights" - even in a state of emergency, torture, the death penalty without trial, arbitrary arrests and persecution for beliefs are not permitted (Article 15 of the Constitution).

However, the 1982 Constitution also introduces an exception that allows certain decisions of the President, the Supreme Military Council, and the Supreme Council of Judges and Prosecutors (Articles 125, 148), as well as decrees issued during a state of emergency (Article 91), not to be subject to judicial review. This significantly limits the possibilities of legal protection during crises.⁶

Article 14 of the Constitution prohibits the use of constitutional rights and freedoms for the purpose of:

- undermining the territorial integrity of the country;
- destroying the democratic and secular nature of the state;
- promoting ideas incompatible with the principles of the Constitution.

In fact, this article functions as an "anti-constitutional filter", allowing the state to apply repressive measures against the political opposition and civil society.

Interestingly, Article 14 has almost identical content to Article 17 of the European Convention on Human Rights, but the ECtHR uses it extremely rarely

⁶ GÖNENÇ, L.: The 2001 amendments to the 1982 constitution of Turkey. Ankara Law Review, 2004, 1(1): 89–109

and in exceptional cases, while the Turkish Constitutional Court interprets it broadly, using it to legitimize strict restrictive measures.

One of the most important steps towards Turkey's rapprochement with international human rights standards was the amendment of Article 90 of the Constitution in 2004. According to the new version, in the event of a conflict between the provisions of international human rights treaties (ratified by Turkey) and national laws, priority should be given to international law.⁷

However, even after this decision, serious problems with the application of international norms remain. The Turkish Constitutional Court often ignores ECtHR decisions or interprets them in a way that preserves national sovereignty in the field of human rights protection.

The human rights protection system in Turkey is based on a combination of national and international mechanisms. The main instruments are the judicial system, specialized state bodies and international treaties that Turkey has committed to comply with. However, despite the formal existence of these mechanisms, the practice of their application is often criticized by both domestic human rights organizations and the international community.

One of the features of the Turkish system is the existence of several extra-judicial bodies that deal with citizens' complaints about violations of their rights. These institutions include:

The Petitions Committee (Dilekçe Komisyonu) - considers citizens' appeals on administrative violations. However, its decisions are not binding and are most often advisory in nature.

The Human Rights Investigation Committee (İnsan Haklarını İnceleme Komisyonu) was established in 1990 to monitor human rights in the country, but it does not have any real independence, since its members are appointed by parliament and the majority of its members belong to the ruling party.

The Committee on Equal Opportunities for Men and Women (Kadın-Erkek Fırsat Eşitliği Komisyonu) was established in 2009 and investigates cases of gender discrimination, but it also has limited powers.

The effectiveness of these bodies is extremely low, since they are not independent and cannot make binding decisions. Their work is largely limited to preparing reports and recommendations.

In 2012, the Human Rights Institute of Turkey (Türkiye İnsan Hakları Kurumu) was also established, the main task of which is to monitor the human rights situation. However, this organization operates under government control and does not meet the independence requirements set by the UN Paris Principles for national human rights institutions.

⁷ ASLAN, Z.: Conflicting paradigms: Political rights in the Turkish Constitutional Court. *Critical Middle Eastern Studies*, 2002, 11: 9–25

Additionally, in 2012, the institution of the Ombudsman (Kamu Denetçiliği Kurumu) was introduced in Turkey. The Ombudsman is elected by parliament and is authorized to consider citizens' complaints against government bodies. However, his decisions are also not binding, and the appointment process makes him dependent on the ruling party.

Thus, the existing extra-judicial system for the protection of human rights in Turkey is formally developed, but in fact ineffective.

Unlike extra-judicial mechanisms, the judicial system provides more opportunities for the protection of citizens' rights, although there are significant problems here too. The main judicial bodies are:

- The Constitutional Court of Turkey (Anayasa Mahkemesi, TCC) is the highest constitutional review body authorized to consider issues of the constitutionality of laws and protect the fundamental rights of citizens.
- Administrative Courts (İdare Mahkemeleri) – hear complaints against government bodies, including decisions to ban assemblies, deportations and violations of electoral rights.
- European Court of Human Rights (ECtHR) – Turkey accepted its jurisdiction in 1989, and citizens can lodge complaints about human rights violations after exhausting domestic remedies.

The Constitutional Court of Turkey plays a key role in protecting fundamental rights and freedoms. In 2010, an individual complaint procedure (Bireysel Başvuru) was introduced, allowing citizens to directly appeal to the Constitutional Court if they believe that their rights enshrined in the Constitution and the European Convention on Human Rights have been violated by government bodies. However, despite the introduction of this mechanism, the practice of considering complaints by the Constitutional Court remains inconsistent. The Court often bases its decisions on national political realities rather than international standards, which leads to controversial decisions. For example: in 2014, the court ruled that a government ban on Twitter in response to criticism from the opposition was unconstitutional (TCC 2014, 2014/4705). In 2016, the court rejected complaints from journalists arrested for publications critical of the government, despite the clear violation of freedom of speech (TCC 2016, 2016/6604).

Turkey is a party to a number of international human rights treaties, including:

- The European Convention on Human Rights (ECHR) – ratified in 1954, the jurisdiction of the ECtHR was recognized in 1989.⁸
- The International Covenant on Civil and Political Rights (ICCPR) – ratified in 2003.

⁸ European Court of Human Rights (ECtHR): Case of Soering v. United Kingdom, 1989

- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – ratified in 1985. Convention against Torture (UNCAT) – ratified in 1988.

In 2004, an important amendment was made to Article 90 of the Constitution, according to which in the event of a conflict between international human rights treaties and national legislation, gives priority to international norms. This meant that the decisions of the European Court had to be taken into account in national courts.⁹

Despite formally recognizing the primacy of international law, Turkey often ignores ECtHR decisions. For example:

- In 2018, the European Court demanded the release of Kurdish politician Selahattin Demirtaş, but Turkish courts refused to implement this decision (ECtHR 2018, *Demirtaş v. Turkey*).
- In 2019, the ECtHR ordered the release of businessman and human rights activist Osman Kavala, but Turkish authorities kept him in custody (ECtHR 2019, *Kavala v. Turkey*).

These cases demonstrate the existing contradictions between Turkey's international obligations and their implementation practice.

Thus, Turkey has a formally developed human rights protection system, including both national and international mechanisms. However, in practice, these mechanisms are weak due to the lack of independence of the judiciary, political pressure on human rights institutions, and a selective approach to the implementation of international obligations. The Constitutional Court of Turkey remains a key body for the protection of fundamental rights, but its decisions are often dependent on the political situation. The influence of the European Court of Human Rights is formally recognized, but in practice remains limited due to the discrepancy between international and national legal standards.

The Constitutional Court of Turkey (*Anayasa Mahkemesi*) is the central body in the system of protection of fundamental rights and freedoms. It was established in 1961 within the framework of the Constitution of the same year and continued to function after the adoption of the 1982 Constitution, retaining broad powers to monitor the compliance of laws, state acts and decisions of government bodies with the Constitution of Turkey.

Unlike administrative and criminal courts, the Constitutional Court considers issues of constitutionality and legality of restrictions on human rights within the framework of the highest judicial authority. Given its powers and mechanisms of work, the role of the CC in the formation of the legal system of Turkey remains key, but its decisions are often criticized for inconsistency and political motivation.

⁹ GÖNENÇ, L. - ESEN, S.: The problem of less protective international agreements in domestic legal systems: Article 90 of the Turkish Constitution. *European Journal of Law Reform*, 2006, 8(4): 490–497

According to the 1982 Constitution of Turkey, the Constitutional Court has the following main functions:

- Control over the constitutionality of laws and presidential decrees (Article 148). The Constitutional Court has the right to consider the compliance of normative acts with the Constitution upon appeals from opposition parties, members of parliament, the president or government structures.
- Review of individual complaints on violations of fundamental rights and freedoms (Article 148, amended in 2010). Citizens may appeal to the Constitutional Court if their rights guaranteed by the Constitution and the European Convention on Human Rights (ECHR) have been violated by government bodies.
- Review of cases on the dissolution of political parties (Article 69). In the event of a violation of constitutional principles, such as secularism or the territorial integrity of the country, the Constitutional Court may decide to close a political party.
- Control over the decisions of the parliamentary commission on the impeachment of the president and senior officials (Article 105).
- Review of disputes on competence between government bodies.

Thus, the Constitutional Court not only protects fundamental rights, but is also an important instrument of political power, which is especially noticeable in cases on the dissolution of parties and the restriction of political freedoms.

Although the Turkish Constitutional Court formally follows international standards for the protection of human rights, its practice has changed significantly depending on the political situation.

Period of Severe Restrictions (1982–2000)

In the first decades after the adoption of the 1982 Constitution, the Constitutional Court took a conservative approach, restricting rights and freedoms in the interests of protecting the state system.

Most of the cases during this period concerned the banning of political parties, especially those representing the Kurdish movement or Islamist forces (TCC 1991/1, 1993/2, 1994/2).

The Constitutional Court upheld restrictions on freedom of speech and association, citing the need to protect national security and territorial integrity.

Period of Moderate Reforms (2001–2016)

Following the adoption of constitutional reforms in 2001 and 2004 aimed at harmonizing Turkish legislation with the requirements of the European Union, the Constitutional Court began to apply the ECHR more frequently (TCC 2008/1, TCC 2010/119).¹⁰

¹⁰ TCC Decision: E. 2008/1, K. 2008/2, annulment of the constitutional amendments that aimed to lift the headscarf ban

In 2010, the individual complaints procedure was introduced, allowing citizens to directly appeal to the Constitutional Court if their rights were violated.

During this period, the Constitutional Court issued several important decisions in favor of freedom of speech and political rights, including lifting the ban on access to social media (TCC 2014/4705).

The period of new restrictions (2016 – present)

Following the attempted coup in 2016 and the introduction of a state of emergency, the Constitutional Court again began to issue tougher decisions, justifying the expansion of state powers by the fight against terrorism.

During this period, the Constitutional Court upheld the legality of mass dismissals of civil servants and the arrests of journalists and activists (TCC 2016/6604, 2017/2163).

Thus, the approach of the Constitutional Court to human rights remains flexible and largely depends on the political situation.

Key areas of human rights protection by the Constitutional Court

2. Gender equality

The issue of protecting women's rights and ensuring gender equality in Turkey has remained at the center of political and legal debates in recent decades. The 1982 Constitution formally enshrined the principle of equality of all citizens before the law, but its provisions did not provide for special mechanisms to protect women from discrimination. In this regard, the constitutional reforms of 2004 and 2010 were an important step towards strengthening gender equality, but their implementation in judicial practice, in particular in the decisions of the Constitutional Court, was ambiguous.

The 2004 constitutional amendments to Article 10 of the Turkish Constitution established that "men and women have equal rights" and the state is responsible for ensuring this equality in practice. This represented a departure from the previous formal approach, according to which equality was recognized, but the state had no obligation to actively ensure it. In 2010, additional provisions were added to the same article, according to which "the state is obliged to take all necessary measures to eliminate inequalities arising between women and men." This move effectively gave government agencies a mandate to implement positive discrimination measures in favor of women, which was seen as a significant step towards compliance with international human rights standards.

Despite these legislative changes, the Constitutional Court's practice in cases related to gender equality remains mixed. In a number of cases, the Court has issued decisions that affirmed the need to protect women's rights and eliminated discriminatory legal provisions. For example, in the 1990s, the Constitutional Court declared unconstitutional provisions of the Civil Code that restricted the

right of married women to work without their husband's consent. In later decisions, the Court supported legislative initiatives aimed at combating violence against women and expanding their rights in the areas of inheritance and property.¹¹

However, in other cases, the Constitutional Court has taken a more conservative position, especially when it comes to traditional family values. For example, in a case concerning the right of women to keep their maiden name after marriage, the court ruled in 2011 that the requirement to change one's surname was not unconstitutional and not discriminatory. This decision contradicted the practice of the European Court of Human Rights, which had previously found similar norms to be discriminatory in the case of *Ünal Tekeli v. Turkey* (2004).¹²

Another controversial issue is the influence of religious norms on the legal regulation of women's rights. The Constitutional Court has long supported the ban on wearing headscarves in universities and public institutions, considering them a symbol of the Islamization of society. However, in 2013, following a change in the political climate and active support for women's rights to religious expression by the government, the court effectively approved the lifting of this ban, which gave rise to debate about the consistency of its approach.¹³

Thus, despite constitutional reforms aimed at protecting gender equality, the practice of the Turkish Constitutional Court demonstrates a combination of progressive and conservative tendencies. Women's rights remain a subject of legal and political debate, and despite some achievements, Turkey continues to face challenges in achieving substantive gender equality.

3. Freedom of political parties

Turkey's political system is characterized by strict restrictions on the activities of political parties, particularly in the constitutional and judicial practice related to their dissolution. The 1982 Constitution set strict conditions for the functioning of parties, requiring them to comply with the principles of territorial integrity, national unity, democracy and secularism. These restrictions have led to the Constitutional Court repeatedly ruling to ban parties whose activities were deemed incompatible with constitutional principles.

According to Articles 68 and 69 of the Turkish Constitution, parties can be closed if their activities are directed against "the independence of the state, the unity of the nation, democratic principles or secularism." This broad wording allowed the Constitutional Court to order the dissolution of parties even if their programs did not explicitly call for violent change of the state system.

¹¹ ÖDEN, M.: *Türk Anayasa Hukukunda Eşitlik İlkesi*. Ankara: Yetkin Yayınları, 2003

¹² European Court of Human Rights: *Ünal Tekeli v. Turkey*, 2004

¹³ European Court of Human Rights: *Leventoğlu Abdülkadiroğlu v. Turkey*, 2013

The most famous cases of party bans include decisions to dissolve Kurdish and Islamist political movements. In 1993, the Constitutional Court banned the Democratic Party, accusing it of supporting separatism, and in 1998 it dissolved the Welfare Party, the largest Islamist party at the time, citing its threat to the secular state system.¹⁴

Particularly harsh measures were applied to Kurdish parties, whose activities often were interpreted as a threat to the territorial integrity of the country. In 2009, the Constitutional Court banned the Democratic People's Party (DTP), accusing it of having links to the Kurdistan Workers' Party (PKK), despite the fact that the DTP did not officially support the armed struggle. This decision was criticized by international organizations, including the European Court of Human Rights, which later found the ban unlawful.

However, in recent years, there has been a certain evolution in the Constitutional Court's approach to banning parties. In 2008, the court considered a case on the dissolution of the ruling Justice and Development Party (AKP), which was accused of deviating from the principle of secularism. Despite the seriousness of the accusations, the court did not ban the party, limiting itself to financial sanctions. This indicated a gradual move away from the practice of completely dissolving parties and towards more lenient forms of sanctions.

Nevertheless, political pressure on opposition parties remains. In 2021, the trial to ban the Peoples' Democratic Party (HDP), the largest pro-Kurdish party, began, once again calling into question the extent of the Constitutional Court's political independence. The HDP case will be an important indicator of the extent to which the court maintains its role as a neutral arbiter of freedom of political association.

Overall, an analysis of the case law shows that the Turkish Constitutional Court has used the banning of parties as an instrument of political control, especially with regard to Kurdish and Islamist movements. Although there has been a softening of the approach in recent years, the practice remains controversial and the risk of dissolution of opposition parties remains high.

4. Social Rights

Despite the constitutional enshrinement of the right to work and social security (Articles 49, 60), the Constitutional Court has repeatedly supported policies aimed at weakening trade union rights. For example, in 2009, it upheld the legality of restrictions on the right to strike in a number of sectors (TCC 2009/113).

¹⁴ KOGACIOĞLU, D.: Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of Political Domain. *International Sociology*, 2003, 18: 258–276

Social rights also occupy a special place in Turkish constitutional jurisprudence. The 1982 Constitution proclaims the principles of a welfare state, including the right to work, social protection and access to health care. However, in practice, the court has often supported state reforms aimed at reducing social guarantees, justifying this by economic necessity. An example is its decision to recognize as constitutional laws restricting the rights of trade unions and reducing public spending on health care. This approach demonstrates that the Turkish Constitutional Court more often sides with the state than with citizens in matters of social policy. An analysis of the activities of the Turkish Constitutional Court shows that, despite its formal role in protecting human rights, in practice it often acts in the interests of state power, justifying restrictions on rights and freedoms by referring to national priorities. This is especially noticeable in matters of freedom of speech, the rights of political parties and emergency measures. Although in some cases the court has issued decisions aimed at protecting civil liberties, the overall trend is one of conservative and state-centric approach. International law and decisions of the European Court of Human Rights have an influence on the activities of the court, but it remains limited, and in cases of conflict between national and international norms, priority is usually given to domestic legislation. This creates a complex and contradictory picture of constitutional review in Turkey, where formal guarantees of human rights often give way to political and state interests.

5. Emergency Measures and Human Rights

Following the 2016 coup attempt, the Constitutional Court upheld emergency decrees that allowed mass dismissals and arrests as constitutional. In its 2017–2018 decisions, it ruled that restrictions on human rights may be interpreted more broadly in the context of a threat to national security (TCC 2017/2163).

The Constitutional Court of Turkey plays a key role in protecting fundamental rights, but its decisions are often political in nature. Despite the incorporation of international standards, the Court maintains the primacy of national legislation, which is particularly noticeable in cases concerning political freedoms and emergency measures. The evolution of Constitutional Court decisions demonstrates a gradual expansion of the scope of human rights protection in the 2000s, but in recent years there has been a reverse trend associated with the strengthening of authoritarian practices.

The Constitutional Court of Turkey, which occupies a central position in the protection of fundamental rights and freedoms, inevitably faces the need to interpret constitutional norms in the light of changing social, political and international realities. One of the most controversial issues in the court's law enforcement practice is the balance between individual freedoms and the interests of the state, especially in areas where complex legal and ideological conflicts arise.

Constitutional principles such as secularism, territorial integrity, democracy and the rule of law have been repeatedly tested in court cases involving issues of political freedoms, social rights and emergency measures.

The formation of judicial practice in the protection of fundamental rights and freedoms is closely linked to Turkey's international obligations. As a country that has signed and ratified the European Convention on Human Rights, Turkey is obliged to comply with the decisions of the European Court of Human Rights, but in practice these obligations are not always adequately reflected in the decisions of the Constitutional Court. The question of the relationship between international and national law is particularly acute in cases where the ECHR's decisions conflict with the political priorities of the Turkish authorities. One such example is the case of Demirtaş, a Kurdish politician arrested on charges of subversion. Despite the ECHR's decision ordering his immediate release, Turkish courts, including the Constitutional Court, refused to implement the ruling, citing national interests and ongoing domestic litigation.

When considering issues of limiting rights and freedoms in the context of emergency situations, the Turkish Constitutional Court has shown considerable flexibility in interpreting constitutional norms. Following the attempted coup in 2016, a state of emergency was declared, under which the government was able to issue decrees with the force of law without the need for parliamentary approval. These decrees led to mass dismissals of civil servants and the arrests of journalists, politicians and activists. In a context where thousands of citizens have lost their jobs and independent media have come under severe pressure, the Constitutional Court has taken a position supporting state measures, citing the need to protect national security. This approach has raised serious questions about the independence of the court and its role in protecting human rights in a context of political instability.

An equally important area in which the Turkish Constitutional Court plays a decisive role is the regulation of freedom of expression. Despite the formal recognition of freedom of speech enshrined in Article 26 of the Constitution, case law shows a significant number of cases in which the Constitutional Court has upheld the legality of restrictive measures against journalists, academics and public figures. Cases on blocking social networks, closing independent publications and arresting bloggers are often brought before the court, but in most cases it takes a conservative position, arguing that the dissemination of information that poses a threat to national security or public order can be legally restricted. In this context, the Twitter ban case of 2014 was particularly indicative, when the government blocked the social network after a series of anti-corruption investigations were published online. The Constitutional Court found the ban unconstitutional, thereby temporarily demonstrating its willingness to protect citizens' digital rights. However, subsequent decisions, such as the approval of the blocking of Wikipedia

and a number of other online resources, showed that the court's position remains inconsistent and largely determined by the political context.

The most important aspect of Turkish constitutional jurisprudence remains the relationship between state power and human rights, especially in the context of protecting democracy, territorial integrity and the rule of law. The Constitutional Court, as the highest body of constitutional review, invariably faces a dilemma: to maintain a balance between individual rights and public interests or, on the contrary, to lean towards increasing state interference in civil liberties. An analysis of its practice shows that this balance has changed depending on the political context and external factors, which has led to uneven law enforcement in different areas.

One of the most complex and controversial topics is the implementation of the principle of secularism in Turkey. The 1982 Constitution enshrined the secular nature of the state, but in practice this provision has repeatedly become the subject of political and legal debate. The Constitutional Court of Turkey considered secularism as an integral part of national identity and has repeatedly made decisions aimed at protecting this principle. In particular, in 1998 the court upheld the ban on wearing Islamic head coverings in universities and public institutions, arguing that religious symbols in public places could undermine the principle of state neutrality. However, in 2008, when the Justice and Development Party government initiated a reform to soften the ban, the court annulled the amendments, stating that the weakening of the principle of secularism threatened the constitutional order.

The Constitutional Court's approach to secularism remains strict, but at the same time demonstrates a certain flexibility depending on the political situation. In later decisions, for example concerning religious education and the right to individual religious expression, the court recognized the need to take into account international standards. However, it continues to view attempts by Islamic groups to organize politically as a threat to the constitutional order. This position was particularly evident in the case of the dissolution of the Welfare Party in 1998, when the court justified the ban on the grounds that the party's rhetoric and activities threatened the democratic and secular structure of the state. Such decisions demonstrate that in Turkey, the principle of secularism continues to be viewed not only as a legal norm, but also as an instrument of control over political life.¹⁵

On the other hand, the protection of democratic institutions has also come into question, especially with regard to freedom of assembly and protest. The 1982 Constitution recognizes the right of citizens to peaceful assembly, but at the same time grants state bodies broad powers to restrict it in the event of a threat to

¹⁵ Kogacioglu, D.: Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of Political Domain. *International Sociology*, 2003, 18: 258–276

public order. As a result, the Constitutional Court has often upheld bans on protests and demonstrations, especially if they are related to the political opposition. In 2013, when mass protests in Gezi Park in Istanbul were brutally suppressed, the Court upheld the government's actions, stating that they were in line with the principle of protecting public safety. Such decisions highlight that even recognized constitutional rights can be limited depending on the political situation.

An equally important area of practice of the Constitutional Court is the issue of the independence of the judiciary. In recent years, debates have intensified about the extent to which the court retains its autonomy from the executive branch. Following the 2017 referendum, which resulted in Turkey switching to a presidential form of government, the balance of power within the state apparatus has changed significantly. The president received the right to directly appoint judges of the Constitutional Court, which has called into question the independence of judicial review. Although the court continues to consider cases concerning human rights and constitutional freedoms, its decisions are increasingly interpreted as oriented towards supporting state policy. This is especially noticeable in cases concerning the arrests of opposition politicians and journalists, where the court, as a rule, takes the side of the prosecution.

The topic of terrorism and national security occupies a special place in constitutional law enforcement. Following the 2016 coup attempt, the Turkish government launched a massive campaign to crack down on alleged coup plotters, arresting thousands of citizens, including judges, military personnel, academics and journalists. The Constitutional Court has heard a number of cases concerning these arrests, but in most cases upheld their legality, citing the need to protect the state from domestic threats. This position by the court has led to sharp criticism from international human rights groups, which point out that the mass detentions and trials do not meet fair trial standards set by the European Convention on Human Rights.

The Constitutional Court has also heard cases related to emergency decrees adopted after 2016. It is important to note that many of these decrees had the force of law but were not debated by parliament, creating a dangerous precedent for circumventing the legislative power. The Court found most of these acts to be constitutional, effectively allowing the executive to tighten its grip on the state apparatus. This approach by the Court demonstrates that in times of crisis, national security and political stability are becoming a priority for the Court over the protection of individual rights.

Despite these trends, the Constitutional Court retains a certain role in protecting human rights, particularly in cases involving social and economic rights. In some decisions, the Court has opposed government attempts to curtail workers' rights, restrict access to health care, or cut education programs. However,

even in these cases, its positions have remained cautious and its impact on the overall legal system limited.

The issue of Turkey's international obligations also continues to be a focus of constitutional jurisprudence. Although the Constitution recognizes the primacy of international human rights treaties over national laws, the Court has often interpreted this provision selectively. For example, it refuses to automatically apply decisions of the European Court of Human Rights if it considers them contrary to national interests. This is especially noticeable in cases of political prisoners, where the Constitutional Court either ignores the rulings of European judges or finds grounds for not applying them.

Thus, an analysis of the law enforcement practice of the Constitutional Court of Turkey shows that, despite the existence of formal mechanisms for the protection of fundamental rights, the real situation remains complex. The judiciary is increasingly faced with the influence of political factors, which leads to an increase in trends aimed at restricting civil liberties in favor of strengthening state power. At the same time, international human rights standards remain secondary to national priorities, and the concept of the rule of law is undergoing a transformation towards greater dependence on the executive branch. This creates serious challenges for the future of the constitutional system of Turkey, calling into question the possibility of effective protection of human rights in the context of ongoing political instability.

6. Conclusion

An analysis of the constitutional and legal regulation of fundamental rights and freedoms in Turkey, as well as the role of the Constitutional Court in their protection, reveals a complex and largely contradictory picture. Since the adoption of the 1982 Constitution, the judicial practice of the Constitutional Court has undergone several stages of transformation, reflecting changes in the country's political landscape, Turkey's international obligations and internal challenges associated with maintaining state stability. Initially, the Constitutional Court played the role of a guarantor of strict state control, limiting political freedoms, supporting bans on party activities and confirming the priority of national security over the rights of citizens. In the 2000s, under pressure from European integration processes, Turkey took steps to liberalize law enforcement practices, which resulted in the easing of some restrictions and the introduction of an individual complaint mechanism to the Constitutional Court. However, following the attempted coup in 2016, the country returned to a policy of strict control, which was reflected in court decisions justifying mass arrests, bans on freedom of speech and assembly, and strengthening the role of the executive.

One of the most controversial issues remains the interaction of the Constitutional Court with international legal mechanisms, primarily the European

Court of Human Rights. Although the Turkish Constitution formally enshrines the priority of international human rights treaties, the practice of court decisions shows that the Constitutional Court does not always follow the obligations assumed under the European Convention on Human Rights. Ignoring the decisions of the European Court, especially in high-profile political cases such as the trials of Selahattin Demirtaş and Osman Kavala, demonstrates a selective approach to compliance with international standards and indicates Turkey's growing divergence from the European legal tradition.

Turkey's political transformation, especially after the 2017 reform, when the country switched to a presidential system of government, has also had an impact on the Constitutional Court. The change in the judicial appointment mechanism, the expansion of presidential powers, and the concentration of power in the executive branch have called into question the independence of the judiciary. The Constitutional Court, which was originally conceived as an independent arbiter, has found itself in a situation where its decisions increasingly correspond to the political priorities of the current government. This is especially evident in issues related to the restriction of the rights of the political opposition, freedom of the press, and the regulation of public protests.

Nevertheless, despite all the restrictions, the Constitutional Court continues to be a key institution in the system of protecting constitutional rights in Turkey. Its decisions, even if they are not always oriented towards the protection of individual freedoms, shape the country's legal system and set the framework for future reforms. In the context of growing international pressure, including from the European Union, the question remains whether the Constitutional Court will be forced to adjust its policies and bring its decisions closer to European standards.

The prospects for the development of judicial review of human rights in Turkey depend on several factors. Firstly, these are internal political changes, including possible reforms aimed at strengthening the independence of the judiciary. Secondly, pressure from international organisations and European institutions may force Turkey to adapt its legal system to higher standards of human rights protection. Thirdly, civil society plays an important role, which, despite the existing restrictions, continues to fight for its rights through judicial mechanisms, including the Constitutional Court and the European Court of Human Rights.

In the long term, the question remains: will the Constitutional Court of Turkey be able to restore its status as a truly independent body of constitutional review, or will it finally turn into an instrument of state policy? The answer to this question will largely determine the future of the Turkish legal system and the degree of protection of fundamental rights and freedoms in the country.

Bibliography:

Aslan, Zühtü. 2002. Conflicting paradigms: Political rights in the Turkish Constitutional Court. *Critical Middle Eastern Studies* 11: 9–25.

Batum, Süheyl. 1990. *Avrupa İnsan Hakları Sözleşmesi ve İnsan Haklarına Etkileri*. PhD Thesis, Istanbul.

Decision of the ECtHR: Case of Soering v. United Kingdom. Date of Judgement: 7 July 1989. Application no. 14038/88.

Decision of the ECtHR: Case of Ünal Tekeli v. Turkey. Date of Judgement: 16 Nov 2004. Application no. 29865/96.

Decision of the ECtHR: Case of Leventoğlu Abdülkadiroğlu v. Turkey. Date of Judgement: 28 May 2013. Application no. 7971/07.

Decision of the ECtHR: Case of Tuncer Güneş v. Turkey. Date of Judgement: 3 September 2013. Application no. 26268/08.

Decision of the ECtHR: Case of Tanbay Tüten v. Turkey. Date of Judgement: 10 December 2013. Application no. 38249/09.

Decision of the TCC: E. 1963/138, K. 1964/71. 11 December 1964. *Official Gazette*, 2 Apr 1965: 11969.

Decision of the TCC: E. 2007/1, K. 2009/4. Regarding the closure of the Democratic Society Party (DTP).

Esen, Selin. 2008. *Karşılaştırmalı Hukukta ve Türkiye’de Olağanüstü Hal Rejimi*. Ankara: Adalet Yayınevi.

Gönenç, Levent. 2004. The 2001 amendments to the 1982 Constitution of Turkey. *Ankara Law Review* 1(1): 89–109.

Gönenç, Levent, and Selin Esen. 2006. The problem of less protective international agreements in domestic legal systems: Article 90 of the Turkish Constitution. *European Journal of Law Reform* 8(4): 490–497.

Human Rights Watch. 2012. *Turkey: Reconsider Appointment to Key Rights Body*. Available online.

ILO. 2006. *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fifth (revised) edition, Geneva: International Labour Office.

Kaboğlu, İbrahim Ö. 2002. *Özgürlükler Hukuku*. Ankara: İmge Kitabevi.

Kogacioglu, Dicle. 2003. Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of Political Domain. *International Sociology* 18: 258–276.

Öden, Merih. 2003a. *Anayasa Hukukunda Siyasi Partilerin Anayasaya Aykırı Eylemleri Nedeniyle Kapatılmaları*. Ankara: Yetkin Yayınları.

Öden, Merih. 2003b. *Türk Anayasa Hukukunda Eşitlik İlkesi*. Ankara: Yetkin Yayınları.

Öden, Merih. 2009. Anayasa Mahkemesi ve Olağanüstü Hal ve Sıkıyönetim Kanun Hükmünde Kararnamelerinin Yargısal Denetimi. *AÜHF Dergisi* 58(3): 659–691.

Öden, Merih, and Selin Esen. 2013. Anayasa Mahkemesi ve Evli Kadının Soyadı. In Prof. Dr. Erdal Onar’a Armağan, 817–836. Ankara: Ankara Üniversitesi Basımevi.

Özbudun, Ergun. 2007. Democratization Reforms in Turkey, 1993–2004. *Turkish Studies* 8(2): 179–196.

Özbudun, Ergun, and Serap Yazıcı. 2004. Democratization Reforms in Turkey. Istanbul: TESEV.

Özbudun, Ergun. 2010. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights. *Democratization* 17: 125–142.

Sağlam, Fazıl. 1982. Temel Hakların Sınırlanması ve Özü. Ankara: AÜSBF Yayını.

Sabuncu, Yavuz. 2006. Anayasaya Giriş, Baskı 7. Ankara: İmaj Yayınları.

Tanör, Bülent. 1978. Anayasa Hukukunda Sosyal Haklar. İstanbul: May Yayınları

United Nations Human Rights Commission. 1992. Resolution 1992/54 of 1992, and by the UN General Assembly in Resolution 48/134 of 1993. Available online

PAPP DÓRA*

Büntetéskiszabás és a mesterséges intelligencia – különös tekintettel az enyhítő és a súlyosító körülményekre

Absztrakt: Az alábbi szövegben a mesterséges intelligencia (MI) alkalmazásának lehetőségeit, kihívásait vizsgálom az igazságszolgáltatás, azon belül is különösen a büntetéskiszabás területén. A dolgozat kiemelt figyelmet fordít az enyhítő és súlyosító körülményekre. Általános cél a minél objektívebb, tisztességesebb, egységesebb és jogbiztonságot garantáló büntetéskiszabás elérése, ennek elérésében segíthetne az MI. A szövegben összegyűjtöttem MI alkalmazása mellett és ellen szóló érveket, valamint nemzetközi kitekintést is tettem. **Kulcsszavak:** MI, büntetőjog, igazságszolgáltatás, enyhítő és súlyosító körülmények.

Abstract: In the following text, I examine the possibilities and challenges of applying artificial intelligence (AI) in the field of justice, particularly in sentencing. The paper focuses on mitigating and aggravating circumstances. The general aim is to achieve the most objective, fair, consistent, and legally secure sentencing, which AI could help achieve. In the text, I have gathered arguments both for and against the application of AI, as well as an international perspective.

Keywords: AI, criminal law, jurisdiction, mitigating and aggravating circumstances.

1. Előszó

Napjainkban nagy energiákat fordítanak a mesterséges intelligenciával, (rövidítve: MI) kapcsolatos kutatásokra.¹ Az mesterséges intelligencia kifejezés előzménye „mesterséges idegsejt” szókapcsolat volt.² Az Európai Bizottság egy 2018-as közleményében a következőt írta: „A mesterséges intelligencia már nem science fiction, hanem mindennapi életünk része. A mesterséges intelligencia valósággá vált”.³ Viszont többek között az MI ellen szóló érvek és a jog művelőinek konzervativizmusa miatt csak későn jelent meg a joggyakorlat területén az MI.⁴

*Papp Dóra, 1. évfolyam, Eötvös Loránd Tudományegyetem, ELTE Állam- és Jogtudományi Doktori Iskola, Büntetőjogi Tanszék; témavezető: Dr. habil. Ambrus István egyetemi docens.

¹ NAGY Z. A.: A mesterséges intelligencia és a jogi felelősség kérdése – 2010-2020.as évek fordulóján de lege feranda. In: MADAI S. - PALLAGI A. - POLT P. (szerk.) *Sic itur ad astra*, ünnepi kötet a 70 éves Blaskó Béla tiszteletére. Budapest: Ludovika Egyetemi Kiadó, 2020, 376.

² https://mind.ilstu.edu/curriculum/mcp_neurons/index.html (letöltés dátuma: 2024. 02. 26.)

³ <https://eur-lex.europa.eu/legal-content/HU/TEXT/HTML/?uri=CELEX%3A52018DC0237> (letöltés dátuma: 2024. 11. 12.)

⁴ BÁN C.: A mesterséges intelligencia hatása és kihívásai a joggyakorlatra. In: SOMSSICH R. (szerk.): *Ratio et mensura Studia M. Király dedicata*. Budapest: ELTE Eötvös Kiadó, 2021, 49.

Ma a digitalizáció miatt újabb és újabb kihívásokkal kell szembenéznie az emberiségnek. Az MI az utóbbi években szinte minden tudományterülethez tartozó kutató érdeklődését felkeltette. Lényegessé vált az MI jogalkalmazás során történő igénybevételenek a jogszabályi kereteknek a megalkotása is.⁵ Emellett fontos tényező a minél egységesebb és objektívebb büntetőkiszabás a jogbiztonság szempontjából.

Az utóbbi évtizedekben jelent meg a „big data” és annak egészen egyszerű hozzáférhetősége révén jóval nagyobb adatmennyiséget lehet feldolgozni. Ennek köszönhetően jobb eredményeket lehet elérni számos tudományterületen, valamint az MI rendszereket is hatékonyabban lehet „tanítani”.⁶

Az embereknek különféle elképzeléseik vannak a témáról. A jogalkotó sokszor tanácstalan a mesterséges intelligenciával szemben. Néhány ember úgy véli, hogy a jövőben az ügyvédek és a bírák helyettesíthetők lesznek az MI által.⁷

A téma aktualitását és fontosságát az is jól mutatja, hogy hazánkban a közelmúltban neveztek ki egy mesterséges intelligenciáért felelős kormánybiztost.⁸

2. Bevezetés, definíciók

Ebben a pontban először a mesterséges intelligencia, majd az enyhítő és súlyosító körülmények definícióját, csoportosítási lehetőségeiket és az MI-vel kapcsolatban felmerülő kérdéskört mutatom be, majd leírom, hogy milyen kutatási kérdésekkel foglalkozom jelen cikkben.

A 2024-ben hatályba lépő AI Act Rendelet szerint az „MI-rendszer” gépi alapú rendszer, amelyet különböző autonómiaszinteken történő működésre terveztek, és amely a bevezetését követően alkalmazkodóképességet tanúsíthat, és amely a kapott bemenetből – explicit vagy implicit célok érdekében – kikövetkezteti, miként generáljon olyan kimeneteket mint például előrejelzéseket, tartalmakat, ajánlásokat vagy döntéseket, amelyek befolyásolhatják a fizikai vagy a virtuális környezetet.⁹

Kétféleképpen definiálhatjuk a mesterséges intelligencia fogalmát. Vagy úgy, hogy külön-külön definiáljuk a mesterséges és az intelligencia fogalmakat vagy alkalmazhatjuk a normatív definíciót, mely szerint minden mesterséges intelligencia, amit a jog ekként szabályoz. Az MI-t autonóm cselekvés, valamint deep learning

⁵ AMBRUS I.: A mesterséges intelligencia és a büntetőjog. *Állam- és jogtudomány*, 2020/4, 4.

⁶ KARSAI K.: Inkriminált algoritmusok a büntető igazságszolgáltatásban. In: MADAI S. - PALLAGI A. – POLT P. (szerk.) *Sic itur ad astra* ünnepi kötet a 70 éves Blaskó Béla tiszteletére. Budapest: Ludovika Egyetemi Kiadó, 2020, 252.

⁷ SZÉKELY J. – VERESS E.: A mesterséges intelligencia és a jogalkalmazás. *Korunk*, 2020/3, 95.

⁸ https://hvg.hu/itthon/20250225_Tobb-kormanybiztost-is-kinevezett-Orban-visszatert-Palkovics-Laszlo (letöltés dátuma: 2025. 02. 27.)

⁹ <https://eur-lex.europa.eu/eli/reg/2024/1689/oj> (letöltés dátuma: 2025. 02. 11.)

jellemzi. Utóbbi olyan gépi tanulást jelent, melynek következtében „az MI alapját képező algoritmus működése során” olyan eredményt produkál, amely ember számára nem határozható meg előre.¹⁰ Az MI „gépi tanulása” alatt azt kell érteni, hogy a szoftver a belé táplált adatok alapján „tanul” és jut el különböző döntésmeghozatalokig.¹¹ Megállapítható, hogy mindenképpen át kell válogatni, majd le kell szűkíteni azon adatok körét, amelyet MI rendszerekbe táplálunk. Ezáltal juthatunk el az MI hatékonyabb döntéseihez.¹²

Megkülönböztethetünk gyenge, szűk és erős mesterséges intelligenciát. A három kategória közötti eltérést a fejlődési fázisok és a felhasználási területek jelentik. A gyenge MI figyelmének középpontjában a korlátozott feladatok és szűk tartományok szerepelnek, miközben „nagy sebességű emberi kogníciót” szimulál. A szűk MI alatt olyan rendszereket kell érteni, amelyeket egy adott feladat vagy terület esetében lehet alkalmazni, valamint módszerük a gépi és a mély tanulás (a már korábban említett deep learning). Az erős MI rendszerek tekinthetők a legfejlettebbnek a három kategória közül, mivel ezeket szinte minden területen lehet alkalmazni.¹³

Egy másik csoportosítás is ismert, mely szerint az MI-nek két típusáról beszélhetünk. Az egyik típusba tartoznak a szoftver alapú rendszerek (pl.: virtuális asszisztens), a másik típusba a fizikai robotok (pl.: drónok).¹⁴

A büntetőjogi területen az enyhítő és súlyosító körülmények (más néven büntetészkiszabási körülmények) fogalmát úgy lehet meghatározni, hogy azok a körülmények tartoznak ebbe a körbe, amelyekre a bíró tekintettel van annak eldöntésénél, hogy vaglyagos büntetési tétel esetén melyik büntetési nemet válassza, valamint a büntetési tétel alsó és felső határa között milyen konkrét büntetést szabjon ki.¹⁵ A Btk. nem sorolja fel sem tételesen, sem példálózva a súlyosító és enyhítő körülményeket, valamint nem is utal arra, hogy ezek mely jogforrásban találhatók meg. Az enyhítő és súlyosító körülményeket jelenleg az 56/2007. BK vélemény, más néven 56. számú BKv¹⁶ tartalmazza.

Számos kérdés merül fel a téma kapcsán. Mennyire megbízhatók az MI rendszerek gyártói?¹⁷ Mi a biztosíték arra, hogy a döntést vagy ítéletet nem manipulált adatok alapján hozta az MI, mi a garancia, hogy nem befolyásolták a

¹⁰ GRUND A.: Beszámoló Ambrus István habilitációs előadásairól. *Ügyészek lapja*, 2021/6, 53.

¹¹ ESZTERI D. – PÉTERFALVI A.: Amikor a gépeink tanulnak mindet, avagy a mesterséges intelligencia alapú döntéshozatal és profilozás szabályozásának európai uniós törekvéseiről. *Századvég*, 2022/1, 101.

¹² ESZTERI D. – PÉTERFALVI A.: i.m. 117.

¹³ https://pecshor.hu/periodika/XXV/Orban_Jozsef.pdf (letöltés dátuma: 2025. 02. 24.)

¹⁴ GYARAKI R.: A mesterséges intelligencia felhasználási lehetősége és fejlesztésének szükségessége a jogalkalmazásban. In: KOVÁCS Z. (szerk.) *A mesterséges intelligencia és egyéb felforgató technológiák hatásainak átfogó vizsgálata*. Budapest: Katonai Nemzetbiztonsági Szolgálat, 2003, 395.

¹⁵ DEMETER V.: A súlyosító és enyhítő körülmények a bírói gyakorlatban. *Magyar Jog*, 1965/7, 291.

¹⁶ PÁPAI-TARR Á.: Az elkövető személyiségének jelentősége a büntetészkiszabásban, különös tekintettel az előéletre. *Pro Futuro*, 2020/1, 94.

¹⁷ GYARAKI R.: i.m. 402.

döntésmeghozatalban?¹⁸ Az említett algoritmikus rendszerek által lehet-e törvényes és megfelelően egyéniesített szankciót kiszabni? Emellett megválaszolásra vár az is, hogy ezek a rendszerek milyen adatok alapján alkotnák meg az ítéletet.¹⁹ Kérdéses az is, hogy a mesterséges intelligencia „ráengedhető-e” a társadalomra, a társadalmi folyamatokra vagy szükség lenne az ezt korlátozó etikai és jogi kontrollra vagy a fejlődési irányainak meghatározására.²⁰ Az is felmerülhet, hogy ki lesz a felelős és milyen következménnyel jár az, ha az MI rossz döntést hoz például egy szoftver hiba miatt.²¹ Az MI kapcsán számos olyan más kérdés is felmerülhet (pl.: az MI büntetőjogi felelőssége), amelyeket ebben a cikkben nem fogok tárgyalni.

Kutatásomban először azt vizsgálom, hogy milyen lehetőségei vannak ma a mesterséges intelligenciának a büntetéskiszabás esetében? Ezt követően számba veszem az alkalmazása mellett és az azzal szemben álló érveket annak érdekében, hogy könnyebben tudjunk dönteni abban a kérdésben, hogy a jövőben mekkora teret engedjünk neki. Végül nemzetközi kitekintést teszek. Megvizsgálom, hogy angolszász területeken, Észtszországban és az EU-ban hogyan alkalmazzák és milyen jogszabályi szinten van kodifikálva a mesterséges intelligencia.

A kutatás során többek között szakirodalmakat és jogszabályokat tanulmányoztam, valamint internetes forrásokat olvastam.

3. A mesterséges intelligencia lehetőségei az igazságszolgáltatásban

Ebben a pontban az MI rendszerek lehetséges felhasználási lehetőségeit és módjait mutatom be.

Mindenekelőtt, első lépésként be kell tanítani az algoritmust, amely folyamatot Székely és Veress ahhoz az elsőosztályos tanulóhoz hasonlítja, aki épp a szépírást tanulja. Annál nagyobb hatékonyságot lehet elérni, minél nagyobb adattömeget, példát adunk az MI rendelkezésére.²²

Lényeges, hogy megfelelő adatokkal lássuk el a mesterséges intelligenciát. Az alternatív büntetések esetében ez azért lehet fontos, mivel például nem szabhat ki például pénzbüntetést olyan esetben, amikor a terhelt anyagi helyzete alapján nem lehet. Ez magába foglalja mind az adekvát minőségű és mennyiségű adatokat.²³ A mesterséges intelligencia rendszerei a nyomozási iratok, a nyomozó hatóság, az

¹⁸ GYARAKI R.: i.m. 403.

¹⁹ AMBRUS I.: Algoritmusok és büntetéskiszabás. *Ügyészek lapja*, 2024/3, 8.

²⁰ KARSAI K.: A mesterséges intelligencia szabályozásának európai tervezete, avagy algoritmusok térnyerésének előjelei a (büntető) igazságszolgáltatásban. *Forum Acta Juridica et Politica ünnepi kötet dr Szabó Imre egyetemi tanár 70. születésnapjára*, 2021/3, 189.

²¹ GYARAKI R.: i.m. 400.

²² SZÉKELY J. – VERESS E.: i.m. 96.

²³ AMBRUS I.: i. m. 2024, 12.

ügyesség, illetve a bíróság által elérhető bünygyi adatok, azok az adatok, amelyek kapcsán ezen szervek megkereséssel élhetnek és a jogerősen befejezett ügyekben lévő nyilvános bírósági határozatok alapján tudnának döntést hozni. Azonban a korlátozott precedensrendszer miatt a Bírósági Határozatokat is a mesterséges intelligencia rendelkezésére kell bocsátani, viszont problémát jelenthet, hogy ugyanabban a kérdésben pár év elteltével ellentétes állást foglal a Kúria.²⁴

Alapvetően az MI rendszerektől előítélet-mentességet, pontosságot, egy felelős döntéshez történő hozzájárulást, tehát a negatív emberi tényezők kiküszöbölését várjuk.²⁵ Döntéstámogatási célú igénybevétel vagy teljesen automatizált döntéshozatal közötti skálán mozog az MI alkalmazási lehetősége.²⁶ Ahogy haladunk előre az időben, egyre több terület egyre több szegmensén alkalmazzák az MI rendszerek segítségét, azonban számos akadály áll az alkalmazásukkal szemben, amelyeket a következő pontban említek meg.²⁷

4. A mesterséges intelligencia használata mellett szóló érvek

Ebben a pontban olyan érveket gyűjtöttem össze, amelyek azt támasztják alá, hogy az MI alkalmazására szükség lenne az igazságszolgáltatás tekintetében.

Az enyhítő és súlyosító körülmények esetében megállapítható, hogy a mesterséges intelligencia használatával kiküszöbölhető lehetne a túlzott bírói szubjektívizmus, így még inkább megvalósulhatna a bíróságok szervezetéről és igazgatásáról szóló 2011 évi CLXI. törvény 24. § (1) bekezdésében deklarált jogegységi igény. Az egységes és objektív ítélkezés nagyon fontos a jogbiztonság szempontjából. Maga az 56. számú BK vélemény mondja ki, hogy az Alaptörvény XV. cikk (1) bekezdése által deklarált törvény előtti egyenlőség alapelvnek az egységes ítélkezési gyakorlat felel meg. Az egységes ítélkezési gyakorlat azt is magában foglalná, hogy az enyhítő és súlyosító körülmények értékelése során ne mutakozzanak nagy és indokolatlan eltérések.²⁸

A bűncselekmény tárgyi súlyának meghatározása esetében is előfordul, hogy a jelenlegi büntetékiszabási rendszerben túlzott szubjektivitás tapasztalható. Ennek kiküszöbölését szolgálhatná az, ha felállítanának egy olyan mércét, amely „százalékos arányban javasolná súlyosabb büntetés kiszabását”, ha a gyógytartam vagy vagyon elleni bűncselekmények esetében egy adott érték az alsó értékhatarát 10-20-30 stb. százalékkal meghaladja. A felsoroltak mellett problémát okoz a fiatal felnőtt esetében a „fiatalkort néhány évvel meghaladott” személy, valamint az „általában a nyugdíjkorhatárt meghaladó életkort” kitételek a BK véleményben,

²⁴ AMBRUS I.: i.m. 2024, 8.

²⁵ GYARAKI R.: i.m. 400.

²⁶ KARSAI K.: i.m. 2021, 19.

²⁷ KARSAI K.: i.m. 2020, 251.

²⁸ <https://kuria-birosag.hu/hu/kollvel/56-bk-velemeney> (letöltés dátuma: 2025. 02. 10.)

mivel ezek alapján semmilyen konkrétumot se lehet megállapítani.²⁹ Az MI segítségével az ilyen jellegű kérdésekben objektívebbé válhatna a büntetésiszabás.

Ezen kívül alkalmazásával olcsóbb, gyorsabb, megvesztegethetetlen lenne a bíraskodás.³⁰ Az MI rendszerek alkalmazásával elkerülhető lenne az emberi figyelmetlenség és fáradtság is, valamint csökkenne a bírókra nehezedő teher.³¹ Egyesek szerint jelenleg hazánkban akár tízezernél is magasabb azoknak az ügyeknek a száma, amelyeket az MI döntéstámogatásával le lehetne zárni.³²

A büntetésiszabási körülmények tekintetében néha láthatunk példát arra, hogy egy körülmény megítélése attól függ, hogy melyik bíróság jár el az adott ügyben, tehát megállapítható, hogy olykor szerteágazó a bírói gyakorlat ezen a téren. Az MI alkalmazásával egységesebb lehetne a bírói gyakorlat több körülményt, például az elszaporodottságot illetően, mely körülményt gyakran automatikusan, bármiféle körültekintés nélkül sorolják fel súlyosító körülményként az ügyészek perbeszédükben és a bírák az ítéletükben. A helyes gyakorlat ezzel szemben az lenne, ha mind az ügyészség, mind a bíróság konkrét statisztikai számadatokkal alátámasztaná ezt a körülményt.³³

Az időmúlás mint enyhítő körülmény esetében az algoritmus alkalmazása által megállapítható lenne, hogy mi okozta adott esetben az időmúlást³⁴, így könnyebben eldönthető lenne, hogy valóban lehet-e enyhítő körülményként értékelni e tényezőt.

Ha a sértett felróható közrehatását továbbra is enyhítő körülményként értékeli a joggyakorlat, akkor ennek objektívebb értékelését is elősegítené az algoritmus.³⁵

Az 56. BK vélemény III/3. pontja alapján, ha egy sérelem vagy veszély minősítése kapcsán fokozatokat lehet megállapítani (pl. súlyos testi sértésnél a gyógyulási időtartam alapján), akkor az átlagos szintet jóval túllépő sérelem vagy veszély általában súlyosító, az átlagosnál jelentős mértékben kisebb, rendszerint enyhítő körülmény.³⁶ Kérdésként merülhet fel, hogy mit kell átlagos szint alatt érteni. Véleményem szerint ennek objektív meghatározásában lehetnének a bírák segítségére az algoritmusok.

Emellett fontos lenne a minél egységesebb és objektívebb büntetésiszabás a jogbiztonság szempontjából. Maga az 56. számú BK vélemény mondja ki, hogy az Alaptörvény XV. cikk (1) bekezdése által deklarált törvény előtti egyenlőség

²⁹ AMBRUS I.: i.m. 2024, 10.

³⁰ SZÉKELY J. – VERESS E.: i.m. 96.

³¹ GYARAKI R.: i.m. 405.

³² GYARAKI R.: i.m. 403.

³³ AMBRUS I. - UJVÁRI Á.: Adalékok a büntetésiszabás elvi és gyakorlati kérdéseihez. *Magyar Jog*, 2020/10, 590-591.

³⁴ AMBRUS I.: i.m. 2024, 12.

³⁵ AMBRUS I.: i.m. 2024, 11.

³⁶ <https://kuria-birosag.hu/hu/kollvel/56-bk-velemenyn> (letöltés dátuma: 2025. 02. 10.)

alapelvnek az egységes ítélkezési gyakorlat felel meg. Az egységes ítélkezési gyakorlat azt is magában foglalná, hogy az enyhítő és súlyosító körülmények értékelése során ne mutakozzanak nagy és indokolatlan eltérések.³⁷

Végül, de nem utolsón sorban az is az MI rendszerek mellett szól, hogy azonosítani tudják az olyan bírósági és bírói működésre vonatkozó viselkedésmintákat, amelyek az emberek számára fel se tűnnek. Az esetlegesen fennálló problémákból tanulni és azokon változtatni lehet, miután az algoritmusok felhívták ezekre a figyelmet.³⁸

5. A mesterséges intelligencia használata ellen szóló érvek

Ebben a pontban azokat a problémákat, aggályokat és veszélyeket részletezem, amelyek az ellen szólnak, hogy MI rendszerek alkalmazásra kerüljenek az igazságszolgáltatásban.

A büntetőeljárásban eljáró bíró harmadik fő feladata a büntetéskiszabás, miután megállapította a tényállást és megtörtént a minősítés, azaz a történeti tényállást megfeleltette valamely törvényi tényállásnak/tényállásoknak. A büntető igazságszolgáltatásban a rendelkezésre álló bizonyítékok alapján hoznak ítéletet és nem statisztikai adatok alapján, bár utóbbi tényezők sem hagyhatók figyelmen kívül.³⁹ A büntetéskiszabás során a bíró egyéniesítést végez az absztrakt törvényi büntetési nem, a büntetési tételkeret és az enyhítő és súlyosító körülmények figyelembevételével, kivéve, ha az adott esetben abszolút határozott szankciót kell alkalmazni.⁴⁰

Egyre több a vita akörül, hogy vajon lehetséges-e az emberi bírót mesterséges intelligencia során helyettesíteni az ítélkezésben.⁴¹ Kijelenthető, hogy egy büntetőbírói ítélet csak akkor tudja elérni a célját, ha közmegnyugvást kelt az adott jogvitában. Közmegnyugvásról pedig csak abban az esetben lehet beszélni, ha a társadalom igazságosnak tartja az ítéletet. Az igazságossághoz az szükséges, hogy a bíró az ítélethozatalakor a hatályos törvény mellett figyelembe vegye a társadalom jog- és igazságérzetét. A bírótól nem csak azt várja el a társadalom, hogy a bűncselekmény elkövetőjét mondja ki bűnösnek és ezért szabjon ki számára büntetést, hanem azt is, hogy a bűnösség fokához igazodó ítéletet hozzon. Ha utóbbi nem így történik és túl enyhe vagy túl súlyos ítélet születik, az legalább akkora

³⁷ <https://kuria-birosag.hu/hu/kollvel/56-bk-velemen> (letöltés dátuma: 2025. 02. 10.)

³⁸ VAJDA J.: Álmodnak-e az androidok elfoglalt bírókkal? Kognitív torzítások és önbeteljesítő jóslatok a mesterséges intelligencia peres előrejelzéseiben. *Infokommunikáció és Jog*, 2022/1, 20.

³⁹ KARSAI K.: i.m. 2020, 252.

⁴⁰ AMBRUS I.: i.m. 2024, 6-7.; Vö.: AMBRUS I.: Abszolút határozott szankciók a 2012-es Btk. tükrében, nemzetközi kitekintéssel. In: MENYHÁRD A. – VARGA I. (szerk.): *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara. A jubileumi év konferenciasorozatának tanulmányai. II. kötet*. Budapest: ELTE Eötvös kiadó, 2018, 1407-1420.

⁴¹ SZÉKELY J. – VERESS E.: i.m. 96.

felháborodást kelt a társadalomban mint amikor felmentenek egy bűnös embert vagy elítélnék egy ártatlant.

Azonban a bírónak annál nehezebb dolga van akkor, minél nagyobb ellentét alakul ki a tételes törvény és a társadalmi közfelfogás között.⁴² Meglátásom szerint manapság ilyen nagyobb ellentétet láthatunk például a marihuána esetében. Míg jogszabályi szinten szigorúan büntetendők azok a bűncselekmények, amelyek tárgyat kábítószer képezi függetlenül a kábítószer fajtájától, addig a bírói gyakorlatban sokszor enyhítő körülményként értékelik, ha a bűncselekmény tárgya az egészségre kevésbé ártalmas kábítószer, azaz nem kemény drog (lásd pl.: 1.Bf.299/2012/53. számú, 3.Bf.84/2015/24. számú, 5.Bf.137/2015/16. számú határozatokban), bár lényeges kiemelni, hogy ez még nem vált általános gyakorlattá⁴³.

A büntetéskiszabási körülmények kapcsán megállapítható, hogy soha nem lehet és korábban sem lehetett egy taxatív listában felsorolni ezeket. Ez az ügyek egyediségéből, a társadalmi folyamatok változásából és a technika fejlődéséből adódik. Megállapítható, hogy új bűncselekmények megjelenésével újabb enyhítő és súlyosító körülmények keletkezhetnek. ⁴⁴ Például volt olyan ügy, ahol a vádlott, a javára értékelték azt a vállalását, hogy elmegy kábítószer elvonó-felvilágosító kúrára. ⁴⁵ Nem szabad hagyni, hogy automatizálttá váljon a büntetéskiszabási gyakorlat azáltal, hogy az MI nem állapít meg ilyen jogosan felmerült a rendhagyó körülményt, hanem csak az 56. BK véleményben foglaltakat vizsgálja. Álláspontom szerint e körülmények alkalmazása elősegíti a törvény előtti egyenlőség alkotmányos alapelv érvényesülését.

Az, hogy egyes körülményeket mekkora intenzitással vesz figyelembe egy bíró a büntetéskiszabásnál, az adott bűncselekménytől, az adott személytől és a társadalmi szemlélettől⁴⁶ függ. Lényeges, hogy nem a körülmények számára, hanem a hatásukra kell tekintettel lenni az értékelésnél mert ez által tudja mérlegelni a bíró, hogy a középértéktől milyen irányba és mennyire térjen el a büntetési cél megvalósulása érdekében.⁴⁷ Véleményem szerint kérdéses, hogy az MI mindig megfelelő hatással tudná-e figyelembe venni a büntetéskiszabási tényezőket.

⁴² EISNER M.: *A súlyosító és enyhítő körülmények és a büntetés kiszabása*. Szeged; Szegedi Városi Nyomda és Könyvkiadó Rt., 1932. 3-4.

⁴³ https://ujbtk.hu/dr-ignacz-gyorgy-kabitoszer-kereskedelem-es-kabitoszer-birtoklasi-a-fovarosi-utclotabla-gyakorlataban/#_ftn26 (letöltés dátuma: 2023. 12. 25.)

⁴⁴ ANGYAL P. – RÁCZ Gy.: *A büntetés kiszabása a bírói gyakorlatunkban*. Budapest, Attila-nyomda Részvénytársaság, 1937, 22.

⁴⁵ UGRÓ M.: Enyhítő körülmények. *Magyar Nemzet*, 2011/246, 7.

⁴⁶ DEMETER V.: i.m. 290.

⁴⁷ SZABÓ Zs.: A háború hatása az enyhítő és súlyosító körülmények megítélésére a vagyoni elleni bűncselekmények kapcsán – különös tekintettel a Debreceni Ítéletábrla gyakorlatára. *Régió kutatás Szemle*, 2016/1, 233.

Gondot okoznak továbbá az olyan büntetéskiszabási körülmények, amelyeknél szükség van a bírói mérlegelésre. Erre hozok egy példát: Az 56. BK vélemény meghatározza, hogy ha az elkövetőt kisebb tárgyi súlyú bűncselekmény miatt ítélték el, és a büntetés kiállása óta már hosszabb idő eltelt, a korábbi elítélésnek súlyosító körülményként való értékelése általában nem indokolt.⁴⁸ Azt, hogy mi határozza meg a bűncselekmény tárgyi súlyát, azt kifejti az 56. BK vélemény: nagymértékben a cselekmény káros következményei határozzák meg, ezért azokat a büntetés kiszabásánál mindig figyelembe kell venni. A káros következmény lehet pénzben kifejezhető kár, hátrány, gyógytartammal jellemezhető sérülés; ezek nagyságát mennyiségileg is meg lehet határozni.⁴⁹ Azonban a példa mondatból nem egyértelmű, jelenleg jórészt az adott ügyben eljáró bíró mérlegelésén múlik, hogy mekkora időintervallumot ért a hosszabb idő alatt. Kérdéses, hogy tudnánk-e annyi ítéletet az MI rendszerekbe betáplálni – amelyek persze jó eséllyel szerteágazó gyakorlatról tanúskodnak e kérdésben –, hogy azok önállóan meg tudják állapítani azt, hogy mi tekinthető hosszabb időnek és mi nem. Problémát okozhat az is, hogy hogyan igazodjon ki, mit vegyen alapul az MI olyan körülmények esetében, melyek alapján semmilyen konkrétumot nem lehet megállapítani, valamint olyan esetekben, ahol a BKv és a joggyakorlat eltér egymástól (pl.: sértett felróható közrehatása nemi bűncselekmények tekintetében). Sajnos számos esetben bizonyossá vált az is, hogy az MI rasszista módon is dönthet.⁵⁰

Aggályosnak tekinthető az is, hogy az MI nem emberi értelemmel, érzékeléssel és empátiával hozná meg a döntéseket, hanem algoritmusok alapján, így valószínűleg előfordulna, hogy az emberi igazságérzettel és a jogi tudattal ellentétes döntés születik.⁵¹ Az MI rendszerek akár arra is képesek lehetnek, hogy egy adott ember „digitális lábnyomából” megállapítsák azt, hogy mely bűncselekmények elkövetésére, illetve mely betegségekre hajlamos az illető. Azonban ez az emberekre is jellemző, előítélethez vezethet, pedig pont az objektivizálódás lenne az emberek célja az MI igénybevételével.⁵²

Székelly János és Veress Emőd véleménye szerint a gépi tanulás – melynek során egy gép számára számos példát és visszajelzést adunk – ellenére jelenleg nincs mód arra, hogy egy gép számára megfelelő mennyiségű példát nyújtsunk ahhoz, hogy egy jogvitát önállóan, igazságosan tudjon elbírálni. Hiszen nem lenne igazságos azonos büntetéssel sújtani egy tolvajt, aki a gyermekei számára élelmet lop, valamint egy kleptomániás embert.⁵³

⁴⁸ <https://kuria-birosag.hu/hu/kollvel/56-bk-velemeney> (letöltés dátuma: 2025. 02. 10.)

⁴⁹ <https://kuria-birosag.hu/hu/kollvel/56-bk-velemeney> (letöltés dátuma: 2025. 02. 10.)

⁵⁰ GYARAKI R.: i.m. 406.

⁵¹ <https://www.youtube.com/watch?v=xs0iQSyBoDE> (letöltés dátuma: 2025. 02. 25.); SZÉKELY J. – VERESS E.: i.m. 95.

⁵² SZÉKELY J. – VERESS E.: i.m. 97.

⁵³ SZÉKELY J. – VERESS E.: i.m. 96-97.

Az MI használata ellen szól továbbá, hogy a jelenleg elérhető GPT alkalmazások tekintetében a hibaarány igen magas, 5-25%. Ebből az adatból is le lehet vonni azt a következtetést, hogy mindenképpen szükség van az emberre.⁵⁴ További probléma, hogy néha nem ellenőrizhető és nem is megállapítható az, hogy az MI hogyan és miért jut egy adott döntésre. Ezt a jelenséget algoritmusok átláthatósága problémának szokták nevezni.⁵⁵ Viszont a jogban mindenképpen szükséges az elszámoltathatóság, valamint a jogi és a ténybeli indoklás határozathozatal esetében, mivel ezek támasztják alá a jogszerűséget és az igazságosságot.⁵⁶

A független bíróság garanciája – amely jogot az Alaptörvény XXVIII. cikk (1) bekezdése, valamint az emberi jogok és alapvető szabadságok védelméről szóló Egyezmény 6. cikke deklarálja – is veszélybe kerülhet az MI által hozott bírósági határozatok által. Ennek veszélye egyrészt akkor állhat fenn, ha manipulált adatok alapján hozza meg a döntéseket az MI, másrészt akkor, ha az MI rendszerek tovább viszik az emberek kognitív torzításait.⁵⁷

A felsoroltak mellett vannak olyan feltételezések, miszerint sok ember munkáját (pl. jogi tanácsadás, bíraskodás) el fogja venni a mesterséges intelligencia.⁵⁸ Emellett mesterséges intelligencia kapcsán az is kérdéses, hogy mennyiben jelentene biztonsági kockázatot, valamint, hogy mennyire lenne megbízható az adatvédelem terén.⁵⁹ Lényeges probléma az is, hogy jelenleg még nem tudnák biztosítani azt a kiberbiztonságot, amelyet egy ilyen szoftver igényelne.⁶⁰ Egyesek álláspontok szerint „a kiberkockázatok nagyobb veszélyt jelentenek, mint a katasztrófák.”⁶¹

Az is az MI rendszerek ellen szól, hogy azok megvásárlása és azok naprakészen tartása nem olcsó sajnós. Emellett az embereket külön be kellene tanítani ezen rendszerek helyes alkalmazására.⁶²

Végül, de nem utolsó sorban probléma merülhet fel annak kapcsán is, ha megbíznánk az MI rendszert azzal, hogy hozzon igazságos ítéletet az ügyben, mivel még az emberek között sem sikerült kialakítani egy általános igazságfogalmat. Ma sajnós nem tudnánk annyi megoldott minta esetet az MI rendszerek számára „megtanítani”, amelynek következtében utána maga meg tudná oldani az új

⁵⁴ https://pecshor.hu/periodika/XXV/Orban_Jozsef.pdf (letöltés dátuma: 2025. 02. 24.)

⁵⁵ https://webfoundation.org/docs/2017/07/WF_Algorithms.pdf (letöltés dátuma: 2024. 02. 26.)

⁵⁶ SZÉKELY J. – VERESS E.: i.m. 98.

⁵⁷ VAJDA J.: i.m. 20.

⁵⁸ SZÉKELY J. – VERESS E.: i.m. 95-96.

⁵⁹ https://pecshor.hu/periodika/XXV/Orban_Jozsef.pdf (letöltés dátuma: 2025. 02. 24.)

⁶⁰ GYARAKI R.: i.m. 418.

⁶¹ <https://www.allianz.hu/hu-HU/lakossagi/sajtoszoba/sajtokozlemenyek/a-kiberkockazatok-nagyobb-veszelyt-jelentenek-mint-a-katasztrofak.html> (letöltés dátuma: 2025. 02. 24.)

⁶² GYARAKI R.: i.m. 399.

jogeseteket úgy, hogy a megoldásokat, ítéleteket a társadalom is elfogadja.⁶³ A leírtak alapján látható, hogy mennyire fontos szerepe van a bírói értékelésnek a büntetéskiszabásnál.

6. Nemzetközi kitekintés

Leginkább angolszász jogterületen jellemző, hogy napi szinten alkalmazzák az algoritmikus kockázatelemzést a mesterséges intelligencia segítségével.⁶⁴ E kockázatelemzésnek elsősorban a nyomozás⁶⁵, a büntetéskiszabás⁶⁶, valamint a büntetés-végrehajtás⁶⁷ során van jelentősége. Emellett angolszász területeken például már felmerült, hogy algoritmusok segítsék a bírakat az enyhítő és súlyosító körülmények objektív megítélésében.

Észtországban megalkottak egy MI-bírókat annak érdekében, hogy felszámolják a bírók ügghátralékát. Ezek az MI-bírók egyszerűbb ügyekben járnak el, olyanokban, amelyekben nincs szükség mérlegelésre.⁶⁸

Az EU alkotott egy mesterséges intelligenciáról szóló rendeletet ((EU) 2024/1689 rendelet), közismert nevén „AI Act”-et⁶⁹, amely idén, 2024. augusztus 1-jén lépett hatályba.⁷⁰ Karsai szerint megkésett az erről szóló EU-s szabályozás, mivel több helyen már alkalmazták az MI-t korábban. Több országban alkalmazták a szabályozás előtt például arra, hogy megbecsülje a terhelt visszaesési valószínűségét a bíróságnak.⁷¹

Sok érv szól az MI igénybevétele ellen, mégis az látható, hogy elsősorban nem Magyarországon, de nagyon sok országban egyre több területen alkalmazzák az algoritmusokat. Annak ellenére veszik igénybe ezeket, hogy ezek valójában sokszor nem hogy segítenek, de újabb kérdések merülnek fel ilyen esetekben.⁷²

7. Összegzés

Az idő előrehaladtával egyre nagyobb szerephez jutnak életünkben az MI rendszerek (pl. az enyhítő és súlyosító körülmények bírói értékelésénél is),

⁶³ SZÉKELY J. – VERESS E.: i.m. 97.

⁶⁴ AMBRUS I.: i.m. 2024, 5.

⁶⁵ AMBRUS I.: i.m. 2024, 5.; Vö. FANTOLY Zs. – HERKE Cs.: A mesterséges intelligencia a hatékonyabb büntetőeljárás szolgálatában. *Magyar Jog*, 2023/4, 223-238.

⁶⁶ AMBRUS I.: i.m. 2024, 6.

⁶⁷ AMBRUS I.: i.m. 2024, 5.

⁶⁸ GYARAKI R.: i.m. 404.

⁶⁹ AMBRUS I.: i.m. 2024, 5.

⁷⁰ https://www.parlament.hu/documents/d/guest/infojegyzet_2024_23_eu_mi_rendelet (letöltés dátuma: 2024. 11. 12.)

⁷¹ KARSAI K.: i.m. 2021, 189.

⁷² KARSAI K.: i.m. 2020, 251.

melyeknek több csoportosításuk is létezik. Sok országban egyre több területen alkalmazzák az algoritmusokat.

Az igazságszolgáltatásban az MI alkalmazása történhet csupán döntéstámogatási céllal vagy a teljes döntéshozatalt is rá lehet bízni az algoritmusokra. Az MI rendszerek alkalmazása mellett számos érvet fel lehet sorolni: kiküszöbölhető lehetne a túlzott bírói szubjektívizmus, egységesebb lehetne a bírói gyakorlat, valamint olcsóbb, gyorsabb és megvesztegethetetlen lehetne a bírászkodás.

Azonban alkalmazásuk ellen szól, hogy az akár az emberi igazságérzettel és a jogi tudattal ellentétes és olykor nem ellenőrizhető döntéseket eredményezne. Emellett a büntetés-kiszabási körülmények és az MI rendszerek tekintetében is felmerül néhány aggály, mint például az, hogy az MI nem biztos, hogy mindig megfelelő hatással venné figyelembe ezeket, ugyanakkor némelynél szükség van a bírói mérlegelésre. Fennállhat annak a veszélye is, hogy manipulált adatok alapján hozza meg a döntéseket az MI, valamint, hogy tovább viszi a kognitív torzításokat, ugyanakkor sajnos még nem lehet biztosítani a megfelelő kiberbiztonságot esetében.

8. Konklúzió

Megállapítható, hogy „(a) helyes büntetés-kiszabás (...) a büntetőjog kulcsfontosságú kérdése, ha nem épp a legfontosabb. Jelentőségét tekintve legalább olyan fontos, mint a bűncselekmény helyes minősítése. A büntetés-kiszabásakor kel életre az anyagi jogi diszpozíció mellett a szankció is, a büntetés-kiszabásában csúcsosodik ki a büntetőeljárás, és ekkortól kapcsolódik be a büntetés-végrehajtás is.”⁷³

Véleményem szerint nem kell attól tartani, hogy valamennyi jogász munkáját elveszi az MI, egyrészt mivel a mesterséges intelligenciát csak egy nagytudású jogász tudja leghatékonyabban, teljes mértékben használni.⁷⁴ Emellett kijelenthető, hogy egy bizonyos szintű emberi szubjektivitásra szükség van a bírói határozathozatalnál.⁷⁵

Azonban azt lehet megállapítani, hogy „a bűnösségi körülmények értékelése terén a teljes egységet - olyan értelemben, mint a jogi minősítésnél - ugyan nem lehet elérni, de törekedni kell arra, hogy azonos alanyi jellegű és tárgyi súlyú bűncselekmény miatt alapján megközelítően azonos büntetés-kiszabására kerüljön sor”.⁷⁶ Az MI alkalmazása az egységesebb ítélkezési gyakorlat kialakulását segítené.

⁷³ PÁPAI-TARR Á.: *A büntetés-kiszabás aktuális kérdései*. Budapest: Novissima Kiadó, 2024. 5.; AMBRUS I.: i.m. 2024, 7.

⁷⁴ SZÉKELY J. – VERESS E.: i.m. 99.

⁷⁵ SZÉKELY J. – VERESS E.: i.m. 98.

⁷⁶ <https://www.moravcsik.hu/index.php?page=reszletes-hirek&id=57> (letöltés dátuma: 2024. 02. 15.)

Azonban személy szerint a döntéstámogatási célú igénybevételt támogatom, mert fontosnak tartom az emberi értelmet, érzékelést és empátiát a büntetéskiszabás során. Úgy gondolom, hogy az emberek tartanának az MI által hozott bírói határozatoktól, valamint nem is fogadnák el annyira azokat, mint azokat, amelyeket emberi bírók hoztak.

Az biztos, hogy általánosan elfogadott álláspontot kell kialakítani az újonnan felmerült kérdésekben, valamint ki kell alakítani ennek kapcsán a jogszabályi kereteket.⁷⁷

Felhasznált irodalom

AMBRUS I.: Abszolút határozott szankciók a 2012-es Btk. tükrében, nemzetközi kitekintéssel. In: MENYHÁRD A. – VARGA I. (szerk.): *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara. A jubileumi év konferenciasorozatának tanulmányai. II. kötet.* Budapest: ELTE Eötvös kiadó, 2018.

AMBRUS I.: Algoritmusok és büntetéskiszabás. *Ügyészek lapja*, 2024/3

AMBRUS I.: A mesterséges intelligencia és a büntetőjog. *Állam- és jogtudomány*, 2020/4

AMBRUS I. - UJVÁRI Á.: Adalékok a büntetéskiszabás elvi és gyakorlati kérdéseihez. *Magyar Jog*, 2020/10

ANGYAL P. – RÁCZ Gy.: A büntetés kiszabása a bírói gyakorlatunkban. Budapest, Attila-nyomda Részvénytársaság, 1937.

BÁN C.: A mesterséges intelligencia hatása és kihívásai a joggyakorlatra. In: SOMSSICH R. (szerk.): *Ratio et mensura Studia M. Király dedicata.* Budapest: ELTE Eötvös Kiadó, 2021

DEMETER V.: A súlyosító és enyhítő körülmények a bírói gyakorlatban. *Magyar Jog*, 1965/7

EISNER M.: A súlyosító és enyhítő körülmények és a büntetés kiszabása. Szeged, Szegedi Városi Nyomda és Könyvkiadó Rt., 1932.

⁷⁷ GRUND A.: i.m. 52.

Papp Dóra

Büntetékiszabás és a mesterséges intelligencia – különös tekintettel az enyhítő és a súlyosító körülményekre – Sentencing and Artificial Intelligence – With Special Regard to Mitigating and Aggravating Circumstances

ESZTERI D. – PÉTERFALVI A.: Amikor a gépeink tanulnak mindet, avagy a mesterséges intelligencia alapú döntéshozatal és profilozás szabályozásának európai uniós törekvéseiről. *Századvég*, 2022/1

FANTOLY Zs. – HERKE Cs.: A mesterséges intelligencia a hatékonyabb büntetőeljárás szolgálatában. *Magyar Jog*, 2023/4

GRUND A.: Beszámoló Ambrus István habilitációs előadásairól. *Ügyészek lapja*, 2021/6

GYARAKI R.: A mesterséges intelligencia felhasználói lehetősége és fejlesztésének szükségessége a jogalkalmazásban. In: KOVÁCS Z. (szerk.) *A mesterséges intelligencia és egyéb felforgató technológiák hatásainak átfogó vizsgálata*. Budapest: Katonai Nemzetbiztonsági Szolgálat, 2003

KARSAI K.: A mesterséges intelligencia szabályozásának európai tervezete, avagy algoritmusok térnyerésének előjelei a (büntető) igazságszolgáltatásban. *Forum Acta Juridica et Politica ünnepi kötet dr Szabó Imre egyetemi tanár 70. születésnapjára*, 2021/3

KARSAI K.: Inkriminált algoritmusok a büntető igazságszolgáltatásban. In: MADAI S. - PALLAGI A. – POLT P. (szerk.) *Sic itur ad astra ünnepi kötet a 70 éves Blaskó Béla tiszteletére*. Budapest: Ludovika Egyetemi Kiadó, 2020

NAGY Z. A.: A mesterséges intelligencia és a jogi felelősség kérdése – 2010-2020.as évek fordulóján de lege feranda. In: MADAI S.-PALLAGI A.-POLT P. (szerk.) *Sic itur ad astra ünnepi kötet a 70 éves Blaskó Béla tiszteletére*. Budapest: Ludovika Egyetemi Kiadó, 2020

PÁPAI-TARR Á.: *A büntetékiszabás aktuális kérdései*. Budapest: Novissima Kiadó, 2024.

PÁPAI-TARR Á.: Az elkövető személyiségének jelentősége a büntetékiszabásban, különös tekintettel az előéletre. *Pro Futuro*, 2020/1

SZABÓ Zs.: A háború hatása az enyhítő és súlyosító körülmények megítélésére a vagyon elleni bűncselekmények kapcsán – különös tekintettel a Debreceni Ítéltábla gyakorlatára. *Régió kutatás Szemle*, 2016/1

SZÉKELY J. – VERESS E.: A mesterséges intelligencia és a jogalkalmazás. *Korunk*, 2020/3

UGRÓ M.: *Enyhítő körülmények*. Magyar Nemzet, 2011/246

VAJDA J.: Álmodnak-e az androidok elfogult bírókkal? Kognitív torzítások és önbeteljesítő jóslatok a mesterséges intelligencia peres előrejelzéseiben. *Infokommunikáció és Jog*, 2022/1

Internetes források

https://mind.ilstu.edu/curriculum/mcp_neurons/index.html (letöltés dátuma: 2024. 02. 26.)

<https://www.moravcsik.hu/index.php?page=rezsletes-hirek&id=57> (letöltés dátuma: 2024. 02. 15.)

<https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX%3A52018DC0237> (letöltés dátuma: 2024. 11. 12.)

<https://eur-lex.europa.eu/eli/reg/2024/1689/oj> (letöltés dátuma: 2025. 02. 11.)

https://hvg.hu/itthon/20250225_Tobb-kormanybiztost-is-kinevezett-Orban-visszatert-Palkovics-Laszlo (letöltés dátuma: 2025. 02. 27.)

https://pecshor.hu/periodika/XXV/Orban_Jozsef.pdf (letöltés dátuma: 2025. 02. 24.)

<https://kuria-birosag.hu/hu/kollvel/56-bk-velemeney> (letöltés dátuma: 2025. 02. 24.)

https://ujbtk.hu/dr-ignacz-gyorgy-kabitoszer-kereskedelem-es-kabitoszer-birtoklasi-a-fovarosi-itelotabla-gyakorlataban/#_ftn26 (letöltés dátuma: 2023. 12. 25.)

<https://www.youtube.com/watch?v=xs0iQSyBoDE> (letöltés dátuma: 2025. 02. 25.)

https://webfoundation.org/docs/2017/07/WF_Algorithms.pdf (letöltés dátuma: 2024. 02. 26.)

Papp Dóra

Büntetéskiszabás és a mesterséges intelligencia – különös tekintettel az enyhítő és a súlyosító körülményekre – Sentencing and Artificial Intelligence – With Special Regard to Mitigating and Aggravating Circumstances

https://www.allianz.hu/hu_HU/lakossagi/sajtoszoba/sajtokozlemenyek/a-kiberkockazatok-nagyobb-veszelyt-jelentenek-mint-a-katasztrofak.html (letöltés dátuma: 2025. 02. 24.)

https://www.parlament.hu/documents/d/guest/infojegyzet_2024_23_eu_mi_ren_delet (letöltés dátuma: 2024. 11. 12.)

RAHELEH SOLTANIBAHREHMAND* –

SOMAYYEH SOLTANIBAHREHMAND**

The Role of Private International Law in Preventing Infringement of IP Rights Over the Internet: A Comparative Analysis of Russian and EU Rules

Abstract: Court orders are requested by parties to halt another from using brand name domain names in a few reviews of the present proof. For example Yahoo case — individuals got court order as against US organization an Indian one would not. Need someone with a court order not to put the domain name yahoo into confusion with German speakers using Yahoo search as a gui. The main procedure then was whether these users would then see the websites of the defendant's Yahoos. Court orders are generally taken as the resolution to disputes, even if it is not. One big consideration should be whether the court order is implementable or not and if not then on intervention, the claimant will proceed through damages. Henceforth the court order has to actually work against the defendant at least when they are operating outside jurisdiction. The area of involvement of rights in respect of URLs is complicated and contesting due policy complaints. This creates enforcement issues. In today's article let us understand the custard bowl of regulations governing claims for.com Domain names.

Application of national intellectual property laws for the redressal of infringements under these rights. This will necessarily be the case of the concept of passing off which to different degrees exists in different legal systems. This legal space has over the years defended interests grounded on the foundation of reputation. It will help them to avoid hypocrisy and misrepresentation with the consumers in respect of nature of their products. Cost the imitator. As internet marketing became prevalent these activities can cross jurisdiction lines, increasing the probability of consumer misunderstanding as to where the products are produced. As a result, English courts have adjudicated on some of the most important cases concerning this matter at issue.

Keywords: Intellectual property rights, Internet infringement, Private international law, Online piracy, Cross-border disputes, EU regulations, Russian law.

1. Introduction

Lawsuits overseas are often driven by the benefits of a lawyer's jurisdiction and the perceived convenience or disadvantage of a type or location of proceedings (known as forum shopping). Plaintiffs typically opt to pursue action, in another country to secure a favorable ruling or higher compensation, which might involve seeking a foreign anti-suit injunction. It's worth noting that international law doesn't standardize the rights of authors and other rights holders and there isn't a regime

* Raheleh Soltanibahrehamand, PhD Student at University of Miskolc

** Somayyeh Soltanibahrehamand, PhD Student at University of Miskolc

that covers every specific right. The same applies to law, which lacks an all-encompassing unified framework. In instances involving the violation of property (IP) rights, there's frequently a transnational aspect¹. This could entail the defendant owning assets or operating a business under a structure rather than as an individual. This section offers an overview of IP rights infringement by examining the development of these rights and subsequent violations with the advent of the Internet. It also underscores the importance of laws in offering guidance and structure for addressing IP rights violations. Furthermore, it delves into the shortcomings, of the laws conflict rule approach and discusses the methodologies utilized by the European Union (EU). Finally, it delineates the research goals and methodology.

1.1. Exploration of Intellectual Property Infringements, on the Web

When the internet first emerged it was viewed as a platform for sharing knowledge and information. Over time the World Wide Web evolved into a tool that could reach a global audience. In today's era, the internet has become a realm where individuals can access information and products through various technological channels. While owners of Intellectual Property (IP) rights have acknowledged the advantages of the internet they are also aware of the risks it poses to safeguarding their copyrights and related rights. The easy availability of content on the internet has led to an upsurge in piracy allowing copyrighted materials to be replicated or modified without authorization. This has prompted discussions on whether existing IP regulations tackle infringements occurring across borders and if private international law can offer a framework for enforcing IP rights².

1.2. The Importance of Private International Law, in Addressing IP Rights Violations

Dealing with issues related to IP rights infringement is a challenge, given the borderless nature of the internet and its diverse user base. Consequently resolving this dilemma at a level proves difficult since any actions taken in one country can be easily bypassed by relocating operations to another jurisdiction. This often sets off a chain reaction as countries strive to attract businesses by any means even if it involves enabling activities, through the provision of high-speed internet and user services. In scenarios, nations with intellectual property (IP) safeguards may find their businesses at a disadvantage when competing with those from regions that

¹ BAYEFSKY, A.: The UN human rights treaty system: Universality at the crossroads, 2021

² BENNETT, T. B. : The Paradox of Exclusive State-Court Jurisdiction over Federal Claims. *Minn. L. Rev.* 2020

have imitated or replicated their IP. To address this issue the country of the IP owner might try to tackle it by blocking infringing content at its borders or taking actions against offending nations. Nevertheless, these approaches are often forceful. Can have effects on the effectiveness of the global economy³. This is where private international law plays a role in addressing border IP infringement by applying choice of law principles and recognizing and enforcing foreign IP rights. The Role of Private International Law in Preventing Infringement of Intellectual Property Rights Over the Internet; An In-depth Examination of EU Regulations discussed further in the sections explores this topic extensively⁴.

1.3 Examining rules in Russia and the European Union from a viewpoint.

The earlier dialogue, in the paper has highlighted that PIL regulations concerning IP are shaped by its aspect. To illustrate how the stages and levels of integration, between Russia characterized as a civil law country, and the EU as a supranational organization influence the nature and content of Private International Law (PIL) regulations a comparative study will be carried out. While this method has not been previously utilized in the context of Intellectual Property (IP) and PIL it is anticipated to serve as a foundation for establishing cohesive PIL regulations. It should be noted that the effectiveness of this approach hinges on instances of similar legislation, which is acknowledged as a potential limitation of the study⁵. Before exploring the comparison of PIL regulations the essay will first discuss the scope of these regulations and their implications on forum selection and the nature of IP litigation. This initial discussion aims to introduce readers to the matter and set the context for comparison. The focus will primarily be on rules and applicable laws outlined in both the Brussels I Regulation and Rome II Regulation within the EU recognized as examples of PIL legislation offering a valuable point for comparison, with Russia. Moreover, the essay will delve into the alignment of regulations, between Russia and the EU with real-world implications considering the dynamic interactions between the two entities, such as the endorsement of a Partnership and Cooperation Agreement and the ongoing talks, for a fresh partnership structure⁶.

³ AURIOL, E. - BIANCINI, S. - PAILLACAR, R.: Intellectual property rights protection and trade: an empirical analysis. World Development. 2023

⁴ SVANTESSON, D. J. B.: Private international law and the internet. *Private International Law and the Internet*, 2023

⁵ RUSTAMBEKOV, I.: Some Aspects of Development of Private International Law in the CIS Countries. *LeXonomica*, 2020

⁶ LEVINA, D.: Jurisdiction at the place of performance of a contract revisited: a case for the theory of characteristic performance in EU civil procedure. *Journal of Private International Law*, 2022

2. Analyzing the Legal Framework, for Safeguarding Intellectual Property Rights

According to Article 2 of the International Convention for the Protection of Industrial Property in 1883 countries participating in the agreement must protect intellectual property rights as they do to their own citizen's rights. The Paris Convention for the Protection of Industrial Property in 1883 also upholds this principle aiming to prevent discrimination against rights. It is widely accepted that international law sets a standard for safeguarding intellectual property rights. This standard was further refined with the Agreement on Trade Related Aspects of Intellectual Property Rights in 1994 (TRIPS) which sets out requirements for regulating property among all members of the World Trade Organization (WTO). Essentially these international legal frameworks establish shared responsibilities among countries to protect the intellectual property rights of entities⁷ (The level and nature of protection provided to these rights are typically determined by laws. The effectiveness of measures often depends on how these rights are acknowledged and safeguarded at a national level. This underscores the significance of legal systems and consistent levels of protection, in preventing violations of intellectual property rights held by foreign entities⁸

2.1. Comprehensive examination of global agreements and pacts

Global agreements, like treaties, provide a solid foundation for safeguarding intellectual property (IP) rights across different nations. These agreements are usually incorporated directly into the laws of participating countries making it simpler to uphold these rights against entities. The process of forming conventions varies based on the IP laws in question. For example, the establishment of the World Intellectual Property Organization (WIPO) in 1967 stemmed from a consensus recognizing the significance of protecting IP rights, especially amidst a rise in counterfeit trading. On the other hand, certain industries opt to create their treaties as demonstrated by the European Patent Convention of 1973 which aimed to streamline patent protection processes across European countries. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) developed during negotiations that led to the formation of the World Trade Organization (WTO) in 1995 has played a role in standardizing aspects of IP law globally. Though TRIPS

⁷ MORCOS, P. G., & KHNEISSER, E. F.: Intellectual property rights. Higher Education in the Arab World: Building a Culture of Innovation and Entrepreneurship, 2020, 183-204.

⁸ ALMEIDA, D., SHMARKO, K., & LOMAS, E.: ... of facial recognition technologies, surveillance, and accountability in an age of artificial intelligence: a comparative analysis of US, EU, and UK regulatory AI and Ethics. 2022

has faced criticism for terms between IP rights holders and the public, in developing nations its enforcement of binding dispute resolution mechanisms has prompted many developing countries to take IP law more seriously ⁹.

The impact of the implementation of property (IP) laws, in these countries has become more apparent since the introduction of TRIPS. According to Davies and Ricketson (2020), there has been an increase in the enforcement of IP rights regulations at a level.

2.2. Analyzing the IP rights protection regulations at the national level

In Russia, there has been an emphasis on strengthening border control measures to protect IP rights. Recent amendments to customs regulations have made it easier for IP rights holders to prevent the import and export of goods that violate their rights. These changes include enhancing the role of customs officials in combating IP rights violations streamlining complaint procedures for rights holders and reducing associated costs. Furthermore, efforts are underway to harmonize laws with the TRIPS agreement resulting in modifications to Civil Procedure Law concerning evidence requirements and proving IP rights infringements. In contrast, the European Union regulates requirements through the European Council. It is important to highlight that these Russian legal adjustments may still be evolving and their interpretation within the TRIPS framework will be determined by courts. The frequent modifications to IP laws present a challenge when attempting to provide an up-to-date overview.

At times significant adjustments have been made to patent law rules regarding resolving domain name conflicts and laws concerning digital rights management. Property (IP) rights, in Russia are safeguarded by the Civil Code and national laws, which generally mirror the principles of TRIPS and the treatment of National and Most Favored Nation (MFN). It's worth noting that as a member of the Commonwealth of Independent States (CIS) Russia is also part of the Eurasian Economic Community along with former Soviet nations. This community has a Court that oversees and enforces decisions made by its member states to the Court of Justice of the European Union (CJEU) in the EU. Member states are required to harmonize their laws with the community's treaties and agreements. This alignment could potentially influence legislation to converge with European Commission (EC) regulations in course. Presently economic agreements take precedence within this community over IP regulations. The court has jurisdiction over IP issues among member states suggesting that if integration deepens within the community there

⁹ DAVIES, G., & RICKETSON, S.: The foundation of the World Intellectual Property Organization: what came before. In: Research Handbook on the World Intellectual Property Organization, Edward Elgar Publishing, 2020, 1-25

might arise a necessity for IP enforcement among member states and, within the community itself¹⁰.

2.3. Difficulties in upholding intellectual property rights in the digital era.

The progress, in information and communication technologies has transformed the economy facilitating the sharing and accessibility of large volumes of data. Consequently, there has been a rise in the infringement of property (IP) rights as the Internet provides individuals with a worldwide and cost-effective platform to obtain and use copyrighted materials, as well as trademarked or patented products. This issue goes beyond piracy of goods that cross borders even in less developed countries. The intangible nature of content and data means that infringement occurs when intangible data is accessed where the IP owner intends to utilize it or when it confuses customers¹¹. This results in a scenario where infringement potential becomes global while the laws protecting these rights remain based on territories. For example, copyright laws are still governed by regulations. Are granted to copyright owners on a country-specific basis. Although copyright treaties set out requirements, for protection scope and duration well as the rights conferred these standards can only be enforced against a state directly if needed. Hence a person who owns the rights to a piece of work and wants to stop or get compensation, for any use must understand and follow the copyright laws of their country, which can vary in interpretation and application.¹²

3. Analyzing Cross-Border IP Rights Infringement with a Focus on Jurisdiction

Selecting the law is crucial in matters especially, in intellectual property cases where laws vary between countries. It is often advisable to apply the laws of the countries where both parties involved reside or are citizens. Alternatively, if the infringement happened in a country its laws may be applicable. The situation becomes more complex when online infringement occurs on a server located in a country from where the actual infringement took place. In some instances, the

¹⁰ MYSLIVSKIY, P.: Execution of Judgments and Advisory Opinions of the Court of the Eurasian Economic Union. The Law and Policy of New Eurasian Regionalization. 2021

¹¹ DRATLER JR, J. & MCJOHN, S. M.: Intellectual property law: Commercial, creative, and industrial property. 2023

¹² STROWEL, A.: Advocating an EU Copyright Title. EU Copyright Law. 1. In: ROMULO, C. S., & DALIMUNTHE, Z.: *Effect of Related Party Transaction and Tax Haven Utilization on Tax Avoidance Moderated by Country-by-country Reporting*. Riwayat: Educational Journal of History and Humanities, 2021, 26-40.

choice of law rules will determine whether to apply the laws of the country hosting the server or where the infringement occurred¹³.

The global reach of the internet presents a challenge when it comes to pinpointing the location of infringement and determining which country's laws should govern. According to principles of law, claimants must demonstrate an action that has caused the infringement to establish jurisdiction in court for issues related to violations of intellectual property rights. This action must be separate, from the infringement itself (Bennett, 2020). From a standpoint, Private international law stands as a unique area of legal practice that deals with resolving international disputes and cases. This field is built upon an array of laws and regulations that vary significantly from one nation to another. Nonetheless, its primary aim is to govern how domestic laws interact with ones. In today's age instances of breaches of intellectual property rights are on the rise creating numerous challenges in determining which country's legal system should have jurisdiction and whose laws should apply¹⁴.

3.1. Examining the jurisdiction for handling Internet-based intellectual property conflicts

Upon identifying an infringement, on intellectual property rights, a rights holder seeking to safeguard their rights often encounters the initial dilemma of where to initiate legal proceedings in cases involving multiple countries. This topic is quite intricate. Poses a challenge when examining it in relation, to the realm. Normally determining the jurisdiction for a claim involves evaluating personal and subject matter jurisdiction within a specific legal framework¹⁵. This process is usually straightforward for cases and transnational cases that occur offline, where geographic boundaries and the location of the infringement point to a jurisdiction. However, given the nature of the internet and how data flows between states through uploads and downloads a single instance of online infringement can have repercussions in multiple jurisdictions. Established systems of law often opt for a "territorial approach" to ascertain the applicable laws and allocate jurisdiction. This approach is supported by the necessity to uphold state sovereignty prevent disorder avoid favoring parties over weaker ones and effectively regulate online activities while discouraging defendants from seeking favorable legal venues. Nevertheless maintaining this approach becomes increasingly difficult in the context of Internet

¹³ SHAKARGY, S.: Choice of law for surrogacy agreements: in the in-between of status and contract. *Journal of Private International Law*, 2020

¹⁴ SVANTESSON, D. J. B.: Private international law and the internet. *Private International Law and the Internet*. 2021

¹⁵ CAMPFENS, E.: Whose cultural objects? Introducing heritage title for cross-border cultural property claims. *Netherlands International Law Review*, 2020

activities and intellectual property laws. For instance, a rule that links the location of an infringement to where content was uploaded tends to benefit rights holders from the United States due to concentrations of ISP servers and English language dominance, on platforms. In cases, various instances of infringement can take place in states. The consequences of an act, in one state, might outweigh an act of negligence in another state influencing the selection of laws related to the tort¹⁶.

3.2. Applicable legal principles regarding conflict of laws and selection of governing laws.

Legal matters involving conflicts of laws and the selection of governing laws can be complex. When a legal case spans countries, with laws a conflict of laws arises. The resolution lies in determining which legal system holds an interest in applying its laws to the case thereby governing it. Parties involved in a dispute may proactively choose the system they wish to apply to their case through a process known as choice of law. The goal is to identify the legal system closely tied to the case but the intricacies of doctrines and tests have led to criticism and confusion. This complexity is particularly evident in border intellectual property infringement disputes, where the location of the IP rights holder often dictates which law applies. In some cases, IP rights holders may opt to file lawsuits in jurisdictions to enforce foreign laws, against alleged infringers¹⁷.

A critical aspect of any intellectual property dispute is determining the system where the case will be resolved. While this is usually straightforward challenges can arise when dealing with cases that involve the reach and cross-border nature of the internet. People, around the world can browse content, and content creators can share their work across different regions. While it may seem like this could subject website content to the laws of every location it's accessed from in reality this idea is not practical. May be excessive. Therefore it's important to identify locations where it makes sense for content to be governed by the law. This determination brings up questions about conflicting laws and how legal norms are chosen.

3.3. Examining the complexities of jurisdiction in Russia and the European Union legal systems reveals insights.

The legal frameworks of the EU are based on the 1968 Brussels Convention and various 'Judgment Conventions' (Ebert, 2008). In a case like *Derain*, it was

¹⁶ HÖRNLE, J.: Internet jurisdiction law and practice. 2021

¹⁷ REEDY, A., PFITZNER, D., ROOK, L., & ELLIS, L.: Responding to the COVID-19 emergency: student and academic staff perceptions of academic integrity in the transition to online exams at three Australian universities. *International Journal for Educational Integrity*, 17(1), 2021, 9.

established that a judgment against a resident defendant can only be enforced if it falls within specific jurisdictional boundaries outlined in these conventions (Derain (Case 125/79)). Generally, this means that enforcement requires the court to have jurisdiction over the defendant unless there is consent or submission from them. The regulations from 1968 and their revisions, in 1988 have largely been superseded by Council Regulation (EC). No. 44/2001 aims to standardize jurisdiction and the enforcement of judgments, among EU member states. This regulation holds importance as it creates a set of rules concerning jurisdiction across member states when interpreting their national laws¹⁸.

As per Article 5 of the Civil Code of the Russian Federation, it is mentioned that Russian law will apply to all matters related to intellectual property rights. Moreover, Article 1253 of the Civil Procedure Code specifies that disputes concerning IP rights will be resolved in a court of jurisdiction determining jurisdiction. However, challenges may arise when enforcing laws economically in the context of internet-based rights without borders¹⁹.

Both Russia's and the European Union's legal systems are based on territoriality, where laws apply within boundaries. However, the internet challenges this concept by transcending limitations leading to complexities, in determining jurisdiction. In terms of territoriality jurisdiction denotes the authority to apply and enforce laws within a defined area. Based on the norms of law a nation possesses the authority to create and uphold its legal regulations along, with resolving legal conflicts arising from such regulations. This notion also extends to the EEOC (Equal Employment Opportunity Commission).²⁰

4. Analyzing the Relevant Measures and Solutions

The focus, on courts in Russia for handling different IP rights contrasting with the UK's lack of a similar system might suggest that the Russian system boasts a higher expertise level. However, in the UK the absence of civil law patent courts has led to increased expenses in resolving patent disputes. To tackle this challenge the Patents County Court rule was implemented on October 1, 2010. This rule established a cost-effective platform for SMEs and individuals to settle patent and registered design conflicts. It reflects a 'trips plus approach commonly seen in law

¹⁸ KOUMPLI, V.: Managing Religious Law in a Secular State: The Case of the Muslims of Western Thrace. Normativity and Diversity in Family Law: Lessons from Comparative Law, 2022, 327-349.

¹⁹ LEVINA, D.: Jurisdiction at the place of performance of a contract revisited: a case for the theory of characteristic performance in EU civil procedure. *Journal of Private International Law*. Kapyrina, N. (2020). Clarifications of the Russian Supreme Court on General Aspects of Intellectual Property Protection: A Summary. GRUR International. 2022

²⁰ SGROI, F.: Territorial development models: A new strategic vision to analyze the relationship between the environment, public goods and geographical indications, *Science of the Total Environment*, 2021

nations aiming to offer more extensive protection than required by TRIPS to stimulate economic and cultural growth²¹.

Section 4.1 underscores a contrast, between Russia's civil law systems and the UK's common law framework. The adaptable nature of law courts enables them to issue injunctions granting UK courts powers to address intellectual property infringements swiftly and effectively.

In Russia according to Article 1087 of the RF Civil Code, the standard civil law principle favors returning what was lost as compensation, for breaking contracts while damages serve as the remedy for wrongful actions. This often results in damages being awarded as a fee than a substantial amount. Although this approach may work for property (IP) violations it falls short of adequately compensating rights holders when the violator is an end user. Additionally, consumers rarely gain any benefits from buying pirated software. Are typically unaware of committing copyright infringement, which makes it an ineffective deterrent.

Since the effectiveness of a law depends on how its rights are enforced expecting any law to completely eradicate all violations of individual rights would be unrealistic. However effective enforcement mechanisms are essential in ensuring that these rights are respected and protected. The transition of everyday interactions to digital platforms like the Internet has led to a rise, in IP infringements and subsequent efforts to enforce intellectual property rights in this digital realm.²²

4.1. Analysis of Potential Civil Measures for Infringement of Intellectual Property Rights

In the past, we discussed how determining the applicable law, for internet IP rights infringement depends on the type of IP right involved. When a conflict of law rules points to the law governing the right civil remedies can be sought based on the nature of the IP at stake. However, complications may arise due to community law factors in these scenarios. Notably Russian law stands separate from that of the European Union and in cases where conflict arises between community law and Russian law as per conflict of laws principles Russian courts would apply their laws (Kharchenko et al.2021) (Papakonstantinou, 2022). This could lead to a situation where civil remedies are not accessible leaving recourse through proprietary remedies utilizing foreign rights. Consequently, conflicts arising from territoriality issues regarding IP rights may leave claimants without a means to halt

²¹ ZINGG, R. - ELSNER, E.: Protection heterogeneity in a harmonized European patent system. *European Journal of Law and Economics*, 2020

²² WALSH, K. - WALLACE, A. - PAVIS, M. - OLSZOWY, N. - GRIFFIN, J. - HAWKINS, N.: Intellectual property rights and access in crisis. *IIC-International Review of Intellectual Property and Competition Law*, 2021, 379-416.

internet IP rights infringement. The resolution of this dilemma hinges on the level of cooperation between EU courts; if cooperation is strong there may be a chance to secure a judgment in an EU member state court, under Brussels regulations and have it enforced in Russia. The effectiveness of addressing IP rights issues depends on the type of property involved. One potential solution could involve implementing measures, like attaching an earnings order for a remedy. Enforcing measures for rights, such as seizing infringing goods across borders could be an aspect of EU law development and beneficial for right holders in upholding their IP rights. Another approach could involve establishing conflict of laws rules to handle internet IP rights infringement and ensuring remedies. However immediate implementation of these solutions is unlikely²³

4.2. Analyzing the implementation of criminal penalties for intellectual property infringement on the Internet.

Examining the enforcement of penalties for internet-based intellectual property infringement reveals that harsher sanctions are more effective in deterring violations compared to penalties. While compensation under law is meant to cover damages its effectiveness has been questioned as it may not fully address the harm caused by infringement. The discrepancy, between compensation awarded and benefits gained by offenders might lead to restitution penalties as discussed by Paparinskis (2020). A practical way to approach the matter is, by comparing how criminal enforcement mechanisms differ from civil enforcement methods. Many legal experts believe that Criminal Law serves as a form of legislation or function. In terms of Criminal Law is meant to impose penalties for breaching rights protected under civil law sections. Although this principle is now interpreted differently it's evident that when it involves intellectual property violations criminal accountability expands the boundaries of liability significantly (Zhang2022). The importance of imposing penalties in copyright law cannot be. Should be recognized in safeguarding intellectual property rights. This research aims to investigate the enforcement strategies and legal remedies offered by international law to prevent infringements, on intellectual property rights. As a result, criminal sanctions are analyzed within the framework of proceedings.²⁴

²³ NELAEVA, G. A. - KHABAROVA, E. A. & SIDOROVA, N. V.: Russia's Relations with the European Court of Human Rights in the Aftermath of the Markin Decision: Debating the "Backlash". *Human Rights Review*, 2020

²⁴ VARIDARIANI, N.: Enforcement of law of copyright infringement and forgery with the rise of the digital music industry. *Jurnal Penelitian Hukum De Jure*. Gray, J. E. & Suzor, N. P. (2020). Playing with machines: Using machine learning to understand automated copyright enforcement at scale. *Big Data & Society*.

4.3. The Impact of Technology on the Implementation of Intellectual Property Rights on the Internet

The influence of technology, on how intellectual property rights are enforced on the internet is a significant topic. In law, a recent amendment to Article 1252(1) of Part IV of the Civil Code of the Russian Federation empowers copyright owners to request the removal of any content they believe violates their rights. This request can be directed towards a hosting provider or website owner even if the content is located in a place. Similarly, the EU Copyright Directive (2001/29/EC) includes Article 8(3) which requires EU member states to allow rights holders to seek an injunction against intermediaries storing infringing content and against infringers themselves to prevent violations. The unified market and harmonized laws in the EU may enhance the effectiveness of this provision. However, it remains uncertain whether these measures will succeed fully in both Russia and the EU especially if individuals can easily evade these injunctions.²⁵

Enforcing copyright online poses challenges due, to the nature of the internet. The dynamic and rapid environment necessitates strategies to mitigate harm to copyright holders' rights before stopping infringing activities. Injunctions present an option. Can lead to success if implemented promptly and effectively. However enforcing these injunctions might pose challenges when the whereabouts of the infringing party are unknown or if they reside in a country, with intellectual property laws and enforcement practices²⁶ (Svantesson, 2021).

5. Conclusion

The establishment of a system to govern rules for the Internet whether by enhancing existing laws or creating a framework is essential. This task is complex due to the issues involved. Nonetheless, it is crucial to tackle this task to ensure that internet development aligns with protecting intellectual property rights and preventing infringement. To facilitate a redistribution of rights and obligations in a changing landscape and enhance the effectiveness of common regulations establishing a coherent and harmonized framework in private international law is essential. Both the European Union (EU) and Russia have prioritized adapting laws to suit the internet's nature and setting up a structure that safeguards intellectual property rights. Despite Russia's global influence, this matter carries weight as it involves balancing global standards, with localized regulations and legislation. In

²⁵ ALEXANDER, S.: The inadequacy of current remedies for violation of data subjects' rights and how to fix it. *Legal Issues in the Digital Age*, 2/2020

²⁶ SVANTESSON, D. J. B.: Private international law and the internet. *Private International Law and the Internet*, 2021

today's evolving world of information, lawmakers are facing challenges when it comes to protecting intellectual property rights. One proposed remedy involves revisiting the principles of frameworks and tailoring them to the online landscape leveraging its tools and means of enforcement. While this strategy could bring about outcomes there is a risk of imposing legal complexities that might hinder the natural evolution of the Internet as we know it today.

References:

Alexander, S. (2020). THE INADEQUACY OF CURRENT REMEDIES FOR VIOLATION OF DATA SUBJECTS' RIGHTS AND HOW TO FIX IT. *Legal Issues in the Digital Age*.

Almeida, D., Shmarko, K., & Lomas, E. (2022). ... of facial recognition technologies, surveillance, and accountability in an age of artificial intelligence: a comparative analysis of US, EU, and UK regulatory *AI and Ethics*.

Auriol, E., Biancini, S., & Paillacar, R. (2023). Intellectual property rights protection and trade: an empirical analysis. *World Development*.

Bayefsky, A. (2021). The UN human rights treaty system: Universality at the crossroads.

Bennett, T. B. (2020). The Paradox of Exclusive State-Court Jurisdiction over Federal Claims. *Minn. L. Rev.*

C

ampfens, E. (2020). Whose cultural objects? Introducing heritage title for cross-border cultural property claims. *Netherlands International Law Review*.

Davies, G., & Ricketson, S. (2020). The foundation of the World Intellectual Property Organization: what came before. In *Research Handbook on the World Intellectual Property Organization* (pp. 1-25). Edward Elgar Publishing.

Dratler Jr, J. & McJohn, S. M. (2023). Intellectual property law: Commercial, creative, and industrial property.

Gray, J. E. & Suzor, N. P. (2020). Playing with machines: Using machine learning to understand automated copyright enforcement at scale. *Big Data & Society*.

Hörnle, J. (2021). Internet jurisdiction law and practice.

Kapyrina, N. (2020). Clarifications of the Russian Supreme Court on General Aspects of Intellectual Property Protection: A Summary. GRUR International.

Kharchenko, O., Kronda, O., Kryvosheyina, I., & Zerov, K. (2021). Protection of intellectual property rights on the Internet: new challenges. Amazonia Investiga, 10(41), 224-236.

Koumpli, V. (2022). Managing Religious Law in a Secular State: The Case of the Muslims of Western Thrace. Normativity and Diversity in Family Law: Lessons from Comparative Law, 327-349.

Levina, D. (2022). Jurisdiction at the place of performance of a contract revisited: a case for the theory of characteristic performance in EU civil procedure. Journal of Private International Law.

Morcos, P. G., & Khneisser, E. F. (2020). Intellectual property rights. Higher Education in the Arab World: Building a Culture of Innovation and Entrepreneurship, 183-204.

Myslivskiy, P. (2021). Execution of Judgments and Advisory Opinions of the Court of the Eurasian Economic Union. The Law and Policy of New Eurasian Regionalization.

Nelaeva, G. A., Khabarova, E. A., & Sidorova, N. V. (2020). Russia's Relations with the European Court of Human Rights in the Aftermath of the Markin Decision: Debating the "Backlash". Human Rights Review.

Papakonstantinou, V. (2022). Cybersecurity as praxis and as a state: The EU law path towards acknowledgment of a new right to cybersecurity? Computer Law & Security Review.

Paparinskis, M. (2020). A case against crippling compensation in International Law of State Responsibility. The Modern Law Review.

Reedy, A., Pfitzner, D., Rook, L., & Ellis, L. (2021). Responding to the COVID-19 emergency: student and academic staff perceptions of academic integrity in the transition to online exams at three Australian universities. International Journal for Educational Integrity, 17(1), 9.

Romulo, C. S., & Dalimunthe, Z. (2024). Effect of Related Party Transaction and Tax Haven Utilization on Tax Avoidance Moderated by Country-by-country Reporting. *Riwayat: Educational Journal of History and Humanities*, 7(1), 26-40.

Rustambekov, I. (2020). Some Aspects of Development of Private International Law in the CIS Countries. *LeXonomica*.

Shakargy, S. (2020). Choice of law for surrogacy agreements: in the in-between of status and contract. *Journal of Private International Law*.

Shokhin, S. O., & Volkova, A. A. (2021). Transboundary Movement of Intellectual Property Items in the EAEU in the ERA of Digitalisation. *NTUT Journal of Intellectual Property Law and Management*, 10(2), 26-38.

Sgroi, F. (2021). Territorial development models: A new strategic vision to analyze the relationship between the environment, public goods and geographical indications. *Science of the Total Environment*.

Strowel, A. (2021). Advocating an EU Copyright Title. *EU Copyright Law*.

Svantesson, D. J. B. (2021). Private international law and the internet. *Private International Law and the Internet*.

Tomczyk, Ł (2021). Evaluation of digital piracy by youths. *Future Internet*.

VaridaAriani, N. (2021). Enforcement of law of copyright infringement and forgery with the rise of the digital music industry. *Jurnal Penelitian Hukum De Jure*, 21(2).

Walsh, K., Wallace, A., Pavis, M., Olszowy, N., Griffin, J., & Hawkins, N. (2021). Intellectual property rights and access in crisis. *IIC-International Review of Intellectual Property and Competition Law*, 52, 379-416.

Zhang, C. (2022). Copyright Enforcement Via Civil Damages Remedy. In *Balance and Limitation of Intellectual Property Protection in China: The Latest Law Amendments and Judicial Development Under Micro-comparative Perspectives* (pp. 119-145). Singapore: Springer Nature Singapore.

Zingg, R. & Elsner, E. (2020). Protection heterogeneity in a harmonized European patent system. *European Journal of Law and Economics*.

SZIKSZAI DÓRA*

Legal comparison of the right of access to end-of-life decisions in Hungary and German-speaking countries

Abstract: The legal status of euthanasia and assisted suicide varies significantly across Europe, reflecting diverse cultural, ethical, and legal perspectives. This article provides a comparative legal analysis of end-of-life decision-making in Hungary, Germany, Austria, and Switzerland, highlighting the differences in legal frameworks, constitutional interpretations, and regulatory approaches. While Hungary maintains a strict prohibition on assisted suicide and euthanasia, other German-speaking countries have moved towards legalization, each implementing different safeguards and procedural requirements. Germany, following a 2020 Constitutional Court ruling, recognizes the fundamental right to self-determined death but lacks a comprehensive legal framework. Austria, influenced by German jurisprudence, legalized assisted suicide under a highly regulated model, while Switzerland has long permitted assisted suicide under certain conditions. The study examines these legislative models, their implications for human dignity, self-determination, and state obligations to protect life, and explores potential lessons for future regulatory developments.

Keywords: Assisted death, euthanasia, legal comparison, Hungary, Germany, Austria, Switzerland

1. Introduction

The legal status of euthanasia and assisted suicide varies significantly across Europe, reflecting diverse cultural, ethical, and legal perspectives. Here, where the states have common legal roots due to the continental legal system and almost identical values in the field of human rights, they still cannot offer the same level of protection to those who wish to end their lives with dignity. Europe has long agreed that people have an inalienable right to life and human dignity. Despite this, however, death with dignity is generally considered to be neither an integral part of these rights, nor to be included in the collection of human rights. While some countries have recognized the right to assisted suicide and, in rarer cases, even euthanasia for decades, others have resisted taking this step. Despite these differences, a clear trend toward legalization is evident, as demonstrated by recent developments in countries such as Germany, Austria, France, England and Wales. While some of these countries have established comprehensive regulatory

* Szikszai Dóra, PhD Student at University of Miskolc, Deák Ferenc Doctoral School of Law, Institute of Criminal Sciences, Department of Criminal Law and Criminology, Supervisors: Prof. Dr. Dr. h. c. Gerhard Dannecker, Seniorprofessor at University of Heidelberg, Prof. Dr. Judit Jacsó, Professor at University of Miskolc, Head of Department of Criminal Law and Criminology.

frameworks for assisted suicide, others are in the process of creating such legislation. This article presents the characteristics of legislation, from the example of a complete criminal law prohibition, through regulations dating back centuries, to the most current models, using the examples of Hungary, Switzerland, Germany, and Austria. First and foremost, it is necessary to clarify the fundamental concepts of the topic. After presenting the regulatory models, a comparative analysis should be made, starting with the examples and best practices that can be followed, and extending to the elements that require changes.

2. Explanation of terms

There are a number of different terminologies used in the legal and medical literature in relation to end-of-life decisions, and it is crucial to distinguish between them when talking about legalisation.¹ The terms are often interpreted differently from country to country, while the public discourse refers to all cases as euthanasia. However, the phrases "medical or physician assistance in dying", "aid in dying", "death with dignity", „mercy killing", "right to die" and "end of life decision" are also known. Death with Dignity, a non-profit organization based in the state of Oregon, has been researching the issue for nearly 30 years, so it's worth using their definitions to clarify the definitions. First of all, it is important to draw a clear line between assisted death and euthanasia, as this is the most significant borderline in the legalisation wave in different countries. Euthanasia may sound a familiar word to everyone, although it is often not used in the right sense. In addition to the two forms of euthanasia (active and passive), there are other distinctions. In the active form, we can speak of the deliberate induction of death, whether by a doctor or a lay person, which should be understood as a de facto active intervention, i.e. it is the external person who administers the lethal drug. Passive euthanasia is the opposite, where the death of a person is facilitated by the non-action of medical staff or a lay person. In practice, this is often identified with the right to refuse life-sustaining care. In addition, as mentioned above, there are other ways of classifying euthanasia, such as the distinction between voluntary and involuntary euthanasia, which looks at the person's consciousness and will at the time of the disposition of death.² A third case is so-called non-voluntary euthanasia, where the patient is not in a position to make a decision due to mental or physical incapacity, and it is therefore made by his legal surrogate on the basis of a pre-defined document.

In fact, as there are many different categories, it may be important to mention physician-induced but not deliberate euthanasia, which some people do not even

¹ KŐRÖSI, A.: Az önrendelkezési jog az eutanázia kapcsán, *Jog Állam Politika*, 2017/2, 77.

² JOBBÁGYI, G.: Eutanázia I., *Magyar Szemle*, 2004., 6-32.

consider to be included in this category. In clinical practice, this is when a doctor administers strong painkillers to alleviate suffering, knowing that this could lead to hasten death.³ However, this is done with the patient's consent and is intended solely to ensure a life of dignity, so it cannot be narrowly classified here.⁴

After a detailed explanation of the concept of euthanasia, it is important to address the definition of assisted death as well, as a distinctly separate institution at the level of legalization. The term is often also used as "physician-assisted death" (PAD) and differs from the aforementioned practices in its method of execution. The lethal medication must be self-administered by the patient without any assistance; therefore, the physician, while adhering to specified conditions and requirements, merely prescribes it.

Comparing the discussed methods, it can be stated that in the cases of active euthanasia and assisted death, an external intervention is what causes death, whereas in passive euthanasia, death is caused by the illness itself due to the absence of medical care.⁵ Of course, even so, no universal rule can be established regarding the meaning of these terms, as, for example, in Canada, the concept medical-assistance in dying (MAiD) includes both previously mentioned categories, and in Australia, voluntarily assisted dying (VAD) also covers both groups. However, in this article, I will use these definitions as a reference point. When examining the regulations of individual countries, it is always essential to approach terminology with caution.⁶

3. Hungarian legal framework

3.1 Act C of 2012 on the Criminal Code

The first point of comparison is Hungary's approach to assisted suicide, from the perspective of total criminal prohibition. The criminal ban of assisted suicide was already included in the first independent Hungarian criminal code, the Csemegi Code, with very similar content to the current one.⁷ Over the years, the criminalization of physical assistance has been extended to include psychological assistance as well, which can be interpreted as reinforcement of intent. Additionally, the classification of qualifying cases has evolved in subsequent criminal codes. However, they have all maintained a consistent stance that assistance in suicide must

³ HALMAI, G. – TÓTH, G. A.: Emberi Jogok, Osiris Kiadó, Budapest, 2008., 348.

⁴ LUCAS LUCAS, R.: *A bioetikáról mindenkinek*, Új Ember Kiadó, Budapest, 2007., 158.

⁵ <https://deathwithdignity.org/resources/assisted-dying-glossary/> (date of download: 12/02/2025)

⁶ COLLERAN, M. – DOHERTY, A. M.: Examining assisted suicide and euthanasia through the lens of healthcare quality; *Irish Journal of Medical Science*, 2024/193., 353-362.

⁷ Csemegi Code § 283 „Any person who persuades a person to commit suicide, or knowingly provides him with means or drugs for this purpose, shall be punished by imprisonment for a term of up to three years.”

be punishable. The current legal framework thus mandates the punishment of both physical and psychological assistance, as well as incitement. Additionally, it provides enhanced protection in qualifying cases for minors.⁸ It is also worth noting that one qualifying case has been included under the homicide section, meaning that a person who incites a child under the age of 14 or an individual incapable of expressing their will to commit suicide is held liable for the crime of homicide.⁹

However, an important question is how accountability is applied in practice in cases of euthanasia and PAD. According to the reasoning of the Criminal Code Commentary, when classifying homicide, the victim's health condition must be disregarded, as well as the fact that the assistance in dying was explicitly carried out at their request.¹⁰ In its decision No. 23/1990 (X.31.), the Hungarian Constitutional Court stated that human life is an overriding value, which is unlimited and the source of many other fundamental rights. However, since the topic of euthanasia became increasingly discussed in the literature in the early 2000s, the Constitutional Court provided guidance in a subsequent decision, namely in ruling No. 22/2003 (IV.28.). In this decision, it was clarified that euthanasia refers to both the active assistance in dying based on the patient's will and the passive euthanasia, where medical care is not provided by the doctor despite the patient's request. According to the Criminal Code, active euthanasia, meaning when the doctor administers the lethal means, is classified as homicide. In contrast, the execution of PAD is not punishable under the homicide section, but rather under the specific criminal offense of aiding and abetting suicide, as defined in the law. Since in this case, the person wishing to die self-administers the lethal medication, only the doctor involved, for prescribing the pill, can be held criminally liable, as the physical assistant. In addition, those individuals who assisted in other ways, such as helping with travel abroad, finding a doctor, etc., may also bear further liability. However, criminal liability also requires the existence of a result, such as attempting or committing suicide. Therefore, if a doctor merely prescribes a lethal drug but the patient does not take it, he cannot be held liable under the provisions of this section.

⁸ Criminal Code § 162 (1) Any person who persuades another to commit suicide, or provides aid for suicide is guilty of a felony punishable by imprisonment between one to five years, if the suicide is attempted or committed.

(2) Any person over the age of eighteen years who persuades another person under the age of eighteen years to commit suicide, or provides aid for committing suicide is punishable by imprisonment between two to eight years, if the suicide is attempted or committed.

⁹ Criminal Code § 160 (5) Any person who persuades another to commit suicide shall be punishable in accordance with Subsection (1) if such person is under the age of fourteen years or is unable to express his will, and if the suicide is in fact committed.

¹⁰ KÓNYA, I.: XV. fejezet – Az élet és testi épség elleni bűncselekmények, *Magyar Büntetőjog I-IV. – Új Btk. – Kommentár a gyakorlat számára*

What illustrates more clearly how strictly the state upholds its obligation to protect life in this area is the provision regarding the scope of the Criminal Code. According to this, terminally ill patients cannot request assistance abroad either, as the Hungarian state, with the permission of the Prosecutor General, can initiate proceedings against the foreign perpetrator of a crime committed against a Hungarian citizen, i.e., the foreign doctor. According to the *passive personality principle*, criminal liability can be established without double incrimination, meaning it is not enough for the patient to seek out a country where euthanasia or PAD is legal.¹¹

As an exception to the strict penalties, self-determination also has a place in the Hungarian legal system, although in a more limited scope. The practice of passive euthanasia has become a natural development worldwide with the evolution of patients' rights, given that no one can be forced to undergo treatments, even if they are life-saving or life-sustaining. The next chapter will examine Hungarian healthcare regulations in the context of passive euthanasia.

3.2 Act CLIV of 1997 on Health Care

Constitutional Court Decision No. 22/2003 (IV.28.) stated that the issue of euthanasia, and in particular passive euthanasia, can be interpreted in compliance with the provisions of the Health Care Act. Prior to 1998, the declaration of patients' rights was not an integral part of legislation, but the Health Care Act already provides a detailed catalogue, with special attention to the rights of the dying patient, such as the rights to information, medical care, human dignity, self-determination, personal support, and the right to relief of pain and suffering. However, the right to treatment also implies that it should not be an obligation, even if the lack of treatment leads to the death of the patient. But this right to self-determination is subject to strict conditions under the law. On the one hand, this right applies only to individuals with capacity to act and, on the other hand, the right to refuse life-sustaining or life-saving interventions is only available if the patient suffers from a serious illness which, according to the current state of medical knowledge, will lead to death within a short period of time, even with appropriate medical care, and is incurable. These conditions are conjunctive and the procedure requires compliance with the formalities, i.e. such a declaration can only be made in a public or private document with full probative value. Before the declaration is

¹¹ Criminal Code § 3 (2) Hungarian criminal law shall, furthermore, apply:

a) to any act committed by non-Hungarian citizens abroad, if:

aa) it is punishable as a criminal offense under Hungarian law and in accordance with the laws of the country where committed,

b) to any act committed by non-Hungarian citizens abroad against a Hungarian national or against a legal person or unincorporated business association established under Hungarian law, which are punishable under Hungarian law.

made, the person is examined by a three-member medical committee (the patient's doctor, a specialist not involved in the treatment and a psychiatrist), who must all agree that the patient has made the decision in full knowledge of the consequences and that the conditions mentioned above are met. On the third day thereafter, the patient must reconfirm his/her intention in the presence of 2 witnesses. According to the established case law of the European Court of Human Rights, it is at the discretion of States to determine the conditions under which they protect human life within the meaning of Article 2 ECHR.¹² This type of conditionality is therefore not at all unusual or excessive in the field of the right to refuse treatment.¹³ The issue received considerable attention in Hungary in the context of the case of Dániel Karsai before the ECtHR. After the rejection of the application for legalisation of assisted suicide, the Ministry of Justice issued a statement saying that it distances itself completely from the legalisation of euthanasia, citing the sanctity of life and Christian values.¹⁴

Overall, it can be said that Hungary takes a conservative stance on the issue, and as things stand, there is no political initiative to amend the nearly 150-year-old legal text.

4. German non-regulative modell

To look back in the past, Germany did not independently criminalize assistance in suicide until 2015. There were several reasons for this; however, many countries, including Hungary, have successfully eliminated these issues. The criminal liability for assisting in suicide was excluded in the Strafgesetzbuch (German Criminal Code) based on one of the fundamental principles of criminal law, namely the principle of accessory liability (Akzessorietätsargument). Both the German and Hungarian penal codes require a main act to establish complicity. Consequently, complicity cannot be established if the victim committed suicide of their own free will (freiverantwortlich). The Hungarian Criminal Code addresses this issue with a quasi sui generis category of criminal offenses. German legal scholarship further supported the non-criminalization of assistance in suicide with a widely accepted theory in legal literature and practice, known as the principle of self-responsibility (Prinzip der Eigenverantwortlichkeit des Opfers). This argument is considered

¹² Lambert and others vs. France

¹³ FILÓ, M. – BUZÁS, P.: Életvégi döntések és a margin of appreciation az Emberi Jogok Európai Bíróságának gyakorlatában, *Állam- és Jogtudomány*, LVII/4., 30.

¹⁴ TÓTH, A. A. – LÉNÁRT, A. – NAGY, E. – SINKÓ, E.: Életvégi döntések lehetőségei Magyarországon 1. rész, *IME Egészségügyi Vezetők Szaklapja*, XXIII. évfolyam, 2024/4., 7.

applicable in German high court jurisprudence even when the victim causes harm to themselves.¹⁵

2015 the legislature introduced a new criminal offense into the penal code, making commercially assisted suicide punishable.¹⁶ Several parts of this provision require clarification, for which the Criminal Code Commentary can provide assistance. It is crucial to highlight that the legislator meant "Gelegenheit" (opportunity) and not "Möglichkeit" (possibility), as merely providing the possibility was not sufficient for establishing criminal liability. This included the organized facilitation of suicide by providing medications, tools, premises, or transportation. These examples help clarify the creation and provision of an opportunity as an act of commission. However, the term "arrange" (vermitteln) requires further explanation. This phrase could be established when the perpetrator created the opportunity for suicide by involving a third party. This would include cases where the perpetrator connected the victim with a third party who assisted in the suicide. However, merely discussing assisted suicide with a third party was not sufficient for criminal liability.¹⁷ This concept required a compromise among the federal states, as some states opted for more radical solutions. Among the proposals were penalizing the promotion of suicide and treating euthanasia organizations similarly to criminal organizations. The justification was that the commercialization of life-ending practices is unconstitutional.¹⁸ Despite rejecting extreme proposals, numerous constitutional complaints were filed against the 2015 amendment with the German Federal Constitutional Court. In its ruling on February 26, 2020, the Constitutional Court established the fundamental right to suicide, thereby declaring the criminalization of assistance in suicide unconstitutional. The Karlsruhe judges derived the right to suicide from human dignity and self-determination. The ruling sends a clear message: *"Every individual has the right to a self-determined death."* According to the ruling, the individual not only has the right to choose the manner and timing of their death, but they can also seek assistance from

¹⁵ FILÓ, M.: Asszisztált öngyilkosság és az életvégi döntések Európában, *Állam- és Jogtudomány*, LVII. évfolyam, 2016/4., 125-126.

¹⁶ dStGB. § 217 Whoever, with the intention of assisting another person to commit suicide, provides, procures or arranges the opportunity for that person to do so and whose actions are intended as a recurring pursuit incurs a penalty of imprisonment for a term not exceeding three years or a fine./Wer in der Absicht, die Selbsttötung eines anderen zu fördern, diesem hierzu geschäftsmäßig die Gelegenheit gewährt, verschafft oder vermittelt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. (in force until 26.02.2020.)

¹⁷ FISCHER, T.: *Strafgesetzbuch mit Nebengesetzen*. 64. Auflage. C.H. Beck Publisher, München, 2017., 1520-1522.

¹⁸ FILÓ, M.: Asszisztált öngyilkosság és az életvégi döntések Európában, *Állam- és Jogtudomány*, LVII. évfolyam, 2016/4., 126.

a third party, as this autonomous act must be respected by both the state and society. This decision should not be limited to a specific life situation, illness, or age.¹⁹

There is no universally accepted definition of human dignity, but years of legal practice have shaped its meaning. In summary, a person should never be reduced to a mere object of state action. Every individual decides for themselves what meaning they assign to their life and how they wish to live. This applies not only to life but also to death, as the two are closely interconnected. A dignified life inherently includes a dignified death. Deciding when and how we die is the last autonomous decision we can make as individuals. This is the constitutional basis for the right to suicide.²⁰

The question arises as to how the February 26, 2020 ruling reshaped the criminal liability for assisting in suicide. In 2023, two legislative proposals were submitted to the Bundestag: The proposal by the Liberals and Greens would allow doctors to prescribe necessary medications to patients who make a free-willed decision, provided they receive proper counseling and submit an official declaration of intent. This proposal aims to prioritize the individual's autonomous will ("autonomer Wille"). Additionally, it suggested developing a national strategy to prevent the legal vacuum around assistance in suicide, ensuring that peer encouragement and assistance among young people do not lead to more deaths. A public information campaign was planned for 2024 to address this issue. The second proposal sought to reintroduce the previously unconstitutional offense, with minor modifications. However, an exception would be made if two psychiatric specialists examined the patient three months apart to confirm their genuine decision. Some MPs argued that even with this exception, the proposal remained unconstitutional. In the summer of 2023, the Bundestag voted on the proposals, but neither secured a majority. As a result, assisted suicide remains a legal "gray area" in Germany.²¹ However, progress has been made, as euthanasia is now part of public discourse.²²

It is worth to mention, killing on request²³ remains a criminal offence, so active euthanasia is still constitutionally protected in the German legal system, only PAD is now excluded from the scope of criminal law.

¹⁹ BVerfG, Urt. v. 26. 2. 2020 – 2 BvR 2347/15 –, Rdnm. 210-212.

²⁰ BOEHME-NEBLER, V.: Das Grundrecht auf Suizid, *Zur Rechtsprechung*, NVwz. 14/2020., 1012.

²¹ TEICHMANN, F. – CAMPRUBI, M.: Regelung der Sterbehilfe in der Schweiz und in Deutschland, *Medizinrecht*, 2021/39/2, 145.

²² PETRUS, Sz.: Németország: jöhet az asszisztált öngyilkosság. <https://jogaszvilag.hu/vilagjogasz/nemetorszag-johet-az-asszisztalt-ongyilkossag/> (date of download: 03/02/2025)

²³ dStGB § 216 Whoever is induced to kill at the express and earnest request of the person killed incurs a penalty of imprisonment for a term of between six months and five years./Ist jemand durch das

5. Austrian legal framework

5.1 Criminal Code (Strafgesetzbuch) amendment after Austrian Constitutional Court decision

Primarily influenced by the ruling of the German Constitutional Court, the Austrian legislature has also taken a new direction in the field of end-of-life decisions. Since the "Big Criminal Law Reform" of 1974, the Austrian StGB has penalized participation in suicide with similar wording to the Hungarian regulation, meaning that both incitement and assistance were punishable.²⁴

In December 2020, an unexpected ruling by the Austrian Constitutional Court overturned a previous 2016 decision and declared parts of the existing legislation unconstitutional, citing the fundamental right to free self-determination.²⁵ The case was brought before the Court by four individuals, two of whom were terminally ill, who argued that their rights to private life and human dignity had been violated. According to the Court, the right to self-determination extends not only to choosing the manner and timing of one's death but also to seeking assistance from a third party. Allowing such assistance ensures that individuals are not forced into undignified circumstances when attempting suicide, often prematurely. For a dignified death to be possible, the state must guarantee responsible decision-making, which includes providing full and comprehensive information. In this context, the state should not differentiate between patients who refuse life-sustaining treatment and those who opt for assisted suicide. Furthermore, Austrian law already permitted the not deliberate form of active euthanasia—where a physician accelerates death by administering painkillers, provided the benefits of pain relief outweigh the harm.²⁶ The Constitutional Court concluded that the existing legal inconsistency—allowing passive euthanasia, palliative care, and free

ausdrückliche und ernstliche Verlangen des Getöteten zur Tötung bestimmt worden, so ist auf Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu erkennen.

²⁴ öStGB. § 78 Anyone who induces another person to kill himself or herself or assists him or her to do so shall be liable to a custodial sentence of six months to five years./Wer einen anderen dazu verleitet, sich selbst zu töten, oder ihm dazu Hilfe leistet, ist mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu bestrafen. (in force until 31.12.2021.)

²⁵ WEIßENBERGER, E.: *Sterbehilfe in Österreich mit Blick auf das Sterbeverfügungsgesetz*, Doctoral Thesis, Johannes Kepler Universität Linz, 2023., 10.

²⁶ Ärztegesetz § 49a (2) Within the meaning of para. 1, it is also permissible in particular to take measures in the context of palliative medical indications in the case of dying persons whose benefit in alleviating the most severe pain and suffering outweighs the risk of accelerating the loss of vital life functions./Im Sinne des Abs. 1 ist es bei Sterbenden insbesondere auch zulässig, im Rahmen palliativmedizinischer Indikationen Maßnahmen zu setzen, deren Nutzen zur Linderung schwerster Schmerzen und Qualen im Verhältnis zum Risiko einer Beschleunigung des Verlusts vitaler Lebensfunktionen überwiegt

suicide while prohibiting assisted suicide—was unjustified and violated human dignity. The central challenge then became how to establish a legal framework that would prevent potential abuses. The most crucial safeguard is the clear definition of free will, ensuring that decisions regarding assisted suicide are made autonomously and without external coercion. While this determination can be complex, it does not justify a complete ban on assistance. Consequently, incitement to suicide remains a punishable offense, as it inherently negates free will. However, third-party assistance, as considered unconstitutional, necessitated changes to the law. Notably, the revised legislation does not address psychological assistance but specifically refers to physical assistance. Physical assistance remains illegal except in cases where certain conditions are met. Assistance is prohibited if provided to a minor, to an individual with a reprehensible motive, or to a person who does not meet the criteria set by the Death Disposition Act (*Sterbeverfügungsgesetz*) and has not been adequately informed of the medical consequences.²⁷ Despite these changes, the Criminal Code's provision on killing on request remained unaltered and was deemed constitutionally acceptable.²⁸ This means that active euthanasia remains a punishable offence, meaning that it is still a criminal offence to take an individual's life against their serious and urgent wishes. The Constitutional Court therefore legalised only assisted suicide, i.e. PAD.

²⁷ *öStGB*. § 78 (1): Anyone who induces another person to kill himself shall be liable to a custodial sentence of six months to five years.

(2) Likewise, anyone who

1. a minor person,

2. a person with a reprehensible motive or

3. a person who is not suffering from an illness within the meaning of Section 6 (3) of the Death Disposition Act (*StVfG*), *BGBI. I* No. 242/2021, or who has not been medically informed in accordance with Section 7 *StVfG*,

physically assists in killing themselves./

(1) Wer eine andere Person dazu verleitet, sich selbst zu töten, ist mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu bestrafen.

(2) Ebenso ist zu bestrafen, wer

1. einer minderjährigen Person,

2. einer Person aus einem verwerflichen Beweggrund oder

3. einer Person, die nicht an einer Krankheit im Sinne des § 6 Abs. 3 des *Sterbeverfügungsgesetzes* (*StVfG*), *BGBI. I* Nr. 242/2021, leidet oder die nicht gemäß § 7 *StVfG* ärztlich aufgeklärt wurde, dazu physisch Hilfe leistet, sich selbst zu töten.

²⁸ *öStGB* § 77 Anyone who kills another person at their serious and insistent request is liable to a custodial sentence of between six months and five years./Wer einen anderen auf dessen ernstliches und eindringliches Verlangen tötet, ist mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu bestrafen.

5.2 Sterbeverfügungsgesetz

The Death Disposition Act applies exclusively to Austrian citizens and habitual residents, effectively precluding the development of so-called "suicide tourism." Moreover, free will extends not only to those seeking assisted suicide but also to those providing assistance, ensuring voluntary participation. The provision regarding the identity of the assisting person allows for broad interpretation, as, beyond being a legally competent adult or a legal entity, the only criterion is the willingness to assist the individual in ending their life. Thus, neither doctors nor relatives, nor even organizations established for this purpose, can be excluded from providing assistance.²⁹ To qualify for end-of-life decision-making, an individual must have full legal capacity, be of legal age, act without undue influence, and suffer from a terminal or severe illness that significantly impairs their ability to live with dignity.³⁰ The process involves thorough consultation with two physicians, one of whom must specialize in palliative care. These consultations cover potential treatment options, suicide prevention, and implementation procedures. If a doctor suspects that a mental illness might affect decision-making, a psychiatric evaluation is required. Following the consultations, a waiting period of at least 12 weeks is mandated before a lethal dose can be administered. However, for patients in the final stages of their illness, this waiting period is reduced to two weeks. If the patient does not proceed with the assisted suicide within one year, they must undergo a renewed consultation and reaffirm their decision.

Once the medical consultation is complete, a notary—serving as an official documenter—records the patient's declaration of intent, verifying their capacity to act and their Austrian citizenship or residency status. This information is entered into a central register to prevent individuals from obtaining the lethal substance multiple times. After documentation, the individual may obtain the substance from a pharmacy, but the list of dispensing pharmacies is not publicly accessible. The Austrian Chamber of Pharmacy only discloses the location of the designated pharmacy upon request from the documenting professional. Before dispensing the substance, the pharmacist must verify the individual's identity and ensure that the patient has not already acquired sodium pentobarbital elsewhere. Unused substances must be returned to the pharmacy for disposal, allowing the patient the possibility of withdrawal until the very last moment, thereby safeguarding free will. In addition to these strict procedural requirements, the law includes a prohibition

²⁹ NEUMAYR – RESCH- WALLNER: *Gmunder Kommentar zum Gesundheitsrecht*, § 3 StVfG Rz 2

³⁰ BIRKLBAUER, A.: Sterbeverfügung und assistierter Suizid. in: Aigner-Kletečka-Kletečka-Pulker-Memmer (ed.): *Handbuch Medizinrecht*, Kap I.24.2.

on advertising assisted suicide services, though it does not restrict providing necessary information to patients about their legal options.³¹

6. Swiss legal framework

6.1 Constitutional introduction

In its judgment 133 I 58, the Federal Supreme Court of Switzerland pointed out that, in accordance with the practice of the ECtHR, Article 8 of the European Convention on Human Rights establishes the right to choose the manner and time of death, provided that the individual is capable of expressing his/her free will and of acting accordingly, since the right to privacy, as enshrined in the article, provides a free space for the individual to manifest his/her personality. According to the decision, Article 10 of the Swiss Constitution³², which guarantees the protection of life and personal freedom, must be specified in each individual case and the extent of the protection must be determined on a case-by-case basis.³³ The right to one's own death must, however, be distinguished from the right to have the state or a third party obliged to assist in this. Nevertheless, the state has a duty to ensure, through appropriate procedures, that the decision to end life is truly in accordance with the free will of the person concerned.³⁴

6.2 Criminal Code (Strafgesetzbuch)

In many aspects, the Swiss criminal law had similarities with the German legal situation prior to the German Constitutional Court's decision in February 2020. While the German Criminal Code punished both killing on request and commercial assistance in suicide, in Switzerland, the legislature places participation motivated by selfish reasons under state criminal jurisdiction instead of commercial assistance.

According to Article 114 of the Swiss Criminal Code (*Tötung auf Verlangen*) anyone who, out of commendable motives—particularly compassion for the

³¹ Sterbeverfügungsgesetz sowie Änderung des Suchmittelgesetzes und des Strafgesetzbuches

³² BG (Federal Constitution of the Swiss Confederation) Art. 10 Right to life and personal freedom

(1) Everyone has the right to life. The death penalty is prohibited.

(2) Everyone has the right to personal freedom, in particular to physical and mental integrity and to freedom of movement./

Recht auf Leben und auf persönliche Freiheit

(1) Jeder Mensch hat das Recht auf Leben. Die Todesstrafe ist verboten.

(2) Jeder Mensch hat das Recht auf persönliche Freiheit, insbesondere auf körperliche und geistige Unversehrtheit und auf Bewegungsfreiheit.

³³ BGE 133 I 58 6.1

³⁴ BGE 133 I 58 6.2.1

victim—causes the death of another person at their genuine and insistent request may face a custodial sentence of up to three years or a monetary penalty.³⁵ However, the presumed will of the victim is not sufficient for sentencing. In this case, the provisions of Articles 111-113 of the Swiss Criminal Code are applicable (*Vorsätzliche Tötung, Mord, Totschlag*).³⁶ It is precisely this commendable motive that contrasts this criminal offense with the offense of inciting or assisting suicide, which is based on selfish motives. This offense is essentially framed similarly to the one found in Hungarian legislation, even in terms of being classified as a material crime.³⁷ The only difference lies in the motive, which requires further explanation. Selfish interest refers to the pursuit of some material, idealistic, or emotional gain, with the most common case being an inheritance interest. However, there are no specific guidelines yet regarding what constitutes a material goal, as operating an assisted suicide organization for the purpose of material gain is still prohibited, while accepting funds to cover administrative costs is allowed.³⁸ In practice, when browsing the platforms of various organizations, other fees, such as membership fees, often appear. This kind of uncertainty leads to legal ambiguity, which will need to be addressed in the future. In summary, it can be said that active euthanasia is not lawful even in Switzerland. Therefore, before the procedure can begin, it must be ensured that the individual is capable of deciding and administering the lethal dose to themselves.

In Switzerland, unlike Austria, no detailed legal framework has been established regarding how the procedure can be implemented in practice.

6.3 Betäubungsmittelgesetz and Guidelines of the Swiss Academy of Medical Sciences

The *Betäubungsmittelgesetz* regulates the control, use, and distribution of narcotic substances, which includes substances potentially used in assisted suicide

³⁵ sStGB 114 § Any person who for selfish motives incites or assists another to commit or attempt to commit suicide shall, if that other person thereafter commits or attempts to commit suicide, be liable to a custodial sentence not exceeding five years or to a monetary penalty./Wer aus achtsenswerten Beweggründen, namentlich aus Mitleid, einen Menschen auf dessen ernsthaftes und eindringliches Verlangen tötet, wird mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.

³⁶ TAG, B.: Strafrecht am Ende des Lebens – Sterbehilfe und Hilfe zum Suizid in der Schweiz. *Zeitschrift für die gesamte Strafrechtswissenschaft*, 128/1, 2016., 82.

³⁷ sStGB § 115 Any person who for selfish motives incites or assists another to commit or attempt to commit suicide shall, if that other person thereafter commits or attempts to commit suicide, be liable to a custodial sentence not exceeding five years or to a monetary penalty./ Wer aus selbstsüchtigen Beweggründen jemanden zum Selbstmorde verleitet oder ihm dazu Hilfe leistet, wird, wenn der Selbstmord ausgeführt oder versucht wurde, mit Freiheitsstrafe bis zu fünf Jahren oder Geldstrafe bestraft.

³⁸ SCHWARZENEGGER, CH.: Art. 115. Rdnr. 14., in: NIGGLI, M. A. – WIPRÄCHTIGER, H.: *Basler Kommentar – StGB*, 4. Auf., 2019.

procedures. In this context, sodium pentobarbital can only be prescribed by a professionally responsible doctor, in accordance with the amount recognized by medical standards.³⁹ The law does not provide detailed regulations; however, it clearly states that the lethal substance is subject to a medical prescription, which, according to the Supreme Court's position, the doctor is not obligated to issue.⁴⁰

In addition, the guidelines of the Swiss Academy of Medical Sciences (SAMW) play a crucial role, as the Supreme Court has emphasized that the permissibility of participation in suicide can only be ensured by taking into account medical professional standards and the position of the medical field.⁴¹ However, the guidelines increasingly interpret the scope of eligible individuals more broadly, which originally was limited to those terminally ill patients who were close to the end of their lives.⁴² Currently, the service is also accessible to those who are enduring unbearable suffering due to illness or disability.

7. Comparative Legal Conclusions

After reviewing the regulatory environment in 4 countries, there is no consensus yet on the regulatory environment that would ensure a dignified end of life, an adequate level of protection of life, a broad interpretation of self-determination and the avoidance of discrimination and abuse. Within Europe, there are also legal systems that argue for a total ban, while in recent years it has become more common to support a degree of legalisation. However, the question is where these limits lie. Hungary's legislation also covers cases committed abroad, thus stating that the state must guarantee the protection of life at the highest level, which it emphasised in *Karsai v. Hungary* before the ECtHR. Despite this, the case has caused a huge media backlash and, after years of silence, has brought the issue of end-of-life decisions into the public debate. The Hungarian legislation raises the question of what the state's duty to protect life means. The states that recognise the right to death interpret this obligation to protect life differently, according to which the state has no right to keep an individual alive against his/her will, but is obliged to protect him/her from making this decision without any influence and in the knowledge of all other alternatives. This would require a rethink of the content of this obligation if the right to self-determination is to be respected. The Hungarian state, however, also raised the argument of ableism⁴³, that to remove people with illnesses from

³⁹ BetmG. § 10-11

⁴⁰ BGE 133 I 58 6.3.6

⁴¹ BGE 133 I 58 6.3.4

⁴² SAMW-Richtlinien, 2004., 9.

⁴³ Ableism is a set of beliefs or practices that devalue and discriminate against people with physical, intellectual, or psychiatric disabilities and often rests on the assumption that disabled people need to be

society in this way, and to represent them as no longer needed, would cause serious damage to social sensitivity. In light of this theory, it certainly requires consideration whether prohibiting the possibility for a physically suffering but mentally competent individual to decide for themselves how long they wish to live under such conditions constitutes discrimination.

Observing Western European legislation, we can notice a completely different approach. Although Austrian regulations changed due to the German Constitutional Court's decision, a much more detailed and well-developed legal framework has since been established to prevent abuses. The specifically enacted *Sterbeverfügungsgesetz* contains several precise conditions similar to those found in the Hungarian *Health Care Act* regarding passive euthanasia, that is, the provisions on refusing life-sustaining treatment. This can also be observed in the requirements concerning medical consultations, formal criteria, and psychiatric evaluations. Based on this, it can be assumed that if Hungary is capable of following these regulations regarding passive euthanasia, it would likewise be capable of reforming its legislation on assisted suicide on the same grounds.

An interesting aspect of the parallel between German and Austrian regulations, as previously mentioned, is the reliance on German constitutional principles. However, it is important to note that while German legislation places primary emphasis on self-determination—ensuring this right for all citizens regardless of illness or any other life circumstances—the Austrian legislature reserves this right exclusively for terminally ill patients. This distinction may raise concerns about potential discrimination, though it can be reasonably justified by the principle of proportionality. If we observe European legislation in this area, it becomes clear that most countries also align with the Austrian stance.

In Switzerland, the situation represents an intermediate position between the German and Austrian legal frameworks. While Switzerland shares a similar perspective with Austria regarding the scope of eligible individuals, the lack of comprehensive legal regulation, similar to Germany, also leads to legal uncertainty. The practices of euthanasia organizations show significant differences in financial aspects, which means that the potential criminal liability for participation could discourage doctors from offering their assistance. A detailed regulation of the procedure—including methods, deadlines, formal requirements, conditions for prescribing medication, the assessment of decision-making capacity, and the involvement of medical or social personnel—could facilitate a safe and predictable implementation. The legislator's passive approach, leaving the development of rules

'fixed' in one form or the other. (<https://cdrnys.org/blog/uncategorized/ableism/> - date of download: 17/02/2025)

to the Swiss Academy of Medical Sciences, certainly does not contribute to ensuring a secure execution.⁴⁴

In Germany, this would be possible by filling the gap in criminal law and developing an appropriate procedural framework. It would be necessary to acknowledge that the right to self-determined death, recognized by the Constitutional Court, could lead to abuses due to the lack of regulation, and without a legally supported system, it could become void of meaning, because a right can only be exercised in real life if a framework has been developed for it. However, based on the Constitutional Court's ruling, the introduction of either a Swiss or Austrian regulation would not be entirely possible, given that the right to self-determination applies to everyone, regardless of their life circumstances.

In summary, if a country supports assisted suicide, the implementation is significantly facilitated by establishing an appropriate regulatory framework, which might initially be thought to hinder it. On the other hand, maintaining well-thought-out criminal law prohibitions is also of great importance, especially in cases that could lead to abuse. Finding a balance between a complete criminal prohibition and the full recognition of the right to die is not simple, but it is certainly a goal that should be pursued.

Bibliography

Books and Journals

BIRKLBAUER, A.: Sterbeverfügung und assistierter Suizid. in: Aigner-Kletečka-Kletečka-Pulker-Memmer (ed.): Handbuch Medizinrecht,

BOEHME-NEBLER, V.: Das Grundrecht auf Suizid, *Zur Rechtsprechung*, NVwz. 14/2020.

COLLERAN, M. – DOHERTY, A. M.: Examining assisted suicide and euthanasia through the lens of healthcare quality; *Irish Journal of Medical Science*, 2024/193.

FILÓ, M. – BUZÁS, P.: Életvégi döntések és a margin of appreciation az Emberi Jogok Európai Bíróságának gyakorlatában, *Állam- és Jogtudomány*, LVII/4.

⁴⁴ TEICHMANN, F. – CAMPRUBI, M.: Regelung der Sterbehilfe in der Schweiz und in Deutschland, *Medizinrecht*, 2021/39/2, 143-144.

FILÓ, M.: Asszisztált öngyilkosság és az életvégi döntések Európában, *Állam- és Jogtudomány*, LVII. évfolyam, 2016/4.

FISCHER, T.: *Strafgesetzbuch mit Nebengesetzen*. 64. Auflage. C.H. Beck Publisher, München, 2017.

HALMAI, G. – TÓTH, G. A.: Emberi Jogok, Osiris Kiadó, Budapest, 2008.

JOBBÁGYI, G.: Eutanázia I., *Magyar Szemle*, 2004.

KÓNYA, I.: XV. fejezet – Az élet és testi épség elleni bűncselekmények, *Magyar Büntetőjog I-IV. – Új Btk. – Kommentár a gyakorlat számára*

KÖRÖSI, A.: Az önrendelkezési jog az eutanázia kapcsán, *Jog Állam Politika*, 2017/2.

LUCAS LUCAS, R.: *A bioetikáról mindenkinek*, Új Ember Kiadó, Budapest, 2007.

NEUMAYR – RESCH- WALLNER: *Gmunder Kommentar zum Gesundheitsrecht*

SCHWARZENEGGER, CH.: Art. 115. Rdnr. 14., in: NIGGLI, M. A. – WIPRÄCHTIGER, H.: *Basler Kommentar – StGB*, 4. Auf., 2019.

TAG, B.: Strafrecht am Ende des Lebens – Sterbehilfe und Hilfe zum Suizid in der Schweiz. *Zeitschrift für die gesamte Strafrechtswissenschaft*, 128/1, 2016.

TEICHMANN, F. – CAMPRUBI, M.: Regelung der Sterbehilfe in der Schweiz und in Deutschland, *Medizinrecht*, 2021/39/2.

TÓTH, Á. A. – LÉNÁRT, A. – NAGY, E. – SINKÓ, E.: Életvégi döntések lehetőségei Magyarországon 1. rész, *IME Egészségügyi Vezetők Szaklapja*, XXIII. évfolyam, 2024/4.

WEIBENBERGER, E.: *Sterbehilfe in Österreich mit Blick auf das Sterbeverfügungsgesetz*, Doctoral Thesis, Johannes Kepler Universität Linz, 2023.

Legal sources

Act C of 2012 on the Hungarian Criminal Code

Act CLIV of 1997 on Health Care (Hungary)

Act V of 1878 (Csemegi Code)

Ärztegesetz (Austria)

Betäubungsmittelgesetz (Switzerland)

BGE 133 I 58

BVerfG, Urt. v. 26. 2. 2020.

Federal Constitution of the Swiss Confederation

Lambert and others vs. France

SAMW-Richtlinien, 2004

Sterbeverfügungsgesetz sowie Änderung des Suchmittelgesetzes und des Strafgesetzbuches (Austria)

Strafgesetzbuch von der Schweiz

Strafgesetzbuch von Deutschland

Strafgesetzbuch von Österreich

Online sources

<https://cdrnys.org/blog/uncategorized/ableism/> (date of download: 17/02/2025)

<https://deathwithdignity.org/resources/assisted-dying-glossary/> (date of download: 12/02/2025)

<https://jogaszvilag.hu/vilagjogasz/nemetorszag-johet-az-asszisztalt-ongyilkossag/> (date of download: 03/02/2025)